73 FLRA No. 60

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL ICE COUNCIL 118
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. IMMIGRATION
AND CUSTOMS ENFORCEMENT
ENFORCEMENT AND REMOVAL OPERATIONS
(Agency)

0-AR-5755

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DECISION

October 13, 2022

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and Susan Tsui Grundmann, Members
(Chairman DuBester dissenting)

I. Statement of the Case

This case involves a dispute over whether the Agency was allowed to implement the "Field Delivered Training Policy" (FDT Policy) without bargaining with the Union.[1] Arbitrator Luella E. Nelson found that the FDT Policy was covered by Article 15 of the parties' agreement; and therefore, the Agency did not violate the parties' agreement or the Federal Service Labor-Management Relations Statute (Statute) by implementing the FDT Policy without bargaining with the Union. The Union argues that the award is contrary to the Statute because it misapplies Authority precedent on the "covered by" doctrine, and fails to draw its essence from the parties' agreement. We deny the Union's exceptions because they fail to demonstrate that the award is defective.

II. Background and Arbitrator's Award

On April 17, 2019, the Agency sent the Union a "Courtesy Notice" concerning the development and implementation of the FDT Policy.[2] Between April 2019 and January 2020, the Union and Agency discussed the FDT Policy and bargaining obligations.[3] The Agency promulgated the FDT Policy on February 2, 2020, and the Union filed a grievance and demand to bargain on February 12, 2020. The grievance alleged that the Agency violated Articles 2 and 9 of the parties' agreement and § 7116(a)(1), (5), and (8) of the Statute by unilaterally implementing the FDT Policy. The Agency denied the grievance and declined to negotiate on the basis that the FDT policy was covered by Article 15 of the parties' agreement. The Union invoked arbitration.

The Arbitrator found that "Article 15 of [the parties' agreement] specifically cover[ed] training in its many facets."[4] The Arbitrator further found that "[the] provisions [of Article 15] ma[d]e plain the Agency's exclusive role in developing and administering training programs."[5] The Arbitrator also found that Article 15.I specified the Union's role in training programs, which was

[1] Award at 8.
[2] *Id.* at 8-9.
[3] *See id.* at 19 ("The Agency conducted work group meetings in November 2019 to discuss . . . the [FDT Policy]."); *id.* ("[The Union] participated in the work group meetings in November 2019 . . . [and] was invited to participate in [further] meetings . . . which were scheduled for February 2020; however, [the Union] withdrew from the work group on January 14, 2020, in anticipation that [it] would need to file a grievance and demand to bargain.").
[4] *Id.* at 31; *see also* Exceptions, Joint Ex. 1 at 33-34 (CBA) (providing the language of Article 15, titled Development and Training, which includes ten provisions dealing with multiple aspects of training).
[5] Award at 32; *see also* CBA at 33 ("The [Agency] agrees to develop and maintain forward-looking effective policies and programs designed to achieve [employee development], consistent with its needs. Through the procedures established in Article 10 of the [parties'] agreement, the parties shall discuss training and development of employees.").

limited to providing recommendations and requiring the Agency to "give careful and due consideration" to such recommendations.[6] Therefore, the Arbitrator concluded that the Union's "contractual rights [regarding] training are to obtain information, ask questions, and make recommendations for the Agency's consideration."[7] The Arbitrator also emphasized that while the parties previously negotiated MOUs related to training on tasers and firearms, such examples were not determinative of whether a duty to bargain existed because "[p]arties are free to negotiate even where not required to do so."[8] Based on the above, the Arbitrator concluded that the Agency did not have a duty to bargain.[9] As such, the Arbitrator denied the grievance.

On August 16, 2021, the Union filed exceptions to the award. On September 15, 2021, the Agency filed its opposition to the Union's exceptions.

III. Analysis and Conclusions

A. The award is consistent with the Statute and Authority precedent.

The Union argues that the award is contrary to the Statute because it misapplies Authority precedent on the "covered by" doctrine.[10] When an exception challenges an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[11] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[12] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[13]

In determining whether the subject matter at issue is covered by the parties' agreement, the Authority applies a two-prong test.[14] Under the first prong, the Authority considers whether the subject matter of the change is expressly contained in the agreement or falls within the scope of the agreement.[15] If the first prong is not satisfied, the Authority moves to the second prong and considers whether the subject is inseparably bound up with, and thus plainly an aspect of, a subject covered by the agreement.[16]

The U.S. Court of Appeals for the District of Columbia Circuit (the Court) has held that the application of the covered-by doctrine is an exercise of construction, and "the scope of what is covered must be construed to give the parties the benefit of their bargain."[17] As the Court stated, "[w]hen parties bargain about a subject and memorialize the results of their negotiation in a collective[-]bargaining agreement, they create a set of enforceable rules – a new code of conduct for themselves – on that subject."[18]

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[6] Award at 32 ("The [Agency] encourages the Union to submit recommendations . . . concerning employee training needs and programs. When establishing or modifying the content or structure of its training courses or programs, the [Agency] will give careful and due consideration to any recommendations received from the Union.") (quoting Article 15.I)).

