70 FLRA No. 155

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OFFICE OF CHIEF COUNSEL
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-5224

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DECISION

August 24, 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

In this case, we determine that the Arbitrator exceeded his authority when he determined that IRS managers could not consider discipline in performance awards determinations even though such consideration was authorized by Agency policy.

Arbitrator Robert T. Simmelkjaer found that the Agency committed various policy, contractual, and statutory violations by considering employees' prior discipline when deciding whether to grant performance awards. The Arbitrator awarded several remedies, and the Agency filed exceptions to the award.

As discussed further below, we find that the Arbitrator exceeded his authority by addressing whether the Agency violated a Treasury Department policy, which was not an issue that he framed or that he needed to address in order to resolve the framed issues. And because a pair of the Arbitrator's findings of contractual and statutory violations were inseparably intertwined with his policy-violation analysis, these related findings exceeded his authority as well.

In addition, we find that the Arbitrator erroneously rejected the Agency's covered-by defense, and accordingly we set aside his findings that the Agency violated contractual and statutory duties to give the Union notice of, and an opportunity to bargain over, changes to performance-awards criteria.

Further, we find that the Arbitrator's determination that the Agency could not consider discipline in the awards process fails to draw its essence from Article 14 of the parties' collective-bargaining agreement. Therefore, we set aside this contractual-violation finding and the related finding that the Agency repudiated Article 14 in violation of the Statute.

As we have set aside all of the violations, we set aside the awarded remedies as well.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency unilaterally implemented Treasury Department Policy TN-15-006 (the policy), which required management to consider employee discipline when deciding whether to grant performance awards. Specifically, the Union alleged that the Agency's failure to give the Union notice and an opportunity to bargain before implementing the policy violated both Article 45 of the parties' agreement and § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute).[1] The Union also alleged that – by treating employees as ineligible for awards based on prior discipline, and by failing to consider discipline in a fair and objective manner – the Agency violated Article 14 of the agreement and repudiated both Article 14 and Article 45, in violation of § 7116(a)(1) and (5) the Statute.[2]

The grievance went to arbitration. The Arbitrator addressed whether Article 14 authorized the Agency to consider employee discipline in the performance-awards process. He noted that Article 14, Section 1.B. states, in pertinent part, that "[p]erformance awards . . . shall be provided on a fair and objective basis considering merit, budget limitations, and the nonmandatory nature of awards."[3] He found that this section sets forth "the *only* criteria within the parties' [agreement] that [the Agency] may consider with respect to granting or not granting an employee a performance award."[4] Thus, the Arbitrator concluded that Article 14, Section 1.B. "effectively exclud[ed] . . . *any consideration* of discipline and/or misconduct as . . . factors" in the performance-awards process,[5] and the Agency's consideration of discipline violated Section 1.B.

[1] 5 U.S.C. § 7116(a)(1), (5).
[2] *Id.*
[3] Award at 4 (quoting Art. 14, § 1.B.).
[4] *Id.* at 20 (emphasis added).
[5] *Id.* at 68 (emphasis added).

Further, the Arbitrator found that the Agency violated the Treasury policy addressing how to consider discipline as a factor for performance awards. The Arbitrator also found, in connection with the policy, that the Agency violated Section 1.B. by failing to ensure "fair and objective" consideration of discipline in the performance-awards process.[6]

Additionally, the Arbitrator found that both of the Agency's violations of Section 1.B. were "clear and patent" breaches of the agreement.[7] Consequently, he found that the Agency repudiated Section 1.B., in violation of § 7116(a)(1) and (5) of the Statute.[8]

Next, the Arbitrator found that the parties' midterm notice-and-bargaining obligations under Article 45 of their agreement were consistent with their obligations under the Statute. And he found that the Agency's unilateral implementation of the policy violated the Agency's obligations under Article 45 and § 7116(a)(1) and (5) of the Statute.[9] In doing so, the Arbitrator rejected the Agency's argument that the subject of performance-awards criteria was "covered by" the parties' existing agreement.[10]

