FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

OALJ 15-41

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
COLEMAN, FLORIDA

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 506

CHARGING PARTY

Case No. AT-CA-13-0478

Brian R. Locke
For the General Counsel

John T. LeMaster
For the Respondent

Jose Rojas
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On July 12, 2013, the American Federation of Government Employees, AFL-CIO, Local 506 (Union/Local 506) filed an unfair labor practice (ULP) charge against the Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida (Respondent/FCC). (Jt. Ex. 6(a)). On February 10, 2014, the Regional Director of

the FLRA issued a Complaint and Notice of Hearing, alleging that the Respondent violated § 7116(a)(1) and (8) of the Statute by failing to comply with a final and binding arbitration award concerning correctional officers' sick and annual leave requests. (Jt. Ex. 6(b)). The Respondent timely filed an Answer to the Complaint in which it admitted certain allegations but denied others, including the allegation that it violated the Statute. (Jt. Ex. 6(d)).

On April 11, 2014, the parties filed a Joint Motion to Enter Into Stipulation of Facts In Lieu of a Hearing (Stip.) and attached joint exhibits 1 through 5. (Jt. Exs. 1-5). In response to the joint motion, the scheduled hearing in this matter was indefinitely postponed. On May 12, 2014, the parties filed timely briefs, which I have fully considered and pursuant to 5 C.F.R. § 2423.26, this decision is issued without a hearing.

Based upon the stipulated record and attached exhibits, I find that the Respondent violated § 7116(a)(1) and (8) of the Statute when it failed to comply with an April 29, 2013, Arbitration Award (Award) issued by Arbitrator Elliot Newman by maintaining a leave approval process that contravened the unambiguous terms of the Award. I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency under § 7103(a)(3) of the Statute. (Stip. ¶2). The American Federation of Government Employees (AFGE) is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent's facility. (Stip. ¶3). Local 506 is an agent of AFGE for the purpose of representing bargaining unit employees of the Respondent. (Stip. ¶42).

On January 26, 2012, the Union filed a grievance alleging that the Respondent implemented a procedure prohibiting lieutenants from approving unscheduled annual leave for correctional officers. (Jt. Ex. 4 at 3-4). The Respondent denied the Union's grievance, and the Union invoked arbitration. (*Id.* at 2).

At issue was the Respondent's handling of officers' requests for unscheduled annual leave in lieu of sick leave. (Jt. Ex. 4). Officers that had exhausted all of their sick leave, but still had annual leave available, sometimes requested to use their annual leave to cover an absence that would otherwise be chargeable to sick leave. (*Id.* at 2-5). When the absence would require the Respondent to pay another officer overtime to cover the shift, the Respondent required the lieutenants, the officers' direct supervisors, place the officers in an absent without leave (AWOL) status. (*Id.* 2-4). The officers then had to obtain approval for the leave from the Captain, the second-level supervisor. (*Id.*). Generally, when the officer had annual leave available, the Captain would subsequently convert the AWOL to annual leave. (*Id.* at 4).

The Union argued that the Respondent's procedure changed the past practice whereby the lieutenants always had authority to approve unscheduled annual leave, even when it resulted in overtime. (Jt. Ex. 4 at 6). The Union argued that placing officers on AWOL was arbitrary and capricious and that the Respondent should be directed to cease the practice and follow its own policy regarding the authority of immediate supervisors to approve unscheduled annual leave. (*Id.*). The Respondent countered that, while policy states that lieutenants may approve leave, nothing says that they are required to approve leave. (*Id.*). The Respondent also argued that incurring non-emergency overtime is a management decision that falls directly into the category of determining budget. (*Id.* at 7).

Arbitration Decision

On April 29, 2013, the Arbitrator sustained the Union's grievance. (Jt. Ex. 4 at 10). In doing so, he reviewed two of the Respondent's policies. (*Id.* at 8-9). The first was a Program Statement 3000.03, which states that the "immediate supervisor has authority to approve annual leave and sick leave." (*Id.* at 8). The second was an order, which states, "[g]enerally, an absence which would otherwise be chargeable to sick leave may be charged to annual leave if requested by the employee and approved by the appropriate official." (*Id.*). The Arbitrator found that the program statement has no caveats or exceptions to the authority of the immediate supervisors, the lieutenants, to approve annual and sick leave, even if the absence will require the use of overtime. (*Id.* at 9). He also found that the lieutenants are the "appropriate officials" who may approve a charge of sick leave to annual leave if requested by an officer. (*Id.*).

