66 FLRA No. 23

UNITED STATES
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3956, COUNCIL 222
(Union)

0-AR-4594

_____

DECISION

September 15, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of William M. Slonaker filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator concluded that the Agency violated the parties' collective bargaining agreement (CBA) and a bargained supplement (Supplement 3)[1] to the CBA when it unilaterally changed its telework policy without giving the Union notice and an opportunity to bargain over this change.[2]

For the reasons that follow, we dismiss the Agency's exceptions in part and deny them in part.

II. Background and Arbitrator's Award

Bargaining unit employees worked under a telework policy established by Supplement 3. Award at 2. Under that policy, the Agency approved employees to telework up to two days per week pursuant to their individual telework agreements. *Id*. at 22.

The Agency allegedly determined that the policy resulted in a lack of sufficient office coverage, *id.* at 50, and unilaterally terminated all of the unit employees' telework agreements. *Id.* at 75. The Agency prepared new telework agreements that limited telework to one day per week, with the Agency selecting which day, and told employees to "take it or leave it." *Id.* at 75, 81. Although the Union requested to bargain with respect to these Agency actions, the Agency declined, stating that it was not changing the telework policy. *Id.* at 81.

The Union filed several grievances, which were consolidated and submitted to arbitration, where the parties stipulated to the following issues, as relevant here:

> 1. Did [the Agency] violate the [CBA] for . . . employees in the . . . office?
>
> 2. Did [the Agency] arbitrarily and capriciously set the number of telework days, specific telework days and other work condition requirements for teleworkers in the [Agency]?
>
> 3. Did [the Agency] violate the fair and equitable treatment of employees under the [CBA] with the implementation of telework in the . . . [o]ffice?
>
> 4. Did [the Agency] violate statutory and contractual requirements for bargaining changes in working conditions for [Agency] employees?

Id. at 1-2.

The Arbitrator found that the Agency violated several provisions of the CBA, including Supplement 3, when it unilaterally changed the telework policy for the entire unit. *Id.* at 73. In making this determination, the Arbitrator noted that Supplement 3, Article 2 allows the Agency to terminate telework agreements in "unusual circumstances." *Id.* at 57. However, he found that Supplement 3, Article 2 applies only to the termination of such agreements on an individual basis, and does not apply to the Agency's "wholesale" termination of all unit employees' telework agreements. *Id*. at 57, 75. In this connection, the Arbitrator reasoned that Supplement 3, Article 2 must be interpreted within the context of the entire Supplement, which addresses telework requests considered on an individual basis. *Id.* at 75.

In resolving whether the Agency acted arbitrarily and capriciously in changing the telework

[1] While the parties' original CBA was in effect, the parties entered into Supplement 3. The parties agreed that Supplement 3 was incorporated into the CBA. Award at 2. The relevant portions of Supplement 3 are set forth in the appendix to this decision.

[2] The relevant portions of Article 5 of the CBA, Mid-Term Bargaining, are set forth in the appendix to this decision.

policy, the Arbitrator found that the Agency violated the CBA by not assessing whether the telework policy affected office coverage. *Id.* at 73. Similarly, in resolving whether the Agency acted fairly and equitably, the Arbitrator found that the Agency violated the CBA by not assessing certain factors relevant to telework before terminating the telework agreements. *Id.* at 78.

The Arbitrator also found that the Agency's decision to terminate and replace the telework agreements constituted a change that was subject to bargaining under the mid-term bargaining provisions in Article 5 of the CBA. *Id.* at 81-82. As the Agency failed to give the Union notice and an opportunity to bargain over that change, the Arbitrator found that the Agency violated Article 5. *Id.* at 81. The Arbitrator concluded that the Agency "violated statutory and contractual requirements for bargaining changes in working conditions." *Id.* at 84.

As a remedy, and as relevant here, the Arbitrator directed the Agency to compensate teleworkers for additional mileage travel expenses agreements (the travel-expenses remedy) that they incurred as a result of not being able to telework under the terms of their prior agreements. *Id.* at 85. He also found that under Article 23, Section 23.04 of the CBA, the Agency, as the "losing party," Exceptions, Attach. 2 at 119, must pay the costs of arbitration.[3] Award at 85.

