73 FLRA No. 62

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3254
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
434TH AIR REFUELING WING
GRISSOM AIR RESERVE BASE
(Agency)

0-AR-5783

DECISION

October 17, 2022

Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and Susan Tsui Grundmann, Members

I. Statement of the Case

Arbitrator Robert M. Lustig found that the parties had reached agreement on a new collective-bargaining agreement, and the Union was therefore obligated under the parties' ground-rules agreement and § 7114(b)(5) of the Federal Service Labor-Management Relations Statute (Statute) to execute that agreement.[1] The Union filed an exception alleging that the award is contrary to law because it requires the parties to execute an agreement that violates Executive Order 14,003[2] (EO 14003). We find that the award is not contrary to law and deny the exception.

II. Background and Arbitrator's Award

The parties began negotiating a new collective- argaining agreement in 2018. They submitted an agreement for Agency-head review in January 2020. After the Agency head disapproved that agreement based on certain provisions, the parties returned to the bargaining table. In April 2020, the parties signed ground rules for that bargaining, which the Agency head approved. The ground rules provided that articles to which the parties had previously agreed could be "revisited" by mutual consent.[3]

Further negotiations resulted in a second agreement signed by the parties in June 2020 (June agreement). The parties submitted the June agreement for Agency-head review, and the Agency disapproved it on the basis that seven provisions were contrary to law. The Union then filed a petition for review with the Authority to determine the provisions' negotiability (petition). While the petition was pending, the parties exchanged proposals in an attempt to resolve the disapproved provisions. Some of the Union's proposals raised issues unrelated to the disapproved provisions. The parties engaged in mediation over the seven disputed provisions, and upon reaching agreement on those provisions, the Union withdrew the petition.

Subsequently, the Agency edited the June agreement to "reflect[] the parties' agreements on the seven provisions that had been disapproved."[4] On December 3, 2020, the Agency sent the revised agreement (December agreement) to the Union. Citing the ground rules, the Agency notified the Union that it declined to reopen any other previously agreed-upon provisions. However, the Union refused to execute the December agreement, asserting that negotiations were not concluded because the additional matters that the Union had proposed while bargaining over the disputed provisions were not resolved. The Agency responded by filing a grievance on January 20, 2021, alleging that the Union violated the parties' ground rules and the Statute by refusing to sign the December agreement. The matter went to arbitration.

On January 22, 2021, after the Agency filed the grievance, but before arbitration, President Biden issued EO 14003. In part, EO 14003 revoked several executive orders issued by the previous administration concerning official time and bargaining matters.

The Arbitrator framed the issue as whether the negotiations following Agency-head disapproval of the June agreement were limited to the disapproved provisions of that agreement.[5] The Arbitrator found that, once the parties signed the June agreement, it was "clear both parties had agreed to the terms of that [agreement]."[6] Rejecting the Union's argument that the Agency head's disapproval reopened the entire agreement for further negotiation, the Arbitrator found the additional matters raised by the Union's proposals would have changed previously agreed-upon articles in the June agreement, and

[1] 5 U.S.C. § 7114(b)(5).
[2] Protecting the Federal Workforce, Exec. Order No. 14,003, 86 Fed. Reg. 7,231, 7,231 (Jan. 22, 2021) (EO 14003).
[3] Award at 3 (quoting the ground rules).
[4] *Id.* at 6.
[5] *Id.*
[6] *Id.* at 10.

the ground rules did not permit such articles to be reopened without mutual consent. Therefore, because the Agency had not agreed to negotiate the additional matters proposed by the Union, the Arbitrator concluded that the articles concerning those matters could not be reopened.

In defending its decision not to sign the agreement, the Union argued that all matters in the June agreement should have been open for further negotiation because EO 14003 required the Agency to "suspend, revise, [or] rescind" any action taken to implement the executive orders revoked by EO 14003.[7] However, the Arbitrator rejected this argument because EO 14003 is "an internal directive to the affected agencies and is not enforceable by third parties," including the Union.[8]

Finding that the "evidence is clear that there was agreement between the parties on all remaining issues that were subject to further bargaining," the Arbitrator determined that the parties reached agreement by December 3, 2020.[9] The Arbitrator concluded that because agreement was reached, § 7114(b)(5) of the Statute obligated the Union to execute the December agreement. Therefore, the Arbitrator sustained the Agency's grievance and directed the Union to sign the December agreement.

