66 FLRA No. 116

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

0-AR-4661

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DECISION

April 26, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Margery F. Gootnick filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator found that the Agency did not commit an unfair labor practice (ULP) in violation of § 7116 of the Statute either by delaying bargaining over a grievance and arbitration procedure until the start of term negotiations or by failing to provide specific notice to the Union of changes the Agency wished to implement before the start of ground rules negotiations. The Union argues that the Arbitrator's conclusions are contrary to law. For the following reasons, we deny the Union's exceptions.

II. Background and Arbitrator's Award

After the creation of the United States Department of Homeland Security (DHS), the National Treasury Employees Union (NTEU) was certified as the exclusive representative for all professional and non-professional employees of the United States Customs and Border Protection, a unit that included employees who were previously employed by the United States Customs Service, the Immigration and Naturalization Service, and the United States Department of Agriculture. Award at 3-4. Prior to the creation of DHS, many of the employees had been covered by an expired agreement between U.S. Customs Service and NTEU (Customs agreement). *Id.*

Before bargaining over a term agreement that would cover all bargaining unit employees at the Agency, the parties bargained over ground rules. The parties reached impasse over several of the ground rules proposals; as a result, the Agency requested the assistance of the Federal Service Impasses Panel (the Panel). *Id.* at 6-7. The Panel issued an order that directed the Union to withdraw several of the ground rules proposals. One such proposal would have incorporated into the ground rules agreement several substantive provisions from the Customs agreement, including the grievance procedure. *Id.* at 8 n.4. The Panel also ordered the Union to provide a list of substantive proposals to the Agency within five days after the ground rules agreement was executed. *Id.* at 8.

Rather than submit substantive bargaining proposals, the Union petitioned the Panel for reconsideration of its decision and also requested that the Authority stay the Panel's decision. Both requests were denied. *Id.* at 9 (citing *NTEU*, 63 FLRA 183 (2009) (*NTEU*)).

The Union presented a grievance alleging that the Agency violated 5 U.S.C. § 7116(a)(1) and (5) and the Customs agreement by its conduct during the Union's certification year.[1] *Id.* at 10. As relevant, the Union alleged that the Agency failed to provide the Union notice of bargaining subjects and to include a grievance procedure in the parties' ground rules agreement. *Id.* at 10-11. To remedy the alleged violations, the Union requested that: (1) any agreement be given retroactive effect, (2) its certification year be extended, and (3) a cease and desist order be posted by the Agency. *Id.* at 11. The matters were unresolved and submitted to arbitration. *Id.* at 12.

The relevant issue as formulated by the Union was:

> Did [the Agency] violate 5 U.S.C. [§] 7116(a)(1) and (5) . . . by engaging in unlawful conduct that prevented [the Union] from negotiating a term

[1] Under § 7111(f)(4) of the Statute, a newly certified exclusive representative has a one-year period during which petitions from rival labor organizations are barred. *See* 5 U.S.C. § 7111(f)(4).

> agreement for its newly certified bargaining unit during its initial certification year? If so, what is the appropriate remedy?

Id. at 13-14. The relevant issue as formulated by the Agency was:

> Did [the Agency] violate 5 U.S.C. [§] 7116(a)(1) and (5) . . . by (a) engaging in unlawful conduct that (b) prevented [the Union] from negotiating a term agreement during its initial certification year? If so, what is the appropriate remedy?

Id. at 14-15.[2]

As an initial matter, the Arbitrator found that the provisions of the Customs agreement applied to the dispute. *Id.* at 18. The Arbitrator rejected the Union's argument that the Agency violated the Statute by failing to bargain over a grievance procedure during ground rules negotiations or include a grievance procedure in its ground rules agreement. *Id.* at 33-34. The Arbitrator found that, "while ground rules negotiations are part of the collective bargaining process, it does not follow that a ground rules agreement is itself a collective bargaining agreement." *Id.* at 32. The Arbitrator concluded that the Agency had a desire to reach substantive negotiations quickly, that it fully participated in the Panel's process, and that it timely submitted a package of substantive bargaining proposals to the Union. *Id.* at 33. According to the Arbitrator, the Agency did not fail to bargain in good faith and, therefore, did not commit a ULP under the Statute by deferring negotiations over a grievance procedure until the start of term bargaining. *Id.* at 33-34.

