66 FLRA No. 25

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

and

NATIONAL TREASURY EMPLOYEES UNION
CHAPTER 233
(Union)

0-AR-4646

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DECISION

September 19, 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 Norman Brand 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 Arbitrator found that the Agency violated § 7116(a)(5) of the Statute by failing to bargain over an increase in the rate that it charged employees for parking. As a remedy, he directed, among other things, that the Agency reimburse employees for the difference between what they paid for parking after the rate increase and what they would have paid if the Agency had not increased the rate (the parking-reimbursement remedy).

For the reasons that follow, we set aside the parking-reimbursement remedy, and deny the remaining exceptions.

II. Background and Arbitrator's Award

The General Services Administration (GSA) manages the federal building in which Agency employees work, and assigns to the Agency parking spaces in that building. Award at 3. The Agency entered into a memorandum of understanding with an "Employee Parking Committee" (the Committee) to govern the allocation of, and payment for, those parking spaces. *Id.* at 3-4. As relevant here, "the Committee collects rent [from employees] for each space quarterly, in advance, and transmits it to an [Agency] finance office." *Id.* at 4. The amount that the Agency collects from employees is equal to the amount that GSA charges the Agency; the Agency does not pay or subsidize employee parking. *Id.*

The Agency signed "a new Occupancy Agreement with GSA" that increased the rates that GSA charged for parking, "based on [a] GSA market survey." *Id.* The Occupancy Agreement raised the rate for "surface parking" from $5 to $36 per month and raised the rate for "structure parking" from $15 to $51 per month. *Id.* The Agency began charging employees the higher rates without bargaining with the Union. *Id.* at 3. The Union filed two grievances that were unresolved and were consolidated for arbitration. *Id.* at 2.

At arbitration, the parties stipulated to the following issues: "Is the Agency obligated to bargain over a parking rate increase[,]" and, "[i]f so, what is the appropriate remedy?" *Id.* Before the Arbitrator, the Agency argued that it was not required to bargain because it had no discretion not to raise the parking rates. *Id.* at 5. The Arbitrator rejected this argument, finding that subsidies for employees using Agency-leased parking spaces are negotiable. *Id.* at 7. The Arbitrator concluded that the Agency's failure to bargain over the increase in parking rates violated § 7116(a)(5) of the Statute. *Id.* As remedies, the Arbitrator directed, among other things, the parking-reimbursement remedy. *Id.* at 7-8.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the Arbitrator exceeded his authority because he did not address the stipulated issue regarding bargaining over rate increases and, instead addressed an issue that was not submitted to arbitration, specifically, a failure to bargain over subsidizing employee parking. Exceptions at 6. According to the Agency, the grievances did not allege a failure to bargain over subsidizing employee parking, and the Union never proposed that the Agency subsidize that parking. *Id.* at 6-7.

In addition, the Agency argues that the award is contrary to law in three respects. First, the Agency claims that the finding of a violation is contrary to law because GSA has exclusive authority to determine parking rates and the Agency lacks discretion to bargain over parking rates. *Id.* at 9-10 (citing *SSA*, 63 FLRA 313 (2009) (*SSA*)); *Headquarters, Def. Logistics Agency, Wash., D.C.*, 22 FLRA 875 (1986) (*DLA*); and *AFGE, Local 12*, 19 FLRA 161 (1985) (*Local 12*)). Second, the Agency argues that "but for the parking rate increase imposed by GSA," there was no change in unit

employees' conditions of employment, *id.* at 10, and, thus, the Agency "made no unilateral changes, let alone a de minimis change," *id.* at 11. Third, the Agency claims that the parking-reimbursement remedy is contrary to law because it requires the Agency to reimburse employees for personal commuting costs, which is not authorized by: the Back Pay Act (BPA), 5 U.S.C. § 5596; the Travel Expense Act (TEA), 5 U.S.C. § 5701 *et seq.*; or the Federal Travel Regulation (FTR), 41 C.F.R. part 300-1 *et seq.* Exceptions at 11-13. In this connection, the Agency asserts that employees may be reimbursed for parking fees when they are engaged in official business for the federal government, but that there is no evidence that unit employees incurred expenses for anything other than their personal commuting expenses. *Id.* at 13.

B. Union's Opposition

The Union argues that the Arbitrator did not exceed his authority because he resolved the stipulated issue and did not decide an issue that was not submitted to arbitration. Opp'n at 4-5. In the latter regard, the Union asserts that the Arbitrator's discussion of bargaining over subsidizing employee parking was: (1) in response to an Agency claim that it had no authority to subsidize parking; (2) in connection with his finding that there was a duty to bargain over the rate increase. *Id.* at 5-6.

The Union also argues that the award is not contrary to law. According to the Union, the Agency had discretion to bargain over parking rates that employees pay to the Agency even if it could not determine the rates that the Agency pays to GSA. *Id.* at 7. In addition, the Union argues that the parking-rate increase was a change in conditions of employment. *Id.* at 8. Finally, the Union argues that the parking-reimbursement remedy is not contrary to law because the remedy is authorized by the Tucker Act, 28 U.S.C. § 1491(a)(1) (Tucker Act),[1] which permits damages for express or implied contracts, and here there was an express -- albeit unwritten -- contract between the Agency and each affected employee in which the employee rented parking spaces from the Agency. *Id.* at 8-10.

