70 FLRA No. 150

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
FLORENCE, COLORADO
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1169
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5342

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DECISION

July 27, 2018

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

I. Statement of the Case

This case reflects another attempt by the American Federation of Government Employees to force bargaining whenever it is dissatisfied with the way that the Bureau of Prisons assigns work under Article 18 of the parties' collective-bargaining agreement (Article 18).[1] Here, Arbitrator Joe H. Henderson found that the Agency was contractually obligated to bargain before increasing assignments of non-custody correctional officers to custody posts. We find that the Agency's assignment of work, in compliance with Article 18, did not trigger a duty to bargain. Therefore, the Arbitrator's contrary conclusion fails to draw its essence from the parties' agreement, and we set aside his award.

II. Background and Arbitrator's Award

The Agency operates a federal prison complex, staffed by correctional officers in custody and non-custody departments. When certain custody posts are vacant, the Agency assigns non-custody employees to work those posts – a practice called augmentation. After the Agency increased its use of augmentation, the Union filed a grievance alleging that the Agency's failure to bargain before doing so violated the parties' agreement.

The grievance went to arbitration, where the Arbitrator focused on the Agency's contractual bargaining obligations in Articles 4 and 7. Article 4 provides, in pertinent part, that the Agency will not change "practices" or implement "changes . . . in working conditions" without negotiating with the Union.[2] In relevant part, Article 7 states that, consistent with law and the agreement, the Agency will give the Union notice of, and an opportunity to bargain over, "any changes in conditions of employment."[3]

The Agency argued that its increased use of augmentation was an exercise of its assignment discretion under Article 18 and, therefore, was not a change that triggered a bargaining obligation under Article 4 or 7.[4] However, the Arbitrator found that the Agency's unilateral decision to increase augmentation was a change within the meaning of Articles 4 and 7, and that the Agency's failure to provide the Union with notice of, and an opportunity to bargain over, that change violated the parties' agreement. As a remedy, he directed the parties to bargain over procedures to be used when the Agency augments custody posts.

On January 12, 2018, the Agency filed exceptions to the Arbitrator's award, and on February 15, 2018, the Union filed an opposition to those exceptions.

[1] *See U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 875 F.3d 667, 676 (D.C. Cir. 2017) (*BOP II*) (challenge to agency's changed use of relief rosters preempted by Article 18); *Fed. BOP v. FLRA*, 654 F.3d 91, 96 (D.C. Cir. 2011) (*BOP I*) (challenge to agency's change in assignment protocols for non-critical posts preempted by Article 18).

[2] Award at 19 (quoting Article 4).

[3] Opp'n, Attach. 16, Collective-Bargaining Agreement (Agreement) at 16; *see* Award at 19-20.

[4] Article 18 is entitled "Hours of Work," and authorizes the Agency to change employees' work assignments. Agreement at 41-47. For example, Article 18 states, in part, that "[w]ork assignments on the same shift may be changed without advance notice" but that if such change involves changing the start and stop times of a shift by more than two hours, then the employee "shall be given at least twenty-four . . . hours[']notice." *Id.* at 46. Article 18 also establishes procedures for "temporary . . . change[s] of shift or assignment" that last less than five days and for notification of shift or assignment changes. *Id.* at 47.

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

The Agency argues that the award fails to draw its essence from the parties' agreement.[5] Specifically, the Agency argues that its increased use of augmentation was an exercise of its assignment discretion under Article 18 and, thus, that the Arbitrator erred when he found that the Agency made a change that triggered a contractual bargaining obligation.[6]

The Arbitrator found that the Agency had the contractual right, under Article 18, "to reassign employees for any reason,"[7] and he defined augmentation as the "reassignment" of a non-custody employee to work a custody post on a short-term basis.[8] Because the parties' agreement does not use the term "augmentation,"[9] he concluded that the Agency's increased use of augmentation was a "change" that triggered a bargaining obligation under Articles 4 and 7.[10] However, the Agency's broad assignment discretion under Article 18 necessarily includes the frequency with which the Agency augments.[11] Here, because the Agency acted in compliance with that established discretion,[12] it did not make a change.[13] As Articles 4 and 7 clearly and unequivocally require bargaining only over changes, the Arbitrator's finding of a contractual duty to bargain in this case fails to draw its essence from the parties' agreement. Accordingly, we grant the Agency's essence exception and set aside the award.[14]

