70 FLRA No. 94

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
BIG SPRING, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3809
COUNCIL OF PRISON LOCALS
(Union)

0-AR-5302

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DECISION

April 6, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester concurring)

I. Statement of the Case

On July 6, 2017, Arbitrator Ed W. Bankston found that the Agency violated the parties' agreement when it failed to staff the third floors of two housing units and, instead, assigned the duties affiliated with those floors to second-floor officers. He directed the Agency to staff the third floors of the housing units during the daytime. The Agency filed exceptions to his award on August 7, 2017.

The main question before us concerns whether the Agency has the right to determine when and where employees will work and how to best secure and safeguard the prison. Specifically, we must determine whether the Arbitrator's award is contrary to law, particularly management's rights to assign work and to determine internal security practices under § 7106(a) of the Federal Service Labor-Management Relations Statute (Statute).[1] Applying the standard set forth in *U.S. DOJ, Federal BOP* (*DOJ*),[2] we find that the award excessively interferes with those rights, and we vacate the award.

[1] 5 U.S.C. § 7106(a)(1)-(2)(A).
[2] 70 FLRA 398, 405-06 (2018) (Member DuBester dissenting).

II. Background and Arbitrator's Award

The Agency is a minimum-security camp and a low-security-level institution. The Union filed a grievance on July 22, 2016, alleging that the Agency did not properly staff the third floors of two housing units during the daytime, which increased the inherent hazards of the institution and violated the parties' agreement. The Union further argued that bargaining-unit employees had been denied overtime opportunities, which caused a reduction in the employees' pay. As remedies, the Union asked that the Agency staff the housing units during the daytime with qualified staff and pay backpay, interest, and attorney fees. As the parties could not resolve the grievance, the dispute proceeded to arbitration.

The Arbitrator framed the dispute, in relevant part,[3] as: "whether the Agency has violated the [a]greement with respect to the issue of staffing the [housing unit] day watch posts? If so, what is the appropriate remedy?"[4]

The Agency argued that it had the rights to (1) assign work, including determining the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned, and (2) determine its internal security practices. The Agency also contended that the parties' agreement states that nothing preempts the Agency's rights under § 7106 of the Statute. The Agency argued that due to inmate work assignments, there are fewer inmates in the housing units during the daytime. The Agency also argued that it is a lower security institution and that the Warden could not justify staffing positions on the third floors. Further, the Agency argued that all staff received safety training and that they can request protective equipment.

The Arbitrator explained that, as the facts were largely undisputed, the case turned on the interpretation of the parties' agreement. Citing testimony at the arbitration hearing, as well as his own experience visiting the housing units, the Arbitrator found that the Agency violated the parties' agreement, specifically Articles 6 (rights of the employee), 18 (hours of work), and 27 (health and safety). He found that, during the daytime, managing the third floor was assigned to second-floor officers as a "double duty."[5]

[3] The Arbitrator also considered whether the grievance was arbitrable due to (1) timeliness and (2) whether it was filed with the proper office. As the Arbitrator found the grievance arbitrable on both counts and as the Agency does not except to those findings, we do not discuss them further.
[4] Award at 3.
[5] *Id.* at 18.

As a remedy, he directed the Agency to staff the third floors of the housing units during the daytime. He also directed the Agency to pay backpay, interest, and attorney fees, but explained that, as the parties elected to bifurcate the matter, those damages would be addressed later.

III. Preliminary Matter: The exceptions are not interlocutory.

In its opposition, filed on September 9, 2017, the Union alleges that the Agency's exceptions are interlocutory as the parties bifurcated the proceeding and they "have submitted none of the evidence or record to determine [backpay] damages and have intentions to hold additional hearing dates as needed to do so."[6]

Under 5 C.F.R. § 2429.11, the Authority ordinarily will not consider interlocutory appeals. However, Authority precedent holds that exceptions to an award are not interlocutory where an arbitrator has retained jurisdiction solely to assist the parties in the implementation of awarded remedies, including determining the specific amount of money to be awarded.[7]

While the Arbitrator indicated that damages were to be addressed at a later date, he also found that backpay was owed.[8] The Arbitrator found a violation and there is no indication that the Arbitrator or the parties contemplated the introduction of some new measure of damages.[9] Instead, the only unresolved issue is the *amount* of damages owed.

Thus, we construe the Arbitrator's retention of jurisdiction as intended only to assist the parties in computing remedies as necessary.[10] This retention of jurisdiction does not render the exceptions to the award interlocutory, and we consider the exceptions.[11]

IV. Analysis and Conclusion: The award is contrary to management's rights to assign work and to determine internal security.

