

65 FLRA No. 185

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
DUBLIN, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3584
(Union)

0-AR-4471

DECISION

May 31, 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 an exception to an award of Arbitrator Philip Tamoush 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.¹ The Union filed an opposition to the Agency's exception.

The Arbitrator found that the Agency violated the parties' collective bargaining agreement (CBA) by leaving certain work posts vacant and ordered the Agency to fill vacant posts.

For the reasons that follow, we deny the Agency's exception.

II. Background and Arbitrator's Award

The Agency schedules correctional officers to fill posts supervising prison inmates in its food

services facilities. Award at 4. In certain locations, post orders call for more than one officer to be on duty at a time. *Id.* at 5. However, the Agency began leaving the additional officers' posts vacant. *Id.* This left one officer on duty to supervise twenty-five to thirty inmates. *Id.* at 4-5. The inmates were in both the kitchen and the dining areas, making the officer's supervision of all of the inmates "an almost impossible responsibility" and raising safety concerns. *Id.* at 5.

The Union filed a grievance alleging, as relevant here, that the Agency violated the CBA by leaving these posts vacant. *Id.* The grievance was unresolved and was submitted to arbitration. The Arbitrator adopted the Union's issue statement, which asked: "Did the Agency violate the [CBA] by vacating . . . posts at [the Agency]?" *Id.* at 2, 10.

The Arbitrator sustained the grievance. The Arbitrator found that the Agency violated the CBA by leaving posts vacant rather than filling them with regular staff officers or through overtime assignments. *Id.* at 11. The Arbitrator did not specify the provision of the CBA on which he relied. However, he referenced Article 27, entitled, "Health and Safety," in the "Relevant Contract Language" section of the award. *Id.* at 3. Article 27 of the CBA requires the Agency to reduce hazards to its employees "to the lowest possible level, without relinquishing its rights under 5 USC § 7106" of the Statute. Award at 3. The Arbitrator was also presented with the Union's argument that the CBA "mandates concern over health and safety issues inherent when [p]osts are not filled." *Id.* at 6-7. In addition, citing another arbitration award, the Union argued to the Arbitrator that "[m]anagement is permitted to vacate posts only for good reason[.]" *Id.* at 7. The Arbitrator concluded that "[m]anagement had a clear obligation[] . . . consistent with . . . prior arbitration cases cited by the Union, to cover and fill [p]ost positions." *Id.* at 12.

As a remedy, the Arbitrator ordered the Agency "to fill all vacant/abandoned posts by overtime or regular assignment forthwith." *Id.* at 13.

III. Positions of the Parties**A. Agency's Exception**

The Agency claims that the award affects management's rights to determine its internal security practices and to assign work under § 7106(a)(1) and (a)(2)(B) of the Statute because the award precludes the Agency from leaving posts vacant. Exception

1. The Authority dismissed the Agency's exceptions to the initial award as interlocutory. Order at 1. The exceptions at issue here challenge both the initial award and the subsequent award. Exception at 1-2.

at 5, 6. The Agency further argues that, as interpreted and applied by the Arbitrator, Article 27 is not enforceable under § 7106(b)(3) because, by precluding the Agency from vacating posts, it excessively interferes with the exercise of management's rights. *Id.* at 7.

B. Union's Opposition

The Union argues that, although the award affects a management right, it is still enforceable as an appropriate arrangement under § 7106(b)(3) of the Statute. Opp'n at 7. According to the Union, the question is whether the award would abrogate the exercise of the Agency's management rights. *Id.* at 8. The Union contends that the award does not abrogate those rights because it does not prevent the Agency from determining "which and how many posts are necessary." *Id.* (citing *U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Atlanta, Ga.*, 57 FLRA 406 (2001) (*DOJ Atlanta*); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Metro. Det. Ctr. Guaynabo, P.R.*, 57 FLRA 331, 333 (2001) (*DOJ Guaynabo*)).

