

72 FLRA No. 135

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

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-5736

DECISION

March 14, 2022

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

Decision by Member Abbott for the Authority

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated Article 32, Section 1 of the parties' National Agreement (NA) and committed an unfair labor practice (ULP) pursuant to § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute¹ (Statute) when it unilaterally implemented changes to the annual leave procedures for certain bargaining-unit employees (BUEs). Arbitrator Andrew M. Strongin sustained the grievance, finding that the unilaterally implemented changes were covered by the NA. The Agency filed an exception arguing that the award failed to draw its essence from the parties' NA. Because the Agency fails to establish that the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, we deny the Agency's exception.

II. Background and Award

Article 32, Section 1 of the parties' 2016 NA² and local procedures and practices mutually agreed upon by the parties in their Memorandum of Understanding

(MOU)³ governed annual leave for BUEs within the Information Technology division, User & Network Services, Customer Service Support area (UNS/CSS). In February 2017, the Agency sent a notice to the Union regarding mid-term bargaining for changes to Article 32 of the NA as it applied to certain BUEs within UNS/CSS.⁴ The Agency reasoned that "[UNS/CSS] lacks a consistent annual leave request process which is challenging for scheduling office coverage."⁵ The 2016 NA was not open for negotiations at the time and the Union informed the Agency that the change was covered by the 2016 NA. Nonetheless, operating under the position that bargaining was permissive rather than mandatory, the Union agreed to exchange proposals.

The parties bargained for over two years without reaching agreement over the proposed changes to UNS/CSS annual leave procedures. Eventually, the Union withdrew from bargaining, reiterating its position that the bargaining had been permissive. In the meantime, the 2019 NA was negotiated and executed without any changes to Article 32. When the Agency threatened unilateral implementation of its proposed changes to the UNS/CSS annual leave procedures, the Union filed the instant grievance alleging that the Agency violated Article 32, Section 1 of the parties' 2019 NA and committed a ULP pursuant to 5 U.S.C. § 7116 (a)(1) and (5).⁶

Approximately two months after the Union invoked arbitration of the grievance, the Agency unilaterally implemented a new standardized annual leave solicitation process.⁷ At arbitration, the Arbitrator specified the issues as whether "the Agency violated Art[icle] 32 of the 2019 NA and committed an unfair labor practice in violation of the Statute, 5 U.S.C. § [] 7116(a)(1) and (5), by unilaterally implementing, over the Union's objection, certain changes to Art[icle] 32 of the 2019 NA in relation to affected employees, defined by the parties as those within [UNS/CSS]."⁸

At arbitration, the Union argued that the Agency's changes were covered by Article 32 of the 2019 NA and the Agency's "unilateral implementation of changes over the Union's objection violate[d] both Art[icle] 32 of the 2019 NA and [§] 7116(a)(1) and (5) of

³ See Opp'n, Attach. 5, Union Ex. 3 at 3-6.

⁴ Opp'n, Attach. 7, Joint Ex. 2.

⁵ *Id.*

⁶ Opp'n, Attach. 1, Joint Ex. 3.

⁷ In summary, the new annual leave solicitation process provided that leave solicitation would occur three times a year instead of various times a year, requests would be made using forms, employees would be placed in a "pool" based on their General Schedule level, and leave would be approved based on pool/seniority and shift. Award at 5.

⁸ *Id.* at 2.

¹ 5 U.S.C. § 7116(a)(1), (5).

² The language of Article 32, Section 1 is the same in the 2016 NA and the 2019 NA. See Opp'n, Attach. 4, Joint Ex. 1, 2019 NA (2019 NA) at 111.

the Statute.”⁹ Furthermore, the Union argued that the Agency’s changes violated the local MOU regarding leave procedures. The Agency, however, argued that the changes were not covered by Article 32 because the article “contains procedures for annual leave, but is silent on the process by which those procedures are to be implemented consistent with management’s right to assign work.”¹⁰

Ultimately, the Arbitrator found that the Agency violated Article 32 of the parties’ 2019 NA and committed a ULP by unilaterally implementing changes to the annual leave procedures. The Arbitrator reasoned that “the change[s] created new national standards, not contained within Art[icle] 32, replacing the mutually-agreed local procedures and practices that filled whatever gaps existed in the Art[icle] 32 requirements.”¹¹ The Arbitrator also determined that Article 32 “‘covers’ leave procedures in that, by agreement of the parties, it establishes a framework for leave requests that the parties have augmented by local procedure and practice . . . [and] the combination works in this case to ‘cover’ the leave procedures at issue and, therefore, to preclude the Agency’s unilateral mid-term changes.”¹² Accordingly, the Arbitrator concluded that “[t]he time for the Agency to alter the established administration of leave requests . . . was when Art[icle] 32 was open for negotiation,” not through unilateral implementation after leaving Article 32 untouched during renegotiations.¹³

The Agency filed an exception to the award on May 21, 2021, and the Union filed an opposition on June 21, 2021.

III. Analysis and Conclusion: The award draws its essence from the parties’ agreement.

The Agency does not dispute the fact that it unilaterally implemented changes to the annual leave procedures, but it argues that the award fails to draw its essence from the parties’ agreement because the Arbitrator disregarded the language of the NA by asserting that past practice can only be altered during term bargaining and by relying upon past practices to augment the terms of Article 32.¹⁴ We disagree.

