69 FLRA No. 31

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
NORTHWESTERN DIVISION
(Agency)

and

UNITED POWER TRADES ORGANIZATION
(Union)

0-AR-5137

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DECISION

March 4, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

Arbitrator Katrina I. Boedecker found that the Agency violated the parties' collective-bargaining agreement (the agreement) by failing to temporarily promote an employee (the grievant) who is not in the bargaining unit that the Union represents, but who temporarily performed the duties of a bargaining-unit position for 100% of his time. As a remedy, the Arbitrator awarded the grievant backpay. This case presents us with two main substantive questions.

The first question is whether the award is contrary to law because the Arbitrator allegedly determined the grievant's bargaining-unit status, and if so, whether the same principles that the Authority uses to determine the bargaining-unit status of temporary employees apply in this case. Because the Arbitrator did not make a bargaining-unit determination in this case, the answer is no.

The second question is whether the Arbitrator exceeded her authority by awarding a remedy to a non-bargaining-unit employee. The Agency provides no basis for concluding that an arbitrator exceeds her authority where, like here, she awards a remedy to an employee for a period during which he spent 100% of his time performing the duties of a bargaining-unit position. Therefore, the answer is no.

II. Background and Arbitrator's Award

The Agency temporarily assigned the grievant, a general maintenance worker, to perform the duties of a "[w]arehouseman."[1] A general maintenance worker is paid according to a wage-system pay plan (the wage system), while the higher-paid position of warehouseman is paid according to a rate schedule (the schedule). The Union filed a grievance alleging that the Agency violated the agreement by failing to pay the grievant according to the schedule while he performed the duties of a warehouseman.

The parties submitted the grievance to arbitration, and the Arbitrator framed the issue as: "Did the Agency violate [the schedule] and [the agreement] when it assigned a [wage-system] employee . . . to a [warehouseman] position without proper compensation? If so, what is the appropriate remedy?"[2]

The agreement provides, in relevant part, that an "employee who is required to perform the duties of a position classified at the higher grade for more than one . . . week shall be temporarily promoted to the higher grade starting at the beginning of the second . . . week, provided he/she satisfies the qualification requirements for the position."[3] The Union argued that, under this provision, the Agency should pay "non-bargaining[-]unit members performing bargaining[-]unit work" – such as the grievant – according to the schedule.[4]

Before the Arbitrator, the Agency "question[ed] the right of the [U]nion to file [the] grievance on behalf of an employee who is not in its bargaining unit."[5] The Arbitrator acknowledged that the grievant was not a member of the bargaining unit that the Union represents. Nonetheless, the Arbitrator found that the Union could pursue the grievance because the grievant performed the duties of a position (warehouseman) that is included in that unit.

On the merits of the grievance, the Arbitrator found that, for over three weeks, the grievant spent 100% of his time performing the duties of a warehouseman. Although the Agency argued that the grievant "was not qualified to perform the duties because he was medically unable to operate a forklift," the Arbitrator found that the "record establishe[d] . . . that [the grievant] performed the critical job duties of" the position, and that another employee's "[e]yewitness testimony . . . established that [the other employee] observed no measurable distinction between" how the grievant performed the duties and how

[1] Award at 12.
[2] *Id.* at 2-3.
[3] *Id.* at 4 (quoting the agreement).
[4] *Id.* at 8.
[5] *Id.* at 13.

the previous incumbents of the position had performed the duties.[6] The Arbitrator concluded that the Agency violated the agreement by failing to temporarily promote the grievant to the warehouseman position. As a remedy, the Arbitrator awarded the grievant backpay for the period during which he performed warehouseman duties.

The Agency filed exceptions to the award, and the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matters

A. The Agency's exceptions are timely.

Based on the date on the Arbitrator's award, the Agency's exceptions appeared to be untimely. Therefore, the Authority's Office of Case Intake and Publication issued an order directing the Agency to show cause why its exceptions should not be dismissed as untimely.[7]

In its response to the order, the Agency asserts that it did not receive the award that the Arbitrator first served on the parties by mail, so the Arbitrator mailed another copy, which the Agency received.[8] The Agency argues that its exceptions are timely relative to the date of service of the second copy of the award.[9]

The Agency's exceptions were due within thirty days of service by the Arbitrator,[10] plus five additional days for service by mail.[11] The Agency timely filed its exceptions relative to the date of service of the second copy of the award – in other words, the date on which the Arbitrator *successfully* served the award on the Agency. Therefore, we find that the exceptions are timely.

B. Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Agency's exceptions.

