73 FLRA No. 84

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF AGRICULTURE
FOOD AND NUTRITION SERVICE
(Agency)

0-AR-5804

_____

DECISION

February 13, 2023

_____

Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator Joyce M. Klein found the Agency violated the parties' agreement and committed an unfair labor practice (ULP) when it failed to notify the appropriate Union official of proposed changes to bargaining-unit employees' conditions of employment. However, the Arbitrator found the Agency did not violate the parties' agreement or commit a ULP when it insisted on bargaining over the proposed changes as part of their ongoing negotiations for a successor agreement (term negotiations), rather than through separate, midterm bargaining.

The Arbitrator determined the Agency had an obligation to bargain before implementing the changes, but that the parties' ground rules for term negotiations may pose an obstacle to such bargaining. Therefore, the Arbitrator stated that, if the Union continues to seek bargaining, then the parties may need to modify their ground rules for term bargaining over the proposed changes' impact and implementation to occur.

The Union filed exceptions asserting that the award does not draw its essence from the parties' agreement and that the Arbitrator exceeded her authority. For the following reasons, we deny the exceptions.

II. Background and Arbitrator Award

In 2017, the parties began term negotiations and identified articles from their previous agreement (parties' agreement) over which they wished to bargain. As relevant here, they agreed to ground rules for term negotiations, to a modified awards article, and to roll over the previous performance-appraisal article without any changes.

In May 2020, while still in term negotiations, the Agency notified bargaining-unit employees and multiple local presidents that it intended to change its performance-appraisal system and its awards program. The Union requested bargaining under the midterm-bargaining article in the parties' agreement, but the Agency agreed to bargain only as part of the ongoing term negotiations. The Union filed a grievance, which went to arbitration.

The parties disagreed on the issue for arbitration. The Union's proposed issue was whether the Agency violated the parties' agreement or law "when it failed to provide [the Union] with appropriate notice and an opportunity to bargain its proposed [midterm] changes to" Article 9 (concerning performance appraisals) and Article 17 (concerning awards) of the agreement.[1] The Agency's proposed issue did not include the concept of "mid[]term" bargaining.[2]

The Arbitrator framed the issue as whether the Agency violated the parties' agreement or committed a ULP "when it failed to provide [the Union] with appropriate notice and an opportunity to bargain its proposed changes to Article 9 and Article 17 in midterm bargaining."[3] The Arbitrator stated that she referenced midterm bargaining because the grievance "addresses midterm bargaining as well as the general duty to bargain."[4]

The Arbitrator determined Article 9, Section 9.10, of the parties' agreement requires the Agency to give the Union notice and an opportunity to bargain when proposing a new performance system. The Arbitrator found the Agency failed to send notice of the proposed changes to the Union's chief negotiator – its designated representative – and thereby violated the parties' agreement and committed a ULP.

However, the Arbitrator concluded the Agency did not violate Section 9.10 when it failed to give the Union an opportunity to bargain midterm. The Arbitrator noted Section 9.10 "does not address whether

[1] Award at 2.
[2] *Id.*
[3] *Id.* at 3.
[4] *Id.* at 2.

[the required] bargaining will be a midterm negotiation or in term bargaining."[5]

Next, the Arbitrator addressed Article 53, which concerns midterm bargaining. She found Article 53 presents "procedural hurdles" and the parties' circumstances "do[] not fit" within the terms of that article.[6] In that regard, the Arbitrator found that Section 53.01 "provides strict time limits on when provisions can be reopened for midterm bargaining,"[7] and that the parties agreed it did not apply to their circumstances.[8] The Arbitrator also found that, in Section 53.02, the Agency agreed "not to unilaterally establish or change any personnel policy, practice[,] or condition of employment which terminates or conflicts with specific terms or conditions of" the parties' agreement.[9] The Arbitrator found the Agency acted "[i]n accordance with" that article because it did not implement the changes and it offered to bargain "at the term table."[10]

In addition, the Arbitrator determined Section 53.02(1) did not apply, because it concerns amendments to the parties' agreement that result from new laws or changes to existing laws – which are not at issue here. As for Section 53.02(2), the Arbitrator found that provision "addresses new personnel policies, practices[,] or conditions of employment '*not* controlled by the terms of'" the parties' agreement.[11] Because Article 9 addresses performance appraisals and Article 17 addresses awards programs, the Arbitrator found the proposed changes were "covered by the [a]greement" and, thus, "not expressly covered by the reopening provisions of Article 53."[12]

The Arbitrator noted that both parties agreed the Agency had an obligation to bargain over the impact and implementation of the proposed changes before implementing them. In this regard, the Arbitrator stated:

