70 FLRA No. 7

UNITED STATES
DEPARTMENT OF LABOR
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 12
(Union)

0-AR-5186

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DECISION

October 26, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

The Agency contracted out one of its medical-review functions without giving the Union notice, or otherwise consulting with the Union. Among its effects, the Agency's contracting-out decision "impacted"[1] the conditions of employment of a bargaining-unit employee, who filed a grievance. Arbitrator Richard Trotter issued an award finding that the Agency violated the parties' collective-bargaining agreement and committed an unfair labor practice (ULP) under § 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute)[2] when it made its contracting-out decision without following the notice and consultation procedures in the parties' agreement. As a remedy, the Arbitrator ordered a notice posting, but denied the Union's other requested remedies, including individual remedies for the grievant.

Both parties filed exceptions to the award. First, the Agency argues that the award is contrary to the Office of Management and Budget's Circular A-76 (A-76) because the Arbitrator had no jurisdiction over A-76 matters. Because the Arbitrator based his award on a violation of the parties' agreement – not compliance with A-76 – the award is not contrary to A-76.

Second, the Union argues that the Arbitrator's finding that the change in the grievant's conditions of employment was only de minimis is contrary to law. Because the Arbitrator's factual findings support the Arbitrator's de minimis determination and the Union's other arguments do not demonstrate that this finding is deficient, we deny this exception.

Third, the Agency argues that the Arbitrator's finding that the Agency committed a ULP is contrary to law. Neither the mere breach of the parties' agreement, nor the Agency's change to the grievant's conditions of employment, provides a sufficient basis for the Arbitrator's ULP finding. Therefore, we grant this Agency exception and modify the award accordingly.

Finally, the Union argues that the award is contrary to law because the Arbitrator did not grant the Union's requested status quo ante relief. Because we set aside the Arbitrator's ULP finding and the Union does not argue that the remedy is otherwise deficient under the parties' agreement, we deny this exception.

II. Background and Arbitrator's Award

The Agency contracted with a third party to conduct medical reviews of certain employees' workers' compensation applications for the Agency. The contract replaced "the existing practice of parceling out [the reviews] to more than [eighty] physicians nationwide," and "provided for review of medical records by [the private contractor's] physicians as well as referral and scheduling of the medical reviews."[3] As one result of this contract, the Agency modified the grievant's duties and gave her a new position title. Responding to the Agency's actions, the Union filed a grievance arguing that the Agency violated Article 31 of the parties' agreement when it contracted out work pursuant to A-76 without giving the Union notice of the action and an opportunity to participate in the process. The parties failed to resolve the issue, and they submitted it to arbitration.

At arbitration, the Union argued that Article 31 requires the Agency to notify the Union and to invite the Union to participate in any contracting-out process under A-76. Focusing on the changes to the grievant's conditions of employment, the Union also argued that those changes were more than de minimis. Specifically, the Union argued that the grievant lost promotion potential and half of her duties, as well as an element of her performance plan.

[1] Award at 1.
[2] 5 U.S.C. § 7116(a)(1).
[3] Award at 2.

The Agency argued that it has a management right to contract out work. Additionally, the Agency contended that the contracting out was not done pursuant to A-76, and, therefore, Article 31 did not apply. In particular, the Agency asserted that the contracting out at issue could not fall under A-76 because Congress had enacted a moratorium prohibiting the Agency from performing A-76 studies.

The Agency also argued that its changes to the grievant's conditions of employment were de minimis, and, therefore, were insufficient to trigger a statutory bargaining obligation and form the basis of a ULP.

