88 FLRR 1-1081

Commander, Carswell Air Force Base, TX and AFGE, Local 1364

Federal Labor Relations Authority

0-AR-1380; 31 FLRA No. 37; 31 FLRA 620

February 23, 1988

Judge / Administrative Officer

Before: Calhoun, Chairman; McKee, Member

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Case Summary

INTEREST ARBITRATORS AND THE FSIP MAY APPLY SETTLED LAW TO RESOLVE NEGOTIABILITY DISPUTES. (1) The FLRA clarified that the FSIP and interest arbitrators may resolve negotiability disputes by applying existing Authority precedent. The Authority may review the application of its rulings. However, an interest arbitrator or the FSIP may not resolve negotiability issues which are a matter of first impression. They must defer to the Authority. When reviewing an arbitrator's application of existing precedent, the FLRA will ask: (1) was the proposal raised substantively identical to one previously addressed by the FLRA? (2) were the parties' contentions similar to the ones in the case cited as precedent? (3) did the arbitrator cite and discuss applicable FLRA and court precedent? and (4) are there any other considerations leading to the conclusion that the arbitrator did or did not correctly consider the duty to bargain issue? (2) The FLRA reviewed the interest arbitrator's action in imposing, over the union's objection, a clause that obliged the parties to bargain over the number and location of union stewards. The union argued that the matter was within its discretion under the CSRA and that it was a permissive subject of bargaining. The arbitrator did not discuss the union's contentions. The FLRA found that the arbitrator was obliged to address a nonnegotiability claim made by the union. Since he did not, the interest arbitration award was modified by striking the clause and the parties were directed to resume negotiations. (3) The interest arbitrator imposed a provision that required union stewards to handle grievances at Steps 1 and 2 of the negotiated procedure and required the union president or chief steward to process the grievance at Step 3. The union objected that this was a permissive subject of bargaining because it had the right to assign its representatives unilaterally if it chose. The FLRA

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noted a recent decision that allowed bargaining over the management officials to be assigned to respond at various stages of the negotiated grievance procedure. The Authority found an exception to management's statutory right to assign work. The Authority now found an exception to the union's statutory right to assign its representatives. The proposal was let stand.

Full Text

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Albert V. Carter filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Rules and Regulations. The award consists of a number of bench decisions issued by the Arbitrator on proposed contract articles submitted to him by the parties in an interest arbitration proceeding.

This case presents an issue as to the authority of an interest arbitrator to consider duty to bargain issues raised by a union. We conclude that interest arbitrators and the Federal Service Impasses Panel (the Panel) have the same authority under the Statute to consider duty to bargain issues which arise in a negotiation impasse. Interest arbitrators and the Panel may apply existing Authority case law in resolving impasses.

We conclude that the portion of the Arbitrator's award pertaining to the number and location of Union stewards in the workplace (Article 5, Section 1) is deficient because the Arbitrator did not have the authority to resolve the impasse as to that matter. Accordingly, we will modify that portion of the award by striking Article 5, Section 1, and we will order the parties to resume negotiations on that matter. We find that the Union's exceptions concerning other portions of the award provide no basis for finding those portions of the award to be deficient.

II. Background and Arbitrator's Award

The parties reached impasse in bargaining on a new collective bargaining agreement and requested the Panel to approve a procedure for binding mediation/arbitration to resolve the impasse. The Panel approved the parties' request. Thereafter, the parties selected Arbitrator Carter as a mediator-arbitrator to resolve the dispute.

After 1 day of mediation, the parties agreed that the mediation process was not effective in resolving their differences and decided to submit the disputed proposals to arbitration. They agreed that Arbitrator Carter would hold hearings to resolve, by bench decision, each of the proposed contractual articles in dispute. The Arbitrator determined the issue before him as follows:

Which of the Union's proposed contractual articles, if any, and which of the Employer's proposed contractual articles, if any, shall be accepted and considered binding on both parties?

