65 FLRA No. 105

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MONTGOMERY REGIONAL OFFICE
MONTGOMERY, ALABAMA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 552
(Union)

0-AR-4566

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DECISION

February 3, 2011

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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 William H. Holley, Jr. filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Union filed a grievance alleging that the Agency raised production standards without first satisfying its bargaining obligations under the parties' Master Agreement (Agreement). The Arbitrator sustained the grievance and directed the Agency to return to the prior performance standards until it met its bargaining obligations. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency decided to raise the productivity element of the performance standards for its Rating Veterans Service Representatives (RVSRs) from 3.5 to 4.0 end products per day. Award at 45. When the Agency implemented the higher standard, the Union filed a grievance contending that the Agency did not meet its contractual bargaining obligations before effecting the change. *Id.* at 2-3. The grievance was unresolved and submitted to arbitration, where the Arbitrator framed the issues, in part, as follows: "Did the Agency violate the Agreement when it increased the production standard for the [RVSRs] from 3.5 to 4.0? If so, what is the remedy?"[1] *Id.* at 9.

The Arbitrator found that the parties engaged in pre-implementation discussions about the change in standards and that the Union proposed certain "stipulations . . . for agreement[,]" *id.* at 45, because the Union wanted the discussions to result in a Memorandum of Understanding (MOU) "to be agreed to and signed by" the Agency and Union, *id.* at 46. In this regard, the Arbitrator identified several ways in which the parties would benefit from a signed, written record of understandings reached in their discussions, but he found that the Agency representative participating in the discussions "refused to initial or sign any" such written statement. *Id.* at 47. The Arbitrator also determined that, although the Agency's participant in the discussions contended that she had reached an unwritten "[g]entlemen's [a]greement" with the Union concerning the change in performance standards, *id.*, the Union's letter proposing "stipulations . . . for agreement" stated, "[W]e've . . . not come to a clear understanding. . . . The Union's position is that we do not agree[,]" *id.* at 46.

The Arbitrator concluded:

> For these reasons, the Agency did not meet its bargaining obligations before the implementation of the 3.5 production standard. . . .[2] [B]ecause the Agency

1. The Arbitrator also resolved whether the Agency's response to the grievance was timely under the Agreement, and he found that the response complied with the Agreement in this regard. As there have been no timely filed exceptions to this finding, *see infra* note 3, we do not discuss it further.

2. The Arbitrator cited, among other provisions, the following sections of Article 26 of the Agreement as relevant to his determination that the Agency did not satisfy its bargaining obligations:

> Section 5 - Performance Standards
>
> A. . . . The [U]nion may provide input into any changes to performance standards and/or establishment of new performance standards.
>
> . . . .

> violated Article 26 [of the Agreement], . . . the Agency must return to the 3.5 production standard until it has met its bargaining obligations under the [Agreement].

Id. at 47; *see also id.* at 48.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the Arbitrator "failed to conform to law, rule, and regulation in finding the Agency did not meet its bargaining obligations under Article 26" because "committing an agreement to writing is not a requirement for meeting the Agency's obligation to bargain under the Agreement." Exceptions at 2-3.

In addition, the Agency argues that the award violates its right to assign work under § 7106(a)(2)(B) of the Statute because it directs changes to performance standards. *Id.* at 6. The Agency argues further that the remedy does not satisfy either the first or second prong of the test set forth in *United States Department of the Treasury, Bureau of Engraving & Printing, Washington, D.C.*, 53 FLRA 146 (1997) (*BEP*), for evaluating awards alleged to infringe on management rights. Exceptions at 6.

Moreover, the Agency asserts that the Arbitrator's direction "to change performance standards[,]" *id.* at 3, exceeds the Arbitrator's authority because: (1) the remedy does not "address" the Arbitrator's finding that the Agency failed to meet its bargaining obligations; and (2) a "more equitable remedy . . . would have been to order the parties to commit the agreement [that resulted from pre-implementation discussions] to writing." *Id.* at 4. Finally, the Agency contends that the Arbitrator exceeded his authority by directing a remedy that: (1) violates management's rights; and (2) fails to conform to the criteria that the Authority set forth in *Federal Correctional Institution*, 8 FLRA 604 (1982) (*FCI*), for assessing whether a status quo ante (SQA) remedy is appropriate. Exceptions at 4-5.

> E. The Union shall be given reasonable written advance notice . . . when [m]anagement changes, adds to, or establishes new elements and performance standards. Prior to implementation of the above changes to performance standards, management shall meet all bargaining obligations.
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> Section 6 - Communications
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> E. . . . [W]hen changes are made to performance standards[,] the [Agency] agrees that the supervisory personnel shall meet with their employees to discuss new or revised critical and non-critical elements and standards . . . . The purpose of the meeting shall be to clarify any questions that the employees have concerning their performance standards . . . .

Award at 10-11; *see also* Award at 43.

