70 FLRA No. 133

UNITED STATES
DEPARTMENT OF THE NAVY
MILITARY SEALIFT COMMAND
(Agency)

and

INTERNATIONAL ORGANIZATION
OF MASTERS, MATES & PILOTS
AFL-CIO
(Union)

and

MARINE ENGINEERS'
BENEFICIAL ASSOCIATION
AFL-CIO
(Union)

0-AR-5245

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DECISION

June 28, 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

In this decision, we hold that an arbitrator irrationally found that a U.S. Navy ship's Commanding Officer acted improperly by restricting shore liberty based on restrictions imposed by the U.S. Navy's Indo-Pacific Command (PACOM).

In 2015, the Agency's ship, the United States Naval Ship Mercy (the Mercy), arrived at Arawa, a port in the island nation of Papua New Guinea (PNG), for a specialized humanitarian mission. Based on a travel restriction that was issued by the PACOM, the Mercy's Commanding Officer (Commander) restricted shore liberty for the eight days the ship was in port. The grievants argued that because of the shore restriction, they were entitled to premium pay. Arbitrator Michael A. Berzansky found that the Agency's shore liberty restriction without premium pay violated the parties' collective-bargaining agreements (agreements). As a remedy, the Arbitrator awarded the grievants premium pay for all off-duty hours the Mercy was in port.

We find that the Arbitrator failed to apply the parties' contractual arbitrary and capricious standard when he determined the Agency's liberty restriction violated the parties' agreements. And because there is no rational basis for concluding that the Commander's restriction was arbitrary or capricious, we vacate the award as failing to draw its essence from the agreements.

II. Background and Arbitrator's Award

The grievants are civil-service mariners serving on the Mercy, a hospital-service support ship assigned to the Military Sealift Command of PACOM during specialized humanitarian missions throughout the South Pacific. On June 27, 2015, the Mercy arrived at Arawa on an eight-day mission. Prior to the Mercy's arrival, PACOM had placed travel restrictions throughout the PNG area based in part on a Navy Criminal Investigation Service (NCIS) threat assessment report for PNG, which cited to a "high inciden[ce] of violent crime and general lawlessness."[1] Based on the Commander's travel restrictions and the NCIS threat assessment, the Commander denied the grievants liberty to go ashore, and he denied their requests for premium pay.

The two Unions representing the grievants filed separate grievances alleging that the Agency's liberty restriction without premium pay violated the parties' agreements, which incorporate Civilian Marine Personnel Instruction 630 (the Instruction) and a 1998 Memorandum of Understanding (MOU) negotiated by the parties.[2]

The Instruction permits a ship's commanding officer to restrict civilian employees from onshore liberties without any grant of premium pay in the event of "unsafe [conditions] due to civil strife, military action, outlawry[,] or natural causes."[3] However, the 1998 MOU provided that the shore restrictions should not be restricted in an "arbitrary and capricious" manner.[4]

The Agency denied the Unions' grievances. The grievances were consolidated and went to arbitration. At arbitration, the Unions challenged the Agency's liberty restriction, arguing that the port city of Arawa was not "obviously and abnormally unsafe due to civil strife, military action, outlawry[,] or natural causes."[5] As a

[1] Exceptions, Agency Ex. 6, Step-Two Grievance Response at 2.
[2] The Unions have been parties to the collective-bargaining agreement since 1997.
[3] Award at 19 (citing Agency Ex. 2, Instruction at 2).
[4] *Id.* at 15 (citing MOU).
[5] *Id.* at 34.

result, the Unions claimed that the restriction was arbitrary and capricious and violated the parties' agreements.

The Agency argued that the restrictions were warranted because the Commander was obligated to follow the PACOM's travel restrictions covering the entire PNG area and information concerning "outlawry" in Arawa[6] contained in the NCIS report.

In a November 4, 2016 award, the Arbitrator found that the Agency violated the parties' agreements because the "conditions inshore were not obviously and abnormally unsafe due to civil strife, military action, outlawry[,] or natural causes."[7] The Arbitrator concluded that the NCIS investigator's testimony was "quite arbitrary,"[8] and that the Agency was obligated to provide the Unions with the reports on which the Commander relied. The Arbitrator ordered the Agency to pay the grievants premium pay for all off-duty hours during the eight-day port stay.