During the afternoon of the second day of the mediation-arbitration proceeding, after the arbitration proceeding had begun, the Union's Chief Negotiator left the room, accusing the Agency of "failing to negotiate in good faith." Arbitrator's Decision at 3. On the third day, the Union was represented for approximately 2 hours by its Vice President, who did not return to the hearing after a short break. Id. That afternoon, the Arbitrator received word that the Union's Chief Negotiator was ill and unable to attend any further meetings. The Union's Chief Negotiator did not claim illness at any time during his participation in the proceeding, nor did he notify the Arbitrator at any time during the second day that he would be unable to attend on the third day. Arbitrator's Decision at 5-6.

After receiving notification that the Union's Chief Negotiator would not attend the proceedings, the Arbitrator considered relevant factors relating to an ex parte proceeding, including the claim of illness and the Union's failure to request an adjournment or delay. The Arbitrator decided to continue the proceeding in the absence of the Union. Id. at 6.

Thereafter, the Arbitrator continued the proceeding under the format to which the parties had agreed. He required the Agency to submit each of the

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proposed articles in the same fashion as if the Union were present. The Arbitrator considered each proposal in turn, and reviewed the proposals submitted by the Union. The Arbitrator ordered that 19 articles submitted by the Agency -- in addition to the provisions previously agreed to by the parties -- be included in the parties' agreement.

The Union filed exceptions to the Arbitrator's award. The Agency did not file an opposition to the exceptions.

III. Discussion

A. Authority of an Interest Arbitrator to Address Duty to Bargain Issues.

Interest arbitrators are not authorized to make negotiability rulings in order to resolve questions concerning the duty to bargain under the Statute. Social Security Administration and National Council of SSA Field Operations Locals (NCSSAFOL), American Federation of Government Employees, AFL-CIO (AFGE), 25 FLRA 238 (1987) (SSA). In SSA, 25 FLRA at 239-40, the Authority stated:

In . . . cases involving allegations of nonnegotiability made in an interest arbitration proceeding, we will carefully examine the record of the case and the arbitrator's award. This examination will be made to determine whether the arbitrator made a negotiability ruling or whether the arbitrator merely applied existing Authority case law to resolve the impasse. In the event of the former action, the award will be set aside. . . In the latter, we will resolve the exceptions on the merits and sustain the award if existing case law is correctly applied.

In cases where the award is set aside because an interest arbitrator improperly asserted jurisdiction over and decided a duty to bargain question, we may require the parties to resume negotiations over the matter. United States Department of Agriculture, Food and Nutrition Service, Midwest Region and National Treasury Employees Union, 28 FLRA 580, 583 (1987).

If a proposal raising a duty to bargain issue is presented to an interest arbitrator and that issue cannot be resolved on the basis of existing Authority case law, the arbitrator may not impose that proposal. If the arbitrator determines that he or she can resolve the duty to bargain issue and does so in an award, we will consider the following questions in order to determine whether the arbitrator applied existing Authority case law in resolving an impasse: (1) was the proposal raising the duty to bargain issue substantively identical to one which was previously addressed by the Authority? (2) were the parties' contentions before the arbitrator similar to ones addressed by the Authority in previous cases? (3) did the arbitrator cite and discuss applicable Authority case law and other relevant precedent? and (4) are there any other considerations which lead to a conclusion that the arbitrator correctly or incorrectly considered the duty to bargain issue?

We expect interest arbitrators, when presented with claims that matters are outside the duty to bargain, to consider these questions and to address them in their awards in order to provide the parties and the Authority with the basis on which they have resolved the claim. The parties likewise have an obligation to provide interest arbitrators with relevant precedent on particular duty to bargain issues. Consistent with our case law as set forth above, if exceptions to an interest arbitration award are filed with the Authority, we will examine the record to determine whether the arbitrator applied existing Authority precedent to resolve an impasse. If an examination of the award supports the conclusion that the arbitrator applied existing precedent, we will resolve the exceptions on the merits by determining whether the arbitrator correctly applied the precedent.

