65 FLRA No. 18

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Union)

and

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

0-AR-4444

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DECISION

September 17, 2010

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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 James E. Conway 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 denied the Union's grievance alleging that the Agency violated the parties' national agreement and the Statute when it discontinued a time-off program without bargaining over the change. For the reasons that follow, we deny the Union's exceptions in part and grant them in part, and remand the award to the parties for resubmission to the Arbitrator, absent settlement, to order an appropriate remedy.

II. Background and Arbitrator's Award

In 2001, the Agency and Union agreed to a program, which was memorialized in a local memorandum of understanding (MOU), pursuant to which local air traffic controllers who committed no operational errors or deviations were given nine hours of time off each year. Award at 1. Several years later, the Agency notified the Union that it planned to discontinue the program because it had failed to achieve its intended result of reducing the controllers' error rate. *Id*. at 4, 13. The Agency requested the Union's "impact and implementation proposal within 30 days." *Id.* at 2.

The Union, instead of responding directly to that request, proposed a new MOU, pursuant to which the previously agreed upon time off would be increased to sixteen hours. *Id*. The Agency replied, reiterating its intent to end the time-off program and proposing other incentive tools to take its place. *Id*. In response, the Union filed a grievance, which was submitted to arbitration. *Id*. The parties agreed to proceed without a hearing and submitted briefs. The parties stipulated to the following issue: "Did the Agency violate the [p]arties' collective bargaining agreement and [the Statute by refusing to bargain over the Union's proposed new MOU] and, if so, what should be the remedy. *Id*. at 2.

The Arbitrator found that the Statute generally requires the Agency to bargain over changes in conditions of employment and that the time-off program was a condition of employment. *Id*. at 10. However, the Arbitrator found that the Agency had no statutory duty to bargain over the substance of the Union's proposed MOU, explaining that the Agency's authority to reward performance was, in essence, authority to establish performance standards, which "touches upon the right to direct employees and assign work," and, as such, is nonnegotiable. *Id*. at 13-14. The Arbitrator also found that, although the Agency solicited impact proposals from the Union, "it [was] highly unlikely that anything the Union presented to the Agency . . . could reasonably be regarded as such 'procedures' or 'appropriate arrangements' under § 7106(b)(2) and (3) over which the Agency had any obligation to bargain." *Id*. at 16. Moreover, although the Arbitrator found that the sixteen-hour aspect of the Union's proposal was negotiable because it pertained only to the level of incentives instead of the substance of the time-off program, he also noted that negotiation of that aspect would be impossible because it was integrally intertwined with, and inseparable from, the program itself. *Id.* at 15-16. Accordingly, the Arbitrator concluded that the Agency did not violate the Statute. *Id*. at 19.

In addition, the Arbitrator found that neither the original MOU nor the Union's proposed MOU

conformed to Article 21, Section 1[1] of the parties' national agreement, pursuant to which the Agency may consider granting awards for superior or exceptional performance. *Id*. at 14, 18. The Arbitrator found that the mere avoidance of errors and deviations "appears to have little in common with" any of the superior performance standards in Article 21, Section 1 with the possible exception of "significant contributions to the efficiency" of government operations. *Id*. at 14. As for that criterion, the Arbitrator found that uncontradicted facts demonstrated a decline in efficiency following the implementation of the time-off program. *Id*. In addition, the Arbitrator found that the original MOU was "offensive" to Article 102,[2] which bars provisions that conflict with the national agreement, and Article 7, Section 5,[3] which prohibits local or regional agreements from increasing or diminishing entitlements expressly contained in the national agreement. *Id*. at 18. As a result, the Arbitrator found that the Union's insistence on continuing the program was inconsistent with the national agreement and that no "compelling contractual arguments" had been presented "for requiring the Agency to persist in maintaining an MOU that failed to comply" with the agreement. *Id*. at 15.

