73 FLRA No. 132

UNITED STATES
DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 0519
NATIONAL JOINT COUNCIL
OF FOOD INSPECTION LOCALS
(Union)

0-AR-5849

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DECISION

September 27, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator David K. Monsour issued an award sustaining a grievance concerning the Agency's failure to bargain with the Union over the impact of changes to (1) the Agency's detailing practices and (2) the position descriptions of certain positions (inspectors). As remedies, the Arbitrator directed the Agency to return to the status quo ante, engage in good-faith bargaining, cease and desist from detailing inspectors involuntarily, and make affected employees whole. The Agency filed exceptions to the award on exceeded-authority, contrary-to-law, nonfact, and mootness grounds. For the reasons explained below, we dismiss the Agency's contrary-to-law exception, and deny the remaining exceptions.

II. Background and Arbitrator's Award

The Agency regulates privately-owned slaughterhouses. In 2014, the Agency issued a rule (final rule) implementing a new poultry-inspection system (new inspection system). Before the Agency implemented the new inspection system, the Agency assigned inspectors to a specific location on a slaughter line, and the number of inspectors assigned to each facility varied based on the facility's size. The new inspection system changed the number of inspectors used in facilities as well as the inspectors' roles on the slaughter lines.

In 2019, the Agency changed the job postings and position descriptions for the inspector position (the reclassification). Before the reclassification, inspector positions varied based on location, species inspected, and shift. There was also a separate position (relief inspectors) that filled shift or other vacancies to cover for employees on leave or to fill district-wide vacancies. If no relief inspectors were available to fill a vacancy, the Agency would use a volunteer list. If no volunteers were available, the Agency would involuntarily reassign employees based on a roster and lowest seniority.

After the reclassification, the Agency eliminated the relief-inspector position and placed all inspectors under the same position description. This change resulted in more involuntary details.[1]

On January 30, 2021, the Union filed a grievance alleging the Agency violated Article 22, Section 4 of the parties' agreement by detailing inspectors involuntarily without bargaining with the Union over the impact and implementation of that change.[2] The Agency denied the grievance, and the parties proceeded to arbitration.

The parties did not stipulate an issue. The Arbitrator framed the issue as:

> Whether the Agency's failure to bargain over the impact and effect of changes in how it carried out its detailing practices and policies had on the conditions of the [inspectors'] employment, when said changes were created by the Agency's [new-inspection-system] implementation and/or its 2019 reclassification of the [inspector] position, violated the [p]arties' [agreements], the [Agency's standard operating procedures] and/or the [Federal Service] Labor[-]Management Relations [Statute (the Statute)]?[3]

The Arbitrator found that, in its denial of the grievance, the Agency had justified its new detailing practices "as being caused by changes in its staffing under the [new inspection system] and the Agency's 2019 reclassification."[4] Accordingly, the Arbitrator interpreted the framed issue as including changes made to inspector numbers and roles at each facility (staffing changes) and the reclassification because the grievance "focuse[d] on

[1] Award at 11.
[2] *See id.* at 2-3.
[3] *Id.* at 5-6; *see also id.* at 1.
[4] *Id.* at 2.

the Agency's failure to follow the detail procedure [in the parties' agreement] and the effect it had on the [inspectors]" and "the Agency brought" those issues into the arbitration in its grievance denial.[5]

The Arbitrator found the Agency changed its staffing by reducing the number of inspectors "per evisceration line[,] per shift," and requiring certain inspectors to perform additional duties, without bargaining with the Union over the impact of the changes.[6] The Arbitrator also found the subsequent detailing changes resulted in some inspectors being detailed "33% to 50% of the time," with more travel,[7] and that the Agency had not been equally distributing detail assignments. The Arbitrator explained that the increased detail frequency and amount of travel required for detail assignments, and the changes in detailing employees to cover duties for different species or to a different shift, "each independently demonstrate a change in how the detailing practices are being carried out."[8] The Arbitrator concluded that these changes had a "more than de minimis impact" on the inspectors' conditions of employment, and that the Agency failed to bargain over the impact of those changes.[9] Therefore, the Arbitrator sustained the grievance.

