68 FLRA No. 120

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
COUNCIL 33
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
(Agency)

0-AR-5094

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DECISION

July 17, 2015

_____

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

I. Statement of the Case

Arbitrator Walt De Treux found that the Agency did not violate the parties' collective-bargaining agreement or the Federal Service Labor-Management Relations Statute (the Statute)[1] by failing to bargain over a reduction in force (RIF). We must decide three questions.

The first question is whether the Arbitrator's finding that the Agency did not violate its contractual or statutory obligations to provide notice and an opportunity to bargain is contrary to law. Because the Arbitrator found that the parties' agreement limits the Agency's bargaining obligation to circumstances that are not present in this case, and the Union has not challenged that finding on essence grounds, Authority precedent supports a conclusion that the Arbitrator did not err as a matter of law. Accordingly, the answer is no.

The second question is whether the award is based on nonfacts in two respects. Because one of the Union's nonfact arguments does not show that the Arbitrator made a clear factual error and challenges a matter that was disputed at arbitration, that argument does not demonstrate that the award is based on a nonfact. And because the Union's other nonfact argument does not show that the Arbitrator made a clear error in a central factual finding, that argument also does not demonstrate that the award is based on a nonfact. Accordingly, the answer to the second question is no.

The third question is whether the Arbitrator exceeded his authority because he allegedly failed to specifically analyze the Union's allegation that the Agency violated the Statute. Because the Arbitrator did analyze (and reject) that allegation, the answer is no.

II. Background and Arbitrator's Award

The Agency owns and operates a program that is funded through the sale of inmate-manufactured products to the federal government. The Agency informed the Union that "business conditions"[2] would "require staffing reductions for [certain] functions and the closing and downsizing of several . . . factories."[3] The Agency stated that it would try to avoid a RIF, but that a RIF might become necessary "[i]f efforts to place staff are unsuccessful."[4] The next day, the Agency issued a memorandum, which announced the closure or movement of certain operations, as well as certain staffing reductions.

Shortly thereafter, the Union told that Agency that, before the Agency issued the memorandum, the Union had not been given notice of the "reorganization" and that the Union sought to negotiate under Article 25 of the parties' agreement (Article 25).[5] The Agency responded that its actions did not constitute a reorganization and that it had no duty to bargain.

The Union filed a grievance that went to arbitration. At arbitration, the parties stipulated that the issues were, in relevant part, whether the Agency "fail[ed] to negotiate" under the Statute and the parties' agreement, and, "[i]f so, what shall be the remedy?"[6]

As an initial matter, the Arbitrator addressed the Union's request that he draw an adverse inference based on the Agency's "[f]ailure to [p]roduce" two particular Agency officials as witnesses (the Agency witnesses) at arbitration.[7] The Arbitrator stated that, after "a lengthy discussion prior to going on the record at hearing . . . it was determined that there were no relevant disputes as to the facts of the case and that the case could be decided" on the documentary evidence.[8] Based on that discussion, the Arbitrator denied the Union's request that he draw an

[1] 5 U.S.C. §§ 7101-7135.

[2] Award at 1.
[3] *Id.* at 2.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 4.
[7] *Id.* at 11.
[8] *Id.*

adverse inference due to the non-appearance of the Agency witnesses.

As for the merits, in order to determine the Agency's statutory and contractual bargaining obligations, the Arbitrator analyzed Article 25, which discusses RIFs, transfers of function, and reorganizations. As relevant here, Article 25 defines a RIF as occurring when the Agency releases employees from duty due to "lack of work, shortage of funds, . . . [or] reorganization," and states that the Agency will avoid RIFs "to the extent feasible."[9] By contrast, Article 25 defines a reorganization as "the planned elimination, addition, or redistribution of functions or duties in an organization."[10] And Article 25(f) provides that "[r]eorganizations . . . [that] affect the working conditions of bargaining[-]unit employees[] are subject to bargaining, as appropriate."[11]