Thus, he found that if an officer requests unscheduled annual leave in lieu of sick leave, and a lieutenant reviews the roster and finds that granting the request will result in overtime, the lieutenant has the authority to approve the annual leave request. (*Id.* at 10). Further, the Arbitrator explained that under Article 19, Section g of the parties' collective bargaining agreement (CBA),[1] annual leave is not to be denied by the lieutenants for arbitrary or capricious reasons, and denial should be based on work-related reasons. (*Id.*). Accordingly, he found that "it is inappropriate for the [Respondent] to place a Correctional Officer on AWOL status after he/she requests unscheduled annual leave in lieu of sick leave." (*Id.*).

To remedy the violation, the Arbitrator ordered that the Respondent follow its Program Statement 3000.03, and if an officer requests unscheduled annual leave in lieu of sick leave, the lieutenants are to have authority to approve the leave request, even if it will require the use of overtime. (*Id.*). He further ordered the Respondent to "cease and desist from placing [officers] on AWOL status when they are unable to report for duty and when they request annual leave in lieu of sick leave." (*Id.*).

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[1] Article 19 says that "[l]eave must not be denied for arbitrary or capricious reasons" and that "[d]enial or cancellation should be based on work-related reasons." (Jt. Ex. 4).

The parties did not file a request for clarification, reconsideration, or exceptions; therefore, the Arbitrator's decision became final and binding on May 29, 2013. (Stip. ¶14).

Respondent's Conduct after the Arbitration Award

On June 21, 2013, the Respondent's Complex Captain issued a "directive" to all lieutenants regarding unscheduled sick and annual leave. (Jt. Ex. 5; Stip. ¶15). The purpose of the memorandum was to "reiterate" the Respondent's leave procedures at the institution. (Jt. Ex. 5).

According to the directive, a lieutenant should grant an annual leave request if staffing levels at the time of the request allow. (Jt. Ex. 5). That is, the lieutenant should approve an unscheduled annual leave request if there are available officers on the roster that are not assigned to a mission-critical post. (*Id.*). Those available officers are known as "sick and annual" staff. (*Id.*). If, however, an officer requests unscheduled annual leave in lieu of sick leave and there is a "bon[a-f]ide government need for that [officer] to report to work," that is, there are no sick and annual staff available, the leave request should be denied. (*Id.*). The Respondent asserts that "bona-fide need" should be read as "work-related reasons," which it says includes the fact that an employee's absence will incur overtime. (R. Br. at 5; Stip. ¶15).

After denying the leave request, the lieutenant must place the officer in an AWOL status. (Jt. Ex. 5). Then, the lieutenant must prepare a memorandum for the Deputy Captain, explaining that the officer's request for annual leave was denied and that the officer was placed on AWOL. (*Id.*). The Deputy Captain will then "ensure there were no extra staff members available at the time of the officer's request and ensure the staff member's placement on AWOL was appropriate." (*Id.*). Upon conclusion of the Deputy Captain's review, if the placement on AWOL was appropriate, the Deputy Captain will refer the memorandum to the Warden. (*Id.*).

The Respondent stipulated that its current practice is consistent with the directive. (Stip. ¶15).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel contends that the Respondent violated § 7116(a)(1) and (8) of the Statute by refusing to comply with a final and binding arbitration award. *U.S. Dep't of the Treasury, IRS, Austin Compliance Ctr., Austin, Tex.*, 44 FLRA 1306, 1315 (1992).

The General Counsel argues that the Respondent failed to comply with the Award in two ways. First, the Award clearly states that the Respondent must give lieutenants the authority to approve unscheduled leave in lieu of sick leave. But the Respondent ordered the lieutenants to deny requests for annual leave in lieu of sick leave and place officers on AWOL, which is the same practice the Arbitrator rejected.

Second, the Award required the Respondent to "cease and desist from placing a Correctional Officer on AWOL status when they are unable to report for duty and when they request annual leave in lieu of sick leave." (Jt. Ex. 4 at 10). After the Award, the Respondent stated that officers who request annual leave in lieu of sick leave should be placed on AWOL if the officer's absence will incur overtime. In other words, the Respondent reaffirmed its prior practice, which the Arbitrator rejected.

