68 FLRA No. 117

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISONS LOCAL 33
(Union)

0-AR-4941

DECISION

June 30, 2015

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

I. Statement of the Case

Arbitrator Stephen E. Alpern found that a Union-filed grievance was timely filed, and that the Agency violated § 7116 of the Federal Service Labor-Management Relations Statute (the Statute)[1] by failing to bargain over a change in its procedures for reimbursing employees for certain cellular-phone calls that the employees make while on work-related travel. This case presents us with five substantive questions.

The first question is whether the Arbitrator's determination that the grievance was timely filed fails to draw its essence from the parties' collective-bargaining agreement. Because the Arbitrator's determination concerns procedural arbitrability, and that determination cannot be directly challenged on essence grounds, the answer is no.

The second question is whether the Arbitrator's determination that the grievance was timely filed is contrary to law. Because we will not find the Arbitrator's procedural-arbitrability determination to be contrary to law unless it conflicts with statutory procedural requirements that apply to the parties' negotiated grievance procedure – and the Agency has not demonstrated that any such conflicting statutory procedural requirements apply here – the answer is no.

[1] 5 U.S.C. § 7116.

The third question is whether the Arbitrator exceeded his authority by resolving an issue that was not submitted to arbitration. Because the award directly responds to the issues that were before the Arbitrator, the answer is no.

The fourth question is whether the award is contrary to law because the Arbitrator erred by finding a change in conditions of employment. Because the Agency does not challenge the factual findings underlying his conclusion of a change, and these findings support his conclusion, the answer is no.

The fifth question is whether the award is contrary to law because the change in conditions of employment is de minimis and, therefore, the Agency had no duty to bargain. Because the change in conditions of employment is more than de minimis, the answer is no.

II. Background and Arbitrator's Award

The Agency reimburses employees for certain personal cellular-phone calls that they make while they are on work-related travel. On March 29, 2012, the Agency sent a memorandum to Agency supervisors addressing cellular-phone-call reimbursement for employees on work-related travel (memorandum). According to the memorandum, the Agency would not reimburse employees for calls that they make while on work-related travel if they do not incur an additional expense outside of their normal cellular-phone plans. The memorandum further instructed Agency supervisors to ask employees who submit claims for cellular-phone-call reimbursement "whether or not they actually incurred an additional expense outside of their normal cell[ular] [-]phone plan[s]."[2] The memorandum further stated that "[t]hese reimbursement procedures must be applied consistently by all sites."[3] On March 30, 2012, an Agency supervisor sent a copy of the memorandum to the Union president.

On May 30, 2012, the Union filed a grievance alleging that the Agency violated § 7116 of the Statute because the memorandum changed conditions of employment related to cellular-phone-call-reimbursement procedures and the Agency failed to bargain with the Union over the change. The Agency denied the grievance, and the parties submitted the matter to arbitration. Absent a stipulated issue, and as relevant here, the Arbitrator framed the following issue: "was the grievance timely filed[,] . . . [and,] [i]f so, did the [Agency's] issuance of its March 29, 2012 memorandum . . . constitute a violation of . . . § 7116?"[4]

[2] Exceptions, Ex. 3 at 1 (Memorandum); *see* Award at 5.
[3] Memorandum at 2; *see* Award at 5.
[4] Award at 3.

As an initial matter, the Arbitrator concluded that the grievance was timely filed. In reaching this conclusion, the Arbitrator found that, "although [Article 31(d) of the parties' agreement] has a forty[-]day time limit for filing grievances," Article 31(d) also "states that 'where the statutes provide for a longer filing period, then the statutory period would control.'"[5] Based on this wording, the Arbitrator found that, because the grievance alleged an unfair labor practice (ULP), the longer six-month period for filing ULP charges under § 7118(a)(4)(A) of the Statute – the wording of which is set forth in section IV.A.1. below – controlled the timeframe for filing the grievance. As the Union filed its grievance within six months of the alleged violation, the Arbitrator found that the grievance was timely.