The Arbitrator determined that, under Article 25, the Agency had an obligation to bargain if it was "contemplating . . . a RIF due to a reorganization," but not if it was "contemplating a RIF due to a shortage of funds/lack of work."[12] The Arbitrator noted that there was "no dispute that the Agency's action was motivated by a shortage of funds and lack of work due to a decline in sales."[13] But he also found that a "[r]eorganization could also be caused by a shortage of funds or lack of work, so the question [became] whether the Agency's actions were a *RIF* due to [a] shortage of funds/lack of work or [a] *reorganization* due to [a] shortage of funds/lack of work."[14]

In determining the answer to this question, the Arbitrator stated that Article 25, Section b.3. defines reorganization as the "elimination . . . of functions or duties," not necessarily the elimination of positions.[15] And he found "no indication from the documentary evidence that the functions and duties of particular classifications were eliminated; but rather, individual positions were abolished."[16] The Arbitrator determined that "[t]he abolishment of individual employees' positions does not equate with the 'elimination . . . of functions and duties.'"[17] "For this reason," the Arbitrator concluded, "the Agency's actions more closely align with a RIF due to [a] shortage of funds/lack of work rather than a RIF due to a reorganization."[18] The Arbitrator acknowledged that "reorganization occurred as a result of the RIF that was due to the shortage of funds/lack of work,"[19] but found that "any reorganization was a by-product of the RIF attributable to the shortage of funds/lack of work."[20]

As he found that "[t]he present case involves a RIF due to [a] shortage of funds/lack of work," rather than a "RIF due to a reorganization," the Arbitrator concluded that Article 25 did not require the Agency to negotiate.[21] Additionally, the Arbitrator addressed whether the Agency had an obligation to bargain under the Statute or the other provisions of the parties' agreement. In this regard, he characterized both the Statute and Articles 1, 3, 5, and 7 of the parties' agreement as "endors[ing]" a "general preference" for bargaining.[22] But he found that, in Article 25, the parties had reached a "detailed and specific agreement" on bargaining over RIFs and reorganizations, and that this agreement "trump[ed]" their "general" bargaining obligation under the Statute and Articles 1, 3, 5, and 7 of the agreement.[23] And because the Agency had no obligation to bargain under Article 25, the Arbitrator found that the Agency did not violate any obligation to bargain under the Statute or the agreement. Accordingly, he denied the grievance.

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 contrary to law.

The Union argues that the award is contrary to law in two respects.[24] When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo.[25] In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[26]

The Union's first contrary-to-law argument contends that the Arbitrator incorrectly found that the Agency did not violate its obligations to provide notice

[9] *Id.* at 5-6.
[10] *Id.* at 6.
[11] *Id.*
[12] *Id.* at 15.
[13] *Id.* at 16.
[14] *Id.*
[15] *Id.* (internal quotation marks omitted).
[16] *Id.*
[17] *Id.* (quoting Article 25).
[18] *Id.*
[19] *Id.*
[20] *Id.* at 17.
[21] *Id.*
[22] *Id.* at 13.
[23] *Id.*
[24] Exceptions at 8, 14.
[25] *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).
[26] *Id.* (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).

and an opportunity to bargain under the parties' agreement, the Statute, and Authority precedent.[27] In this regard, the Union contends that the Agency conducted a "RIF and reorganization" that required impact-and-implementation bargaining.[28]

The Authority has found that contract provisions that define, or limit, parties' obligations to engage in mid-term bargaining are enforceable.[29] Therefore, when an arbitrator finds that an agreement limits a party's statutory-bargaining rights, and that finding draws its essence from the agreement, an award that enforces the agreement is not contrary to law.[30]

Here, the Arbitrator found that Article 25 both narrows the scope of the Agency's bargaining obligations and did not require bargaining in this case. The Union has not filed an essence exception challenging the Arbitrator's interpretation of the agreement. Therefore, consistent with the principles set forth above, the Union's arguments provide no basis for finding the award contrary to law.

The Union's second contrary-to-law argument is that the Arbitrator erroneously failed to draw a negative inference from the Agency's failure to produce the Agency witnesses.[31] But the Union does not cite any law to support its argument. Section 2425.6(e)(1) of the Authority's Regulations provides, in pertinent part, that an exception "may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground" listed in § 2425.6(a)-(c) of the Regulations, "or otherwise fails to demonstrate a legally recognized basis for setting aside the award."[32] As the Union fails to support its second contrary-to-law argument, we reject it.[33]

For the foregoing reasons, we deny the Union's contrary-to-law exceptions.

