66 FLRA No. 102

SPORT AIR TRAFFIC CONTROLLERS ORGANIZATION
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
AIR FORCE FLIGHT TEST CENTER
EDWARDS AIR FORCE BASE, CALIFORNIA
(Agency)

0-AR-4750

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DECISION

March 20, 2012

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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 Philip Tamoush 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 concluded that the Agency did not violate the parties' collective bargaining agreement (CBA) or 2008 memorandum of understanding (MOU) when it established the Air Boss position in the air-traffic-control room. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Agency established a new management position – Air Boss – in the air-traffic-control room where bargaining unit air-traffic controllers perform various air-traffic activities. Award at 3. The Agency established the Air Boss position to ensure the safety of flying operations, work with supervisors, and direct all operations if necessary. *Id.* at 3-4.

The Union filed a grievance claiming that the Agency violated the CBA and the MOU by failing to provide it with advance notice regarding the newly established Air Boss position, and by failing to offer to bargain over the new position's impact and implementation.[1] *Id.*

When the parties could not resolve their dispute, they submitted it to arbitration. The parties stipulated to the following issues: (1) "Did the Agency violate Article 6, Section 1 [(Article 6)] [,] Article 2, Section 1 [(Article 2)], and the . . . MOU?"[2]; and (2) "Did the Agency implement a change in Agency policies and practice when [it] assigned the position of 'Air Boss' to the [air-traffic-control room], with the authority to direct the bargaining unit employees as to what [a]ir-[t]raffic instructions to issue the aircraft under their control?" *Id.* at 2.

The Arbitrator concluded that the Agency did not violate the CBA or the MOU when it established the Air Boss position. He found that nothing in those agreements could "in any way be interpreted to require mandatory bargaining" in the circumstances of this case. *Id.* at 7. The Arbitrator found, further, that under "basic management principles," the Agency has a right to establish management positions. *Id.* The Arbitrator also found that the Air Boss position has a direct relationship with the supervisors in the air-traffic control room and "no[] . . . direct[-]line relationship in which Air Bosses

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[1] In the grievance, the Union also claimed that the Agency violated § 7116(a)(1) and (5) of the Statute. Exceptions, Attach. 6 at 1. However, as discussed *infra*, that claim was neither part of the stipulated issues before the Arbitrator, nor did the Arbitrator address an alleged statutory violation. *See* Award at 2.

[2] Article 2, Section 1 provides: "Prior to implementing changes in personnel policies, practices, and procedures subject to negotiations, the employer will provide the union a copy, or make available for checkout, a copy of the proposed changes or new regulation(s)." Award at 2.

Article 6, Section 1 provides: "It is agreed that personnel policies, practices, and matters affecting working conditions, which are within the scope of the employer's authority will not be changed without providing the Union, when required, the opportunity to negotiate." *Id.*

The MOU provides:

> SATCO and the Employer agree to comply with Article 6[,] Section 1 of the [CBA]. Additionally, the Parties agree that the Employer will not implement any change in personnel policies, and practices and matters affecting working conditions, which are within the scope of management's authority until negotiations are complete.
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> This means, that if the Parties cannot agree, there will be no implementation of the issue being negotiated until after attempted resolution by the Federal Mediation and Conciliation Service and/or until a decision or order has been issued by the Federal Service Impasses Panel.

Id.

actually are directing the work of [c]ontrollers." *Id.* Based on these findings, the Arbitrator concluded that the Agency had not implemented a change in unit employees' working conditions, *id.* at 10, and as such, that nothing in the CBA or the MOU required bargaining over the Air Boss position, *id.* at 7, 10.

III. Positions of the Parties

A. Union's Exceptions

The Union excepts to the award on five grounds.

First, the Union claims, the award is contrary to § 7106 and § 7116(a)(1) and (5) of the Statute. Exceptions at 6. The Union asserts that, in exercising its management rights under § 7106, the Agency was required to conduct impact and implementation bargaining with the Union before implementing a change that has more than a de minimis impact on unit employees' conditions of employment. *Id.* at 6-7 (citing *U.S. Dep't of Homeland Sec., Customs & Border Prot.*, 64 FLRA 989, 994 (2010) (*CBP*) (Member Beck dissenting in part); *U.S. Dep't of the Army, Lexington-Blue Grass Army Depot, Lexington, Ky.*, 38 FLRA 647, 661 (1990) (*Army*)). The Union argues that the Arbitrator "ignore[d] the effects and[/]or foreseeable impact." *Id.* at 6.

