68 FLRA No. 69

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Union)

0-AR-5067

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DECISION

March 27, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Theodore H. O'Brien issued an award ruling that the Agency violated the parties' agreement when it failed to provide the Union with a copy of the annotated list of employees who were drug tested (the annotated test list) at the conclusion of random drug testing. As a remedy, the Arbitrator ordered the Agency to comply with the parties' agreement.

The Agency challenges the award on three grounds. First, the Agency alleges that the award is contrary to law as it violates its management right to determine internal security practices under § 7106(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute).[1] Because the Arbitrator found that providing the annotated test list to the Union at the conclusion of testing did not implicate internal security practices, we deny this exception.

Second, the Agency argues that the award conflicts with Agency rules and regulations. Even assuming that there is such a conflict, the parties' agreement, including the Arbitrator's interpretation of that agreement, governs the conflict. Because the Agency does not contend that the Arbitrator's interpretation fails to draw its essence from the parties' agreement, we deny this exception.

Third, the Agency alleges that the Arbitrator failed to conduct a fair hearing. Because the record does not substantiate the Agency's allegations, we deny this exception.

II. Background and Arbitrator's Award

The Agency conducts random drug and alcohol testing for employees in sensitive positions. As relevant to this matter, the Agency conducted random drug testing on two separate occasions. Pursuant to Article 73 of the parties' agreement, the Union requested a copy of the annotated test list. Article 73, Section 2, states that "[t]he Union may request a copy of the annotated test list[,] which shall be provided to the Union as soon as the information becomes available. All privacy data will be removed from the copy prior to delivery to the Union."[2] At the times of the testings in question, the annotated test list no longer contained any privacy information that needed to be removed. The Agency did not provide the requested annotated test list to the Union until one month after the Union had requested it. The Union filed a grievance alleging that the Agency had violated the parties' agreement by failing to provide the list on the days of the drug testing. The matter was unresolved, and the parties submitted it to arbitration.

The issues before the Arbitrator were: (1) whether "the Agency violate[d] Article 73, Section 2, Substance Testing, of the [parties' agreement] when it failed to provide a copy of the annotated test list immediately upon the conclusion of substance testing," and (2) "[i]f so, what is the appropriate remedy?"[3]

At arbitration, the Union argued that, under the language of the parties' agreement, it was entitled to a copy of the test list on the day of the testing. According to the Union, because no privacy data needed to be removed from the annotated test list, the list was "available," within the meaning of Article 73, at the end of the testing days.[4] As pertinent here, the Agency argued that access to the annotated test list was protected by its management right to determine internal security practices. As such, the Agency argued that it has "the sole right to decide" how the annotated test list is maintained.[5]

Turning to the language of the parties' agreement, the Arbitrator determined that the word "available" in Article 73, Section 2, meant "readily obtainable[,] accessible[,] or at hand."[6] Applying this

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[1] 5 U.S.C. § 7106(a)(1).

[2] Award at 2 (quoting Art. 73, § 2 of the parties' agreement).

[3] *Id.* at 1.

[4] *Id.* at 6.

[5] *Id.* at 9.

[6] *Id.* at 12 (internal quotation marks omitted).

interpretation, the Arbitrator stated that "[t]he evidence presented in this case leaves no doubt that the annotated test list was accessible when all testing was complete on the days in question."[7] The Arbitrator also determined that "there is no evidence that the particular process [of sending the annotated test list back and forth between officials] is necessitated by security concerns."[8] Further, the Arbitrator found that the Agency's "evidence offered in support" of the theory that this process preserved the integrity of the testing "was not convincing."[9]

In conclusion, the Arbitrator found that "the Agency violated Article 73, Section 2, of the [parties' agreement] when it failed to provide a copy of the annotated test list when it became available, at the conclusion of substance testing" on the days in question, and he ordered the Agency to comply with the parties' agreement.[10]

The Agency filed exceptions to the award, and the Union filed an opposition to those exceptions.

