71 FLRA No. 193

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL VETERANS AFFAIRS COUNCIL
(Union)

0-AR-5450

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DECISION

September 30, 2020

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

I. Statement of the Case

Arbitrator Stephen Crable issued an award finding that the Agency violated the parties' collective-bargaining agreement and § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)[1] by unilaterally reducing the per diem rate for certain expenses payable to employees traveling to participate in an Agency-required training. To remedy the violations, the Arbitrator, as relevant here, directed the Agency to restore the status quo ante and begin paying the per diem rate that existed before the reduction.

The Agency filed exceptions arguing that the awarded remedy is contrary to law because there is no statutory authority to retroactively pay the full per diem to travelers, and that the Arbitrator exceeded his authority to the extent the Arbitrator's remedy requires the payment of "actual expenses."[2] Because the Arbitrator did not award retroactive payments nor direct the payment of "actual expenses," we deny the exceptions.

II. Background and Arbitrator's Award

The Agency requires that certain employees attend a "[c]hallenge [t]raining" to ensure that they are qualified to perform their jobs.[3] That training is four to six weeks long and held in either Baltimore, Maryland or Denver, Colorado. As a result, attending the training typically requires extended travel outside of an employee's normal work location.

The Agency had paid meal and incidental expenses at the per diem rate set by the General Services Administration (GSA) to employees attending the challenge training or other types of training requiring extended travel. However, the Agency implemented a policy reducing the meal and incidental per diem rate to a "rate equal to 55%" of the GSA rate "when the travel assignment involves extended stays and the traveler is able to obtain lodging and/or meals at lower costs."[4]

The Union filed a grievance alleging that the Agency unilaterally implemented the reduction in the per diem rate in violation of the parties' agreement and the Statute. The parties were unable to resolve the grievance, and it proceeded to arbitration.

At arbitration, the parties stipulated to the following issue: "Whether the [Agency] violated the [parties' a]greement and/or federal law when it reduced the per diem rates . . . for bargaining[-]unit employees traveling to [c]hallenge [t]raining, and, if so, what shall the remedy be?"[5]

The Arbitrator found that the Agency violated Article 37, Section 3 of the parties' agreement (Article 37) by reducing the meal and incidental per diem rate. That section mandates that the Agency "pay all expenses . . . in connection with training required by the [Agency] to perform the duties of an employee's current position."[6] In addition, the Arbitrator concluded that the Agency violated Article 47 of the parties' agreement (Article 47)[7] and § 7116(a)(1) and (5) of the Statute by failing to properly notify the Union of, and bargain over, the reduction to the per diem rate.

As remedies, the Arbitrator directed the Agency to, in relevant part: "begin[] paying the full applicable GSA per diem rate[] for employees attending [c]hallenge [t]raining";[8] "cease and desist from further violations of

[1] 5 U.S.C. § 7116(a)(1), (5).
[2] Exceptions Br. at 5.
[3] Award at 10.
[4] *Id.* at 8.
[5] *Id.* at 2.
[6] *Id.* at 11 (quoting Collective-Bargaining Agreement Art. 37, § 3(A)).
[7] "Article 47 . . . outlines the procedures to be followed in making mid-term changes . . . ." *Id.* at 12.
[8] *Id.* at 14.

Article 37, Section 3";[9] restore the "status quo ante";[10] and initiate bargaining over any proposed rate reduction consistent with Article 47.

On December 26, 2018, the Agency filed exceptions to the award, and, on January 25, 2019, the Union filed an opposition to the exceptions.

III. Analysis and Conclusion: The Agency's exceptions challenge a remedy not contained within the award.

The Agency argues that the awarded remedy is contrary to law[11] and that the Arbitrator exceeded his authority.[12] Both of these exceptions are premised on the Agency's view that the Arbitrator directed it to (1) retroactively pay the difference between the GSA rate and the reduced rate to employees who received the reduced per diem rate,[13] and (2) pay employees' "actual expenses" related to attending the challenge training.[14]

The Arbitrator did not direct backpay, reimbursement, or any other retroactive monetary remedy to any employees. Although the Arbitrator directed status quo ante relief, that remedy does not require the Agency to reimburse employees who received the reduced per diem rate after the Agency implemented the policy. Instead, the status quo ante remedy simply *returns* the per diem rate to the full GSA rate that existed before the reduction, places the parties in the position that they were in before the reduction, and provides the Agency with an opportunity to comply with Article 47 and § 7116(a)(1) and (5) of the Statute before initiating a rate reduction.[15] Moreover, contrary to the Agency's claim,[16] the award does not include the phrase, let alone direct the payment of, "actual expenses." The awarded remedy relates to the payment of per diem *rates*,[17] not expenses.[18] Thus, the Agency's contrary-to-law and exceeds-authority exceptions are based on a misunderstanding of the award. As such, the exceptions do not show that the award is deficient,[19] and we deny them.