Second, the Union argues, the Arbitrator failed to provide the Union a fair hearing because he "makes no mention of the testimony or evidence provided by the Union showing an impact" on air-traffic controllers of the "new policy and procedures regarding the Air Boss [position]." *Id.* at 8.

Third, the Union contends, the award is based on a nonfact. The Union asserts that the Arbitrator erred by finding that the Air Boss position did not have a direct-line relationship with air traffic controllers, and that it therefore did not affect air-traffic-controllers' working conditions. *Id.* at 9. According to the Union, the Arbitrator's findings regarding the Air Boss' duties, responsibilities, and authority are not consistent with those described in the position description provided by the Agency. *Id.* at 9-10 (citing Exceptions, Attach. 8).

Fourth, the Union asserts, the Arbitrator's award fails to draw its essence from Articles 2 and 6 of the CBA and the MOU because the Arbitrator failed to find that the Air Boss position changed employees' working conditions. *Id.* at 10. The Union argues that the award is an implausible interpretation of the CBA and the MOU because the Arbitrator erred in failing to find that the Agency had a duty to bargain. *Id.* at 11-12. The Union also asserts that Articles 2 and 6 of the CBA incorporate language identical to that found in § 7103(a)(14) of the Statute regarding the definition of the term "conditions of employment."[3] *Id.* at 11. In addition, the Union argues that the Arbitrator's award is an implausible interpretation of the CBA and the MOU because it is inconsistent with Authority precedent interpreting the statutory language requiring an agency to provide notice and an opportunity to bargain before implementing a change in working conditions. *Id.* at 11-12 (citing *Ogden Air Logistics Ctr., Hill Air Force Base, Utah*, 41 FLRA 690, 698 (1991) (*Hill AFB*)).

Finally, the Union argues, the Arbitrator exceeded his authority by ignoring the stipulated issues and instead deciding the issue of whether the Agency had the right to establish a managerial position. *Id.* at 13.

B. Agency's Opposition

First, the Agency argues, the award is not contrary to law. According to the Agency, when it exercised its management right under § 7106(a) to establish the Air Boss position, it was not obligated to bargain over the impact and implementation of the change because there was no impact on bargaining unit employees that was more than de minimis. Opp'n at 3. In addition, the Agency asserts that in its exception, the Union did not support its claim that the award violates § 7116(a)(1) and (5) of the Statute. *Id.*

Second, the Agency claims, the Arbitrator did not deny the Union a fair hearing. *Id.* at 4. The Agency asserts that arbitrators are not required to specify or discuss specific items of evidence that they may have considered in formulating their awards. *Id.*

Third, the Agency asserts, the award is not based on a nonfact. *Id.* at 5. The Agency argues that the Arbitrator's conclusions regarding the Air Boss position's duties, responsibilities, and authority do not contradict the position description provided by the Agency. The Agency also contends that the Union does not show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *Id.*

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[3] Section 7103 (a)(14) provides:

> "[C]onditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—
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> (A) relating to political activities prohibited under subchapter III of chapter 73 of this title;
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> (B) relating to the classification of any position; or
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> (C) to the extent such matters are specifically provided for by Federal statute.

Fourth, the Agency argues, the award does not fail to draw its essence from the CBA and the MOU. *Id.* at 5-6.

Finally, the Agency contends, the Arbitrator did not exceed his authority. *Id.* at 6-7.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Union argues that the award is contrary to § 7106 and § 7116(a)(1) and (5) of the Statute because the Agency failed to bargain with the Union prior to implementing the Air Boss position, the impact of which was greater than de minimis. Exceptions at 6-7 (citing *CBP*, 64 FLRA at 994; *Army*, 38 FLRA at 661).