[7] *Id.* at 33.

[8] *Id.* at 32.

[9] *Id.* at 33 (finding that "[b]argaining, if any, is at the Agency's discretion").

[10] Exceptions Br. at 14-21. To the extent the Union argues the award is contrary to the doctrine of waiver, the argument is misplaced. *See* Exceptions Br. at 26 (briefly asserting the Arbitrator's interpretation of Articles 15.A and 15.I fails to draw its essence from the parties' agreement because "waivers of a party's statutory right to negotiate must be expressly made"). The doctrines of waiver and covered-by are distinct. Waiver involves a party "waiving" the right to bargain in the first place; while covered-by involves whether the party previously exercised that right. *Compare U.S. Dep't of VA*, 72 FLRA 781, 783 n.18 (2022) (stating "[t]he 'covered by' doctrine excuses parties from bargaining on the ground that they have *already bargained and reached agreement* concerning the matter at issue" (emphasis added)) *with NTEU*, 64 FLRA 982, 985 (2010) (finding "[p]arties may negotiate waivers of their right to bargain under the Statute"). Here, as explained below, the Union did not waive its right to bargain, but in fact exercised that right resulting in Article 15 – which covers the Union's role in the development and administration of training programs. As such, the doctrine of waiver is not applicable in the instant matter.

[11] *AFGE, Loc. 2076*, 71 FLRA 1023, 1026 n.26 (2020) (*Loc. 2076*) (then-Member DuBester concurring) (citing *AFGE, Loc. 933*, 70 FLRA 508, 510 n.13 (2018)).

[12] *Id.* To the extent the Union challenges the Arbitrator's failure to explicitly apply the two-prong covered by test, *see, e.g.*, Exceptions Br. at 16 (asserting that "the Arbitrator did not address either prong of the 'covered by' test"), we note that the Authority will not find an award deficient *solely* because an arbitrator failed to apply a particular legal analysis. *U.S. Dep't of the Air Force, Seymour Johnson Air Force Base, N.C.*, 55 FLRA 163, 166 (1999). Instead, the Authority will determine whether an arbitrator's legal conclusions are consistent with the applicable standard of law based on the arbitrator's factual findings. *Id.*

[13] *Loc. 2076*, 71 FLRA at 1026 n.26. We note that the Union did not challenge any of the Arbitrator's factual findings as nonfacts.

[14] *See NTEU*, 70 FLRA 941, 942 (2018) (then-Member DuBester dissenting).

[15] *Id.*

[16] *See U.S. Dep't of the Interior, U.S. Geological Survey, Great Lakes Science Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 739 (2015) (citing *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1018 (1993)).

[17] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 875 F.3d 667, 675 (D.C. Cir. 2017) (*BOP II*).

[18] *Dep't of the Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992) (*Navy*).

Further, the Court explicitly "rejected the Authority's use of a 'covered-by' standard that compelled bargaining 'unless the collective[-]bargaining agreement *specifically addresses the precise matter at issue*.'"[19] According to the Court, "[s]uch an approach would undermine the Statute's goal of 'promot[ing] collective bargaining and the negotiation of collective[-]bargaining agreements,' as collective bargaining is encouraged if and only if the parties to such agreements can rely on 'stability and repose with respect to matters reduced to writing in the agreement.'"[20]

Accordingly, "if the parties' bargain encompasses the implementation of a new policy, then the new policy is deemed covered by the agreement."[21] Furthermore, the Authority does not require an exact congruence of the language, but instead, finds the requisite similarity if a reasonable reader would conclude that the contract provision settles the matter in dispute.[22]

