

66 FLRA No. 36

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY
ADJUDICATION AND REVIEW
NATIONAL HEARING CENTER
(Agency)

and

ASSOCIATION OF
ADMINISTRATIVE LAW JUDGES
INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS
(Union)

0-AR-4524

DECISION

September 28, 2011

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 Michael A. Murphy 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 grievance concerned the Agency's unilateral action in establishing National Hearing Centers (NHCs) and staffing them with newly created Administrative Law Judge (ALJ) positions. The Arbitrator determined that the NHC ALJ positions were nonsupervisory bargaining unit positions and that the actions taken by the Agency constituted unfair labor practices (ULPs) under the Statute and breached the parties' collective bargaining agreement (CBA).

For the reasons that follow, the Agency's exceptions are granted in part and denied in part, and the award is set aside, in part.

II. Background and Arbitrator's Award**A. Background**

The Union represents approximately 1,100 nonsupervisory ALJs at the Agency's Hearing Offices nationwide. Award at 1-2. In September 2007, the Union became aware of the Agency's intent to establish NHCs and staff them with supervisory non-unit ALJs. *Id.* at 12, 31. The Union requested a meeting. *Id.* at 31-32. The Agency promised the Union that it would take no further action regarding the NHCs until after it met with the Union. *Id.* at 32. However, five days before the meeting took place, the Agency posted vacancy notices to fill the NHC ALJ positions. *Id.* The solicitation, which was sent to all bargaining unit ALJs, indicated that applications for the positions were due no later than six days later, the day after the meeting. *Id.* at 12, 31-32.

During the meeting, the Union claimed that the NHC ALJ positions were bargaining unit positions. *Id.* at 2-3, 31-32. The Agency asserted that the NHC ALJ positions were supervisory and therefore excluded from the unit. *Id.* at 2-3. The meeting concluded without reaching agreement regarding the unit status of the NHC ALJ positions. The Union subsequently filed a grievance alleging that the Agency breached the CBA and the Statute when, motivated by union animus, it unilaterally transferred bargaining unit work to what the Agency characterized as non-unit positions. Exceptions, Ex. D. When the matter was not resolved, it was submitted to arbitration.

B. Arbitrator's Award

The Arbitrator framed the issue in pertinent part as follows: "Did the Agency's action in assigning ALJs to NHCs constitute a breach of the CBA and/or [a] ULP under the [Statute]? If so, what shall the remedy be?" Award at 3.

At arbitration, the parties disputed whether the grievance was arbitrable. The Union claimed that the grievance was properly before the Arbitrator because the NHC ALJ positions at issue were bargaining unit positions. The Agency disagreed, asserting that the positions were supervisory and therefore excluded from the CBA. *Id.* at 7-8, 14. The Arbitrator determined that the matter was properly before him and proceeded to decide whether the NHC ALJs were nonsupervisory bargaining unit positions and whether the Agency breached the CBA and violated the ULP provisions of the Statute. *Id.* at 14.

The Arbitrator found that the NHC ALJs were not supervisors because their duties were essentially the same as those of the unit ALJs and there was no evidence that the NHC ALJs actually performed any supervisory duties. *Id.* at 22. The Arbitrator also determined that the Agency committed a ULP when it: (1) failed to notify the Union of its intent to establish the NHCs; (2) unilaterally created the NHCs and staffed them with ALJs without engaging in impact and implementation bargaining with the Union; and (3) displayed a hostile demeanor in its dealings with the Union concerning the NHCs. *Id.* at 36-38.¹ Therefore, the Arbitrator ordered the Agency to cease and desist from refusing to recognize the Union as the bargaining representative of the NHC ALJs and to engage in impact and implementation bargaining concerning the changes in the NHC ALJs' working conditions. The Arbitrator further ordered the Agency to cease and desist from displaying union animus in any of its dealing with the Union. *Id.* at 38-39.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that §§ 7105(a)(2)(A) and 7112(a) of the Statute provide the Authority with exclusive jurisdiction to determine the appropriateness of bargaining units. Exceptions at 9-10. The Agency claims that the Authority has consistently held that an arbitrator cannot determine employees' bargaining unit status, even if this question is raised as a collateral issue to a grievance otherwise properly brought under a CBA. *Id.* at 9-10. Therefore, the Agency argues, the Arbitrator had no authority to determine the bargaining unit status of the NHC ALJ positions. *Id.* at 11. The Agency further argues that the Arbitrator's ULP findings are contrary to law because they are dependent on his erroneous unit status determination. Consequently, the Agency asserts, the entire award must be set aside. *Id.* at 9, 11.