Regarding the contracting-out issue, the Arbitrator rejected the Agency's argument that Article 31 did not apply because the Agency's contracting-out decision did not fall under A-76. Specifically, the Arbitrator found that the Agency's contracting-out decision "was an A-76 action,"[4] and that the Agency's "violat[ion of] the [c]ongressional moratorium banning the A-76 process by taking this action . . . [did] not justify the Agency's failure to follow" the contracting-out procedures that the parties negotiated and included in Article 31.[5] In this regard, he stated that it was "no defense for the Agency to claim that [it was] free of [its] negotiated obligations under the [parties' agreement] because [the Agency] violated a congressional mandate to take an illegal action."[6]

Regarding the Agency's reassignment of the grievant, the Arbitrator found that the Union did not demonstrate that the grievant lost any promotion potential or that her new position was dissimilar from her old position. In particular, the Arbitrator found that "[the grievant]'s duties and responsibilities before and after the assignment [were] administrative and similar in type and nature."[7]

Addressing the Agency's argument that the impact on the grievant was de minimis, the Arbitrator determined that the parties' agreement does not contain any language absolving the Agency of its obligation to follow Article 31 where there is no more than a de minimis impact on conditions of employment. Additionally, the Arbitrator found that when the Agency contracted out bargaining-unit work, it had a "responsibility to notify the [U]nion of the changes in working conditions and . . . engage in impact[-]and [-]implementation bargaining with the [U]nion."[8]

In conclusion, the Arbitrator found that the Agency violated Article 31 and, "thus[,] . . . committed a [ULP,] when it failed to follow the notice[-]and [-]consultation procedures as set forth in Article 31."[9] As a remedy, the Arbitrator ordered the Agency to "sign and post [a notice]" stating that the Agency "will abide by its responsibility to notify the [U]nion of changes in working conditions and will engage in impact[-]and [-]implementation bargaining with the [U]nion if the [U]nion requests bargaining in a timely manner."[10] Based on his findings that the grievant did not lose promotion potential, and that the Agency's reassignment of the grievant did not place her "in a dissimilar position," the Arbitrator denied the Union's request that the grievant be returned to her former position.[11]

Both the Union and the Agency filed exceptions to the award. The Agency filed an opposition to the Union's exceptions; however, the Union did not file an opposition to the Agency's exceptions.

III. Preliminary Matters

A. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the parties' arguments.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the Arbitrator.[12]

In its exceptions, the Agency argues that the award is contrary to law, alleging that: (1) the contracting out in question is not subject to the requirements of A-76, as the contract affected fewer than ten employees;[13] and (2) the *remedy* of a notice posting requires the Agency to spend funds in relation to A-76, in violation of federal law.[14] However, the Agency did not raise either of these arguments before the Arbitrator, despite the facts that A-76 was at issue and the Union specifically requested a notice posting as a remedy. As the Agency could have raised these arguments before the Arbitrator, but did not do so, we will not consider them now.[15] Accordingly, we dismiss these contrary-to-law exceptions.

[4] *Id.* at 16.
[5] *Id.* at 15.
[6] *Id.* at 17.
[7] *Id.* at 19.
[8] *Id.* at 22.

[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOL*, 67 FLRA 287, 288 (2014) (*DOL*); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012) (*Local 3448*).
[13] Agency's Exceptions Br. at 12.
[14] *Id.* at 16.
[15] 5 C.F.R. §§ 2425.4(c), 2429.5; *DOL*, 67 FLRA at 288; *Local 3448*, 67 FLRA at 73-74.

In its exceptions, the Union argues that, "[w]hether there is a de minimis change in . . . working conditions is irrelevant to the necessity to negotiate if there is a unilateral change in the conditions of employment."[16] Although the issue of whether the change was de minimis was before the Arbitrator, and the Union should have known to raise this unilateral-change argument at arbitration, the Union did not do so. As such, we will not consider this argument now.[17]

B. We dismiss the Union's exceptions that fail to raise a recognized ground for review under § 2425.6(e)(1) of the Authority's Regulations.

The Union argues that the Arbitrator "abused his discretion with unsupported conclusions,"[18] "abused his discretion to decide that the [grievant] should not be reinstated,"[19] and "abused his discretion in determining that the change in conditions of employment was de minimis."[20] Section 2425.6(e)(1) of the Authority's Regulations provides, in pertinent part, that an exception "may be subject to dismissal . . . if . . . [t]he excepting party fails to raise" a ground listed in § 2425.6(a)-(c), "or otherwise fails to demonstrate a legally recognized basis for setting aside the award."[21] Thus, an exception that does not raise a recognized ground is subject to dismissal under the Authority's Regulations.[22] The Union's argument does not articulate a ground currently recognized by the Authority for reviewing an arbitration award.[23] Because the Union does not raise a recognized ground, or cite legal authority to support a ground not currently recognized by the Authority,[24] we dismiss these exceptions.[25]

