72 FLRA No. 58

ASSOCIATION OF
ADMINISTRATIVE LAW JUDGES
INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS
(Union)

and

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARING OPERATIONS
(Agency)

0-AR-5553

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DECISION

May 25, 2021

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

I. Statement of the Case

Arbitrator Marilyn H. Zuckerman denied the Union's grievance alleging that the Agency violated the parties' collective-bargaining agreement and § 7116(a)(1) or (5) of the Federal Service Labor-Management Relations Statute (the Statute) when it notified the Union of its intent to reduce the maximum office size for Administrative Law Judges (ALJs) and requested to bargain over the change. The Union filed exceptions to the award on contrary-to-law, essence, and exceeded-authority grounds. Because the Union does not demonstrate that the award is deficient, we deny the exceptions.

II. Background and Arbitrator's Award

Article 29 of the parties' agreement (Article 29) provides, in pertinent part, that ALJs "shall be provided an individual private office consistent with the provisions of Article 29 and its Sidebar."[1] The Sidebar provides that "[w]hen the Agency opens, moves, relocates, expands, or renovates an office, [it] shall follow the terms and conditions of the March 1998 Space Allocation Standard (SAS), . . . until such time as the [Agency] and the [Union] bargain any changes in the SAS to agreement or through the impasse procedures to the extent required by 5 U.S.C. Chapter 71 and/or this Sidebar."[2]

On July 30, 2018, the Agency notified the Union that it planned to reduce the maximum office size for ALJs from 200 to 120 square feet, and offered to bargain over the change. The Union responded that the issue of office space was not subject to midterm bargaining under the terms of Article 29, the Sidebar, and the SAS, but agreed to engage in bargaining while reserving its right to take legal action on the basis that the midterm negotiations violated Article 29. Subsequently, the parties exchanged proposals and met with a mediator, but were unable to reach an agreement. On September 4, 2018 the Union filed a grievance asserting, in relevant part, that it had no obligation to bargain over matters covered by the parties' agreement. The Agency denied the grievance and the parties submitted the grievance to arbitration.

In relevant part, the parties stipulated to the following issue: "Did the Agency violate [§] 7116(a)(1) or (5) of [the Statute] or the [parties' agreement] when it notified the Union of its intent to reduce the size of future ALJ offices during the term of the [parties' agreement]?"[3]

In response to the Union's argument that ALJ office size was "covered by" the parties' agreement, the Arbitrator reviewed the language of the agreement, the Sidebar, and the SAS. She found that Article 29 does not mention office size and that the Sidebar only requires that the parties follow the SAS. And although the SAS provides guidelines for the development of office space for ALJs, the Arbitrator found that it "does not create entitlements for individual ALJs to have an office of a specific size."[4] Therefore, she determined that the matter was not expressly contained in those agreements. She also found that the "issue of the specific guaranteed office size is also not inseparably bound up with the [parties' agreement], Sidebar and SAS because these documents do not guarantee a specific office size."[5]

[1] Award at 6 (quoting Art. 29, § 3.E).

[2] *Id.* (quoting the Sidebar). The SAS is an agreement between the Agency and the General Services Administration's Public Building Service, which is responsible for most aspects of Agency-occupied real estate. Award at 12. The SAS states that "[i]t should be understood that space allowances noted below are considered guidelines for developing office layouts and should not be considered as entitlements." *Id.* at 7 (quoting SAS § I.1). The SAS also states that "[t]he following requirements are authorized and will be provided as an initial space alteration: . . . Allow each subordinate ALJ a private office that will not exceed 200 sq. ft." *Id.* (quoting SAS § I.1a). SAS Table C also references 200 square feet of office space for ALJs. *Id.*

[3] *Id.*

[4] *Id.* at 16.

[5] *Id.*

Additionally, the Arbitrator found that the Sidebar "states that the parties can bargain any changes in the SAS to agreement or through the impasse procedures to the extent required by 5 U.S.C. Chapter 71 and/or the Sidebar."[6] Thus, she concluded that "any requirement that an ALJ office size be 200 [square feet] is not covered by the [parties'] agreement."[7]

Instead, she found that the 200 square foot office size had been established through past practice, which the Agency sought to change through bargaining pursuant to Article 2 of the parties' agreement.[8] She also found that the Agency did not engage in bad faith bargaining during the course of negotiations to reduce office size. Therefore, she concluded that the Agency did not violate the parties' agreement or § 7116(a)(1) or (5) of the Statute, and she denied the grievance.

On October 15, 2019, the Union filed exceptions to the award, and the Agency filed an opposition to the Union's exceptions on November 15, 2019.