The Arbitrator also determined that the Agency repudiated Article 45, and thereby committed an additional ULP under § 7116(a)(1) and (5) of the Statute.[11]

Finally, the Arbitrator awarded a number of remedies – including retroactive performance awards and make-whole relief – and "retain[ed] jurisdiction . . . to address any issues that may arise in the interpretation or implementation of the remedy portion" of the award.[12]

On September 9, 2016, the Agency filed exceptions to the award,[13] and, on October 17, 2016, the Union filed an opposition to those exceptions.

III. Analysis and Conclusions

A. The Arbitrator exceeded his authority by finding a violation of the Treasury Department policy and a related portion of Article 14.

The Agency argues that the Arbitrator did not frame the issues before him to include whether the Agency violated the policy itself,[14] so he exceeded his authority[15] by finding such a violation.[16]

The Union concedes that the interpretation of the Treasury Department policy "was not an issue submitted to arbitration," but argues that the policy violation was "directly related to" issues that were before the Arbitrator.[17] We note that the Arbitrator did not explain why he needed to address the policy-violation issue in order to resolve the issues that he framed, and we can find no such reason. Therefore, we find that, by addressing that issue, the Arbitrator exceeded his authority.[18] Consequently, we set aside the policy-violation finding.[19]

Further, the Arbitrator's finding that the Agency violated Article 14, Section 1.B. of the parties' agreement by failing to ensure "fair and objective" consideration of discipline[20] resulted from – and was, consequently, inextricably intertwined with – his finding that the

[6] *Id.* at 71.
[7] *Id.* at 77-78.
[8] 5 U.S.C. § 7116(a)(1), (5).
[9] *Id.*
[10] Award at 65.
[11] *Id.* at 77 (citing 5 U.S.C. § 7116(a)(1), (5)).
[12] *Id.* at 85.
[13] Because the Arbitrator stated that he would "defer judgment" on whether employees would receive make-whole relief "until such time [as] the adversely impacted employees" were identified, Award at 82, the Authority's Office of Case Intake and Publication ordered the Agency to show cause why the exceptions should not be dismissed, without prejudice, as interlocutory. In response, the Agency notes that the Arbitrator also stated that a "back[pay] remedy *will be appropriate* for any employees whose performance award was denied based on discipline and/or misconduct." *Id.* at 83 (emphasis added). The Authority has held that "an award is considered final, and exceptions to the award are not interlocutory, where an arbitrator has retained jurisdiction solely to assist the parties in the implementation of awarded remedies, including the specific amount" of backpay awarded. *AFGE, Local 2145*, 69 FLRA 563, 564 (2016) (citing *U.S. Dep't of the Treasury, IRS*, 63 FLRA 157, 158-59 (2009)). While the Arbitrator's statement that he would "defer" judgment on make-whole relief is unclear, Award at 82, he also articulated the specific circumstances under which backpay "*will be* appropriate," *id.* at 83 (emphasis added), and identified at least one employee who satisfied the Arbitrator's backpay-award criteria, *id.* at 82. Thus, we find that the exceptions are not interlocutory, and we address them below.
[14] Exceptions at 34.
[15] As relevant here, arbitrators exceed their authority when they resolve an issue not submitted to arbitration. *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996) (*Local 1617*). However, arbitrators do not exceed their authority by addressing an issue that is necessary to decide issues submitted to arbitration, *NATCA, MEBA/NMU*, 51 FLRA 993, 996 (1996), or by addressing an issue that necessarily arises from issues submitted to arbitration, *Air Force Space Div., L.A. Air Force Station, Cal.*, 24 FLRA 516, 519 (1986).
[16] Exceptions at 34.
[17] Opp'n at 35.
[18] *See Local 1617*, 51 FLRA at 1647.
[19] Award at 73.
[20] *Id.* at 71.

