66 FLRA No. 123

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 26
(Union)

and

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

0-AR-4730

_____

DECISION

May 10, 2012

_____

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 Stanley H. Sergent 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 rejected the Union's claim that the Agency violated the Statute, the parties' agreement, and the Agency's workplace standards governing the allocation of space to employees within the Agency (workplace standards) when the Agency moved a non-bargaining unit employee (employee) to a work station in its appeals office. For the reasons that follow, we dismiss the exceptions in part and deny the exceptions in part.

II. Background and Arbitrator's Award

The Agency moved a non-bargaining unit employee to a vacant work station in its appeals office, where bargaining unit employees also have work spaces. *See* Award at 7-8. After learning of the move, the Union presented an institutional grievance alleging, among other things, that the Agency violated the parties' agreement and committed an unfair labor practice (ULP) under § 7116(a)(5) and (6) of the Statute by failing to provide the Union with notice of the move and an opportunity to bargain. *See id.* at 3. The Agency denied the grievance, and the matter was submitted to arbitration. The parties stipulated to the following issue: "Whether the Agency violated the . . . Statute . . . , Article 15 of the [parties'] agreement, and . . . its own workplace standards by placing [the employee] in the [a]ppeals office space . . . ? If so, what should the remedy be?"[1] *Id.* at 5.

The Arbitrator found the Agency had no "statutory duty to bargain." *Id.* at 13; *see also id.* at 13-17. The Arbitrator first determined that the "assignment of work space is a right that is reserved to management" under § 7106(b)(1) of the Statute. *Id.* at 13 (stating that, under § 7106(b)(1), agencies are not required to bargain over the "'technology, methods, and means of performing work'"). The Arbitrator also found that moving the employee into the vacant work station "had a de minim[is] impact" on bargaining unit employees. *Id.* at 14. As a result, the Arbitrator found that moving the employee "did not constitute a change in working conditions" that required notice and an opportunity to bargain. *Id.* In this regard, the Arbitrator found that: (1) no bargaining unit employee was asked to move or was displaced; (2) no change was made in the configuration of the work place, office furnishings, or lease; and (3) "nothing was taken away" from the bargaining unit by the Agency's decision. *Id.* at 16-17. The Arbitrator also found that "unrefuted testimony" showed that the appeals office had no need for "the vacant work station for any anticipated new hires" or for its "own use at that time." *Id.* at 15. Moreover, the Arbitrator found no support for the Union's claim that the employee's new location may allow him to view appeals' case files. *Id.* at 16.

The Arbitrator held that the Union's reliance on Article 11, Section 15 B of the parties' agreement was "misplaced because the [relocated] employee . . . is not a member of the bargaining unit." *Id.* at 13. The Arbitrator also found that the Union's claim that the work location was bargaining-unit space was refuted by testimony that "all space is considered a corporate asset" and that no space is designated as bargaining-unit space other than Union offices. *Id.*

The Arbitrator also held that, because no "unit employee was impacted" by the Agency's decision to relocate the employee to the empty work station, the requirements of Article 15 -- which provides that the Agency will provide the Union "with notice of its intention to reassign/realign employees," *id.* at 5 -- "were not triggered." *Id.* at 17; *see also id.* (finding Agency "was not required to provide advance notice to the Union since no bargaining unit employee was physically moved

[1] The text of the relevant provisions of the parties' agreement is set forth in the appendix to this decision.

[2] Although the Union cites Article 42 of the parties' agreement, it quotes the definition of grievance contained in Article 41.

and there was no change in the physical location" of bargaining unit employees (internal quotation marks omitted)).

The Arbitrator found that the Union's claim that the employee's relocation to the appeals office violated the Agency's workplace standards was without merit. *Id.* The Arbitrator noted that, because this issue had not been raised in the grievance, he had "serious reservations about whether [he had] . . . authority to consider it." *Id.* at 18. Addressing the merits, the Arbitrator found that, even if he determined that the Agency had not adhered to the standards, the Union had no basis for relief. *Id.* Relying on Article 42 of the parties' agreement, the Arbitrator found that, because the standards were not negotiated with the Union and were not a subject covered by the parties' agreement, the Union had no "right to . . . enforce" the standards in the grievance proceeding. *Id.*

Based on the above findings, the Arbitrator denied the grievance.

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the award is contrary to law because the Arbitrator erred in finding that the relocation of the employee to the work station in the appeals office "was an elective subject of bargaining [under § 7106(b)(1)] and a management right over which the [U]nion could not bargain." Exceptions at 4. According to the Union, the Arbitrator applied the incorrect standard for "determin[ing] . . . whether a matter is a method, means or technology for performing work." *Id.* The Union asserts that, under the proper legal standard, an agency first "must demonstrate a direct and integral relationship between the particular method or means the agency has chosen and the accomplishment of the agency's mission" and then "must show that the proposal would directly interfere with the mission-related purpose for which the method or means was adopted." *Id.* (citing *NTEU*, 41 FLRA 1283 (1991)).

