

71 FLRA No. 180

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2282
(Union)

0-AR-5523

DECISION

August 27, 2020

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

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, we stress to the federal labor relations community that an agency's duty to bargain is triggered only when the agency has changed a bargaining unit employee's (BUE) conditions of employment and the change has affected the working conditions of the BUE—as relevant here, the duties performed by the employee—such that the Agency was required to bargain before implementing the change.

Arbitrator Bruce Ponder found that the Agency violated the parties' agreement by converting the positions of bargaining-unit employees into contractor positions without first engaging in impact and implementation bargaining with the Union. As a remedy, he ordered the Agency to engage in post-implementation bargaining and to comply with the parties' collective-bargaining agreement in the future.

We find that the Agency was not denied a fair hearing and that it fails to demonstrate the award is incomplete, ambiguous, or contradictory. We also find that the award does not draw its essence from the parties' agreement, in part, because the employees are non-appropriated fund employees. However, because the Arbitrator has not made sufficient factual findings for the

Authority to assess his conclusion regarding the Agency's duty to bargain, we remand the case to the parties for resubmission to the Arbitrator, absent settlement, to make such a determination.

II. Background and Arbitrator's Award

Bargaining-unit employees of the Agency (the employees), who worked in accounts receivable, were notified by the Agency that they would be moving to accounts payable after some noticed their names were moved already in the facility directory. The employees heard unconfirmed reports that the Agency would use contractors to accomplish the accounts-receivable work. Thereafter, the Agency responded to the Union's inquires by stating that some employees had been moved into accounts receivable, but there would be a meeting to discuss the inquires. The employees were then ordered to train the contractors to do all the work in accounts receivable.

The Union filed the grievance alleging that the Agency violated the parties' agreement by failing to notify and bargain with the Union when it replaced all the employees with contractors. The parties could not resolve the grievance and it proceeded to arbitration.

At the hearing, the Agency argued that it merely reassigned the employees, as it had done before many times over the years. According to the Agency, Article 33—"Contracting Out", Section 1 of the parties' agreement was inapplicable because the Agency did not replace the employees, who are "franchise fund" or non-appropriated fund (NAF) employees, pursuant to the Office of Management and Budget's Circular A-76 (A-76).¹

¹ Exceptions at 8, 13. Article 33, Section 1 of the parties' agreement states the following:

The Union shall be notified in writing when an A-76 cost comparison study is to be initiated which may result in a transfer to contract performance services currently performed by Unit employees. The Union will be promptly notified, in writing, when management decides to effect a direct conversion of work currently performed by unit employees to contract performance.

Award at 14. A-76 requires agencies to perform a formal cost comparison study if it will replace its employees with contractors. Office of Mgmt. & Budget, Exec. Office of the President, Circular No. A-76, *Performance of Commercial Activities* (2003) (A-76). However, A-76 does not apply to non-appropriated fund employees. *Id.*

On June 12, 2019, the Arbitrator found that the Agency violated the parties' agreement. The Arbitrator rejected the Agency's argument that it had merely reassigned the NAF employees, finding it did not "hold water."² He then turned to the Agency's claims that a direct conversion could not be triggered absent an A-76 cost-comparison study, and that an A-76 study was not required for NAF employees.³ He determined that certain statutes and regulations demonstrate that there are other instances where the Agency can initiate a direct conversion absent an A-76 study. Namely, Office of Management and Budget's Circular A-11 (A-11)⁴ explains that an agency can initiate a direct conversion when it fails to properly initiate a public-private competition pursuant to 41 U.S.C. § 1710.⁵ Accordingly, the Arbitrator determined that the parties' agreement itself, specifically Article 33, Section 1, imposed an obligation independent of A-76 requiring the Agency to notify the Union when it is initiating a direct conversion, regardless of whether the affected employees are NAF employees.

Furthermore, the Arbitrator noted that Article 36 – "Changes in Agreement and Past Practices" – of the parties' agreement also requires the Agency to notify the Union and give it an opportunity to request impact and implementation bargaining when the Agency enacts "personnel policies, practices, [and] procedures" that affect the employees' conditions of employment.⁶ He found that directing accounts-receivable employees to perform accounts-payable work changed a condition of employment under the parties' agreement. Because the direct conversion affected the employees' conditions of employment, he found that the Agency violated Article 36.⁷

He also found that the Agency had never notified the Union of its intent to replace the employees with contractors. Therefore, the Arbitrator concluded that the Agency violated Articles 33 and 36 by failing to give the Union sufficient notice of the changes. As remedies, he ordered the Agency to engage in post-implementation bargaining, to send an email notifying all its employees of the award's remedies, and to comply with the parties' agreement in the future by giving the Union notice and an opportunity to bargain impact and implementation when the Agency is replacing bargaining-unit employees with contractors.

