

71 FLRA No. 175

UNITED STATES
DEPARTMENT OF HEALTH
AND HUMAN SERVICES
FOOD AND DRUG ADMINISTRATION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-5581

DECISION

August 12, 2020

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

Decision by Member Abbott for the Authority

I. Statement of the Case

This case involves a grievance filed by the Union alleging that the Agency violated the Federal Service Labor-Management Relations Statute (Statute)¹ and the parties’ agreement when it failed to authorize the Union’s email communications to bargaining-unit employees. We find that the Agency failed to provide any reason or support for disturbing the award. Accordingly, we deny the exception.

II. Background and Arbitrator’s Award

The arbitration concerned two grievances over two emails the Agency declined to authorize. The Agency only raised an exception to the Arbitrator’s finding concerning the second email. Therefore, we will limit the background to the relevant email at issue.

As relevant here, the Union submitted an email for Agency approval on January 17, 2019. The email contained information on back pay for furloughed employees, government funding for fiscal year 2019, and the upcoming federal holiday in honor of Martin Luther

King, Jr. (MLK), and a link to Standard Form (SF) 1187.² The Agency disapproved the email because the attachments did not concern representational matters as required by the parties’ agreement. The Union filed a grievance and invoked arbitration.

Article 9, Section 2 provides: “[t]he Union may use the [e]mployers’ . . . e-mail . . . to transmit or receive representational correspondence concerning the [e]mployers’ labor relations program.”³ As to the Agency’s denial of the email based on the attachments, the Arbitrator found that Article 9, Section 2 “authorize[d] the Union to use the Agency’s email system to transmit or receive representational correspondence concerning [the Agency’s] labor relations program.”⁴ The Arbitrator further found that the parties’ agreement did not define “representational correspondence” or the Agency’s “labor relations program.”⁵ In making this finding, the Arbitrator relied on the previous Agency-approved Union communications to find that the information in the email about back pay for furloughed employees, government funding for fiscal year 2019, and the upcoming MLK holiday constituted representational correspondence about the Agency’s labor relations program. As such, the Arbitrator found that the Agency violated the parties’ agreement by denying the portion of the email concerning the information on back pay for furloughed employees, government funding, and the MLK holiday.⁶ The Arbitrator also found that the Agency violated 5 U.S.C. § 7116(a)(1) by failing to approve the email attachments because the denial “wrongly interfered with [the Union’s] right to communicate with bargaining unit employees concerning representational matters.”⁷

² SF 1187 is the form used by Office of Personnel Management to request payroll deductions for labor organization dues. See SF 1187, https://www.opm.gov/forms/pdf_fill/sf1187.pdf (last accessed August 12, 2020).

³ Award at 3 (quoting Collective-Bargaining Agreement, Art. 9, § 2).

⁴ *Id.* at 21.

⁵ *Id.*

⁶ Member Abbott notes, as he has previously, that it is not the Authority’s role to save parties from vague and imprecise language agreed to or other “poor choices” made at the bargaining table. See *AFGE, Local 3430*, 71 FLRA 881, 886 n.3 (2020) (Concurring Opinion of Member Abbott) (citing *U.S. Dep’t of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 170, 172 (2019) (Dissenting Opinion of Member Abbott)).

⁷ Award at 25-26. The Arbitrator also found that the inclusion of the link to the SF 1187 constituted a solicitation of Union membership and, thus, that the Agency’s refusal to include the link violated neither the Statute nor the parties’ agreement. Award at 19-20.

¹ 5 U.S.C. §§ 7102, 7116(a)(1).

On January 8, 2020, the Agency filed exceptions to the award. The Union filed its opposition to the exceptions on February 6, 2020.

III. Analysis and Conclusion: The Agency fails to provide grounds for disturbing the award.

The Agency argues that the award is contrary to the Statute⁸ because it did not violate § 7102 of the Statute. Specifically, the Agency asserts the Union’s “communications with bargaining[-]unit employees . . . is not a statutory right secured generally under the Statute or specifically under [§] 7102(a).”⁹ However, the Agency ignores the Arbitrator’s clear findings. The Arbitrator found that the Agency violated § 7116(a)(1) because its failure to authorize the email communication “wrongly interfered with [the Union’s] right to communicate with bargaining unit employees concerning representational matters.”¹⁰ The Arbitrator never found a violation of § 7102(a).¹¹ Furthermore, the Authority has held that a party can violate § 7116(a)(1) without otherwise violating the Statute.¹² Instead of identifying any reason or support for why the Arbitrator’s finding—that the Agency violated § 7116(a)(1)—was contrary to the Statute, the Agency proceeds to argue why it did not violate § 7102. Therefore, the Agency has failed to provide any grounds or support for overturning the award, specifically the remedy of a notice posting. Accordingly, we deny the Agency’s exception.¹³

IV. Order

We deny the Agency’s exception.

⁸ The Authority reviews questions of law de novo. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In conducting a de novo review, the Authority determines whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party established that they are nonfacts. See *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014).

⁹ Exceptions Br. at 3.

¹⁰ Award at 26.

¹¹ *Id.* at 25. We note that the Arbitrator explicitly found that the Agency did not violate § 7102 of the Statute in regards to the first email communication, which, as noted above, was not at issue in this exception. *Id.*

¹² *U.S. DOJ, Fed. BOP*, 68 FLRA 786, 788 (2015) (Member Pizzella dissenting in part) (citing *Dep’t of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.*, 51 FLRA 858, 861 (1996) (stating that it is a violation of § 7116(a)(1) and (5) when an Agency repudiates a negotiated agreement)).

¹³ See *AFGE, Local 2328*, 70 FLRA 797, 798 (2018) (citing *NTEU*, 70 FLRA 57, 60 (2016) (denying an exception when the party failed to provide support); *NTEU, Chapter 67*, 67 FLRA 630, 630-31 (2014)); see also 5 C.F.R. § 2425.6(e)(1) (An exception “may be subject to dismissal or denial if . . . [t]he excepting party fails to . . . support a ground.”).

Member DuBester, concurring:

I agree with the Order to deny the Agency's exception.