The Agency argues that the award is contrary to management's rights to assign work and to determine internal security under § 7106(a) of the Statute because the Agency "is left completely devoid of any choice whatsoever to ever not have a third-floor housing unit day watch post."[12] The Agency further argues that the award limits the Agency's ability to make changes to what posts are available even if the changes are for internal security reasons.[13] In support, it quotes *U.S. DOJ, Federal BOP, Federal Correctional Institution, Lompoc, California* (*Lompoc*),[14] where the Authority found that the rights to assign work and to determine internal security are affected by restrictions on leaving correctional-officer posts vacant.[15] Also citing *Lompoc*, the Agency contends that, as a correctional environment, its internal security determinations are entitled to extra deference.[16] Further, the Agency requests that the Authority reconsider its "abrogation" standard and instead use the "excessive interference" standard when evaluating management's rights.[17]

Management has the right to "assign work."[18] The Authority has found that the right to assign work under § 7106(a)(2)(B) of the Statute includes the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned.[19] Precluding managers from assigning particular functions to particular individuals or positions affects the right to assign work.[20]

Management also has the right to determine the "internal security practices of the agency."[21] The Authority has found that the right to determine internal security practices includes the right to determine the policies and practices that are part of an agency's plan to secure and safeguard its personnel and physical property and to prevent the disruption of the agency's activities

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[6] Opp'n at 4.

[7] *U.S. DHS, U.S. Citizenship & Immigration Serv.*, 68 FLRA 1074, 1076 (2015) ("[T]he award is final even though the [a]rbitrator has ordered further proceedings to determine the amount of backpay to award employees."); *U.S. Dep't of the Air Force, Kirtland Air Force Base, Air Force Materiel Command, Albuquerque, N.M.*, 62 FLRA 121, 123 (2007) (*Kirtland*).

[8] Award at 19-20.

[9] *Id.* at 20.

[10] *Kirtland*, 62 FLRA at 123.

[11] *Id.* (citing *OPM*, 61 FLRA 358, 361 (2005) (award is final when it awards fees or damages, but leaves the amount of those damages to be determined); *SSA, Balt., Md.*, 60 FLRA 32, 33 (2004) (award final where arbitrator retains jurisdiction solely to assist parties in determining "costs owed to the [u]nion"); *U.S. Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project*, 55 FLRA 152, 158 (1999) (award is final where arbitrator retains jurisdiction to assist parties in determining backpay and interest)).

[12] Exceptions at 29.

[13] *Id.* at 27.

[14] 58 FLRA 301, 302 (2003) (Chairman Cabaniss concurring and Member Pope dissenting).

[15] *Id.*

[16] Exceptions at 28 (citing *Lompoc*, 58 FLRA at 303).

[17] *Id.* at 25 n.8.

[18] 5 U.S.C. § 7106(a)(2)(B).

[19] *U.S. EPA*, 65 FLRA 113, 115 (2010) (citing *U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 55 FLRA 553, 558 (1999)).

[20] *Id.* (citing *NTEU, Chapter 243*, 49 FLRA 176, 181-82 (1994)).

[21] 5 U.S.C. § 7106(a)(1).

and operations.[22] When there is a link or reasonable connection between an agency's goal of safeguarding personnel or property or of preventing disruption of agency operations and the disputed practice, the Authority will find that the disputed practice is part of the right to determine internal security practices under § 7106(a)(1).[23]

We now apply the new framework set forth in *DOJ*.[24] As the issue is whether the award is contrary to § 7106(a), the first question that must be answered is whether the arbitrator has found a violation of a contract provision.[25] If the answer to that question is yes, then the second question is whether the arbitrator's remedy reasonably and proportionally relates to the violation.[26] If the answer to either of these questions is no, then the award must be vacated.[27] But, if the answer to the second question is yes, then the final question is whether the arbitrator's interpretation of the provision excessively interferes with a § 7106(a) management right.[28] If the answer to this question is yes, then the arbitrator's award is contrary to law and must be vacated.[29]

The Arbitrator found that the Agency violated Articles 6, 18, and 27 of the parties' agreement,[30] so the answer to the first question is yes. As a remedy for the violation, the Arbitrator directed the Agency as to how it must staff the third-floor posts during the daytime. So the answer to the second question is also yes.

Therefore, this case turns on whether the Arbitrator's interpretation of the parties' agreement excessively interferes with management's rights to assign work and to determine internal security. By requiring the Agency to always staff the third floors of the housing units, the Arbitrator denies the Agency the ability to determine how it should staff the prison. The Agency can no longer move officers to a different area of the institution or make basic managerial decisions regarding staffing resources. In short, the Arbitrator substituted his judgment for that of the Agency on how to best secure and safeguard the prison, and his award excessively interferes with the Agency's § 7106(a) rights to assign work and to determine internal security.[31] Accordingly, we vacate the award.

Because we vacate the award as contrary to law, we do not need to address the Agency's remaining arguments.[32]

V. Decision

We vacate the award.