III. Positions of the Parties

A. Agency's Exceptions

The Agency claims that the travel-expenses remedy is contrary to law. Exceptions at 3. In this regard, the Agency contends that the "Agency's regulations and public law" exclude compensation to employees for time spent commuting from their home to their duty station using their privately owned vehicles. *Id.*

In addition, the Agency asserts that the Arbitrator's finding that the Agency "violated statutory and contractual requirements for bargaining changes in working conditions" is based on a nonfact. *Id.* at 1. In this regard, the Agency claims that, because the Agency did not implement a "new telework policy" but merely terminated telework agreements under Supplement 3, it was not obligated to bargain. *Id.* The Agency also argues that it was not obligated to bargain because the telework policy is "covered by"[4] Supplement 3, which does not require bargaining. *Id.* at 2.

Further, the Agency argues that the award is contrary to public policy, specifically, the "covered by" doctrine. *Id.* In this connection, the Agency contends that, if the "covered by" doctrine did not apply, then "each time the Agency took an action in accordance with the negotiated agreement on telework, full scale bargaining [would] result[]." *Id.*

Moreover, the Agency contends that the award does not draw its essence from the CBA. *Id.* In this connection, the Agency claims that the Arbitrator misconstrued Supplement 3, Article 2 when he found that the Agency did not have the right to terminate more than one telework agreement at a time. *Id.* at 3. The Agency further argues that Supplement 3 requires only that the Agency notify the Union and the affected employee when the Agency terminates the employee's telework agreement. *Id.* In addition, contrary to the Arbitrator's interpretation, the Agency argues that Supplement 3, Article 2 "is not intended to greatly limit the definition of 'unusual circumstances' in which the Agency may terminate a telework agreement." *Id.* According to the Agency, "unusual circumstances" exist, and allow the Agency to terminate telework agreements, in any circumstance "other than at the request of the employee, the completion of the task(s) ahead of schedule, or the expiration of the agreement." *Id.* The Agency also argues that the Arbitrator erroneously required the Agency to prove that it assessed the "effects of [the] telework agreements on office coverage" before terminating these agreements. *Id.*

Finally, the Agency contends that because the Authority should set aside or modify the award for the foregoing reasons, the Authority also should modify the Arbitrator's remedy concerning the costs of arbitration. *Id.* at 4.

[3] The relevant portion of Article 23, Section 23.04 of the CBA is set forth in the appendix to this decision.

[4] Under the Authority's "covered by" doctrine, a party is not required to bargain over terms and conditions of employment that already have been resolved by bargaining. *U.S. Dep't of Health & Human Servs., SSA, Balt., Md.*, 47 FLRA 1004, 1017-18 (1993). In particular, the doctrine is "available to a party claiming that it is not obligated to bargain because it has already bargained over the subject at issue." *U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 12 (2000). The doctrine has two prongs. *U.S. Customs Serv., Customs Mgmt Ctr., Miami, Fla.*, 56 FLRA 809, 814 (2000). Under the first prong, the Authority assesses whether the matter over which bargaining is sought is expressly contained in the parties' agreement. *Id.* If it is not, then under the second prong, the Authority assesses whether the matter is inseparably bound up with, and thus, an aspect of a subject covered by the parties' agreement. *Id.*

B. Union's Opposition

According to the Union, the Agency's exception claiming that the Agency merely terminated telework agreements and created new agreements should be dismissed because this argument was not raised before the Arbitrator. Opp'n at 9. Moreover, with regard to the Agency's contrary to law argument, the Union contends that the Agency has failed to identify any law with which the award allegedly conflicts. *Id.* at 12. Regarding the Agency's nonfact argument, the Union contends that the alleged nonfact -- whether the Agency changed the telework policy -- was disputed before the Arbitrator. *Id.* at 2. The Union also contends that the Agency has not proven that the "covered by" doctrine applies because the Arbitrator found that a change in policy took place, and, thus, the CBA required the Agency to bargain. *Id.* at 4-5. In addition, the Union argues that the award is not contrary to public policy because the Agency violated the parties' negotiated procedure for bargaining, and it would violate public policy to ignore that procedure. *Id.* at 6-7. Finally, the Union contends that the award does not fail to draw its essence from the CBA, *id.* at 8-11, and that the Authority should not set aside or modify the award of costs. *Id.* at 15-16.