The Agency filed exceptions to the award on December 9, 2016, and the Unions filed oppositions on January 9, 2017, and February 16, 2017, respectively.

III. Analysis and Conclusions

A. The award fails to draw its essence from the parties' agreements.

The Agency argues that the award fails to draw its essence[9] from the parties' agreements because the agreements provided the Commander with the authority to restrict liberty without paying premium pay so long as the imposed restriction was not arbitrary and capricious.[10]

The Arbitrator did not clearly address, and thus did not expressly interpret, the "arbitrary and capricious" phrase in the parties' agreement and how the Commander's decisions fell short of that standard. However, under any rational interpretation of that phrase, the Commander did not act arbitrarily and capriciously in the circumstances of this case.[11] The Commander relied on PACOM's instructions, NCIS threat assessments, and conversations with NCIS and the embassy to conclude that conditions onshore were unsafe. Despite acknowledging that reliance, the Arbitrator conducted his own factual assessment to determine that the conditions in Arawa were not, in his opinion, "obviously [or] abnormally unsafe."[12] In other words, the Arbitrator substituted his own judgment over the point-in-time assessments made by the Commander, PACOM, and NCIS. Given the circumstances of this case, we find that there is no rational basis for concluding that the Commander acted arbitrarily and capriciously. And because the Arbitrator could find a contract violation only if the Commander's action was arbitrary and capricious, the Arbitrator's finding of a contractual violation does not draw its essence from the parties' agreements.

B. The premium pay remedy must be set aside.

Based exclusively on his finding that the Agency violated the agreement by denying shore liberty without premium pay, the Arbitrator awarded premium pay to the grievants for all off-duty hours during which the Mercy was in port.[13] In awarding the remedy of premium pay, the Arbitrator made no connection to the Agency's failure to provide documentation to the Union. Moreover, the record fails to show that the grievants lost any premium pay as a result of the Agency's failure to provide the Union with the requested documentation. Therefore, because we found that the Arbitrator's underlying contractual violation fails to draw its essence from the parties' agreements, we also set aside the Arbitrator's remedy of premium pay based solely on that violation.

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[6] *Id.* at 29-30.
[7] *Id.* at 37.
[8] *Id.* at 39.
[9] When reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (citing *AFGE, Council 220*, 54 FLRA 156, 159 (1998)). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective-bargaining agreement when the appealing party establishes that the award does not represent a plausible interpretation of the agreement. *Id.* (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).
[10] Exceptions at 5-6.
[11] *See, e.g.*, *Motor Vehicle Mfr. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that, under the Administrative Procedure Act, an agency's action is arbitrary and capricious when the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'"); *Arbitrary*, *Black's Law Dictionary* (9th ed. 2009) (defining "arbitrary" as "founded on prejudice or preference rather than reason or fact"); *Capricious*, *id.* (defining "capricious" as "contrary to the evidence or established rules of law"); *Arbitrary*, *New Oxford American Dictionary* (3d ed. 2010) (defining "arbitrary" as "based on random choice or personal whim, rather than any reason or system"); *Capricious*, *id*. (defining "capricious" as "given to sudden and unaccountable changes of mood").
[12] Award at 37.
[13] *Id.* at 47.

In light of these determinations, it is unnecessary[14] to address the Agency's remaining exceptions.[15]

IV. Decision

We set aside the award.

Member Abbott, concurring:

I think we should start here – Congress never intended to give the Federal Labor Relations Authority, arbitrators, or federal unions and agencies (under the collective-bargaining provisions of the Federal Service Labor-Management Relations Statute) the power to second guess decisions − made by a major command of any of the branches of the United States Military – concerning whether or not conditions in any part of the world are sufficiently safe for military members or the civilian employees who work side-by-side with the military and whether those conditions warrant restricting access to those areas which have been deemed to be unsafe.

