64 FLRA No. 82

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C.
(Agency)

0-AR-4244

DECISION

February 19, 2010

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 Joshua M. Javits 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 Union's exceptions.

The Arbitrator found that the Agency committed an unfair labor practice (ULP) under § 7116(a)(1) and (6) of the Statute by failing to follow a Decision and Order of the Federal Service Impasses Panel (FSIP Order). The Arbitrator held that the Agency did not violate § 7116(a)(5) of the Statute, however, because there was no requirement in the FSIP Order that the parties bargain. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

As part of the Agency's reorganization of its Case Processing and Insolvency units, the Agency determined that a reduction in force (RIF) was necessary. In January 2004, the Agency notified the Union of its plans. *See* Award at 2-3. The parties entered into negotiations regarding the impact and implementation of the proposed RIF, but were unable to reach agreement. *Id.* at 3.

To resolve the dispute, the Agency requested assistance from the Federal Service Impasses Panel (FSIP). *Id.* The FSIP directed the parties to resume negotiations with the assistance of the Federal Mediation and Conciliation Service, and, if agreement was not reached by January 31, 2005, to submit their "last best offers" and a written statement of positions to the FSIP by February 11, 2005. *Id.* The parties were unable to reach full agreement by that date; as a result, they submitted their "last best offers" to the FSIP. Among other things, the parties disputed the Union's request for Equal Employment Opportunity data (EEO data) to perform an adverse impact analysis. *Id.* at 4.

In March 2005, the FSIP issued its Decision and Order, directing the parties to adopt the Agency's "last best offer" regarding this issue. [1] *Id.* at 5. The FSIP Order directed the Agency to provide the EEO data to the Union by May 5, 2005. *Id.* It is undisputed that the Agency did not provide this information to the Union by this date. *Id.*

The RIF occurred on September 30, 2005. *Id.* As a result of the RIF, 194 Case Processing and Insolvency employees were separated from the Agency and a further 1450 employees left the Agency voluntarily, took early retirement, resigned with buy-outs, or were assigned to other positions within the Agency. *Id.* at 6.

In October 2005, more than two weeks after the RIF was implemented, and five months after the deadline for providing the EEO data, the Union filed a grievance regarding the Agency's failure to provide the EEO data as directed by the FSIP Order. *Id.* at 6. The Union claimed that the Agency's failure to provide this infor-

1. The Agency's "last best offer" was:

> The Employer will provide [the Union] with EEO data for the impacted Case Processing and [I]nsolvency employees.
>
> 1. The data will be provided to [the Union] within ten (10) workdays of the effective date of this agreement.
> 2. The data provided to the [U]nion will include race, age (over/under 40 years), national origin, gender, and disability status of impacted employees.
> 3. Within fifteen (15) workdays of receipt, [the Union] will provide the results of any adverse impact studies conducted utilizing the data.

Award at 5.

mation constituted a ULP in violation of § 7116(a)(1), (5), and (6) of the Statute.[2] *Id.*

The grievance could not be resolved. As relevant here, the parties submitted the following stipulated issues to arbitration:

> 1) Did the Agency commit an ULP under 5 U.S.C. § 7116(a)(1), (5) and (6) by violating the March 25, 2005 Decision and Order of the Federal Service[] Impasse[s] Panel?
>
> 2) If so, what shall be the remedy?

Id. at 2.

The Arbitrator found that the Agency had failed to comply with the FSIP Order and that such failure, even if unintentional, constituted a ULP under § 7116(a)(1) and (6) of the Statute. *Id.* at 21-22 (citing *U.S. Dep't of the Treasury, IRS*, 23 FLRA 774 (1996); *Nat'l Guard Bureau*, 47 FLRA 1175 (1993)). However, the Arbitrator determined that such failure did not constitute a ULP under § 7116(a)(5). *Id.* at 22-23.

The Arbitrator also held that a *status quo ante* remedy was inappropriate. *Id.* at 24. The Arbitrator held that the appropriateness of a *status quo ante* remedy "must be determined on a case by case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy." *Id.* (citing *Fed. Corr. Inst.*, 8 FLRA 604 (1982). The Arbitrator stated that the following factors should be considered in performing this balancing:

> (1) whether and when notice was given to the Union; (2) whether and when the Union requested bargaining; (3) the willfulness of the Agency's conduct in failing to discharge its bargaining obligation; (4) the nature and extent of the adverse impact on unit employees; and (5) whether and to what degree a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the Agency's operations.

Id.