IV. Preliminary Issue: §2429.5 of the Authority's Regulations bars the exceptions in part.

The Agency claims that the travel-expenses remedy is contrary to law. Exceptions at 3. The Authority's Regulations that were in effect when the Agency filed its exceptions provided that "[t]he Authority will not consider. . . any issue, which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5 (§ 2429.5).[5] Under § 2429.5, the Authority will not consider an issue that could have been, but was not, presented to the arbitrator. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008).

There is no indication in the record that the Agency argued to the Arbitrator that awarding the travel-expenses remedy would be inappropriate. Moreover, the Agency could have done so because the Union requested this remedy before the Arbitrator, Award at 28, and there is no claim or basis for finding that the Agency did not have an opportunity to respond to that request. Because the Agency could have challenged this remedy before the Arbitrator, but did not do so, we dismiss this exception under § 2429.5.

In addition, the Union argues that the Authority should dismiss the Agency's claim that it merely terminated telework agreements and created new agreements because this claim was not raised before the Arbitrator. Exceptions at 9. However, the issue of whether the Agency terminated telework agreements and replaced them with new ones was presented in the proceedings before the Arbitrator. Award at 75. Accordingly, we find that § 2429.5 does not bar the Agency's claim, and we address that claim below.

V. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency contends that the Arbitrator's finding that the Agency "violated statutory and contractual requirements for bargaining changes in working conditions" is based on a nonfact. To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993). However, an arbitrator's interpretation of a collective bargaining agreement does not constitute a matter that can be challenged as a nonfact. *See AFGE, Nat'l Council of EPA Locals, Council 238*, 59 FLRA 902, 904 (2004) (*AFGE)* (citing *U.S. Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 57 FLRA 489, 493 (2001)). Moreover, an arbitrator's legal conclusions cannot be challenged on the grounds of nonfact. *See, e.g., AFGE, Local 801, Council of Prison Locals 33*, 58 FLRA 455, 456-57 (2003).

The Agency's nonfact exception challenges the Arbitrator's findings that the Agency's failure to bargain violated the Statute and the CBA. This challenges, respectively, the Arbitrator's legal conclusion and his interpretation of the CBA. Consistent with the above, such challenges do not provide a basis for finding that the award is based on a nonfact. *See id*; *AFGE*, 59 FLRA at 904. Accordingly, we deny this exception.

B. The award is not contrary to public policy.

The Agency asserts that the award is contrary to public policy. Exceptions at 2. The Authority construes public-policy exceptions "extremely narrow[ly]." *NTEU*, 63 FLRA 198, 201 (2009) (citing *U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 810 F.2d 1239, 1241 (D.C. Cir. 1987)). For an award to be found deficient on this basis, the asserted public policy must be "explicit," "well-defined," and "dominant," *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766 (1983) (*Rubber Workers*), and a violation of the policy

[5] The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including 5 C.F.R. § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Agency's exceptions in this case were filed before that date, we apply the prior Regulations.

"must be clearly shown." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987). In addition, the appealing party must identify the policy "by reference to the laws and legal precedents and not from general considerations of supposed public interests." *NTEU*, 63 FLRA at 201 (quoting *Rubber Workers*, 461 U.S. at 766).