The Agency argues that the award is deficient because the Arbitrator granted relief to an employee who is not a member of the bargaining unit that the Union represents.[12] The Union maintains that the Agency did not argue before the Arbitrator that the grievant was not a member of that unit when he performed higher-graded duties, and, thus, that the Agency cannot now file exceptions based on that "premise."[13]

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.[14] However, the Arbitrator acknowledged in her award that the Agency "question[ed] the right of the [U]nion to file [the] grievance on behalf of an employee who is not in its bargaining unit."[15] Thus, §§ 2429.5 and 2425.4(c) do not bar the arguments that the Agency makes in its exceptions.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Agency argues that the award is contrary to law.[16] To resolve an exception claiming that an award is contrary to law, the Authority reviews any question of law raised by an exception and the award de novo.[17] In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[18] Under this standard, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[19]

The Agency argues that the award is contrary to the Federal Service Labor-Management Relations Statute (the Statute),[20] the Authority's Regulations, and

[6] *Id.* at 12.
[7] Order to Show Cause at 1-2.
[8] Response to Order at 1.
[9] *Id.* at 1-2.
[10] 5 U.S.C. § 7122(b) (requiring that exceptions to arbitration awards be filed within thirty days of service by the arbitrator); 5 C.F.R. § 2425.2(b) (same).
[11] 5 C.F.R. § 2429.22(a).
[12] Exceptions at 3-4.
[13] Opp'n at 3.
[14] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012).
[15] Award at 13.
[16] Exceptions at 3.
[17] *U.S. DHS, U.S. CBP*, 68 FLRA 846, 848 (2015); *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)).
[18] *USDA, Forest Serv.*, 67 FLRA 558, 560 (2014) (*Forest Serv.*) (citation omitted).
[19] *Id.* (citation omitted).
[20] 5 U.S.C. §§ 7101-7135.

Authority case law.[21] Specifically, the Agency contends that the Arbitrator "implicitly" determined the bargaining-unit status of the grievant when she found that he was entitled to backpay for performing warehouseman duties.[22] According to the Agency, only the Authority – not arbitrators – may resolve questions concerning whether certain employees are included in a certified bargaining unit.[23]

In this case, it is undisputed that the grievant's normal position is outside the unit that the Union represents, and that the warehouseman position is within that unit.[24] And the Arbitrator addressed only whether the Agency assigned the grievant warehouseman duties on a temporary basis. It was not necessary for the Arbitrator to, and she did not, determine the bargaining-unit status of any position. Therefore, the Agency's argument provides no basis for finding the award contrary to law.[25]

The Agency also argues that "*[s]hould* the Authority consider the [grievant's] bargaining[-]unit status," the Authority must apply its test for determining whether a temporary employee is appropriately included in an existing bargaining unit.[26] In this regard, under § 7112(a) of the Statute, the Authority may determine a bargaining unit to be appropriate only if, as relevant here, the determination will "ensure a clear and identifiable community of interest among the employees in the unit."[27] And to have a community of interest with unit employees, a temporary employee must have a "reasonable expectation of continued employment in the unit."[28] According to the Agency, the grievant's short-term assignment to perform warehouseman duties does not meet this test.[29] Further, the Agency claims that, even if the grievant shares a community of interest with the bargaining unit, the grievant did not meet the minimum qualifications of the warehouseman position.[30]

As discussed above, this case does not involve determining the bargaining-unit status of any position. Thus, the Authority's standards for including temporary employees in a unit do not apply here. As for the Agency's claim that the grievant was not qualified for the warehouseman position, the Arbitrator rejected that claim – and, because the Agency does not argue that the Arbitrator's finding on that matter is a nonfact, we defer to that finding in resolving the Agency's contrary-to-law exception.[31]

In sum, the Agency's arguments provide no basis for finding the award contrary to law, and we deny this exception.

B. The Arbitrator did not exceed her authority.

The Agency also argues that the Arbitrator exceeded her authority by granting relief to an employee who is outside the bargaining unit that the Union represents.[32] For support, the Agency cites Authority decisions in which the Authority concluded that arbitrators exceed their authority in connection with a remedy when they fail to confine their remedy to bargaining-unit employees.[33]

Here, the Arbitrator found that, at the time of the events giving rise to the grievance in this case, the grievant spent 100% of his time performing the duties of a warehouseman[34] – a position that is undisputedly included in the bargaining unit that the Union represents. The decisions that the Agency cites do not address a similar situation or provide a basis for finding that, in these particular circumstances, the Arbitrator could not award a remedy to the grievant.[35] Consequently, we find no basis for concluding that the Arbitrator exceeded her authority, and we deny the Agency's exceeded-authority exception.[36]