Agency unfairly implemented the policy.[21] Because the Arbitrator should not have reached the policy-violation issue, we also set aside his concomitant contractual-violation finding as exceeding his authority. And we set aside the Arbitrator's finding that the Agency violated § 7116(a)(1) and (5) by repudiating the fair-and-objective contractual requirement of Article 14,[22] because this repudiation finding is legally untenable without a contractual violation to support it.

B. The Arbitrator erred in finding that the subject of performance-awards criteria was not covered by the parties' existing agreement.

The Arbitrator found that the Agency violated its obligations, under Article 45 of the agreement and § 7116(a)(1) and (5) of the Statute, to provide the Union pre-implementation notice and an opportunity to bargain over the consideration of discipline in the performance-awards process.[23] The Agency argues that the Arbitrator erred as a matter of law by rejecting its covered-by defense to those violations.[24]

Under the "covered-by" doctrine, a party is not required to bargain over matters that already have been resolved by bargaining.[25] As relevant here, to determine whether a matter is covered by an existing agreement, the Authority examines whether the subject matter of the change in conditions of employment is expressly contained in the agreement.[26] In this case, the Arbitrator found that Article 14, Section 1.B of the parties' agreement expressly addressed performance-awards criteria.[27] Therefore, the subject matter was covered by the agreement, and we set aside the Arbitrator's findings that the Agency violated its notice-and-bargaining obligations under Article 45 and § 7116(a)(1) and (5) of the Statute. Further, because we are setting aside the finding that the Agency *violated* Article 45, the Arbitrator's finding that the Agency *repudiated* Article 45 is legally untenable, and we set aside that finding as well.

C. The Arbitrator's finding that the Agency violated Article 14, Section 1.B. by considering discipline fails to draw its essence from the parties' agreement.

The Arbitrator found that the Agency violated the following portion of Article 14, Section 1.B.:[28] "Performance awards . . . shall be provided on a fair and objective basis considering merit, budget limitations, and the nonmandatory nature of awards."[29] Specifically, he found the Agency could not consider discipline *at all* in the performance-awards process.[30]

The Agency argues that this finding fails to draw its essence[31] from Article 14, Section 1.B. because that provision "does not prohibit it from considering . . . discipline when making awards determinations."[32] Section 1.B. permits the Agency to consider "merit," and we find that the Arbitrator's determination that "merit" cannot include disciplinary history is implausible. "Merit" is a broad term that easily extends beyond performance appraisals alone.[33] In our view, it was implausible for the Arbitrator to find that the Agency could not consider discipline in assessing whether employees are deserving of "praise or reward."[34] Therefore, we set aside, on essence grounds, the Arbitrator's finding that the Agency violated Section 1.B. by considering discipline. And we set aside the Arbitrator's finding that the Agency's consideration of

[21] *See, e.g., id.* ("[A] violation of Article 14, Section 1.B[.] occurred when [the Agency] failed to administer the disciplinary component of the awards program it incorporated from [the policy] on a 'fair and objective basis.'"); *see also id.* at 71-73 (discussing policy violation and fair-and-objective contractual violation together).

[22] *Id.* at 78 (repudiation finding).

[23] *Id.* at 60-69; *see also id.* at 9 (noting that obligations under the agreement are to be "[c]onsistent with the rights and duties of the parties under the . . . Statute" (quoting Art. 45, § 1.B.)).

[24] Exceptions at 28-29.

[25] *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 813-14 (2000).

[26] *Id.* at 813. If a matter is not expressly contained in the agreement, then the Authority assesses whether the matter is inseparably bound up with a subject expressly covered by the agreement. *Id.*

[27] *E.g.*, Award at 68. Further, the parties' agreement incorporates the covered-by doctrine to limit contractual notice-and-bargaining obligations. *Id.* at 10 (quoting Art. 45, § 2.A.).