According to the General Counsel, the Respondent plainly refused to follow the Arbitrator's decision by issuing the directive and reaffirming its previous policy. Such conduct wastes the government's resources and delays justice.

Finally, the General Counsel argues that the Respondent should not be permitted to collaterally attack the Award in a compliance proceeding and that any arguments that could have been, but were not made during the arbitration or filed in an exception to the Award, should be disregarded.

Respondent

The Respondent denies that it violated the Statute as alleged. First, it claims that it complied with the Award. Prior to the Award, the Respondent did not permit lieutenants to decide correctional officers' unscheduled annual leave requests. Instead, the lieutenant simply placed the requesting officer on AWOL and reserved the leave determination to the Captain. The Arbitrator ordered the Respondent to permit lieutenants to make a leave determination at the time of the request, and not merely place the requester on AWOL. In compliance, the Respondent issued a memorandum that requires the lieutenants to make a determination to approve or deny the leave at the time of the request. Because the Respondent corrected the offending practice, it complied with the Award.

Second, the Respondent argues that the Award is ambiguous and that the Respondent has not violated the Statute because it has acted in accordance with a reasonable construction of the Award. *U.S. Dep't of the Treasury, IRS*, 25 FLRA 71, 82 (1987). A construction is reasonable if it is consistent with the entire award and consistent with applicable rules and regulations. (*Id.*). The Respondent argues that the Arbitrator examined the interplay of the controlling documents in this matter, all of which delineate the discretion to the Respondent to approve or deny leave. Interpreting the Award as prohibiting the Respondent from placing an officer in an AWOL status disregards the Arbitrator's recognition of the Respondent's discretion to deny leave for work-related reasons. The Respondent argues that the Arbitrator was focused only on the facility's practice of placing an officer in AWOL status prior to making a leave determination, and, as it has fixed that practice, it has complied with the Award. Finally, the Respondent argues that its interpretation is consistent with OPM and DOJ Guidance, which affirm the Respondent's discretion to make leave determinations.

ANALYSIS AND CONCLUSIONS

It is well established that under § 7122(b) of the Statute an agency must take the action required by an arbitrator's award when that award becomes "final and binding." *U.S. Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash.*, 55 FLRA 293, 296 (1999) (*FAA Renton*). An award becomes "final and binding" when there are no timely exceptions filed or when timely filed exceptions are denied by the Authority. (*Id.*); *U.S. Dep't of the Air Force, Carswell AFB, Tex.*, 38 FLRA 99, 104 (1990) (*Carswell*). Where an agency disregards an unambiguous award or portions of an award, it fails to comply with the award within the meaning of § 7122(b) of the Statute and violates § 7116(a)(1) and (8) of the Statute. *U.S. Dep't of the Air Force, 6th Air Mobility Wing, MacDill AFB, MacDill AFB, Fla.*, 59 FLRA 38, 40 (2003); *FAA Renton*, 55 FLRA at 296; *Carswell*, 38 FLRA at 105. Where an award is ambiguous, an agency will not be found to have violated the Statute if its actions are consistent with a "reasonable construction" of the award. (*Id.*).

In a ULP proceeding for enforcement of a final and binding award, the award is not subject to collateral attack, and the Authority will not review the merits of the award. *FAA Renton*, 55 FLRA at 297. As the Authority "has repeatedly stated, to allow a respondent to litigate matters that go to the merits of the award would circumvent Congressional intent with respect to statutory review procedures and the finality of arbitration awards." (*Id.*); *U.S. DHS, U.S. CBP, Swanton, Vt.*, 65 FLRA 1023, 1029 (2011). Thus, generally speaking, the only issue for resolution in a ULP proceeding for enforcement of an award is whether there was non-compliance. *See Dep't of HHS, SSA*, 41 FLRA 755, 765 (1991).

Applying this authority, I find, in agreement with the General Counsel, that the Respondent disregarded the unambiguous terms of the Award when it issued the June 21, 2013, directive.

The Arbitrator's central unambiguous holding was that the immediate supervisors, the lieutenants, must have the *authority to approve* unscheduled annual leave in lieu of sick leave, even if it will require the use of overtime. Following the issuance of the Award, the Captain announced that the lieutenants must *deny* a request for unscheduled annual leave in lieu of sick leave if the absence will incur overtime. In other words, the lieutenants have no authority to approve an annual leave request when the absence will incur overtime. This practice contravenes a central holding of the Award.