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[21] Exceptions at 3-4.
[22] *Id.* at 4.
[23] *Id.* at 3-4 (citations omitted).
[24] Award at 6, 12; Exceptions at 2.
[25] *Cf. AFGE, Local 933*, 34 FLRA 645, 647-49 (1990) (setting aside award in which arbitrator ruled that temporary employees were not included in the bargaining unit).
[26] Exceptions at 5 (emphasis added).
[27] *FAA Tech. Ctr., Atl. City Airport, N.J.*, 44 FLRA 1238, 1240 (1992) (quoting 5 U.S.C. § 7112(a)).
[28] *Id.*
[29] Exceptions at 5-6.
[30] *Id.* at 6.
[31] *Forest Serv.*, 67 FLRA at 561-62.
[32] Exceptions at 4-5.
[33] *Id.* (citing *Bureau of Indian Affairs*, 25 FLRA 902 (1987) (*Indian Affairs*); *U.S. Dep't of HUD*, 24 FLRA 442 (1986) (*HUD*)).
[34] Award at 12-13.
[35] *See Indian Affairs*, 25 FLRA at 906-07 (arbitrator exceeded authority by awarding refund of rent increase to supervisors, who were not in the bargaining unit at the time of the rental increase at issue); *HUD*, 24 FLRA at 444-45 (arbitrator exceeded authority by directing the agency to provide acoustic screens in spaces where non-bargaining-unit employees work).
[36] *Cf. AFGE, Local 2058*, 68 FLRA 676, 685 (2015) (noting, with respect to dues withholding under § 7115 of the Statute, that a collective-bargaining agreement ceases to be applicable to an employee when the employee transfers out of the bargaining unit); *NFFE, Local 1442*, 44 FLRA 723, 725-26 (1992) (finding a proposal that would continue to afford "protections" to bargaining-unit employees when they are temporarily reassigned to positions outside the bargaining unit nonnegotiable because it would impose a contractual requirement that would be inconsistent with § 7114(a)(2)(B) of the Statute).

V. Decision

We deny the Agency's exceptions.

Member Pizzella, dissenting:

This case brings to mind a quip of the late comedian George Carlin: "I don't like to think of laws as rules you have to follow, but more as suggestions."[1]

The Federal Service Labor-Management Relations Statute (Statute)[2] stands on the premise that a federal union, which has been accorded "exclusive recognition" of employees in "an appropriate unit,"[3] has the unfettered *right* to represent its bargaining-unit employees "with respect to the conditions of employment affecting *such* employees."[4] Because of that exclusive right, however, a federal union also carries the concomitant *responsibility* to represent the interest of every employee who is included by certification in the unit regardless of whether the employee joins, or otherwise participates in, the union.[5]

Equally true, however, is the proposition that a federal union does not have the right to act for, or on behalf of, employees who are not part of its bargaining unit and are represented by another union (which has also been accorded *exclusive recognition* of the employees in its *appropriate unit*) or to represent employees who are not represented by any union.

On this point, the Authority consistently has held that an arbitrator exceeds her authority when she entertains a grievance which is filed by a union on behalf of, and awards a remedy to, employees who do not belong to the bargaining unit represented by the union.[6]

Put another way, a union may not simply jump into any workplace dispute that catches its fancy.

Today, however, the Majority turns this commonsense framework on its head and blurs the clear lines which have demarcated the boundaries between exclusive representatives that have existed *for thirty-eight years*. In doing so, the Majority opens a virtual door which can only lead to unnecessary boundary disputes between exclusive representatives and openly invites exclusive representatives, which heretofore have existed in peaceful coexistence, to compete for standing to file duplicative and competing grievances whenever a bargaining-unit employee from another union is assigned to perform duties on a temporary basis (no matter how brief) in another work unit whose employees belong to a different bargaining unit and are represented by their own exclusive representative.

That proposition runs counter to longstanding Authority precedent and needlessly encourages federal unions to attempt to generate even more official time at a time when Congress has expressed concern about the amount of official time that is being used by "federal employees who collect taxpayer-funded salaries while conducting business for [federal] unions."[7] Whereas other oversight agencies, such as the U.S. Government Accountability Office and the U.S. Office of Personnel Management (OPM), have made recommendations to Congress on "[a]ctions [which are] [n]eeded to [i]mprove [t]racking and [r]eporting of the [u]se and [c]ost of [o]fficial [t]ime"[8] and ways to improve upon the reporting of official time,[9] the Majority paves an entirely new avenue for union officials to request even more official time as they seek to file grievances on behalf of employees *who do not even belong to their bargaining unit*.