III. Preliminary Matter: The Agency's exceptions do not warrant dismissal.

The Union argues that the Authority should dismiss the Agency's exceptions as procedurally deficient.[11] The Authority's Regulations provide that a party filing a document with the Authority must serve a copy on all counsel of record or other designated representatives of the parties, and must submit a statement of service to that effect.[12] When timely filed exceptions have been served on an opposing party after the expiration of the filing period for exceptions, the Authority views such service to be procedurally sufficient, unless the opposing party establishes that it was prejudiced by such service.[13]

Here, the Union acknowledges that the Agency timely filed its exceptions with the Authority, but argues that the Authority should dismiss the exceptions because the Agency failed to send a copy of the exceptions to the Union until one day after the filing deadline and also never sent the Union any of the exceptions' attachments.[14] The Union alleges that it was prejudiced by these actions because it "receiv[ed] less than the full allotment of time to respond to the Agency's [e]xceptions," and, because of the lack of attachments, "the Union has no idea what documentary evidence the Agency presented to the Authority, and thus has been denied the opportunity to fully respond."[15] Regarding the failure to provide attachments, the Union notes that "some of the Agency's claims in its exceptions [concerning a fair hearing] refer to events that allegedly occurred off the record in this matter."[16]

Although arguing that it was prejudiced by the one-day delay in service, the Union only raises this contention for the first time in its opposition and did not request an extension of time to file its opposition.[17] It is reasonable to conclude, therefore, that the Union had sufficient time to respond to the Agency's exceptions. Consequently, the Union has not demonstrated that it was prejudiced by the one-day delay in service.

Regarding the Agency's alleged failure to serve the exceptions' attachments, the Union claims that it was prejudiced because it "has no idea what documentary evidence the Agency presented to the Authority, and thus has been denied the opportunity to fully respond."[18] The Authority's Regulations require that a party serve the opposing party with all documents that the party files with the Authority.[19] This includes any filed attachments to documents a party is filing.[20] Service of documents that is not in accordance with the Authority's Regulations is procedurally deficient. Conversely, where a party does not serve its exceptions on the opposing party in a manner that prejudices the other party, the Authority views the service as procedurally sufficient.[21] Generally, when the Authority is made aware of a failure to serve attachments, the Authority will grant the excepting party an opportunity to properly serve the missing attachments, and will grant the opposing party an extension of time to file its response.[22]

However, in this particular case, we need not determine whether the Agency's service of its exceptions was procedurally deficient. As indicated previously and discussed below, we deny the Agency's exceptions. This

[7] *Id.*
[8] *Id.* at 13.
[9] *Id.*
[10] *Id.* at 14.
[11] Opp'n at 10.
[12] 5 C.F.R. § 2429.27(a), (c).
[13] *IFPTE, Local 77, Prof'l & Scientists Org.*, 65 FLRA 185, 188 (2010) (citations omitted) (*IFPTE, Local 77*).
[14] Opp'n at 10.
[15] *Id.* at 11.
[16] *Id.* at 12.
[17] 5 C.F.R § 2429.23; *OPM*, 61 FLRA 358, 361 (2005) (finding no prejudice to the union because the union requested and was granted a two-week extension to file its opposition to the agency's untimely served exceptions).
[18] Opp'n at 11.
[19] 5 C.F.R. § 2429.27(a).
[20] *Dep't of the Air Force, Carswell Air Force Base, Tex.*, 35 FLRA 754, 758 (1990).
[21] *IFPTE, Local 77*, 65 FLRA at 188.
[22] *NAGE, Local R1-109*, 61 FLRA 593, 595 (2006).

renders any procedural deficiency in the Agency's service of its exceptions on the Union a harmless error.[23]

Accordingly, the Union's arguments do not warrant the dismissal of the Agency's exceptions.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Agency alleges that the award is contrary to law because it violates the Agency's management rights under § 7106(a)(1) of the Statute, specifically its right "to determine . . . internal security practices of the agency."[24] When an exception challenges an award's consistency with law, the Authority reviews any question of law raised by the exception de novo.[25] 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.[26] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[27] Furthermore, the legal framework that the Authority applies when reviewing exceptions alleging that an award is inconsistent with management rights is well established.[28] Under this framework, the Authority first assesses whether the award affects the exercise of the asserted management right.[29] If so, then the Authority examines whether the award applies an enforceable contract provision negotiated under § 7106(b) of the Statute.[30]