First, the Agency argues that Article 54, Section 2(C) “gives the parties the option of addressing past practice without resorting to term bargaining.”¹⁵ That provision provides that a party who wishes to propose a change to a “continuing practice” will follow the parties’ negotiated midterm bargaining procedures “to provide notice and bargain to the extent required by law.”¹⁶ Relying on Article 54, the Agency takes issue with the award’s “repeated references to Article 32 and local past practice and procedures as subjects that can be addressed only during term negotiations.”¹⁷ The Arbitrator did not find that changes to annual leave procedures could *only* be addressed during term bargaining. Instead, the Arbitrator found that the parties could engage in midterm bargaining, but that it would be permissive and not mandatory because annual leave procedures were covered by the parties’ existing agreement. And since the Agency failed to raise any objections to the procedures during term negotiations and prior to the execution of the 2019 NA, the Agency could not unilaterally implement changes to the procedures of Article 32 or the mutually agreed upon local practices and procedures of the MOU.¹⁸ Because Article 54 states that parties may midterm bargain “to the extent required by law,”¹⁹ and the Arbitrator found that the law only provided for permissive bargaining under these circumstances, the Agency fails to demonstrate how the

plausible interpretation of the agreement; or (4) evidences a manifest disregard for the agreement. *AFGE, Loc. 3342*, 72 FLRA 91, 92 (2021); *U.S. Dep’t of Educ., Fed. Student Aid*, 71 FLRA 1166, 1167 n.11 (2020) (then-Member DuBester concurring) (citing *U.S. Dep’t of State, Passport Servs.*, 71 FLRA 12, 13 n.18 (2019)); *AFGE, Loc. 1594*, 71 FLRA 878, 879 (2020).

¹⁵ Exceptions Br. at 8. Article 54, Section 2(C) provides, “If either party wishes to propose a change in the working conditions established pursuant to a continuing midterm agreement or continuing practice, it will use the applicable procedures of Article 47 to provide notice and bargain to the extent required by law.” 2019 NA at 169.

¹⁶ 2019 NA at 169.

¹⁷ Exceptions Br. at 7.

¹⁸ “Absent some material change in underlying law, rule, or regulation – not present here – it is black letter law that a party to a federal sector collective[-]bargaining agreement cannot willingly carry over to a successor agreement negotiated language and related mutually-agreed local procedures and practices related to permissively-bargained working conditions and then change those working conditions unilaterally mid-term. That is precisely what happened here. Art[icle] 32 of the parties’ 2019 NA, as informed and augmented by mutually agreed local procedures and practices, no longer suited the Agency’s desires, so the Agency unilaterally implemented a mid-term change to the settled agreement over the Union’s objection without demonstrating – as discussed more fully below – any excessive interference with any management right or that the settled terms somehow were otherwise non-negotiable.” Award at 9.

¹⁹ 2019 NA at 169.

⁹ *Id.* at 6.

¹⁰ *Id.* at 6-7 (internal quotation marks omitted).

¹¹ *Id.* at 8 (finding that the Agency violated the 2019 NA).

¹² *Id.* at 12.

¹³ *Id.*

¹⁴ Exceptions Br. at 9-10. For an award to be found deficient as failing to draw its essence from the parties’ agreement, the excepting party must establish 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 parties’ agreement as to manifest infidelity to the obligation of the arbitrator; (3) does not represent a

award fails to draw its essence from Article 54, Section 2(C) of the parties' agreement.

Lastly, the Agency contends that the Arbitrator relied upon past practice to modify Article 32 of the agreement instead of interpreting it. The Agency specifically argues that "past practice is to be relied upon only in cases of ambiguous contract terms and may not be used to modify a contract. The terms of Article 32 are not ambiguous[,] but nonetheless, the Arbitrator relied upon past practice to 'augment' the agreement."²⁰ The Agency relies upon appropriate case law,²¹ but misinterprets the award. The Arbitrator did not rely upon the local practices and procedures to modify Article 32 or create a new contract provision. Instead, the Arbitrator acknowledged that the parties themselves used local practices and procedures within the MOU to augment and add to Article 32.²² Nonetheless, the Arbitrator found that the Agency's unilateral changes were covered by Article 32 of the parties' agreement because it established an annual leave solicitation and approval process and the parties carried this over to the 2019 NA.²³ As such, the Agency does not establish how the Arbitrator modified the language of Article 32.

Because the Agency fails to demonstrate that the Arbitrator's award modifies, or fails to draw its essence from, the parties' agreement, we deny the Agency's essence exception.

IV. Decision

We deny the Agency's exception.

²⁰ Exceptions Br. at 10.

²¹ *Id.* (citing *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 755-56 (2018) (then-Member DuBester dissenting) ("Although arbitrators may look to parties' past practices when interpreting an ambiguous contract provision, they may not rely on past practices to create a new contract provision.")).

²² "The parties have administered the Art[icle] 32 leave procedures, as augmented by local procedure and practice" Award at 11.

²³ "[T]he parties' Art[icle] 32 expressly establishes that employees may request leave, to which management is expected to respond 'as soon as possible.' It provides that management 'shall make every reasonable effort to grant employees request for annual leave consistent with workload and staffing needs,' but expressly recognizes management's right to deny a leave request for workload-related reasons subject to provision of supporting information upon request. Art[icle] 32 establishes a tiebreaker for conflicting leave requests, recognizing management's right to assign work and providing stability to the leave calendar." *Id.* at 10.

Chairman DuBester, concurring:

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