The Arbitrator directed the parties to return to the status quo ante because he found such a remedy "would not have a negative impact on the Agency and would annul the cause behind the Agency's increased implementation of involuntar[ily] detail[ing]" inspectors.[10] Additionally, the Arbitrator directed the Agency to engage in good-faith bargaining over the impact of the change in its detailing practice; cease and desist from involuntarily detailing inspectors without bargaining with the Union; and make affected inspectors whole "to the extent that they had to use vacation [or paid-time-off hours] because they were involuntarily detailed to a different shift or . . . facility."[11]

On December 7, 2022, the Agency filed exceptions to the award. On January 20, 2023, the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Agency's exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[12] The Agency maintains the status-quo-ante remedy is contrary to the final rule because the remedy would require the Agency to use a certain number of inspectors and relief inspectors.[13] The record reveals the Agency argued before the Arbitrator that a status-quo-ante remedy would "not [be] supported" because the Agency had "no duty to bargain."[14] At no point in the arbitration proceedings did the Agency argue that a status-quo-ante remedy would be contrary to the final rule, even though it could have done so. Therefore, §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar this argument, and we dismiss this exception.[15]

IV. Analysis and Conclusions

A. The Agency does not demonstrate that the Arbitrator exceeded his authority.

The Agency argues that the Arbitrator exceeded his authority by granting a remedy which would require it to use a certain number of inspectors.[16] According to the Agency, the grievance "did not deal with staffing," but rather with the "detail practices" at its facilities.[17] Thus, the Agency claims the Arbitrator exceeded his authority "by addressing a non-issue and fashioning a remedy with respect to staffing at [Agency] establishments."[18]

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.[19] Where the parties do not stipulate the issue for resolution, arbitrators may formulate the issue on the basis of the subject matter before them, and the Authority accords substantial deference to

[5] *Id.*
[6] *Id.* at 8-9 (stating that "the Agency [required] just one [inspector to] perform both verification and processing duties").
[7] *Id.* at 11; *id.* at 10 (finding that before the reclassification, inspectors "would be detailed once every few months, if that, with little or no travel").
[8] *Id.* at 12.
[9] *Id.* at 14.
[10] *See id.* at 24-26 (analyzing the factors set forth in *Federal Correctional Institution*, 8 FLRA 604, 606 (1982) (*FCI*) for determining whether a status-quo-ante remedy is appropriate).
[11] *Id.* at 28 & n.3 (directing restoration of leave but finding no basis for awarding backpay).
[12] *U.S. DHS, U.S. Citizenship Immigr. Servs.*, 73 FLRA 82, 83-84 (2022) (citing 5 C.F.R. §§ 2425.4(c), 2429.5; *AFGE, Loc. 3627*, 70 FLRA 627, 627 (2018)).
[13] Exceptions Br. at 14 (quoting Award at 28); *see also* Modernization of Poultry Slaughter Inspection, 79 Fed. Reg. 49566, 49590 (Aug. 21, 2014) (to be codified at 9 C.F.R. pts. 381, 500).
[14] *See* Exceptions, Attach. 11, Agency's Post-Hr'g Br. at 17-18 (citing *FCI*, 8 FLRA at 606).
[15] *IFPTE, Loc. 4*, 73 FLRA 484, 486 (2023).
[16] Exceptions Br. at 13.
[17] *Id.*
[18] *Id.*
[19] *NFFE, Loc. 1998*, 73 FLRA 143, 144 (2022) (citing *AFGE, Loc. 2052, Council of Prison Locs. 33*, 73 FLRA 59, 61 (2022)); *U.S. Dep't of VA, Montgomery Reg'l Off., Montgomery, Ala.*, 65 FLRA 487, 490 (2011).

that formulation.[20] The Authority has held that arbitrators do not exceed their authority where the award is directly responsive to the formulated issues.[21] Additionally, in assessing whether arbitrators have exceeded their authority, the Authority grants arbitrators broad discretion to fashion remedies that they consider appropriate.[22]

As previously noted, the parties did not stipulate to an issue. The Arbitrator framed the issue as whether the Agency's failure to bargain violated the parties' agreement, Agency procedures, or law when the "changes in how it carried out its detailing practices and policies . . . were created by" the Agency's implementation of the new inspection system or the reclassification.[23] The Arbitrator determined that the framed issue included the Agency's staffing changes because those changes resulted in the change in the Agency's detail practices,[24] and because the Agency brought this issue into the arbitration in its grievance denial.[25]

In resolving the framed issue, the Arbitrator found that the Agency had a duty to bargain over the changes in detailing practices because they had "more than [a] de minimis impact on the conditions of the [inspectors'] employment."[26] To remedy the Agency's failure to bargain over these changes, the Arbitrator found it appropriate to award a status-quo-ante remedy because it "would not have a negative impact on the Agency" and would eliminate the reason for the Agency's increased use of involuntary details.[27]

The Agency does not argue that the formulated issue restricted the Arbitrator's remedial authority. As the award and remedy are directly responsive to the framed issue, the Agency's argument does not demonstrate that the Arbitrator exceeded his authority.[28] Therefore, we deny this exception.