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. *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.*

Arbitrators are required to apply statutory burdens of proof when resolving an alleged unfair labor practice (ULP). *See, e.g., U.S. GSA, Ne. & Caribbean Region, N.Y.C., N.Y.*, 60 FLRA 864, 866 (2005). However, when a dispute involves a bargaining obligation as defined by the parties' agreement, "'the issue of whether the parties have complied with the agreement becomes a matter of contract interpretation for the [a]rbitrator.'" *U.S. Dep't of Homeland Sec., U.S. Immigration & Customs Enforcement*, 65 FLRA 792, 795 (2011) (*ICE*) (quoting *Broad. Bd. of Governors, Office of Cuba Broad.,* 64 FLRA 888, 891 (2010) (*Cuba*) (citation omitted)). In those circumstances, the Authority applies the deferential essence standard to the arbitrator's contract interpretation. *Id.* (citation omitted).

The dispute before the Arbitrator did not involve a claim that the Agency failed to satisfy its statutory duty to bargain. Rather, the parties stipulated to issues concerning only the Agency's contractual duty to bargain: (1) "Did the Agency violate Article[s 2 and 6 of the CBA], and the . . . MOU?"; and (2) "Did the Agency implement a change in Agency policies and practice when [it] assigned the position of 'Air Boss' to the [air-traffic-control room] . . . ?" *Id.* at 2.

In addition, the Arbitrator's summary of the parties' positions includes no arguments relating to the Agency's statutory duty to bargain. *See* Award at 5 (describing Union's position that the Agency "is obligated to negotiate the establishment of the Air Boss position, based on a logical application and interpretation of [Articles 2 and 6] and the [MOU]"); *id.* at 6 (describing Agency's position that it did not violate Articles 2 and 6 of the CBA or the MOU). Further, the Arbitrator did not address any alleged statutory violations in reaching his legal conclusions. *Id.* at 7 (the "MOU, and Articles 2 and 6 cannot in any way be interpreted to require mandatory bargaining); *id.* at 9 (the Arbitrator "awards that there is no violation of the [CBA] or of the [MOU] in the establishment of the Air Boss position").

As the issues before the Arbitrator were purely contractual, the Union's statutory claim provides no basis for finding the award contrary to law. *See, e.g., ICE*, 65 FLRA at 795; *Cuba*, 64 FLRA at 891. For the same reason, the Authority precedent cited by the Union – which involves the duty to bargain under the Statute – is inapposite and also provides no basis for finding the award contrary to law. *See, e.g., ICE*, 65 FLRA at 795; *Cuba*, 64 FLRA at 891. Accordingly, we deny the Union's contrary-to-law exception.

B. The Arbitrator did not fail to provide a fair hearing.

The Union argues that the Arbitrator failed to provide the Union a fair hearing because he "makes no mention of the testimony or evidence provided by the Union" regarding the Air Boss position's impact on unit employees. Exceptions at 8.

An award will be found deficient on the ground that the Arbitrator failed to provide a fair hearing when the excepting party establishes that an arbitrator's refusal to hear or consider pertinent and material evidence, or other actions in conducting the proceeding, prejudiced a party so as to affect the fairness of the proceeding as a whole. *See, e.g., AFGE, Local 1668*, 50 FLRA 124, 126 (1995). That an arbitrator does not mention a particular evidentiary item in his or her award does not demonstrate that the arbitrator refused to consider it or failed to provide a fair hearing. *See, e.g., AFGE, Local 3438*, 65 FLRA 2, 3-4 (2010) (*Local 3438*); *AFGE, Local 3615*, 57 FLRA 19, 22 (2001) (*Local 3615*).

The Union's exception challenges the Arbitrator's failure to discuss particular testimony and evidence offered by the Union. However, under the precedent set forth above, the Arbitrator's failure to mention particular testimony or evidence does not establish that the Arbitrator failed to consider it or failed to provide the Union a fair hearing. *Local 3438*, 65 FLRA at 4; *Local 3615,* 57 FLRA at 22. Accordingly,

the Union has not established that the Arbitrator denied it a fair hearing, and we deny its fair-hearing exception.

C. The award is not based on a nonfact.

The Union asserts that the Arbitrator erred by finding that the Air Boss position has a direct relationship with the supervisors in the air-traffic control room and "no[] . . . direct[-]line relationship in which Air Bosses actually are directing the work of [c]ontrollers." Exceptions at 9 (quoting Award at 7).