On the merits, the Arbitrator concluded that the Agency's failure to bargain over the memorandum violated § 7116. Before the Arbitrator, the Agency argued that the memorandum "clarified" existing policies and "was not a change."[6] The Arbitrator found that the Agency had existing practices relating to phone-call reimbursement (using any device to make phone calls) made during work-related travel. But, relying on the Agency's witness testimony, he found that the Agency did not have an existing national policy specifically addressing cellular-phone-call reimbursement, and that practices related to this reimbursement varied throughout the Agency.[7] By issuing the memorandum, according to the Arbitrator, the Agency established a new, national policy addressing cellular-phone-call reimbursement, and this policy affected employees' conditions of employment. Further, the Arbitrator determined that this national policy "changed, at least with respect to some local practices, the procedures for claiming reimbursement."[8]

The Arbitrator found that the memorandum's "policy is being used to justify going well beyond the travel-reimbursement practices previously in effect."[9] In this regard, he noted one example where an Agency facility changed its practice from requiring that employees requesting reimbursement itemize the cost of their calls to also requiring them to itemize the dates of their calls and to whom the calls were made. The Arbitrator concluded that "[t]he record in this matter showed that," after the Agency issued the memorandum, "at least some employees were denied reimbursement for cell[ular-]phone calls for which they claimed to have actually incurred additional charges."[10] On this basis, the Arbitrator effectively rejected the Agency's argument that the memorandum had only a de minimis effect on employees' conditions of employment.

The Agency filed exceptions to the Arbitrator's award. The Union filed an opposition to the Agency's exceptions.

III. Preliminary Matters

A. The Union's opposition is timely filed.

Under § 2429.24(e) and (f)(11) of the Authority's Regulations, parties must file oppositions to arbitration exceptions with the Authority in person, by commercial delivery, by first-class mail, by certified mail, or electronically through the FLRA's eFiling system.[11] The Union filed its opposition with the Authority by facsimile on June 14, 2013, and also indicated that it had mailed the opposition to the Authority that same day. The Authority never received the opposition from the U.S. Postal Service (USPS). Because the Authority's Regulations do not permit an opposition to be filed by facsimile,[12] the Authority issued, to the Union, an order to show cause (order) why the Authority should not reject the opposition.

In response, the Union submitted evidence that it mailed its opposition to the Authority by certified mail on June 14, 2013, but that the USPS misrouted it.[13] We note that, in order for its opposition to be timely, the Union was required to file the opposition with the Authority by June 18, 2013. Based on the evidence submitted by the Union, we find that the Union timely filed its opposition with the Authority by certified mail.[14] Therefore, we consider the Union's opposition.

B. Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Agency's claim that any change in conditions of employment was de minimis.

The Agency argues that the award is contrary to law because any change in conditions of employment resulting from the issuance of the memorandum was de minimis.[15] The Union claims that the Authority should not consider this argument because it was not raised before the Arbitrator.[16]

[5] *Id.* at 15.
[6] *Id.* at 17.
[7] *Id.*
[8] *Id.* at 18.
[9] *Id.*
[10] *Id.* at 20.
[11] 5 C.F.R. § 2429.24(e) & (f)(11).
[12] Order at 1 (citing 5 C.F.R. § 2429.24(e) & (f)(11)).
[13] Union's Resp. at 1.
[14] 5 C.F.R. § 2429.24(e).
[15] Exceptions at 11.
[16] Opp'n at 8.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the Arbitrator.[17] Contrary to the Union's claim, the record shows that, at arbitration, the Agency argued that any change resulting from the issuance of the memorandum was de minimis.[18] As the Agency raised this matter before the Arbitrator, §§ 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Agency from raising it now. Therefore, we resolve the Agency's de minimis argument below.

