

87 FLRR 1-1017

**Social Security Administration and  
National Council of SSA Field Operations  
Locals (NCSSAFOL), AFGE**

**Federal Labor Relations Authority**

0-AR-1167; 25 FLRA No. 17; 25 FLRA 238

**January 20, 1987**

**Judge / Administrative Officer**

**Before: Calhoun, Chairman; Frazier, McKee,  
Members**

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**Case Summary**

FLRA REVIEWS INTEREST ARBITRATION AWARD. (1) The FLRA reiterated that an interest arbitrator lacked statutory authority to make negotiability determinations. However, where an interest arbitrator merely applies existing Authority precedent to resolve an impasse, the Authority will sustain the award if the precedent is correctly applied. In the subject case, the interest arbitrator found [87 FLRR 1-5001] that an accommodation for pregnant video display terminal operators was an exception to management's rights to assign work and employees. The Authority found that there was no clear precedent on the matter. Therefore, the arbitrator's award was deficient in this respect. (2) The interest arbitrator's award provided for reopening of the contract within 60 days if the union membership failed to ratify it. The agency contended that the provision was inconsistent with the FSIP's obligation under 5 USC 7119(c)(5)(B) to render final decisions. The FLRA disagreed. (3) The interest arbitrator's award requiring the employer to implement provisions of the negotiated agreement not disapproved pursuant to Section 7114(c) review was proper. (4) The union objected to the portion of an interest arbitrator's award which it considered to be a partial waiver of its right to obtain information pursuant to 5 USC 7114(b)(4). The union alleged that the provision was nonnegotiable. The FLRA found that only the agency

could make allegations of nonnegotiability under 5 USC 7117(c)(1). Furthermore, the provision stated that it did not constitute a waiver of statutory rights. The provision was merely a procedure by which information could be obtained by the union. It allowed management to sanitize information for privacy reasons and to withhold information that was burdensome or unwieldy. (5) The interest arbitrator did not exceed his authority by deciding that the union's proposals concerning office space and equipment should be rejected because they were inconsistent with the national agreement. This question was central to all determinations made with regard to this supplemental agreement. (6) The FLRA found that the issue of the termination of all alternative work schedules was timely raised before the interest arbitrator. Therefore, the provision requiring such action was proper.

## Full Text

### DECISION

#### I. Statement of the Case

This matter is before the Authority on exceptions to the award of Arbitrator James P. Whyte filed by the Agency and by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

#### II. Background

The parties reached an impasse in bargaining on a supplemental agreement and were directed by the Federal Service Impasses Panel (the Panel) to submit their dispute to mediation/arbitration. The Arbitrator was given authority by the Panel to issue a final decision on the outstanding issues. The Arbitrator made his award on May 6, 1986 and issued a supplemental award on June 4, 1986. Both parties filed exceptions to various portions of the award as set forth below.

#### III. Agency Exceptions

##### A. First Exception

###### 1. Contentions

The Agency contends that the award of the following language of Article 9, Section 7.G.3. is contrary to the Statute:

Any pregnant VDT [Video Display Terminal] operator will be permitted to transfer upon request to another function during her pregnancy without adverse effect.

Specifically, the Agency contends that this part of the award is contrary to section 7105(a)(2)(E) because the Arbitrator resolved an issue relating to the duty to bargain and such issues may be resolved by the Authority only. Additionally, the Agency contends that the award is contrary to the rights to assign work and employees under section 7106(a)(2).

In its opposition, the Union contends that the Arbitrator did not make a negotiability determination but only decided that an exception to management's right to assign employees was appropriate in this situation to protect the health and safety of pregnant VDT operators. The Union contends that the award is not contrary to section 7106(a)(2) because the provision constitutes an arrangement for employees adversely affected by the exercise of a management right.

#### 2. Analysis and Conclusion

The Authority has consistently ruled that negotiability disputes which arise between an agency and an exclusive representative under section 7117(c) of the Statute must be resolved by the Authority as required by section 7105(a)(2)(E). 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 No. 81 (1985); Louis A. Johnson Veterans Administration Medical Center, Clarksburg, West Virginia and American Federation of Government Employees, Local 2384, 15 FLRA 347 (1984). The Authority has held on this basis that an interest arbitrator acting pursuant to a direction of the Federal Service Impasses Panel does not have authority to resolve such duty-to-bargain issues. AFLC, Wright-Patterson Air Force Base.

