70 FLRA No. 125

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
EL PASO, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 1929
(Union)

0-AR-5125
(69 FLRA 261 (2016))

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DECISION

June 8, 2018

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

I. Statement of the Case

This case returns to the Authority for a second time to resolve whether the Agency had an obligation to notify and bargain with the Union before it modified the application of its shift-trade procedure.[1] In the first decision, the Authority determined that the matter was covered by Article 28 and the Agency had no statutory obligation to bargain under those circumstances. However, the majority decided to remand the matter to the Arbitrator for him to address a "critical ambiguity" concerning whether the Arbitrator intended to find that Article 3 of the parties' collective-bargaining agreement created a separate bargaining obligation.[2]

In his remand award, Arbitrator T. Zane Reeves again concluded that the Agency violated Article 3 of the parties' agreement when it neither informed nor negotiated with the Union prior to implementing the modified shift-trade procedure. The Arbitrator also awarded attorney fees to the Union.

The Agency, once again, files exceptions, arguing that the award on remand (remand award) does not draw its essence from Article 3, which only requires bargaining over changes to personnel policies that are *not covered by* the parties' agreement. Because Article 28 *covered* the modified shift-trade procedure, Article 3 did not require the Agency to bargain. Therefore, the remand award does not draw its essence from the parties' agreement, and we vacate the award.

II. Background and Arbitrator's Awards

1. The first award and *U.S. DHS, U.S., CBP, El Paso, Texas* (*DHS*).

As *DHS* sets forth the facts of this case in detail, we will only briefly summarize them here.[3]

The grievant is a border patrol agent at the Las Cruces, New Mexico Border Patrol Station. Beginning in January 2014, the Agency announced that all shift-trade requests would be "highly scrutinized and reserved for those [employees] with the most pressing . . . issues" as a means to resolve prolonged inconsistencies with shift-trade requests.[4] After the Agency's announcement, the grievant submitted a request to trade shifts. The supervisor denied the grievant's request because it did not demonstrate a "pressing need."[5]

The Union filed a grievance arguing that the Agency violated the shift-trade procedures in the parties' agreement, and also its statutory[6] and contractual obligations to bargain with the Union over what it perceived to be a change in procedures.

The Arbitrator issued his first award on May 9, 2015. The Arbitrator found that the Agency's denial of the grievant's shift-trade request violated the parties' agreement and awarded a make-whole remedy. On the bargaining issue, the Arbitrator found that the Agency violated its obligations under § 7116(a)(1), (4), and (5) of the Federal Service Labor-Management Relations Statute (the Statute) and the parties' agreement, and ordered status-quo-ante relief and bargaining.

[1] *U.S. DHS, U.S. CBP, El Paso, Tex.*, 69 FLRA 261, 265-67 (2016) (*DHS*) (Member Pizzella concurring in part, dissenting in part).
[2] *Id.* at 264-65.
[3] *Id.* at 261.
[4] First Award at 4.
[5] *Id.* at 6.
[6] 5 U.S.C. § 7116(a)(1), (4)-(5).

As noted above, the Agency filed exceptions and the Authority determined that because questions concerning shift-trade procedures were covered by Article 28, the Agency had no statutory duty to bargain. But the then-majority nonetheless remanded the matter for the Arbitrator to determine whether Article 3 imposed a duty to bargain.[7]

Article 3 provides, as pertinent here:

> Impact Bargaining at National, Regional, and Sector Level
>
> A. The parties recognize that from time to time during the life of the agreement, the need will arise requiring the change of existing [Agency] regulations covering personnel policies, practices, and/or working conditions not covered by this agreement.[8]

2. The remand award.

The Arbitrator issued his remand award on July 6, 2016. The Arbitrator once again found that Article 3 imposed a contractual duty to bargain on the Agency, which it violated when it implemented the modified shift-trade procedure without providing notice and an opportunity to bargain with Union. The Arbitrator also awarded the Union attorney fees under the Back Pay Act.[9]

The Agency filed exceptions to the remand award on July 25, 2016.

III. Analysis and Conclusion: The remand award fails to draw its essence from the parties' agreement.

Under its plain language, Article 3 provides for impact bargaining over changes to personnel policies, but it applies to personnel policies *not covered by* the parties' agreement. As the Authority found Article 28 *covered* the modified shift-trade procedure, consequently, the modifications are explicitly covered by Article 28 and the Agency had no duty to bargain.[10] As a result, both the first award and the remand award fail to draw their essence from the parties' agreement.