IV. Analysis and Conclusions

A. The Arbitrator's procedural-arbitrability determination is not deficient.

The Agency contends that the Arbitrator's finding that the Union timely filed its grievance (1) fails to draw its essence from the parties' agreement[19] and (2) is contrary to law.[20] An arbitrator's determination regarding the timeliness of a grievance is a determination regarding the procedural arbitrability of that grievance.[21] The Authority generally will not find an arbitrator's ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the procedural-arbitrability ruling itself, which include a claim that an award fails to draw its essence from the parties' agreement.[22] However, a procedural-arbitrability determination may be directly challenged and found deficient on the ground that it is contrary to law.[23] For a procedural-arbitrability determination to be found deficient as contrary to law, the appealing party must establish that the determination conflicts with statutory procedural requirements that apply to the parties' negotiated grievance procedure.[24]

1. The Agency's essence exception provides no basis for finding the procedural-arbitrability determination deficient.

The Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator erroneously interpreted Article 31(d) of the parties' agreement to determine that § 7118(a)(4)(A) of the Statute governs the time period for filing grievances alleging ULPs.[25] As noted previously, Article 31(d) of the parties' agreement states that "[g]rievances must be filed within forty . . . calendar days of the date of the alleged grievable occurrence . . . . [H]owever, where the statutes provide for a longer filing period, then the statutory period would control."[26] Section § 7118(a)(4)(A) of the Statute states that "no complaint shall be issued on any alleged [ULP] which occurred more than [six] months before the filing of the charge with the Authority."[27]

Here, the Arbitrator found that because the grievance alleged a ULP, the longer six-month period for filing ULP charges under § 7118(a)(4)(A) controlled the timeframe for filing the grievance under Article 31(d).[28] And the Arbitrator determined that the Union timely filed its grievance within that period.[29] These findings are procedural-arbitrability determinations, and the Agency's essence claim directly challenges these determinations.[30] Therefore, consistent with the standards set forth above, we find that the Agency's essence exception does not provide a basis for finding the award deficient.[31]

2. The Arbitrator's procedural-arbitrability determination is not contrary to law.

The Agency asserts that the award is contrary to § 7118(a)(4)(A) of the Statute because that section applies only to ULP complaints.[32] Specifically, the Agency argues that the Arbitrator erroneously determined, based on Article 31(d), that § 7118(a)(4)(A) governs the time period for filing grievances that allege ULPs.[33]

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[17] 5 C.F.R. §§ 2425.4(c), 2429.5; *see, e.g.*, *Broad. Bd. of Governors*, 66 FLRA 380, 384 (2011).

[18] Award at 14 ("Even if one could reach the 'unimaginable' conclusion that [the memorandum] did change working conditions, any such change was de minimis." (emphasis omitted).

[19] Exceptions at 6.

[20] *Id.* at 5.

[21] *AFGE, Council of Prison Locals, Council 33*, 66 FLRA 602, 604 (2012) (*AFGE*) (citations omitted).

[22] *U.S. Dep't of the Navy, Naval Air Station, Whiting Field*, 66 FLRA 308, 309 (2011) (*Whiting Field*).

[23] *AFGE*, 66 FLRA at 604; *Whiting Field*, 66 FLRA at 309.

[24] *See U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 122, 124 (2005).

[25] Exceptions at 6.

[26] Award at 8.

[27] 5 U.S.C. § 7118(a)(4)(A).

[28] Award at 15-16.

[29] *Id.* at 16.

[30] *See AFGE*, 66 FLRA at 604.

[31] *See id.*

[32] Exceptions at 5.

[33] *Id.*

But the Agency does not explain how the Arbitrator's finding that the grievance was timely filed conflicts with any statutory procedural requirement set forth in § 7118(a)(4)(A).[34] In this regard, nothing in § 7118(a)(4)(A) precludes an arbitrator from applying the six-month time period to determine whether a grievance alleging a ULP is timely filed. Thus, we find that the exception does not provide a basis for finding the award contrary to law.[35]

B. The Arbitrator did not exceed his authority.

The Agency argues that the Arbitrator exceeded his authority by resolving an issue that was not submitted to arbitration.[36] Specifically, the Agency contends that the Arbitrator erred when he "broadened the issues" by determining whether the procedures for processing claims for cellular-phone-call reimbursement – rather than limiting the issue to issuance of the memorandum itself – changed conditions of employment.[37]

As relevant here, arbitrators exceed their authority when they resolve an issue not submitted to arbitration.[38] Where the parties fail to stipulate to the issue, the arbitrator may formulate the issue on the basis of the subject matter before him.[39] And absent a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference.[40]

