

64 FLRA No. 73

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

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

0-AR-4307

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DECISION

January 29, 2010

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Before the Authority: Carol Waller Pope, Chairman,
and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Roger I. Abrams filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the exceptions.

The Arbitrator denied a grievance alleging that the Agency violated the parties' national agreement and committed an unfair labor practice (ULP) by unilaterally changing conditions of employment. For the reasons that follow, we deny the exceptions.

II. Background and Arbitrator's Award

The Agency revised certain provisions in its Internal Revenue Manual (IRM) that concerned the duties of Revenue Officers (ROs). Award at 3, 11. Specifically, the Agency revised the IRM to: (1) require that all offices use a designated "Revenue Officer of the Day" program (ROD), *id.* at 3-4; (2) require the use of "morning after reviews" (MARs) as a way to evaluate the written record of an RO's field work the day after he or she completes that field work, *id.* at 5-6;¹ (3) require ROs to document certain procedures that are required before

1. The Arbitrator found that the record is mixed as to whether the MARs were required to be, or were in practice, unannounced. Award at 6-7; 28. However, the Arbitrator assumed for purposes of his analysis that the reviews were unannounced. *Id.* at 28.

contacting a taxpayer (the pre-contact documentation provisions), *id.* at 7, Exceptions at 15; and (4) provide that an RO's follow-up with a taxpayer to inquire about a missed deadline was appropriate only if conducted in-person (the follow-up provision). *Id.* at 8.

As the Agency failed to provide the Union with notice and opportunity to bargain over those revisions, the Union filed a grievance that was unresolved and submitted to arbitration. At arbitration, the parties stipulated to the following issues:

Did the Agency violate Article 47 of the National Agreement[²] by implementing changes regarding [ROs] without providing notice and the opportunity to bargain [with] the Union? If so, what shall be the remedy?

Did the Agency commit [a ULP] by violating 5 U.S.C. § 7116(a)(1) and (5) by unilaterally implementing changes regarding [ROs]? If so, what shall be the remedy?

Id. at 2-3.

The Arbitrator found that, under the ROD, one RO would be on duty in the office for an entire day, on a rotating basis, to perform both his or her own in-office duties and those of the other ROs. The Arbitrator determined that the duties to be performed were the same as the in-office duties that ROs already performed, and that the only change under the ROD — that these duties would be performed on a rotating basis — had only a *de minimis* impact on working conditions. *Id.* at 24-26. While acknowledging that a rotational assignment would require an RO to remain in the office throughout the day, the Arbitrator found that the ROs spend seventy to eighty-five percent of their time in the office even when they are not performing duties under the rotation. *Id.* at 25. Further, the Arbitrator noted that the ROD was of limited duration because it was revoked shortly after the Union filed its grievance, and that there was no evidence as to the number of employees affected by the ROD. *Id.* at 27. In addition, he found that the ROD

2. Article 47, Section 2 of the parties' agreement provides, in pertinent part that:

A. Where either party proposes changes in conditions of employment that are [Agency]-wide in nature . . . it will consolidate those proposed changes and serve notice thereof on a quarterly basis.

. . . .

C. Within fifteen (15) calendar days of receipt of such notice, the appropriate party will either request to negotiate or request a briefing.

Jt. Exh. 1 at 147.

would have no impact on the ability of an RO to work on a flexiplace schedule.

Similarly, the Arbitrator concluded that the MARs constituted a continuation of procedures followed in the past and that “if there was a change, the change was *de minimis*.” *Id.* at 29. Specifically, the Arbitrator rejected the Union’s claim that the MARs’ impact is greater than *de minimis* because it can affect an RO’s performance evaluation and cause stress. In this regard, the Arbitrator found that any review of performance can have that impact, and that “projecting the extent of the impact [in this case] is speculative.” *Id.* at 28. While acknowledging testimony that unannounced reviews cause consternation and stress among ROs, the Arbitrator found that, in the absence of a meaningful change in duties, the existence of such consternation or stress does not trigger an obligation to bargain. *Id.* at 28-29, citing *U.S. Dep’t of HHS, SSA, Balt., Md.*, 41 FLRA 1309 (1991) (*SSA-Baltimore*).