The Arbitrator found that the Agency had not intentionally withheld the information and stated that this fact "clearly mitigates" the Agency's conduct. *Id.* at 8, 24-25. Also, the Arbitrator found that the Union did not grieve the matter with "clean hands," noting that the Union failed to complain about the EEO data until after the RIF had been implemented, rather than immediately after the Agency failed to comply with the FSIP Order. *Id.* at 25. The Arbitrator also determined that a *status quo ante* remedy would impair significantly the efficiency and effectiveness of, and be unduly burdensome to, the Agency's operations. *Id.* at 25-26.

To remedy the Agency's violation, the Arbitrator ordered the Agency to cease and desist from ignoring all future FSIP orders. *Id.* at 27. In addition, the Arbitrator directed the Agency to post a notice acknowledging its unlawful conduct on all Agency notice boards for 60 days. *Id.*

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the Arbitrator exceeded his authority by rendering an award that is contrary to law. Exceptions at 5. The Union argues that the remedy for a ULP under the Statute is *status quo ante* relief and that the Arbitrator's failure to provide such a remedy renders his award contrary to law. *Id.* at 6 (citing *U.S. Dep't of Justice, Bureau of Prisons, Safford, Ariz.*, 35 FLRA 431, 445-46 (1990)).

Further, the Union asserts that, if *status quo ante* relief is inappropriate, the Arbitrator should have imposed a "*Transmarine*" remedy instead. *Id.* at 7 (citing *Transmarine Navigation Corp.*, 170 NLRB 389 (1968)). According to the Union, under *Transmarine*, "where an [e]mployer commit[s] an unfair labor practice while bargaining with the exclusive representative over a RIF or layoffs due to a sale or shut[-]down of operations, the appropriate remedy [is] to order retroactive bargaining and reinstate the employees for the period of time that the parties are engaged in retroactive bargaining[.]" *Id.* Applying that standard here, the Union contends that the employees who were separated in the RIF are entitled to reinstatement and back pay for the period of time that the RIF would have been delayed had the Agency complied with the FSIP Order. *Id.* at 9-10 (citing *Gannett, Inc.*, 333 NLRB 355 (2001)).

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2. 5 U.S.C. § 7116(a)(1), (5), and (6) provides, in relevant part, that it is an unfair labor practice for an agency:

> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> . . . .
>
> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;
>
> (6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter[.]

5 U.S.C. § 7116.

The Union asserts that, had the FSIP Order been followed, the RIF would have been delayed at least thirty-five workdays; accordingly, the Union alleges that the RIF-separated employees are entitled, at a minimum, to be placed on the Agency's payroll for that amount of time. *Id.* at 10. The Union contends that this temporary reinstatement would not be unduly disruptive to the Agency as it "would require nothing more than the Agency placing [the] employees back on the payroll for . . . 35 days." *Id.* at 11. The Union alleges that the Arbitrator erred because he failed to consider this more limited alternative remedy. *Id.* Additionally, the Union argues that the remedy provided by the award should be overturned because it "encourages [a]gencies to violate their collective bargaining obligations." *Id.* at 11-12.

B. Agency's Opposition

The Agency argues that the Arbitrator's award is not contrary to law and that the Union has "failed to identify any legal authority which compelled the Arbitrator to order the remedies requested by the Union." Opposition at 11. The Agency asserts that the Authority has held that arbitrators have broad discretion in fashioning remedies and that arbitrators are not required to provide remedies for every violation of a collective bargaining agreement. *Id.* (citing *Def. Sec. Assistance Dev. Ctr.*, 60 FLRA 292, 294 (2004); *AFGE, Local 2274*, 57 FLRA 586, 589 (2001)). As such, the Agency argues that the Arbitrator's award is not contrary to law because it fails to impose a *status quo ante* remedy. *Id.* at 12-17.

The Agency alleges that the Union mischaracterizes the Arbitrator's rationale for failing to award the *status quo ante* remedy and that the Arbitrator did not "conclude that he was somehow prohibited or precluded by law from awarding the Union's requested remedy." *Id.* at 12 (citing *NTEU*, 48 FLRA 566, 570-71 (1993)). Instead, the Agency asserts that the Arbitrator "squarely" addressed the Union's requested remedy and expressly decided not to grant it. *Id.*

Further, the Agency contends that the Union failed to identify any law that would compel the Arbitrator to issue a *status quo ante* remedy. *Id.* at 13. The Agency argues that both cases cited by the Union are not comparable because they did not involve the test to be applied when determining whether a *status quo ante* remedy is appropriate in arbitration. *Id.* at 15 (citing Exceptions at 7), 24-25. According to the Agency, the Authority has held that it will uphold the remedy determinations of an arbitrator unless it can be shown that the remedy is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute]." *Id.* at 15, 16-17 (quoting *NTEU*, 48 FLRA at 572) (citation omitted). The Agency contends that the Union failed to meet this "heavy burden." *Id.* at 17. The Agency further alleges that the Arbitrator's findings regarding why a *status quo ante* remedy was inappropriate in this case are supported by the record and remain unchallenged by the Union. *Id.* at 17-24.