The "grievant" in this case, Jason Becker, works at the Agency's Lookout Point Dam as a "non-professional" maintenance worker and is paid under the federal wage system. As a "non-professional" employee he belongs to the "non-professional bargaining unit" which is represented exclusively by the National Federation of Federal Employees, Local 7 (NFFE).[10] In early 2013, Becker seriously injured his left hand and arm.[11] As a result of the injury, he required two surgeries and several months off of work.[12] After the surgeries, Becker could not perform the full scope of his regularly-assigned duties.

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[1] http://www.quotationspage.com/quote/31445.html.

[2] 5 U.S.C. §§ 7101-7135.

[3] *Id.* § 7111(a); *see also* § 7103(a)(16).

[4] *Id.* § 7103(a)(12) (emphasis added).

[5] *See* §§ 7102, 7116(b)(1)-(8).

[6] *U.S. Dep't of the Air Force, Luke Air Force Base, Phx., Ariz.*, 62 FLRA 214, 215-16 (2007) (*Air Force*); *Bureau of Indian Affairs*, 25 FLRA 902, 906 (1987) (*Indian Affairs*) (citing *U.S. Dep't of HUD*, 24 FLRA 442, 445 (1986) (*HUD*)).

[7] Kathryn Watson, *Congress Turns up Heat on Taxpayer-Funded Union Business*, The Daily Caller (Feb. 16, 2016, 12:42 AM), http://dailycaller.com/2016/02/16/congress-turns-up-heat-on-taxpayer-funded-union-business/; Letter to Katherine Archuleta, Director of U.S. OPM from Hon. Phil Gringrey, M.D. and Hon. Dennis Ross, Members of Congress (Mar. 24, 2014).

[8] GAO Highlights, *Actions Needed to Improve Tracking and Reporting of the Use and Cost of Official Time*, (Oct. 2014) (highlights of GAO-15-9, a report to congressional requesters).

[9] *See* Shefali Kapadia, *OPM releases long-awaited report on official time*, Federal News Radio 1500 AM (Oct. 7, 2014, 10:58 AM), www.federalnewsradio.com/management/2014/10/opm-releases-long-awaited-report.

[10] Exceptions at 1.

[11] Award at 5.

[12] *Id.*

In July 2013, the Agency approved Becker for light duty, with the restrictions that he could not use his left hand or arm,[13] carry anything which required lifting with two hands,[14] and if the Agency had light duties which he could perform with his restrictions.[15] Becker performed available light duties, which complied with his restrictions, at his regular work facility for six months.[16]

In January 2014, when the Agency had no more light duty for Becker to perform at his permanent work facility,[17] the Agency assigned Becker to perform similar light duties for three weeks in a "warehouse" that was located "near" his work facility.[18] This brief three-week assignment afforded Becker new "experience" in the warehouse where some employees, such as materials handlers, are paid at a higher rate of pay, which is reserved for employees in "[t]rade and [c]raft" positions.[19] Employees who work in the warehouse in such a position belong to an entirely different bargaining unit, which is represented by the United Power Trades Organization (UPTO).

During the three weeks that Becker was in the warehouse, he performed some materials-handler duties.[20] But he could not perform any of the duties that required the use of two hands, carrying, or lifting.[21] He also could not perform any forklift operations because he was not "certifi[ed]" or "train[ed]" as a forklift operator (a "[s]kill" required to qualify as a materials handler and the higher rate of pay).[22]

Sometime after Becker returned to his normal work facility in February 2014, UPTO (the warehouse union) filed its own grievance arguing that the Agency should have paid Becker at the higher rate of pay of a materials handler for the three weeks he was in the warehouse.

Excuse me, but there seem to be a couple of problems here.

First, there is not one shred of evidence that Becker ever complained about the three weeks he spent in the warehouse, that he believed he was entitled to a higher rate of pay, or that he even asked to be paid at a different rate. Second, Becker belongs to a bargaining unit that is represented *exclusively* by NFFE.[23] This grievance was filed by UPTO.[24] Finally, and most telling, Becker did not even participate in this grievance and "did not testify at the arbitration."[25]

Despite having no grievant (who belongs to their bargaining unit) and no evidence that Becker knew about, cared about, or ever approved of the grievance, UPTO nonetheless pressed ahead on its own.

For this reason alone, I would vacate the award.