B. The award is not based on a nonfact.

The Agency argues the award is based on a nonfact because the Arbitrator erroneously found that, before the reclassification, "only [r]elief [i]nspectors were listed on the volunteer rosters" and the reclassification "effectively rendered the volunteer rosters useless."[29] According to the Agency, it was "undisputed that relief inspectors were not listed on voluntary rosters" because "[b]y the very nature of their jobs, relief inspectors were used to cover vacant job assignments on an involuntary basis."[30] The Agency contends that, "[b]ut for this erroneous conclusion," the Arbitrator "would have no basis for finding that the reclassification rendered the voluntary rosters useless and no basis for ordering the Agency to cease and desist using the involuntary detail rosters."[31]

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.[32] Contrary to the Agency's assertion, the Arbitrator did not find that, before the reclassification, only relief inspectors were listed on the volunteer rosters.[33] Rather, the Arbitrator found that, after reclassification, only "*former* [r]elief [inspectors] were . . . on the volunteer roster, and they were on other priority assignments."[34] This finding is consistent with the Agency's grievance response and witness testimony.[35] Thus, the Agency does not demonstrate that the challenged finding is clearly erroneous.[36]

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[20] *U.S. Dep't of the Navy, Naval Med. Ctr. Camp Lejeune, Jacksonville, N.C.*, 73 FLRA 137, 141 (2022) (*Navy*) (citing *NLRB Pro. Ass'n*, 71 FLRA 737, 740 (2020)).
[21] *Id.* (citing *U.S. Dep't of VA, Nashville Reg'l Off., VA Benefits Admin.*, 72 FLRA 371, 374 (2021) (Member Abbott concurring); *AFGE, Loc. 1815*, 65 FLRA 430, 431-32 (2011)).
[22] *Id.* (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 67 FLRA 552, 554 (2014) (Member Pizzella dissenting on other grounds); *U.S. Dep't of Transp., FAA*, 65 FLRA 320, 322 (2010)).
[23] Award at 5.
[24] *Id.*; *see also id.* at 8-12, 17-18, 26.
[25] *Id.* at 2.
[26] *Id.* at 14.
[27] *Id.* at 26.
[28] *See Navy*, 73 FLRA at 141-42 (citing *Navajo Area Indian Health Serv., Winslow Serv. Unit, Winslow, Ariz.*, 55 FLRA 186, 189 (1999); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Or.*, 66 FLRA 388, 391 (2011)) (finding arbitrator did not exceed his authority by awarding a status-quo-ante remedy where remedy was directly responsive to the framed issue).
[29] Exceptions Br. at 15.
[30] *Id.* (emphasis omitted).
[31] *Id.*
[32] *AFGE, Loc. 4156*, 73 FLRA 588, 590 (2023) (citing *U.S. Dep't of HHS*, 73 FLRA 95, 96 (2022)).
[33] *See* Award at 10 (describing pre-reclassification process by which Agency would *first* use relief inspectors, but "if no relief [inspectors] were available, the Agency would . . . use the volunteer detail list," and only if no volunteers were available would the Agency resort to using involuntary details).
[34] *Id.* (emphasis added); s*ee* Exceptions, Attach. 2, Tr. (Tr.) at 195-197.
[35] *See* Exceptions, Attach. 8, First-Step Grievance Denial at 2 ("The only voluntary details are the former 'relief' [inspectors] who volunteered to continue to travel on the road. There are no other inspectors on the voluntary list."); Award at 3 (referencing first-step grievance denial); Tr. at 197.
[36] *Indep. Union of Pension Emps. for Democracy & Just.*, 71 FLRA 965, 966 (2020) (denying nonfact exception where excepting party failed to demonstrate arbitrator's finding was clearly erroneous (citing *NLRB Pro. Ass'n*, 68 FLRA 552, 554 (2015))).

Moreover, the Arbitrator's conclusion that the Agency violated its duty to bargain is not based on the composition of the volunteer list. The Arbitrator found the reclassification, which eliminated the relief-inspector position, caused inspectors to be detailed "more often" and involuntarily because there was "no longer" a designated position to cover detail assignments.[37] The Arbitrator, therefore, concluded that the reclassification and the Agency's subsequent changes to its detail practices had "a more than de minimis impact on the conditions of the [inspectors'] employment,"[38] and that the Agency was required to bargain over these changes.[39] Thus, the Agency fails to establish how the Arbitrator's statement that only former relief inspectors were on the volunteer list after reclassification is a central fact, but for which the Arbitrator would have reached a different result.[40]

Accordingly, we deny the Agency's nonfact exception.

