

63 FLRA No. 184

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1367
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
LACKLAND AIR FORCE BASE, TEXAS
(Agency)

0-AR-4347

DECISION

August 14, 2009

Before the Authority: Carol Waller Pope, Chairman
and Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator Mark R. Sherman 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 exception.

The Arbitrator denied a grievance alleging that the Agency had improperly terminated a past practice of paying nurses for two hours of overtime when they were away from work, but on-call, carrying a beeper. For the reasons that follow, we deny the Union's exception.

II. Background and Arbitrator's Award

In 2001, at a time when the Agency was experiencing a staffing shortage, the Agency issued a memorandum to a single Interventional Radiology Nurse (nurse), offering her monetary compensation for carrying a beeper, in order to retain her. Award at 2. The policy set forth in the memorandum was applied to nurses who were subsequently hired, and evolved into the nurses claiming two hours of overtime for carrying the beeper. *Id.* The Agency called the practice into question in 2006. In 2007, the Agency gave the Union "official notice" that it

intended to terminate the provisions of the memorandum, and such termination would be effective immediately following any impact and implementation bargaining. *Id.* at 3. The Agency provided the Union with a deadline for the submission of impact and implementation proposals. Rather than submit proposals, the Union filed a grievance challenging the termination of the past practice. *Id.* After the Agency deadline for submitting proposals had passed, the Agency notified the Union that it considered the Union to have waived impact and implementation bargaining and announced the immediate termination of the past practice. *Id.*

The grievance was not resolved and was submitted to arbitration. The Arbitrator framed the issue as "[d]id the Agency have the right to terminate the ongoing practice articulated in the provisions of the [m]emorandum . . . , and if not what shall the remedy be?" *Id.* at 2.

The Arbitrator determined that the memorandum was not a memorandum of agreement because there was no evidence that it had been negotiated by the parties, the Union did not sign it, and there was no evidence that the employees had been represented by a labor organization when it was administered. *Id.* at 13. According to the Arbitrator, the memorandum simply offered additional compensation to one employee that the Agency could not afford to lose and this incentive had been offered to other nurses as well. The Arbitrator found that, after approximately six years of offering the same incentives to all nurses, the policy that the Agency may have originally intended to apply only to one nurse "had become a custom and practice." *Id.*

Although the Arbitrator found that such practice had never been memorialized in the parties' collective bargaining agreement, he found that it nevertheless could not be discontinued immediately and unilaterally by the Agency. In this respect, the Arbitrator found that the past practice could only be discontinued if the Agency provided reasonable advance notice of its intention to discontinue the practice and offered the Union an opportunity to engage in impact and implementation bargaining over the effect of the proposed change.* *Id.* at 14.

* The Arbitrator found that it was unnecessary to address whether the practice was illegal because, regardless of the legality of the practice, the Agency can discontinue a past practice, like the one in this case, as long as it follows the notice and opportunity procedures set forth above. Award at 14.

As the Union “decided to waive [its] opportunity” to engage in impact and implementation bargaining, the Arbitrator found that the grievance was unsupported and denied it. *Id.* at 15.

III. Positions of the Parties

A. Union’s Exception

The Union asserts that in determining whether the Agency had a right to terminate the past practice established by the memorandum, the Arbitrator should have determined “whether the practice had acquired the force of a binding contractual agreement by virtue of meeting the criteria explained by the Supreme Court and specified in the definition of past practice approved by the [Authority].” Exception at 1, 4 nn.1, 2 (footnotes and emphasis omitted) (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579, 581-82 (1960); *SSA, Mid-Am. Program Ctr., Kan. City, Mo.*, 9 FLRA 229, 240 (1982)). According to the Union, the termination of the practice is justified only if the practice is illegal, and the Arbitrator erred in finding that a determination as to whether the practice was illegal was not relevant to the resolution of the grievance. Exception at 2. That is, the Union disputes the Arbitrator’s legal determination that the termination of a binding past practice is permissible as long as the Agency has given the Union notice and an opportunity to bargain over the impact and implementation of the effects of the change. *Id.* In sum, the Union argues that “the past practice was . . . enforceable as a formally negotiated workplace agreement” and the Arbitrator “failed to recognize the significance and the implications of the established past practice.” *Id.* at 4.

