72 FLRA No. 65

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

and

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARING OPERATIONS
(Agency)

0-AR-5640

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DECISION

June 8, 2021

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and James T. Abbott, Members
(Chairman DuBester concurring;
Member Abbott dissenting in part)

I. Statement of the Case

Arbitrator Malcolm Pritzker issued an award finding that the Agency violated § 7114(b)(4) of the Federal Service Labor-Management Relations Statute (Statute).[1] The Arbitrator denied some of the requested remedies, and the Union filed exceptions. As discussed below, we find that the remedy portion of the award is contrary to law, in part. Accordingly, we remand to the parties to resubmit to the Arbitrator, absent settlement, for further action consistent with this decision.

II. Background and Arbitrator's Award

As relevant here, the Union submitted multiple information requests during negotiations on a new collective-bargaining agreement (CBA). The Union filed three separate grievances over the Agency's failure to adequately respond to seven information requests. The three grievances were consolidated into the instant grievance. Before the instant grievance went to arbitration, the parties, with assistance from a mediator, reached agreement on all but nine articles of the new CBA. The mediator "certified an impasse [on] the remaining nine articles," and the Agency requested the Federal Service Impasses Panel (FSIP) assert jurisdiction in October 2019.[2]

On April 4, 2020, the Arbitrator found that the Agency violated § 7114(b)(4) of the Statute by failing to adequately respond to five of the seven information requests. However, the Arbitrator stated that he could not award two of the remedies requested by the Union. Specifically, the Arbitrator found that he could not award the cease and desist order,[3] because he could not "comment about possible future behavior."[4] The Arbitrator also stated that he could not award the retroactive bargaining order,[5] because he did "not have the right to interfere with the procedures of [FSIP] or to intervene in the collective[-]bargaining process and [he would] not order the reopening of negotiations between the parties."[6] Based on these restrictions, the Arbitrator ordered the Agency to provide the requested information within thirty calendar days, and for the Agency to "post a notice for sixty calendar days advising bargaining[-]unit employees of the results of [the award]."[7]

[1] *See* 5 U.S.C. § 7114(b)(4) ("The duty of an agency . . . to negotiate in good faith . . . shall include the obligation . . . to furnish to the exclusive representative . . . upon request and, to the extent not prohibited by law, data (A) which is normally maintained by the agency in the regular course of business; (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.").

[2] Exceptions Br. at 4.

[3] *See* Award at 10 ("That the [A]gency cease and desist from: (a) [f]ailing and refusing to respond to requests for information by the Union[;] (b) [f]ailing and refusing to bargain in good faith with the Union[; and] (c) [i]n any like or related manner, interfering with, restraining, or coercing bargaining-unit employees in the exercise of their rights assured by the Statute.").

[4] *Id.* at 11.

[5] *Id.* at 10 ("Following the receipt of [the requested information], bargain[ing] in good faith with the Union by returning to the bargaining table, resuming term negotiations, allotting time for such negotiations consistent with the . . . time allotted in the parties' prior ground rules and deeming all initial proposals, subsequent offers, agreed articles, and impasse filings withdrawn so that the Union has the benefit of negotiating with all information requested . . . .").

[6] *Id.* at 11.

[7] *Id.*

The Union filed exceptions on June 8, 2020.[8]

III. Analysis and Conclusion: The award is contrary to law, in part.

The Union argues that part of the remedy portion of the award is contrary to law[9] because the Arbitrator had the authority to award all of the requested remedies but incorrectly stated he did not. Specifically, the Union argues that the Arbitrator had the authority to award a cease and desist order and a retroactive bargaining order.[10]

An arbitrator has the authority to "fashion the same remedies in the arbitration of a grievance alleging . . . an unfair labor practice as those authorized under [§] 7118 of the Statute."[11] The Authority normally defers to the arbitrator's judgment and discretion in the determination of a remedy.[12] However, the Authority has held that "[f]or arbitrators to refuse to consider the remedies authorized by [§] 7118 of the Statute because they determine that they are not empowered to grant such relief is not consistent with the framework of the Statute, and we will find that such determinations are deficient."[13]