IV. Analysis and Conclusions

The Agency claims that the award is contrary to management's rights to determine its internal security practices and to assign work under § 7106(a)(1) and (a)(2)(B) of the Statute. The Authority reviews questions of law raised by exceptions to an arbitrator's 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 a standard of de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *Id.*

The Authority recently revised the analysis that it will apply when reviewing management-rights exceptions to arbitration awards. *See U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-07 (2010) (Chairman Pope concurring) (*FDIC*). Under the revised analysis, the Authority will first assess whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115.² If so, the

Authority examines whether the award provides a remedy for a violation of either an applicable law, within the meaning of § 7106(a)(2) of the Statute, or a contract provision that was negotiated pursuant to § 7106(b) of the Statute. *Id.* Also, under the analysis, in determining whether the award enforces a contract provision negotiated under § 7106(b)(3), the Authority assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and (2) if so, whether the arbitrator's enforcement of the arrangement abrogates the exercise of the management right. *Id.* at 116-18. In concluding that it would apply an abrogation standard, the Authority rejected continued application of an excessive interference standard. *Id.* at 118. Furthermore, in setting forth its revised analysis, the Authority specifically rejected the continued application of the reconstruction standard set forth in prior case law. *FDIC*, 65 FLRA at 106-07.

It is not disputed that the award affects management's rights to determine its internal security practices and to assign work under § 7106(a)(1) and (a)(2)(B) of the Statute. Consequently, we examine whether the Arbitrator enforced a contract provision negotiated pursuant to § 7106(b). Here, the Arbitrator enforced Article 27 of the CBA. He determined that the Agency violated the CBA "when it left post positions vacant, without filling them either by regular staff" or with "voluntary/mandatory overtime assignments." Award at 11.

With regard to § 7106(b)(3), the Agency does not dispute that this provision is an arrangement, but argues that the Arbitrator's enforcement of this provision excessively interferes with its management rights to determine its internal security practices and assign work by precluding the Agency from leaving posts vacant. Exception at 4, 6-7. However, as stated above, the Authority no longer applies an excessive interference standard in determining whether an arbitrator has enforced a contract

an appropriate arrangement or whether it abrogates a § 7106(a) right. The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. *See EPA*, 65 FLRA at 120 (Concurring Opinion of Member Beck); *FDIC*, 65 FLRA at 107; *SSA, Office of Disability Adjudication & Review*, 65 FLRA 477, 481 n.14 (2011); *U.S. Dep't of the Air Force, Air Force Materiel Command*, 65 FLRA 395, 398 n.7 (2010); *U.S. Dep't of Health & Human Servs., Office of Medicare Hearings & Appeals*, 65 FLRA 175, 177 n.3 (2010); *U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 171, 173 n.5 (2010).

2. For the reasons articulated in his recent concurring opinion and footnotes, Member Beck would conclude that it is unnecessary to assess whether the contract provision is

provision negotiated under § 7106(b)(3); rather, it applies an abrogation standard. *EPA*, 65 FLRA at 116-18. The Authority has previously described an award that abrogates the exercise of a management right as an award that “precludes an agency from exercising” the affected management right. *U.S. Dep’t of the Air Force, Air Force Materiel Command*, 65 FLRA 395, 399 (2010) (citation omitted).

The Agency fails to demonstrate that Article 27, as interpreted and applied by the Arbitrator, abrogates the exercise of its rights to determine its internal security practices and to assign work. The Arbitrator found that, consistent with cases cited by the Union permitting vacating posts for good reason, the Agency must cover and fill post positions. Award at 7, 12. Therefore, the award may reasonably be read as allowing the Agency to vacate posts for good reason, rather than precluding the Agency from vacating them in all circumstances. *See DOJ Atlanta*, 57 FLRA at 410-11 (award did not abrogate § 7106 right where award allowed Agency to leave posts vacant in certain circumstances); *DOJ Guaynabo*, 57 FLRA at 333-34 (same).

In addition, nothing in the award prevents the Agency from determining which and how many posts are necessary. The award does not preclude the Agency from determining the degree of staffing needed to maintain the security of its facility. *See DOJ Atlanta*, 57 FLRA at 410-11 (award did not abrogate § 7106 right where award did not prevent agency from determining which and how many posts are necessary); *DOJ Guaynabo*, 57 FLRA at 333-34 (same). Accordingly, the Agency fails to demonstrate that Article 27, as interpreted and applied by the Arbitrator, abrogates the exercise of its rights to determine its internal security practices and assign work. Based on the foregoing, we find that the contract provisions at issue were negotiated under § 7106(b) of the Statute and deny the exception.

V. Decision

The Agency’s exception is denied.