B. Authority of the Federal Service Impasses Panel to Address Duty to Bargain Issues

Duty to bargain issues in connection with the resolution of negotiation impasses can arise not only before interest arbitrators, but before the Federal Service Impasses Panel as well. The Panel's role in resolving negotiation impasses is an important one for the effectuation of a successful Federal sector labor-management relations program. It is also

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important that the labor-management community understand the obligations and limitations relating to the appropriate procedures to resolve impasses which include duty to bargain issues. Accordingly, we set forth here our view as to the Panel's authority in this area.

In Interpretation and Guidance, 11 FLRA 626 (1983), the Authority concluded that the Panel's authority under section 7119 of the Statute to assist the parties in resolving an impasse through whatever methods of procedures the Panel considers appropriate did not include resolving questions concerning the underlying obligation to bargain. Subsequently, the Authority stated that interest arbitrators have the same authority as the Panel in resolving these issues. Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and American Federation of Government Employees, Council of Locals, No. 214, 18 FLRA 710, 711 (1985).

The view that the resolution of duty to bargain issues arising in the context of specific proposals is a matter reserved to the Authority under the Statute has been affirmed in the courts. For example, in American Federation of Government Employees v. FLRA, 778 F.2d 850, 854 (D.C. Cir. 1985), the court stated that issues of negotiability are to be resolved by the Authority, not the Panel. Similarly, in Department of Defense, Army Air-Force Exchange Service v. FLRA, 659 F.2d 1140, 1146 at n.32 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1983), the court noted that in determining the negotiability of disputed proposals properly brought before it under section 7117(c), the Authority must determine whether union proposals, as they are actually drafted, satisfy the negotiability standards of the Statute. For the reasons discussed below, we conclude that not every claim in an impasse resolution proceeding that a proposal is outside the duty to bargain must be addressed by the Authority instead of the Panel or an interest arbitrator.

There is now a substantial body of Authority precedent resolving numerous duty to bargain issues. That precedent is intended to provide guidance not only to the parties to the bargaining process, but also to third parties like the Panel and interest arbitrators whose function is to resolve negotiation impasses. In our view, the purposes of the Statute are best furthered by encouraging third party consideration and application of this precedent so as to assist in the resolution of negotiation impasses which raise substantively identical duty to bargain issues to those already decided by the Authority. No useful purpose is served by requiring the Panel or interest arbitrators to refrain from applying precedent merely in order to permit the Authority to address a substantively identical proposal which varies slightly in wording from a proposal previously addressed by the Authority. Accordingly, not every claim in an impasse resolution proceeding that a proposal raises a duty to bargain issue must be brought to the Authority for resolution. In the circumstances outlined above, a proposal as to which such claims are made may be resolved by the Panel or an interest arbitrator without requiring the Authority to consider the proposal.

We believe that the Panel and interest arbitrators have the same authority under the Statute to consider duty to bargain issues which arise in the negotiation impasse. That is, if the Panel can resolve an impasse relating to a proposal concerning a duty to bargain issue by applying existing Authority case law, the Panel may do so. In our view, this approach is consistent with the Statute because it encourages prompt resolution of impasses involving duty to bargain issues which have already been ruled on by the Authority. This approach also preserves the Panel's discretion as to whether or not to assert jurisdiction, and, as intended by the Statute, ensures that undecided duty to bargain issues will be resolved by the Authority.

IV. First Exception

A. Contentions

The Union contends that the award of the following portion of Article 5, Section 1 is contrary to law:

The number and location of Stewards will be

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subject to mutual agreement between the Employer and the Union so that the employees will have access to a Steward in their working area.

The Union contends that this provision is contrary to law because it involved the designation of Union representatives, a right reserved to the Union under the Statute. The Union contends that it chose not to bargain on this provision, which was proposed by management. Therefore, the Union claims that the Arbitrator exceeded his authority when he required the parties to incorporate this provision in their contract. The Union contends that only the Authority "can resolve negotiability disputes." Union's Exceptions at 1.

B. The Union's Claim of Nonnegotiability

The Union's exception in this case presents the issue whether the authority of an interest arbitrator to resolve duty to bargain issues depends on whether the claim of nonnegotiability is made by an agency or a union. We conclude that it does not.

