70 FLRA No. 151

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1633
(Union)

and

UNITED STATES
DEPARTMENT OF VETERAN AFFAIRS
MICHAEL E. DEBAKEY VAMC
(Agency)

0-AR-5344

_____

DECISION

August 6, 2018

_____

Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members

I. Statement of the Case

The grievant volunteered to cover another employee's schedule until that employee returned to work. When the employee eventually returned to work, the grievant resumed her regular schedule. The Union filed a grievance alleging that the Agency violated the law and the parties' agreement because the Agency did not bargain with the Union before returning the grievant to her regular schedule. On December 15, 2017, Arbitrator AlmaLee P. Guttshall issued an award denying the Union's grievance.

The Union files exceptions alleging that the award is contrary to the Federal Service Labor-Management Relations Statute (the Statute),[1] and the Federal Employees Flexible and Compressed Work Schedules Act (the Work Schedules Act).[2] Because the Arbitrator found that the Agency did not change the grievant's schedule, but merely returned the grievant to her regular schedule, the Agency had no obligation to bargain under either the Statute or the Work Schedule's Act. Therefore, we deny the Union's exceptions.

[1] 5 U.S.C. § 7101. Section 7116(a)(1) and (5) makes it an unfair labor practice for an Agency "to refuse to consult or negotiate" with a labor organization.
[2] *Id.* § 6131.

II. Background and Award

The grievant is a diagnostic radiologic technician (DRT) at the Agency's medical center in Houston, Texas. When another DRT (the employee) – who was working a compressed work schedule (CWS) – took an extended leave of absence, the grievant volunteered to cover that employee's schedule until she returned. Once the employee returned to work, the Agency notified the grievant that she would be returning to her regular schedule.

The dispute in this case arose because the grievant believes that she is entitled to continue working the employee's CWS. After the Agency notified the grievant that it was returning her to her regular schedule, the Union requested that the Agency bargain over the alleged change to the grievant's schedule. The Agency did not respond to the bargaining request and directed the grievant to resume her regular schedule. In response, the Union filed a grievance. The parties were unable to resolve the grievance, and proceeded to arbitration.

The parties did not agree on the issues, so the Arbitrator framed the issues as: "Did the Agency have a duty to bargain with the Union regarding the [g]rievant's return to the [schedule] she worked prior to her assignment to the . . . [CWS]? . . . Did the Agency violate the [parties' agreement] . . . or any statutory provision when it returned [the g]rievant to the work schedule she had prior to working the CWS?"[3]

As relevant here, at arbitration the Union argued that the Agency violated the Statute and § 6131 of the Work Schedules Act[4] by failing to bargain with the Union over the asserted change to the grievant's schedule. Addressing the Union's arguments, the Arbitrator found that "the Agency had no duty to bargain under the Statute because it was not terminating the [grievant's assignment to a] CWS."[5] The Arbitrator discredited the "[g]rievant's claims that she was unaware that her assignment to the CWS . . . was temporary."[6] Instead, the Arbitrator found that the grievant "knew that she was covering for an employee on extended leave."[7] Additionally, the Arbitrator stated that although § 6131 of the Work Schedules Act requires an agency to bargain over terminating an alternate work schedule, the Agency had no such duty here because it was simply returning the

[3] Award at 5.
[4] Under § 6131, an agency must bargain to impasse over its decision to terminate an alternate work schedule—such as a CWS. 5 U.S.C. § 6131(c)(3)(A)-(B).
[5] Award at 10.
[6] *Id.*
[7] *Id.*

grievant to her regular schedule – "not discontinuing a CWS."[8]

The Arbitrator concluded that the Agency's decision to "place [the grievant] in her former [schedule] was not a violation of . . . any statutory provision."[9] Accordingly, the Arbitrator denied the Union's grievance.

The Union filed exceptions on January 14, 2018. The Agency did not file an opposition.

