70 FLRA No. 73

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTE
BENNETTSVILLE, SOUTH CAROLINA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2585
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5286

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DECISION

November 28, 2017

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Before the Authority: Patrick Pizzella, Acting Chairman, and Ernest DuBester, Member

I. Statement of the Case

Arbitrator Philip A. LaPorte issued an award finding that the Agency had violated a past practice and Articles 4, 6, 18, and 27 of the parties' agreement when it improperly augmented vacant positions as well as unilaterally changed conditions of employment without first bargaining with the Union. The Arbitrator found that the Agency had committed an unjustified or unwarranted personnel action that resulted in the loss of pay or benefits to bargaining-unit employees under the Back Pay Act (the Act).[1] As a remedy, the Arbitrator awarded backpay to affected employees and attorney fees to the Union. The Agency filed exceptions.

The Agency argues that the award is contrary to its management rights under the Federal Service Labor-Management Relations Statute (the Statute)[2] to assign employees and work. However, the Agency fails to support this argument, and we deny the Agency's exception.

[1] 5 U.S.C. § 5596(b)(1).
[2] *Id.* § 7106.

II. Background and Arbitrator's Award

The Agency operates a prison in the federal system. In 2009, the parties entered into a memorandum of understanding (MOU) concerning augmentation. Augmentation is the process of assigning non-correctional-service employees to vacant correctional-service posts. Through augmentation, the Agency avoids having to fill vacant shifts with employees who would earn overtime. In 2015, the Union filed a grievance alleging that the Agency was not following the augmentation procedures and a past practice. The parties were unable to resolve the grievance, and they submitted it to arbitration.

The issue before the Arbitrator was whether the Agency violated a past practice and the parties' agreement by unilaterally changing how it augmented custodial posts with non-custodial employees.

The Union argued that the parties had established a past practice to use augmentation only during annual training, periods with a high volume of training, or when agreed to by the Union. The Union alleged that the Agency, by changing this past practice, also violated Articles 3 and 4 of the parties' agreement that require the Agency to bargain before implementing a change in any personnel policies, practices, or conditions of employment.

The Union further alleged that the Agency violated Article 27 of the parties' agreement that requires the Agency to lower inherent correctional hazards to the lowest level possible. Specifically, the Union contended that by improperly augmenting, the Agency was placing non-correctional staff in unfamiliar and dangerous positions on short notice, increasing the inherent hazards of the prison.

Finally, the Union argued that the Agency had violated Articles 16 and 18 of the parties' agreement by inequitably distributing overtime. The Union argued that, by improperly augmenting, the Agency prevented employees from working those shifts as overtime shifts.

As a result of these alleged violations, the Union claimed that the Agency had committed multiple unjustified and unwarranted personnel actions and that the employees denied overtime shifts should get backpay as a remedy. The Union also requested attorney fees and costs.

The Agency argued that it has the discretion to direct the workforce and "to establish the use and implementation of the roster."[3] The Agency also argued

[3] Award at 45.

that the parties' agreement as well as § 7106 of the Statute gave the Agency the authority to reassign employees.

The Arbitrator determined that: (1) the parties had a binding past practice that limited the Agency's ability to augment to during the annual refresher training, other periods of high-volume training, or with the agreement of the Union; (2) the Agency violated this past practice; (3) this unilateral change without the opportunity to bargain violated Article 4 of the parties' agreement; (4) the Agency violated Article 27 by augmenting without advance notice or adequate preparation to employees, thereby increasing the inherent risks of the facility; and, (5) by improperly augmenting and not fairly and equitably filling the vacant posts, the Agency violated Articles 6 and 18 of the parties' agreement.

The Arbitrator determined that each of these violations constituted an unjustified or unwarranted personnel action that led to the loss of pay or benefits to bargaining-unit employees. As a remedy, the Arbitrator ordered backpay and interest to affected employees as well as attorney fees.

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

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar most of the Agency's arguments.

The Union argues that the Agency now presents arguments that it did not present at arbitration.[4] 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.[5]

The Agency argues in its exceptions to the Authority that the award is contrary to law because the violations of both any past practice and the parties' agreement were covered by the parties' agreement, specifically Article 18.[6] In addition, the Agency argues: (1) that the award is contrary to its management right to determine internal security;[7] (2) that the Arbitrator's interpretation of Article 3 fails to draw its essence from the parties' agreement;[8] and (3) that the Arbitrator's reliance on Article 3 was based on a nonfact.[9]

In particular, the Union argues that the Agency failed to raise below to the Arbitrator two arguments that the Agency now discusses at length in its exceptions, namely a covered-by argument and an argument that the Arbitrator's use of past practice "theory" was contrary to law.[10]

After a review of the record, we find that the Agency failed to raise *any* of these arguments before the Arbitrator. In fact, the record indicates that the only argument the Agency made before the Arbitrator was that it "has the legal and contractual right to direct the workforce."[11] The Agency did not file a post-hearing brief, but asks that we now review the hearing transcript for its arguments concerning past practice.[12] No party submitted the transcript to the record.