IV. Analysis and Conclusions

Both parties argue that the award is contrary to law in varying respects.[26] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception de novo.[27] 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.[28] In making this assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[29]

A. The award is not contrary to A-76.

The Agency argues that the award is contrary to A-76 because A-76 matters are not arbitrable as a matter of law.[30] The Authority has held that parties may not file grievances over compliance with A-76 *itself*.[31] However, the Authority also has held that parties may enforce, through their negotiated grievance procedures, contract provisions that independently impose certain contracting-out requirements.[32]

The Arbitrator found that Article 31 of the parties' agreement requires the Agency to notify the Union of any proposed contracting out and to involve the Union in the process.[33] As such, Article 31 independently imposes certain contracting-out requirements on the Agency.[34] And, by finding that the Agency violated the parties' agreement when it contracted out work "without following A-76 rules and notice and comment procedures set forth in Article 31,"[35] the Arbitrator was enforcing the contracting-out procedures in the parties' agreement – not A-76 itself. Consequently, the award is not contrary to A-76.[36]

[16] Union's Exceptions Br. at 6 (citing *FDIC v. FLRA*, 977 F.2d 1493, 1498 (D.C. Cir. 1992); *DOL*, 44 FLRA 988, 994 (1992)).
[17] 5 C.F.R. §§ 2425.4(c), 2429.5; *DOL*, 67 FLRA at 288; *Local 3448*, 67 FLRA at 73-74.
[18] Union's Exceptions Br. at 1.
[19] *Id.* at 8.
[20] *Id.*
[21] 5 C.F.R. § 2425.6(e)(1).
[22] *AFGE, Local 1858*, 66 FLRA 942, 943 (2012).
[23] 5 C.F.R. § 2425.6(a)-(b).
[24] *Id.* § 2425.6(c).
[25] *AFGE, Local 738*, 65 FLRA 931, 932 (2011).
[26] Agency's Exceptions at 4; Union's Exceptions at 4.
[27] *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)).
[28] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[29] *E.g.*, *AFGE, Nat'l INS Council*, 69 FLRA 549, 552 (2016) (*INS Council*).
[30] Agency's Exceptions Br. at 10.
[31] *NTEU*, 65 FLRA 509, 518-19 (2011) (*NTEU*).
[32] *See id.* (finding that parties could enforce, in arbitration, "contract provisions that independently impose on agencies obligations that are the same as, or similar to, the requirements set forth in A-76").
[33] Award at 20.
[34] *Compare* OMB Circular A-76 (mentioning no role for unions) *with* Award at 20 (under the requirements of Article 31, "if work is contracted out[,] the Union is to be given notice and . . . is to be actively involved in the contracting[-]out process.").
[35] Award at 22.
[36] *NTEU*, 65 FLRA at 518-19.

B. The Arbitrator's finding of no more than a de minimis change in the grievant's conditions of employment is not contrary to law.

The Union argues that the award is contrary to law because the Arbitrator found that the changes to the grievant's conditions of employment were de minimis.[37] The parties agree that the Arbitrator found that the Agency's changes to the grievant's conditions of employment were de minimis,[38] and we therefore accept that interpretation of the award.[39] Under the Statute (and with certain exceptions not relevant here), an agency is required to bargain over a change in conditions of employment that is more than de minimis.[40] In assessing whether the effect of a change is more than de minimis, 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."[41]

The Authority has found changes to have only a de minimis effect where they have little significance and impact, such as: the reassignment of an employee from one position back to the employee's previous, substantially similar, position; or the discontinuation of an assignment involving only a small amount of work.[42] By contrast, the Authority has found a change to have a greater than de minimis effect when it involves a more significant change in working conditions, such as where: employees are assigned additional tasks that they had not performed before, employees' workloads increase significantly, or a new method of assigning claims replaces a method that equalizes claims assigned to employees.[43]