The Agency filed exceptions to the award on July 12, 2019 and the Union filed an opposition on August 6, 2019.

III. Analysis and Conclusions

A. The Agency was not denied a fair hearing.

The Agency argues that it was denied a fair hearing because the Arbitrator's award relies on statutes—A-11, 41 U.S.C. § 1710,⁸ and the Omnibus Appropriations Act of 2009 (Appropriations Act)⁹—that were not presented at the arbitration hearing by either party.¹⁰ However, the Agency concedes that A-11 and 41 U.S.C. § 1710 were both referred to in the Union's grievance, which was an exhibit at arbitration.¹¹ Furthermore, the Arbitrator noted that A-11 refers to and uses language from the Appropriations Act.¹² The record also reflects that the Agency was on notice that the Union was claiming that the Agency had initiated a direct conversion regardless of whether it was required to perform an A-76

² Award at 25.

³ *Id.* at 22-23. A direct conversion is a replacement of bargaining-unit employees with contractors.

⁴ Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget* (2018) (A-11).

⁵ *Id.*

⁶ Award at 14, 26.

⁷ *Id.* at 26.

⁸ 41 U.S.C. § 1710 (requiring agencies to conduct a public-private competition prior to initiating a direct conversion).

⁹ Pub. L. No. 111-8, 123 Stat. 524 (2009).

¹⁰ Exceptions at 17. The Authority will find that an arbitrator failed to conduct a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that he or she conducted the proceedings in a manner that so prejudiced a party as to affect the fairness of the proceeding as a whole. *AFGE, Local 3254*, 70 FLRA 577, 579 (2018).

¹¹ Exceptions at 17; *see also* Exceptions, Attach. 3, Tr. (Tr.) at 16.

¹² *See* Award at 23-24; A-11 ("Appropriations acts since 2009, however, have prohibited agencies from using funds to 'begin or announce a study or public-private competition regarding the conversion to contractor performance of any function performed by Federal employees pursuant to Office of Management and Budget Circular A76 or any other administrative regulation, directive, or policy.'").

cost-comparison study.¹³ Therefore, the Agency was on notice that A-11, 41 U.S.C. § 1710, and the Appropriations Act were a component of the Union's grievance and the Agency has, therefore, failed to demonstrate that the Arbitrator's reference to them denied it a fair hearing.¹⁴ The exception is denied.

B. The award is not incomplete, ambiguous, or contradictory.

The Agency argues that the award is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible.¹⁵ The Agency claims that the award is contradictory because the Arbitrator referred to an email that demonstrated that the Agency notified the Union of the reassignment yet nevertheless found that the Agency did *not* provide the Union with notice.¹⁶ However, the Arbitrator found that the Agency's notice was insufficient because the Union was never notified that the employees were being replaced by contractors.¹⁷ The Agency does not successfully challenge any of the numerous factual

findings made by the Arbitrator as to the timing or contents of the communications, and so, its exception here fails to demonstrate an internal contradiction. Most importantly, none of the Agency's assertions explain how implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain.¹⁸ Therefore, we deny this exception.

C. We grant the Agency's essence exceptions in part.

The Agency argues that the award does not draw its essence from Article 33, which states that the Agency must notify the Union of direct conversions,¹⁹ because Article 33 does not require the Agency to notify the Union prior to initiating a direct conversion of NAF employees.²⁰ The Agency also argues that the remedy fails to draw its essence from Articles 33 and 36 because the parties' agreement requires the Agency to bargain over matters that affect the employees' conditions of employment *only if* the Union requests to bargain over such matters.²¹

1. The award fails to draw its essence from Article 33 of the parties' agreement.

Here, the award does not draw its essence from Article 33 of the parties' agreement. Relying on language from 41 U.S.C. § 1710, the Arbitrator stated that Article 33 applies to NAF employees because a "direct conversion can occur as part of an agency action independent of A-76."²² However, a review of the statute demonstrates that the opposite is true. Title 41, § 1710 of the United States Code requires an A-76 study before

¹³ See Tr. at 11, 27; *Overseas Educ. Ass'n, W. Point Elementary Sch. Teachers*, 48 FLRA 213, 216 (1993) ("[T]he Arbitrator's acceptance of the documents did not prevent the [u]nion from adequately presenting its case and did not affect the fundamental fairness of the arbitration proceeding.>").

