

67 FLRA No. 80

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3974
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
MCKEAN, PENNSYLVANIA
(Agency)

0-AR-4915

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DECISION

March 18, 2014
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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Peter R. Meyers denied a grievance alleging that the Agency violated the parties' collective-bargaining agreement when it declined to bargain with the Union over a particular matter. There are three questions before us.

The first question is whether the Arbitrator's award is based on the nonfact that "agencies are not required to negotiate" with unions even if the "plain wording" of the Federal Service Labor-Management Relations Statute (the Statute) and the parties' agreement "require[s] negotiation."¹ Because parties may not successfully challenge legal conclusions, contract interpretations, and matters that were disputed at arbitration on nonfact grounds – and the Union's nonfact exception attempts to do so – we find that the answer is no.

The second and third questions are, respectively, whether the award is contrary to law – specifically, the Statute – and whether the award fails to draw its essence from the parties' agreement. Because it is unclear whether the Arbitrator based his award on an interpretation of the Statute, the parties' agreement, or

both – and it is necessary to know the basis for the award, and for the Arbitrator to clarify certain findings, in order to resolve the Union's contrary-to-law and essence arguments – we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for clarification.

II. Background and Arbitrator's Award

The Union represents employees working at a correctional facility (the facility). The facility's acting warden identified "security concerns" with a lockable, one-way turnstile at the entrance to the facility's recreation area, and he notified the Union that he planned to replace the turnstile with a locking gate.² Later, the Agency installed the gate, and the Union filed a grievance alleging a violation of the parties' agreement.

The grievance went to arbitration. At arbitration, the parties did not stipulate an issue, and the Arbitrator framed the issue, in pertinent part, as "[w]hether the Agency violated the parties' . . . agreement when it removed the one-way turnstile . . . without allowing the Union an opportunity to negotiate the change prior to its implementation[.]"³

As the parties "dispute[d] . . . the proper interpretation and application of [their] . . . agreement,"⁴ the Arbitrator summarized their differing positions. He noted the Union's contention that because the parties had well-developed "practices" related to using the turnstile, the Agency could not remove the turnstile until "negotiations were completed" with the Union.⁵ He stated further that the Union "concede[d] that management has the statutory authority to determine internal[-]security practices," but the Union maintained that the Agency "must do so pursuant to the statutory provision on negotiations."⁶ As for the Agency's position, the Arbitrator acknowledged the Agency's argument that it "engaged in [impact-and-implementation] bargaining by giving the Union the opportunity to express any concerns over" replacing the turnstile.⁷ In addition, he noted the Agency's assertions that the parties' agreement recognized "management's statutory authority" to determine internal-security practices,⁸ and consequently, the Agency's exercise of that authority could "not violate . . . [the a]greement . . . [or] the relevant statutory provisions."⁹

² Award at 24.

³ *Id.* at 3.

⁴ *Id.* at 23.

⁵ *Id.* at 17.

⁶ *Id.* at 19.

⁷ *Id.* at 21.

⁸ *Id.* at 23.

⁹ *Id.* at 22.

¹ Exceptions at 7.

In addition, the Arbitrator identified several provisions of the parties' agreement that he found "[r]elevant" to the dispute.¹⁰ These included:

- Article 3, Section c. (§ 3c.), which provides that, "prior to implementation of any policies, practices, and/or procedures," the parties "will meet and negotiate on any and all policies, practices, and procedures which impact conditions of employment, where required by" §§ 7106, 7114, and 7117 of the Statute;¹¹
- Article 4, Section b. (§ 4b.), which provides that, except for matters covered in local supplemental agreements, "all written benefits, or practices and understandings between the parties . . . , which are negotiable, shall not be changed unless agreed to in writing" first;¹²
- Article 4, Section c. (§ 4c.), which states that the Agency "will provide . . . notification of . . . changes . . . in working conditions at the local level[, and s]uch changes will be negotiated in accordance with the provisions" of the agreement;¹³
- Article 5, Section a. (§ 5a.), which provides that "in accordance with" § 7106 of the Statute, management has the authority "to determine the . . . internal[-]security practices" of the Agency;¹⁴ and
- Article 5, Section b. (§ 5b.), which provides that "[n]othing in this section . . . shall preclude . . . negotiating . . . appropriate arrangements for employees adversely affected by the exercise" of management's authority.¹⁵

The Arbitrator also identified one "[r]elevant [s]tatutory [p]rovision[]" – § 7106 of the Statute, the text of which parallels § 5a. and b. of the parties' agreement.¹⁶