Moreover, the Respondent disregarded the Arbitrator's unambiguous order to stop placing officers in an AWOL status when they are unable to report for duty and when they request annual leave in lieu of sick leave. The Arbitrator rejected the Respondent's practice of placing officers in an AWOL status when their absence would incur overtime, pending review by the Captain as to whether to convert the AWOL to annual leave. In its directive, the Respondent implemented a requirement that the lieutenants deny leave in that circumstance and place the officers in an AWOL status pending review by the Deputy Captain as to whether to approve the annual leave. Both before and after the Award,

lieutenants placed officers in an AWOL status between the time the officers request leave and the time that a higher-level official makes a final decision about the status of the leave. As the Respondent has not stopped placing officers in an AWOL status as directed by the Arbitrator and has instead left in place the same AWOL practice the Arbitrator rejected, the Respondent has disregarded the Award.

The Respondent's argument that it complied with the Award by requiring the lieutenants to make a leave determination *before* placing the officer in an AWOL status is unpersuasive. The lieutenant's so-called leave determination is nothing more than a provisional denial of the leave. Whether the lieutenant provisionally denies the leave and marks the employee AWOL, pending a final decision by a higher-level official, or just marks the employee AWOL, pending a final decision by a higher-level official, the result is the same. By implementing an illusory leave determination, the Respondent did not materially alter the procedure that the Arbitrator rejected.

Finally, the Respondent's argument that it has acted in accordance with a reasonable construction of the Award, which allows it discretion to approve leave, ignores the Arbitrator's finding that the Respondent's discretion may not be used to "arbitrarily and capriciously" deny leave in violation of the parties' CBA. As the Respondent has not materially changed the practices that the Arbitrator found violated the Respondent's policies and the parties' CBA, I find that the Respondent failed to comply with the Award. I will not revisit the Arbitrator's decision in a compliance proceeding.

CONCLUSION

I find that the Respondent violated § 7116(a)(1) and (8) of the Statute when it failed and refused to comply with the Award in FMCS Case No. 12-53907, as required by § 7122 of the Statute.

REMEDY

The Respondent will be ordered to cease and desist its unlawful conduct and comply with the final and binding award of Arbitrator Elliot Newman in FMCS Case No. 12-53907.

The Authority recently held that unfair labor practice notices should, as a matter of course, be posted both on bulletin boards and electronically whenever an agency uses such methods to communicate with bargaining unit employees. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014). As such, I will incorporate the electronic dissemination into the Order.

Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida, shall:

1. Cease and desist from:

(a) Failing and refusing to comply with the final and binding arbitration award of Arbitrator Elliot Newman in FMCS Case No. 12-53907.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of the rights assured them by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Comply with the final and binding arbitration award of Arbitrator Elliot Newman in FMCS Case No. 12-53907 by rescinding the June 21, 2013, memorandum and restoring authority to the lieutenants to approve unscheduled annual leave in lieu of sick leave, even if the absence will require the Respondent's use of overtime.

(b) Rescind the AWOL status given to any officer after he requested unscheduled annual leave in lieu of sick leave and expunge any reference to the AWOL status from the Respondent's records.

(c) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden, of the Coleman Correctional Complex, and shall be posted and maintained for sixty (60) consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Disseminate a signed copy of the Notice through the Respondent's e-mail system to all bargaining unit employees. This Notice will be sent on the same day that the Notice is physically posted.

(e) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Atlanta Region, Federal Labor Relations Authority, in writing, within thirty (30) days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., August 18, 2015

Susan E. Jelen

SUSAN E. JELEN
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to comply with the final and binding arbitration award of Arbitrator Elliot Newman in FMCS Case No. 12-53907.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of the rights assured them by the Statute.

WE WILL comply with the final and binding arbitration award of Arbitrator Elliot Newman in FMCS Case No. 12-53907 by affording lieutenants the authority to approve correctional officers' sick and annual leave requests, even when the leave will incur overtime and by ending the practice of placing officers on an absent without leave status when officers request annual leave in lieu of sick leave.

WE WILL rescind the AWOL status given to any officer after the officer requested unscheduled annual leave in lieu of sick leave and expunge any reference to the AWOL status from our records.

_____
(Agency/Respondent)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Atlanta Regional Office, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA 30303, and whose telephone number is: (404) 331-5300.