¹⁴ *U.S. DOD, Def. Commissary Agency*, 69 FLRA 379, 382 (2016) ("The [a]gency's belief that it may have been prejudiced, without more, does not demonstrate that the [a]rbitrator denied the [a]gency a fair hearing."). While the Agency correctly asserts that the June 2018 version of A-11 could not apply to a grievance filed in March 2018, Exceptions at 17, the portions of A-11 that the Arbitrator cited to in his award did not change from the 2017 and 2018 versions. *Compare A-11* (stating that "agencies are precluded from converting, in whole or in part, functions performed by federal employees to contract performance absent a public-private competition (a practice known as 'direct conversion')"), with Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget* (2017) (stating that "agencies are precluded from converting, in whole or in part, functions performed by federal employees to contract performance absent a public-private competition (a practice known as 'direct conversion')"). Consequently, we find that the Arbitrator committed harmless error by citing to the 2017 version of A-11 and that the Agency was not prejudiced so as to affect the fairness of the proceedings as a whole. *U.S. Dep't of VA, VA Med. Ctr., Louisville, Ky.*, 64 FLRA 70, 73 (2009) (finding that any alleged misinterpretation of past practice was "harmless error" because it did not affect the arbitrator's "pivotal finding" that the agency violated the parties' agreement).

¹⁵ To demonstrate that an award is deficient on this ground, the appealing party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain. *AFGE, Local 1415*, 69 FLRA 386, 386 (2016) (*Local 1415*).

¹⁶ Exceptions at 15.

¹⁷ Award at 26.

¹⁸ *Local 1415*, 69 FLRA at 386.

¹⁹ Award at 14. The Authority will find an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the excepting 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. *Library of Cong.*, 60 FLRA 715, 717 (2005) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

²⁰ Exceptions at 10, 13, 19.

²¹ *Id.* at 25.

²² Award at 24.

converting any appropriated fund functions.²³ While the Authority has held that parties may enforce contract provisions that independently impose certain contracting-out requirements,²⁴ we have also held that an arbitrator's interpretation of a contractual provision must conform with the regulations that are referenced²⁵ in that provision.²⁶ As noted above, an A-76 study does not apply to NAF employees.²⁷ Because the Agency's contracting-out of NAF employees does not require an A-76 study, and an A-76 study is a precondition to the Agency's duty to notify the Union of a direct conversion pursuant to Article 33, Article 33 does not apply in this situation.²⁸ Therefore, the Arbitrator's interpretation of Article 33 is implausible and we grant the Agency's essence exception as to Article 33.²⁹

2. We remand the award to the parties for resubmission to the Arbitrator to determine whether reassigning the employees to accounts payable from accounts receivable changed the actual duties performed by the employees.

While the Arbitrator found that Article 33 requires the Agency to notify the Union when it initiates a direct conversion,³⁰ he separately found that Article 36 creates a duty to bargain over the changes because the direct conversion was a change in the employees' conditions of employment.³¹ Consequently, the Arbitrator did not find that Article 33 creates a duty to bargain over direct conversions. Instead, the duty arises from Article 36, which requires the Agency to notify the Union and to bargain over changes in the employees' conditions of employment at the request of the Union.³²

Furthermore, the Arbitrator found that the Agency was required to notify the Union of the changes so that the Union could "choose its response" under Article 36.³³ As a result, he ordered the Agency to notify the Union of future direct conversions so that both parties could engage in "the necessary bargaining" to "lessen the impact of such personnel changes."³⁴ However, based on the Agency's argument that it did not have a duty to bargain under the current circumstances,³⁵ we find it necessary for the Arbitrator to determine whether there was a change to a condition of employment that required the Agency to bargain.

While arbitrators may direct prospective relief, including directing the agency to comply with the violated contract provision in conducting future actions,³⁶ the Authority has previously found that an agency has a duty to bargain only when a change to a policy or practice actually changes the working conditions of BUEs—as relevant here, the duties actually performed by

²³ 41 U.S.C. § 1710(a)(1)(B) ("A function of an executive agency performed by [ten] or more agency civilian employees may not be converted, in whole or in part, to performance by a contractor unless the conversion is based on the results of a public-private competition that . . . creates an agency tender, including a most efficient organization plan, in accordance with Office of Management and Budget Circular A[-]76, as implemented on May 29, 2003, or any successor circular") However, A-76 does not apply to non-appropriated fund employees. *See* A-76.