Here, the Arbitrator refused to consider two requested remedies – the cease and desist order, and the retroactive bargaining order – based on his belief that he did not have authority to award such remedies.[14] A cease and desist order and a retroactive bargaining order are among authorized remedies under § 7118(a)(7).[15] As such, the award is contrary to law to the extent the Arbitrator erroneously concluded that he could not award such relief.[16]

We remand this matter to the parties for resubmission to the Arbitrator.[17] On resubmission, the Arbitrator must consider, under the same remedial approach applied by the Authority, whether a cease and desist order and the issuance of a retroactive bargaining order are appropriate relief to remedy the found statutory violations.[18]

IV. Order

The award is contrary to law, in part, and we remand the matter to the parties for further action consistent with this decision.

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[8] The Agency's opposition was due on July 8, 2020, but the Agency did not file it until July 9, 2020. The Authority's Office of Case Intake and Publication issued an Order to Show Cause directing the Agency to show why its opposition should not be rejected as untimely. In response, the Agency admitted that it miscalculated the due date for filing it opposition and did not allege an "extraordinary circumstance" warranting waiver of the expired time limit. *See* Resp. to Order to Show Cause at 1-2 (arguing that the thirty-day deadline should be waived because "the time limit . . . is regulatory and not statutory," no one was prejudiced by the one-day delay, and there was "no other defect in [its] submission of its [o]pposition"); *see also* 5 C.F.R. § 2429.23(b). Accordingly, we do not consider the Agency's untimely opposition. *See AFGE, Loc. 547*, 71 FLRA 943, 945 n.20 (2021).

[9] When an exception challenges an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *AFGE, Loc. 2076*, 71 FLRA 1023, 1026 n.26 (2020) (then-Member DuBester concurring) (citing *AFGE, Loc. 933*, 70 FLRA 508, 510 n.13 (2018)). 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. *Id.* In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts. *Id.*

[10] Exceptions Br. at 6.

[11] *NTEU*, 48 FLRA 566, 570 (1993).

[12] *AFGE, Loc. 12*, 69 FLRA 360, 361 (2016) (*Loc. 12*).

[13] *NTEU*, 48 FLRA at 570-71. *But see Loc. 12*, 69 FLRA at 361 (stating that the "Authority upholds the arbitrator's remedy determination unless the determination is 'a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute]'" (quoting *NTEU v. FLRA*, 647 F.3d 514, 517 (4th Cir. 2011))).

[14] Award at 11.

[15] 5 U.S.C. § 7118(a)(7)(A), (B) ("If the Authority . . . determines . . . that the agency or [union] named in the complaint has engaged in or is engaging in an [ULP], then the [Authority] . . . shall issue and cause to be served on the agency or [union] an order – (A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged; (B) requiring the parties to renegotiate a collective[-]bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect.").

[16] *See NTEU*, 48 FLRA at 571. *But see AFGE, Loc. 1738*, 71 FLRA 505, 506 (then-Member DuBester concurring) (finding the denial of a requested remedy was consistent with law, even though the requested remedy was authorized by law); *Loc. 12*, 69 FLRA at 362 (denying an exception because the union only argued that the requested remedy was more appropriate, not that the requested remedy was required by law). Furthermore, the fact that FSIP asserted jurisdiction does not preclude the Arbitrator from awarding relief for a found violation. *See U.S. Dep't of HUD*, 71 FLRA 616, 618 (2020) (then-Member DuBester concurring) (upholding an award remedying an unfair-labor-practice that occurred during negotiations despite FSIP asserting jurisdiction).

[17] *NTEU*, 48 FLRA at 571 (remanding a matter to the parties when the arbitrator erroneously concluded that he could not award the requested relief).

[18] *E.g.*, *id.*

Chairman DuBester, concurring:

I agree with the Order finding the award contrary to law, in part, and remanding the matter to the parties.