As set forth above, the parties did not stipulate to an issue and, as relevant here, the Arbitrator framed the following issue: "was the grievance timely filed . . . [and,] [i]f so, did the [Agency's] issuance of its March 29, 2012 memorandum . . . constitute a violation of . . . § 7116?"[41] The Arbitrator limited his review to these issues and found that the memorandum established a national policy addressing cellular-phone-call reimbursement.[42] He also found that issuing the memorandum "changed, at least with respect to some local practices, the procedures for claiming reimbursement."[43] On that basis, he found that the Agency's failure to bargain over the issuance of the memorandum violated § 7116.[44] The award is thus directly responsive to an issue before the Arbitrator, and we find that the Arbitrator did not exceed his authority.

C. The award is not contrary to law.

The Agency contends that the award is contrary to law because (1) the issuance of the memorandum did not change any conditions of employment[45] and (2) any change in conditions of employment was de minimis.[46]

The Authority reviews questions of law de novo.[47] 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.[48]

Further, when resolving a grievance that alleges a ULP under § 7116 of the Statute, an arbitrator functions as a substitute for an Authority administrative law judge (judge).[49] Consequently, in resolving the grievance, the arbitrator must apply the same standards and burdens that judges apply under § 7118.[50] In a grievance that alleges a ULP by an agency, the union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence.[51] As in other arbitration cases, in determining whether the award is contrary to the Statute, the Authority defers to the arbitrator's findings of fact unless the excepting party demonstrates that the award is based on a nonfact.[52]

Before implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain if the change will have more than a de minimis effect on conditions of employment.[53] The determination of whether a change in conditions of employment has occurred involves a case-by-case analysis and an inquiry into the facts and circumstances regarding the agency's conduct and employees' conditions of employment.[54] In assessing whether the effect of a change is more than de minimis,

[34] *See AFGE*, 66 FLRA at 604.
[35] *See id.*
[36] Exceptions at 8 n.3.
[37] *Id.*
[38] *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).
[39] *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 887, 891 (2000).
[40] *Id.; U.S. Dep't of the Army, Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997).
[41] Award at 3.
[42] *Id.* at 18.
[43] *Id.*
[44] *Id.* at 19.
[45] Exceptions at 8.
[46] *Id.* at 11.
[47] *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)).
[48] *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).
[49] *U.S. DHS, U.S. CBP*, 65 FLRA 870, 872 (2011) (*DHS*).
[50] *Id.*
[51] *Id.*
[52] *Id.*; *see IFPTE, Local 386*, 66 FLRA 26, 27-28 (2011).
[53] *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85, 89 (2009).
[54] *SSA, Office of Hearings & Appeals, Charleston, S.C.*, 59 FLRA 646, 649 (2004), *pet. for review denied sub nom., Ass'n of Admin. Law Judges v. FLRA*, 397 F.3d 957 (D.C. Cir. 2005).

the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining-unit employees' conditions of employment.[55] The Authority has found a change to have a greater than de minimis effect when, for example, the change had financial consequences for employees.[56]

1. The Agency changed conditions of employment.

The Agency argues that the memorandum did not change conditions of employment, but served as a "reminder to supervisors of the long-standing policy that allowed employees to be reimbursed for telephone calls only if the employees incurred an actual cost."[57] The Arbitrator found, and it is undisputed, that the Agency had existing practices relating to phone-call reimbursement (using any device to make phone calls) made during work-related travel.[58] But, relying on the Agency's witness testimony, he found that the Agency did not have an existing national policy specifically addressing cellular-phone-call reimbursement, and that practices related to this reimbursement varied throughout the Agency.[59] On this basis, the Arbitrator found that the memorandum established a national policy specifically addressing cellular-phone-call reimbursement, which "changed, at least with respect to some local practices, the procedures for claiming reimbursement."[60] The Arbitrator also found that the memorandum's "policy is being used to justify going well beyond the travel [-]reimbursement practices previously in effect," and he identified an Agency facility that changed its practice from requiring itemized costs of calls to also requiring the dates of calls and to whom calls were made.[61]

The Agency does not challenge the Arbitrator's factual findings as nonfacts. Therefore, the Authority defers to them.[62] Further, the Arbitrator's factual findings support his conclusion that the Agency changed employees' conditions of employment.