Regarding the pre-contact documentation provisions, the Arbitrator found that “[t]here is little evidence [that those provisions require] any significant additional work — let alone how much additional work — and no evidence that it has or will have a foreseeable impact on performance evaluations.” *Id.* at 30. As for the follow-up provision, the Arbitrator found that “there [was] sufficient evidence that this was the pre-existing policy.” *Id.* at 31.

For the foregoing reasons, the Arbitrator found that all of the revisions to the IRM were continuations of existing practices and/or *de minimis* in effect. Accordingly, he concluded that the Agency did not violate the parties’ agreement or commit a ULP by unilaterally implementing the revisions.

III. Positions of the Parties

A. Union’s Exceptions

The Union contends that the Arbitrator erred as a matter of law by finding that the revisions had only *de minimis* effects. Exceptions at 16. According to the Union, even a “slight” change can be more than *de minimis*. *Id.* at 21, citing *SSA, Malden Dist. Office, Malden, Mass.*, 54 FLRA 531 (1998) (*SSA-Malden*). In addition, the Union suggests that any change to the IRM would be negotiable because it would create a mandatory requirement that may affect an employee’s performance and the appraisal of such performance, possibly subjecting the employee to a removal or demotion. *Id.* at 22-23.

With respect to the ROD, the Union contends that the impact of that revision is greater than *de minimis* because it requires ROs to perform in-office duties on a rotating basis, thereby impacting their work schedules. *Id.* at 24. For support, the Union cites *U.S. Dep’t of HUD*, 58 FLRA 33 (2002) (*HUD*); and *SSA, Gilroy Branch Office, Gilroy, Cal.*, 53 FLRA 1358 (1998) (*SSA-Gilroy*). The Union contends further that this revision affects leave procedures and workloads. Exceptions at 25.

As for the MARs, the Union disagrees with the Arbitrator’s findings that this type of review occurred in the past and that, if there was a change, it was *de minimis*. *Id.* In this regard, the Union notes the Arbitrator’s acknowledgement that unannounced reviews can be stressful, and argues that subjective factors, such as stress, can trigger an obligation to bargain. *Id.* at 26, citing *SSA-Baltimore*, 41 FLRA at 1318. In addition, the Union cites the testimony of an Agency witness that Agency management “hope[d] . . . [the change] will have an impact on the day-to-day performance” of ROs. Exceptions at 26, quoting Award at 7.

With regard to the pre-contact documentation provisions, the Union contends that they have a greater than *de minimis* impact because they require ROs to perform extra work. Exceptions at 28, citing *SSA-Malden, supra*. In addition, the Union excepts to the Arbitrator’s finding that the follow-up provision reflected a pre-existing policy. Exceptions at 27.

B. Agency’s Opposition

The Agency alleges that the Union’s exceptions do not demonstrate that the award is deficient because they merely dispute the Arbitrator’s factual findings. Opp’n at 7-8. The Agency also alleges that the Arbitrator properly applied relevant Authority decisions and that the Authority decisions cited by the Union are distinguishable. *Id.* at 12.

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Union challenges the Arbitrator’s factual findings that several of the alleged changes resulting from the IRM revisions, specifically, the duties performed under the ROD, the MARs, and the follow-up provision, are pre-existing policy. We construe this challenge as a contention that the award is based on nonfacts. To establish that an award is based on a nonfact, the appeal-

ing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.* As the parties disputed at arbitration whether the forgoing IRM revisions reflected pre-existing policy, we deny this exception.