The dissent's assessment of this case is flawed in several respects. First, while focusing upon our use of the term "misunderstanding,"[20] the dissent fails to contest our dispositive holding: that both of the Agency's exceptions are premised on an erroneous view of the award. Whether that erroneous view stems from the Agency's inadvertent "misunderstanding" or a more purposeful "mischaracterization" of the award, the dissent does not deny that the Agency's construction of the award is inaccurate. Consequently, the outcome must be the denial of the exceptions on which that inaccurate construction is based. By disparaging this decision's use of the word "misunderstanding," the dissent "engages in

[9] *Id.* at 16.
[10] *Id.*
[11] Exceptions Br. at 5.
[12] *Id.* at 5-6.
[13] *Id.* at 4-5.
[14] *Id.* at 5. We note that the Agency elected not to challenge the merits of the Arbitrator's award.
[15] *See* Award at 16 (directing the Agency to "initiate mid-term bargaining as provided by Article 47 if it wishes to change the per diem rates for [c]hallenge [t]raining"). After the Arbitrator issued the award, the Agency emailed the Arbitrator requesting that he clarify the remedy as it pertained to "the Agency's obligation to retroactively pay per diem to [employees]." Exceptions, Ex 6 at 2. The Arbitrator responded by email. In his email, the Arbitrator stated that, "employees incorrectly paid a reduced per diem should likewise be restored to their pre dispute status and possessed of the rights which they enjoyed immediately prior to the unilateral change in per diem rates." Exceptions, Ex.7 at 1. But the Arbitrator also explained that he did not "further address the issue of retroactivity [in the award] since the record did not provide [him] with sufficient information regarding the specific procedures, law and regulations for claiming incorrectly paid per diem." *Id.* Chairman Kiko finds it unnecessary to consider the Arbitrator's post-award email. As we recently stated in *U.S. Dep't of VA, Gulf Coast Veterans Healthcare Sys.*, 71 FLRA 752, 753 (2020) (*Dep't of VA*) (Member DuBester concurring), it is not the Authority's role "to referee email communications between parties and an arbitrator." *Dep't of VA* exemplifies how off-the-record communications can lead to additional disputes. Asking the Authority to resolve a disagreement pertaining to emails that are tangentially related to an underlying dispute is not an effective and efficient use of government resources. For that reason, the Chairman discourages arbitrators from engaging in post-award, off-the-record communications concerning substantive questions that should have been resolved during the arbitration proceeding.
[16] Exceptions Br. at 5.
[17] We note that the Union, in its opposition, interprets the award as *not* directing any retroactive monetary relief or as requiring the payment of "actual expenses." Opp'n at 6 (asserting that the award does not direct "the Agency to pay to the Union or any employees any money, neither per diem nor actual expenses").
[18] Award at 16 (directing the Agency to begin "paying the full applicable GSA per diem rates to employees").
[19] *See SPORT Air Traffic Controllers Org.*, 66 FLRA 552, 554 (2012) ("Exceptions that are based on misunderstandings of an arbitrator's award do not show that an award is contrary to law."); *see also U.S. DHS, U.S. CBP*, 66 FLRA 838, 844 (2012) (misunderstanding does not establish that arbitrator exceeded authority).
[20] Dissent at 6 n.1.

technical hairsplitting of the highest order and a machination that we refuse" to further engage.[21]

Second, the dissent's conclusions disregard the arguments that brought this dispute before the Authority for resolution. The dissent does not address any of the Agency's exceptions to the award. And, contrary to the dissent's assertion, the Agency does not argue that "the award excessively interferes with its § 7106(a) rights."[22] In fact, the exceptions do not use any variation of the phrase "excessive interference," reference any management right in § 7106, or cite that section of the Statute.[23]

Third, the dissent asserts that per diem rates are specifically provided for in the "Travel Expenses Act" (the Act),[24] such that disputes involving per diem rates are excluded from the grievance procedure under § 7103(a)(14)(C) of the Statute. Neither the Union, the Agency, nor the Arbitrator mentioned the Act as a basis for the grievance, the exceptions, or the award, respectively. In addition, the stipulated issue before the Arbitrator was, as relevant here, whether the Agency violated Article 37 of the parties' agreement.[25] As the claim advanced to, and resolved by, the Arbitrator involved the application and interpretation of a collective-bargaining agreement, we have jurisdiction.[26] The dissent concludes otherwise, stating that the Civilian Board of Contract Appeals (the Board) has jurisdiction over this dispute.[27] However, the dissent cites no authority to support that assertion, and the Board itself acknowledges that it "*lacks* authority to settle [a] claim using [its] administrative procedures" when the claim "is subject to resolution under the terms of a grievance procedure mandated within a collective[-]bargaining agreement."[28] Thus, even the Board recognizes that matters governed by the Federal Travel Regulations are subject to any applicable negotiated grievance procedure.