The principles discussed above concerning the extent of an arbitrator's authority in this area apply equally to claims of nonnegotiability made by unions as well as to claims made by agencies. In our view, nothing in the Statute warrants a finding that an arbitrator' authority to resolve duty to bargain questions raised by a union differs from the arbitrator's authority when the questions are raised by an agency. We conclude that an arbitrator's authority to resolve duty to bargain issues is the same whether the issues are raised by agencies or unions.

Where exceptions to interest arbitration awards raise either union or agency claims that an arbitrator's award improperly addressed a duty to bargain issue, we will apply the principles discussed above. We note that in SSA, 25 FLRA at 243-44, with regard to a union's claim that an arbitrator improperly ruled on a negotiability matter, the Authority stated that under section 7117(c)(1) of the Statute only an agency may make an allegation of nonnegotiability and therefore the arbitrator did not make an improper negotiability determination. To the extent that that statement suggests that union claims of nonnegotiability will be treated differently from agency claims in the resolution of exceptions to interest arbitration proceedings, it will no longer be followed.

C. Whether the Arbitrator Correctly Addressed the Union's Claim of Nonnegotiability

We find that the portion of the award relating to Article 5, Section 1 is deficient. The Union claims, without challenge, that it asserted during the arbitration proceeding that this section was "nonnegotiable as being a right reserved to the [U]nion," and that the Arbitrator, in spite of the Union's claim, imposed this provision on the parties.

As we noted above, in cases involving duty to bargain questions which arise in an interest arbitration proceeding, we will carefully examine the record in the case, including the arbitrator's award, to determine whether the arbitrator applied existing case law in resolving the issue. In this case, the Arbitrator did not address the Union's claim in this decision, did not address any relevant Authority precedent, and did not provide any reasons for imposing this provision on the parties. We find, therefore, that by imposing Article 5, Section 1 on the parties, the Arbitrator resolved a negotiability dispute between the parties, contrary to an arbitrator's authority under the Statute. Accordingly, we will modify the award by striking Article 5, Section 1, and will order the parties to resume negotiations on the matter addressed in this provision. Insofar as Article 5, Section 1 concerns the designation of union representatives, the parties should refer to applicable Authority precedent, including American Federation of Government Employees, AFL-CIO, 4 FLRA 272 (1980).

V. Second Exception

A. Contentions

The Union contends that the award of Article 13, Section 6, Steps 1, 2, and 3 is contrary to section 7121 of the Statute because this procedure restricts the processing of grievances to certain Union officials. For example, this provision requires Union stewards to handle grievances at Steps 1 and 2, and requires the

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Union president or chief steward to process grievances at Step 3. The pertinent text of Article 13 is set forth in the Appendix.

B. Discussion

We conclude that the Arbitrator's award with respect to Article 13, Section 6, Steps 1, 2, and 3 is not contrary to law.

In National Federation of Federal Employees, Local 29 and Department of Defense, HQ, U.S. Military Entrance Processing Command, 29 FLRA 726 (1987) (Provision 1), the Authority found negotiable a provision which prohibited management officials from delegating authority to decide a grievance to an official who had decided the issue at a previous step. The Authority held that the "requirement of section 7121 that the parties' mandatory grievance procedure be negotiated carves out an exception to management's right to assign work under section 7106(a)(2)(B) of the Statute." Id. at 728. The Authority noted that the intent of the provision was to negotiate on the structure of the grievance procedure; that is, to ensure that different officials consider a grievance at successive steps of the procedure. The Authority also found that the provision was "consistent with the intent of Congress that the parties' grievance procedure be a negotiated procedure." Id. at 729.

We find that Article 13, Section 6, Steps 1, 2, and 3, like the provision in U.S. Military Entrance Processing Command, concerns the structure of the grievance procedure. In our view, the rationale applied in U.S. Military Entrance Processing Command is applicable to this case. We find, therefore, that in this limited circumstance -- when parties are negotiating over the structure of the grievance procedure -- a union's right to designate its representatives is subject to the requirement of section 7121 of the Statute that the parties negotiate over the structure of grievance procedures. Accordingly, the exception must be denied.