The Union also claims that "undisputed facts" show that the impact of the relocation of the employee to the appeals' work space "was more than merely de minim[is]." *Id.* at 5 (citing *U.S. Dep't of the Treasury, IRS*, 56 FLRA 906 (2000)). According to the Union, it is undisputed that the employee was relocated to a space used by a unit employee and that the appeals office had been doing "unprecedented hiring." *Id.* The Union further asserts that the Authority has held that, where a union proposal has only a limited or indirect effect on the interests of employees outside the bargaining unit, the proposal is subject to negotiations. *Id.* at 4 (citing *AFGE, Local 12, AFL-CIO*, 25 FLRA 979 (1987) (*Local 12*)).

The Union also asserts that the award fails to draw its essence from Article 11, Section 15 B of the parties' agreement. *Id.* at 6. The Union contends that, because that provision "explicitly states that action plans [used] in the process of modifying or *occupying* space is a proper subject for bargaining[,]" the Arbitrator erred in finding that Agency space is a "corporate asset" and that assigning such space is a "reserved management right." *Id.* (internal quotation marks omitted).

The Union additionally contends that the Arbitrator's "conclusion that he had no jurisdiction to address the matter of the . . . workplace standards since [they] were not raised in the grievance is . . . without substantiation in the record." *Id.* at 7. The Union claims that the grievance referred to the standards and that the parties testified that such "standards came up at the grievance meeting." *Id.* The Union further asserts that the Arbitrator's conclusion that the workplace standards cannot be enforced in the grievance procedure is "contradicted by the . . . description of a grievance" in the parties' agreement. *Id.* (quoting Article 41 of the parties' agreement).

B. Agency's Opposition

The Agency disputes the Union's assertion that the Arbitrator erred in concluding that the assignment of space is a reserved management right under § 7106(b)(1) of the Statute. Opp'n at 2 (citing *NTEU, Chapter 83*, 35 FLRA 398 (1990); *NFFE, Local 2192*, 59 FLRA 868 (2004)). The Agency contends that the Union's argument regarding *Local 12* is misplaced because this case, unlike *Local 12*, does not involve a bargaining proposal. *Id.* at 2-3. The Agency further contends that the Arbitrator's factual findings support his determination that the Agency's decision to move the employee to the vacant work station resulted in "only a de minimis impact" on unit employees. *Id.* at 6; *see also id.* at 4-6.

With respect to the Union's argument regarding Article 11, Section 15 B, the Agency contends that the Union "abandoned" this claim below and that, as a result, the Authority should not consider this argument. *Id.* at 8. The Agency argues that, even if the Authority were to consider this argument, the Union's reliance on Article 11 is "misplaced." *Id.* at 8-9. According to the Agency, the Arbitrator correctly found that the move at issue did not concern "building specifications, build out specifications, floor plans, [or] action plans used in the process of modifying or occupying such space." *Id.* (internal quotation marks omitted).

The Agency also contends that the Arbitrator correctly determined that, under the plain wording of the parties' agreement, the Union had no right to enforce the workplace standards in an institutional grievance

proceeding. *Id.* at 10 (citing Article 42, Sections 2A and 4A of the parties' agreement).

IV. Preliminary Issue

The Union asserts that the award fails to draw its essence from Article 11, Section 15 B of the parties' agreement. Exceptions at 6. According to the Union, because that provision "explicitly states that action plans [used] in the process of modifying or *occupying* space is a proper subject for bargaining," the Arbitrator erred in finding that Agency space is a "corporate asset" and that assigning such space is a "reserved management right." *Id.* (internal quotation marks omitted).

Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that "could have been, but were not, presented" to the arbitrator. 5 C.F.R. § 2429.5; *see, e.g., U.S. Dep't of the Navy, Trident Refit Facility, Kings Bay Ga.*, 65 FLRA 672, 675 (2011) (*Dep't of the Navy*). Where a party makes an argument before the Authority that is inconsistent with its position before the arbitrator, the Authority applies § 2429.5 to bar the argument. *See, e.g., Dep't of the Navy*, 65 FLRA at 675 (dismissing agency's contention that arbitrator exceeded his authority by failing to issue award within time required by the parties' agreement because the agency, while before the arbitrator, tacitly agreed to extend the time permitted for issuing the award); *U.S. Dep't of Transp., FAA, Detroit, Mich.*, 64 FLRA 325, 328 (2009) (*FAA*) (dismissing agency's argument that parties' agreement did not incorporate certain Office of Personnel Management regulations because agency conceded before arbitrator that agreement incorporated the regulations).

