

92 FLRR 1-1101

**AFGE, Council of Marine Corps Locals
and Department of the Navy, U.S. Marine
Corps**

Federal Labor Relations Authority

0-AR-2108; 44 FLRA No. 45; 44 FLRA 543

March 24, 1992

Judge / Administrative Officer

**Before: McKee, Chairman, Talkin and
Armendariz, Members**

Related Index Numbers

**42.21 Scope of Bargaining, Permissive Subjects,
Case Law**

**44.945 Subjects of Bargaining, General Agreement
Provisions, Application of Agreement, Zipper
Clause**

**47.8611 Grievances/Grievance Arbitration,
Grievance Arbitration Award, Review, Grounds,
Violation of Law**

**72.54 Employer Unfair Labor Practices, Refusal to
Bargain in Good Faith, Insistence to Impasse on
Non-Mandatory Subject**

Case Summary

THE EMPLOYER DID NOT INSIST TO IMPASSE ON A PERMISSIVE SUBJECT OF BARGAINING. The arbitrator found that the employer had not insisted to impasse that the union agree to a zipper clause, a permissive subject of bargaining. He found that the union had not waived its right to initiate bargaining during the term of the agreement. The union appealed the finding that the employer had not committed a ULP. The Authority deferred to the arbitrator's finding that impasse had not been reached. Moreover, the contract signed by the parties had not included a zipper clause. The union's exception was dismissed.

Full Text

DECISION

I. Statement of the Case

This matter is before the Authority on exceptions

to an award of Arbitrator Jonathan E. Kaufmann 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 Agency filed neither exceptions to the award nor an opposition to the Union's exceptions.

A grievance was filed alleging that the Agency had violated section 7116(a)(1) and (5) and section 7131(a)*1 of the Statute, and Article 3 of the parties' collective bargaining agreement, by insisting to impasse that the Union agree to a zipper clause in the parties' agreement. As a remedy, the Union requested that "any language alleged to be a waiver of the [U]nion's bargaining rights be removed [from the negotiated agreement] or otherwise rendered moot with respect to a waiver of mid-term bargaining rights." Joint Exhibit 2 at 3.

The Arbitrator sustained the grievance in part, finding that the Union had not waived its right to bargain during the term of the agreement. The Arbitrator declined to award the remedy requested by the Union "since no reformation of the agreement is necessary." *Id.* at 16. For the following reasons, we conclude that the Union's exceptions provide no basis for finding the award deficient. Accordingly, we will deny the exceptions.

II. Background and Arbitrator's Award

Prior to negotiating the current Master Labor Agreement (MLA), the parties had an agreement that had been effective since April 1985 (1985 MLA). The preamble to the 1985 MLA stated:

Pursuant to the policy set forth by the Civil Service Reform Act of 1978 . . . the following articles of this Master Labor Agreement (MLA), together with any and all amendments which may be agreed to at later dates, constitute a TOTAL AGREEMENT between the United States Marine Corps (USMC) . . . and the American Federation of Government Employees.

Id. at 2 (emphasis in original). The 1985 MLA contained the following language in Article 5, Section 1:

Past practices pertaining to personnel policies, practices, and working conditions in operation on the effective date of this Agreement will continue if they comply with applicable law and regulations and they have not [been] altered or addressed by this MLA.

Id.

Negotiations for a new agreement commenced in early 1990. In May of that year the parties remained in dispute over whether the language of the preamble would constitute a zipper clause that would preclude further negotiations during the term of the agreement.

A Federal Mediation and Conciliation Service mediator suggested that the dispute over whether parts of the new agreement would constitute a zipper clause was nothing more than a legal argument as to whether language in the contract constituted a waiver of the Union's right to bargain during the term of the agreement. Consequently, he proposed that, rather than reach impasse on that issue, the parties sign the management proposal and at the same time enter into a memorandum of understanding (MOU), which they did.

The parties then executed an agreement with a preamble containing the same "total agreement" language that appeared in the 1985 MLA. They also included the same past practice provision. Language was added to Article 4, Section 3, that provided:

When a mid-term bargaining right/obligation exists under law, such mid-term bargaining shall be conducted in accordance with the following ground rules.