Finally, the Agency argues that the Arbitrator did not commit a legal error by failing to impose the Union's requested *Transmarine* remedy. *Id.* at 25. Citing *AFGE, Gen. Comm.*, 28 FLRA 1028, 1029 (1987), the Agency asserts that the Arbitrator is not required to consider or specifically address every remedy requested by the Union. *Id.* at 27. Moreover, the Agency contends that the Arbitrator acknowledged that the Union was requesting the *Transmarine* remedy, thereby showing that the Arbitrator considered it. *Id.* at 26-27.

IV. Analysis and Conclusions

A. The award is not contrary to law.

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 & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). 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 in a ULP proceeding under § 7118 of the Statute. 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). However, as in other arbitration cases, including those 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).

In this regard, where the arbitrator finds that a ULP was committed, the Authority defers to the judgment and discretion of the arbitrator in the determination of the remedy. *NTEU*, 48 FLRA at 571. Unless the party excepting to the arbitrator's determination of remedy establishes that a particular remedy is compelled by the Statute, we review the remedy determinations of arbitrators in ULP grievance cases just as the Authority's remedies in ULP cases are reviewed by the federal courts of appeals. *Id.* at 571-72. More specifically, we uphold the arbitrator's remedy determination unless the determination is "a *patent attempt* to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute]." *Id.* at 572 (quoting *NTEU v. FLRA*, 910 F.2d 964, 968 (D.C. Cir. 1990) (*en banc*)) (emphasis in original).

The Union makes no claim that the remedy awarded by the Arbitrator was "a *patent attempt* to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute]." *Id.* Rather, the Union merely argues that the Authority would have awarded a *status quo ante* remedy if it had been determining the remedy in the first instance. However, as noted, this is not the standard that the Authority applies in resolving such a claim.

Moreover, we find that the Arbitrator did not err in failing to award the *Transmarine* remedy. As the Agency contends, an arbitrator is not required to consider or specifically address every remedy set forth by a party. *See AFGE*, 28 FLRA at 1029. *See also NTEU, NTEU, Chapter 33*, 44 FLRA 252, 276 (1992). Furthermore, the Arbitrator did acknowledge that the Union was requesting the *Transmarine* remedy, thereby showing that the Arbitrator considered it. Award at 14.

Accordingly, we find that the remedy awarded is not contrary to law and deny the Union's exception.

B. The award is not contrary to public policy.

Under § 7122(a)(2) of the Statute, an award will be found deficient on grounds similar to those applied by federal courts in private sector labor relations cases. In the private sector, courts will find an arbitration award deficient when the award is contrary to public policy. However, the Authority has held that this ground is extremely narrow. *U.S. Dep't of the Navy, Long Beach Naval Shipyard, Long Beach, Cal.*, 48 FLRA 612, 618 (1993). In particular, for an award to be found deficient on this basis, the public policy asserted must be "explicit," "well-defined," and "dominant," *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983), and a violation of the policy "must be clearly shown." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987).

We construe the Union's argument that the award encourages agencies to violate their collective bargaining obligations because the award fails to implement a *status quo ante* remedy as an exception that the award is contrary to public policy. Exceptions at 11-12. A failure to order *status quo ante* relief, however, does not by itself make an award contrary to public policy. Moreover, the Union has failed to identify a policy requiring a *status quo ante* remedy in these circumstances. Indeed, the Authority previously has held that, where a *status quo ante* remedy is inappropriate, other "traditional" remedies, including a cease-and-desist order and a posting of a notice of the ULP – such as those ordered by the Arbitrator here – are also available. *Air Force Logistics Command, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 53 FLRA 1664, 1671 (1998) (citing *F.E. Warren Air Force Base, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996)).

Accordingly, we find that the award is not contrary to public policy and deny the Union's exception.

V. Decision

The Union's exceptions are denied.