Here, as found by the Arbitrator, "Article 15 of [the parties' agreement] specifically cover[ed] training in its many facets."[23] The Arbitrator further found that "[the] provisions [of Article 15] ma[d]e plain the Agency's *exclusive* role in *developing and administering* training programs."[24] The Arbitrator also found that Article 15.I specified the *Union's* role in developing training programs, which was limited to *providing recommendations* and requiring the Agency to "give careful and due consideration" to such recommendations.[25] It is clear to us – as it was to the Arbitrator – that a "reasonable reader would conclude" that Article 15 "settles the matter" of the parties' respective roles in the development and administration of training programs.[26] Specifically, Article 15 provides: "The [Agency] agrees to develop and maintain forward-looking effective policies and programs designed to achieve [employee development], consistent with its needs. Through the procedures established in Article 10 of the [parties'] agreement, the parties shall *discuss* training and development of employees."[27] Additionally, Article 10 merely provides for "Information and Questions," "Consultations," and "Labor Management Partnerships."[28]

In short, through bargaining, the parties have "created[ed] a [new] set of enforceable rules"[29] concerning the parties' respective roles in the development and administration of training programs – and agreed that the Union's role is to provide recommendations regarding those matters. As ordered by the Court, we must construe the covered-by doctrine to give the parties the benefit of their bargain. It is true that the parties' agreement does not specifically mention every single possible training program that the Agency may develop – including the FDT Policy. However, that does not change the fact that the parties have defined their respective roles with regard to the development and administration of training programs generally, which necessarily covers the development and administration of the FDT Policy specifically. As such, the Arbitrator's conclusion that the Agency did not have a duty to bargain over the FDT Policy is consistent with Authority precedent.[30]

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

The Union also argues that the award fails to draw its essence from the parties' agreement because the Arbitrator's interpretation of Articles 15.A and 15.I are implausible.[31] As relevant here, the Authority will find an arbitration award fails to draw its essence from the parties' agreement when it does not represent a plausible interpretation of the agreement.[32] However, the Authority has held that mere disagreement with the arbitrator's

[19] *BOP II*, 875 F.3d at 675.
[20] *Id.*
[21] *Id.*
[22] *U.S. DHS, U.S. CBP, El Paso, Tex.*, 69 FLRA 261, 264 (2016) (*El Paso*) (Member Pizzella concurring in part, dissenting in part on other grounds).
[23] Award at 31; *see also* CBA at 33-34 (providing the language of Article 15, Development and Training, which includes ten provisions dealing with multiple aspects of training).
[24] Award at 32 (emphasis added); *see also* CBA at 33 ("The [Agency] agrees to develop and maintain forward-looking effective policies and programs designed to achieve [employee development], consistent with its needs. Through the procedures established in Article 10 of the [parties'] agreement, the parties shall *discuss* training and development of employees." (emphasis added)).
[25] Award at 32 ("The [Agency] encourages the Union to submit recommendations . . . concerning employee training needs and programs. When *establishing* or modifying the content or structure of its training courses or programs, the [Agency] will give careful and due consideration to any recommendations received from the Union." (quoting Article 15.I) (emphasis added)). As discussed below, we find the Arbitrator's interpretation draws its essence from the agreement.
[26] *El Paso*, 69 FLRA at 264.
[27] CBA at 33.
[28] *Id.* at 23-24.
[29] *Navy*, 962 F.2d at 57.
[30] *See, e.g.*, *El Paso*, 69 FLRA at 265 (finding a subject matter in dispute covered by the parties' agreement because the parties' agreement set forth procedures and policies governing the matter in dispute).
[31] Exceptions Br. at 25-26.
[32] *NAGE*, 71 FLRA 775, 776 (2020) (citing *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017)).

interpretation and application of an agreement does not provide a basis for finding an award deficient.[33]

Here, the Arbitrator found that Article 15.A, along with the other provisions of Article 15, clearly indicated the "Agency's exclusive role in developing and administering training programs."[34] The Arbitrator also found that Article 15.I specified the Union's role in developing training programs, which was limited to providing recommendations.[35] The Union fails to identify any language from the parties' agreement that requires a different result, but merely argues for its preferred interpretation.[36] Accordingly, we deny the Union's essence exception.[37]

IV. Decision

We deny the Union's exceptions.

[33] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 1262, 1264 (2020) (*Miami*) (then-Member DuBester concurring); *SSA*, 71 FLRA 580, 581 (2020) (then-Member DuBester concurring) (citing *SSA*, 71 FLRA 352, 353 (2019) (then-Member DuBester concurring); *U.S. DOL (OSHA)*, 34 FLRA 573, 575-76 (1990)).