The Agency's public policy exception claims that the award is inconsistent with the "covered by" doctrine. However, the "covered by" doctrine is a defense to a statutory duty to bargain; it does not apply as a defense to a contractual obligation to bargain, and, thus, the Arbitrator's finding of a contractual violation does not conflict with the doctrine. *U.S. Dep't of Def., Nat'l Guard Bureau, Adjutant Gen., Kan., Nat'l Guard*, 57 FLRA 934, 936-37 (2002) (*Nat'l Guard*). With regard to the Arbitrator's separate finding of a statutory failure to bargain, the Authority has declined to find a matter "covered by" an agreement where the agreement specifically contemplates bargaining. *See U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 12 (2000) (*DOE*). As the Arbitrator found that the CBA specifically contemplated bargaining, there is no basis for concluding that the finding of a statutory violation conflicts with the "covered by" doctrine.[6] For these reasons, even assuming that the "covered by" doctrine is an "explicit," "well-defined," and "dominant" public policy, the Agency has not "clearly shown" a violation of such policy. *See Nat'l Guard*, 57 FLRA at 936-37; *DOE*, 56 FLRA at 12.

Accordingly, we deny this exception.

C. The award does not fail to draw its essence from the CBA.

The Agency contends that the award fails to draw its essence from Supplement 3, Article 2 of the CBA. In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576. Where an arbitrator interprets an agreement as imposing a particular requirement, the fact that the agreement is silent with respect to that requirement does not, by itself, demonstrate that the arbitrator's award fails to draw its essence from the agreement. *See, e.g., U.S. Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 413, 414 (2003) (*Johnson Med. Ctr.*); *U.S. Dep't of Def., Educ. Activity, Arlington, Va.*, 56 FLRA 901, 905-06 (2000) (*DOD*).

Supplement 3, Article 2 of the CBA provides that:

> [I]n the case of unusual circumstances warranting involuntary termination of a Telework Agreement (i.e., other than at the request of the employee, the completion of the task(s) ahead of schedule, or the expiration of the agreement), Management agrees to give the employee and the local union five (5) days' advance notice, or as soon as practicable, before termination.

Award at 17; Exceptions, Attach. 3 at 1.

The Agency contends that the Arbitrator misconstrued Supplement 3, Article 2 when he found that the Agency did not have the right to terminate more than one telework agreement at a time. Exceptions at 3. However, the Arbitrator found that Supplement 3 in its entirety addresses only telework requests considered on an individual basis and that, as a result, Supplement 3, Article 2 addresses only termination of telework agreements on an individual basis, not the Agency's "en masse" termination of the agreements. Award at 57, 75. The Agency does not demonstrate that it was irrational, unfounded, implausible, or in manifest disregard of the CBA to find that Supplement 3, Article 2 does not apply.

[6] Additionally, even if the finding of a statutory violation conflicts with the "covered by doctrine, discussed above, we find that the finding of a CBA violation provides a separate and independent basis for the award. We note that in *Federal Bureau of Prisons v. FLRA*, 2011 WL 2652437 (D.C. Cir. July 8, 2011) (*Federal Bureau of Prisons*), the court rejected the Authority's contention that the award was based on separate and independent grounds because the "award [made] no distinction between the purportedly 'separate' statutory and contractual grounds for the award." *Id.* at *6. However, this case is distinguishable from *Federal Bureau of Prisons* because, here, the Arbitrator clearly distinguished between the separate grounds he relied on in the award. As the Agency has not shown that the finding regarding the CBA is deficient, any deficiency in the statutory finding does not provide a basis for setting aside the award. *See Soc. Sec. Admin., Fredericksburg Dist. Office*, 65 FLRA 946, 949 (2011).

In addition, the Agency argues that the Arbitrator erroneously found that Supplement 3, Article 2 limits the "unusual circumstances" in which the Agency may terminate a telework agreement. Exceptions at 3. However, the Arbitrator did not interpret the term "unusual circumstances" in Supplement 3, Article 2, because, as discussed above, he found that Supplement 3, Article 2 did not apply to the Agency's actions. Thus, the premise of the Agency's argument is incorrect and does not provide a basis for finding that the award fails to draw its essence from the agreement.