To support its argument regarding no change, the Agency cites *Department of the Navy, Supervisor of Shipbuilding, Conversion & Repair, Groton, Connecticut* (*Navy*).[63] In *Navy*, the Authority upheld a judge's decision that found that an agency did not change conditions of employment when it distributed checklists to aid supervisors in implementing an already-existing program.[64] Unlike in *Navy*, here the Arbitrator found that the Agency did *not* have an existing policy that specifically applied to reimbursement for cellular-phone calls.[65] Therefore, *Navy* is distinguishable from this case and provides no basis for finding that the Arbitrator erred in concluding that the Agency changed conditions of employment.

For the foregoing reasons, the Agency has not demonstrated that the Arbitrator erred, as a matter of law, in finding that the Agency changed employees' conditions of employment.

2. The change in conditions of employment is not de minimis.

The Agency argues that any change in working conditions resulting from the memorandum was de minimis.[66]

Here, the Arbitrator found that the Agency's decision to issue the memorandum directing a national policy on cellular-phone-call reimbursement changed the procedures for claiming reimbursement, and that change affected whether employees would be granted or denied reimbursement.[67] As to the nature and extent of the effect, the Arbitrator found, and it is undisputed, that "[t]he record in this matter showed that at least some employees were denied reimbursement for cell[-]phone calls for which they claimed to have actually incurred additional charges."[68] The Arbitrator also considered the Union's alleged effects, including employees being "led to believe that [the Agency] no longer pays for personal calls when an employee is in a travel status" and being asked to itemize whom they called and how long those phone calls lasted.[69] Based on the foregoing, the Arbitrator rejected the Agency's argument that the issuance of the memorandum had only a de minimis effect.[70] That conclusion is consistent with Authority precedent, including precedent finding that changes that

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[55] *U.S. Dep't of the Treasury, IRS*, 64 FLRA 972, 977 (2010) (*IRS*).
[56] *U.S. Dep't of the Treasury, IRS*, 66 FLRA 528, 530 (2012) (*Dep't of the Treasury*) (finding that moving employees into different awards pools causing changes in the awards-pool system that could ultimately affect which employees received performance awards had a greater than de minimis effect); *U.S. Dep't of VA, Med. Ctr., Leavenworth, Kan*., 60 FLRA 315, 318 (2004) (*VA*) (finding that reducing employees' time to perform certain duties resulting in a lost opportunity to earn overtime and differential pay had a greater than de minimis effect).
[57] Exceptions at 8.
[58] Award at 18.
[59] *Id.* at 17.
[60] *Id.* at 18.
[61] *Id.*
[62] *DHS*, 65 FLRA at 872.
[63] 4 FLRA 578 (1980).
[64] *Id.*
[65] Award at 17.
[66] Exceptions at 11.
[67] Award at 18-20.
[68] *Id.* at 20.
[69] *Id.* at 12.
[70] *See id.* at 14.

have financial consequences for employees may be greater than de minimis.[71]

Consistent with the principles set forth above, the Arbitrator's factual findings support his conclusion that the nature and extent of the effects of the change on bargaining-unit employees' conditions of employment was greater than de minimis.[72]

The Agency also claims that the Authority must rely only on the *reasonably foreseeable* effects – and not on the *actual* effects – of a change when assessing whether the effects of a change are greater than de minimis.[73] This claim is inconsistent with Authority precedent.[74] As stated above, in assessing whether the effects of a change are greater than de minimis, the Authority looks to the nature and extent of *either* the effects (that is, the *actual* effects), *or* the reasonably foreseeable effects, of the change on bargaining-unit employees' conditions of employment.[75]

Accordingly, the Agency has not demonstrated that the award is contrary to law in this regard, and we deny the exception.

V. Decision

We deny the Agency's exceptions.

[71] *E.g.*, *Dep't of the Treasury*, 66 FLRA at 530; *VA*, 60 FLRA at 318.
[72] *See, e.g.*, *IRS*, 64 FLRA at 977.
[73] Exceptions at 12.
[74] *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 240.
[75] *Id.*