[34] Award at 31-32; *see also* CBA at 33 ("The [Agency] agrees to develop and maintain forward-looking effective policies and programs designed to achieve [employee development], consistent with its needs. Through the procedures established in Article 10 of the [parties'] agreement, the parties shall *discuss* training and development of employees." (emphasis added)).

[35] Award at 32 ("The [Agency] encourages the Union to submit recommendations . . . concerning employee training needs and programs. When establishing or modifying the content or structure of its training courses or programs, the [Agency] will give careful and due consideration to any recommendations received from the Union." (quoting Article 15.I)).

[36] Exceptions Br. at 25-26 (arguing that Article 15 of the parties' agreement is "silent as to the Union's subsequent bargaining rights and/or the Agency's bargaining obligations," and "[g]iven this ambiguity, the plain wording of these contract provisions cannot be plausibly interpreted to foreclose the Union's right to bargain over *any* changes to training policy").

[37] *See Miami*, 71 FLRA at 1264 (denying an essence exception because it was mere disagreement with the arbitrator's interpretation and application of the parties' agreement); *SSA*, 71 FLRA at 581 (same); *see also SSA*, 70 FLRA 227, 230 (2017) (finding that an excepting party's attempt to relitigate its interpretation of an agreement and the evidentiary weight given by the arbitrator fails to demonstrate that the award is deficient). The Union also argues that the Arbitrator's interpretation of Article 9.G is implausible because the plain language "provides that mid-term bargaining over all subjects in the [parties' agreement] is precluded *only* when the first prong of the Authority's covered by test is established." *Id.* at 24 (emphasis in the original). We deny this exception because it is based on the previously denied contrary-to-law argument. *See SSA, Off. of Hearing Operations*, 72 FLRA 108, 110 n.23 (2021) (Chairman DuBester dissenting in part) (denying exception that was based on previously denied exception); *see also U.S. DOJ, Fed. BOP, Fed. Corr. Ctr., Petersburg, Va.*, 72 FLRA 477, 480 n.30 (2021) (Chairman DuBester concurring; Member Abbott concurring) (denying essence exception that reiterated previously denied contrary-to-law claim).

Chairman DuBester, dissenting:

I disagree that the Arbitrator correctly concluded the Agency did not have a statutory duty to bargain over the FDT Policy pursuant to the Authority's covered-by doctrine.

At the outset, it is unclear from the award whether the Arbitrator separately analyzed both the Union's contractual and statutory duty-to-bargain claims. But to the extent the Union is challenging the Arbitrator's application of the covered-by doctrine to the Union's statutory duty-to-bargain claim, I would grant the Union's contrary-to-law exception.[1]

Of course, in construing essence exceptions to awards, the Authority should afford significant deference to arbitrators' interpretations of parties' agreements. But when assessing if an arbitrator has correctly applied the covered-by doctrine to a statutory bargaining claim, "'whether a subject is 'covered by' an existing agreement is a *question of law*[,]' and not a matter of deferral to an arbitrator's interpretation of that agreement."[2] And, applying this principle, I disagree with the majority's conclusion that the Agency's unilateral implementation of the FDT Policy was covered by the parties' agreement.

In reaching its conclusion, the majority relies upon the Arbitrator's finding that Article 15 "specifically cover[ed] training in its many facets,"[3] and that Article 15 "ma[d]e plain the Agency's exclusive role in developing and administering training programs."[4] But none of Article 15's provisions specifically addresses the *subject matter of the changes at issue in this case*, which, as the Union argued to the Arbitrator, would have a "monumental effect on the way bargaining unit employees receive training in the field, and also on the workload and job responsibilities of bargaining unit employees who will be tasked with providing training to junior co-workers."[5]

Moreover, Article 15(I) – upon which the Arbitrator relied for this finding, and which simply provides that the Agency will give consideration to any Union recommendations regarding training needs and programs – does not specifically cover the subject matter at issue.[6] As the Union persuasively argues, it should not be precluded from exercising its right to bargain over Agency-initiated changes simply because the parties have "provided [in their agreement] for the Union to make any sort of input to the Agency as it develops a policy."[7] And in response to the majority's rejection of the Union's arguments in favor of judicial interpretations of the "covered by" doctrine that ignore this practical reality, I would simply reiterate my call for the Authority to re-examine the manner in which it applies the "covered by" doctrine.[8]