In 2016, the United States Court of Appeals for the District of Columbia Circuit strongly reprimanded the Authority for second guessing military judgment in *U.S. Department of the Air Force, Luke Air Force Base, Arizona v. FLRA* (*Luke AFB*).[1] According to the Court, Congress never "intended to empower a civilian agency like the [Authority] to second-guess the military's judgment . . . on matters of internal military governance [and] must be careful not to circumscribe the authority of military commanders to an extent never intended by Congress."[2] Yet, in this award, the Arbitrator blithely pushes aside and second guesses travel restrictions issued by the Navy's Pacific Command as suggestions worthy of no more weight than his own.

Even the provision at issue in this case that formed the basis for this grievance is circumspect – "liberty may be restricted when, in the opinion of the senior commander or their duly authorized designee[,] unsafe conditions exist such as civil strife, military action, and natural disasters. These restrictions shall not be *arbitrary and capricious*."[3] That the union proposed and the Agency agreed that this is a matter subject to bargaining is confounding. But, in any event, the *Agency* agreed to those terms. (I suspect that the executive orders and Authority decisions issued during the 1990s, which blurred the lines between those subjects which were not negotiable − Section 7106 management rights − and what had to be negotiated, contributed to the confusion.) It appears to me that it is just this sort of questionable bargaining which necessitated, and has been addressed by, the issuance of Executive Order 13,836, *Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining*, whereby permissive bargaining under § 7106(b)(1) and

[14] *See AFGE, Local 1992*, 70 FLRA 313, 315 (2017).
[15] Exceptions 9-11.

[1] 844 F.3d 957 (D.C. Cir. 2016).
[2] *Id.* at 961-62.
[3] Exceptions, Agency Ex. 1, 1998 MOU, para. 3D.

under §§ 7106(b)(2) and (b)(3) has been distinctly circumscribed.[4]

Although this grievance purportedly challenged the Mercy's Commander's authority to restrict civilian mariners to the ship (and whether he acted arbitrarily and capriciously by issuing that order), it was effectively a direct challenge to the authority of orders issued by the United States Pacific Command which was based on threat assessments made by the Navy Criminal Investigation Service. Under these circumstances, one might say that the concern underlying the grievance was more about the desire for premium pay than the safety of the civilian mariners.

Finally, although the Arbitrator's award in this case was issued one month before the Court's decision in *Luke AFB*, it is telling indeed that an Arbitrator would view his authority so expansively to second-guess a decision by a ship's Commander to ensure the safety of the sailors and civilian mariners for whom he bears full responsibility and which was issued pursuant to orders from the Pacific Command. It is nothing short of ironic that this award has come before three civilian political appointees, based in distant Washington, D.C., for our review and judgement on the source, scope, and severity of orders issued by a major, geographic military command. Yet, the dissent casts aside the military orders, referring to them as "reports" as though they suggested nothing more noteworthy than an early release from duty because of an impending snowstorm.[5]

I agree with the premise underlying the Court in *Luke AFB* – Congress never intended that a provision agreed to in collective bargaining would go so far and would subject to arbitral interpretation the scope of the authority of the Pacific Command or the ship's Commander.

[4] 83 Fed. Reg. 25329 (May 25, 2018).
[5] Dissent at 7-8.

Member DuBester, dissenting:

I disagree with the majority's decision that the award fails to draw its essence from the parties' agreement. This case does not set aside deference to military decisions or the Agency's authority to restrict shore liberty. Those issues were never before the Arbitrator.[1]

Rather, this case is about the Arbitrator's interpretation of the agreement's *premium pay* requirements, and whether his award is a *plausible* interpretation of the agreement.[2] The majority fails to apply this deferential standard of review. The majority also errs in its description of the issue before us, and the facts of this case. I therefore dissent.

The facts are undisputed. The Mercy's commander may restrict shore liberty. If the restriction is due to unsafe conditions, the Mercy's crew is not entitled to premium pay. But if the restriction is *not* due to unsafe conditions (that is, is "arbitrary and capricious"),[3] the shore-liberty restriction still stands, but the crew receives premium pay pursuant to the agreement.

