65 FLRA No. 104

UNITED STATES
DEPARTMENT OF AGRICULTURE
FARM SERVICE AGENCY
KANSAS CITY, MISSOURI
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 264
(Union)

0-AR-4239

DECISION

February 3, 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 Marsha J. Murphy 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's unilateral implementation of a five-tier performance appraisal system (PAS) violated the parties' collective bargaining agreement (CBA) and § 7116(a)(7) of the Statute. For the reasons that follow, we dismiss in part and deny in part the Agency's exceptions.

II. Background and Arbitrator's Award

The unit of employees involved here operated under a two-tier PAS specifically established by Article 27 of the parties' CBA. Award at 3. The Agency unilaterally decided to implement a five-tier PAS. The Agency notified the Union of its decision by providing the Union with copies of Notices PM-2482 and PM-2512. *Id.* at 3-4; Exceptions, Attach. C, Tr. at 17-22. Notices PM-2482 and PM-2512 are Agency notices announcing the implementation of a five-tier PAS. Exceptions, Attach. C, Tr. at 17-22. The Union challenged this proposed change on the ground that it conflicted with Article 27's two-tier PAS. Award at 4. However, the Agency subsequently implemented the five-tier PAS. *Id.*

The Union filed a grievance alleging that the Agency violated Article 27 of the CBA by implementing a five-tier PAS.[1] *Id.* at 2. The grievance was unresolved and was submitted to arbitration.

At arbitration, the parties stipulated to the following issues:

> Did the [Agency] violate Article 27, Article 45 (sections A and B), or Article 62 (Sections A, B and C) of the [CBA] [2] . . ; 5 USC Section 7114 (a); and/or 5 USC Section 7116 (a)(1)(5)(7) or (8) when it implemented a new performance appraisal system . . . ?

Id. at 3.

The Arbitrator granted the grievance in part. She ruled that the Agency violated a number of provisions of the CBA by implementing the five-tier PAS. *Id.* at 7. For instance, the Arbitrator held that the Agency violated Article 27, which established the two-tier PAS. *Id*. at 7-8. In addition, the Arbitrator held that the Agency violated Article 45, which provides that the CBA can be modified only if a statute, Executive Order, government-wide regulation, or judicial decision conflicts with a CBA provision. *Id.* at 6-7. The Arbitrator found that the Agency failed to prove that one of the outside authorities listed in Article 45 required implementation of a five-tier PAS. *Id.*

As relevant here, the Arbitrator also found that the Agency violated § 7116(a)(7) of the Statute when it implemented the five-tier PAS by "enforc[ing] any rule or regulation . . . which is in conflict with any applicable collective bargaining agreement . . . ." *Id.* at 8 (quoting 5 U.S.C. § 7116(a)(7)).

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1. Article 27 sets forth the two-tier PAS in detail. *See* Exceptions, Attach. B.

2. The relevant text of Articles 45 and 62 of the CBA is set forth in the attached appendix.

As a remedy, the Arbitrator ordered the Agency to return to the two-tier PAS and make adversely affected employees whole. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is deficient because: (1) the award is contrary to law; and (2) the award fails to draw its essence from the CBA.

The Agency makes three arguments in support of its contrary to law exception. First, the Agency contends that the award affects management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute. Exceptions at 6-9. In addition, the Agency asserts that the provisions of the CBA, as interpreted by the Arbitrator, are not enforceable under § 7106(b)(3) because they excessively interfere with management's rights by dictating the performance levels of the PAS. *Id.* at 8-9. Last, the Agency argues that, even if the CBA provisions are enforceable under § 7106(b)(3), the award fails to reconstruct what action the Agency would have taken in the absence of the contract violation found by the Arbitrator. *Id.* at 9 n.20.