IV. Decision

We set aside the award.[15]

[5] As relevant here, the Authority will find that an arbitration award fails to draw its essence from a collective-bargaining agreement when the appealing party establishes that the award does not represent a plausible interpretation of the agreement. *AFGE, Local 2152*, 69 FLRA 149, 152 (2015) (citing *AFGE, Council 220*, 54 FLRA 156, 159 (1998)).

[6] Exceptions at 7-10.

[7] Award at 19-20 (citing Articles 5 and 18 of the parties' agreement). Article 5 restates the management rights set forth in 5 U.S.C. § 7106. *See* Agreement at 8-9.

[8] Award at 3.

[9] *Id.* at 18-19.

[10] *Id.* at 19-20.

[11] We note that the D.C. Circuit has held that Article 18 is the parties' agreement about how and when management would exercise its right to assign work, and that it encompasses assignments not explicitly mentioned in the agreement. *See BOP II*, 875 F.3d at 676 (Article 18 "is the last word on the subject it addresses . . . and cannot be circumvented merely because one of the bargaining parties did not anticipate a policy it might produce."); *BOP I*, 654 F.3d at 95 ("Article 18 . . . reflects the parties' earlier bargaining over the impact and implementation of the [Agency's] statutory right to assign work" including "the procedures by which a warden formulates a roster, assigns officers to posts, and designates officers for . . . relief shift[s].").

[12] Award at 18-19. As mentioned previously, Article 18 states, in part, that "[w]ork assignments on the same shift may be changed without advance notice" as long as the shift's start and stop times do not change by more than two hours. Exceptions at 8 (quoting Agreement at 46). The Agency states, and the Union does not dispute, that it did not change employees' shifts when it augmented. *See id.* at 10.

[13] *E.g.*, *BOP I*, 654 F.3d at 96 (finding that Article 18 "covers and preempts challenges to all specific outcomes of the assignment process").

[14] Because we set aside the award on the ground discussed above, we need not resolve the Agency's contrary-to-law exceptions. *E.g.*, *AFGE, Local 2145*, 69 FLRA 7, 9 (2015).

[15] Member Abbott observes that his dissenting colleague's deference to arbitrators appears to have no end point. Even the decisions and conclusions of Article III judges are subject to review.

Member DuBester, dissenting:

The decision in this case is another example of the majority's determination not to give appropriate deference to arbitrators' contract interpretations.[1] In addition, the majority's decision is another instance where the majority gives no weight to parties' past practices, and to the legal and policy reasons for enforcing those past practices when interpreting the parties' collective-bargaining agreements.[2] Moreover, the majority's tone in the decision's opening sentence continues a theme of other majority decisions: opposition to the Statute's adoption of collective bargaining as an effective and efficient means of avoiding and resolving workplace conflicts.[3] Because the majority's conclusion to set aside the Arbitrator's award is based on these mistakes, I dissent.

The majority barely acknowledges the deferential standard of review the Authority applies when it resolves claims that an award does not draw its essence from the parties' agreement.[4] This ignores the Supreme Court's declaration that "[t]he federal policy of settling labor disputes by arbitration would be undermined if [a reviewing body] ha[s] the final say on the merits of [an] award[]"[5]; a reviewing body has "no business overruling" an arbitrator simply because "[its] interpretation of the contract is different."[6]

To the contrary, when reviewing an arbitrator's interpretation of a collective-bargaining agreement, Authority precedent applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[7] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective-bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[8] 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."[9] When reviewing a challenge to an arbitrator's interpretation of a parties' agreement, the Authority also applies this deferential standard of review to an arbitrator's determination of how parties' past practices have modified the express terms of an agreement.[10]

The Arbitrator's award in this case draws its essence from the parties' agreement. The Arbitrator finds that the parties had an established past practice of augmenting the custody roster with non-custody staff in limited situations; only during "mandatory training, i.e., annual refresher training [and] firearms training."[11] But in this case, the Arbitrator finds, the Agency used augmentation to deal with "serious budget concerns."[12] The Arbitrator accordingly determines that "[a]ugmentation procedures were changed"[13] by the Agency. These are factual findings to which the Authority should defer.