C. The award is not moot.

The Agency argues that the Arbitrator's "decision and award is moot" because on September 23, 2022 – before the award issued – the parties signed a memorandum of understanding (MOU) in which they "agreed to bargain over how the reclassification and any resultant change of that effort impacted and affected" the inspectors, "including the detail practices."[41] An underlying dispute becomes moot "when the parties no longer have a legally cognizable interest in the dispute."[42] The burden of demonstrating mootness "is a heavy one."[43] As relevant here, a party alleging a matter is moot must demonstrate that "events have completely or irrevocably eradicated the effects of the alleged violation."[44]

To support its mootness argument, the Agency contends the MOU "deprive[s] the Arbitrator's decision and award – which ordered bargaining and the use of [r]elief [i]nspectors – of practical significance or made it a purely academic exercise."[45] We disagree. While the MOU contains provisions referencing bargaining obligations for changes arising from the reclassification, these provisions only obligate the Agency to bargain *if* such changes occur in the future, and do not acknowledge the Arbitrator's conclusion that such changes have already occurred.[46] Moreover, the MOU does not require the Agency to return to the status quo ante pending the completion of such bargaining, or to cease and desist from involuntarily detailing inspectors without bargaining with the Union. As such, the MOU neither addresses the award's findings that the Agency made specific changes and has *already violated* its duty to bargain over these changes, nor obligates the Agency to take the actions that the award imposed to remedy that violation. Therefore, the MOU does not render the Arbitrator's award moot,[47] and we deny this exception.

V. Decision

We partially dismiss and partially deny the Agency's exceptions.

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[37] *See* Award at 9-11.
[38] *See id.* at 17-18, 27.
[39] *See id.* at 11-12, 17-19, 27.
[40] *See U.S. Dep't of HHS, Food & Drug Admin., San Diego, Cal.*, 67 FLRA 255, 255-56 (2014) (denying a nonfact exception where the agency provided no basis for finding that, but for the alleged factual error, the arbitrator would have reached a different conclusion); *see also AFGE, Loc. 1482*, 67 FLRA 168, 169 (2014) (denying a nonfact exception because "even assuming that the facts asserted by the [u]nion . . . are true, they do not refute these central facts upon which the [a]rbitrator based his award").
[41] Exceptions Br. at 11-12.
[42] *U.S. DHS, CBP, U.S. Border Patrol, Laredo Sector*, 70 FLRA 921, 922 (2018) (*Laredo*) (Member DuBester concurring) (addressing agency's argument that award is moot because the grievant was offered, and accepted, a transfer to the requested duty station after the arbitration hearing but before the award issued).
[43] *Ass'n of Civilian Technicians, Show-Me Army Chapter*, 59 FLRA 378, 380 (2003).
[44] *Laredo*, 70 FLRA at 922.
[45] Exceptions Br. at 12.
[46] *See* Exceptions, Attach. 3, MOU, § 1 ("If changes occurred due to the reclassification, the impact and implementation will be negotiated in accordance with the current [Labor-Management Agreement] and applicable laws."); *id.* § 4 ("In the event of changes to the responsibilities and complexity of assignments for reestablishing GS-10 or higher positions, the Agency will bargain with the Union."); *id.* § 8 ("In accordance with Articles 22 and 23 of the parties' [Labor-Management Agreement], where there is a change in detail policies or practices, or rotation patterns, the parties will bargain to the extent required by the [Labor-Management Agreement] and the Statute.").
[47] *See U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 626, 631 (2012) (rejecting agency's argument that status-quo-ante remedy is moot where it failed to demonstrate that the claim underlying the grievance is moot); *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 59 FLRA 787, 790 (2004) (finding disputed remedy not moot); *SSA, Bos. Region (Region 1), Lowell Dist. Off., Lowell, Mass.*, 57 FLRA 264, 268 (2001) (Member Wasserman dissenting on other grounds) (finding reassignment remedy not moot); *U.S. Small Bus. Admin.*, 55 FLRA 179, 183 (1999) (remedy requiring agency change grievant's position not mooted by grievant's removal because remedy could have viability if the grievant were reinstated as a result of another proceeding).