Second, the Agency argues that the award is contrary to § 7116(a)(7) of the Statute. *Id.* at 9-10. Specifically, the Agency asserts that the Arbitrator does not identify the "rule or regulation" within the meaning of § 7116(a)(7) that the Agency improperly enforced when it implemented the five-tier PAS. *Id.*[3]

Third, the Agency argues that the award is contrary to the Back Pay Act because the Arbitrator did not make the requisite findings to support a remedy of back pay. *Id.* at 11 n.23.[4]

B. Union's Opposition

The Union asserts that even if the award affects management's rights, it is still enforceable as an appropriate arrangement under § 7106(b)(3). Opp'n at 7.[5]

IV. Analysis and Conclusions

A. The award is not contrary to § 7106(a) of the Statute.

The Agency claims that the award is contrary to management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute. When an exception involves an 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) (*NTEU*) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying this standard, 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.*

The Authority recently revised the analysis that it will apply when reviewing management rights exceptions to arbitration awards. *See U.S. Envtl. Prot. Agency*, 65 FLRA 113, 115 (2010) (*EPA*) (Member Beck concurring); *Fed. Deposit Ins. Corp.,*

3. The Agency bases its essence exception on the claim that the Arbitrator failed to identify any rule or regulation enforced by the Agency that conflicted with the CBA when she found a § 7116(a)(7) violation. Exceptions at 10. This claim is substantively the same as its contrary to law claim that the Arbitrator erroneously found that the Agency violated § 7116(a)(7). Therefore, we do not separately analyze the Union's essence exception.

4. There is no evidence that the Agency raised this argument in the proceedings before the Arbitrator. Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were 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). In this regard, the Union, in its post-hearing brief, specifically requested make-whole relief. *See* Opp'n, Attach., Union's Post-Hearing Brief at 14. Although the Union's brief was filed after the Agency filed its post-hearing brief, nearly a month elapsed before the Arbitrator issued her award, and "the Agency does not argue that either the Arbitrator or the parties' CBA precluded the Agency from responding to the Union's post-hearing brief." *U.S. Dep't of Justice, Fed. Bureau of Prisons, Wash. D.C.,* 64 FLRA 1148, 1152 (2010) (where Agency failed to demonstrate that it had "no opportunity to respond" to union's attorney fee request, Authority dismissed exception under § 2429.5). For these reasons, there is no basis for finding that the Agency could not have raised its argument below, and we dismiss this exception.

5. The Union also argues that the issue of whether the award is contrary to management's rights was not raised before the Arbitrator within the meaning of § 2429.5 of the Authority's Regulations. The Authority finds that the Agency raised this issue before the Arbitrator. *See* Award at 5.

Div. of Supervision & Consumer Prot., S.F. Region, 65 FLRA 102, 106-07 (2010) (*FDIC, SF Region*) (Chairman Pope concurring). Under the revised analysis, the Authority assesses whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115.[6] If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b).[7] *Id*. Also, under the revised 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. *See 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" requirement set forth in prior case law. *FDIC, SF Region,* 65 FLRA at 106-07.

It is not disputed that the award affects management's rights to direct employees and assign work. Consequently, we examine whether the Arbitrator enforced a contract provision negotiated under § 7106(b). Here, the Arbitrator enforced Articles 27, 45, and 62 of the CBA. He determined that the Agency violated these provisions by implementing a five-tier PAS because the parties already negotiated a two-tier PAS under Article 27. With regard to § 7106(b)(3), the Agency does not dispute that these provisions are arrangements, but argues that the Arbitrator's enforcement of these provisions excessively interferes with management's rights to direct employees and assign work by dictating the performance levels of the PAS. However, as stated above, the Authority no longer applies an excessive-interference standard in determining whether an arbitrator has enforced a contract 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 right. *U.S. Dep't of the Army, Army Transp. Ctr., Fort Eustis*, *Va*., 38 FLRA 186, 190 (1990) (quoting *Dep't of the Treasury, U.S. Customs Serv.*, 37 FLRA 309, 314 (1990)).

The Agency fails to demonstrate that Articles 27, 45, and 62, as interpreted and applied by the Arbitrator, abrogate the exercise of the rights to direct employees and assign work. The Arbitrator did not interpret the provisions to prevent management from establishing criteria to evaluate employees in their performance appraisals. The provisions agreed to by the Agency require it to limit its evaluation to two performance levels. Therefore, the provisions do not preclude the Agency from evaluating employees in their performance appraisals. Accordingly, the Agency has failed to establish that the provisions abrogate management's rights to direct employees and assign work. Based on the foregoing, the Authority finds that the contract provisions at issue were negotiated under § 7106(b) of the Statute.