The Authority also held in the cited cases that when an agency has asserted to an interest arbitrator that a proposal is not negotiable by reason of section 7106(a) of the Statute, the Arbitrator is not authorized to resolve the issue and his award on that issue is deficient. In this and future 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 accordance with *Louis A. Johnson V.A. Medical Center*. In the latter, we will resolve the exceptions on the merits and sustain the award if existing case law is correctly applied.

In this case, the Arbitrator states in his award that the Agency claimed that the proposal concerning accommodations for pregnant VDT operators was not negotiable but he included the proposal in the agreement as an "exception" to management's right to assign work. There is no clear Authority precedent on this issue. Accordingly, since the Agency asserted its claim of nonnegotiability, the Arbitrator did not have the authority to resolve the impasse on this issue and his award is deficient to that extent.

#### B. Second Exception

##### 1. Contentions

The Agency contends that the award of the following language of Article 7, Section 2 is contrary to section 7119(c)(5)(B) of the Statute:

In the event the union fails to ratify the Supplemental Agreement, the parties will meet within 60 days to renegotiate those portions specified by the union.

The Agency contends that this requirement is contrary to the Panel's power to take final action to resolve an impasse and that it is contrary to the Panel's direction to the Arbitrator that he resolve the issues not resolved by mediation by "issuing a final

decision."

The Union in its opposition maintains that there is no violation of section 7119(c)(5)(B) because the award is consistent with the Panel's directions and provides for subsequent procedures to be followed only if ratification is not obtained. The Union also points out that the parties' ground rules for negotiating the supplemental agreement include a provision that "the agreement will be subject to ratification by the Locals."

#### 2. Analysis and Conclusion

We find that the Agency fails to show that the disputed portion of the award is contrary to section 7119(c)(5)(B). There is nothing in the Statute which prohibits the parties from including a provision for Union ratification of an agreement before it becomes final and the Authority has held that ratification of a tentative agreement by a union's membership may be a precondition to a binding agreement. See *U.S. Department of Commerce, Bureau of the Census and American Federation of Government Employees, Local 2782, AFL-CIO, 17 FLRA 667 (1985)*. In this case, the parties' ground rules provide for ratification by the Union locals and the Arbitrator's award is consistent with that agreement. Consequently, we find that the provision allowing the reopening of the agreement in the event the Union fails to ratify the agreement is not contrary to section 7119(c)(5)(B) and the Agency's second exception provides no basis for finding the award deficient.

#### C. Third Exception

##### 1. Contentions

The Agency contends that the award of the following highlighted language of Article 7, Section 2 is contrary to section 7114(c):

If the Agency Head disapproves any portion of this Agreement, the parties will meet within 60 days to reopen negotiations on all affected provisions.  
**IMPLEMENTATION OF THE REMAINING PROVISIONS WILL NOT BE DELAYED.**

An allegation by either party that there is no duty to bargain on a specific proposal SHALL NOT

## DELAY IMPLEMENTATION OF THE REMAINING PROVISIONS.

The Agency contends that once an agreement has been disapproved by the agency head, there is no duty to implement other parts of the agreement.

The Union contends in its opposition that there is no statutory requirement to delay implementation of provisions to which no allegation of nonnegotiability has been made. Further, the Union maintains that section 7114(c) does not prohibit implementation by the parties of those provisions of an agreement not specifically disapproved by an agency head.

### 2. Analysis and Conclusion

We find that the Agency's third exception fails to show that the award is contrary to section 7114(c). Both parties cite in support of their position, the Authority's decision in Department of the Interior, National Park Service, Colonial National Historical Park, Yorktown, Virginia, 20 FLRA No. 65 (1985). In that decision, the Authority held essentially that under section 7114(c), "the agreement," not a portion of the agreement, must be approved by the agency head before the agreement goes into effect and becomes enforceable. *Id.*, at page 5 of the Decision. However, as the Union points out, the Authority also added that the parties could agree to implement all provisions of their local agreement not specifically disapproved by the agency head. *Id.* at page 5, n.6. In this case, the Arbitrator, as part of this final award resolving the parties' impasse, ordered implementation of the provisions which are not disapproved by the Agency head or not alleged to be outside the duty to bargain. This provision is not inconsistent with section 7114(c) and the Agency's third exception provides no basis for finding the award deficient.