III. Analysis and Conclusion: The award is not contrary to law.

The Union claims that the award is contrary to law. 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.[10] In making that determination, we defer to the arbitrator's underlying findings of fact.[11]

As the Arbitrator found, the "crux of the matter" is the grievant's claim that she was given a permanent assignment when the grievant volunteered to cover the employee's schedule.[12] According to the Union, by directing the grievant to resume her regular schedule, the Agency made a "change in [the grievant's] *working conditions*,"[13] and, therefore, the Agency was required to bargain with the Union under the Statute.[14]

Under the Statute, agencies are obligated to bargain over changes to employees' "*conditions of employment*."[15] After the Union filed its exceptions, the Authority clarified, in *U.S. DHS, U.S. CBP, El Paso, Texas*, that the terms "*working conditions*" and "*conditions of employment*" are not synonymous.[16] However, regardless of the terminology used by the Union, no change occurred here. As the Arbitrator found, the Agency merely returned the grievant to her regular schedule. Therefore, the Agency had no obligation to bargain under the Statute.[17]

The Union also claims that, under the Work Schedules Act, the Agency has a "duty to negotiate . . . a change in an employee's CWS."[18] However, the Arbitrator determined that the Act was inapplicable here because the Agency did not "discontinu[e] a CWS"– it merely returned the grievant to her regular schedule.[19] Moreover, while parties are obligated to bargain over certain matters related to alternative work schedules under the Work Schedules Act, there is no obligation to bargain over the application of an established alternative work schedule to a single employee.[20] Therefore, the Arbitrator was correct in concluding that the Agency's decision to return the grievant to her regular schedule did not implicate the Work Schedules Act.

Accordingly, we deny the Union's exceptions.

IV. Decision

We deny the Union's exceptions.

---

[8] Award at 9; *see* 5 U.S.C. § 6131(c)(3)(A)-(B).
[9] Award at 9.
[10] *U.S. DHS, CBP*, 69 FLRA 579, 581 (2016); *U.S. DOJ, Fed. BOP, Wash., D.C.*, 64 FLRA 1148, 1150 (2010) (*BOP*).
[11] *BOP*, 64 FLRA at 1150.
[12] Award at 7.
[13] *Id.* (emphasis added).
[14] *See* Exceptions at 2, 5.
[15] *E.g., U.S. DHS, U.S. Citizenship & Immigration Servs.*, 69 FLRA 512, 515 (2016) (emphasis added).
[16] 70 FLRA 501, 503 (2018) (*El Paso*) (holding that there is no obligation to bargain over "working conditions") (Member DuBester dissenting).

For the reasons stated in his dissenting opinion in *El Paso*, Member DuBester would uphold the Authority's longstanding precedent that "working conditions" are synonymous with "conditions of employment." 70 FLRA at 504-07. But in the instant case, the asserted distinction is irrelevant, because the Agency did not make a change of any sort.

[17] While Member Abbott agrees with his colleagues that the award is not contrary to law in any respect, he is not convinced that the underlying matter is grievable. In its grievance, at arbitration, and in its exceptions, the Union characterizes its complaint as being about a purported "change in working conditions." Exceptions at 7. As we recently held in *El Paso*, the distinction between conditions of employment and working conditions is significant and "lies at the very foundation" of our Statute and determines what matters "are, and are not, subject to a duty to bargain." 70 FLRA at 503. If an agency has no obligation to bargain over such matters then it may follow that matters which pertain only to working conditions are not grievable. In *El Paso*, we found that a memorandum which directed how officers performed their duties "did not change the *nature of* or the *type of* duties the officers performed." *Id.* Similarly, here, there was no change to the nature of or type of duties the grievant performed. At the beginning of the story, the grievant worked as a GS-10 technician. She then volunteered to cover for another technician whose duties required a CWS. When that technician returned to work, the grievant went back to her same duties and same work schedule. At the end of the story, nothing had changed. It seems obvious that there was not even a change in working conditions. But to the extent one characterizes the temporary shift change (for which the grievant volunteered) as a change in working conditions, there certainly was no change to a condition of employment. Member Abbott remains unconvinced that these circumstances meet the definition of a "grievance" as that term is defined by § 7103(9).
[18] Exceptions at 6.
[19] Award at 9.
[20] *See AFGE, Local 1709*, 57 FLRA 711, 712-13 (2002).