And in any event, I am not convinced that the Arbitrator's interpretation of Article 15(I) is even *governed* by the covered-by doctrine. In the award, the Arbitrator concludes that "[h]ad the parties intended to reserve [the right to negotiate concerning employee training needs and programs], the phrase 'submit recommendations' would not have been used. Rather, 'negotiations' or 'bargaining' would have been used . . . ."[9] In my view, the Arbitrator's conclusion constitutes nothing more than a finding that the Union *waived* its statutory rights to bargain over changes to

[1] Of course, the "covered-by" defense would not apply to the Union's contractual duty-to-bargain claims. *See, e.g., U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Miami, Fla.*, 68 FLRA 61, 64 (2014) (Member Pizzella dissenting) (explaining that, because the arbitrator "resolved the grievance based on a finding of a violation of a contractual – not a statutory – obligation to bargain," the "covered-by" doctrine did not apply).

[2] *U.S. DHS, CBP, Wash., D.C.*, 63 FLRA 434, 438 (2009) (quoting *NTEU v. FLRA*, 452 F.3d 793, 797 (D.C. Cir. 2006) (emphasis added)).

[3] Majority at 4 (quoting Award at 31).

[4] *Id.* (quoting Award at 32).

[5] Award at 29. To buttress its conclusions, the majority relies on our statement in *U.S. DHS, U.S. CBP, El Paso, Texas* (*El Paso*) that the "covered by" analysis is satisfied if a "reasonable reader would conclude that the contract provision settles the matter in dispute." Majority at 4 (quoting 69 FLRA 261, 264 (2016) (Member Pizzella concurring in part, dissenting in part)). But the majority's conclusion is not supported by our actual application of this standard in *El Paso*, where we concluded that the first prong was satisfied because the contract provision at issue explicitly addressed the subject matter of the disputed change. *See El Paso*, 69 FLRA at 265 (applying the first prong of the covered-by doctrine to agency's change to the "procedures employees must follow to apply for a shift trade, and the basis upon which the [a]gency will approve or deny a shift-trade request," where article in parties' agreement expressly addressed circumstances under which employees "'may trade shifts out of the normal rotation,'" and which expressly allowed supervisors to "'withhold approval of a request to trade shifts'" (quoting Art. 28 of the parties' agreement)).

[6] For similar reasons, I disagree that Article 15's reference to Article 10, in which the parties agreed that they shall "discuss training and development of employees," demonstrates that the parties' agreement "specifically covers" the matter at issue.

[7] Exceptions Br. at 7.

[8] *See NTEU*, 72 FLRA 556, 563-64 (2021) (Dissenting Opinion of Chairman DuBester) (explaining how allowing parties to bargain over the implementation of a new policy, rather than forcing them to resolve disagreements regarding its implementation through the grievance procedure, promotes the goals of the Federal Service Labor-Management Relations Statute).

[9] Award at 32 (quoting Art. 15(I) of the parties' agreement).

employee training programs by agreeing to this language. Finding nothing in the record to support such a conclusion, I would grant the Union's exception on this basis as well.[10]

Further, because I disagree that Article 15 "specifically covers" the subject matter at issue, I also disagree with the Arbitrator's conclusion that it is "unnecessary to . . . decide the merits of the Union's analysis of the interplay of the two sentences of Article 9.G."[11] Article 9 generally establishes the Union's right to engage in mid-term bargaining over Agency-proposed changes during the term of the agreement. And the first sentence of Article 9(G) states that "[m]id-term agreements may be negotiated at the level of recognition covering subjects or matters *not specifically covered* in this agreement."[12]

As noted, I agree with the Union that the subject matter of the FDT program was not "specifically covered" by Article 15 of the parties' agreement. Therefore, in my view, it *was* necessary for the Arbitrator to address the meaning of the first sentence of Article 9(G), which clearly reserves the Union's right to bargain mid-term agreements under the circumstances presented in this case. And for the same reasons, I disagree with the majority's decision to deny the Union's essence exception regarding this point "because it is based on the previously denied contrary-to-law argument."[13]

Accordingly, I dissent.

[10] The majority summarily rejects the Union's argument on this point as "misplaced" because it fails to recognize that the "doctrines of waiver and covered-by are distinct." Majority at 3 n.10. Ironically, this is precisely the premise of the Union's argument, which asserts that the Arbitrator erred by failing to recognize the correct legal standard that should apply to his findings regarding Article 15(I).

[11] Award at 31.

[12] *Id.* at 3 (quoting Art. 9(G) of the parties' agreement) (emphasis added).

[13] Majority at 6 n.37.