## IV. Union Exceptions

### A. First Exception

#### 1. Contentions

The Union contends that the award of the following language of Article 2, Section 1.A. is contrary to section 7114(b)(4) of the Statute:

### Section 1A - Information Requests

Union agrees to make reasonable efforts to be specific in identifying the areas of information desired, when requesting information under 5 USC 71.

When feasible and consistent with the union right to information under law, employee data will be sanitized in the interest of protecting individual privacy. Union representatives are responsible for maintaining the confidentiality of personnel data made available to them in accordance with applicable law, rule and regulation.

The parties agree that management is not obligated to provide information that it previously provided.

The parties agree that management is not obligated to provide information which is burdensome and/or unwieldy.

The Union maintains that this provision abridges its right to obtain necessary information under section 7114(b)(4) and that it constitutes a waiver of its rights. The Union further contends that the award of this provision over which it had elected not to bargain constituted an improper negotiability determination by the Arbitrator.

The Agency denies that the provision imposes any illegal restrictions on the Union's right to obtain information and argues that it only requires the Union to be reasonably specific in its requests. The Agency maintains that the Union's rights under law are protected by the language of the agreement, particularly Article 2, Section 13 which states "[n]othing in this Article constitutes a waiver of union rights under 5 U.S.C. 7114."

### 2. Analysis and Conclusion

The Union's first exception fails to demonstrate that the award is contrary to section 7114(b)(4) of the Statute. It is well established that the Union is entitled, upon request, to information which meets the requirements of that section. Bureau of Alcohol, Tobacco and Firearms, National Office and Western Region, San Francisco, California, 8 FLRA 547

(1982). However, the Authority has held that section 7114(b)(4) does not preclude the parties from establishing procedures for furnishing information to an exclusive representative. Department of Defense Dependents Schools, Washington, D.C. and Department of Defense Dependents Schools, Germany Region, 19 FLRA No. 96 (1985). In this case, we find that the Arbitrator's award concerning information requests does not deprive the Union of its rights to request and receive information under section 7114(c) of the Statute. We further note, with regard to the Union's claim of nonnegotiability, that under section 7117(c)(1) of the Statute, only an agency may make an allegation of nonnegotiability. Veterans Administration Medical Center, Salisbury, North Carolina and American Federation of Government Employees, AFL-CIO, Local 1738, 2 FLRA 405 (1980). The Statute does not sanction allegations of nonnegotiability by the Union. The Arbitrator therefore did not make an improper negotiability determination as alleged. We further find that there was no waiver of any rights of the Union under section 7114 because the agreement provision in Article 2, Section 13 plainly states that there is no waiver of those rights. The Union's first exception provides no basis for finding the award deficient.

#### B. Second Exception

##### 1. Contentions

The Union contends with respect to the provisions of Article 2, Sections 1.A and 13 (quoted above), that the award is ambiguous and contradictory so as to make implementation impossible.

The Agency denies that the provisions are ambiguous or contradictory and argues that they are consistent with law.

##### 2. Analysis and Conclusion

We find that the Union's exception provides no basis for finding the award deficient. The Union fails to show that the award of the language in question is in any way ambiguous or contradictory so as to make implementation impossible. See, for example, U.S.

International Trade Commission, Washington, D.C. and American Federation of Government Employees, Local 2211, AFL-CIO, 13 FLRA 440 (1983). The Union's second exception must be denied.

#### C. Third Exception

##### 1. Contentions

The Union contends with respect to Article 11, Sections 1.A. (items 1, 2 and 3), 2.A., 2.B., 2.C., and 2.F., that the Arbitrator exceeded his authority by determining issues not included in the subject matter submitted to him. The Arbitrator rejected those Union proposals which concerned Union office space and equipment on the grounds that they were inconsistent with the national agreement and not appropriate for the supplemental agreement. The Union maintains that neither party made an allegation that the proposals were inconsistent with the national agreement.

In opposition, the Agency contends that the proposals were presented to the Arbitrator for a final determination and that he had the authority to resolve the issues presented.

