UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

OKLAHOMA CITY AIR LOGISTICS CENTER, OKLAHOMA CITY, OKLAHOMA Respondent	
and	Case No. 76-CA-10739
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 916 Charging Party	

Hazel E. Hanley, Esquire
For the General Counsel

Major Johnny H. Edwards, Esquire
For the Respondent

Mr. Jimmie D. Green
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Section 7122(b) of the Federal Service Labor-Management Relations Statute (the Statute) requires an agency to "take the actions required by an arbitrator's final award." This case presents the issue of whether an arbitrator's final award in favor of an individual grievant required the Respondent (OCALC) to apply the award to similarly situated individuals who were not grievants. The complaint here alleges that by refusing to comply with the award, OCALC committed an unfair labor practice in violation of sections 7116(a)(1) and (8) of the Statute.

A hearing was held in Oklahoma City, Oklahoma, on January 15, 1992. Counsel for the General Counsel and for OCALC filed post-hearing briefs. The facts are undisputed.

Findings of Fact

Section 4.07 of the Master Labor Agreement to which OCALC and the Charging Party (the Union) are bound carries the heading, "FUNCTIONS FOR WHICH A LIMITED AMOUNT OF OFFICIAL TIME IS AUTHORIZED." That section provides, in pertinent part, that:

> When work conditions are such that the steward/official may be excused from work and the steward/official represents an employee from outside the representative's organizational area, not more than five hours per pay period of non-cumulative, non-transferable official time will be authorized for stewards below division level, and six hours for those stewards/officials at division level or above to perform [certain representational] duties . . . .

Employee Mike Worden is a "division level" steward for the Union. He sought to exercise the right provided in section 4.07 of the contract to official time to represent employees outside his organizational area. His supervisor interpreted the "cap" of six hours of official time per pay period as being a cumulative total irrespective of the number of employees Worden was representing, and so limited his use of official time. Worden claimed that the contractual "cap" entitled him to six hours per pay period for each employee he represented. He filed a grievance to vindicate his interpretation of the provision. He was represented in this grievance by Union Representative Paul Hill.

The contract provides one grievance procedure for "employee grievances" and other procedures for "union or employer grievances" at different command levels. Worden's was processed as an individual grievance. It reached the arbitration stage and was presented to Arbitrator Jerome Smith.

Section 7.06 of the contract provides that:

> a. The arbitrator's authority is limited to deciding only the issue or issues considered in the formal grievance. If the parties fail to agree on a joint stipulation of the issue for arbitration, then each shall submit a separate stipulation and the arbitrator shall determine the issue or issues to be heard. The arbitrator is empowered to fashion

an appropriate remedy consistent with the terms of this contract and in accordance with applicable law, rule, or regulation.

The parties did not jointly "stipulate" the issue. OCALC's representative did frame the issue to the arbitrator in the following manner, as appears from an excerpt from the transcript of the arbitration hearing: "Section 4.07 requires management to grant six hours of non-cumulative, non-transferable official time per case to a steward or official of the union when that steward or official represents outside his or her organizational area." The quoted excerpt is, on its face, not in the form of a statement of an issue but, rather, a statement of position. Moreover, the position stated is not what I understand to be OCALC's position but the Union's position. The only sense I can make out of it is that it is to be understood as being preceded by the equivalent of the word, "Whether."

The record is silent as to what if any statement of the issue the Union made to the arbitrator. In the course of his written presentations of the grievance through the various pre-arbitration steps, Union Representative Hill referred at times to the proper interpretation of section 4.07 of the contract and at times to the number of hours to which Mr. Worden was entitled. On the standard form for taking a grievance to Step II--the only document entered into this record which calls for the grievant or his representative to identify the remedy sought--Mr. Hill requested that: "Mr. Worden not be capped for Management Meetings . . . and allowed 6 hours per pay period on grievances in his Union Designated Area."

Arbitrator Smith framed the issue as one of contract interpretation. Thus, his opinion begins: "This grievance arose as the result of a dispute as to the meaning of Section 4.07 . . . ." After setting the section out, the arbitrator states: "The grievance involves no issue of back pay but only a question of future contract interpretation. The Employer urges that Section 4.07 provides . . . whereas the Union contends . . . ."

