65 FLRA No. 124

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL PRISON CAMP
DULUTH, MINNESOTA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3935
COUNCIL OF PRISON LOCALS
COUNCIL 33
(Union)

0-AR-4500

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DECISION

February 28, 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 an exception to an award of Arbitrator James A. Lundberg 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 untimely opposition to the Agency's exception.[1]

The Arbitrator concluded that the Agency: (1) violated Article 24 of the parties' agreement (Agreement) when a supervisory employee engaged in prohibited advocacy in seeking employment for his wife; and (2) violated Article 6 of the Agreement by conducting the grievant's reassignment in an inequitable manner. As a remedy the Arbitrator awarded, among other things: (1) bargaining to clarify the scope of the grievant's reassigned position; and (2) cross development training for the grievant. For the reasons set forth below, we deny the Agency's exception.

II. Background and Arbitrator's Award

The grievant is employed by the Agency as a medical secretary. The grievant was originally employed as a unit secretary prior to her current position as a medical secretary. Award at 2.

The Agency hired a new health services administrator (Mr. S) while there was an open medical secretary position. *Id.* at 3. His wife (Ms. S) requested and was granted a transfer to the open medical secretary position at the Agency after her husband took the health services administrator position. *Id.*

The warden submitted a U-2 Waiver for Supervision Request because Ms. S's employment in the medical secretary position violated Article 24 of the Agreement, which prohibits one relative from being in the supervisory chain of command over another.[2] *Id.* at 4. However, the Regional Director denied the waiver, believing that the Agency should avoid even the appearance of nepotism. *Id.* at 4-5. Ms. S then switched positions with the grievant, causing the grievant to be reassigned to the medical secretary position and Ms. S to be assigned to the unit secretary position. *Id.* at 5. The grievant was informed of the change by a reassignment letter, and then met with management at a reassignment meeting at which the Union was not present. *Id.* The grievant previously had told Mr. S that she was not interested in the medical secretary position. *Id.* at 4.

The Union requested to bargain with the Agency over "management's proposal to reassign a [u]nit secretary to the Health Services Department." *Id.* at 5. Subsequently, the Agency held a second reassignment meeting with the Union, at which the Agency asked the Union "what impact and implementation issues [it] wished to negotiate." *Id.* Rather than responding to the Agency's request, the Union presented a grievance, alleging that the

1. The Union concedes that its opposition was untimely filed. *See* Union Response to Show Cause Order at 2. Under 5 C.F.R. § 2429.23(b), an expired time limit can be waived upon a showing of "extraordinary circumstances" justifying the waiver. As the Union fails to make any claim that extraordinary circumstances warrant a waiver of the time limit, we will not consider the Union's opposition.

2. Article 24, Section (a)(2) provides: "There will be no prohibitions to the employment of a relative (including spouse) of an employee provided that: . . . there is no situation created in which one relative is in the supervisory chain of command over the other." Award at 6.

Agency improperly handled the consideration of Ms. S, failed to give the Union reasonable notice of the reassignment, failed to conduct impact and implementation bargaining, and failed to treat its employees fairly. *Id.* at 5-6. The Agency responded that it was exercising its right to assign work under 5 U.S.C. § 7106. *Id.* at 6. The matter was not resolved and was submitted to arbitration. *Id.*

The issue before the Arbitrator as framed by the Union was: "In the reassignment of [the grievant], did the [A]gency, in the exercise of its rights, violate the rights of the [U]nion as well as multiple articles of the [Agreement]? If this is found to be the case, what is the appropriate remedy?" *Id.* at 2. The issue as framed by the Agency was: "Did the [A]gency violate the Master Agreement, Article 3 section c, Article 6 section b, Article 7 section b and Article 24, with regards to the reassignment of [the grievant] from [u]nit [s]ecretary to [m]edical [s]ecretary at the [Agency]? If so, what is the appropriate remedy?" *Id.*

The Arbitrator concluded that conversations Mr. S had with the warden, as well as with secretaries in other units, constituted "prohibited advocacy," in violation of Article 24 of the Agreement.[3] *Id.* at 14-15.

The Arbitrator further concluded that the Agency violated Article 6, Section (b)(2) of the Agreement by conducting the reassignment in an inequitable manner.[4] *Id.* at 16. The Arbitrator found that the Agency provided the grievant less than a week's notice of the reassignment, reassigned her to a job she did not want, conducted the reassignment meeting without the Union present, and did not conduct impact and implementation bargaining prior to the reassignment. *Id.* Specifically, the Arbitrator found that the issues of work load, boundaries of work, cross-training, leave time, and work schedule should have been negotiated. *Id.* at 16-17.