IV. Preliminary Issue: 5 C.F.R. § 2429.5 bars the Union's argument regarding the Tucker Act.

The Authority's Regulations that were in effect when the Agency filed its exceptions and the Union filed its opposition provided that "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5 (§ 2429.5).[2] Under § 2429.5, the Authority will not consider any issue that could have been, but was not, presented to the Arbitrator. *E.g., U.S. DoJ, Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla.*, 65 FLRA 1040, 1042 (2011).

The Union argues that the Tucker Act provides a basis for the parking-reimbursement remedy. There is no evidence in the record that the Union relied on the Tucker Act before the Arbitrator. In addition, the record supports a conclusion that the Union should have known to raise the Tucker Act. In this connection, in his opening statement at arbitration, Union counsel stated: "There is some case law that precludes the payment of any damages to employees that have been charged the higher rate, and we acknowledge that." Exceptions, Attach. B, Tr. at 9. Thus, the Union was aware that statutory authorization for a parking-reimbursement remedy was at issue before the Arbitrator, and the Union could have raised the Tucker Act. As there is no evidence that it did so, we dismiss the Union's argument that relies on the Tucker Act.

V. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

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. *NFFE, Local 858*, 63 FLRA 227, 229 (2009). Arbitrators do not exceed their authority by addressing an issue that is necessary to decide a stipulated issue, or by addressing an issue that necessarily arises from issues specifically included in a stipulation. *Id.* at 229-30. Further, arbitrators do not exceed their authority by resolving issues closely related to the issue giving rise to the grievance. *Id.* at 230. In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue the same substantial deference that it accords an arbitrator's interpretation and application of a collective bargaining agreement. *U.S. DHS, U.S. Immigration & Customs Enforcement*, 65 FLRA 529, 532 (2011). Moreover, even where a stipulated issue does not expressly include a particular matter, the arbitrator does not exceed his or her authority by addressing that matter if doing so is consistent with the arguments raised before him or her. *Id.* at 536.

[1] The Tucker Act provides, in pertinent part: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States . . . ." 28 U.S.C. § 1491(a)(1).

[2] The Authority's Regulations concerning the review of arbitration awards, as well as certain procedural regulations -- including § 2429.5 -- were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the exceptions and the opposition in this case were filed before the effective date of the revised Regulations, we apply the prior version of the Regulations.

Here, the stipulated issues were whether the Agency was "obligated to bargain over a parking rate increase[,]" and, "[i]f so, what is the appropriate remedy?" Award at 2. The Agency's claim that the Arbitrator failed to resolve whether there was an obligation to bargain over the parking rate increase is unsupported; the Arbitrator did resolve that issue. *See id.* at 7. With regard to the Agency's claim that the Arbitrator resolved an issue that was not before him -- specifically, an obligation to bargain over subsidizing employee parking -- the Agency argued, before the Arbitrator, that it had no obligation to bargain because it lacked discretion to change the parking rates. *See id.* at 5. In rejecting that argument, the Arbitrator found that parking subsidies for employees using Agency-leased parking spaces are negotiable. *See id.* at 7. Thus, the issue of parking subsidies necessarily arose from the stipulated issues and the arguments presented to the Arbitrator, and the Agency does not demonstrate that the Arbitrator exceeded his authority by resolving this issue. Accordingly, we deny this exception.

B. The parking-reimbursement remedy is contrary to law, but the remainder of the award is not contrary to law.

The Authority reviews questions of law 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 a standard of de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

When resolving a grievance that alleges an unfair labor practice (ULP) under § 7116 of the Statute, an arbitrator functions as a substitute for an Authority administrative law judge (ALJ). *U.S. DHS, U.S. Customs & Border Prot.*, 65 FLRA 870, 872 (2011). Consequently, in resolving the grievance, the arbitrator must apply the same standards and burdens that are applied by ALJs under § 7118 of the Statute. *Id.* In a grievance that alleges a ULP by an agency, the union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence. *Id.* As in other arbitration cases, in determining whether the award is contrary to the Statute, the Authority defers to the arbitrator's findings of fact. *Id.*

Prior to implementing a change in conditions of employment, an agency is required to 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 if the change will have more than a de minimis effect on conditions of employment. *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85, 89 (2009). The determination of whether a change in conditions of employment has occurred involves a case-by-case analysis and an inquiry into the facts and circumstances regarding the agency's conduct and employees' conditions of employment. *SSA, Office of Hearings & Appeals, Charleston, S.C.*, 59 FLRA 646, 649 (2004) (Member Armendariz concurring and then-Member Pope dissenting in part on other grounds), *pet. for review denied sub nom.*, *Ass'n of Admin. Law Judges v. FLRA*, 397 F.3d 957 (D.C. Cir. 2005). A change in parking arrangements for unit employees generally constitutes a change in those employees' conditions of employment. *Id.*

In addition, with an exception not relevant here, matters concerning conditions of employment, including employee parking, are subject to collective bargaining when they are within the discretion of an agency and are not otherwise inconsistent with law.[3] *AFGE, Local 2139, Nat'l Council of Field Labor Locals*, 61 FLRA 654, 656 (2006) (*Local 2139*). Even where an agency does not have sole discretion over a matter regarding parking, it must bargain to the extent of its discretion. *See Phila. Naval Base, Phila. Naval Station & Phila. Naval Shipyard*, 37 FLRA 79, 88 (1990). Further, the Authority has found that where an agency has leased parking spaces through the GSA, proposals requiring management to subsidize employee parking costs are within the duty to bargain. *Local 2139*, 61 FLRA at 656.