Although, in its grievance, the Union raised violations of both Articles 11 and 15 of the parties' agreement, at the arbitration hearing, the Union expressly stated that it was only "pursuing the Article 15 issue, [and] not the Article 11 issue[.]" Opp'n, Attach., Tr. at 7. In addition, the parties stipulated that the only contractual issue before the Arbitrator was whether the Agency violated Article 15 of the parties' agreement. *See* Award at 5. In its exceptions, the Union now challenges the Arbitrator's interpretation of Article 11, including his conclusion that the provision does not apply in this case. The Union's argument is inconsistent with the position that it took before the Arbitrator - i.e., that Article 11 was not before the Arbitrator and, hence, was not involved in the resolution of this matter. Consequently, the Union's exception is not properly before the Authority. *See, e.g., Dep't of the Navy*, 65 FLRA at 675; *FAA*, 64 FLRA at 328.

Accordingly, we dismiss this exception.

V. Analysis and Conclusions

A. The Union has failed to establish that the award is contrary to law.

The Union contends that the Arbitrator did not properly apply § 7106(b)(1) of the Statute in finding that the Agency's assignment of the employee to the work station was an elective subject of bargaining under § 7106(b)(1) and, thus, a management right over which the Agency was not required to bargain. *See* Exceptions at 4.

Even assuming that the Arbitrator failed to properly apply § 7106(b)(1), the Union's contention does not provide a basis for finding the award deficient because, as discussed below, the Arbitrator found that moving the employee to the vacant work station had a de minimis impact on bargaining unit employees.

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*.

Furthermore, when resolving a grievance that alleges a ULP under § 7116 of the Statute, an arbitrator functions as a substitute for an Authority administrative law judge (ALJ). *See, e.g., U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 239 (2011) (citing *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 431 (2010) (*IRS*)). 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.*

It is well established that, 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. *See, e.g., U.S. Dep't*

of Homeland Sec., U.S. Customs & Border Prot., 65 FLRA 870, 872 (2011) (citing *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr. Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 173 (2009) (Member Beck concurring in part on other grounds). In assessing whether the effect of a change is more than de minimis, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment. *See U.S. Dep't of the Treasury, IRS*, 64 FLRA 972, 977 (2010) (*IRS*).

The Arbitrator concluded that, based on the evidence, "it [wa]s abundantly clear" that moving the employee to the appeals office had only a de minimis impact on bargaining unit employees. Award at 14. The Arbitrator found that: (1) no bargaining unit employee was asked to move or was displaced; (2) no change was made in the configuration of the work place, office furnishings, or lease; and (3) "nothing was taken away" from the bargaining unit by the Agency's decision. *Id.* at 16-17. The Arbitrator also found that "unrefuted testimony" showed that the appeals office had no need for the "vacant work station for any anticipated new hires" or for its "own use at that time." *Id.* at 15. Moreover, the Arbitrator found no support for the Union's claim that the employee's new location may allow him to view appeals' case files. *Id.* at 16.

The Union does not argue that the Arbitrator's findings are based on a nonfact, but merely asserts that the evidence shows that the impact of the employee's relocation on bargaining unit employees was more than de minimis. The Union has not provided any basis for setting aside the Arbitrator's findings. The Arbitrator's factual findings, to which we defer, support his conclusion that the impact or reasonably foreseeable impact of the employee's relocation on bargaining unit employees was de minimis. *See, e.g., IRS*, 64 FLRA at 977 (upholding arbitrator's finding that change in conditions of employment was de minimis).

Moreover, the Union's reliance on *Local 12* to support a contrary conclusion does not provide a basis for finding the award deficient. As discussed above, the impact of the relocation of the employee on bargaining unit employees was de minimis. As such, the Agency had no duty to bargain over the relocation of the employee to the appeals office. Because the Agency had no duty to bargain over the relocation of the employee, the Union has failed to demonstrate that *Local 12* -- which involved the negotiability of a bargaining proposal -- provides a basis for finding the award deficient as contrary to law.

Accordingly, we find that that the Agency was not required to provide the Union with notice of the change and an opportunity to bargain over the matter, and the award is not contrary to law in this regard.

B. The award does not fail to draw its essence from the parties' agreement.

The Union claims that the award does not draw its essence from the parties' agreement because the Arbitrator's finding that workplace standards could not be "enforced" in the grievance proceeding is "contradicted by the . . . agreement's description of a grievance." Exceptions at 7. The Union's assertion challenges the Arbitrator's substantive arbitrability determination. *See, e.g., AFGE, Local 1815*, 65 FLRA 430, 431 (2011) (substantive arbitrability involves questions regarding whether the subject matter of a dispute is arbitrable). Where an arbitrator's substantive arbitrability determination is based on an arbitrator's interpretation of the parties' agreement, the Authority reviews challenges to this determination under the deferential "essence" standard. *See Fraternal Order of Police, Lodge No. 158*, 66 FLRA 420, 423 (2011) (citing *U.S. Dep't of Veterans Affairs, Med. Ctr., Hampton, Va.*, 65 FLRA 125, 127 (2010)). 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).

