70 FLRA No. 4

GENERAL SERVICES ADMINISTRATION
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
(Union)

0-AR-5191

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DECISION

October 14, 2016

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

I. Statement of the Case

Arbitrator Andrew M. Strongin issued an award finding that the Agency violated the parties' collective-bargaining agreement and the Federal Service Labor-Management Relations Statute (the Statute)[1] when it failed to bargain over the impact and implementation of the Agency's space-allocation policy (policy).

The Agency files one exception to the award. The Agency argues that the award is contrary to law because the only proposal submitted by the Union was nonnegotiable and, therefore, the Agency had no duty to bargain. Because the sole proposal submitted by the Union was outside the Agency's statutory duty to bargain, and because, pursuant to the Arbitrator's interpretation of the parties' agreement, bargaining under the parties' agreement is dependent on a statutory duty to bargain, we grant this exception and set aside the award.

II. Background and Arbitrator's Award

In 2013, the Office of Management and Budget (OMB) issued a directive to all federal agencies known as "Freeze the Footprint." OMB directed agencies to create three-year plans with the goal of not increasing their real-estate needs. The directive also provided that federal agencies should consult with the General Services Administration, the Agency in this case, on how to use technology and space management to consolidate workspaces.

In response, the Agency developed its policy as a showcase of how federal agencies could "implement innovative workplace strategies, including right-sizing (individual and collaborative spaces), desk-sharing, and open-plan design."[2] Prior to implementing the policy, the Agency invited the Union to submit proposals over the impact and implementation of the policy. The Union submitted one proposal: "The Union proposes maintaining the status quo pertaining to the [policy] until the completion of the term negotiations of the Master Agreement. The [p]arties would then use the procedures agreed to in the new Master Agreement to address the issues in the [A]gency's proposal."[3]

The Agency declared that the Union's proposal was nonnegotiable and stated that it was going to implement the policy. The Union filed a grievance. The parties were unable to resolve the grievance, and they submitted it to arbitration.

At arbitration, the parties stipulated that the issue was whether the Agency violated the Statute and the parties' agreement "by declaring [that] it had no duty to bargain with the Union over" the policy.[4]

The Union argued that, under the parties' agreement and the Statute, the Agency had a duty to bargain over either the substance or the impact and implementation of the policy. The Union contended that it met the procedural requirements under the parties' agreement to request bargaining and that proposals that ask the Agency to maintain the status quo are negotiable.

According to the Agency, the policy directly related to its mission, and the policy was therefore subject only to impact-and-implementation bargaining. The Agency also stated that the Union's proposal was nonnegotiable as it would "negate its managerial right to effectuate its mission."[5]

[1] 5 U.S.C. § 7116(a)(5).

[2] Award at 4.
[3] *Id.* at 11.
[4] *Id.* at 2.
[5] *Id.* at 11.

The Arbitrator first determined that the substance of the policy is a permissive subject of bargaining because it was an exercise of the Agency's management right to determine the methods and means of performing work under § 7106(b)(1) of the Statute. The Arbitrator further found – and the Agency conceded – that the Agency nonetheless had a duty to bargain over the impact and implementation of the policy.

The Arbitrator next found that, under the parties' agreement, the Union's request to bargain was timely. The Arbitrator also determined that because "[t]he Agency . . . refused to bargain" it "violated the terms of the parties' [a]greement, except and unless that obligation was excused based on considerations of statutory negotiability."[6]

The Arbitrator then turned to the issue of whether the Union's proposal was negotiable under the Statute. The Arbitrator rejected the Agency's argument that the proposal was nonnegotiable, finding that the decisions cited by the Agency delineated a difference "between proposals that merely delay the exercise of a management right, which generally might be negotiable, and those proposals that are meant more broadly to negate the underlying management right, which are not negotiable."[7] The Arbitrator determined that "immediate implementation of the new policy was not, strictly speaking, mission critical."[8]

In conclusion, the Arbitrator found that the Agency had a duty to bargain over the impact and implementation of the policy – under the Statute and the parties' agreement – and that the Agency violated that duty by refusing to negotiate. As a remedy, the Arbitrator ordered the Agency to cease from violating the parties' agreement and the Statute, to post a notice of the violations, and to engage in impact-and-implementation bargaining with the Union over the policy.