The Arbitrator also rejected the Union's claim that the Agency violated the Statute by refusing to provide the Union notice of the substantive changes in conditions of employment that it would propose during term negotiations. *Id.* at 34. In reaching this conclusion, the Arbitrator relied on Authority precedent "resolving the same issue." *Id.* (citing *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426 (2010) (*IRS*)).

[2] The Arbitrator also resolved other procedural and substantive issues, including issues relating to a grievance filed by the Agency. Because neither party excepts to the Arbitrator's findings on these issues, we do not address them further. *See U.S. Dep't of the Army, U.S. Corps of Eng'rs, Nw. Div.*, 65 FLRA 131, 132 n.4 (2010) (Member Beck dissenting in part).

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the Arbitrator's conclusions – that the Agency did not commit a ULP when it did not bargain over a grievance procedure during ground rules negotiations or include a grievance procedure in the ground rules agreement – are contrary to law. Exceptions at 12. According to the Union, the Authority has found ground rules agreements to be collective bargaining agreements. *Id.* at 15-16. Further, the Union asserts, § 7121 of the Statute requires that all collective bargaining agreements contain a grievance and arbitration procedure. *Id.* at 19. The Union contends that there is no reason to treat ground rules differently from other collective bargaining agreements. *Id.* at 20-21.

The Union also avers that the existing grievance and arbitration procedures were inadequate. *Id.* at 25-26. According to the Union, it was unclear which procedures would apply in the event of a dispute because the newly certified bargaining unit was composed of employees from three different unions and newly hired employees who were not represented by any union. *Id.* The Union also claims that the Agency's willingness to bargain during substantive negotiations over a grievance and arbitration procedure does not excuse the Agency's failure to bargain over this procedure during the ground rules negotiations. *Id.* at 26. Finally, the Union contends that the Authority's test stating that ground rules must "further, not impede" the bargaining process is contrary to the Statute because it is vague and permits the Authority to assess proposals based on standards other than their negotiability. *Id.* at 37-38.

The Union also characterizes as contrary to law the Arbitrator's conclusion that the Agency did not fail to bargain in good faith when it refused to provide specific notice to the Union of changes it wished to make to existing conditions of employment. *Id.* at 27. The Union claims that the Arbitrator should not have relied on *IRS* and that the Authority's reasoning in that case was "specious" because there is no reason to except ground rules agreements from the notice requirement. *Id.* at 30-32.

According to the Union, ground rules are a mandatory subject of bargaining, *id.* at 28, and, therefore, "subject to all statutory and case law mandates" regarding collective bargaining, *id.* at 29. The Union contends that the obligation to bargain includes the obligation of the Agency to provide specific notice of the changes it seeks. *Id.* at 30 (citing *Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 51 FLRA 1532, 1535 (1996) (*Wright-Patterson*)).

The Union asserts that the Agency violated the Statute when it failed to provide the Union notice regarding the scope, nature, timing, and potential loss of the "articles that [the Agency] wished to negotiate." *Id.* at 32-33.

The Union asks that the Authority order a status quo ante remedy and order that any term agreement negotiated by the parties be retroactively dated to when the union's certification year ended. *Id.* at 40, 47. The Union also requests that the Authority extend the Union's certification year until the effective date of the parties' term agreement. *Id.* at 43. Finally, the Union asks the Authority to issue a cease and desist order and a posting, and that the Authority direct the commanding officer to read the notice aloud. *Id.* at 50-51.

B. Agency's Opposition

The Agency argues that the Arbitrator correctly determined that it did not prevent the Union from completing negotiations of a term agreement during the Union's certification year. Opp'n at 9. The Agency contends that it exchanged substantive proposals with the Union after the Panel resolved the ground rules impasse. *Id.* at 11. The Agency also notes that it did not cancel or postpone negotiation sessions. *Id.* at 12.