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*Local 1984*). However, the Authority will not find an award deficient based an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.*

The parties disputed the Air Boss position's duties, responsibilities, and authority at arbitration. *See* Award at 5-6; Exceptions, Attach. 3 at 1, 5; Opp'n, Attach. 1 at 3-4. As the Authority will not find an award deficient based on an arbitrator's determination of any factual matter that the parties disputed below, the Union does not provide a basis for finding that the award is based on a nonfact. *See Local 1984*, 56 FLRA at 41. Accordingly, we deny the Union's nonfact exception.

D. The award draws its essence from the CBA and the MOU.

The Union asserts that the award fails to draw its essence from Articles 2 and 6 of the CBA and the MOU because the Arbitrator failed to find that the creation of the Air Boss position affected the working conditions of the air traffic controllers and that, therefore, the Agency was required to bargain. Exceptions at 10-12. In this regard, the Union asserts that the Arbitrator failed to interpret the CBA and MOU consistent with Authority precedent interpreting the statutory duty to bargain. *Id.* at 11-12.

In reviewing an arbitrator's interpretation of a CBA, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor (OSHA),* 34 FLRA 573, 575 (1990) (*DOL*). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id*. at 576.

Articles 2 and 6 of the CBA and the MOU require that, prior to implementing a change concerning "personnel policies, practices, and matters affecting working conditions," the Agency must provide the Union with notice and an opportunity to negotiate over the impact of the change. Award at 2. Here, the Arbitrator found that the Air Boss neither had a direct relationship with unit employees, nor directed the work of unit employees, *id.* at 7, and as such, the Agency did not change unit employees' working conditions, *id.* at 10. Based on these findings, which the Union does not establish are nonfacts, *see supra* Section IV.C., the Arbitrator concluded that the Agency had no duty to bargain under either the CBA or the MOU. *Id.* at 7. As the Authority defers to the Arbitrator's factual findings in these circumstances, and as the Arbitrator's interpretation of the CBA and the MOU is based on those findings, the Union does not establish that the Arbitrator's interpretation is irrational, unfounded, implausible, or in manifest disregard of the CBA and the MOU.[4] *See OSHA*, 34 FLRA at 575. Accordingly, we deny the Union's essence exception.

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[4] In addition, the Union argues that: (1) Articles 2 and 6 of the CBA incorporate language identical to the statutory definition of "conditions of employment" found in § 7103(a)(14) of the Statute, Exceptions at 11; and (2) the award is an implausible interpretation of the CBA and the MOU because it is inconsistent with Authority precedent interpreting the statutory language requiring an agency to provide notice and an opportunity to bargain before implementing a change in working conditions, *id.* at 11-12 (citing *Hill AFB*, 41 FLRA at 698). As these claims are based on the Union's contrary-to-law claim regarding the statutory duty to bargain, we do not separately analyze them. *See, e.g., AFGE, Local 1547*, 65 FLRA 624, 625 n.* (2011) (declining to separately analyze essence claim that was based on contrary-to-law claim that arbitrator erroneously applied government-wide regulations); *USDA, Farm Serv. Agency, Kan. City, Mo.*, 65 FLRA 483, 484 n.3 (2011) (declining to separately analyze essence exception that was "substantively the same" as a contrary-to-law exception).

E. The Arbitrator did not exceed his authority.

The Union argues that the Arbitrator exceeded his authority because he ignored the stipulated issues, and instead decided the issue of whether it was within the Agency's management rights to establish the Air Boss position. Exceptions at 13.

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) (*Local 1617*).

Contrary to the Union's claim, the Arbitrator did not exceed his authority by ignoring the issues the parties stipulated. The stipulated issues concerned whether the Agency violated the CBA or the MOU by failing to provide the Union with notice and an opportunity to negotiate over the creation of the Air Boss position. Award at 2. In deciding those issues, the Arbitrator found that the Agency appropriately created a management position, and that the position did not change unit employees' working conditions such that the Agency had a duty to bargain under either the CBA or the MOU. *Id.* at 7. As the Arbitrator's award is responsive to the stipulated issues, the Union has not demonstrated that the Arbitrator exceeded his authority. *See Local 1617*, 51 FLRA at 1647. Accordingly, we deny the Union's exceeded-authority exception.

V. Decision

The Union's exceptions are denied.