²⁴ *U.S. DOL*, 70 FLRA 27, 29 (2016) (Member Pizella dissenting).

²⁵ *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 58 FLRA 553, 554 (2003) (*BOP Guaynabo*) ("[U]nder the parties' agreement and [a]gency policy, the requirement to wear a uniform is a precondition to the [a]gency's obligation to provide employees a uniform allowance. As there is no dispute that non-correctional employees are not required to wear uniforms when temporarily assigned to correctional posts, they are, therefore, not entitled to the allowance.").

²⁶ Member Abbott notes that he believes that the Authority should reconsider its precedent concerning the extent to which parties are obligated to bargain, if at all, over contracting-out determinations and that this case presents the opportunity to do so.

²⁷ *See supra* note 1.

²⁸ *See BOP Guaynabo*, 58 FLRA at 554.

²⁹ The Agency also argues that the award is based on a nonfact and is contrary to law because the employees are NAF employees and, therefore, the Agency was not required to comply with either A-76 or 41 U.S.C. § 1710. Exceptions at 5, 11, 19. Because we grant the Agency's essence exception regarding Article 33, we need not address its contrary-to-law and nonfact exceptions, which do nothing more than restate the Agency's essence exception. *See AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009) (citation omitted).

³⁰ Award at 25.

³¹ *Id.* at 25-26.

³² *Id.* at 14-15.

³³ *Id.* at 29.

³⁴ *Id.* In this context, "necessary bargaining" can only be interpreted as impact and implementation bargaining that comports with Article 36 and requires the Union to request bargaining. *Id.*

³⁵ Exceptions at 25-27.

³⁶ *U.S. Dep't of the Army, U.S. Corps of Eng'rs Nw. Div.*, 65 FLRA 131, 133, 134 (2010), *overruled on other grounds by SSA*, 71 FLRA 798 (2020).

the grievants.³⁷ The Authority has also held that where an award is unclear and the arbitrator has not made sufficient findings for the Authority to determine whether the award is deficient, the Authority will remand the award.³⁸ In the instant case, the Arbitrator's award does not provide a sufficient basis for concluding that the employees' job duties changed as a result of the reassignment.³⁹ Consequently, we remand the award to the parties for resubmission to the Arbitrator, absent settlement. On remand, the parties need to address, and the Arbitrator must make factual findings regarding, whether assigning the grievants to work in accounts payable, rather than accounts receivable, constitutes an actual change to a personnel policy, practice, or matter that affects the working conditions of the grievants such that the Agency was obligated to bargain prior to the reassignment.⁴⁰

³⁷ *U.S. Dep't of the Air Force, Headquarters, 96th Air Base Wing, Eglin Air Force Base, Fla.*, 58 FLRA 626, 630 (2003) ("The Instruction issued by the Maintenance Commander did not change the nature of the crew chiefs assignments; it only changed the non-unit personnel making assignment determinations. Where, as here, an agency has an established practice of modifying work assignments in response to mission and workload fluctuations, assignments consistent with that practice are not bargainable changes in conditions of employment." (citation omitted)). The Authority has previously noted that the distinction between a contractual and a statutory duty to bargain is not warranted unless the contract language indicates that the contractual bargaining obligations differ substantively from the obligations that the Statute imposes. *U.S. Dep't of Commerce, Nat'l Inst. of Standards & Tech.*, 71 FLRA 199, 200 (2019) (*NIST*) (Member DuBester dissenting). Because the parties' agreement uses wording that is in accordance with the Union's § 7114(a)(2)(A) right to negotiate over the impact and implementation of an agency's exercise of management's rights, Award at 14, 26, we find that the issue before us is statutory. See *NIST*, 71 FLRA at 200.

³⁸ See *AFGE, Local 3408*, 70 FLRA 638, 639 (2018) (Member DuBester concurring) (remanding an award where "the [a]rbitrator's cursory analysis does not provide a sufficient basis for us to assess whether the award is deficient on the grounds raised by the [u]nion's exceptions"); *AFGE, Local 3506*, 64 FLRA 583, 584-85 (2010) (*Local 3506*) ("Where an arbitrator has not made sufficient factual findings for the Authority to assess or determine an [a]rbitrator's legal conclusions, and those findings cannot be derived from the record, the Authority will remand the award to the parties for further action.").