The Agency argues that the award affects its right to determine its internal security practices.[31] The right to determine internal security practices under § 7106(a)(1) of the Statute includes the authority to determine the policies and practices that are part of an agency's plan to secure or safeguard its personnel, physical property, or operations against internal or external risks.[32] Where an agency shows a link or reasonable connection between its security objective and a policy or practice designed to implement that objective, an award that conflicts with that policy or practice affects management's right under § 7106(a)(1).[33] However, if an agency fails to demonstrate a reasonable connection between its practice and its security objective, then the Authority will find that management's right to determine its internal security practices is not affected.[34] Furthermore, the Authority has held that implementation of a drug testing program constitutes an exercise of management's right to determine its internal security practices.[35]

The Agency contends that, in granting the Union immediate access to the annotated test list, the award "directly infringes upon the integrity of the Agency's substance testing process, and therefore is in conflict with the Agency's internal security objective."[36] Although the Agency assumes that providing the annotated test list to the Union affects the integrity of the testing program, the Arbitrator found, as a factual matter, that it did not. The Arbitrator stated that the Agency "offer[ed] no compelling reason for the slow and deliberate procedure" that caused a delay in giving the annotated test list to the Union.[37] Specifically addressing the argument that employees would misuse the information and affect the integrity of the testing process, the Arbitrator rejected this argument, finding that "[t]he evidence offered in support of this theory was not convincing."[38] In short, the Arbitrator found that providing the annotated test list to the Union at the end of a testing day did not affect the Agency's implementation of its drug testing program. Because the Agency did not challenge the Arbitrator's

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[23] Member Pizzella notes that the Union included with its opposition all of the documents that the Agency cites and relies on in its exceptions. This alone demonstrates that the Agency's failure to provide its attachments to the Union did not prejudice the Union. However, Member Pizzella does not disagree with his colleagues that any error by the Agency in this instance was a harmless one.

[24] Exceptions at 4-5 (quoting § 7106(a)(1) of the Statute).

[25] *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)).

[26] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (citations omitted).

[27] *Id.*

[28] *U.S. EPA*, 65 FLRA 113, 115 (2010) (*EPA*) (Member Beck concurring); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 105-07 (2010) (Chairman Pope concurring).

[29] *EPA*, 65 FLRA at 115.

[30] *Id.*

As he previously has, Member Pizzella continues to express concern that the *FDIC* and *EPA* framework is no longer viable. *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 608 (2014) (Dissenting Opinion of Member Pizzella). However, Member Pizzella applies the framework here in order to resolve this case.

[31] Exceptions at 4.

[32] *NTEU*, 53 FLRA 539, 581 (1997).

[33] *NTEU*, 61 FLRA 48, 51 (2005).

[34] *AFGE, Local 2076*, 47 FLRA 1379, 1381-82 (1993) (agency did not establish that award affected right to determine its internal security practices where it provided no evidence or argument in support of its claim); *NFFE, Local 2050*, 36 FLRA 618, 639-40 (1990) (management's right not affected where agency failed to demonstrate a connection between method of notifying employees about criminal activity and internal security practices).

[35] *AFGE, Local 723*, 66 FLRA 639, 643 (2012) (citations omitted) (internal quotation marks omitted).

[36] Exceptions at 5.

[37] Award at 13.

[38] *Id.*

factual findings as nonfacts, we defer to them.[39] Consequently, the Agency has failed to demonstrate a reasonable connection between the timing of giving the annotated test list to the Union and the Agency's security objective.[40]

Accordingly, the Agency has failed to demonstrate that the award is contrary to law, and we deny this exception.

B. The award is not contrary to an Agency-wide regulation.

The Agency alleges that the award "is in direct conflict with the Agency-wide rules found in the [Department of Transportation (the department)] Drug and Alcohol Testing Guide [(the testing guide)] and the [Agency's] Site Coordinators Handbook [(handbook)]."[41] When evaluating exceptions asserting that an arbitration award is contrary to a governing agency rule or regulation, the Authority determines whether the award is inconsistent with the plain wording of, or is otherwise impermissible under, the rule or regulation.[42]

The Agency argues that the award violates the rules set forth in the testing guide and the handbook.[43] Specifically, the testing guide requires that the department drug officer (DDO) maintains all associated lists and records and oversees access to them. Furthermore, the Agency argues that, under the handbook, "[i]t is only the DDO that is allowed to provide appropriate copies."[44] Therefore, the Agency alleges, the Arbitrator's remedy "would circumvent the DDO's control over the [annotated] test lists."[45]