The Agency argues, and I agree, that the Arbitrator exceeded her authority by granting relief to an employee who is outside the bargaining unit that UPTO represents.[26] The Authority for thirty-eight years has held that arbitrators exceed their authority when they fail to confine their remedy to bargaining-unit employees[27] and any remedy should apply only to employees who are in the bargaining unit at the time of the events giving rise to the grievance.[28]

There simply is no dispute that before the circumstances which gave rise to this grievance and that at all times after the filing of this grievance, Becker was *never* a member of the bargaining unit that UPTO represents. In fact, the evidence is to the contrary. Even the Majority concedes that Arbitrator Katrina Boedecker never found that Becker belonged to the UPTO bargaining unit. To the contrary, the evidence clearly demonstrates that at all times Becker was a member of, and represented *exclusively* by, NFFE.[29]

Quite frankly, UPTO had *no business* getting involved in a matter that concerned a bargaining-unit employee represented *exclusively* by *another union* (NFFE).

Unlike the Majority, I would conclude that the Arbitrator exceeded her authority.

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[13] *Id.*at 7.
[14] *Id.*
[15] *Id.* at 5.
[16] *Id.*
[17] *Id.* ("If there was no light duty accommodation, Becker would have to stay home. After one year at home, the [Agency] could let him go.").
[18] *Id.* at 5-6.
[19] *Id.* at 6.
[20] *Id.* at 15.
[21] *Id.* at 7.
[22] *Id.*
[23] Exceptions at 2.
[24] Award at 1.
[25] *Id.* at 6.
[26] Exceptions at 4-5.
[27] *Air Force*, 62 FLRA at 215-16; *Indian Affairs*, 25 FLRA at 906 (citing *HUD*, 24 FLRA at 445).
[28] *Indian Affairs*, 25 FLRA at 906.
[29] Award at 8 (describing UPTO's request that the Agency pay "non-bargaining[-]unit members performing bargaining[-]unit work" – such as the grievant – according to the schedule); 13 (recounting the Agency's argument that UPTO could not pursue a grievance "on behalf of an employee who is not in its bargaining unit").

I also do not agree with the Majority insofar as they embrace a clearly erroneous finding made by the Arbitrator that "the grievant spent 100% of his time performing the duties of a warehouseman."[30]

There is no evidence to support that conclusion.

Before Arbitrator Boedecker, UPTO presented the testimony of one (mysterious, Perry Mason-esque) witness, Justin Barrowcliff.[31] All that we know about Barrowcliff is that he is a mechanic at the Lookout Point Dam where Becker also works. The Arbitrator provides no clue as to whether Barrowcliff is a permanent or temporary worker;[32] whether Barrowcliff is a member of UPTO, NFFE, or any other union; whether Barrowcliff is an officer or steward in either union; whether Barrowcliff understands the scope of duties that are performed by a materials handler; or whether Barrowcliff knew that Becker was on light duty (facts which, considering the odd circumstances of this case, just might prove to be quite revealing). All we know about Barrowcliff, the sole witness for UPTO, however, is that he visited the warehouse "several times a week" during the three weeks Becker was there.[33] During those visits (which by my count could have been *as few as six* but in any event could be *no more than nine*), Barrowcliff asserts that "he saw Becker *being instructed* about how to do [m]aterials [h]andler duties," "d[oing] paperwork to order . . . supplies," and "handle products and stock them."[34]

Even looking at this testimony in the best possible light, it does mitigate against the undisputed fact that Becker could not perform *the full scope* of duties that a materials handler is *required to perform* – i.e., duties that require the use of both hands or lifting and the operation of a forklift (for which Becker was neither trained nor certified). Accordingly, there is no support for the Majority's conclusion that Becker *actually* "*spent **100% of his time** performing the duties of a warehouseman*."[35]

Even if that conclusion could be surmised reasonably from this sparse evidence (which it cannot), it is quite different than determining that Becker performed, or had the ability to perform, ***100% of the duties that are required to be performed** by a warehouseman*.

That difference matters.

Therefore, I would vacate the award.

Thank you.

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[30] Majority at 5.
[31] Award at 6.
[32] TC-1 Power Plant Mechanics assigned to the Army Corps of Engineers typically are recruited on a temporary NTE basis. *See* U.S. Army Corps of Engineers Agency Job Opportunity Announcement WTHG161075811636723R, USA Jobs (Feb. 25, 2016 – Mar. 7, 2016).
[33] Award at 6.
[34] *Id*. (emphasis added).
[35] Majority at 5 (emphasis added).