B. The award is not contrary to law.

The Union claims that the Arbitrator committed legal error when he denied the grievance. Exceptions at 4-5. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. *See U.S. Dep't of Def., Dep'ts of the Army and the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (*Ala. Nat'l Guard*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

When a grievance under § 7121 of the Statute involves an alleged ULP, the arbitrator must apply the same standards and burdens that would be applied by an administrative law judge (ALJ) in a ULP proceeding under § 7118. *AFGE, Local 940*, 52 FLRA 1429, 1437-38 (1997). In a grievance alleging a ULP by an agency, the Union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence. *See AFGE, Nat'l Border Patrol Council*, 54 FLRA 905, 909 (1998). As in other arbitration cases where violations of law are alleged, the Authority defers to an arbitrator's findings of fact. *See, e.g., U.S. Dep't of Commerce, Patent & Trademark Office*, 52 FLRA 358, 367 (1996).

Prior to changing unit employees' conditions of employment, an agency must provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain under the Statute. *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 715 (1999). As relevant here, an agency is not required to bargain over the impact and implementation of a change if the change has a *de minimis* effect. *U.S. Dep't of the Treasury, Internal Revenue Service*, 56 FLRA 906, 913

(2000). In assessing whether the effect of a change is more than *de minimis*, the Authority "looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment." *Id.*; *U.S. Dep't of the Air Force, Air Force Materiel Command*, 54 FLRA 914, 919 (1998); *U.S. Gen. Servs. Admin.*, 62 FLRA 341, 343 (2008).

The Authority has found changes to have only a *de minimis* effect where they have little significance and impact, such as: the reassignment of an employee from one position back to the employee's previous, substantially similar, position, *see HHS, SSA, supra*; or the discontinuation of an assignment involving only a small amount of work, *see Portsmouth Naval Shipyard, Portsmouth, N.H.*, 45 FLRA 574 (1992).

By contrast, the Authority has found a change to have a greater than *de minimis* effect when it involves a more significant change in working conditions, such as where: employees are assigned additional tasks that they had not performed before, *see SSA-Malden, supra*; *HUD, supra*; employees' workloads increase significantly, *see SSA-Gilroy, supra*; or a new method of assigning claims replaces a method that equalizes claims assigned to employees, *see SSA-Baltimore, supra*.³

Several of the Union's arguments challenge the Arbitrator's factual findings that some of the alleged changes resulting from the IRM revisions — specifically, the duties performed under the ROD, the MARs, and the follow-up provision — are pre-existing policy. However, as noted above, in assessing whether an arbitrator's legal conclusions are contrary to law, the Authority defers to the arbitrator's factual findings. *See Ala. Nat'l Guard*, 55 FLRA at 40. As also noted above, we find that the award is not based on nonfacts in this regard. Accordingly, the Union provides no basis for finding that the Arbitrator erred by finding that these particular revisions to the IRM were not, in fact, "changes" to conditions of employment over which the Agency had a duty to bargain.

3. In addition to these four Authority decisions, the Union cites numerous ALJ decisions to support its claim that the Arbitrator failed to follow Authority case law. Exceptions at 22, 23, 25-28. However, these decisions, to which exceptions were not filed with the Authority, are without precedential significance. *See* 5 C.F.R. § 2423.41(a) (an ALJ decision to which no exceptions are filed "shall, without precedential significance, become the . . . decision and order of the Authority"). Thus, the Union's reliance on these decisions provides no basis for finding that the award is contrary to law.

With respect to the remaining revisions to the IRM, the Arbitrator found that the rotational aspect of the ROD had only a *de minimis* effect because the ROs spent seventy to eighty-five percent of their time in the office whether or not they were performing the rotating duty. Award at 25. In addition, the Arbitrator found that the ROD was of limited duration because it was revoked shortly after the Union filed its grievance. *Id.* at 27. As for the pre-contact documentation revisions, the Arbitrator found little evidence that they resulted in additional work or would have a foreseeable impact on performance evaluations. *Id.* at 30. Thus, these changes were of little significance and impact, and the Union provides no basis for finding that the Arbitrator erred by finding that they were *de minimis* within the meaning of the above-cited Authority precedent.

For the foregoing reasons, we deny this exception.

V. Decision

The Union's exceptions are denied.