The Union contends that the grievance fits the definition of grievance contained in Article 41, "Employee Grievance Procedure."[2] However, the Union presented its grievance as an *institutional* grievance pursuant to Article 42, "Institutional Grievance Procedure." *See* Award at 2 (finding Union presented grievance "as an institutional grievance pursuant to Article 42" of the parties' agreement). Hence, the definition quoted by the Union is inapplicable. Accordingly, the Union has not demonstrated that the Arbitrator's determination that the workspace standards could not be enforced under Article 42 fails to draw its essence from the parties' agreement.

As part of its essence exception, the Union also challenges the Arbitrator's "conclusion that he had no jurisdiction to address the matter of the . . . workplace

[2] Although the Union cites Article 42 of the parties' agreement, it quotes the definition of grievance contained in Article 41. *See* Exceptions at 7; Opp'n, Attach., Agreement II, Articles 41 and 42.

standards since [they] were not raised in the grievance." Exceptions at 7. This claim is without merit as it is based on a misunderstanding of the award. The Arbitrator did not find that he lacked jurisdiction to address the workplace standards. Rather, he only noted that, because the issue of workplace standards had not been raised in the grievance procedure, he had "serious reservations" about whether he had "jurisdiction or authority to consider it." Award at 18. The Arbitrator then proceeded to reject the Union's claims on the merits, finding that any "potential deviation" from the standards did "not provide the Union with any basis for relief under the [parties' agreement]." *Id.* Accordingly, the Union's contention does not demonstrate that the Arbitrator's award fails to draw its essence from the parties' agreement.

Accordingly, we deny the Union's essence exceptions.

VI. Decision

The Union's exceptions are dismissed in part and denied in part.

APPENDIX

Article 11, "Facilities and Services," provides, in relevant part:

> Section 15
>
> . . . .
>
> (B) The parties recognize that building specifications, build out specifications, floor plans, and action plans used in the process of modifying or occupying such space are proper subjects to be negotiated between the parties prior to implementation.

Award at 5. *See also* Opp'n, Attach., Agreement II at 27-28.

Article 15, "Reassignments/Realignments and Voluntary Relocations," provides, in relevant part:

> Section 2
>
> Involuntary Reassignments/Realignments
>
> A. Reassignments/Realignments Within a POD
>
> Where the Employer proposes to reassign/realign employees within a particular POD, which may also involve a change in the physical location of employees, the following procedures will apply:
>
> 1. The Employer will provide the appropriate Union chapters with notice of its intention to reassign/realign employees if required by law. If formal notice of the change is not required by law, managers will provide a courtesy notice to the impacted chapters of such reassignments/realignments.
>
> . . . .
>
> 6. The Union reserves the right to bargain in accordance with law, regulation, and this Agreement.

Award at 5-6. *See also* Opp'n, Attach., Agreement II at 50-51.

Article 41, "Employee Grievance Procedure," provides, in relevant part:

> Section 2
>
> A. Consistent with 5 U.S.C. § 7103(a)(9), the term "grievance" means any complaint:
> . . . .
>
> 3. by an employee or the Union concerning:
> (a) the effect or interpretation, or a claim of a breach, of a collective bargaining agreement; or
> (b) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

Opp'n, Attach., Agreement II at 114. *See also* Opp'n at 9-10.

Article 42, "Institutional Grievance Procedure," provides, in relevant part:

> Section 2
>
> Definitions and General Provisions for Local/National Institutional Grievances
>
> A. "Institutional grievance" means any complaint by the Union concerning the effect or interpretation, or a claim of breach of the provisions of this Agreement relating to the rights and benefits that accrue to the Union as the exclusive representative of bargaining unit employees. Grievances on behalf of employees, or that relate to the employment of employees, or that concern any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment of employees are not institutional grievances within the meaning of this procedure unless the provisions of subsection 4A2 apply.
>
> . . . .
>
> Section 4
>
> National Union Institutional Grievance Procedure
>
> A. The Union's National President may file grievances as provided in this section. For purposes of this section only, the term "grievance" means:
>
> 1. an institutional grievance as defined in subsection 2A of this Article; or
>
> 2. a grievance concerning an issue of rights afforded to employees under this Agreement which otherwise would be recognized as separate grievances from two (2) or more chapters over the same issue(s).

Opp'n, Attach., Agreement II at 120. *See also* Opp'n at 10-11.