B. Agency’s Opposition

According to the Agency, there is no dispute that the policy set forth in the memorandum constituted a past practice. Opposition at 2. The Agency disagrees with the Union’s assertion that the past practice had attained the status of a contractual obligation and the Agency could not discontinue the practice, even after providing notice and an opportunity to bargain over the impact and implementation of the change, unless there was a finding that the practice was illegal. *Id.* The Agency asserts that the issue in this case was whether the Agency acted properly in terminating the past practice, and, in agreement with the Arbitrator, the Agency argues that it did. *Id.* at 3. In sum, the Agency contends that it provided the Union with notice and an opportunity to bargain over the impact and implementation of the termination of the past

practice, the Union declined to bargain, and, as such, the Agency was well within its rights to discontinue the practice. *Id.*

IV. Analysis and Conclusion

The Union disputes the Arbitrator’s legal conclusion that the Agency had a right to terminate the past practice, arguing essentially that the practice had become part of the parties’ negotiated agreement, and, as such, could not be terminated unless it was illegal. We construe this argument as a claim that the award is contrary to law. The Authority reviews questions of law *de novo*. See *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a standard of *de novo* review, the Authority determines whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. See *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator’s underlying factual findings. See *id.*

An agency is required to fulfill its obligation to bargain in good faith before changing conditions of employment, which may be established by past practice. See, e.g., *AFGE, Nat’l Council of HUD Locals 222, AFL-CIO*, 60 FLRA 311, 314 (2004) (*HUD*) (citing *United States Dep’t of Justice, Executive Office for Immigration Review, Bd. of Immigration Appeals*, 55 FLRA 454, 456-57 (1999) (Member Wasserman concurring; Member Cabaniss dissenting on other grounds) (*EOIR*)); see also *Dep’t of the Air Force, Scott Air Force Base, Ill.*, 19 FLRA 136, 149-50 (1985) (adopting administrative law judge’s decision that agency’s past practice of granting routine overtime could not be terminated absent bargaining over the impact and implementation of the change). An agency violates its obligation to bargain in good faith when it changes a past practice prior to the completion of bargaining. *EOIR*, 55 FLRA at 456.

Here, there is no dispute that the policy set forth in the memorandum constituted a past practice. Further, there is no dispute that the Agency provided the Union with notice of the proposed termination of the practice and an opportunity to submit proposals regarding the impact and implementation of the termination. It is similarly undisputed that the Union failed to submit any proposals to the Agency. Accordingly, there is no evidence that the Agency failed to bargain in good faith prior to terminating the practice.

The Union's argument regarding the legality of the practice is inapposite: the legality of a past practice concerns only *when* -- and not *whether* -- an agency may change the practice. In this respect, there are limited circumstances where an agency does not violate its duty to bargain in good faith by changing the *status quo* prior to the completion of bargaining. See *United States INS, Wash., D.C.*, 55 FLRA 69, 73 n.8 (1999) (Member Wasserman dissenting) (*INS*). As relevant here, an agency may lawfully implement changes when necessary to correct an unlawful practice. *Id.* (citation omitted). In this regard, an agency that implements a change in order to correct an unlawful practice is only obligated to bargain *after* implementation over the impact and implementation of the change. *Id.* (citation omitted). Thus, contrary to the Union's claim that the past practice could only be terminated if the practice was illegal, Authority precedent establishes that the legality of a past practice concerns only whether an agency is authorized to implement a proposed change to the practice prior to completing impact and implementation bargaining with a union. See *Id.* As such, the Union's claim does not establish that the award is deficient. Further, having found that the Agency provided the Union with notice and an opportunity to bargain over the impact and implementation of the termination of the practice prior to implementation, and that the Union waived the opportunity to bargain by failing to submit proposals, the Arbitrator was correct in finding that it was unnecessary for him to determine whether the practice was illegal.

Finally, the cases cited by the Union fail to establish that the Arbitrator's award is contrary to law. In this respect, neither of the cases cited by the Union establish that the Agency did not have the right to terminate the past practice after providing the Union with notice and an opportunity to engage in impact and implementation bargaining. In this regard, the Supreme Court case is a private sector case that does not concern an agency's obligations under the Statute when changing a past practice. The Authority case cited by the Union merely sets forth the definition of a past practice. As there is no dispute that the policy set forth in the memorandum constituted a past practice, this case similarly provides no basis for overturning the Arbitrator's award.

Based on the foregoing, we find that the award is not contrary to law and deny the Union's exception.

V. Decision

The Union's exception is denied.