> While [the Union] has not established a basis to proceed with midterm bargaining pursuant to Article 53, it has raised legitimate concerns about its ability to bargain over Articles 9 and 17 at the term table under the current ground rules. In order to permit bargaining over the implementation and impact of [the Agency's] plan to [make the changes at issue], both parties need to agree to modify the ground rules for term bargaining to permit negotiations over Article 9 and 17. The Union will do so *if* it continues to seek to bargain over the implementation and impact of the changes . . . . The Agency will do so because it has an obligation to engage in such bargaining before implementing its changes.[13]

Thus, the Arbitrator stated "[t]he parties may best comply with their respective bargaining obligations" by agreeing to modify their ground rules and that, "[t]hereafter, they should promptly bargain at the term table over the impact and implementation of the Agency's changes."[14]

Based on the foregoing, the Arbitrator concluded that the Union had not established that the Agency violated the parties' agreement or committed a ULP when it failed to enter into midterm bargaining pursuant to Article 53.

The Union filed exceptions to the award on March 31, 2022, and the Agency filed an opposition to the exceptions on April 26, 2022.

III. Preliminary Matters

A. The Agency's request to modify the award is not timely raised.

In its opposition, the Agency argues the Authority should modify the award to remove the requirement to bargain ground rules.[15] To the extent the Agency is excepting to the award, § 7122(b) of the Federal Service Labor-Management Relations Statute states that exceptions to an arbitrator's award must be filed "during the [thirty]-day period beginning on the date the award is served on the party."[16] The Authority's Regulations prohibit extension or waiver of this time limit.[17] Because the Agency did not file its opposition within thirty days of service of the Arbitrator's award, its request to modify the award is not timely raised, and we do not consider it.

---

[5] *Id.* at 12.
[6] *Id.*
[7] *Id.* at 13. Section 53.01 provides, in pertinent part: "This Agreement shall provide for mid[]term negotiations when during the thirty (30) day period beginning with the eighteenth (18th) month and ending with the beginning of the nineteenth (19th) month after the effective date of this Agreement, either Party may reopen negotiations up to four (4) articles." *Id.* at 4.
[8] *Id.* at 12.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 13 (emphasis added).
[12] *Id.*
[13] *Id.* at 14 (emphasis added).
[14] *Id.*
[15] Opp'n Br. at 8.
[16] 5 U.S.C. § 7122(b).
[17] 5 C.F.R. § 2429.23(d).

B. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Union's submission of the parties' ground rules.

To support its exceptions, the Union submitted a copy of the parties' ground rules.[18] Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider evidence that could have been, but was not, presented to the arbitrator.[19] At arbitration, the Union made arguments about the parties' ground rules[20] and, thus, could have submitted a copy of those ground rules to the Arbitrator. It did not do so – and, in fact, both parties acknowledge that the ground rules were not part of the record before the Arbitrator.[21] Thus, §§ 2425.4(c) and 2429.5 bar the Union from submitting them on exceptions, and we do not consider them.

IV. Analysis and Conclusions

A. The award draws its essence from the parties' agreement.

The Union argues the Arbitrator's direction to negotiate modified ground rules fails to draw its essence from the parties' existing ground rules and from Article 53 of the parties' agreement.[22]

The Authority will find an award fails to draw its essence from the parties' agreement when the excepting party establishes the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[23] The Authority has held that arbitrators have wide discretion to fashion remedies.[24]

With regard to the Union's reliance on the parties' existing ground rules, as discussed above, those ground rules are not properly before us. Further, the Union's only argument regarding the ground rules is that "no plausible interpretation" of them would result in the award.[25] As for the Union's reliance on Article 53, the Union states only that the Arbitrator's interpretation is "unfounded in reason and fact."[26] The Union's conclusory statements provide no basis for finding the Arbitrator's interpretations to be irrational, implausible, unfounded, or in manifest disregard of the ground rules or Article 53. Therefore, we deny the essence exception.[27]

B. The Arbitrator did not exceed her authority.

The Union asserts the Arbitrator exceeded her authority in several respects.[28] As relevant here, arbitrators exceed their authority when they: resolve an issue not submitted to arbitration;[29] award a remedy without finding a violation of law or contract;[30] or disregard specific limitations on their authority.[31] However, arbitrators do not exceed their authority when their awards are directly responsive to the issues they have framed.[32] Further, the Authority has held that arbitrators have broad discretion to fashion remedies they consider appropriate.[33]