The Authority's remand in *DHS* unduly served to prolong the dispute for two additional years when the award should have been vacated in the first instance. The Arbitrator did not find, and nor do we, that Article 3 imposed a different bargaining obligation than the Statute. For these reasons, we vacate the remand award that stems from that decision.[11]

In light of this determination, it is unnecessary to address the Agency's remaining exception[12] concerning the remedy granted in the remand award.[13]

IV. Decision

We vacate the remand award.

[7] *DHS*, 69 FLRA at 267.
[8] First Award at 4 (quoting Article 3).
[9] 5 U.S.C. § 5596.
[10] *DHS*, 69 FLRA at 268-69 (Dissenting Opinion of Member Pizzella) ("Article 3 unmistakably provides that any obligation the Agency may have to bargain only applies to issues 'not covered by [the parties'] agreement.'").
[11] *E.g.*, *SSA, Bos. Region 1*, 59 FLRA 671, 672 (2004); *AFGE, Council 220*, 54 FLRA 156, 160 (1998).
[12] Exceptions Br. 9-11.
[13] *See AFGE, Local 1992*, 70 FLRA 313, 315 (2017).

Member Abbott, concurring:

I agree that the Arbitrator's remand award from July 2016 is just as deficient as was his first award from May 2015. I write separately because it is not enough to vacate an erroneous award; I firmly believe an unnecessary and erroneous aberration of caselaw must be called out and reversed.

Looking back, it is, thus, painfully obvious that the prior-majority's decision to remand this matter − to give the Arbitrator a second chance to try to find a violation – has served no purpose other than to needlessly prolong this dispute for two additional years when the first award could have, and should have, been vacated in its entirety the first time around.

As then-Member Pizzella noted in his dissenting opinion in *U.S. DHS, U.S., CBP, El Paso, Texas* (*DHS*), the Arbitrator's award was not "ambiguous," it was just plain "wrong."[1] Because Article 28 covered the modified shift-trade procedure, Article 3 could not apply and could not create a separate bargaining obligation for the Agency.[2]

That said, I cannot join my colleagues in their implicit affirmation that the notion of a "critical ambiguity" (aka "critical contract terminology")[3] forms a basis upon which to remand a matter back to an arbitrator.

Prior to *DHS*, the notion of "critical ambiguity" had only been mentioned twice in thirty-eight years of FLRA decisions, and in both instances, it was soundly criticized.[4] Then-Member Pope (in 2004) and then-Member Pizzella (in 2016) separately called the use of "critical ambiguity" a "sham" which permits the Authority to "get a different result from an arbitral award with which it disagrees."[5] Nonetheless, it was resurrected in zombie-like fashion by the majority in *DHS* to give the Arbitrator one more chance to try to find a violation – seemingly any violation would do.

During my confirmation hearing before the U.S. Senate Committee on Homeland Security and Governmental Affairs to become a Member of the Authority on November 7, 2017, I pledged that one of my foremost objectives was to bring "clarity" to decisions which are issued by the Authority and to ensure that our decisions would be written in such a manner that they could be understood by the federal labor-management relations community. The affirmation − that any purported ambiguity in an arbitrator's award which can be called "critical" may form the basis of a remand – is just the type of legal gymnastics which creates confusion for federal unions and agencies alike and will only lead to any number and variety of arguments which will have to be resolved by the Authority in the future.

I cannot join my colleagues on that path. An arbitrator's award is either right or it is wrong. If an arbitrator's award is ambiguous, it is deficient and should be vacated.

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[1] 69 FLRA 261, 268 (2016) (Member Pizzella concurring in part, dissenting in part).

[2] *Id.* at 268-69 (Dissenting Opinion of Member Pizzella) ("Article 3 unmistakably provides that any obligation the Agency may have to bargain only applies to issues 'not covered by [the parties'] agreement.'").

[3] *See AFGE Council 220*, 54 FLRA 156, 160 (1998) (*AFGE Council 220*).

[4] *DHS*, 69 FLRA at 268-69 (Dissenting Opinion of Member Pizzella) (citing *AFGE Council 220*, 54 FLRA at 160; *SSA, Bos. Region 1*, 59 FLRA 671, 673 (2004) (Dissenting Opinion of Member Pope)).

[5] *Id.* at 269 (citation omitted).