Id. at 3. This section also set out ground rules for mid-term negotiations over various issues. The MOU, executed at the same time, provided as follows:

The parties acknowledge that they have a dispute as to their respective bargaining right[s] and obligations under law. Accordingly, they further acknowledge and agree that, by the agreements reached [in] the preamble, Articles 4 and 5 of the MLA, neither party is waiving any legal argument it may have concerning its bargaining rights and obligations under law (including the right of Union to

initiate bargaining during the term of the MLA).

Id.

On June 6, 1990, the Union filed a grievance alleging that the Agency violated the Statute and the 1985 MLA by insisting to impasse on the Union's waiver of its statutory bargaining rights, which the grievance contends is a permissive subject of bargaining. The grievance was not resolved and was submitted to arbitration.

The Arbitrator stated that the following issues were before him:

1. Did the Union, by signing the MLA, waive its bargaining rights during the life of the agreement?
2. Did the Employer engage in conduct that violated its bargaining obligations under the CSRA and the MLA?

Id. at 11.

The Agency conceded before the Arbitrator that a party may not insist to impasse on a permissive subject of bargaining. It argued that there had been no impasse, however, and that the Union had agreed to a zipper clause despite the MOU. The Agency contended that the parties had bargained to agreement, and that the parties' side agreement had no effect on the plain language of the MLA. It asserted that the purpose of the MOU was to make certain that neither party gave up any legal arguments they had advanced in other litigation by agreeing to the MLA.

The Union argued before the Arbitrator that the MOU made it plain that it was not waiving its bargaining rights. In addition, the Union argued that where contract language is unclear, it is common practice to interpret it against the party that drafted the language. As this provision was written by the Agency, the Union contended that any ambiguity in the language should be interpreted against the Agency.

The Arbitrator concluded that the Union understood management's view that the "total agreement" preamble language, combined with the past practice provision, amounted to a zipper clause

during the term of the agreement. He also found that management understood the Union's position that it did not intend to waive its statutory right to initiate mid-term bargaining. The Arbitrator found that the parties signed the agreement and the MOU so that the record would be clear as to their intentions.

The Arbitrator noted that a union has a statutory right to initiate mid-term bargaining, and determined that neither the new agreement nor the MOU waived the Union's right in this case. He found that Article 4, section 3 specifically preserved each party's mid-term bargaining rights, and noted that "[t]he ground rules for this section indicate that either party could make proposals when a bargaining right or obligation existed." *Id.* at 13.

Although the Arbitrator further found that the preamble "is not nearly so explicit," *id.*, he concluded that it, like Article 4, Section 3, did not constitute a waiver. In so finding, he noted that the Agency had argued that the Union preserved its right in the MOU to make legal arguments but that it had waived its bargaining rights in agreeing to the preamble. The Arbitrator stated that, contrary to the "actual bargaining history[.]" "this would mean that the Union could prevail with its legal claims but then have no right to negotiate over mid-term matters." *Id.* at 14. Accordingly, finding that the parties had negotiated an agreement containing language that was in dispute, the Arbitrator concluded that the Union had specifically reserved its right to argue that the collective bargaining agreement does not waive the Union's right to mid-term bargaining and that, therefore, the Union had not clearly and unmistakably waived its right.

Finally, in response to the Union's allegation that the Agency failed to bargain in good faith by insisting to impasse over a waiver of the Union's right to engage in mid-term bargaining in violation of section 7116(a)(1) and (5) of the Statute, the Arbitrator found that the negotiations had never reached impasse. In reaching this conclusion, the Arbitrator relied on his earlier finding that the Union had never waived its bargaining rights, as well as the fact that both parties

had signed the agreement. Accordingly, the Arbitrator concluded that "no language [in the MLA] . . . needs to be changed or altered. . . ." *Id.* at 15.