First, the Union argues, citing evidence presented to the Arbitrator, that "the Agency did not provide persuasive evidence that [the grievant] did not suffer a large impact" as a result of contracting out and that the Arbitrator made this decision "without weighing other evidence."[44] However, this argument challenges the Arbitrator's evaluation of the evidence and, therefore, does not demonstrate that the award is contrary to law.[45]

Second, the Union contends that the Arbitrator's de minimis determination is contrary to law because he "applied a narrow[,] unsupported legal test to determine promotion potential."[46] Specifically, the Union argues that the Arbitrator incorrectly determined that the grievant "did not have any promotion potential because she was only completing administrative[-]status work before and after the violation and did not have the benefit of a career ladder."[47] The Union also cites case law to support its argument that the Arbitrator should have considered the totality of the circumstances to determine the impact of the change in conditions of employment.[48]

However, the Arbitrator never found that the grievant had no promotion potential. Rather, the Arbitrator found that, in being reassigned, the grievant did not lose any promotion potential.[49] Because this argument misconstrues the Arbitrator's award, it does not provide a basis for finding the award deficient.[50]

Finally, the Union alleges that the Arbitrator erred in his de minimis finding because his conclusion ignored (1) evidence that the grievant lost promotion potential and (2) changes to the grievant's position description and performance-appraisal elements.[51]

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[37] Union's Exceptions Br. at 8-9.

[38] *Id.* at 8 ("The Arbitrator . . . abused his discretion in determining that the change in conditions of employment was de minimis."); Agency's Opposition at 2 ("[T]he Arbitrator made a correct determination that there was only a de minimis change in the working conditions issue based on all the facts presented before him at the hearing.").

[39] *Fraternal Order of Police, N.J., Lodge 173*, 58 FLRA 384, 386 (2003) (accepting interpretation of award where both parties agree on that interpretation); *U.S. DOJ, INS, San Diego, Cal.*, 51 FLRA 1094, 1098 (1996) (same); *U.S. Dep't of the Army, Army Med. Activity, Fort Knox, Ky.*, 43 FLRA 102, 114 (1991) (same).

[40] *NTEU*, 64 FLRA 462, 464 (2010) (*NTEU II*).

[41] *U.S. Dep't of the Treasury, IRS*, 56 FLRA 906, 913 (2000).

[42] *NTEU II*, 64 FLRA at 464 (citing *U.S. Dep't of HHS, SSA, Balt., Md.*, 41 FLRA 1309 (1991); *Portsmouth Naval Shipyard, Portsmouth, N.H.*, 45 FLRA 574 (1992)).

[43] *Id.*

[44] Union's Exceptions Br. at 9.

[45] *U.S. DHS, U.S. CBP*, 65 FLRA 356, 362 (2010) (citing *AFGE, Local 4044*, 65 FLRA 264, 266 (2010)) ("[A]rguments [that] challenge the [a]rbitrator's evaluation of evidence and testimony and determination of the weight to be accorded such evidence and testimony [do] not establish[] that the award is contrary to law."); *NFFE, Local 1827*, 52 FLRA 1378, 1385 (1997).

[46] Union's Exceptions Br. at 9.

[47] *Id.*

[48] *Id.* (citing *AFGE v. FLRA*, 446 F.3d 162 (D.C. Cir. 2006)).

[49] Award at 19 ("The testimony . . . verified that neither position held by [the grievant] . . . had any career ladder beyond . . . [g]rade 9.").

[50] *U.S. Dep't of the Treasury, IRS, Indianapolis Dist.*, 36 FLRA 227, 231 (1990) ("The [u]nion again misconstrues the award . . . and, consequently, fails to establish that the award is contrary to law."); *see also U.S. Dep't of the Treasury, IRS*, 69 FLRA 122, 125 (2015); *AFGE, Local 1858*, 56 FLRA 422, 424 (2000).

[51] Union's Exceptions Br. at 10.

The Arbitrator found, and the Union does not challenge as nonfacts, that: (1) "the grievant did not lose promotion potential by the Agency's action";[52] (2) "the testimony of the grievant supports the Agency's assertion that the grievant's position reassignment [was] . . . not . . . dissimilar from her previous position";[53] and (3) the grievant's "duties and responsibilities before and after the assignment [were] administrative and similar in type and nature."[54] Consistent with the principles set forth above, the Arbitrator's factual findings, to which we defer,[55] support his conclusion that the nature and extent of the effects of the change in conditions of employment were not more than de minimis.[56]

Consequently, the Union does not demonstrate that the Arbitrator erred in his determination that the change to the grievant's conditions of employment were de minimis, and we deny this contrary-to-law exception.