[28] As stated in Section III.A., we have already set aside the Arbitrator's findings that the Agency violated and repudiated Article 14, Section 1.B. by failing to implement the policy in a fair-and-objective manner.

[29] Award at 4 (quoting Art. 14, § 1.B.); *see id.* at 60-74 (discussing violation of Article 14, Section 1.B.).

[30] *Id.* at 68.

[31] The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining 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 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. *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

[32] Exceptions at 25.

[33] *Merit*, New Oxford American Dictionary (3d ed. 2010) (defining "merit" as "the quality of being particularly good or worthy, esp[ecially] so as to deserve praise or reward").

[34] *Id.*

discipline repudiated Section 1.B., in violation of § 7116(a)(1) and (5) of the Statute, because there is no longer a contractual violation to support that repudiation finding.[35]

Finally, because we have set aside all of the violations in the award, we also set aside all of the awarded remedies.

IV. Decision

We set aside the award.

[35] Because we have set aside the Arbitrator's findings that the Agency violated and repudiated Article 14, Section 1.B., we need not address the parties' arguments about whether the Arbitrator based those findings on nonfacts, Exceptions at 22-23 (nonfact arguments); Opp'n at 6-13 (opposition to nonfact arguments), or whether the findings are contrary to public policy, *e.g.*, Exceptions at 3.

Member DuBester, dissenting:

I disagree with the majority's decision to set aside the Arbitrator's award. The Arbitrator correctly finds that the Agency violated the parties' agreement and the Statute by unilaterally implementing and unfairly applying a policy which considers discipline in granting performance awards. The majority's decision is inconsistent with the Arbitrator's findings to which we should defer, and with Authority precedent.

The majority's determination that the Arbitrator exceeded his authority is wrong. It is also self-contradictory.

The majority finds that the Arbitrator exceeded his authority when he found that the Agency violated the Treasury Department policy[1] addressing the role of "employee conduct when making decisions about monetary compensation."[2] However, the Arbitrator considered the Agency's compliance with the Treasury Policy to resolve one of the issues before him: "Did the [Agency] violate . . . Article 14, Section 1.B of the parties' [agreement]"[3] when it began considering discipline in granting performance awards. Section 1.B requires that "performance awards . . . shall be provided on a fair and objective basis."[4] The Arbitrator found that the Treasury Policy required "fair, objective and consistent use of discipline . . . , including guidance to supervisors regarding the range of disciplinary actions subject to the policy."[5] And, the Arbitrator also found that the Agency was not fairly and objectively following the policy's guidelines.[6] Further, because the Agency implemented the Treasury Policy jointly[7] with its implementation of Section 1.B, he found that the Agency violated Section 1.B by failing "to administer the disciplinary component of the awards program it incorporated from [the Treasury Policy] on a 'fair and objective basis.'"[8]

Authority precedent holds that where an arbitrator addresses an issue that is necessary to decide in order to resolve an issue before the parties, the arbitrator does not exceed his or her authority.[9] The Arbitrator's Treasury-Policy-violation finding in this case satisfies this test. As the majority acknowledges, the Arbitrator's

[1] Majority at 4.
[2] Award at 69-70 (quoting Treasury Policy TN-15-006).
[3] Award at 3.
[4] *Id.* at 69.
[5] *Id.* at 70.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 71.
[9] *SSA*, 69 FLRA 208, 211 (2016); *U.S. DHS, U.S. ICE*, 65 FLRA 529, 532 (2011).

findings that the Agency violated the Treasury Policy and also Section 1.B are interrelated. Ironically, the majority concludes that "the Arbitrator's finding that the Agency violated Article 14, Section 1.B. of the parties' agreement by failing to ensure 'fair and objective' consideration of discipline resulted from – and was, consequently, inextricably intertwined with – his finding that the Agency unfairly implemented the [Treasury Policy]."[10] *I agree*. Consequently, the Arbitrator did not exceed his authority when he made his Treasury-Policy-violation finding.