The Agency also asserts, without elaboration, that even if the contract provisions are appropriate arrangements, the award is deficient because the award fails to "reconstruct" what the Agency would have done had it not violated those provisions. However, as discussed above, such "reconstruction" is no longer applicable. *See FDIC, SF Region,* 65 FLRA at 106-07. Accordingly, we find that the award does not impermissibly affect management's rights by failing to reconstruct what the Agency would have done if it had not violated the contract, and we deny this exception.

B. The award is not contrary to § 7116(a)(7) of the Statute.

The Agency argues that the award is contrary to § 7116(a)(7) of the Statute. As discussed above, when an exception involves an award's consistency with law, the Authority reviews any question of law

6. 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 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).

7. When an award affects a management right under § 7106(a)(2) of the Statute, the Authority may also examine whether the award enforces an applicable law. *EPA*, 65 FLRA at 115 n.7.

raised by the exception and the award de novo. *See NTEU,* 50 FLRA at 332.

In deciding a grievance that alleges an unfair labor practice (ULP), "the arbitrator must apply the same standards and burdens that would be applied by an [Administrative Law Judge (ALJ)] in a ULP proceeding under § 7118." *NTEU, Chapter 168*, 55 FLRA 237, 241 (1990). That is, in resolving a grievance alleging a ULP under § 7116 of the Statute, an arbitrator functions as an ALJ. *NTEU*, 61 FLRA 729, 732 (2006).

Section 7116(a)(7) provides that "it shall be [a ULP] for an agency . . . to enforce any rule or regulation . . . which is in conflict with any applicable collective bargaining agreement . . . ." 5 U.S.C. § 7116(a)(7). The Authority has indicated that the terms "rule or regulation" as used in § 7116(a)(7) include internal agency policy issuances. *See Dep't of Health & Human Servs., Health Care Fin. Admin.*, 39 FLRA 120, 124, 132-33, 141 (1991) *enf'd sub. nom. U.S. DHHS, HCFA v. FLRA*, 952 F.2d 398 (4th Cir. 1991) (*HCFA*) (upholding ALJ decision finding § 7116(a)(7) violation based on agency's implementation of a policy issuance banning smoking, in conflict with parties' MOU).

The award is not contrary to § 7116(a)(7) of the Statute as the Agency claims. The Agency does not dispute the Arbitrator's factual findings that the Agency enforced Notices PM-2482 and PM-2512, which announced implementation of a five-tier PAS. Award at 3-4; Exceptions, Attach. C, Tr. at 17-22. *AFGE, Local 2054*, 63 FLRA 169, 173 (2009) (Authority may derive arbitrator's factual findings from record to assess arbitrator's legal conclusions). Notices PM-2482 and PM-2512 are policy issuances that constitute "rules or regulations" under § 7116(a)(7). *See HCFA,* 39 FLRA at 124, 132-33, 141. There is also no dispute that Notices PM-2482 and PM-2512 conflicted with the two-tier PAS specifically established by Article 27 of the CBA. Therefore, the Arbitrator's conclusion that the Agency violated § 7116(a)(7) of the Statute is consistent with the requirements of that provision.

Accordingly, as the Agency fails to establish that the award is contrary to § 7116(a)(7), we deny this exception.

V. Decision

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

APPENDIX

The relevant portion of Article 45 of the CBA provides:

Section B. Mandated Changes to This Agreement

1. If a future . . . government-wide regulation . . . requires the parties to change this Agreement, the Employer or the Union will notify the other, in writing, of proposed formal contract language to implement the change required. If either party desires to negotiate the impact and implementation of the change, to the extent permitted by law, it shall notify the other within five workdays. Such request to negotiate shall include a specific formal proposal for negotiations. Failure by either party to respond timely to the other's notice shall constitute a waiver of any right to negotiate on the proposed required change, and the proposed formal contract language will become part of this Agreement . . . . Neither party will be permitted to propose changes unrelated to the change specifically required by . . . government-wide regulation . . . .

Exceptions, Attach. B at 148.

The relevant portion of Article 62 of the CBA provides:

Section A. Laws and Regulations

In the administration of all matters covered by this Agreement, the Employer, the Union and employees are governed by existing and future laws and government-wide regulations.

Section B. Agreement Duration

For the duration of this Agreement, it will have the full force and effect of regulations within the bargaining unit. . . .

Id. at 187.