The Agency also contends that the award is contrary to law because the Arbitrator failed to require the Union to prove, by a preponderance of the evidence, that the Agency's actions and conduct constituted a ULP. *Id.* at 13-14, 19-20. Instead, the Agency claims that the Arbitrator shifted the burden to the Agency to disprove

the Union's allegations that the NHC ALJs were unit positions. The Agency also claims that the Arbitrator erroneously failed to find that the NHC ALJs were supervisors when an application of the law to the existing facts proved otherwise. *Id.* at 13-18.

The Agency further argues that the Arbitrator erroneously required the Agency to show that its conduct was not coercive toward the Union rather than requiring the Union to prove this allegation by a preponderance of the evidence. *Id.* at 19-20. In addition, the Agency argues, the Union's evidence is refuted by affidavits attached to the Agency's exceptions. *Id.* at 18-19.

In regard to the Arbitrator's finding of a ULP based on the Agency's hostile demeanor, the Agency contends that neither the Commissioner's actions nor his statements constitute unlawful animus or coercion. Exceptions at 19, 21. Specifically, the Agency argues that the statements made by the Commissioner during the meeting with the Union representatives were merely expressions of his personal views and opinions, which are permitted under the Statute as long as they do not contain threats and are not made under coercive conditions. *Id.* at 19-20. The Agency further argues that the statements were not threatening or coercive because the Union's representatives never exhibited any fearful behavior. *Id.* at 20-21. Therefore, the Agency asserts, the Arbitrator's finding that it committed a ULP based on hostile demeanor is contrary to law.

B. Union's Opposition

The Union contends that the Arbitrator did not make a bargaining unit status determination. Rather, the Union argues that the Arbitrator made a factual determination as to whether the work performed by the NHC ALJs constituted work covered by the CBA and simply upheld the ALJ bargaining unit agreed upon by the parties. *Opp'n* at 12-13.

Furthermore, the Union claims, even if the Authority finds that the Arbitrator made a bargaining unit status determination, that ruling should have no bearing on the award's other findings. The Union contends that the focus of the award, whether the Agency committed ULPs and breached the CBA by failing to notify the Union of its intent to establish the NHCs and then unilaterally creating them in a manner motivated by union animus, is not contingent upon whether the NHC ALJs are supervisors. *Id.* at 14.

¹ Subsequent to the award's issuance, the Agency filed a representation petition with a Regional Director (RD) of the Authority. The RD determined that he was not bound by the award because the Arbitrator had no authority to determine the bargaining unit status of the NHC ALJs. Reaching a different conclusion than the Arbitrator, the RD found that the ALJ positions at the NHCs were supervisory non-bargaining unit positions. The Union sought review by the Authority, which issued a decision upholding the RD's finding. *See SSA, Office of Disability Adjudication & Review, Balt., Md.*, 64 FLRA 896 (2010).

IV. Preliminary Issue: Section 2429.5 of the Authority's Regulations bars the Agency from submitting affidavits and raising issues concerning whether the Agency exhibited a hostile demeanor towards the Union.