III. Analysis and Conclusions

A. The award is not contrary to law.

The Union argues that the award is contrary to law because the Arbitrator found that ALJ office size is "only a condition of employment, rather than a matter covered by the [agreement]" and therefore subject to midterm bargaining.[9] The Union further contends that the issue is not "whether or not ALJs have a 'guarantee' of a specific office size" but "whether the Agency is trying to change the terms of the [parties' agreement] outside of term bargaining."[10] To support this argument, the Union asserts that the terms of the SAS, which required 200 square feet to be used in planning space layouts, were "expressly included in the parties' [agreement] through the Sidebar to Article 29," and therefore the matter is covered by the parties' agreement.[11]

It is well established that before changing conditions of employment, an agency must provide the union with notice and an opportunity to bargain over those aspects of the change that are within the duty to bargain.[12] The "covered by" doctrine excuses parties from an obligation to bargain on the basis that they have already bargained and reached agreement concerning a disputed matter.[13] However, the Authority has declined to find a matter covered by a collective-bargaining agreement where the agreement specifically contemplates bargaining to resolve the matter.[14]

As the Arbitrator found, Article 29 does not mention office size and neither the Sidebar nor the SAS guarantees a particular office size.[15] Additionally, we find unavailing the Union's argument that the Agency could not reduce office sizes because the SAS stated that 200 square feet offices were to be used in planning office layout.[16] As noted previously, the Sidebar requires the parties to "follow the terms and conditions of the . . . []SAS[] . . . until such time as the [Agency] and the [Union] bargain any changes in the SAS to agreement or through the impasse procedures."[17] Therefore, we agree with the Arbitrator's finding that the Sidebar specifically contemplated bargaining over changes to the terms of the SAS, which includes the square footage of ALJ offices. Accordingly, the Arbitrator's finding that the matter was not covered by the agreement is not contrary to law.[18]

B. The award draws its essence from the parties' agreement.

The Union argues that the award fails to draw its essence from the parties' agreement because "it ignores the Sidebar's requirement to apply the 'terms and conditions' of the [] SAS."[19] According to the Union, "[b]asic fidelity to this language required the Arbitrator to consider" whether the proposed change altered the SAS, but the award "determines the issue of midterm

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[6] *Id.* at 15.
[7] *Id.*
[8] The Arbitrator found that Article 2 "authorizes bargaining over mid-term changes in conditions of employment." *Id.* at 17.
[9] Exceptions Br. at 13. In resolving a contrary to law exception, the Authority reviews any question of law raised by the exception and the award de novo. *U.S. Dep't of State, Bureau of Consular Affs., Passport Servs. Directorate*, 70 FLRA 918, 919 (2018). In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.* In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts. *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014).
[10] Exceptions Br. at 14.
[11] *Id.* at 15.
[12] *U.S. Dep't of the Interior, U.S. Geological Surv., Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 737 (2015) (citing *U.S. Army Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 53 FLRA 79, 81 (1997)).
[13] *AFGE, Loc. 1916*, 64 FLRA 532, 533 (2010) (citing *SSA, Headquarters, Balt., Md.*, 57 FLRA 459, 460 (2001)).
[14] *U.S. Dep't of HUD*, 66 FLRA 106, 109 (2011) (citing *U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 12 (2000)).
[15] Award at 15-16.
[16] Exceptions Br. at 14.
[17] Award at 6 (quoting the Sidebar).
[18] The Union also contends that the Arbitrator misread the SAS and its tables. Exceptions Br. at 15-18. However, this argument challenges the Arbitrator's interpretation of the SAS and does not provide a basis for finding that the award is contrary to law. *U.S. DOL (OSHA)*, 34 FLRA 573, 578 (1990).
[19] Exceptions Br. at 18.

negotiability solely based on an assessment of whether the SAS guarantees ALJs 200 [square foot] offices."[20]

When reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority will find that an arbitration award is deficient as failing to draw its essence from the 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.[21]

The record does not support the Union's claim that the Arbitrator ignored the Sidebar's incorporation of the terms of the SAS, failed to follow the "express, plain language" of the Sidebar, or determined the issue solely on the basis of whether the SAS guaranteed ALJs 200 square foot offices.[22] To the contrary, the Arbitrator found that the Sidebar permitted the parties to "bargain any changes in the SAS to agreement or through the impasse procedures"[23] and that such bargaining was not limited to term bargaining. Although the Union disagrees with the Arbitrator's conclusion that the terms of the SAS could be changed through midterm bargaining, the Union does not demonstrate that the Arbitrator's interpretation of the Sidebar is implausible, irrational, or in manifest disregard of the parties' agreement.[24] Moreover, to the extent that the Union incorporates the arguments raised in its contrary-to-law exception to assert that the award fails to draw its essence from the parties' agreement,[25] we reject those arguments on the same basis that we rejected the Union's contrary-to-law exception.

Accordingly, we deny the Union's essence exception.