The Agency asserts that the Arbitrator's decision – that it did not violate the Statute when it did not include a grievance procedure in the ground rules agreement –was not contrary to law. *Id.* at 13. The Agency argues that a ground rules agreement is not a collective bargaining agreement because it is only one step in the process leading to a collective bargaining agreement. *Id.* at 14. The Agency contends that the decision in *U.S. Geological Survey, Caribbean Dist. Office, San Juan, P.R.*, 53 FLRA 1006 (1997) (*USGS*), is distinguishable because, in finding a failure to bargain in good faith in that case, the Authority relied on the Agency's delay rather than its failure to bargain over a grievance procedure. Further, the Agency avers that the parties were able to use the grievance procedure from the Customs agreement, as evidenced by the fact that the grievance advanced to arbitration. Opp'n at 18.

The Agency contends that the Union is attempting to obtain review of the Panel's order, even though, according to the Agency, the Authority may review a Panel's order only in a ULP proceeding involving noncompliance with that order. *Id.* at 19. The Agency also requests that, should the Authority find a grievance procedure to be required, the ruling be applied prospectively. *Id.* at 20.

The Agency also argues that the Arbitrator's conclusion that the Agency did not commit a ULP when it failed to provide specific notice to the Union is not contrary to law. *Id.* The Agency claims that the Authority in *IRS* already rejected the Union's argument. *Id.* at 21.

The Agency asserts that, if the Authority agrees with the Union that the Agency acted unlawfully with regard to ground rules negotiations and specific notice, the matter should be remanded to the Arbitrator for a determination, based on the totality of the circumstances, of whether the Agency prevented the Union from completing negotiations during its certification year. *Id.* at 24. The Agency argues that the Union is not entitled to an extension of its certification year. According to the Agency, because the Union "dragged its heels" for so long before invoking arbitration, it mooted its requested remedy. *Id.* at 25. The Agency also suggests that retroactive implementation of a term agreement is not an appropriate remedy because it is impossible to determine when the parties would have reached an agreement. *Id.* at 29.

IV. Analysis and Conclusions: The award is not contrary to law.

When an exception challenges an award's consistency with law, the Authority reviews the question of law raised by the exception and the award de novo. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995). In applying a standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In a grievance proceeding that alleges a ULP under § 7116 of the Statute, an arbitrator must apply the same standards and burdens that are applied by administrative law judges under § 7118 of the Statute. *NTEU*, 61 FLRA 729, 732 (2006). As in other arbitration cases, in determining whether the award is contrary to the Statute, the Authority defers to the arbitrator's findings of fact. *Id.* In addition, the Authority does not supplement those findings by engaging in its own factfinding. *AFGE, Nat'l Council of HUD Locals 222*, 54 FLRA 1267, 1275 (1998) (Member Wasserman dissenting as to other matters).

A. The Arbitrator did not err in finding that the Agency did not commit a ULP when it failed to bargain over a grievance procedure during ground rules negotiations.

The Union argues that the Arbitrator's conclusions – that the Agency did not fail to bargain in good faith by refusing to negotiate over or otherwise include a grievance procedure in the parties' ground rules

agreement – are contrary to law. Exceptions at 12. Ground rules are within the duty to bargain, and negotiating over them is an inherent aspect of the obligation to bargain in good faith. *IRS*, 64 FLRA at 431; *see also Ass'n of Civilian Technicians v. FLRA*, 353 F.3d 46, 51 (D.C. Cir. 2004) (*ACT*) (finding that ground rules may encompass any guide for the conduct of negotiations).

As the Union recognizes, § 7121 of the Statute states that, "any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability." 5 U.S.C. § 7121(a)(1); *see also IFPTE, Local 386*, 66 FLRA 26, 29 (2011). According to the Union, § 7121 encompasses ground rules agreements and requires them to expressly contain a grievance procedure. Exceptions at 19.