The Agency attempts to refute the Arbitrator's "hostile demeanor" finding with post-hearing affidavits submitted with its exceptions. Under § 2429.5 of the Authority's Regulations, applying the version in effect prior to October 10, 2010, the Authority will not consider evidence that could have been, but was not, presented to the arbitrator. *See, e.g., U.S. Dep't of Homeland Sec. Customs & Border Prot.*, 63 FLRA 495, 497 (2009) (post-hearing affidavits not considered by Authority); *U.S. Dep't of Veterans Affairs Med. Ctr. Newington, Conn.*, 50 FLRA 566, 568 (1995) (*Veterans Affairs*) (Authority refusing to consider affidavits that could have been presented to arbitrator but were not).

The record establishes that the Agency was on notice that the Union argued that the Agency exhibited a hostile demeanor toward the Union. *See Award at 33-34* (Union's witnesses testified as to the Commissioner's hostile demeanor and the Arbitrator offered the Agency an opportunity to present rebuttal witnesses). Despite this notice, the record contains no indication that the Agency ever presented evidence to the Arbitrator, as it seeks to do now before the Authority, to support its claim that the Commissioner's conduct was not hostile. Because the Agency could have presented evidence to the Arbitrator but did not, it may not present this evidence to the Authority on exception. Accordingly, in resolving the "hostile demeanor" issue in this case, we will not consider the Agency's affidavits submitted with its exceptions.

In addition, the Agency claims that the statements made by the Commissioner during the meeting could not constitute a ULP because they were merely expressions of his personal views and opinions. Exceptions at 19-20. However, there is no indication in the record that the Agency raised the issue of the nature of the Commissioner's statements before the Arbitrator. Section 2429.5 bars Authority consideration of issues that could have been, but were not, presented to the Arbitrator. Accordingly, as the Agency could have raised this issue before the Arbitrator but did not, the Agency is barred from raising it to the Authority on exception. *See Veterans Affairs*, 50 FLRA at 568. Accordingly, in resolving the "hostile demeanor" issue in this case, we will also not consider whether the Commissioner's statements during the meeting were merely expressions of his personal views and opinions.

V. Analysis and Conclusions

A. The Arbitrator's bargaining unit status determination is contrary to §§ 7105(a)(2)(A) and 7112(a) of the Statute.

1. The Arbitrator did not have the authority to determine the NHC ALJs' bargaining unit status.

The Agency claims that the award is contrary to law because the Arbitrator did not have the authority to determine the bargaining unit status of the NHC ALJs. When an exception challenges an award's consistency with law, the Authority reviews the question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995). In applying this standard, the Authority assesses 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 assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Authority found that the NHC ALJ positions were supervisory unit positions in *Social Security Administration, Office of Disability Adjudication & Review, Baltimore, Maryland*, 64 FLRA 896 (2010). In that case, the Authority directly addressed the unit status question at issue here and found that, under §§ 7105(a)(2)(A) and 7112(a), the Authority has exclusive jurisdiction to resolve the question regarding the bargaining unit status of the NHC ALJs, even if the unit question is raised as a collateral issue to an otherwise proper grievance. *Id.* at 904 (citing *U.S. Small Bus. Admin.*, 32 FLRA 847, 853-54 (1988), *recons. granted*, 36 FLRA 155 (1990)). Consequently, the portion of the award finding that the NHC ALJs are nonsupervisory bargaining unit employees is contrary to law. Accordingly, we grant the Agency's exception and set aside this portion of the award.²

2. The Arbitrator has authority to decide only the ULPs that do not depend on a determination of the NHC ALJs' bargaining unit status.

The Arbitrator found that the Agency committed ULPs when it: (1) failed to notify the Union of its intention to create the NHCs; (2) unilaterally created the

² Based on the Authority's finding that the Arbitrator did not have the authority to determine the bargaining unit status of ALJs assigned to the NHCs, we do not need to address the Agency's subsidiary exception concerning the Arbitrator's application of the burden of proof in determining the NHC ALJs' bargaining unit status.