The Arbitrator also addressed several other contentions of the Union. Specifically, he rejected the Union's argument that it was improper for the Agency to cancel the program based on performance of the facility rather than of individuals, finding that the purpose of the program was to improve operational efficiency instead of individual performance. *Id*. at 17. The Arbitrator also rejected the Union's contention that the Agency failed to establish that the operational necessity exception in Article 7, Section 4[4] of the national agreement excused the Agency from engaging in substantive bargaining before terminating the time-off program. *Id*. at 18. Instead, the Arbitrator found that the

1. Article 21, Section 1 provides, in pertinent part:

> The Parties agree that the use of awards is an excellent incentive tool for increasing productivity and creativity of bargaining unit employees by rewarding their contributions to the quality, efficiency, or economy of government operations. The Agency agrees to consider granting a cash, honorary, or informal recognition award, or grant time off without charge to leave or loss of pay to an employee individually or as a member of a group on the basis of:
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> a. adoption or implementation of a suggestion or invention;
> b. significant contributions to the efficiency, economy, or improvement of government operations;
> c. exceptional service to the public, superior accomplishment, or special act or project on or off the job and contributions made despite unusual situations;
> d. recurring exemplary service . . . ;
> e. exceptional customer service or contributions . . .
> f. creative or innovative methods used to make work processes or results more effective and efficient;
> g. productivity gains;
> h. performance as reflected in the employee's most recent rating of record . . .
> i. unusual situations . . . in which an employee's efforts go beyond his/her normal duties.
>
> The Parties agree that this list is meant to be an example but is not all inclusive.

Exceptions, J. Ex. 1, Agreement at 53-54.

2. Article 102, Section 1 provides, in pertinent part:

> Any provision of this Agreement shall be determined a valid exception to, and shall supersede any existing or future Agency rules, regulations, directives, orders, policies and/or practices which conflict with the Agreement.

Id. at 172-73.

3. Article 7, Section 5 provides:

> The Parties at the local or regional levels may enter into written agreements or understandings on individual issues that do not conflict with this Agreement. However, unless specifically authorized by this Agreement, no such local or regional agreements may increase or diminish entitlements expressly contained in this Agreement.

Id. at 16.

4. Article 7, Section 4 provides, in pertinent part:

> The Agency will not implement the proposed change prior to completion of bargaining unless required by operational necessity. Operational necessity is defined as any change necessary to maintain the safety and efficiency of the air traffic system. Operational necessity is not to be invoked as a means to avoiding bargaining . . . . Operational necessity will only be invoked in those cases which meet the strict definition as set forth in this Article.

Id. at 16.

Agency's facts in support of operational necessity were not contradicted. *Id*. at 18-19.

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the award is contrary to law because the Agency's unilateral termination of the time-off program violated § 7116(a)(5) of the Statute. Exceptions at 7, 10. In this regard, the Union contends that the Arbitrator should have viewed the proposal as "a mixture of both substantive and non-substantive proposals . . . [m]any [of which] were negotiable[.]" *Id*. at 12. The Arbitrator erred further, the Union claims, by finding that the Agency's unilateral action was not a breach of its bargaining obligation because it was "necessary to the functioning of the agency[.]" *Id*. at 14-16.

The Union also contends that the award is contrary to law because the Agency failed to abide by the terms of Article 7 of the national agreement, addressing midterm bargaining, and Article 21, Section 4, requiring the parties, at the local level, to develop jointly an operational error and deviation reduction program. *Id*. at 7-9, 13-14. In this regard, the Union contends that the Agency failed to raise the "operational necessity" exception in Article 7, Section 4 of the national agreement as a defense to the prohibition against implementing changes prior to the completion of bargaining. *Id*. at 14-16.

Finally, the Union contends that the award is contrary to public policy because it denies employees the right to bargain over the termination of an incentive awards program. Award at 5-6.

B. Agency's Opposition

The Agency contends that the Arbitrator properly determined that the Agency had not violated either the national agreement or the Statute when it terminated the time-off program and invited the Union to engage in impact and implementation bargaining. Opp'n at 3-13. Regarding the agreement, the Agency observes that the Union does not explicitly except to the award on the ground that it fails to draw its essence from the agreement or challenge the Arbitrator's determination that the terminated time-off program and the Union's proposal were inconsistent with Article 21, Section 1 and Article 102. *Id*. at 3 & 6. Instead, the Agency notes, the Union bases its argument that the award is contrary to the agreement on Article 21, Section 4,[5] a provision that was only a tangential basis for the Arbitrator's ruling. In addition, the Agency notes that the Union's argument that the Agency failed to comply with the mid-term bargaining requirements in Article 7 already had been considered and rejected by the Arbitrator. *Id*. at 6.

As for the Agency's compliance with the Statute, the Agency contends that Authority precedent supports the Arbitrator's finding that the Agency was not obligated to negotiate over the substance of the proposal because it interferes with management rights. *Id*. at 8-9.

Finally, the Agency argues that the award is not contrary to public policy as a denial of the right to bargain over incentive awards. *Id*. at 10. Instead, the Agency argues, the award finds only that the particular proposal at issue is not negotiable and is inconsistent with the national agreement. *Id*.