Member DuBester, dissenting:

I disagree with the majority's decision that the award does not draw its essence from the parties' agreement. In reviewing the Arbitrator's interpretation of Article 3, the majority's decision overlooks the language that the Arbitrator relied on to find that the Agency violated the Article. Further, the majority misinterprets the language in Article 3 that the majority cites to overturn the award. Consequently, because the majority bases its decision on inapplicable contract language, and fails to apply the deferential standard of review that federal courts and the Authority apply in reviewing an arbitrator's interpretation of a collective-bargaining agreement,[1] I dissent.

The majority's decision purports to rely on language in Article 3 which states: "The parties recognize that from time to time during the life of the agreement, the need will arise requiring the change of *existing [Agency] regulations* covering personnel policies, practices, and/or working conditions *not covered* by this agreement."[2] In the majority's view, because the changes in this case *are* "covered" by the agreement, Article 3's bargaining requirements do not apply.

But the majority's reliance on this Article 3 language is misplaced. The Article 3 language the majority's decision cites is not the language the Arbitrator relies on, and in any event this language is inapplicable. The Arbitrator acknowledges the Article 3 language the majority's decision cites,[3] which pertains to changes to *Agency regulations*. But this case does not involve a change to Agency regulations.

Recognizing this, the Arbitrator bases his findings on other language in Article 3.[4] Unlike the language the majority's decision cites, the language the Arbitrator discusses addresses "changes [the Agency] wishes to make to existing rules, regulations[,] *and existing practices*."[5] And, retaining his focus on changes to "existing practices," the Arbitrator finds that the Agency "did not follow the process described in Article 3[] to make every effort to inform and consult with the [U]nion before implementing changes" to shift-trade procedures, and to "negotiate with the Union in good faith regarding [the Agency's] intended change in an established personnel practice."[6]

Because the Arbitrator's contract-violation finding is consistent with Article 3's "plain language," which the Arbitrator specifically discusses, the remand award does not fail to draw its essence from the parties' agreement. Accordingly, disagreeing with the majority's incomplete and erroneous analysis of Article 3, I would deny the Agency's essence challenge to the remand award.

Finally, I disagree with the suggestion that "[i]f an arbitrator's award is ambiguous, it is deficient and should be vacated."[7] Where an ambiguity in an award is "critical" to an arbitrator's resolution of a grievance, a remand is appropriate. As the Authority has reaffirmed on multiple occasions, "where it appears that [an] agreement and [an] award are inconsistent, and an arbitrator has not interpreted the relevant contract provision, the appropriate course of action is to remand."[8] A remand in these circumstances "permits the arbitrator, who was the parties' choice to interpret and apply their agreement, to interpret in the first instance the provision that may be dispositive."[9]

For these reasons, I would deny the Agency's essence exception. And, I would address and deny the Agency's remaining exception to the award of attorney fees.[10] Because of the majority's decision's multiple errors, I dissent.

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[1] *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (citing 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998)).

[2] Majority at 3 (emphasis added).

[3] Remand Award at 9.

[4] *See id.* at 9. The Article 3 language the Arbitrator relies on states: "The [Agency] shall present the changes it wishes to make to existing rules, regulations and *existing practices* to the Union. The Union will present its views and concerns (which must be responsive to either the proposed changes or the impact of the proposed change) within a set time after receiving notice from Management of the proposed change. In the absence of timely Union proposals[,] Management will have no obligation to enter into negotiations" (emphasis added).

[5] *Id.* (quoting Article 3) (emphasis added).

[6] *Id.*

[7] Concurrence at 6.

[8] *U.S. DHS, U.S. CBP, El Paso, Tex.*, 69 FLRA 261, 266 (2016) (citing *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 601 (2014) (Member Pizzella dissenting on other grounds)).

[9] *Id.*

[10] The courts and the Authority hold that fees may be assessed for time spent litigating issues other than those entitling backpay itself. *See, e.g.*, *AFGE, AFL-CIO, Local 3882 v. FLRA*, 994 F.2d 20, 21-24 (D.C. Cir. 1993) (fees recoverable for time spent litigating *entitlement* to fees); *Ala. Ass'n of Civilian Technicians*, 56 FLRA 231, 233-34 (2000) (Chairman Wasserman dissenting in part) (same); *U.S. DOD, DOD Dependents Sch.*, 54 FLRA 773, 789-90 (1998) (fees recoverable for collecting *interest* on backpay); *U.S. DOD Dependents Sch.*, 54 FLRA 514, 520 (1998) (same).