NHCs and staffed the NHCs with ALJs without engaging in impact and implementation bargaining with the Union; and (3) exhibited a hostile demeanor toward the Union. The Agency claims that these findings are contrary to law because they are dependent on the Arbitrator's erroneous bargaining unit status determination.

Consistent with the discussion in section V.A.1., *supra*, the Arbitrator was precluded from addressing that portion of the grievance pertaining to the bargaining unit status of the NHC ALJ positions. Consequently, his findings that the Agency had an obligation to engage in impact and implementation bargaining with the Union over the changes in the NHC ALJs' working conditions must be set aside because those findings are premised on the status of NHC ALJs as bargaining unit employees. Conversely, the Arbitrator was not precluded from deciding whether the Agency committed a ULP with respect to its failure to notify the Union of its intent to establish the NHCs and its hostile demeanor toward the Union. Those ULP issues do not depend on a determination of the NHC ALJs' bargaining unit status.

Accordingly, we consider the portions of the award finding that the Agency committed ULPs when it: (1) failed to notify the Union of its intention to create the NHCs; and (2) exhibited a hostile demeanor toward the Union. We set aside the Arbitrator's finding that the Agency committed a ULP when it failed to engage in impact and implementation bargaining with the Union concerning the working conditions of the NHC ALJs. We sustain the Arbitrator's other ULP determinations.

- B. The Arbitrator's ULP findings that do not depend on a determination of the bargaining unit status of the NHC ALJs are not otherwise contrary to law.
1. The Agency committed a ULP by failing to notify the Union of its intention to establish the NHCs and then by unilaterally creating them.

When, as here, a grievance under the Statute involves an alleged ULP, the arbitrator must apply the same standards and burdens that would be applied by an administrative law judge in a ULP proceeding under § 7118. In a grievance alleging a ULP by an agency, the union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence. *See AFGE, Nat'l Border Patrol Council*, 54 FLRA 905, 909 (1998). However, as in other arbitration cases, including those where violations of law are alleged, the Authority defers to the arbitrator's findings of fact. *See, e.g., U.S. Dep't of Commerce, Patent & Trademark Office*, 52 FLRA 358, 367 (1996).

The Arbitrator found that, after the Union became aware of rumors that the Agency was about to open the first NHC, the Agency agreed to meet with the Union. However, despite a promise not to implement its plan to create the NHCs until after the meeting, the Agency sent out job solicitations for the NHC ALJ positions to all the ALJs in the bargaining unit before the meeting took place. Award at 32. This was actually the first official notice the Union received from the Agency regarding the NHCs. This behavior led the Arbitrator to conclude that "[t]he creation of the NHCs was all but over and done with before the . . . meeting ever took place" and that the matter was a "done deal." *Id.* at 32, 35.

The Agency's conduct circumvented the Union. The Agency dealt directly with unit employees by issuing the job solicitation for the NHC positions prior to the meeting. Such actions constitute a ULP because they bypass the Union, undermining its authority as the exclusive representative. *See, e.g., SSA*, 55 FLRA 978, 982 (1999); *U.S. Dep't of Justice, Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 51 FLRA 1339, 1346 (1996); *Dep't of Health & Human Servs., SSA, Balt., Md.*, 39 FLRA 298, 311 (1991); *cf. Tra-Mar Commc'ns, Inc.*, 265 NLRB 664, 681 (1982) (employer violated § 8(a)(1) of National Labor Relations Act by unilaterally granting wage increases to certain employees because such bypassing of collective bargaining representative undermined its authority as representative of employees).

For the foregoing reasons, and as this conduct constitutes a ULP not dependent on a determination of the bargaining unit status of the NHC ALJs, we deny the Agency's exceptions with respect to this portion of the award.