The parties adopted this private-sector shore-liberty practice to prevent "restricting liberty for either arbitrary or financial reasons (for example, avoiding the cost of launch service)."[4] Applying the agreement's "arbitrary and capricious" standard, the Arbitrator finds that the Agency did not show that Arawa was unsafe. The Arbitrator finds therefore that the Agency violated the agreement when it failed to pay the crew premium pay.[5] This is a plausible interpretation of the agreement.

The Agency cites two sources of evidence to show that Arawa was unsafe: reports from the Pacific Command and State Department, and from an NCIS agent.[6] Both sources claim that the general geographic area was unsafe. However, neither source claims that Arawa, the port in question, was, in the words of the parties agreement, "abnormally unsafe due to civil strife, military action, outlawry[,] or natural causes."[7]

[1] Award at 2.
[2] Majority at 3; *id.* at 3 n. 9 (citing *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (like the federal courts, the Authority defers to arbitrators' contractual interpretations because it is their construction of the agreement for which the parties have bargained)).
[3] Award at 15 (parties' Memorandum of Understanding establishing arbitrary and capricious standard).
[4] *Id.* at 14.
[5] *Id.* at 15.
[6] *Id.* at 39.
[7] *Id.* at 37 (quoting the parties' agreement).

In making its case to the Arbitrator, the Agency was unable to specify whether the Pacific Command and State Department reports referred to Arawa or all of Papua New Guinea (PNG),[8] a country slightly larger than California.[9] Further, the Mercy's captain acknowledged that "DOD *did not order the restriction*" that he imposed on the Mercy's crew.[10] Instead, the captain clarified that "he wanted to adhere to the same standard as applied to the military."[11] Additionally, the Agency could not explain why shore liberty was granted to crew members of a different vessel at a different port in Rabaul, PNG, but not to the Mercy's crew at Arawa.[12]

The Agency's reason for relying on the NCIS agent's report also did not persuade the Arbitrator.[13] In concluding that the report is "quite arbitrary," the Arbitrator finds that the investigator failed to stay in Arawa as he was supposed to,[14] summarily determined that Arawa was a "jungle" after only a brief investigation,[15] and "could not identify whether the crime referred to in his advance report was specific to Arawa or whether it was attributable to Port Moresby, the [city] with the highest crime rate in [P]NG."[16] These undisputed inconsistencies and ambiguities in the Agency's case to the Arbitrator, which the majority fails to mention, are only a few of the Arbitrator's numerous findings supporting his interpretation of the agreement. Those findings, mostly unchallenged by the Agency, show that the Arbitrator's award *is* a plausible interpretation of the agreement.

The majority concludes that the Arbitrator's interpretation of the agreement is *not* plausible. The majority's reason is that the Agency "*relied* on PACOM's instructions, NCIS threat assessments, and conversations with NCIS and the embassy to conclude that conditions onshore were unsafe."[17] But under the agreement, what the Agency relied on is not the only relevant consideration. In this case, the pivotal issue for the Arbitrator was whether that reliance was "arbitrary and capricious." As discussed above, the information the Agency relied on lacked even the most basic details. Also, the Agency could not explain that information's many inconsistencies and ambiguities, despite having a full opportunity to support its shore-liberty determination before the Arbitrator. Finding the Agency's reasons arbitrary, the Arbitrator did not set aside the captain's liberty restriction. Instead, the Arbitrator simply found that the restriction's arbitrary character required that the affected employees receive premium pay.[18]

For these reasons, applying the Authority's deferential essence standard of review to the Arbitrator's contract interpretation, I would deny the Agency's essence exception. And I would address and deny all the Agency's remaining exceptions.

DISSENT APPENDIX

Map of Papua New Guinea

[8] *Id.* at 44-45.
[9] *See* dissent appendix, map of Papua New Guinea, CIA Factbook, 2018, available at https://www.cia.gov/library/publications/the-world-factbook/geos/pp.html.
[10] Award at 40 (emphasis added).
[11] *Id.* (emphasis added).
[12] Award at 44; *see* dissent appendix.
[13] Award at 39.
[14] *Id.*
[15] *Id.* at 40.
[16] *Id.* at 39.
[17] Majority at 3 (emphasis added).
[18] *See* Award at 47 ("The Agency violated the [a]greement by denying liberty *without pay*") (emphasis added).