[22] *SSA, Balt., Md.*, 55 FLRA 498, 502 (1999) (citing *U.S. DOD, Def. Fin. & Accounting Serv., Indianapolis Ctr., Indianapolis, Ind.*, 48 FLRA 1124, 1126–27 (1993)).
[23] *Id.*
[24] Member Abbott notes that, as the Authority observed in *DOJ*, the D.C. Circuit rejected the abrogation standard four years ago in *U.S. Dep't of the Treasury, IRS, Office of the Chief Counsel, Wash., D.C. v. FLRA*, 739 F.3d at 20-21 (D.C. Cir. 2014); *see DOJ*, 70 FLRA at 403.
[25] *DOJ*, 70 FLRA at 405-06.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Award at 19.
[31] *Lompoc*, 58 FLRA at 302-03; *see also AFGE, Local Union No. 171*, 58 FLRA 469, 471 (2003).
[32] *See* Exceptions at 6-20 (arguing that award fails to draw its essence from the parties' agreement), 20-23 (arguing that award is contrary to law because the Agency's roster decisions are "covered by" the parties' agreement), 30-33 (arguing that award is contrary to the Back Pay Act).

Member DuBester, concurring:

The Arbitrator found that this is "a contract interpretation case."[1] He concluded that the Agency violated Articles 6, 18, and 27 of the parties' agreement because it "failed to properly staff the third floors of the housing units on the day watch shift."[2] If this were a private-sector arbitration case, that would be the end of the story.

However, federal-sector arbitration has several unique attributes. One of these unique attributes is that the Authority, when reviewing federal-sector arbitration awards, sits as a surrogate for the courts in reviewing private-sector arbitration awards. And, in that role, the Authority considers exceptions to arbitration awards asserting violations of statutory management-rights provisions.[3] In these cases, the Authority applies a particular legal standard when it considers whether there is permissible encroachment on the asserted management right.

For reasons expressed in the recent *U.S. DOJ, Federal BOP* (*DOJ*) decision,[4] I believe that the abrogation test is the appropriate test to determine whether the Arbitrator's award is contrary to law for impermissibly encroaching on a management right.[5] Also, for the reasons stated in my dissent in *DOJ*, I believe that the majority again misapplies its own test.[6] Instead, the majority "substitute[s] their own judgment, based on arbitrary standards" in determining that the award "excessively interferes" with management's rights to assign work and determine internal security practices.[7]

It is worth noting that multiple challenges to an arbitrator's interpretations of Article 27, one of the contract provisions at issue here, have come before the Authority. Based on arbitrators' interpretations of Article 27, the Authority has found that an award does not abrogate management's rights to assign work and determine internal security practices where the agency is not precluded from leaving posts vacant.[8] And, the Authority has also found that this provision impermissibly interfered with the agency's management rights where it was interpreted and applied to effectively preclude the agency from leaving posts vacant.[9]

In this case—under the Arbitrator's interpretation of Article 27, and based on the record—the Agency is precluded from leaving vacant the posts at issue.[10] Therefore, applying the abrogation test, I feel constrained to find that the award is contrary to law, and concur in the result of this case.[11]

Accordingly, I concur.

[1] Award at 12.
[2] *Id.* at 19.
[3] 5 U.S.C. § 7122.
[4] 70 FLRA 398, 409-12 (2018) (Dissenting Opinion of Member DuBester).
[5] *See U.S. EPA*, 65 FLRA 113 (2010).
[6] The majority does not, as it claims, apply the "excessive interference" test. The majority's test is little more than a repackaging of the "direct-interference" test that "the Authority— with the urging of the courts—wisely abandoned." *DOJ*, 70 FLRA at 411. To determine whether there is excessive interference, the Authority balances the benefits to employees against the burden on the agency's exercise of its management rights. *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Lompoc, Cal.*, 58 FLRA 301, 303 (2003). The majority does not conduct this balancing test, and cites to cases that that do not support the majority's vague analysis. *See* Majority at 5.
[7] *DOJ*, 70 FLRA at 412.
[8] *See U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atlanta, Ga.*, 57 FLRA 406, 410-11 (2001) (The Authority did not find abrogation because the agency was permitted to leave post vacant for "good reason" or if post does not contribute to safety.); *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 57 FLRA 331, 334 (2001) (The Authority did not find abrogation because the agency was permitted to leave post vacant for emergency situations.).
[9] *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 58 FLRA 109, 111, 115, 116-17 (2002) (*BOP Okla.*) (Concurring Opinion of Member Pope) (concurring with the result but finding abrogation where award did not leave any circumstance under which an agency may leave posts vacant).
[10] Award at 20 (While the Arbitrator's merits discussion seems to suggest that the Agency has options in addressing the unjustified and unwarranted personnel actions found here, the Award (§ IX) appears to only direct that the Agency staff the third-floor posts.).
[11] *BOP Okla.*, 58 FLRA at 109, 116-17 (2002) (Concurring Opinion of Member Pope) (The Authority found abrogation where award did not leave any circumstance under which an agency may leave posts vacant.).