Even assuming that a ground rules agreement is a collective bargaining agreement, the Statute only requires that a collective bargaining agreement "provide" procedures for the settlement of grievances, not that each collective bargaining agreement contain an express grievance and arbitration procedure. *Cf. NTEU*, 63 FLRA at 184 (noting that the union argued that "any collective bargaining agreement under § 7121(a)(1) must contain *or be subject to* a grievance/arbitration procedure") (emphasis added). Further, the Authority has held that § 7121 "does not establish the structure of" a negotiated grievance procedure. *See United Power Trades Org.*, 44 FLRA 1145, 1168 (1992). Therefore, § 7121(a)(1)'s requirement can be met either by an express grievance procedure or by implicitly or explicitly incorporating a grievance procedure from another agreement. *Cf. U.S. Dep't of the Navy, Marine Corps Logistics Base, Barstow, Cal.*, 42 FLRA 287, 309 (1991) (noting that the master agreement set forth a grievance procedure to resolve "any matter involving the interpretation or application of this [master agreement], supplemental agreements, MOU's . . .").

This reading of § 7121 is consistent with the Statute's purpose of "protect[ing] the right to file and process grievances." *See Dep't of the Air Force Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 24 FLRA 875, 883 (1986). As noted above, the Arbitrator expressly found that the Customs agreement, including its grievance procedure, applied to the dispute. *See* Award at 15-18. Therefore, because the parties were subject to at least one grievance procedure, § 7121 was satisfied regardless of whether any ground rules agreement contained an express grievance and arbitration procedure.

Having determined that the ground rules agreement did not need to contain a stand-alone grievance and arbitration procedure, we still must determine whether the Agency failed to bargain in good faith in violation of the Statute when it did not bargain over a grievance and arbitration procedure during ground rules negotiations. Whether a party has bargained in good faith depends on the totality of the circumstances. *USGS*, 53 FLRA at 1012. The Authority assesses the propriety of ground rules proposals by asking whether they are offered in good faith and whether they are designed to further the bargaining process. *ACT*, 353 F.3d at 51. Ground rules proposals must, at a minimum, be designed to further, not impede, the bargaining for which the ground rules are proposed.[3] *U.S. Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 36 FLRA 524, 533 (1990) (*AFLC*).

We find that the Arbitrator did not err in concluding that the Agency did not violate the Statute. The Arbitrator concluded that the Agency did not fail to bargain in good faith because it "had a desire to reach substantive negotiations as quickly as possible," "participated fully in the Panel's impasse-resolution process," and "submitted a package of substantive bargaining proposals" to the Union within days of

[3] The Union contends that the Authority's assessment of whether a ground rules proposal "furthers, not impedes" the bargaining process is contrary to the Statute. Specifically, the Union argues that the Authority uses a vague test for ground rules proposals that is different from its test for other agreements without a statutory basis. Exceptions at 37. However, an assessment of whether a party acted in good faith requires different applications of the "totality of the circumstances" test in different contexts. *See, e.g., AFLC*, 36 FLRA at 533 (a party bargains in good faith over ground rules when ground rules are offered to "further, not impede" the bargaining process); *U.S. Dep't of the Treasury, Internal Revenue Serv.*, 64 FLRA 934, 938 (2010) (finding that a party does not bargain in good faith if it "insist[s] on piecemeal negotiations regarding mandatory subjects of bargaining"); *Council of Prison Locals*, 64 FLRA at 290 (finding that a party does not bargain in good faith if it does not respond to a request to negotiate, fails to set dates for negotiations, or "d[oes] not submit negotiation proposals" to the other party). Therefore, the Authority's "furthers, not impedes" test is simply the application of the good faith test in the ground rules context. The Union also argues that the test permits the Authority to assess the legality of proposals based on standards other than their negotiability. Exceptions at 37-38. However, contrary to the Union's assertion, nonnegotiability is not the only defense to an obligation to bargain. *See, e.g., Patent Office Prof'l Ass'n*, 66 FLRA 247, 254 (2011) (finding that the agency did not commit a ULP by failing to bargain, during impact and implementation (I&I) bargaining, over proposals that were unrelated to the scope of I&I bargaining); *see also U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 65 FLRA 870, 873 (2011). Therefore, the Union's arguments do not establish that the Authority's "furthers, not impedes" test is contrary to the Statute.