Further, applying the parties' agreement to the facts, the Arbitrator finds that Articles 4 and 7 "give[] the Union the right to negotiate changes in working conditions and assignments."[14] And, rejecting that Agency's argument that augmentation is "covered by" the parties' national agreement, the Arbitrator finds that the Agency "presented" "no documentation . . . to substantiate that statement."[15] The Arbitrator observed, among other things, that neither the topics of "Reassignment" nor of "Augmentation" are found in the parties' national agreement.[16]

Although the Arbitrator's past-practice finding is at the heart of his award, the majority carefully avoids any mention of that determination. As I have stated in other separate opinions, the majority's determination, to give no weight to parties' past practices to resolve

[1] *See, e.g., U.S. Dep't of Transp., FAA*, 70 FLRA 687, 688-89 (2018) (Member DuBester dissenting); *U.S. Dep't of the Treasury, IRS, Austin, Tex.*, 70 FLRA 680, 683-84 (2018) (Member DuBester dissenting); *U.S. Dep't of VA, Med. Ctr., Asheville, N.C.*, 70 FLRA 547, 548 (2018) (Member DuBester dissenting).

[2] *See U.S. Dep't of the Army, 93rd Signal Brigade, Fort Eustis, Va.*, 70 FLRA 733, 734 (2018) (Member DuBester dissenting); *U.S. Small Bus. Admin.*, 70 FLRA 525, 528-29 (2018) (*SBA*) (Member DuBester dissenting).

[3] *See, e.g., U.S. DHS, U.S. ICE*, 70 FLRA 628, 628 (2018) (Member DuBester dissenting); *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 501, 501 (2018) (Member DuBester dissenting).

[4] Majority at 3 n.5.

[5] *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

[6] *Id.* at 599.

[7] *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

[8] *Id.*

[9] *Id.* (quoting *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

[10] *See, e.g., AFGE, Local 3740*, 68 FLRA 454, 454-55 (2015) (Authority applies deferential essence standard in reviewing arbitrator's finding that past practice altered agreement).

[11] Award at 19.

[12] *Id.* at 20.

[13] *Id.* at 21.

[14] *Id.*

[15] *Id.* at 18.

[16] *Id.*

contract-interpretation issues, erroneously "reverses the Authority's past-practice precedent and conflicts with the clear weight of other authority that has addressed the subject."[17] Contrary to the majority, I agree with the predominant view of the courts and arbitrators, the Authority's well established precedent, and *Elkouri & Elkouri* that "[a]n arbitrator's award that appears contrary to the express terms of the agreement may nevertheless be valid if it is premised upon reliable evidence of the parties' intent."[18]

In this case, the majority does not deferentially analyze or dispute the Arbitrator's past-practice finding. Indeed, the majority does not even mention it. Because the majority has determined to eliminate deference to arbitrators' interpretations of collective-bargaining agreements from the Authority's current decisions, contrary to fundamental principles and policies underlying the Federal Service Labor-Management Relations Statute, and to arrogate to itself that function, I dissent.

I would deny the Agency's claim that the award fails to draw its essence from the parties' agreement. And I would reach the Agency's remaining exception.

[17] *SBA*, 70 FLRA at 531 (Dissenting Opinion of Member DuBester).
[18] *Id.* (citing *Elkouri & Elkouri, How Arbitration Works*, 12-28 (Kenneth May ed., 8th ed. 2016)).