The Arbitrator found that the Agency replaced the turnstile because of "very real security problems," and "[b]oth the [a]greement and governing statutory language establish . . . managerial authority to determine internal[-]security practices."¹⁷ In that regard, he found that "because it was addressing a matter of internal

security, the Agency was not required to negotiate and reach agreement with the Union over its proposed replacement of the turnstile."¹⁸ The Arbitrator stated that: "the decision to replace the turnstile absolutely was a matter of internal security first and foremost, and its impact, if any, on working conditions was secondary and relatively minimal";¹⁹ and although "the Union may have real and legitimate concerns over the impact of the new gate on safety and working conditions, these concerns do not override the Agency's explicit managerial authority to determine the internal[-]security practices at" the facility.²⁰

In addition, the Arbitrator found that the Agency gave the Union president advance notice of the proposed change.²¹ The Arbitrator determined that the president "did not raise any objections to management's plans, and he stated that he only wanted to *see* the [gate]" before its installation.²² Additionally, the Arbitrator found that, when the Agency was ready to install the gate, the president "indicated that he was done dealing with the issue and no longer was concerned about seeing the [gate]."²³ Further, the Arbitrator found that "other Union staff members" expressed concerns about the gate, including the Union's vice president, who "expressly informed management that he was opposed to the turnstile's replacement and that the Union wished to negotiate over the proposed change."²⁴ After considering this evidence, the Arbitrator determined that the Agency "inform[ed] the Union of the change[] and . . . engage[d] in several discussions with different Union officials about the impact and implementation of [the] change," and that the Agency "was not required to do any more" before replacing the turnstile with the locking gate.²⁵

"In light of all these considerations," the Arbitrator found that the Union had "not met its burden of proof" under "the governing language of the parties' . . . agreement and relevant statutory provisions."²⁶ Based on his conclusion that the Agency's "unilateral decision to replace" the turnstile "without negotiating the implementation"²⁸ "did not violate the parties' [a]greement,"²⁹ he denied the grievance.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 4 (quoting § 3c.).

¹² *Id.* at 4-5 (quoting § 4b.).

¹³ *Id.* at 5 (quoting § 4c.).

¹⁴ *Id.* (quoting § 5a.).

¹⁵ *Id.* (quoting § 5b.).

¹⁶ *Id.* at 7 (quoting § 7106).

¹⁷ *Id.* at 25.

¹⁸ *Id.* at 27.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 24.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 27.

²⁶ *Id.* at 28.

²⁷ *Id.*

²⁸ *Id.* at 29.

²⁹ *Id.* at 28.

The Union filed exceptions to the Arbitrator's award, and the Agency filed an opposition to the Union's exceptions.

III. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union argues that the award is based on the nonfact that "agencies are not required to negotiate with" unions even if the "plain wording" of the Statute and the parties' agreement requires negotiations.³⁰ 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.³¹ However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.³² In addition, neither legal conclusions³³ nor conclusions based on the interpretation of a collective-bargaining agreement³⁴ may be challenged as nonfacts.

To the extent that the Union is arguing that the Arbitrator erred in reaching a legal conclusion or interpreting the parties' agreement, as stated above, legal conclusions and contractual interpretations may not be challenged as nonfacts.³⁵ Moreover, to the extent that the Union is challenging a factual finding, the Union concedes that the parties disputed before the Arbitrator all of the matters discussed in its nonfact exception.³⁶ As stated above, the Arbitrator's determination of any factual matter that the parties disputed at arbitration provides no basis for finding the award deficient.³⁷ Therefore, we deny the Union's nonfact exception.

B. We remand the award because we are unable to determine whether it conflicts with the Statute or fails to draw its essence from the parties' agreement.

The Union, citing principles that apply to the duty to bargain under the Statute, argues that the award is

contrary to law.³⁸ The Union also argues that the award fails to draw its essence from several provisions of the parties' agreement.³⁹

In response to the Union's contrary-to-law argument, the Agency claims that the Arbitrator properly addressed only whether the Agency had a duty to bargain under the parties' agreement – not whether the Agency had a duty to bargain under the *Statute*.⁴⁰ Alternatively, the Agency asserts that the award does not conflict with principles regarding the statutory duty to bargain.⁴¹ The Agency also asserts that the award draws its essence from the parties' agreement.⁴²

Several aspects of the award are unclear.