IV. Decision

We deny the Agency's exceptions.

[21] *U.S. DOD Educ. Activity*, 71 FLRA 900, 902 n.20 (2020) (Member Abbott concurring; Member DuBester dissenting). We note that in a Member-Abbott-authored decision, the Authority denied exceptions because the "[u]nion appear[ed] to *misunderstand* the award." *See AFGE, Local 933*, 70 FLRA 508, 510 (2018) (emphasis added).

[22] Dissent at 7.

[23] Chairman Kiko notes that the dissent persuasively argues that an agency exercises a § 7106(a) right when it establishes and implements a per diem policy. But, resolution of such an argument is best saved for a case where a party to the dispute has presented it. *See Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (noting the general rule that "our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the . . . arguments entitling them to relief" (quoting *Castro v. United States*, 540 U.S. 375, 381-38 (2003) (Scalia, J., concurring in part and concurring in judgment))); *see also Burgess v. United States*, 874 F.3d 1292, 1300 (11th Cir. 2017) (when "a court engages in . . . raising claims or defenses on [a party's] behalf, the court may cease to appear as a neutral arbiter, and that could be damaging to our system of justice").

[24] Dissent at 6 (citing 5 U.S.C. §§ 5701-5702).

[25] Award at 2.

[26] 5 U.S.C. § 7103(a)(9)(C)(i) (defining "grievance" as any complaint concerning "the effect or interpretation, or a claim of breach, of a collective[-]bargaining agreement").

[27] Dissent at 8.

[28] *See In the Matter of James R. Linder*, CBCA 2559-RELO, 12-1 BCA ¶ 34,974 (March 16, 2012) (emphasis added); *see also In the Matter of Forrest S. Ford*, CBCA 1289-RELO, 09-2 BCA ¶ 34,163 (May 22, 2009) (noting that the Board lacks jurisdiction unless the collective-bargaining agreement "explicitly and clearly excludes the claim from its [negotiated grievance] procedure[]").

Member Abbott, dissenting:

Unlike the majority, I would conclude that the Arbitrator's award is contrary to law[1] because it excessively interferes with the Agency's § 7106(a) rights to determine its budget and to assign work. But, as I have noted before, there is an edge to the reach of the Federal Service Labor-Management Relations Statute.[2] The matters underlying this grievance go beyond that edge. For this reason, I would also conclude that the matters addressed in this grievance are not matters that may be pursued under the parties' negotiated grievance procedures because they are "specifically provided for by Federal statute" [3] — the Travel Expenses Act[4] (much like the Privacy Act[5] and Debt Collection Act[6]), implemented by 41 C.F.R. Subtitle F and the Federal Travel Regulations (FTR).[7]

The majority avoids the point that is most relevant to the resolution of this case. From its inception, this grievance concerned the *implementation* of a policy that reduced per diem rates for bargaining unit employees on extended detail or training. In its grievance, the Union asserts that it is "well established that *prior to implementing* a change in a condition of employment, an agency is . . . required to provide . . . notice of the change and an opportunity to bargain."[8] More specifically, the Union argues that the Agency "unilaterally *implement[ed]*" the policy and violated its statutory obligation to bargain.[9] Although the Union also argues that the policy contradicts Article 37, that point is irrelevant, if as the Agency asserts, that it had no obligation to bargain and the award excessively interferes with its § 7106(a) rights.

The Agency correctly points out that the establishment of per diem rates is "distinct from the payment of actual expenses under the [FTR]."[10] The former is a matter that falls under the Agency's § 7106 rights "to determine the . . . budget . . . of the agency"[11] and "to assign work"[12] while the latter involves a specific claim concerning whether an employee was appropriately reimbursed under that policy.[13] The Agency was not obligated to bargain over the policy itself, but had the Union requested to bargain over the implementation of the policy, the Agency would have been obligated to do so.

In its grievance, however, the Union does not challenge that the Agency refused to bargain over § 7106(b)(2) procedures or § 7106(b)(3) arrangements, such as, how and when bargaining-unit employees should be notified about the policy change, or to which office a travel form must be directed, or whether travel claims will be submitted electronically or by paper. Instead, the Union directly challenges the Agency's unfettered prerogative to *implement* a policy that is provided for by federal statute and falls under the Agency's § 7106(a) rights to determine its budget and to assign work, a point undermined by the majority's analysis. Thus, the Arbitrator's award is contrary to law to the extent he concluded that the Agency had an obligation to bargain and thus violated § 7116(a)(1) and (5), Article 37, Section 3, which provides the requirement to pay specific travel expenses, and Article 47, which requires the Agency to notify the Union of certain changes.