B. Union's Opposition

The Union argues that the Arbitrator correctly found that the Agency failed to meet its bargaining obligations before raising performance standards. Opp'n at 3. In addition, the Union contends that the Arbitrator did not exceed his authority by establishing new performance standards. *Id.* Instead, according to the Union, the Arbitrator directed the Agency to return to the previously agreed-upon performance standards until the Agency satisfied its bargaining obligations. *Id.* Further, although the Union recognizes that management has a right to assign work, the Union asserts that the Agency must exercise its right in compliance with the Agreement. *Id.*[3]

3. The Union additionally requests that the Authority "review the decision on the grievance procedure[.]" Opp'n at 4; *see also supra* note 1. To the extent that the Union is excepting to the award, § 7122(b) of the Statute provides, in pertinent part, that exceptions to an arbitrator's award must be filed "during the 30-day period beginning on the date the award is served on the party[.]" 5 U.S.C. § 7122(b). Under the Authority Regulations in effect when this case was filed, the first day of the thirty-day period for filing exceptions was the date of service of the award. *See former* 5 C.F.R. § 2425.1(b) (2009). In this regard, the Authority presumes, absent evidence to the contrary, that an award was served by U.S. mail on the date of the award, and the Arbitrator's award is dated August 24. *See, e.g., Int'l Org. of Masters, Mates & Pilots*, 49 FLRA 1370, 1370-71 (1994) (*Masters, Mates & Pilots*). Thus, the thirty-day deadline for filing exceptions was September 22. Under both the current and former Regulations, if an award is served on a party by U.S. mail, then five days are added to the thirty-day filing deadline. *See current* 5 C.F.R. § 2429.22 (2010); *former* 5 C.F.R. § 2429.22 (2009). As there is no evidence to the contrary, we assume that the award was served by U.S. mail, *see Masters, Mates & Pilots*, 49 FLRA at 1370-71, and add five days to the September 22 filing deadline, *see* 5 C.F.R. § 2429.22. Because the last day of that addition fell on Sunday, September 27, in accordance with 5 C.F.R. § 2429.21(a), the deadline for filing exceptions was Monday, September 28. Although the opposition bears a signature

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Agency contends that the Arbitrator "failed to conform to law, rule, and regulation" in finding that the Agency violated Article 26 of the Agreement, and that the award violates management's right to assign work. Exceptions at 2, 6. When an exception involves an award's consistency with law, rule, or regulation, 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.*

Although the Agency alleges that the Arbitrator "failed to conform to law, rule, and regulation" when he found that the Agency violated the Agreement, the Agency does not cite a law, rule, or regulation with which the Arbitrator allegedly failed to conform. "'A general assertion, absent more, is not sufficient to support a contention that an award is contrary' to law." *NFFE, Local 1442*, 61 FLRA 857, 859 (2006) (quoting *U.S. Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 57 FLRA 489, 492 (2001)). Consequently, the Agency's allegation constitutes a bare assertion that does not establish that the award is deficient. *See AFGE, Local 217*, 60 FLRA 459, 460 (2004). Therefore, we deny this exception.[4]

With regard to the Agency's contentions that the award violates its right to assign work and that the remedy provided does not satisfy the *BEP* test, we note that the Authority recently revised the analysis that it will apply when reviewing management-rights exceptions to arbitration awards. *See U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-07 (2010) (Chairman Pope concurring) (*FDIC, S.F. Region*). Under the revised analysis, the Authority will first assess whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115.[5] If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated pursuant to § 7106(b) of the Statute. *Id.* In setting forth its revised analysis, the Authority specifically rejected the continued application of the reconstruction standard (i.e., the "second prong") set forth in *BEP*. *FDIC, S.F. Region*, 65 FLRA at 106-07.

The Union does not challenge the Agency's contention that the award affects management's right to assign work. *See* Opp'n at 3. As for whether the award enforces a contract provision negotiated under § 7106(b), the Arbitrator found that the Agreement obligates the Agency to bargain over the impact and

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date of September 28, *see* Opp'n at 4, the Union did not file the opposition with the Authority until November 4. *See* UPS Envelope from Union to FLRA (hand-dated Nov. 3, received Nov. 4) (on file with Authority's Office of Case Intake and Publication); *former* 5 C.F.R. § 2429.27(d) (2009) ("[D]ate of service . . . shall be the day when the matter served is . . . received from commercial delivery[.]"). Therefore, to the extent that the Union is excepting to the Arbitrator's procedural ruling, that exception is untimely, and we dismiss it.

4. We note that the Agency does not contend that the award fails to draw its essence from the Agreement. Nevertheless, even if the Agency's arguments were construed to raise an essence exception, the Agency does not provide any further explanation or identify any contractual language to substantiate its sole argument regarding the Arbitrator's interpretation of the Agreement: that "committing an agreement to writing is not a requirement for meeting the Agency's obligation to bargain under the Agreement." Exceptions at 3. Thus, even if construed as an essence exception, the Agency's claim is a bare assertion that does not provide any basis for finding the award deficient. *Cf. U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 65 FLRA 160, 163 n.4 (2010) (argument that contractual provision permitted, but did not require, actions directed by arbitrator, without further explanation, found to be bare assertion).