As a remedy for the violations of Article 24 and Article 6 of the Agreement, the Arbitrator ordered that: (1) the parties negotiate over the issues listed in the ground rules agreed to by the parties; (2) the grievant maintain her current work station and not be moved without a legitimate work reason and notification to the Union; (3) the grievant be treated fairly and not be subject to retaliation; (4) the parties conduct "[n]egotiations over the scope of the [m]edical secretary position . . . for the purpose of clarifying the duties of the [m]edical secretary and establishing work expectations and boundaries[;]" (5) the grievant "be allowed to receive training in cross development courses without any limitation due to her work assignment as [m]edical secretary[;]" (6) the grievant receive priority consideration for future vacancies in her job series; and (7) the Agency not arbitrarily deny a request by any qualified secretary willing to exchange positions with the grievant. *Id.* at 18-19.

III. Agency's Exception

The Agency argues that the Arbitrator's award is contrary to law because it violates management's rights under § 7106 of the Statute. Exception at 4. The Agency asserts that two of the remedies ordered by the Arbitrator -- that the parties must negotiate to clarify "the scope of the [m]edical secretary position" and that the "grievant will be allowed to receive training in cross development courses without any limitation due to her work assignment as [m]edical secretary" -- affect management's right to assign work. *Id.* at 4-5. Accordingly, the Agency contends that the Authority should apply the two-prong test set forth in *United States Department of the Treasury, Bureau of Engraving & Printing, Washington, D.C.*, 53 FLRA 146 (1997) (*BEP*) and conclude that the award violates management's rights. *Id.*

The Agency claims that the award "clearly affects [its] right to assign work." *Id.* at 5. According to the Agency, the right to assign work includes the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned. *Id.* at 6. Additionally, the Agency argues that "the assignment of training constitutes the assignment of work." *Id.* at 7. Therefore, according to the Agency, the above remedies affect its right to assign work.

The Agency also argues that the Arbitrator's award does not satisfy prong I of *BEP* because Article 6 and Article 24 of the Agreement do not

3. Article 24, Section (a)(1) provides: "There will be no prohibitions to the employment of a relative (including spouse) of an employee provided that: (1) there is no evidence of advocacy of employment, either orally or in writing, by the relative (including spouse) already employed[.]" *Id.*

4. Article 6, Section (b)(2) grants to employees the right "to be treated fairly and equitably in all aspects of personnel management." *Id.* at 7.

constitute arrangements for employees adversely affected by the exercise of a management right. *Id.* at 8. According to the Agency, requiring it to bargain with the Union over the scope of the duties of the medical secretary position directly interferes with its right to assign work. *Id.* at 10. The Agency claims that these provisions, as interpreted by the Arbitrator, are not sufficiently tailored to be appropriate arrangements. *Id.* at 11. The Agency also argues that the portion of the award allowing the grievant to participate in cross development training "effectively abrogates" its right to assign work. *Id.*

Finally, the Agency argues that, even if the Arbitrator's interpretation of the Agreement is an appropriate arrangement, the award does not satisfy prong II of *BEP* because it is not a reconstruction of what the Agency would have done had it not violated the Agreement. *Id.* at 12-13. The Agency claims that, even if it had violated the Agreement, it would have only negotiated over the impact and implementation of the decision to reassign, and would not have bargained over the scope of the medical secretary duties. *Id.* at 13. Additionally, the Agency argues that it would not have granted the grievant an "unfettered right to training," but would have notified the Union and bargained over the impact and implementation of the reassignment. *Id.* at 13-14.

IV. The Arbitrator's award is not contrary to § 7106 of the Statute.

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.*

The Agency contends that the Arbitrator's award enforcing Article 24 and Article 6 of the Agreement impermissibly affects management's right to assign work under § 7106 of the Statute. The Authority recently revised the analysis that it will apply when reviewing management rights exceptions to arbitration awards. *See U.S. Envtl. Prot. Agency*, 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. If so, then the Authority examines whether the award provides a remedy for a violation of either an applicable law, within the meaning of § 7106(a)(2) of the Statute, or a contract provision that was negotiated pursuant to § 7106(b) of the Statute. *Id.* Furthermore, in setting forth the revised analysis, the Authority rejected the continued application of the "reconstruction" requirement set forth in *BEP*. *FDIC, S.F. Region*, 65 FLRA at 106-07.

The Agency argues that the Arbitrator's award affects management's right to assign work. Exceptions at 5. The right to assign work under § 7106(a)(2)(B) of the Statute encompasses the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Oakdale, La.*, 59 FLRA 277, 279 (2003) (citing *AFGE, Local 3529*, 56 FLRA 1049, 1050 (2001)). The right to assign work also encompasses "decisions as to the type of training to be assigned and the frequency and duration of [the] training." *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 61 FLRA 113, 116 (2005) (quoting *NTEU*, 45 FLRA 339, 358 (1992)). The Arbitrator's award requires the parties to negotiate to clarify the particular duties assigned to the grievant's position and allows the grievant to receive training without any limitation due to her current work assignment. Therefore, we find that the award affects management's right to assign work.