B. The award is not based on a nonfact.

The Union asserts that the award is based on nonfacts in two respects.[34] To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[35] And the Authority will not find an award deficient based on an arbitrator's determination regarding any factual matter that the parties disputed at arbitration.[36]

First, the Union asserts that many bargaining-unit employees' duties changed as a result of the Agency's actions and, thus, that the Arbitrator erred in finding that "[t]he abolishment of individual employees' positions does not equate with the elimination . . . of functions and duties."[37] According to the Union, the Arbitrator's error led him to erroneously conclude that the Agency did not conduct a "RIF due to reorganization."[38] For support, the Union cites an arbitration-hearing exhibit that allegedly demonstrates that certain employees were reassigned to new positions.[39]

Even assuming that the Union has demonstrated that certain employees were reassigned to new positions, this does not show that the Arbitrator clearly erred when he found that "[t]he abolishment of individual employees' positions does not equate with the 'elimination . . . of functions and duties.'"[40] Moreover, by challenging the Arbitrator's conclusion that the Agency's actions did not constitute a reorganization under Article 25, the Union challenges a matter that was disputed at arbitration.[41] As the Union has not established that the Arbitrator made a clear factual error, and a challenge to a matter disputed below does not provide a basis for finding that an award is based upon a nonfact,[42] we deny this nonfact exception.

Second, the Union argues that the award is based on a nonfact insofar as the Arbitrator found that the Agency witnesses would not have testified to anything beyond what was reflected in the documentary evidence.[43] In this connection, the Union contends that the Agency witnesses "could have expanded on the Agency['s] intent when [it] gave notice to the Union and the bargaining[-]unit employees."[44] But the Union's argument does not provide a basis for concluding that the

[27] Exceptions at 5, 8-9, 11, 14.
[28] *Id.* at 11.
[29] *NTEU*, 63 FLRA 299, 300 (2009) (citing *U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 12 (2000)).
[30] *Id.*
[31] Exceptions at 14.
[32] 5 C.F.R. § 2425.6(e)(1).
[33] *See, e.g.*, *AFGE, Local 1336*, 68 FLRA 704, 707-08 (2015).
[34] Exceptions at 12.
[35] *NLRB Prof'l Ass'n*, 68 FLRA 552, 554 (2015) (*NLRB*) (citing *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 623 (2014); *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry*)).
[36] *Id.* (citing *Lowry*, 48 FLRA at 593-94).
[37] Exceptions at 12 (quoting Award at 16) (internal quotation marks omitted).
[38] *Id.*
[39] *Id.*; *see also id.* at 9.
[40] Award at 16 (quoting Article 25).
[41] *See id.* at 13.
[42] *E.g.*, *NLRB*, 68 FLRA at 554-55.
[43] Exceptions at 12.
[44] *Id.*

Arbitrator made a clear error in a central factual finding. As a result, the Union has not shown that a central fact underlying the award is clearly erroneous, but for which the Arbitrator would have reached a different conclusion. Accordingly, the Union has not demonstrated that the award is based on a nonfact, and we deny this nonfact exception.

C. The Arbitrator did not exceed his authority.

The Union claims that the Arbitrator did not specifically analyze whether the Agency violated the Statute by refusing to negotiate, and that he exceeded his authority by allegedly failing to do so.[45] Arbitrators exceed their authority when, as relevant here, they fail to resolve an issue submitted to arbitration.[46] But here, the Arbitrator *did* analyze whether the Agency violated the Statute by refusing to negotiate – and he found that it did not.[47] Thus, the Union does not demonstrate that the Arbitrator exceeded his authority by failing to resolve a submitted issue, and we deny this exception.

IV. Decision

We deny the Union's exceptions.

[45] *Id.* at 13.
[46] *U.S. DOD, Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996).
[47] Award at 13, 17.