³⁹ Award at 26 ("To the extent that this case involved 'matters affecting the working conditions of employment which are in the scope of the Employer's authority,' and I find that it did, the agency was obligated to notify the union that the [employee's] jobs were being assigned to private contractor employees and to negotiate impact and implementation.").

⁴⁰ The Agency argues that the Arbitrator exceeded his authority for the same reasons that the award does not draw its essence from Articles 36 of the parties' agreement. Exceptions at 27. The Agency also argues that the award's remedy, which requires the Agency to notify the Union of direct conversions and to complete impact and implementation bargaining,

IV. Decision

We grant the Agency's exceptions in part. We also remand the award for further action consistent with this decision.

excessively interferes with management's right to contract out employees under § 7106(a)(2)(B) of the Statute. *Id.* at 10. The Agency also argues that the award is ambiguous, incomplete, and contradictory because it does not require the Union to comply with the parties' agreement by requesting to bargain in future actions and it excessively interferes with the Agency's management rights. *Id.* at 13. We do not reach these exceptions because the Arbitrator must first determine that there was an actual change to the employees' conditions of employment. *Local 3506*, 64 FLRA at 585 n.5 ("As it is unclear whether the [u]nion's other exceptions are inextricably intertwined with the issue of whether the award is contrary to law, we find it unnecessary to address those exceptions at this time.").

Member DuBester, dissenting in part:

I disagree that the award needs to be remanded to the Arbitrator. The Arbitrator found that the Agency violated Article 36, Sections 1 and 2 because it changed a “matter[] affecting the working conditions of employment which are in the scope of [its] authority.”¹ Specifically, the “matter” was the change of unit employee job duties “being assigned to private contractor employees.”² In my view, the Arbitrator made sufficient findings that the reassignment changed a condition of employment.³

The Agency does not dispute that the reassignment changed employees’ duties. Rather, it asserts that its contractual duty was limited to providing the Union with notice of the changes, and that, upon such notice, contrary to the Arbitrator’s award, the Union bears the burden to initiate bargaining.⁴ But the majority, stretching that argument, concludes that the question is whether the changes gave rise to a duty to bargain at all.⁵ And it finds that, although the Arbitrator found that the Agency initiated a change that warranted bargaining, “the Arbitrator’s award does not provide a sufficient basis for concluding that the employees’ job duties changed as a result of the reassignment.”⁶

However, the Arbitrator credited the Union’s testimony and referenced the record in finding that the Agency violated Article 36.⁷ As he discussed, ten employees had their duties changed from performing accounts receivable (AR) work to accounts payable work⁸ because the AR duties were being “automated,” contractors were being brought in to perform the AR duties during the transition to automation, and the

AR positions would ultimately be eliminated.⁹ He also found that the employees were required to train the contractors to perform their former AR duties.¹⁰ This unchallenged evidence clearly supports the Arbitrator’s conclusion that the employees’ duties were changed.

Accordingly, I dissent from the Decision to unnecessarily waste the parties’ time by remanding this case to the Arbitrator.

¹ Award at 26.

² *Id.*

³ Even if the Arbitrator had failed to make the necessary findings, a remand is not required under Authority precedent. See *AFGE, Local 2583*, 69 FLRA 538, 539 (2016) (“When an arbitrator does not set forth specific findings supporting his or her determinations, the Authority will examine the record to determine whether it permits the Authority to resolve the matter. If the record does, then the Authority will modify the award or deny the exception as appropriate. If the record does not, then the Authority will remand the award for further proceedings.” (citing *NAGE, SEIU, Local 551*, 68 FLRA 285, 289 (2015); *USDA, Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 53 FLRA 1688, 1694 (1998))).

⁴ Exceptions at 25 (arguing that “the Agency is only required to notify the Union” and that “[p]er Article 36 the Union has 14 days to request to negotiate”).

⁵ Majority at 5-6.

⁶ *Id.* at 7.

⁷ Award at 28.

⁸ *Id.* at 3.

⁹ *Id.* at 6-7, 26; see also Exceptions, Attach. 3, Joint Ex. 3 at 1 (acknowledging in the grievance response that the AR positions were being automated and then eliminated).

¹⁰ Award at 3-4. Additionally, it was undisputed that the employees were physically relocated. Exceptions, Attach. 1, Agency’s Post-Hr’g Br. at 13; Exceptions, Attach. 3, Mgmt. Ex. 1 at 1 (“management will proceed with the physical relocation of the below identified employees”).