To begin, it is unclear whether the Arbitrator addressed a contractual-duty-to-bargain issue, a statutory-duty-to-bargain issue, or both. There are some indications that the Arbitrator addressed a contractual issue. Specifically, he framed the issue as "[w]hether the Agency violated the parties' . . . *agreement*," not the *Statute*.⁴³ In addition, he cited as "[r]elevant" certain contract provisions that do not mirror provisions of the *Statute*,⁴⁴ including: § 4b., which identifies when the parties must "agree[] . . . in writing" to particular changes;⁴⁵ and § 4c., which refers to matters that "will be negotiated" by the parties.⁴⁶ On the other hand, the Arbitrator cited as relevant § 3c. of the parties' agreement,⁴⁷ which the Authority has found to "mirror" the bargaining obligations set forth in the *Statute*.⁴⁸

It is critical to ascertain whether the Arbitrator addressed only a contractual issue, only a statutory issue, or both issues because, to the extent that he addressed a statutory issue, he was required to apply the following statutory-duty-to-bargain principles.⁴⁹ 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* that change will have more than a "de minimis" effect on bargaining-unit employees'

³⁰ Exceptions at 7.

³¹ *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*Local 1984*) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).

³² *Id.*

³³ *AFGE, Local 801, Council of Prison Locals 33*, 58 FLRA 455, 456-57 (2003) (*Local 801*) (citing *U.S. DOD Educ. Activity, Arlington, Va.*, 56 FLRA 744, 749 (2000)).

³⁴ *U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 56 FLRA 498, 501 (2000) (*Warner Robins*); *NLRB*, 50 FLRA 88, 92 (1995).

³⁵ See *Local 801*, 58 FLRA at 456-57; *Warner Robins*, 56 FLRA at 501.

³⁶ Exceptions at 8.

³⁷ See *Local 1984*, 56 FLRA at 41.

³⁸ Exceptions at 3-6.

³⁹ *Id.* at 8-10.

⁴⁰ Opp'n at 4-6.

⁴¹ *Id.* at 6-11.

⁴² *Id.* at 12-16.

⁴³ Award at 3 (emphasis added).

⁴⁴ *Id.*

⁴⁵ *Id.* at 4-5 (quoting § 4b.).

⁴⁶ *Id.* at 5 (quoting § 4c.).

⁴⁷ *Id.* at 4.

⁴⁸ *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 66 FLRA 978, 980 (2012).

⁴⁹ *NTEU, Chapter 26*, 66 FLRA 650, 652 (2012) (when arbitrators resolve unfair-labor-practice issues, they must apply statutory standards).

conditions of employment.⁵⁰ 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 unit employees' conditions of employment.⁵¹ In addition, if the agency's decision to make a change involves the exercise of a management right under § 7106 of the Statute, then the substance of the agency's decision is not subject to negotiation.⁵² But, under § 7106(b)(2) and (b)(3) of the Statute, the agency still must bargain over the impact and implementation of that decision.⁵³ Further, a union may waive its right to bargain over a proposed change, either explicitly or implicitly through inaction.⁵⁴ In this regard, the agency may implement the proposed changes if, among other things, the union fails to request bargaining within a reasonable period of time after being notified of the proposed changes,⁵⁵ fails to submit any bargaining proposals⁵⁶ (or any negotiable proposals)⁵⁷ within a contractual or other agreed-upon time limit,⁵⁸ or fails to bargain.⁵⁹

It also is unclear whether the award is consistent with these statutory standards. The parties make three arguments in this regard.

First, the Union argues that the Arbitrator erroneously found that the Agency had no duty to bargain over the impact and implementation of the change.⁶⁰ But it is unclear whether the Arbitrator made such a finding, or whether he found no duty to bargain over only the *substance* of the change. In this regard, he made several statements regarding whether the Agency had an obligation to negotiate over "the change"⁶¹ – which could refer to substantive bargaining.⁶¹ However, in his

"[a]ward," the Arbitrator stated that the Agency did not violate the parties' agreement "when it removed the . . . turnstile . . . without negotiating the *implementation* with the Union"⁶² – which indicates that he may also have found no duty to bargain over the impact and implementation of the change. There is no dispute that the Agency exercised its management right to determine internal-security practices when it made the change. Thus, if the Arbitrator found no duty to bargain over the substance of the change, then that finding is consistent with the legal principles set forth above;⁶³ if he found that there was no duty to bargain over the impact and implementation of that change solely because it involved the exercise of a management right, then that finding is *not* consistent with the legal principles set forth above.⁶⁴ In order for the Authority to determine whether the award is contrary to law, it is necessary for the Arbitrator to clarify this point.