The arbitrator found Section 4.07 to be ambiguous with respect to the question of whether hours were "capped" "per case per pay period or per steward per pay period." He resolved that ambiguity by examining "the thinking behind the concept of capping" and the evidence presented as to the parties' practice under the contract, crediting the testimony of Acting Chief Steward Green (also the Union's

representative and a witness in the instant case) that his own supervisor and the supervisors of most of the stewards permitted them use of official time on a per case per pay period basis. The arbitrator found, on the record as a whole and "applying various tests of contract interpretation, . . . that the Union interpretation of Section 407.2 prevails." The "award" section of his "Opinion and Award" reads, in its entirety:

AWARD

> As stipulated by the parties there is no back pay award.
>
> Section 407.2 is interpreted to require the Employer to separately cap steward's [sic] pay on a pay period individual grievance case basis.

OCALC did not file exceptions to the award, and it undisputedly became a "final and binding" award within the meaning of section 7122(b) of the Statute. However, OCALC applied the arbitrator's interpretation of the contract only to the grievant, Worden. It has applied its own, more restrictive interpretation of section 407.2 generally to other stewards. On learning of this, the Union requested that OCALC join in a request to the arbitrator for clarification of the award. OCALC's supervisory labor relations officer for civilian personnel refused to join in such a request. He told Acting Chief Steward Green that he knew what the award said and did not need clarification.

Discussion and Conclusions

As must be clear by now, the General Counsel and the Union contend that the arbitrator's award must be read as a general declaration of the right of stewards to official time on a per case per pay period basis. OCALC reads the award as being personal to grievant Worden. The Authority set forth its test for determining whether an agency has committed the unfair labor practice of failing or refusing to comply with an arbitration award in United States Department of the Treasury, Internal Revenue Service and United States Department of the Treasury, Internal Revenue Service, Austin, Texas, 25 FLRA 71, 72 (1987) (IRS Austin):

> [T]he adequacy of compliance with an arbitration award will be determined by whether the Respondent's construction of the award is reasonable, which would depend on whether the construction is consistent with

the entire award and consistent with applicable rules and regulations.

The IRS Austin test is applicable where, as here, the agency has not repudiated the award but has applied it consistent with its own construction of its meaning and scope. This test places a heavy burden of persuasion on the General Counsel, akin to that placed by the Authority's recently abandoned "differing and arguable [contract] interpretations" doctrine for cases in which a party asserted a contract defense for action that violated a statutory right. See Internal Revenue Service, Washington, D.C., 39 FLRA 1568, 1573 (1991). Thus, under the IRS Austin test, an agency will rarely if ever commit an unfair labor practice if the award is ambiguous and the agency applies it in a manner that is arguably consistent with its meaning. See U.S. Patent and Trademark Office, 31 FLRA 952, 975 (1988). I also take it, and the parties here seem by their arguments to agree, that in stating that the agency's construction must be consistent with "the entire award," the Authority's reference is to the arbitrator's entire decision and not only that part of the disposition labelled "Award."

OCALC would also have the Authority consider the nature of the underlying grievance. The General Counsel opposed introduction of the grievance file as an exhibit, arguing in effect that the "award" is clear and unambiguous on its face. As a preliminary matter, I do not find the award to be so clear insofar as its direction for OCALC's action is concerned as to preclude exploration of the entire grievance proceeding that led ultimately to the award. Thus, the award does not explicitly direct OCALC to do anything. In the General Counsel's and the Union's view, it is to be inferred that OCALC is directed to act globally consistent with the arbitrator's interpretation of the contract. OCALC views the award rather as saying, in effect: "the grievance is sustained." I cannot dismiss that construction as frivolous. It is plausible enough to warrant a closer look at where such a reading would take us.

If the arbitrator's intention was essentially to sustain the grievance as presented to him, one might properly look at the grievant's requested remedy for at least some guidance as to the intended remedial scope of the award. Here, the only requested remedy that the record reflects is one that is personal to grievant Worden. With due regard for the possibility that at some stage the arbitrator was

asked to grant a broader remedy, and bearing in mind that the arbitrator might not have considered himself restricted by the grievant's request, the request for a personal remedy gives at least some credence to the view that the award runs in favor of Worden alone.

Having taken a peek at the implications of viewing the award as simply sustaining the grievance, the way has been prepared for looking back at the reasonableness of that view of the award. The most direct approach, given at least some ambiguity in the language of the award, will be to attempt to view the problem of remedy as the author would.