C. The Arbitrator's ULP determination is contrary to law.

The Agency argues that the Arbitrator's finding that the Agency committed a ULP is contrary to law because the Agency has no statutory duty to bargain over de minimis changes in conditions of employment.[57] As an initial matter, it is unclear from the award whether the Arbitrator found that the Agency committed a ULP because it repudiated the parties' agreement,[58] because it failed to bargain,[59] or both. As such, we address both potential bases for the Arbitrator's ULP finding.

Concerning repudiation, the Authority has held that "a mere breach of a collective[-]bargaining agreement is not a[ULP] under the Statute."[60] In this case, the Arbitrator only found a violation of Article 31. Because this is "a mere breach" of the parties' agreement, rather than repudiation, it cannot form the basis of a ULP.[61]

Concerning a failure to bargain, in order for an agency to have a statutory duty to bargain over a change in bargaining-unit employees' conditions of employment, the change must have more than a de minimis effect on conditions of employment.[62] As discussed above, the Arbitrator found that the change here did not have more than de minimis effects, and the Union has not demonstrated that this finding is deficient. Therefore, there was no basis for the Arbitrator to find that the Agency had – or breached – a statutory duty to bargain in the circumstances of this case.[63]

Consequently, neither potential basis for the Arbitrator's finding of a ULP – repudiation or a failure to bargain – provides a legally sufficient basis for that finding. Accordingly, we grant the Agency's contrary-to-law exception and set aside the Arbitrator's ULP determination.

As part of his remedy, the Arbitrator ordered a notice posting concerning the Agency's responsibility to engage in impact-and-implementation bargaining.[64] Because we set aside the Arbitrator's ULP determination, we also modify the notice posting to remove any reference to a ULP.[65]

D. The Union does not demonstrate that the award is otherwise contrary to law.

The Union argues that the award is contrary to law because the Arbitrator failed to grant a status quo ante remedy.[66] Specifically, the Union argues[67] that the Arbitrator incorrectly applied the factors from *Federal Correctional Institution*[68] (the *FCI* factors).

Where an arbitrator crafts a remedy to redress a violation of an agreement, the arbitrator is not required to adopt a remedy that might be appropriate in disposing of a statutory violation.[69] In short, where an arbitrator finds a violation of an agreement, the agreement – rather than the *FCI* factors – governs the propriety of a status quo ante remedy.[70]

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[52] Award at 18.
[53] *Id.* at 19.
[54] *Id.*
[55] *INS Council*, 69 FLRA at 552.
[56] *NTEU II*, 64 FLRA at 464.
[57] Agency's Exceptions Br. at 14.
[58] Award at 22 ("[T]he Agency committed a[ULP] when it failed to follow . . . Article 31 of the [parties' agreement].").
[59] *Id.* at 20 (describing the ULP as "involving a failure to bargain").
[60] *IRS, Wash., D.C.*, 47 FLRA 1091, 1104 (1993).
[61] *Id.*
[62] *NTEU, Chapter 26*, 66 FLRA 650, 652 (2012) (*NTEU, Chapter 26*); *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 (1986).
[63] *NTEU, Chapter 26*, 66 FLRA at 652.
[64] Award at 22.
[65] *See, e.g.*, *NTEU*, 66 FLRA 577, 581 (2012) (modifying award to delete notice's reference to a ULP where Authority set aside the finding of a ULP), *pet. for review denied sub nom., NTEU v. FLRA*, 745 F.3d 1219 (D.C. Cir. 2014).
[66] Union's Exceptions Br. at 8.
[67] *Id.* at 1.
[68] 8 FLRA 604 (1982).
[69] *Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 891 (2010) (*BBG*); *AFGE, Local 916*, 57 FLRA 715, 717 (2002).
[70] *BBG*, 64 FLRA at 891; *NTEU, Chapter 88*, 57 FLRA 256, 257 (2001) (*Chapter 88*).