Even assuming, without deciding, that the award conflicts with an Agency rule or regulation, the Authority has held that parties' agreements, and not agency rules and regulations, govern the disposition of matters to which they both apply when there is a conflict.[46] Thus, an argument that an agency rule or regulation conflicts with an applicable provision of a collective-bargaining agreement raises a matter of contract interpretation, in which the Authority examines whether the award draws its essence from the parties' agreement.[47]

In interpreting the parties' agreement, the Arbitrator determined that Article 73 requires that the Agency provide the Union with the annotated list "when all testing was completed on the days in question."[48] The Agency does not contend that the Arbitrator's interpretation fails to draw its essence from the parties' agreement. Consequently, because any conflict between Agency rules and the parties' agreement must be resolved in favor of the parties' agreement,[49] the Agency's argument fails. As such, we deny the exception.

C. The Arbitrator did not fail to provide a fair hearing.

The Agency alleges that the Arbitrator failed to provide a fair hearing.[50] An award will be found deficient on the grounds that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or conducted the proceeding in a manner that so prejudiced a party as to affect the fairness of the proceeding as a whole.[51]

The Agency argues that "the Arbitrator deprived the Agency of a fair hearing by not allowing the Agency to present a relevant witness, and by engaging a Union witness in ex parte discussion after the close of the hearing."[52] Regarding the allegation of ex parte communication, the Agency states that "the Arbitrator continued discussing the handling of names on the test list with the Union witness after the close of the hearing."[53] However, the Agency does not present any evidence in the record supporting this allegation. The Agency's unsubstantiated allegations cannot establish that the Arbitrator denied it a fair hearing.[54]

The Agency also alleges that it "requested to recall an Agency witness," but "the Arbitrator refused."[55] However, the transcript reveals that the Agency mischaracterizes what occurred at the hearing. While a witness for the Union was on the stand, the Arbitrator

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[39] *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 106 (2012) (citation omitted).

[40] Member Pizzella notes that contracts have consequences. An agency should use better judgment when drafting and negotiating provisions and should not, as here, attempt to use its exceptions to wriggle out of a poorly thought out and constructed contract provision. Moreover, if a legitimate security concern does exist in this case, the Agency has simply compounded its failure by ineffectively arguing and articulating its security concern before the Arbitrator.

[41] Exceptions at 7.

[42] *SSA, Region IX*, 65 FLRA 860, 863 (2011) (citation omitted).

[43] Exceptions at 6.

[44] *Id.* at 8.

[45] *Id.* at 7.

[46] *NTEU, Union Chapter 215*, 67 FLRA 183, 184 (2014) (*NTEU*) (citations omitted).

[47] *Id.* (citation omitted).

[48] Award at 12.

[49] *NTEU*, 67 FLRA at 184.

[50] Exceptions at 12.

[51] *AFGE, Local 1668*, 50 FLRA 124, 126 (1995).

[52] Exceptions at 12.

[53] *Id.* at 13.

[54] *AFGE, Local 4044, Council of Prisons Local 33*, 57 FLRA 98, 100 (2001) (citation omitted) (internal quotation marks omitted).

[55] Exceptions at 12.

began questioning the witness. Interrupting the Arbitrator's questioning, the Agency counsel stated that the witness was not qualified to answer the questions and that the Agency counsel could recall an Agency witness on the subject, "if you would like."[56] At that point, the Arbitrator said, "[w]e can talk about this after."[57] After the Arbitrator had finished asking the witness questions and determined that no party had further questions for that witness, the Arbitrator dismissed the witness. The Arbitrator then asked, "[d]o you want to go off the record? Nothing else?" to which the Agency counsel answered, "[n]o, I think we are all set."[58] Rather than refuse to hear the Agency's rebuttal witness, the Arbitrator, after finishing his questioning, gave the Agency counsel an opportunity to request to recall a witness, but it was Agency counsel who stated, "I think we are all set."[59]

The Agency's exception does not demonstrate that the Arbitrator failed to conduct a fair hearing. Accordingly, we deny this exception.

V. Decision

We deny the Agency's exceptions.

[56] *Id.*, Attach., Tr. at 136.
[57] *Id.*
[58] *Id.* at 136-37.
[59] *Id.* at 137.