##### 2. Analysis and Conclusion

We find that the Union's exception fails to show that the Arbitrator exceeded his authority by deciding an issue not before him. The Arbitrator was empowered by the Panel to resolve any issues not resolved in negotiating on the supplemental agreement by issuing a final decision. Central to all the issues presented was the issue of whether or not the provisions of the supplemental agreement were consistent with the master agreement. The Union is merely disagreeing with the Arbitrator's interpretation and application of the master agreement. National Treasury Employees Union and U.S. Nuclear Regulatory Commission, 12 FLRA 609 (1983). The Union's third exception provides no basis for finding the award deficient.

#### D. Fourth Exception

##### 1. Contentions

The Union contends that the following portion of

the Arbitrator's award adopting the Agency's counteroffer on flexitime is contrary to law:

All current flexitime, alternative work schedules, credit hour agreements, arrangements, and/or experiments in effect in AFGE offices will terminate on the date this agreement becomes effective.

The Union contends that adoption of this management proposal will abolish existing alternative work schedules (AWS) in approximately 30 field offices in the Atlanta Region without using the procedures required by 5 U.S.C. 6131 particularly section 6131(c)(3)(B).<sup>\*</sup> The Union maintains that the Agency's declaration of an "adverse impact" was not presented to the Arbitrator until the final day of the mediation/arbitration process, was never before the Panel for resolution, and was not within the authority of the Arbitrator.

In its opposition, the Agency argues that the matter was presented to the Arbitrator well before the final day of the proceeding and that alternative work schedules were a major area of dispute throughout the mediation process before both the Panel and the arbitrator. The Agency points out that (1) AWS plans in 14 of the Atlanta Regional offices were covered by a memorandum of understanding until superseded by a national master agreement or a national supplemental agreement; and (2) another group of 25 offices were covered by the Court's decision enforcing the Authority's decision in *Social Security Administration and American Federation of Government Employees, AFL-CIO*, 11 FLRA 390 (1983), enforced sub nom. *FLRA v. Social Security Administration*, 753 F.2d 156 (D.C. Cir. 1985). The Agency contends that the negotiation of a supplemental agreement at the national level constitutes negotiation on the termination of AWS at the appropriate level with the appropriate group.

#### 2. Analysis and Conclusion

We find that the Union fails to show that the Arbitrator's award adopting the Agency's counterproposal on flexitime is contrary to 5 U.S.C. 6131. After carefully considering the record before

us, we conclude that the matters of alternative work schedules and flexitime were presented as issues to the Arbitrator in timely fashion and were issues in the dispute which the Arbitrator was empowered to resolve. The Panel in its direction to the parties to submit their dispute to mediation/arbitration, authorized the Arbitrator to issue a final decision on "all outstanding issues." Accordingly, the Union's fourth exception provides no basis for finding the award deficient.

#### E. Fifth Exception

##### 1. Contentions

In its fifth exception, the Union contends that the Arbitrator exceeded his authority by considering and ruling on the abolition of AWS plans in regional offices because that issue was not included in the subject matter submitted to him.

The Agency contends in opposition that the issue of abolition of existing AWS plans already in existence was presented to the Arbitrator and submits copies of management proposals and comments which it maintains demonstrate that it presented the matter to the arbitrator.

##### 2. Analysis and Conclusion

The Union's fifth exception fails to show that the award is deficient on the ground that the Arbitrator exceeded his authority by ruling on the abolition of flexitime plans in the regional offices. The entire matter of flexitime and AWS was presented as one of the areas of impasse to be resolved, as noted with regard to the Union's fourth exception. Therefore, abolition of flexitime and AWS plans in the regions was properly an issue before him. The Union's fifth exception provides no basis for finding the award deficient.

#### V. Decision

In accordance with the above discussion, that portion of the Arbitrator's award concerning Article 9, Section 7.G.3. is set aside. The two remaining Agency exceptions and the five Union exceptions are denied.

Issued, Washington, D.C., January 20, 1987.

Jerry L. Calhoun, Chairman Henry B. Frazier III,  
Member Jean McKee, Member FEDERAL LABOR  
RELATIONS AUTHORITY

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\* 5 U.S.C. 6131(C)(3)(B) provides:

If the agency and exclusive representative reach  
an impasse in collective bargaining with respect to  
terminating such schedule, the impasse shall be  
presented to the Panel.