First, the Union argues the Arbitrator addressed an issue that was not submitted – specifically, how the parties' bargaining should be conducted, including a discussion of the parties' ground rules.[34] The Arbitrator framed the issue as whether the Agency violated the parties' agreement or committed a ULP "when it failed to provide [the Union] with appropriate notice and an opportunity to bargain its proposed changes to Article 9 and Article 17 *in midterm bargaining*."[35] The Arbitrator found the Agency failed to provide the Union with appropriate notice and stated that, for future changes that require bargaining, the Agency is required to provide notice to the correct Union official.[36] She also determined that the parties had a duty to bargain before the Agency could implement the changes at issue. In determining whether the Agency had a duty to bargain *midterm*, the Arbitrator necessarily discussed the circumstances under

[18] Exceptions, Attach. 4, Ground Rules.
[19] 5 C.F.R. § 2425.4(c); *id.* § 2429.5.
[20] *See* Award at 7, 9, 12.
[21] Exceptions Br. at 7; Opp'n Br. at 5.
[22] Exceptions Br. at 6-7.
[23] *AFGE, Loc. 446*, 73 FLRA 421, 421 (2023).
[24] *U.S. Dep't of VA, Boise Veterans Admin. Med. Ctr.*, 72 FLRA 124, 129 (2021) (*VA Boise*) (Member Abbott concurring on other grounds; Chairman DuBester dissenting in part on other grounds).
[25] Exceptions Br. at 7.
[26] *Id.*
[27] *See VA Boise*, 72 FLRA at 129 (denying exception that "failed to demonstrate how the remedy fails to draw its essence from the parties' agreement").
[28] Exceptions Br. at 7-12.
[29] *NFFE, Loc. 1998*, 73 FLRA 143, 144 (2022) (*Loc. 1998*).
[30] *U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 65 FLRA 969, 973 (2011).
[31] *Loc. 1998*, 73 FLRA at 144.
[32] *U.S. Dep't of the Navy, Naval Med. Ctr. Camp Lejeune, Jacksonville, N.C.*, 73 FLRA 137, 141 (2022) (*Camp Lejeune*); *NTEU, Chapter 66*, 72 FLRA 70, 71 (2021) (Chairman DuBester concurring; Member Abbott dissenting on other grounds).
[33] *Camp Lejeune*, 73 FLRA at 141.
[34] Exceptions Br. at 8-11.
[35] Award at 3 (emphasis added).
[36] *Id.* at 14-15.

which such bargaining could take place. Because the Arbitrator's discussion of the precise nature of the Agency's bargaining obligation – including how it was shaped by the parties' agreement and ground rules – flows from, and is directly responsive to, the issue she framed, she did not exceed her authority in this regard.[37]

Second, the Union argues the Arbitrator disregarded specific limitations on her authority by awarding a remedy the Union did not request in its post-hearing brief.[38] The Union notes that, in its post-hearing brief, it requested various relief and stated that "[t]he Union cannot be compelled to bargain over impact and implementation" of the changes.[39] To the extent the Union interprets the award as *compelling* it to bargain, the Arbitrator merely set forth the parties' bargaining obligations "*if* [the Union] continues to seek to bargain over the implementation and impact of the changes."[40] As such, the Union's argument mischaracterizes the remedy and provides no basis for finding the award deficient.[41] Further, to the extent the Union is arguing the Arbitrator could award only remedies listed in the Union's post-hearing brief, the Union cites no authority for that notion. Thus, we reject the Union's second argument.

Third, the Union argues the Arbitrator provided a remedy without finding a violation of law or contract.[42] For support, the Union cites *Veterans Administration*,[43] where an arbitrator exceeded his authority by issuing a remedy directing the agency to notify the grievant of vacancy announcements after upholding the grievant's termination and denying the grievance in its entirety.[44] In contrast, here, the Arbitrator found the Agency violated both the parties' agreement and law when it failed to provide proper notice.[45] Therefore, the Arbitrator did not provide a remedy without finding a violation of law or contract, and we reject the Union's third argument.

For the above reasons, we deny the Union's exceeded-authority exception.

V. Decision

We deny the Union's exceptions.

[37] *See NAIL, Loc. 10*, 71 FLRA 513, 515 (2020) (where award was "directly responsive" to arbitrator's framed issue, Authority denied exceeded-authority exception).
[38] Exceptions Br. at 11-12.
[39] *Id.* at 12.
[40] Award at 14 (emphasis added).
[41] *See AFGE, Loc. 2502, Council of Prison Locs. 33*, 73 FLRA 59, 61 (2022) (Chairman DuBester concurring) (denying exceeded-authority exception based on erroneous premise that arbitrator failed to resolve grievance's merits).
[42] Exceptions Br. at 12.
[43] 24 FLRA 447 (1986).
[44] *Id.* at 451.
[45] Award at 15.