VI. Third Exception

A. Contentions

The Union contends that certain other sections of the award, namely Article 5, Section 3; Article 13, Section 2; and Article 28, Section 12, are contrary to law. The text of these provisions is set forth in the Appendix.

B. Discussion

We find that the Union's exception provides no basis for finding that award deficient. The Union objects to Article 5, Section 3 because it allows management to deny the Union's request for official time when the workload requires the presence of employees or Union representatives at the worksite. The Union asserts that the provision is contrary to Authority precedent dealing with official time.

The Union's assertion is without merit. The Authority has explained that an exclusive representative is not entitled to an allocation of official time without regard to management's needs and requirements regarding the performance of its assigned work. See Overseas Federation of Teachers and Department of Defense Dependent Schools, Mediterranean Region, APO New York, 21 FLRA 640 (1986). See also U.S. Small Business Administration and American Federation of Government Employees, Local 2532, 30 FLRA 75 (1987). Article 5, Section 3, which allows the Agency to consider its workload requirements when granting requests for official time, is not contrary to law.

The Union also alleges that Article 13, Section 2 which defines "grievance," is contrary to the definition of grievance in 5 U.S.C. Section 7103(a)(9). However, the Union has failed to show how the provision is contrary to section 7103(a)(9). Further, as to the Union's assertion that Article 28, Section 12, which provides for advanced sick leave, is contrary to 5 U.S.C. Section 6307(c), we find that the provision is consistent with law. Section 6307(c) of Title 5 of the United States Code provides: "When required by the exigencies of the situation, a maximum of 30 days sick leave with pay may be advanced for serious disabilities or ailment[.]" Section 12 of Article 28 similarly provides for advanced sick leave up to 30 days and also establishes the conditions

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under which the Agency will grant a request for sick leave. The provision is consistent with 5 U.S.C. Section 6307(c) because it allows the Agency to determine when and whether the grant of sick leave is required by the "exigencies of the situation."

VII. Fourth Exception

A. Contentions

The Union contends that the Arbitrator denied the Union a fair and impartial hearing by (1) conducting the hearing in an arbitrary and capricious manner; and (2) refusing to delay the hearing in spite of the Union representative's claim of illness.

B. Discussion

We conclude that this exception fails to establish that the award is deficient. As the Authority has previously indicated, an arbitration award will be found deficient if it is established that the arbitrator failed to conduct a fair hearing. U.S. Department of Labor and American Federation of Government Employees, Local No. 644, NCFLL, 12 FLRA 639, 641 (1983). There is nothing in the record before us to indicate that the Arbitrator acted improperly so as to deny the Union a fair hearing. It is well established that an arbitrator has considerable latitude in the conduct of a hearing. The fact that the Arbitrator conducted the hearing in a manner which one party finds objectionable does not support a contention that the Arbitrator denied the party a fair hearing. U.S. Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, Local No. 547, 24 FLRA 959 (1986).

As to the Union's claim that the Arbitrator denied it a fair hearing by refusing to delay the hearing, the record shows that the Arbitrator considered the circumstances surrounding the Union Chief Negotiator's absence from the hearing, and, after finding that no request for adjournment or delay had been made by either party, decided to continue the hearing. Further, awards resulting from ex parte hearings have been sustained by the Authority on the rationale that since the losing party had a chance to be heard but refused to participate, it should not later complain because it chose to stay away. See, for example, Warner Robins Air Logistics Center, Department of the Air Force, Warner Robins, Georgia and American Federation of Government Employees, Local No. 987, 24 FLRA 968 (1986).

Therefore, we find that the Union's exception constitutes nothing more than disagreement with the Arbitrator's determination. Once the parties to a collective bargaining agreement submit the subject matter of a dispute to arbitration, procedural questions which grow out of the dispute and bear on its resolution should be left to the arbitrator. Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO, 27 FLRA 706, 710 (1987). Thus, it is properly the function of the Arbitrator to determine whether a proceeding should be delayed. Accordingly, this exception must be denied.