One may assume that normally arbitrators do not, knowingly, reach beyond their grasp. And generally, arbitrators have no jurisdiction to grant relief to non-grievants. Fairweather's Practice and Procedure in Labor Arbitration 360 (Ray J. Schoonhoven, ed., 3d ed. 1991). Specifically, at least one arbitrator has held (and I have been able to find no authority to the contrary), that only those who bring the grievance are entitled to a "determination." "Therefore, this decision must be limited to those employees who initiated the complaint, regardless of the fact that there are or may be other employees similarly situated." United Telephone System, 64 Lab. Arb. (BNA) 525, 528 (1975) (Cohen, Arb.).1/ Moreover, although it is of slightly less probative value because the issue here is what the arbitrator intended, the Authority, relying on a United States Court of Appeals decision, has come to the same conclusion as Arbitrator Cohen. American Federation of Government Employees, AFL-CIO, National Immigration and Naturalization Service Council and U.S. Immigration and Naturalization Service, 15 FLRA 355 (1984) (citing Hotel Employees Union v. Michelson's Food Services, 545 F.2d 1248, 1253 (9th Cir. 1976)); United States Army Academy of Health Sciences, Fort Sam Houston, Texas and National Federation of Federal Employees, Local No. 28, 34 FLRA 598 (1990). Nor is there anything about the contract under which Arbitrator Smith acted that would appear to compel a different result.

Another way of looking at the problem through an arbitrator's eyes leads also toward OCALC's view of the award. Arbitrators differ about the precedential weight other arbitrators' decisions are appropriately given. See

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1/ Neither counsel took the opportunity to educate me on this point.

Elkouri and Elkouri, How Arbitration Works, 414-430 4th ed. 1985); Fairweather's, supra at 375-82. Although the arbitrators' discussions borrow labels from different judicial doctrines of finality (see Elkouri at 425 n.46), their common understanding is that the issue is one of precedential value or issue preclusion, not whether the prior award made the current grievance unnecessary. Thus, as the Elkouris (supra) say at 422: "Where a new incident gives rise to the same issue that is covered by a prior award, the new incident may be taken to arbitration but it may be controlled by the prior award." In arguing, then, that Arbitrator Smith's award covers stewards other than the grievant, the General Counsel may be confusing the issue of the award's scope with that of its authoritative weight. In other words, even if the General Counsel is right about what issue Arbitrator Smith decided, that does not answer the question of the scope of the award.

Given this body of arbitral lore, even if I were to grant that the General Counsel's construction of Arbitrator Smith's award is a reasonable one, I cannot say that OCALC's is not. OCALC's construction is consistent with a labor relations professional's understanding of "how arbitration works" and is not inconsistent with the language of the award seen in the light of that understanding.2/

The General Counsel points out that OCALC refused to seek clarification of the award and that, in U.S. Patent and Trademark Office, supra, the Authority adopted Judge Naimark's conclusion that agency's construction of an award was not reasonable, especially in light of the agency's failure to seek clarification. 31 FLRA at 976. In that case, however, Judge Naimark found the agency's failure to seek clarification remarkable in light of its insistence that it was confused about the award's application. Here, OCALC has consistently taken the position that the award

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2/ That part of the IRS Austin test concerning consistency "with applicable rules and regulations" is not implicated here.

At the hearing, I explored with OCALC witness Coil the implications of the arbitrator's apparent error in punctuation where, in the award, he refers to "steward's pay" instead of "stewards' pay." (We can pass over the fact that it was not pay that the grievance involved, but official time.) On further reflection, resulting in the discussion in the text above, I do not see the position of the apostrophe as affecting the reasonableness of OCALC's construction.

needs no clarification. Either course--seeking clarification from the arbitrator or not--entailed risks. But OCALC was entitled, so far as this case is concerned, to rely on its own construction.3/

Nor is OCALC merely claiming here that the award must be construed narrowly because it otherwise would exceed the arbitrator's authority. Such a claim would fail because OCALC did not file exceptions to the award. Cf. National Treasury Employees Union, National Treasury Employees Union Chapter 33 and U.S. Internal Revenue Service, Phoenix District, 44 FLRA 252, 268 (1992). OCALC has presented a plausible alternative to the General Counsel's construction of the award. OCALC's construction is supported by the presumption that the arbitrator, absent a clear indication that he did so, did not intend to award a remedy that by common understanding would have been unauthorized.

I have concluded that OCALC has complied with Arbitrator Smith's award in accordance with a construction that is reasonable under the IRS Austin test. I therefore recommend that the Authority issue the following order.

ORDER

The complaint is dismissed.

Issued, April 27, 1992, Washington, DC

Jesse Etelson

JESSE ETELSON
Administrative Law Judge

3/ Section 7.06e. of the parties' contract provides that: "Any dispute over the application or interpretation of an arbitrator's award, including remanded awards, shall be returned to the arbitrator for settlement." There is no contention before me, however, that OCALC's refusal to join the Union in requesting clarification violated any obligation, contractual or statutory, that it might have had.