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

III. Analysis and Conclusion: The award is contrary to law.

The Agency argues that the award is contrary to law.[9] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception de novo.[10] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions – not his or her underlying reasoning – are consistent with the applicable standard of law.[11] In making this assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[12]

The Agency contends that the proposal was nonnegotiable and, thus, that it had no duty to bargain and the award is contrary to law.[13] Prior to 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.[14]

Where such a change to conditions of employment constitutes the exercise of a management right under § 7106 of the Statute, the agency is nevertheless obligated to notify the exclusive representative and negotiate over the impact and implementation of the change.[15] However, the Authority has held that, during such bargaining, an agency is obligated to bargain only over proposals that are reasonably related to the proposed change in conditions of employment.[16] An agency, therefore, is not required to bargain over proposals that go beyond the scope of a proposed change or over a matter that is conditioned on an agency bargaining over proposals that are outside the

[6] *Id.* at 12.
[7] *Id.* at 14.
[8] *Id.* at 15.

[9] Exception Form at 4.
[10] *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)).
[11] *U.S. DHS, U.S. CBP*, 68 FLRA 276, 277, *recons. denied*, 68 FLRA 807, 809 (2015), *pet. for review dismissed sub nom., U.S. DHS, U.S. CBP v. FLRA*, No. 15-1342, 2016 WL 231956 at *1 (D.C. Cir. Jan. 4, 2016).
[12] *E.g., AFGE, Nat'l INS Council*, 69 FLRA 549, 552 (2016).
[13] Exception Br. at 9.
[14] *NTEU, Chapter 26*, 66 FLRA 650, 652 (2012); *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 173 (2009); *Dep't of HHS, SSA*, 24 FLRA 403, 407-08 (1986).
[15] *POPA*, 66 FLRA 247, 253 (2011) (*POPA*); *U.S. DHS, U.S. CBP*, 65 FLRA 870, 872-73 (2011) (*DHS*).
[16] *POPA*, 66 FLRA at 253; *DHS*, 65 FLRA at 873.

scope of an agency's impact-and-implementation bargaining obligation.[17]

Here, the Arbitrator found that the policy was an exercise of the Agency's management right to determine the methods and means of performing work. According to the Arbitrator, the policy is a permissive, rather than mandatory subject of bargaining, and the Agency had a duty to bargain over the impact and implementation of the policy. No party has excepted to these findings.

The Union's proposal requires the Agency to delay implementation of the policy until after the parties complete negotiations over a new term agreement, including proposals unrelated to the Agency's policy.[18] As such, the Union's proposal goes beyond the scope of the proposed change and is not reasonably related to the impact and implementation of the policy. Consequently, the Union's proposal is outside the statutory duty to bargain.[19]

Because the Agency had no statutory duty to bargain over the Union's proposal – and it was the Union's only proposal – the Arbitrator erred in finding that the Agency violated the Statute. Therefore, that finding is contrary to law, and we set aside it aside.[20]

Additionally, the Arbitrator found that the Agency "violated the terms of the parties' [a]greement, except and unless that obligation was excused based on considerations of statutory negotiability."[21] Because we find that the Agency did not violate the Statute and – under the Arbitrator's interpretation of the parties' agreement – such a determination would "excuse[]"[22] the Agency's obligation under the parties' agreement, we also set aside the Arbitrator's finding that the Agency violated the parties' agreement.

IV. Decision

We grant the Agency's contrary-to-law exception and set aside the award.

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[17] *POPA*, 66 FLRA at 253; *DHS*, 65 FLRA at 873.
[18] Award at 5-6 (noting only one section of one article of the parties' agreement concerning the policy).
[19] *POPA*, 66 FLRA at 253-54; *DHS*, 65 FLRA at 873.
[20] Member Pizzella agrees that the proposal is not reasonably related to the policy and is therefore outside the duty to bargain. However, Member Pizzella would also note that the proposal is also not within the duty to bargain *because* it precludes the Agency from exercising a management right unless or *until another event occurs. NAGE, Locals R5-136 & R5-150*, 55 FLRA 679, 680 (1999) ("Proposals that preclude an agency from exercising a management right unless or until other events occur are generally not within the duty to bargain.").
[21] Award at 12.
[22] *Id.*