Member Abbott, dissenting in part:

I cannot join the majority in their conclusion that we must remand the case to the parties, for resubmission to the Arbitrator, in order to determine if the requested remedies are appropriate.[1]

While it is true that the Authority often remands matters to the parties for resubmission to the arbitrator, this is not a statutory or regulatory requirement.[2] In fact, the Federal Service Labor-Management Relations Statute (Statute) requires that its provisions are "interpreted in a manner consistent with the requirement of an effective and *efficient* [g]overnment."[3] Remanding the matter to the parties, under the instant circumstances, does not adhere to this efficiency requirement. Instead of remanding the matter, and therefore requiring the parties to expend more time and money,[4] I would look at the record before us and determine whether the remedies in dispute are appropriate.

Section 2423.41(c) provides that when there is a finding of a violation of the Statute, "the Authority shall . . . issue an order directing the violator . . . to cease and desist from any unfair labor practice."[5] Here, the Arbitrator found that the Agency violated the Statute.[6] As such, a cease and desist order is appropriate. Accordingly, I would modify the award to include a cease and desist order.[7]

The Authority has held that a retroactive bargaining order is appropriate where an agency's unlawful conduct has deprived the exclusive representative of an opportunity to bargain in a timely

[1] Majority at 3-4.
[2] *See* 5 U.S.C. § 7122(a) ("[T]he Authority *may* take such action and make such recommendations concerning the [arbitral] award as it considers necessary, consistent with applicable laws, rules, or regulations." (emphasis added)); 5 C.F.R. § 2423.41(b) ("Whenever exceptions are filed . . . the Authority shall issue a decision affirming or reversing, in whole or in part, the decision of the Administrative Law Judge . . . ."); *see generally* 5 U.S.C. § 7105 (listing the powers and duties of the Authority); 5 U.S.C. § 7118 (listing the obligations of the Authority in preventing unfair-labor-practices).
[3] 5 U.S.C. § 7101(b) (emphasis added).
[4] *See U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 623, 625 (2018) (Member Abbott concurring; then-Member DuBester dissenting) (Concurring Opinion of Member Abbott) (criticizing the previous decision to remand an award to the parties, which "needlessly prolong[ed] th[e] dispute," when the Authority could have resolved the issue the first time).
[5] 5 C.F.R. § 2423.41(c).
[6] Award at 8-10.
[7] *See U.S. Dep't of Treasury, IRS*, 64 FLRA 972, 980 (2010) (then-Member DuBester dissenting in part) (modifying an award to provide the "typical remed[ies] in failure-to-respond cases, which is a cease-and-desist order and a direction to post a notice" (citations omitted)).

manner over negotiable conditions of employment affecting bargaining unit employees.[8] However, retroactive bargaining orders are awarded in cases alleging a failure to bargain.[9] Here, the issue at arbitration only involved the Agency's responses, or lack therefore, to the Union's information requests.[10] Furthermore, the parties reached agreement on all but nine articles through the assistance of a mediator, and the remaining nine went to the Federal Services Impasse Panel.[11] Therefore, it appears the parties completed bargaining. Because there is not an allegation of a failure to bargain, a retroactive bargaining order is not appropriate. Accordingly, I would deny the Union's exception to the extent it argues a retroactive bargaining order is appropriate.

[8] *U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 60 FLRA 456, 457 (2004) (*Army*) (citing *FAA, Nw. Mountain Region, Renton, Wash.*, 51 FLRA 35, 37 (1995)).

[9] *See U.S. Dep't of Com., Nat'l Inst. of Standards & Tech.*, 71 FLRA 199, 199-202 (2019) (then-Member DuBester dissenting) (awarding a retroactive bargaining order to remedy the agency's failure to provide notice and bargain before implementing a change to conditions of employment); *Army*, 60 FLRA at 457 (awarding a retroactive bargaining order to remedy the agency's failure to complete bargaining).

[10] Award at 1 ("Because the parties did not agree on the issue[,] I decide[d] that the issue is as follows: [d]id the Agency violate [f]ederal law and/or the [parties' agreement] in its responses to the following Union requests for information . . . .").

[11] Majority at 2; *see also* Exceptions Br. at 4.