66 FLRA No. 71

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

0-AR-4754

DECISION

December 9, 2011

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 Arbitrator M. David Vaughn filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator found that the Agency violated the parties' collective bargaining agreement (CBA), § 7116(a)(1) and (5) of the Statute,[1] and/or past practices by unilaterally implementing changes to its recruitment-incentive program (program) without giving the Union notice and the opportunity to bargain. The Arbitrator directed certain remedies, but denied the Union's request for status quo ante (SQA) and make-whole remedies. For the reasons set forth below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The program concerned the Agency's offers of recruitment incentives of $5,000 for positions in "hard to fill" locations. Award at 16. Prior to June 2009, the Agency determined whether locations were "hard to fill" by analyzing historical-hiring data. *Id.* In June 2009, the Agency changed the program by implementing a new methodology for determining whether locations were "hard to fill," specifically by requiring that announced position vacancies at the locations have fewer than four qualified applicants. *Id.* at 16-17. As a result of the changed methodology, the number of locations designated as "hard to fill" – and, thus, the number of locations where recruitment incentives were available – was significantly reduced. *Id.* at 18.

The Union filed a grievance alleging, in pertinent part, that the Agency violated Article 47 of the CBA[2] and the Statute because it unilaterally changed the program without providing the Union with advance notice or an opportunity to bargain. *Id.* at 22; Exceptions Memorandum (EM) at 14-15. The grievance was unresolved and submitted to arbitration, where the parties stipulated to the following issues, in pertinent part:

> (1) Is the grievance arbitrable?
>
> (2) [If arbitrable], [d]id the [Agency] violate . . . Article 47 . . . of the [CBA] and/or violate [the Statute] when it made changes to the [program] . . . without providing [the Union with] notice of those changes and opportunity to bargain? If so, what should be the remedy?[3]

Award at 3.

With respect to arbitrability, the Arbitrator found that the grievance was arbitrable because the changes to the program had an impact on the conditions of employment of bargaining-unit employees that was "sufficient" to require bargaining. *Id.* at 39-42. With respect to the merits of the grievance, the Arbitrator found that because the changes had a greater than de minimis impact on bargaining unit employees – and because the program was an established past practice – the Agency was required to give the Union notice and an opportunity bargain. *Id.* at 44-46. As for the scope of that required bargaining, the Arbitrator stated that the Union did not dispute that the CBA gives

[1] Section 7116(a) of the Statute, provides, in pertinent part, that it is an unfair labor practice for an agency: "(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter . . . [or] (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter."

[2] Article 47 of the CBA requires the Agency to provide the Union written notice and an opportunity to bargain when the Agency proposes changes to conditions of employment of unit employees. Award at 10-11; EM at 13.

[3] The Arbitrator also addressed whether the Agency violated a "[s]ide [l]etter" between the parties, and he found that the Agency did not violate that side letter. Award at 46-47. As the Union has not excepted to this finding, we do not address that issue further.

the Agency "discretion to determine whether, when and to whom to offer recruitment incentives." *Id.* at 44. But the Arbitrator also stated: "It is as a result of the *impact* on bargaining unit members – not the *substance* of the . . . program itself – that the Union is entitled to notice and the opportunity to bargain." *Id.* (emphasis added). The Arbitrator concluded that the Agency failed to give the Union notice and an opportunity to bargain over the impact and implementation of the changes, and that this failure violated the CBA and § 7116(a)(1) and (5) of the Statute. *Id.* at 43-46.