Finally, the Agency argues that the Arbitrator erred by requiring the Agency to prove that it assessed the "effects of [the] telework agreements on office coverage" before terminating these agreements. *Id.* The Arbitrator found that the Agency violated the CBA by not assessing whether the telework policy affected office coverage and evaluating certain factors before terminating the telework agreements. Award at 73, 78. However, the Agency does not cite any provision of the CBA that conflicts with the Arbitrator's finding. In addition, even if the CBA does not specifically require the Agency to assess the effects of the telework agreements on office coverage, that the CBA is silent with respect to this requirement does not demonstrate that the Arbitrator's award fails to draw its essence from the parties' agreement. *See Johnson Med. Ctr.*, 58 FLRA at 414; *DOD*, 56 FLRA at 905-06.

For the reasons above, we deny the Agency's essence exceptions.

VI. Decision

The Agency's exceptions are dismissed in part and denied in part. [7]

[7] As the Agency's argument regarding the remedy concerning the costs of arbitration is premised on its other claims that the award is deficient, and we dismissed and/or denied these claims, we find it unnecessary to resolve the Agency's argument regarding costs.

APPENDIX

Article 5 of the CBA provides, in pertinent part:

> **ARTICLE 5**
> **MID-TERM BARGAINING**
>
> **Section 5.01 - Mid-Term Changes at the National Level.** During the term of this Agreement, Management shall transmit to the Union its proposed changes relating to personnel policies, practices, and general conditions of employment. The parties agree that it is in the interest of the Government, the public and the parties to negotiate in good faith in order to facilitate the negotiations process.
>
> . . . .
>
> **Section 5.03 - Ground Rules for Mid-Term Bargaining at the Local Geographic Area.** Local Management shall give in writing to the Local or Geographic Area designated representative, as appropriate, proposed changes relating to personnel policies, practices, and conditions of employment.
>
> (1) Such notice shall be given to the representative according to the following procedures:
>
> (a) The proposed changes shall be sent to the designated representative.
>
> (b) Upon receipt of Managernent's notice, the Union may request bargaining . . . .
>
> **Section 5.04 - Information to the Union on Mid-Term Changes.** The following information, if available, shall be included in the notices of proposed Management mid-term changes.
>
> . . . .

Article 23, Section 23.04 of the CBA provides in pertinent part:

> . . . **Arbitration Fees and Expenses**. The losing party shall pay the arbitrator's fees and expenses. The

> arbitrator should indicate which party is the losing party.
>
> . . . .

Award at 13, 16.

Supplement 3 of the CBA provides, in pertinent part:

> **SUPPLEMENT 3**
> **SUPPLEMENT BETWEEN THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES NATIONAL COUNCIL OF HUD LOCALS 222**
>
> **SUBJECT:** Telework Program
>
> **SCOPE:** The scope of this Supplement encompasses the implementation of the Telework Program.
>
> 1. Management agrees that each request to participate in the telework program will be fairly and equally considered. Supervisors shall not discriminate for or against any employee with respect to the approval/disapproval, or with respect to termination of a telecommuting agreement.
>
> 2. A telecommuter may terminate the telecommuting arrangement at any time. In the case of unusual circumstances warranting involuntary termination of a Telework Agreement (i.e., other than at the request of the employee, the completion of the task(s) ahead of schedule, or the expiration of the agreement), Management agrees to give the employee and the local union five (5) days' advance notice, or as soon as practicable, before termination. This notice shall provide the rationale for terminating the Agreement.
>
> 3. Telecommuting work-at-home and satellite office arrangements will include a Telecommuter's working a minimum of two (2) days per week in the office.
>
> . . . .
>
> 5. Decisions by Management that a work unit will not participate in the Telework Program or decisions by supervisors not to approve telework requests may be grieved under the negotiated grievance procedure.
>
> 6. A supervisor may deny or terminate a telework agreement based on safety hazards at the site . . . .
>
> . . . .
>
> 12. Management agrees to provide a copy of all applications for telecommuting to the Union before approval/disapproval of the application.

Exceptions, Attach. 3 at 1-2.