C. The Arbitrator did not exceed her authority.

The Union also argues that the Arbitrator exceeded her authority by changing the stipulated issue "to one not presented – did the [parties' agreement] guarantee ALJs would receive 200 [square foot] offices."[26] Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration or resolve an issue not submitted to arbitration.[27] However, the Authority has consistently held that arbitrators do not exceed their authority by addressing any issue that is necessary to decide a stipulated issue or by addressing any issue that necessarily arises from issues specifically included in a stipulation.[28]

Here, the stipulated issue was whether the Agency violated the Statute or the parties' agreement "when it notified the Union of its intent to reduce the size of future ALJ offices during the term of the [parties' agreement.]"[29] The Arbitrator addressed the issue of whether ALJs were guaranteed a specific office size because the Union asserted that the matter of ALJ office size was covered by the parties' agreement and thus not subject to bargaining.[30] The issue of whether a specific office size was guaranteed in the parties' agreement was both closely related to the stipulated issue and consistent with the arguments raised by the Union. Therefore, the Arbitrator did not exceed her authority by addressing it.[31] Consequently, we deny this exception.[32]

IV. Decision

We deny the Union's exceptions.

[20] *Id.*
[21] *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017); *see also U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 103, 104 & n.13 (2019).
[22] Exceptions Br. at 19.
[23] Award at 15.
[24] *U.S. DOJ, Fed. BOP, Corr. Inst, McKean, Pa.*, 49 FLRA 45, 49 (1994).
[25] Exceptions Br. at 19.
[26] *Id.* at 20.
[27] *AFGE, Loc. 3254*, 70 FLRA 577, 578 (2018) (*Loc. 3254*) (citing *U.S. DOJ, Fed. BOP, Metro. Det. Ctr. Guaynabo, P.R.*, 68 FLRA 960, 966 (2015); *SSA, Off. of Disability Adjudication & Rev., Springfield, Mass.*, 68 FLRA 803, 806 (2015)).
[28] *AFGE, Loc. 3911, AFL-CIO*, 68 FLRA 564, 568 (2015) (*Local 3911*) (citing *U.S. DHS, U.S. ICE*, 65 FLRA 529, 536 (2011)) (an arbitrator does not exceed his or her authority by addressing that matter if doing so is consistent with the arguments raised before him or her).
[29] Award at 7.
[30] *See id.* at 8.
[31] *Local 3911*, 68 FLRA at 568.
[32] To the extent that the Union also argues that the Arbitrator exceeded her authority by failing to resolve the stipulated issue, *see* Exceptions Br. at 19-22, we reject that argument because we find the award responsive to the stipulated issue. *See, e.g.*, *Loc. 3254*, 70 FLRA at 578-79.

Member Abbott, concurring:

I agree with the majority's decision to deny the Union's exceptions, but I do so reluctantly. In my view, the Sidebar unavoidably conflicts with 5 U.S.C § 7106(a) of the Federal Service Labor-Management Relations Statute (the Statute).[1]

Based on how the parties framed the issues and concessions made by the Agency, my colleagues reasonably conclude that the Sidebar "language" agreed to by the Agency indicates that it "contemplated bargaining over changes . . . includ[ing] the square footage of the [Administrative Law Judge (ALJ)] offices."[2] And, because the Authority has declined to find a matter covered by a collective-bargaining agreement where the agreement specifically contemplates bargaining, the Arbitrator's finding – that the matter was not covered by the Sidebar and therefore required mid-term bargaining – is not contrary to law. This focus on the language of the Sidebar and whether the decision to reduce ALJ office size was or was not covered by its terms misses the key, unresolved issue – whether the agreement or the Arbitrator's interpretation of its terms conflicts with § 7106(a). However, the Agency did not raise any § 7106(a) arguments.

It is noteworthy that the Agency's change to ALJ office space allocations resulted from a directive from the Office of Management and Budget. The directive sought to "reduce the size of its real-estate footprint"[3] because "after labor, real estate is the second highest cost for Agency operations."[4] Consequently, the goal to reduce office size was based on considerations related to the Agency's budget. Decisions that concern how an Agency will allocate its resources are management rights protected under § 7106(a) of the Statute. Thus, this grievance should have been resolved, not by considering whether the Sidebar contemplated bargaining but, by determining whether the Agency's decision to reduce office size required bargaining required bargaining at all.[5] But, because the Agency did not address this issue, it is understandable that neither does our decision.

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[1] 5 U.S.C § 7106(a).
[2] Majority at 4.
[3] Opp'n at 7.
[4] *Id.* at 3 (citing Opp'n, Ex. 1A, Hr'g Tr. at 161).
[5] The Arbitrator's award could potentially interfere with the Agency's rights under the Statute, thereby resulting in a § 7106(a) issue. For example, absent the Sidebar and its language, the Arbitrator could have found that the space allocations were covered by the parties' agreement and therefore the Agency violated the parties' agreement by proposing a change in office sizes without bargaining with the Union.