VIII. Fifth Exception

A. Contentions

The Union contends that the Arbitrator exceeded his authority by: (1) failing to consider the Union's proposals; (2) allowing management to introduce new material; and (3) deleting sections previously agreed to by the parties.

B. Discussion

The Union has failed to establish that the Arbitrator's award is deficient. The Union is attempting to relitigate the merits of the case before the Authority and the thrust of the Union's exception constitutes mere disagreement with the Arbitrator's resolution of the issues before him. This disagreement provides no basis for finding an award deficient under the Statute. See American Federation of Government Employees and Social Security Administration, 25 FLRA 173, 177 (1987). Accordingly, this exception must be denied.

IX. Decision

The portion of the Arbitrator's award concerning Article 5, Section 1 is set aside. With respect to this

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provision, we order that the parties resume negotiations on the matter addressed in Article 5, Section 1. The remaining exceptions are denied.

Issued, Washington, D.C., February 23, 1988.

Jerry L. Calhoun, Chairman Jean McKee, Member FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

Article 5, Union Representation

Section 3. Should it be necessary for a Union Representative to leave the work area, he/she must request permission from their immediate supervisor or designee and must schedule any meeting/visitors as far in advance as possible with the supervisor in the section to be visited. The Representative will give his/her supervisor as much notice as possible when requesting permission to leave the work area. permission will be granted unless an emergency or workload requirement requires the presence of the Union Representative or the employee to accomplish their normal duties. The Representative must report to his/her immediate supervisor or designee as soon as he/she returns to work area and annotate the amount of time and purpose for which the time was used on the Use of Official Time for Representational Functions, AF Form 1510. The Union agrees that representatives will guard against the use of excessive time in performing duties considered appropriate by this agreement.

Article 13, Grievance Procedures

Section 2. A grievance is defined to be any dispute or complaint between the Employer and the Union or an employee or employees covered by this agreement; which may pertain to any of the following:

(1) Any matter involving the interpretation, application, or violation of this agreement.

(2) The Employers interpretation and application of Agency policies, regulations, and practices affecting working conditions not specifically covered by this agreement. The right to grieve does not extend to the content of the regulations, but only to its interpretation and application by the Employer.

Section 6. - Step 1 - The grievance will first be taken up orally by the concerned employee or steward with the appropriate supervisor in an attempt to settle the matter. Grievances must be presented within fifteen (15) calendar days from the date the employee or the Union became aware of the grievance. The steward may be present if the employee so desires. However, if an employee(s) presents a grievance directly to the Employer for adjustment consistent with the terms of this agreement, the Union shall have an observer present on official time.

Step 2 - If the matter is not satisfactorily settled following the initial discussion, the steward may, within five (5) working days, submit the matter in writing to the squadron commander or equivalent. The grievance must contain the specific nature of the complaint; time, date, place, and the corrective action must be personal to the grievant(s). The squadron commander or equivalent or his representative will meet with the steward and the aggrieved employee(s) within five (5) working days after receipt of the grievance. The squadron commander or equivalent will give the steward his written answer within five (5) working days after the meeting.

Step 3 - If the grievance is not settled by the squadron commander, the Union President or Chief Steward may, within five (5) working days, forward the grievance to the Group Commander for further consideration. The Group Commander or his designee will review the grievance and give the Union President or Chief Steward his written answer within fifteen (15) working days after receipt of the grievance.

Article 28, Leave

Section 12. Advanced sick leave up to thirty (30) days may be granted subject to following conditions: (1) total employment record and past record of sick leave usage justifies such action; (2) the absence from duty because of illness is for a period of five (5) or more consecutive work days; (3) the application for

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leave (Standard Form 71) is supported by a medical certificate containing clear and comprehensive explanation of the illness; (4) the circumstances are such that repayment to the Employer of the advanced leave can reasonably be expected; (5) employee is serving under a career or a career conditional appointment and has been under the Civil Service Retirement Act for one year or more.

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