IV. Analysis and Conclusions

A. The award draws its essence from the national agreement.

We construe the Union's argument that the award is contrary to law because the Agency failed to abide by the terms of Article 7 and Article 21, Section 4 of the parties' national agreement as a claim that the award fails to draw its essence from the agreement. In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). 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

5. Article 21, Section 4 provides:

> The Parties agree that a critical component of any effective quality assurance program is problem prevention. The Parties further agree it is desirable to identify and correct deficiencies and to recognize success in the area of Operational Error and Operational Deviation prevention. Therefore, the Parties at the local level shall meet to develop an operational error/deviation reduction program in accordance with FAA Order 7210.56.

Id. at 54-55.

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 Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id*. at 576.

Here, the Union contends that the award fails to draw its essence from the midterm bargaining requirements in Article 7 of the national agreement. In his consideration of the Union's argument that the Agency acted contrary to Article 7, the Arbitrator found that the Agency demonstrated "operation necessity" for its unilateral termination of the time-of program pursuant to Section 4 of Article 7 and that the Union did not rebut the facts on which the Agency based this demonstration. Nor does the Union rebut these facts in its exceptions. Additionally, the Arbitrator found that the Union's proposed MOU would require increased entitlements to air traffic controllers for performing their basic duties, which Article 7, Section 5 expressly prohibits. The Union contends further that the award fails to draw its essence from Article 21, Section 4 of the national agreement, which requires the parties jointly to develop an operational error and deviation reduction program. However, the award does not excuse the Agency from this requirement; it merely permits the Agency unilaterally to end one error reduction program and invite the Union to negotiate over an alternative program. As such, the Union fails to establish that the award is unfounded in reason or fact, unconnected with the wording or purpose of the national agreement or manifests a disregard of the agreement. Accordingly, we deny this exception.

B. The award is contrary to the Statute.

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*.

The Union contends that the Agency violated § 7116(a)(5) of the Statute, which states that it is an unfair labor practice for an agency "to refuse to consult or negotiate in good faith with a labor organization . . . ." In this regard, the Union contends that the Agency terminated the MOU without giving the Union the opportunity to negotiate over the substance of the proposed change. Thus, the Union argues, the award is contrary to *NTEU v. FLRA*, 793 F.2d 371 (D.C. Cir. 1986) (*NTEU*), which, in vacating an Authority decision, held that a proposal determining the level of incentive pay for the performance of work was negotiable and was not an exercise of management's right to assign work. Exceptions at 11-12. While acknowledging this precedent, the Arbitrator found that the Agency had no statutory duty to bargain over the substance of the Union's proposed MOU, explaining that the Agency's authority to reward performance was, in essence, authority to establish performance standards, which "touches upon the right to direct employees and assign work[,]" and, as such, is nonnegotiable. Award at 13-14.

We agree with the Union that its proposed MOU involves the level of incentive pay for the performance of agency work, rather than the content of a performance standard. In this regard, the proposed MOU would provide a time-off incentive award based on the number of errors without regard to an employee's performance rating or appraisal. Exceptions at 12, Jt. Ex. 5 at 1 (stating that controllers "who have been both operation error-/deviation-free throughout the year will receive an award of 16 hours' time off"). Thus, like the proposal at issue in *NTEU*, the proposed MOU would reward the superior performance of assigned work, not establish a minimum standard of performance. *NTEU*, 793 F.2d at 374-75 (finding proposal that would provide additional compensation to employees who exceed certain requirements negotiable because it would reward superior performance of work, rather than establish "minimum levels of effort to avoid remedial action"). As a result, the proposal does not affect management's right to assign work and is negotiable.[6] Accordingly, we grant this exception.[7]

6. In finding the proposal to be within the duty to bargain, we make no judgment as to its merits.

7. In light of this determination, we find it unnecessary to resolve the Union's exception that the award is contrary to public policy.

V. Remedy

Consistent with our finding that the award is contrary to law, we set aside the award. The effect of our decision to set aside the award is to sustain the Union's grievance. *See NTEU, Chapter 207*, 60 FLRA 731, 735 (2005) (Chairman Cabaniss dissenting). The Arbitrator, however, did not make any determination with respect to remedy. As a result, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to order an appropriate remedy.

VI. Decision

The Union's exceptions are denied in part and granted in part. The award is deficient insofar as the Arbitrator found that the Agency's termination of the MOU without providing the Union an opportunity to negotiate over the substance of the proposed change did not violate the Statute. The award is remanded to the parties consistent with this decision.