III. Union's Exceptions

The Union contends that the award is inconsistent with law, rule and regulation and that the Arbitrator did not decide the issue before him. Specifically, the Union asserts that the Arbitrator did not apply the appropriate law in determining whether the Agency committed an unfair labor practice by insisting to the point of impasse on a waiver of the Union's mid-term bargaining rights, as alleged in the grievance. The Union states that the main issue before the Arbitrator was "whether the employer could insist on the bargaining waiver as a condition precedent to overall agreement to the Master Labor Agreement." Exceptions at 2. The Union asserts that the Arbitrator did not decide that issue.

The Union argues that there was agreement that "the only thing between the parties and total agreement on a new collective bargaining agreement was disagreement on a permissive subject for bargaining--the union's refusal to agree that the employer's so-called zipper language was a waiver of its bargaining rights." *Id.* at 7. The Union contends that the Arbitrator's conclusion that there was no impasse because the agreement was signed by both parties "is simply incorrect. . . ." *Id.* at 8. The Union argues that "[t]he illegal insistence occurred before the contract was signed." *Id.*

IV. Analysis and Conclusions

We disagree with the Union's contention that the Arbitrator did not decide the issues of whether the Agency insisted on a bargaining waiver as a condition precedent to the Union's execution of the MLA and whether the Agency violated section 7116(a)(1) and (5) of the statute by its insistence to the point of impasse on a permissive subject of bargaining.

The Union has failed to establish that the award is inconsistent with the Statute or that the Arbitrator failed to address the issues before him. Although the Arbitrator did not specifically address the unfair labor

practice issue, he did find that there was no impasse and that, therefore, there could not have been an unlawful insistence to impasse.

In agreement with the Arbitrator, we conclude that the bargaining history, especially the MOU and the circumstances surrounding its adoption, indicate that there was no impasse in the negotiations on the issue of a Union waiver. The Authority has stated that "[a]n impasse is that point in negotiations at which the parties are unable to reach agreement." Department of Defense, Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, 17 FLRA 896, 897 (1985). In determining whether parties have reached impasse during negotiations, the Authority examines the entire conduct of the parties from the inception of their negotiations. Davis-Monthan Air Force Base, Tucson, Arizona, 42 FLRA 1267, 1278 (1991). See also U.S. Department of the Air Force, Space Systems Division, Los Angeles Air Force Base, California, 38 FLRA 1485 (1991) application for enforcement filed sub nom. FLRA v. U.S. Department of the Air Force, Space Systems Division and Air Force Contract Management Division, Los Angeles Air Force Base, California, No. 91-1282 (D.C. Cir. June 14, 1991).

We note that the parties began negotiations early in 1990, and that by May 24, 1990, they had agreed on all issues except whether certain language would serve to waive the Union's right to mid-term bargaining. At that point, they acceded to the advice of the mediator to meet one more time in a last effort to reach agreement so they could sign the MLA. That meeting resulted in agreement both to sign the MLA and to enter into the MOU.

In arriving at our conclusion that the award is not deficient, we note particularly that the purpose of the MOU was to preserve the Union's position that it had not waived its mid-term bargaining rights by signing the MLA. As the Arbitrator found, the MOU "memorialized" the parties' disagreement on the meaning of the preamble, and "allowed the Union to sign off on [the disputed "total agreement"] provision." Award at 14. Based on this bargaining history, the Arbitrator reasonably concluded that the

MOU indicated that the issue of whether the Union waived its right to mid-term bargaining remained unsettled. In view of the Arbitrator's subsequent finding that the Union did not waive its right to engage in mid-term bargaining, a finding as to which no exceptions have been filed, it follows that there could have been no unlawful insistence on such a waiver. Thus, contrary to the Union's argument, the Arbitrator's finding that there was no impasse is entirely consistent with his finding that the Union did not waive its right to engage in mid-term bargaining.

As we find no basis on which to conclude that the Arbitrator's award is inconsistent with law, rule or regulation, or that the Arbitrator did not decide the issue before him, we will deny the exceptions.

V. Decision

The Union's exceptions are denied.

1. We find it unnecessary to discuss the section 7131 allegation as there was no exception to the Arbitrator's award in this regard.