Here, as we have set aside the Arbitrator's ULP determination, we must consider the Arbitrator's denial of status quo ante relief under the parties' agreement, not the *FCI* factors.[71] However, the Union does not allege that the award fails to draw its essence from the parties' agreement or is otherwise deficient under the parties' agreement. Consequently, the Union does not demonstrate that the award is deficient, and we deny this exception.

V. Decision

We set aside the Arbitrator's finding of a violation of § 7116(a)(1) of the Statute, and we modify the notice posting to remove any reference to a ULP. We dismiss, in part, and deny, in part, the Agency's remaining exceptions, and we deny the Union's exceptions.

[71] *BBG*, 64 FLRA at 891; *Chapter 88*, 57 FLRA at 257.

Member Pizzella, dissenting:

I would agree with the majority that the Arbitrator's unfair labor practice (ULP) finding is contrary to law but for one detail – AFGE Local 12's grievance is not arbitrable. Consequently, the Arbitrator was without jurisdiction to make any determination on the merits of this grievance.

The Department of Labor (DOL) modified the duties of one employee, the grievant Jewel Pearson,[1] and there is no dispute that the Agency *did not apply* the Office of Management and Budget's Circular A-76 (Circular A-76) when it made that decision. In fact, the Agency *could not apply* Circular A-76, under these circumstances, because the provisions of the circular are not triggered unless certain threshold requirements are present (e.g. affecting more than ten employees).

But never deterred by mere technicalities, AFGE Local 12 nonetheless complained that DOL *should have applied* Circular A-76 even though it could not argue that the Agency violated any particular provision.

And here lies a small but significant problem. The grievance is not arbitrable.

Circular A-76 specifically provides that it does not "create *a*[*ny*] substantive or procedural basis [for anyone] to challenge [*any*] agency *action* or *inaction*" under Circular A-76.[2] On this point, the United States Court of Appeals for the District of Columbia has been quite clear: "[i]t is obvious that *collective bargaining* over the method for resolving disputes concerning *application* of [Circular A-76] . . . would . . . be inconsistent with the terms of [Circular A-76]."[3]

Although I agree with my colleagues that agencies may agree to contractual "provisions that independently impose on agencies obligations that are the same as, or similar to, the requirements" in Circular A-76,[4] it stands to reason that if Circular A-76 bars from the grievance process any question concerning whether an agency violated any of the circular's provisions, any question concerning whether or not DOL *applied* Circular A-76 is similarly barred. That is a determination that stems from the circular itself, not a contractual provision.

DOL agreed, in Article 31, Section 2 of the parties' agreement, that DOL will "*notify* [AFGE Local 12] within [five] working days of its *decision* to *use* an A-76 competition."[5] That provision, however, presupposes that a *decision* to use Circular A-76 was made and that the circumstances which would trigger the requirements of the circular are present. But where, as here, DOL *did not*, and legally *could not*, *apply* Circular A-76 procedures – because DOL's decision impacted just one employee − the Arbitrator had no authority to determine that DOL *applied* those procedures when it did not. If Circular A-76 procedures were not triggered, then DOL had no obligation to provide AFGE Local 12 with "notice and consultation" (or any other obligations) as set forth in Article 31, Section 2.[6]

Obviously, the Arbitrator's erroneous determination that DOL *applied* Circular A-76 "concern[s] [the] *application* of [Circular A-76]" and is thus not arbitrable.[7]

Consequently, I would set aside the entire award.

Thank you.

[1] Award at 5.

[2] Office of Mgmt & Budget, Exec. Office of the President, Circular A-76, *Performance of Commercial Activities*, 3 (May 29, 2003) (emphasis added).

[3] *U.S. Dep't of the Treasury, IRS v. FLRA*, 996 F.2d 1246, 1250 (D.C. Cir. 1993) (*IRS*) (emphasis added).

[4] Majority at 6 n.32 (quoting *NTEU*, 65 FLRA 509, 518-19 (2011)).

[5] Award at 13 (emphasis added).

[6] *Id.* at 22.

[7] *IRS*, 996 F.2d at 1250.