5. For the reasons articulated in his recent concurring opinion and footnotes, Member Beck would conclude that it is unnecessary to assess whether the award affects the exercise of the asserted management right. The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. *See EPA*, 65 FLRA at 120 (Concurring Opinion of Member Beck); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Terre Haute, Ind.*, 65 FLRA 460, 462-63 n.2 (2011); *Soc. Sec. Admin., Dallas Region*, 65 FLRA 405, 408 n.5 (2010); *U.S. Dep't of the Air Force, Air Force Materiel Command*, 65 FLRA 395, 398 n.7 (2010); *U.S. Dep't of Health & Human Servs., Office of Medicare Hearings & Appeals*, 65 FLRA 175, 177 n.3 (2010); *U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 171, 173 n.5 (2010). Member Beck would conclude that the Arbitrator's award is a plausible interpretation of the parties' agreement and deny the exception.

implementation (I & I) of changes to performance standards.[6] *See* Award at 47-48 (finding violation of Art. 26, § 5(E)); *see also id.* at 43 (quoting Art. 26, § 5(E)) ("Prior to implementation of . . . changes to performance standards, management shall meet all bargaining obligations[.]"). In this regard, the Authority has held that contractual requirements to bargain I & I before exercising management rights are enforceable § 7106(b) provisions. *See, e.g., U.S. Dep't of the Air Force, Warner Robins Air Force Base, Ga.*, 53 FLRA 1344, 1349 (1998) (*Warner Robins AFB*). Consequently, the Arbitrator's direction to the Agency to satisfy its I & I bargaining obligations under Article 26, Section 5(E) of the Agreement enforces a contract provision negotiated pursuant to § 7106(b) of the Statute. *See EPA*, 65 FLRA at 115; *Warner Robins AFB*, 53 FLRA at 1349. As to the Agency's contention that the award does not satisfy the reconstruction standard of *BEP*, as mentioned above, the Authority has rejected the continued application of that standard. *See FDIC, S.F. Region*, 65 FLRA at 106-07. Thus, the Agency's contention that the award is deficient under the second prong of *BEP* does not provide a basis for setting the award aside. For the foregoing reasons, we find that the Agency has not demonstrated that the award is contrary to management's right to assign work under § 7106(a)(2)(B), and we deny this exception.

B. The Arbitrator did not exceed his authority.

The Agency contends that Arbitrator exceeded his authority in several ways. Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

As for the Agency's argument that the Arbitrator should have directed the "more equitable remedy" of reducing the parties' agreement to writing, Exceptions at 4, the argument proceeds from an incorrect premise: that the parties reached an I & I agreement on the changed performance standards, which, if written and signed, would fully satisfy the Agency's contractual I & I bargaining obligations. The Arbitrator did not find that such an agreement existed between the parties, and he noted that the Union expressly denied that any agreement had been reached. *See* Award at 46. Thus, the "more equitable remedy" that the Agency requests is inapplicable to circumstances of this case.

With regard to the Agency's contention that the Arbitrator failed to apply the *FCI* factors before granting an SQA remedy, the Authority has held that arbitrators have "great latitude in fashioning remedies[.]" *AFGE, Local 916*, 57 FLRA 715, 717 (2002) (*Local 916*) (quoting *NTEU, Chapter 68*, 57 FLRA 256, 257 (2001) (*Chapter 68*)); *Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 25 FLRA 969, 971 (1987). In particular, where an arbitrator finds that an agency's failure to bargain violates a collective bargaining agreement, the propriety of SQA relief is governed by the arbitrator's remedial authority under the violated agreement, not the *FCI* factors. *Chapter 68*, 57 FLRA at 257; *AFGE, Council 215, Nat'l Council of SSA OHA Locals*, 46 FLRA 1518, 1523-24 (1993) (*Council 215*). Although the Agency asserts that the Arbitrator contravened contractual limits on his remedial authority, the Agency does not identify a provision in the Agreement that limits the Arbitrator's authority in such a manner. *Cf., e.g., U.S. Dep't of the Air Force, Luke Air Force Base, Phoenix, Ariz.*, 62 FLRA 214, 215 (2007) (Chairman Cabaniss dissenting; Member Pope dissenting as to other matters) (excepting party failed to identify a specific contractual limitation on arbitrator's remedial authority); *Council 215*, 46 FLRA at 1524 (union did not establish that agreement required arbitrator to provide SQA relief for violations). In the absence of such a limitation, the Arbitrator's direction to the Agency is an appropriate exercise of his "great latitude" in fashioning remedies. *See Local 916*, 57 FLRA at 717 (quoting *Chapter 68*, 57 FLRA at 257).[7]

For these reasons, we find that the award is not deficient for disregarding specific limitations on the Arbitrator's remedial authority, and we deny this exception.

V. Decision

The Agency's exceptions are denied.

6. We note that the Agency does not dispute this obligation but contends that the obligation has been satisfied. *See* Exceptions at 2. The Arbitrator rejected that contention, *see* Award at 47-48, and the Agency provides no basis for finding that the Arbitrator erred in that regard.

7. Although the Agency also contends that the Arbitrator exceeded his authority because the award violates management's rights, as we have found that the award does not violate those rights, *supra* Part IV.A., we reject this contention as well.