Second, the Agency claims that the Arbitrator found that bargaining was excused because the effects of the change were only *de minimis*.⁶⁵ In this regard, the Arbitrator stated that "the decision to replace the turnstile absolutely was a matter of internal security first and foremost, and its impact, if any, on working conditions was secondary and relatively minimal."⁶⁶ It is unclear from this statement whether the Arbitrator: (1) assessed the effects, or the reasonably foreseeable effects, of the change on unit employees' conditions of employment, and found that the effects were *de minimis*; or, instead, (2) determined that, because the installation of the gate involved an internal-security decision, the impact on employees was necessarily minimal. The latter finding would be incorrect because the effects of a change may be greater than *de minimis* even when the change involves the exercise of a management right.⁶⁷ This point also must be clarified in order for the Authority to be able to assess whether the award is contrary to law.

Third, according to the Agency, the Arbitrator properly found no bargaining obligation because the Union waived its right to bargain.⁶⁸ As relevant here, the Arbitrator found that when the Agency notified the Union president about the proposed change, the Union president "did not raise any objections to management's plans, and he stated that he only wanted to *see* the [gate]."⁶⁹ The Arbitrator also found that, when the Agency was ready to install the gate, the Union president "indicated that he

⁵⁰ *Id.*

⁵¹ *Id.* at 653.

⁵² *Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 852 (1999) (*FCI Bastrop*) (Chair Segal concurring).

⁵³ *Id.*

⁵⁴ *U.S. DHS, U.S. CBP*, 62 FLRA 263, 265 (2007) (*CBP*).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *See Pension Benefit Guar. Corp.*, 59 FLRA 48, 50 (2003) (then-Member Pope dissenting in part on other grounds) (agency's duty to bargain "is predicated on the union's submission of negotiable proposals").

⁵⁸ *CBP*, 62 FLRA at 265.

⁵⁹ *Id.*

⁶⁰ Exceptions at 6.

⁶¹ Award at 3 (framing issue as whether Agency violated agreement when it removed turnstile without allowing Union to negotiate "the change"); *id.* (noting that grievance alleged Agency violated agreement when it did not allow Union to negotiate "the change"); *id.* at 23 (stating that Union had burden to prove that Agency violated agreement when it replaced the turnstile with a gate without giving the Union an opportunity to negotiate "the change"); *cf. id.* at 27 (finding Agency had no obligation to "negotiate and reach agreement" over the Agency's "proposed replacement of the turnstile").

⁶² *Id.* at 28-29 (emphasis added).

⁶³ *FCI Bastrop*, 55 FLRA at 852.

⁶⁴ *Id.*

⁶⁵ Opp'n at 9.

⁶⁶ Award at 27.

⁶⁷ *See U.S. DHS, U.S. CBP, El Paso, Tex.*, 67 FLRA 46, 49-50 (2012).

⁶⁸ Opp'n at 10-11.

⁶⁹ Award at 24.

was done dealing with the issue and no longer was concerned about seeing the [gate].”⁷⁰ Additionally, the Arbitrator found that “other Union staff members” expressed concerns about the gate, including the Union’s vice president, who “expressly informed management that he was opposed to the turnstile’s replacement and that the Union wished to negotiate over the proposed change.”⁷¹ The Arbitrator then stated that the Agency: (1) “inform[ed] the Union of the change, and . . . engage[d] in several discussions with different Union officials about the impact and implementation” of the change; and (2) “was not required to do any more before implementing” the change.⁷² It is unclear whether, by making these findings, the Arbitrator intended to find that the Union waived its right to bargain over the proposed change, either explicitly or through inaction. If the Arbitrator properly found a waiver of the right to bargain, then a finding of no statutory violation would be consistent with the legal principles set forth above.⁷³ This point also must be clarified in order for the Authority to resolve the Union’s contrary-to-law exception.

Arbitrator, absent settlement, for clarification regarding the remaining issues.

For the foregoing reasons, it is unclear whether the Arbitrator intended to find no duty to bargain over only the substance of the change, and whether he found that the Agency’s bargaining obligation was excused because the change was de minimis or the Union waived its right to bargain. Given this lack of clarity – and the lack of clarity regarding whether the Arbitrator even intended to address a statutory-duty-to-bargain issue – we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for clarification as to what issue or issues he was addressing. In the event that the parties return to the Arbitrator and he clarifies that he resolved a statutory-duty-to-bargain issue, then the Arbitrator must also address how the award comports with the pertinent statutory standards set forth above.

Additionally, as it is unclear what contract provisions the Arbitrator relied on in finding no contract violation – including whether he relied on contract provisions that differ from the Statute in any way – we are unable to resolve the Union’s essence exception at this time. Accordingly, if the parties return to the Arbitrator, then he must clarify his contractual analysis as well.

IV. Decision

We deny the Union’s nonfact exception and remand the award to the parties for resubmission to the

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 27.

⁷³ *CBP*, 62 FLRA at 265.