receiving a final decision from the Panel. Award at 33-34. Further, the Arbitrator noted that the Union "refused to submit its own substantive proposals" and arguably "hoped to elicit an unfair labor practice charge" from the Agency. *Id.* at 33. The Union does not challenge these factual findings as being based on nonfacts. Therefore, we defer to the Arbitrator's undisputed factual findings. *See AFGE, Council of Prison Locals 33, Locals 1007 & 3957*, 64 FLRA 288, 291 (2009) (*Council of Prison Locals*) (denying a union's exceptions to an arbitrator's factual finding that the agency did not fail to bargain in good faith over ground rules proposals where the union did not argue that the findings were based on nonfacts).

Moreover, a conclusion that the Agency did not violate the Statute is consistent with Authority precedent. In *USGS*, the Authority found that, "for the reasons stated by the [administrative law judge]," the agency failed to bargain in good faith when it refused to bargain over a grievance procedure in ground rules negotiations. *USGS*, 53 FLRA at 1014. In so deciding, the judge relied on the agency's delay in bargaining over all substantive proposals. *Id.* at 1012. The judge noted that the agency's defense to its failure to bargain "would have merit" if the agency had "indicated a willingness to commence substantive bargaining in a timely manner." *Id.* Here, the Arbitrator expressly found that the Agency was willing to commence substantive bargaining and that it was the Union who refused to engage in substantive bargaining. Award at 33. Similarly, in *U.S. Immigration & Naturalization Service*, 24 FLRA 786 (1986), the Authority found that the agency satisfied its obligation to bargain in good faith because it met with the union over ground rules and participated in the Panel's process, even though it rejected several of the union's proposed ground rules. *Id.* at 790.

Accordingly, based on the totality of the circumstances, we find that the Arbitrator did not err in concluding that the Agency did not violate the Statute by failing to bargain in good faith during ground rules negotiations. We, therefore, deny the Union's exception.

B. The Arbitrator did not err in finding that the Agency did not commit a ULP when it failed to provide the Union with specific notice before bargaining over ground rules.

The Union also argues that the Arbitrator's finding – that the Agency did not violate the Statute when it refused to provide specific notice to the Union of changes it wished to make to existing conditions of employment – is contrary to law. Exceptions at 27-30. In concluding that the Agency did not commit a ULP in violation of the Statute, the Arbitrator found that the Authority's decision in *IRS* "resolv[ed] the same issue" that the Union presented in its grievance. Award at 34.

The Union asserts that the Authority's reasoning in *IRS* was "specious" because there is no basis on which to except ground rules agreements from the notice requirements. Exceptions at 31-32. However, in *IRS*, the Authority considered arguments similar to those the Union makes. Specifically, the union in *IRS* argued that the Statute did not distinguish between term collective bargaining and bargaining over management-initiated changes, and that specific notice was required. *See IRS*, 64 FLRA at 430. The Authority rejected those arguments, concluding that it had "never conditioned the obligation to bargain over ground rules on specific notice of the changes a party intended to propose to the term agreement." *Id.* at 431 (citing *Dep't of the Air Force, Griffiss Air Force Base, Rome, N.Y.*, 25 FLRA 579 (1987)).

Because this case, like *IRS*, does not involve an agency announcement of a change to unit employees' conditions of employment, the cases cited by the Union, which all involved changes in conditions of employment, are inapposite. *See* Exceptions at 30 (citing *NFFE, FD-1, IAMAW, Local 1442 v. FLRA*, 369 F.3d 548 (D.C. Cir. 2004); *Wright-Patterson*, 51 FLRA at 1535; *Aircraft Fire & Rescue Div., Air Operations. Dep't, Naval Air Station, Norfolk, Va.*, 3 FLRA 118 (1980)). Therefore, we similarly reject the Union's arguments and find that the Arbitrator did not err in concluding that the Agency did not commit a ULP when it failed to provide notice of specific changes to the Union before conducting ground rules negotiations.

Accordingly, we deny the Union's exception.[4]

V. Decision

The Union's exceptions are denied.

[4] Because we deny the Union's exceptions, we find it unnecessary to address the Union's requested remedies.