The Agency did not raise these arguments despite the fact that the Union argued that the Agency violated a past practice as well as Article 3. Because the Agency could have raised these arguments before the Arbitrator, but did not do so, we will not consider these arguments now. Consequently, we dismiss these exceptions.[13]

The Agency also argues that the Authority should reduce the recovery period "to when th[e past] practice could have reasonably beg[u]n being considered a past practice."[14] However, the record does not demonstrate that the Agency raised this argument before the Arbitrator either, despite the fact that the Union asked for the awarded recovery period. As such, we will not consider this argument.[15] Finally, the Agency argues that the Arbitrator's "vague reference" to Article 6 was insufficient to "sustain" the award.[16] However, this argument does not raise a recognized ground for review, and we deny it.[17]

We find it odd that the Agency would make these arguments to the Authority, but not to the Arbitrator. The filing of exceptions is not the time to suddenly realize the rights and the duties at stake or to recognize the consequence of inaction.

[4] Opp'n at 4.
[5] 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012).
[6] Exceptions at 6, 20.
[7] *Id.* at 25.
[8] *Id.* at 7 n.2.
[9] *Id.*
[10] Opp'n at 4.
[11] Award at 44.
[12] Exceptions at 22 n.11.
[13] 5 C.F.R. §§ 2425.4(c), 2429.5.
[14] Exceptions at 21 n.10.
[15] 5 C.F.R. §§ 2425.4(c), 2429.5.
[16] Exceptions at 27.
[17] 5 C.F.R. § 2425.6(e)(1); *see also AFGE, Local 2272*, 67 FLRA 335, 335 n.2 (2014) (citing *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011)).

IV. Analysis and Conclusion: The award is not contrary to law.

The Agency argues that the award is contrary to law.[18] The Authority reviews questions of law raised by the Agency's exceptions de novo.[19] In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[20] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[21]

The Agency argues that the award is contrary to its management right under § 7106(a) of the Statute to assign work and to assign employees.[22] However, outside of arguments dismissed above as not raised before the Arbitrator, the Agency only quotes the language of the Statute and cases that generally outline an agency's right to assign work.[23] Other than stating that Article 18 preserves these rights for the Agency and sweeping references to the right to assign and the right to assign employees, the Agency does not provide arguments as to how the award, the Arbitrator's interpretation of the parties' agreement or the MOU, or the remedy violates its management rights. As a result, the Agency has failed to support this argument, and we deny it.[24]

Additionally, as the Agency raised no arguments challenging the violations of a past practice as well as Articles 4, 6, and 27, and these violations constitute separate and independent grounds[25] for the remedy,[26] the Agency has not demonstrated that the award is deficient.

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

[18] Exceptions at 6, 20, 23.
[19] *E.g.*, *AFGE, Local 342*, 69 FLRA 278, 278 (2016) *(citing NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).
[20] *Id.* (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998)).
[21] *Id.* at 278-79 (citing *U.S. Dep't of the Air Force, Warner Robins Air Logistics Complex, Robins Air Force Base, Ga.*, 68 FLRA 102, 103 (2014)).
[22] Exceptions at 23.
[23] *Id.* at 23-24.
[24] 5 C.F.R. § 2425.6(e)(1); *see NAGE, Local R3-10, SEIU*, 69 FLRA 510, 510 n.11 (2016) (exceptions are subject to denial under § 2425.6(e)(1) of the Authority's Regulations if they fail to support arguments that raise recognized grounds for review (citing *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 450 (2014); *Fraternal Order of Police, Pentagon Police Labor Comm.*, 65 FLRA 781, 784-85 (2011))).
[25] *SSA, Region VI*, 67 FLRA 493, 496 (2014) ("An award is based on separate and independent grounds when more than one ground independently would support the remedies that the arbitrator awards.").
[26] *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 105 (2012) ("An award of backpay is authorized under the [Act] only when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified and unwarranted personnel action and (2) the personnel action resulted in the withdrawal or the reduction of an employee's pay, allowances, or differentials."); *id.* ("[A] violation of the parties' agreement constitutes an unjustified and unwarranted personnel action.").