With respect to remedies, the Arbitrator directed the Agency to: (1) bargain over the impact and implementation of the changes to the program to the extent that those changes affect unit employees' conditions of employment; and (2) post a notice. *Id.* at 48-49. Although the Union requested SQA and make-whole relief, the Arbitrator declined to grant this relief for three reasons. First, he found that SQA relief would negatively impact both the Agency and many unit employees. Specifically, he found that granting SQA relief would require the Agency to undo more than a year's employment transactions and would negatively impact applicants who were selected for positions as a result of the Agency's changes and who are now members of the bargaining unit. *See id.* at 48. Second, he found that an SQA remedy would "provide significant advantages to one portion of the bargaining unit . . . whose tenure with the [Agency] pre-dated [the changes to the program,] over all others." *Id.* at 48-49. Third, he stated that he was not persuaded that "employees who would have received recruitment incentives but for the . . . changes should be granted them retroactively," because the Union has no authority to negotiate whether candidates for employment (i.e., non-unit employees) are entitled to receive recruitment incentives. *Id.*

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the Arbitrator's denial of SQA and make-whole relief is contrary to law because, under Authority precedent, those are the appropriate remedies and are required by law when an agency makes unilateral changes and refuses to bargain. *See* EM at 18-20, 25 (citing *FDIC v. FLRA*, 977 F.2d 1493, 1498 (D.C. Cir. 1992) (*FDIC*); *NTEU v. FLRA*, 910 F.2d 964, 969 (D.C. Cir. 1990) (en banc) (*NTEU*); *U.S. Dep't of Def., Def. Commissary Agency, Peterson Air Force Base, Colorado Springs, Colo.*, 61 FLRA 688, 694-95 (2006) (*DOD*); *U.S. Dep't of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pa.*, 57 FLRA 852, 857 (2002) (*AF*); *U.S. Dep't of Labor, Wash., D.C.*, 44 FLRA 988, 996 (1992) (*DOL*); *Dep't of the Interior, Bureau of Reclamation, Wash., D.C.*, 33 FLRA 671, 680 (1988) (*DOI*); and *Fed. Corr. Inst.*, 8 FLRA 604, 605-06 (1982) (*FCI*)). The Union also contends that the Agency failed to meet its burden to show that SQA relief is inappropriate. *See id.* at 19-26 (citing *Army & Air Force Exch. Serv., Waco Distrib. Ctr., Waco, Tex.*, 53 FLRA 749 (1997); *Dep't of Health & Human Serv., SSA*, 35 FLRA 940 (1990)). In addition, the Union argues that the Arbitrator's denial of SQA and make-whole relief fails to effectuate the purpose and policies of the Statute and amounts to a patent attempt to achieve ends contrary to the Statute's purpose and policies. *Id.* at 26-30 (citing *NTEU*, 48 FLRA 566 (1993)). Further, the Union contends that this case is distinguishable from other Authority decisions that have deferred to arbitrators' remedial discretion where the records did not support the parties' proposed remedies. *Id.* at 35. In this regard, the Union claims the record in this case supports the Union's request for make-whole relief under the criteria set forth in the Back Pay Act (BPA), 5 U.S.C. § 5596. *Id.* at 35-37.

In addition, the Union argues that the Arbitrator's finding that the Agency is not obligated to bargain over the substance of the changes is contrary to law. *Id.* at 37-42. In this regard, the Union claims that the Arbitrator erred in failing to analyze whether initiatives dealing with non-unit employees are substantively negotiable under the Authority's tests developed in *International Ass'n of Machinists & Aerospace Workers, Local Lodge 2297*, 45 FLRA 1154 (1992) (*IAM*), and *Antilles Consolidated Education Ass'n*, 22 FLRA 235 (1986) (*Antilles*).

B. Agency's Opposition

The Agency argues that the Arbitrator's decision not to award SQA and make-whole remedies is not contrary to law. Opp'n at 15-28. In addition, the Agency argues that the Arbitrator's decision to limit the remedy to impact and implementation bargaining is not contrary to law. *Id.* at 24-28.