On December 8, 2021, the Union filed exceptions to the award, and the Agency filed an opposition on January 20, 2022.[10]

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

The Union argues that the award is contrary to law because it requires the Union to sign an agreement that is contrary to EO 14003 and guidance issued by the U.S. Office of Personnel Management (OPM).[11] In resolving 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.[12] 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.[13] Under this standard, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[14]

Section 7114(b)(5) of the Statute requires either party, "if agreement is reached" during negotiations, "to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement."[15] Applying § 7114(b)(5), the Authority has found that an "agreement" is reached when authorized representatives of the parties come to a meeting of the minds on the terms over which they have been bargaining.[16] Additionally, the Authority has consistently held that once authorized representatives have agreed to the terms of a negotiated agreement, a party's failure to execute the agreement violates the Statute.[17]

Here, the Arbitrator found that there was "agreement between the parties on all remaining issues that were subject to further bargaining" by December 3, 2020, and the Union does not challenge this finding as a nonfact.[18] Therefore, we find no basis to disturb the Arbitrator's conclusion that § 7114(b)(5) obligated the Union to execute the agreement at that time.[19] Accordingly, we conclude that the Arbitrator's direction to the Union to execute the agreement is consistent with the Statute and Authority precedent.[20]

The Union's arguments on exception provide no basis for reaching a contrary conclusion. The Union argues that the Arbitrator mischaracterized the Union as "seek[ing] enforcement" of EO 14003 when the Union was

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[7] *Id.* at 9 (quoting EO 14003).

[8] *Id.* at 10-11. In reaching this conclusion, the Arbitrator relied upon Section 7(c) of EO 14003, which states that the EO "is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable by law or in equity by any party against the United States, its departments, agencies or entities, its officers, employees, or agents, or any other person."

[9] Award at 11.

[10] The Agency requested an extension of time on December 22, 2021, to file an opposition. The Authority's Office of Case Intake and Publication granted the request, giving the Agency until January 21, 2022 to file an opposition. Extension of Time Order at 1. Therefore, the opposition is timely.

[11] Exceptions Br. at 3.

[12] *AFGE, Loc. 3954*, 73 FLRA 39, 42 (2022) (citing *AFGE, Loc. 3954*, 72 FLRA 403, 404 (2021) (Member Abbott concurring)).

[13] *Id.*

[14] *Id.*

[15] 5 U.S.C. § 7114(b)(5); *see NTEU*, 72 FLRA 151, 152 (2021) (*NTEU*) (Member Abbott concurring) (citing 5 U.S.C. § 7114(b)(5); *U.S. Dep't of Transp., FAA, Standiford Air Traffic Control Tower, Louisville, Ky.*, 53 FLRA 312, 317 (1997)).

[16] *NTEU,* 72 FLRA at 152-53 (citing *AFGE, AFL-CIO, Loc. 1815*, 69 FLRA 309, 309 (2016) (*Local 1815*); *U.S. DOD, Ill. Nat'l Guard, Springfield, Ill.*, 68 FLRA 199, 201 (2015); *U.S. Dep't of the Treasury, BEP*, 44 FLRA 926, 938 (1992); *U.S. Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 44 FLRA 205, 206 (1992); *Int'l Org. of Masters, Mates & Pilots*, 36 FLRA 555, 560 (1990); *Nat'l Council of SSA Field Operations Locs. – Council 220, AFGE, AFL-CIO*, 21 FLRA 319, 320 (1986)).

[17] *Id.*

[18] Award at 11.

[19] 5 U.S.C. § 7114(b)(5); *NTEU*, 72 FLRA at 152; *Local 1815*, 69 FLRA at 309.

[20] *See, e.g.*, *Local 1815*, 69 FLRA at 309 (directing union to execute negotiated collective-bargaining agreement).

instead "defending against a grievance filed by the Agency demanding that the Union sign and execute a collective bargaining agreement that violates" EO 14003 and related OPM guidance.[21] The Union further argues that the Arbitrator improperly failed to determine whether the December agreement was consistent with EO 14003.[22]

However, as the Agency argues,[23] EO 14003 did not issue until January 21, 2021 – which, according to the Arbitrator's unchallenged finding, was more than a month after the parties had reached agreement. Therefore, the Union cannot rely on the subsequent issuance of EO 14003 as a defense for its failure to execute the December agreement.[24]

Because EO 14003 was not in effect at the time the parties reached agreement, that EO provides no basis for finding the award deficient. Accordingly, the Union does not establish that the award is contrary to law.

IV. Decision

We deny the Union's exception.

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[21] Exceptions Br. at 7.

[22] *Id.*

[23] Opp'n Br. at 1, 2; *see also* Award at 8 (summarizing Agency's argument that EO 14003 was "not applicable" because the parties reached agreement on December 3, 2020, the Agency filed the grievance on January 20, 2021, and the EO did not become effective until January 21, 2021).

[24] *E.g.*, *U.S. EPA*, 72 FLRA 114, 115-16 (2021) (Chairman DuBester concurring; Member Kiko concurring; Member Abbott concurring) (concluding that agency could not rely on executive order addressing official-time requests to argue that award was contrary to law where the executive order was not in effect at the time agency denied the request); *see also AFGE, Loc. 1441*, 73 FLRA 36, 37 n.15 (2022) (citing *AFGE, Loc. 1441*, 70 FLRA 161, 164 (2017)) (in assessing whether an arbitrator's legal conclusions are consistent with the applicable standard of law, the Authority is not required to rely on the arbitrator's underlying reasoning).