But, contrary to Authority precedent, and apparently ignoring its finding that the policy and contract violation issues are "inextricably intertwined,"[11] and that the contract-violation finding "resulted from"[12] the policy-violation finding, the majority claims that it can "find no . . . reason . . . why [the Arbitrator] needed to address the policy-violation issue."[13] Because the majority's own decision demonstrates that its exceeded-authority conclusion is wrong, I dissent from this finding, and the majority's related determination to set aside the Arbitrator's finding that the Agency committed an unfair labor practice by repudiating its obligation under Section 1.B to consider discipline in a "fair and objective" manner when granting awards.

Contrary to the majority, I also agree with the Arbitrator's rejection of the Agency's covered-by defense. The majority's covered-by determination rests solely on the conclusion that because Article 14, Section 1.B addresses *performance-awards criteria*, the *subject matter of the change* in conditions of employment is expressly contained in the parties' agreement.[14] But the Arbitrator finds that the *subject matter* of the change here involved whether *discipline* should be considered in granting performance awards.[15] On this basis, he concludes, and I agree, that *clearly*, Article 14, Section 1.B's language "does not expressly address the subject of discipline."[16]

Moreover, long-standing Authority precedent further undermines the majority's application of the covered-by doctrine. The majority concludes that the covered-by doctrine excuses the Agency's *contractual duty* to bargain under Article 45.[17] But the covered-by doctrine only applies as a defense to an alleged *statutory* duty to bargain.[18] It does not apply as a defense to an arbitrator's finding of a *contractual* duty to bargain.[19]

While, as noted, this case illustrates the difficulty of determining whether a contract provision "expressly covers" a subject in dispute, the Arbitrator thoughtfully does make several findings to support his conclusion that "the clear and unambiguous express language of Article 14, 1.B specifies the criteria to be considered in administering the awards on a 'fair and objective basis,' thereby effectively excluding . . . consideration of discipline . . . as [an] additional factor."[20] Assessed in this context, it surely cannot be said that the Award is "implausible" or fails to draw its "essence" from the agreement. However, that is exactly what the Majority also concludes.

The majority's determination that the Award fails to draw its "essence" from the contract makes a mockery of the Supreme Court's Steelworkers' Trilogy.[21]

The mind reels.

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[10] Majority at 4 (footnote omitted).
[11] *Id.*
[12] *Id.*
[13] *Id.* at 4.
[14] *Id.* at 6.
[15] Award at 65.
[16] *Id.* at 66.

I have previously expressed my view that "the Authority's use of the covered-by standards warrants a fresh look." *SSA, Balt., Md.*, 66 FLRA 569, 575-76 (2012) (*SSA*) (Dissenting Opinion of Member DuBester); *accord U.S. DOJ, Fed. BOP, Fed. Cor. Inst., Williamsburg Salters, S.C.*, 68 FLRA 580, 583 n.38 (2015) (Member Pizzella dissenting); *NTEU, Chapter 160*, 67 FLRA 482, 487-88 (2014) (Dissenting Opinion of Member DuBester).

In those cases, I have particularly focused on the difficulty of applying the covered-by standard's second prong. And, I have raised a question "about its practical usefulness to parties or the Authority." *SSA*, 66 FLRA at 575. This case also illustrates the challenge of determining whether a contract provision "expressly covers" a subject in dispute, as required by the more *straightforward* first prong of the covered-by standard. In any event, I repeat my call that use of this standard "warrants a fresh look."

[17] Majority at 5-6.
[18] *U.S. DOJ, Fed. BOP*, 70 FLRA 398, 406 (2018) (*DOJ*) (Member DuBester dissenting); *see U.S. Dep't of HUD*, 66 FLRA 106, 109 (2011) (*HUD*).
[19] *DOJ*, 70 FLRA at 406; *see HUD*, 66 FLRA at 109.
[20] Award at 68; *see generally*, *id.* at 64-72.
[21] *See, e.g.*, *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).