IV. Analysis and Conclusions

When an exception involves an arbitration award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

Where an arbitrator finds that a party has committed an unfair labor practice (ULP), the Authority defers to the arbitrator's judgment and discretion in the determination of the remedy. *NTEU*, 64 FLRA 833, 838 (2010); *NTEU*, *Wash., D.C.*, 48 FLRA 566, 571 (1993) (*NTEU, Wash.*). Thus, unless a party establishes that a particular remedy is compelled by the Statute, the Authority reviews remedy determinations of arbitrators in ULP grievance cases just as the Authority's remedies in ULP cases are reviewed by the federal courts of appeals. *U.S. Dep't of the Treasury, IRS*, *Wash. D.C.*, 64 FLRA 426, 436 (2010). This means that the Authority upholds the arbitrator's remedy determination unless the determination is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute]." *NTEU v. FLRA*, 647 F.3d 514, 517 (4th Cir. 2011); *NTEU, Wash.*, 48 FLRA at 572 (quoting *NTEU*, 910 F.2d at 968). The Authority has emphasized that making such a showing "is a heavy burden indeed." *NTEU, Wash.*, 48 FLRA at 572.

Here, the Arbitrator declined to award SQA and make-whole remedies because he found that: (1) the Agency would be required to "und[o] more than a year's worth of employment transactions;" (2) such remedies "would have a significant – and negative – impact on many current bargaining unit members, i.e., those external applicants who were awarded positions as a result of the [program] and are now members of the bargaining unit;" and (3) he was "not persuaded that . . . employees who would have received recruitment incentives but for the . . . changes [to the program] should be granted them retroactively" because the Union has no authority to negotiate whether applicants are entitled to receive recruitment incentives. Award at 48-49. Although the Union argues that the award fails to effectuate the purpose and policies of the Statute, the Union does not identify any applicable law, rule, or regulation that demonstrates that the Arbitrator's remedy determination is a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute]." *NTEU*, 48 FLRA at 572. The Union cites decisions of the Authority and the U.S. Court of Appeals for the District of Columbia Circuit stating that SQA and make-whole relief are *appropriate* remedies, but none of these decisions holds that these remedies are *required* in any particular circumstances. *See, e.g., FDIC*, 977 F.2d at 1498; *NTEU*, 910 F.2d at 969; *DOD*, 61 FLRA at 694-95; *AF,* 57 FLRA at 857; *DOL,* 44 FLRA at 997; *DOI*, 33 FLRA at 680; and *FCI*, 8 FLRA at 605-06. In addition, although the Union cites to the BPA, 5 U.S.C. § 5596, as supporting its request for make-whole relief, EM at 35-37, the Arbitrator interpreted the CBA as not entitling the Union to negotiate over whether candidates for employment are entitled to receive recruitment incentives, *see* Award at 44, and the Authority has previously stated that "without [an SQA] remedy or a finding by the Arbitrator that employees suffered a loss of pay, allowances, or differentials as a direct result of the Agency's failure to bargain, no basis is provided for disturbing the Arbitrator's rejection of a backpay remedy." *NTEU*, 48 FLRA at 572. Based on the foregoing, we find that the Union has not demonstrated that the Arbitrator erred by failing to award SQA and make-whole relief.

With respect to the Union's contention that the Arbitrator's finding that the Agency is not obligated to bargain over the substance of the changes is contrary to law, the Arbitrator based this determination on his interpretation of the CBA as precluding substantive bargaining over the changes. In this connection, the Arbitrator found that the Union did not dispute that the CBA gives the Agency "discretion to determine whether, when and to whom to offer recruitment incentives," and, thus, that the Union's entitlement to bargain was with respect to the program's "*impact* on bargaining unit members – not the *substance* of the . . . program itself." Award at 44 (emphasis added). The Union does not argue that the award fails to draw its essence from the CBA in this regard, and the Arbitrator's finding supports a conclusion that the Agency had no obligation to bargain over the substance of the changes. *IAM*, 45 FLRA 1154, and *Antilles*, 22 FLRA 235, cited by the Union, are inapposite because they involved negotiability appeals of disputed proposals, and did not address whether a CBA required substantive bargaining.

For the foregoing reasons, the Union's exceptions provide no basis for finding the award deficient, and we deny the exceptions.

V. Decision

The Union's exceptions are denied.