The Agency disputes that the Arbitrator's award enforces a contract provision that was properly negotiated pursuant to § 7106(b)(3) because the provision is not an appropriate arrangement. In determining whether the award enforces a contract provision negotiated under § 7106(b)(3), the Authority assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and (2) if so, whether the arbitrator's enforcement of the arrangement abrogates the exercise of the management right. *EPA*, 65 FLRA at 116-18. In concluding that it would apply an abrogation standard, the Authority rejected continued application of an excessive interference standard. *Id.* at 118.

A contract provision constitutes an arrangement if the provision, as interpreted and applied by an arbitrator, ameliorates or mitigates adverse effects that flow from management's exercise of its management rights. *See Soc. Sec. Admin.*, 65 FLRA 339, 341-42 (2010) (citing *EPA*, 65 FLRA at 116). The Authority has held that provisions requiring an agency to exercise its management rights fairly and equitably, similar to Article 6, constitute arrangements within the meaning of § 7106(b)(3) of the Statute. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Beaumont, Tex.*, 62 FLRA 100, 102 (2007) (finding a "fair and equitable" provision to be an arrangement); *U.S. Dep't of the Navy, Supervisor of Shipbuilding, Conversion & Repair, Newport News, Va.*, 57 FLRA 36, 39 (2001) (same).[5] We find that Article 6, as interpreted and applied by the Arbitrator, constitutes an arrangement. An award abrogates the exercise of a management right if the award precludes the agency from exercising the right. *U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 171, 174 (2010). The Arbitrator's award does not, as the Agency alleges, preclude it from reassigning employees, but, rather, only precludes the Agency from conducting reassignments in an unfair manner. *See U.S. Dep't of the Army, Dugway Proving Ground, Dugway, Utah*, 57 FLRA 224, 226 (2001) (finding that, because the agreement provision preserved the agency's right to treat employees fairly, the award did not abrogate management's rights). We find that Article 6, as enforced by the Arbitrator, does not abrogate management's right to assign work. *See U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr., Warner Robins Air Force Base, Ga.*, 53 FLRA 1344, 1349 (1998) (finding that the arbitrator's award ordering the parties to negotiate over procedures and appropriate arrangements did not abrogate the agency's right to assign work). Accordingly, we find that Article 6, as interpreted by the Arbitrator, was properly negotiated pursuant to § 7106(b).[6]

The Agency further argues that even if the Arbitrator's award satisfies prong I of *BEP*, the remedy is not a reconstruction of what the Agency would have done had it not violated the Agreement. Exceptions at 12-13. However, as noted above, the Authority no longer requires that an arbitrator's remedy reconstruct what management would have done had it not violated the Agreement.[7] *FDIC*, 65 FLRA 179, 181 (2010).

For the foregoing reasons, we find that the Arbitrator's award is not contrary to § 7106 of the Statute and deny the Agency's exception.[8]

V. Decision

The Agency's exception is denied.

5. Moreover, although the Agency argues that the award is not sufficiently tailored to be an arrangement, "because an arbitration award necessarily applies an agreement provision to actual, aggrieved parties, arbitration awards are inherently tailored to adversely affected employees, and the Authority does not conduct a tailoring analysis in resolving exceptions to arbitration awards." *EPA*, 65 FLRA at 116.

6. Because we find that Article 6 was properly negotiated pursuant to § 7106(b), it is unnecessary to consider whether Article 24 was also negotiated pursuant to § 7106(b). *Cf. EPA*, 65 FLRA at 119 n.12 (finding it unnecessary to address an award's alternative finding after finding an appropriate arrangement).

7. For the reasons set forth in her concurring opinion in *FDIC, S.F. Region*, 65 FLRA at 112, Chairman Pope agrees that the Agency provides no basis for finding the Arbitrator's remedy deficient because the remedy is reasonably related to Article 6 and the harm being remedied.

8. Member Beck agrees with the conclusion to deny the Agency's exception. He does not agree, however, with his colleagues' analysis insofar as they address the question of whether the award affects the exercise of an asserted management right. For the reasons discussed in his concurring opinion in *EPA*, 65 FLRA 113, Member Beck concludes that where, as here, the Arbitrator is enforcing a contract provision that has been accepted by the Agency as a permissible limitation on its management's rights, it is inappropriate to assess whether the provision itself is an appropriate arrangement or whether it abrogates a § 7106(a) right. *Id.* at 120 (Concurring Opinion of Member Beck). The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. *Id.*; *see also FDIC, S.F. Region*, 65 FLRA at 107. Member Beck concludes that the Arbitrator's award is a plausible interpretation of the parties' agreement. Accordingly, Member Beck agrees that the Agency's exception should be denied.