With regard to the Agency's claim that it did not change employees' conditions of employment, the Agency does not dispute that it increased the amount of money that it collected from employees for their parking. Rather, it argues only that it was GSA, not the Agency, that changed parking rates. Exceptions at 11. As the Agency does not dispute that it increased the amount of money that it began collecting from employees for their parking, we find that the Arbitrator did not err in concluding that the Agency changed employees' conditions of employment.

With regard to the Agency's claim that the change was only de minimis, where an excepting party fails to provide any supporting arguments or authority to support its exception, the Authority will deny the exception as a bare assertion. *See, e.g., U.S. Dep't of Veterans Affairs, Med. Ctr., Kan. City, Mo.*, 65 FLRA

[3] The exception is that agencies are not required to bargain over matters over which they have discretion if that discretion is "sole and exclusive." *See, e.g., U.S. Dep't of the Interior, Bureau of Indian Affairs, Sw. Indian Polytechnic Inst., Albuquerque, N.M.*, 58 FLRA 246, 248 (2002), *pet. for review dismissed sub nom., NTEU v. FLRA*, 435 F.3d 1049 (9th Cir. 2006).

809, 812 n.6 (2011). Here, the Agency does not provide any supporting arguments or authority to support its claim that the change was only de minimis. Accordingly, we deny that claim as a bare assertion.

With regard to the Agency's claim that it had no duty to bargain over the parking increase because it lacked discretion to determine what GSA would charge the Agency for parking spaces, there is no basis for finding that the Agency lacks discretion to determine what *it* will charge *employees* for those spaces. In this connection, as discussed above, the Authority has held that proposals requiring management to subsidize employee parking are within the duty to bargain. *See Local 2139*, 61 FLRA at 656.

In addition, the decisions cited by the Agency do not provide a basis for concluding that the Agency lacks discretion to bargain over what, if anything, it will charge employees. In *SSA*, the Authority resolved exceptions to an arbitration award that awarded personal commuting expenses, and the Authority set aside the award because there was no waiver of sovereign immunity for those expenses; the Authority did not hold that the agency lacked discretion to bargain over the rate, if any, that it charged employees for parking. 63 FLRA at 314-15. In the portion of *DLA* cited by the Agency, an Authority administrative law judge stated that there is no duty to bargain over the content of government-wide regulations. *See* 22 FLRA at 903. Similarly, in *Local 12*, the Authority held that agencies may not be required to bargain over matters that are inconsistent with government-wide regulations established by GSA. *See* 19 FLRA at 162. Here, the Arbitrator did not direct bargaining over either the content of government-wide regulations or matters that would be inconsistent with government-wide regulations. Accordingly, the cited decisions provide no basis for finding that the Agency lacks discretion to bargain over what rate, if any, it will charge employees for parking. Accordingly, we deny the Agency's exception.

With regard to the Agency's claim that the parking-reimbursement *remedy* is contrary to law, the Authority has held that personal commuting expenses, including parking costs, are not reimbursable under the BPA, *see SSA, Office of Disability Adjudication & Review, Region 1*, 65 FLRA 334, 337-38 (2010), the TEA, or the FTR, *see NTEU*, 30 FLRA 677, 678-79 (1987). *See also INS, LA. Dist., L.A., Cal.*, 52 FLRA 103, 105-06 (1996) (Authority cannot direct reimbursement for parking expenses as make-whole relief for violation of Statute, absent waiver of sovereign immunity). The Arbitrator did not find, and the Union does not cite, any alternative authority for this remedy.[4] Accordingly, we set aside the parking-reimbursement remedy as contrary to law.[5]

VI. Decision

The parking-reimbursement remedy is set aside. The Agency's remaining exceptions are denied.

[4] As discussed previously, we dismiss the Union's reliance on the Tucker Act.

[5] We note that, in addition to the parking-reimbursement remedy, the Arbitrator directed the Agency to: (1) cease and desist from refusing to bargain; (2) return the parking rates to their pre-violation levels; and (3) give the Union notice and an opportunity to bargain before making future changes. *See* Award at 8. Thus, setting aside the parking-reimbursement remedy would not leave the Agency's violation unremedied, and there is no need to remand this matter for an alternative remedy. *Cf., e.g., U.S. Dep't of HUD*, 65 FLRA 433, 436 (2011) (Authority remanded for alternative remedy where Authority set aside sole remedy for violation that was left undisturbed).