2. The Agency committed a ULP by exhibiting a hostile demeanor toward the Union.

The Agency contends that the award is contrary to law because the Union did not prove, by a preponderance of the evidence, that it exhibited a hostile demeanor toward the Union in violation of § 7116(a)(1) of the Statute.³ Exceptions at 19-20. In order to prove a ULP under § 7116(a)(1), it is not necessary to establish anti-union animus or any other unfair labor practices. *Dep't of the Air Force, Scott Air Force Base, Ill.*, 34 FLRA 956, 962 (1990) (*Scott AFB*). The standard for

³ When addressing this issue, the Arbitrator used "hostile demeanor" and "anti-union animus" interchangeably, ultimately finding that the Agency committed a ULP with respect to its "hostile demeanor" toward the Union. Award at 35-36. The Agency challenges this finding and argues that the Commissioner's statements and conduct did not constitute a ULP under § 7116(a)(1). Exceptions at 19-20.

determining whether a manager's statement or conduct violates § 7116(a)(1) of the Statute is an objective one. The question is whether, under the circumstances, the statement or conduct would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from them. *See U.S. Dep't of Transp., FAA*, 64 FLRA 365, 370 (2009) (finding violation where employer's conduct linked employee's protected activity with treatment adverse to employee's interest); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Safford, Ariz.*, 59 FLRA 318, 321-22 (2003) (*FCI Safford*) (finding violation where statements, coupled with overall tone of meeting, were coercive and interfered with employees' exercise of rights under Statute); *Scott AFB*, 34 FLRA at 962 (finding violation where supervisor's statements could have reasonably coerced employee and interfered with right to use negotiated grievance procedure). Although the circumstances are taken into consideration, the standard is not based on the subjective perceptions of the employee or the intent of the employer. *See id.* The test is whether the employees could reasonably have drawn a coercive inference, not whether they actually did. *FCI Safford*, 59 FLRA at 322.

The Arbitrator relied on several factual findings when he determined that the Agency's hostile demeanor constituted a ULP. The Arbitrator found that: (1) the establishment of the NHC was a "done deal" before the meeting occurred; (2) the testimony of the Union's representatives, both ALJs experienced in labor matters, was "extremely credible;" (3) the meeting between the Commissioner and the Union representatives was "anti-union in tone" and that the Commissioner "exhibited a complete disdain for any bargaining with the Union;" (4) the Commissioner was "rude, angry, hostile and discourteous" to the Union representatives; (5) the Commissioner admitted that his intent in creating the NHCs was to circumvent the CBA; and (6) the Commissioner "conducted himself in a way deliberately calculated to instill fear in the Union representatives." Award at 28, 32-35.

The Agency contested the hostile demeanor issue in the proceeding before the Arbitrator, but did not present any supporting evidence. *Id.* at 33. Moreover, we have held, in section IV., *supra*, that, in resolving the hostile demeanor issue, we will not consider affidavits the Agency submitted with its exceptions or the Agency's claim that the Commissioner's statements during the meeting were merely expressions of his personal views and opinions.

Therefore, lacking any evidentiary or other support, we find the Agency's argument that the Commissioner's demeanor was not hostile to be a bare assertion. *See AFGE, Local 3354*, 64 FLRA 330,

333 (2009) (finding the Union's unsupported statement that arbitrator was biased to be a bare assertion).⁴ We note, in this regard, that the Agency does not challenge, as a nonfact, the Arbitrator's finding that the Commissioner intended to circumvent the CBA when he established the NHCs. *See Award* at 28.

Because the Agency's objections to the award's hostile demeanor findings are unsupported, and as this ULP finding is not dependent on a determination of the bargaining unit status of the NHC ALJs, we deny the Agency's exceptions with respect to this portion of the award.

VI. Decision

The Agency's exceptions are granted in part and denied in part, and the award is set aside, in part.

⁴ Additionally, the Agency asserts, without providing any law to support its claim, that the award is contrary to law because it rejects management's right to establish the NHCs. Because this argument also lacks substantiation, we similarly reject it as a bare assertion.