Because the Agency was acting pursuant to federal statute and its rights to determine its budget and to

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[1] The majority asserts that the Agency's contrary-to-law exception is based on a "misunderstanding" of an arbitrator's award. As I noted recently in *United States DOD, Defense Logistics Agency, Richmond, Virginia*, the Authority is not sufficiently clairvoyant to determine whether a party understands or misunderstands an award. Whether a party understands or misunderstands an award is quite irrelevant and, more importantly, does not constitute a basis upon which to dismiss or deny an exception. Exceptions may be wrong and they may raise an argument that was not raised during arbitration, but the characterization that a party does not understand an award, much like the name-calling of a schoolyard bully, serves no useful purpose and often, as demonstrated below, avoids the issue that is most necessary to an appropriate resolution of the case.

[2] *See U.S. Dept of VA, Veteran Benefits Admin., Nashville Reg'l Office*, 71 FLRA 322, 324 (2019) (*VBA Nashville*) (Member Abbott concurring; Member DuBester dissenting) (Concurring Opinion of Member Abbott, discussing the Privacy Act).

[3] 5 U.S.C. § 7103(a)(9), (a)(14)(C).

[4] *Id.* §§ 5701-5702, 5704, 5706-5707; 41 C.F.R. Subtitle F.

[5] *See VBA Nashville*, 71 FLRA at 324 (Concurring Opinion of Member Abbott).

[6] *See U.S. DOD Educ. Activity, U.S. DOD Dependents Schs.*, 70 FLRA 718, 720 (2018) (Member DuBester dissenting).

[7] In footnote 21 my colleagues take issue with language contained in a unanimous decision of the Authority, which I authored for the Authority. I have repeatedly pledged to make the Authority's decisions as transparent as possible. One way to accomplish that end is to acknowledge, for the benefit of the labor-management relations community, which Member penned each decision issued by the Authority. My colleagues have not joined me in this effort at transparency. It should be noted, however, that Authority decisions, whether or not identifying which Member prepared the decision for the Authority, every decision of the Authority is authored by one of the three Members and requires the consensus of at least two Members. In order to achieve consensus, any number of compromises and accommodations may be necessary, as was the case in *AFGE, Local 933*, 70 FLRA 508 (2018).

[8] Exceptions, Ex. 2, National Grievance at 2 (emphasis added).

[9] *Id.* at 1 (emphasis added).

[10] Exceptions at 5.

[11] 5 U.S.C. § 7106(a)(1).

[12] *Id.* § 7106(a)(2)(B).

[13] Exceptions at 5.

assign work, there could be no violation of Article 37, Section 3. That provision simply provides that an employee should be paid those "expenses" to which she is entitled under the authorized per diem rates. The majority is correct that such disputes – concerning what expenses may or may not be covered during any particular travel undertaken by an employee or the calculation of the amount of reimbursement to be paid to the employees as part of that travel – are matters that may be addressed through the parties' negotiated grievance procedure. As any federal employee who has traveled under Agency funded travel is well aware, those matters will generally arise, for example, when the employee and Agency dispute whether the employee is entitled to a full or partial day reimbursement when traveling to or from a duty location, whether the employee's per diem should be reduced when a training includes lunch in the tuition, etc. But that is not this grievance. As noted above, the Union's grievance here was about the Agency's unilateral *implementation* of the new policy and its failure to properly notify the Union of the change and satisfy its statutory obligation to bargain.

The majority is simply wrong that the Civilian Board of Contract Appeals (CBCA) does not have jurisdiction over a direct challenge to the Agency's authority to implement per diem rates for travel pertaining to extended details and training. *In the Matter of James R. Linder*[14] does not support the majority. That case concerned a dispute over the "*misapplication* of [of existing and already-implemented] travel and relocation regulations."[15] Not a dispute, as here, that concerns the Agency's *implementation* of a new policy that established the per diem rates which would be applied to future travel of employees. This distinction is important. The former is properly addressed under the parties' CBA, the latter is properly a matter for the CBCA.

For the reasons discussed above, I would conclude that the Arbitrator's award is contrary to law and that the matters underlying the grievance fall outside the scope of the parties' CBA.

[14] CBCA 2559-RELO, 12-1 BCA ¶ 34,974 (March 6, 2012).
[15] *Id.*