66 FLRA No. 21

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
BORDER PATROL
WASHINGTON, D.C.
(Agency)

0-AR-4562

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DECISION

September 14, 2011

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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 Kathleen Miller 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 violate the parties' agreement or the Statute when it implemented a revised vehicle pursuit policy (VPP) because the only Union proposal that the Agency did not ultimately include in the VPP was a non-negotiable proposal concerning recordings of vehicle pursuit incidents (pursuit recordings proposal). For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

When the Agency informed the Union of its plans to revise the VPP, the Union requested bargaining, and the parties met to bargain (initial bargaining session). Award at 4-5. On the second day of the initial bargaining session, the Agency asserted that the Union's proposals, including its pursuit recordings proposal, were non-negotiable and that, therefore, the Agency was unilaterally ending bargaining. *Id.* at 5-6. Subsequently, the Agency circulated the revised VPP to the Agency's Office of Training and Development (OTD) so that OTD could begin developing training on the revised VPP for employees (OTD circulation). *Id.* at 15.

After the OTD circulation, the Union filed the instant grievance and submitted seven proposals that it asserted were outstanding from the initial bargaining session. *Id.* at 9. The Agency granted the grievance with respect to all of the proposals except the pursuit recordings proposal.[1] *Id.* In denying this portion of the grievance, the Agency alleged that the pursuit recordings proposal excessively interfered with management's right to determine internal security practices under § 7106(a)(1) of the Statute.[2] *Id.* at 10.

After the Agency revised the VPP consistent with its disposition of the grievance, it circulated an updated version of the VPP to Chief Patrol Agents, along with a cover memo instructing them to begin employees' training in the new VPP immediately (supervisor circulation). *Id.* at 12. The memo also stated that "[this] policy is an interim version and will be superseded with a final version that revises [the section of the VPP concerning vehicle pursuit recordings (pursuit recordings section)] . . . ." *Id.* Similarly, at the end of the pursuit recordings section, the VPP provided that "(THIS SECTION IS INCOMPLETE AND UNDER REVIEW)." *Id.*

After the supervisor circulation, the parties met for additional bargaining, and the Agency adopted all of the Union's additional proposals other than the pursuit recordings proposal. *Id.* at 12-13. Accordingly, the Agency provided the Union with an updated version of the VPP that included all of the Union's proposed language except for the pursuit recordings proposal.[3] *Id.* at 13.

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[1] The Union ultimately submitted several alternative versions of the pursuit recordings proposal to the Agency, and the Arbitrator's analysis focused on the version of the proposal presented in a later bargaining session, rather than the version presented in the initial bargaining session and memorialized in the instant grievance. *See* Award at 28-29. Although the wording of the two proposals differs, the substantive requirements are similar, and neither party excepts to the Arbitrator's decision to focus on the later version of the proposal. Accordingly, we find it appropriate to address the proposal focused on by the Arbitrator in her award, and by the Union in its exceptions. *See id.*; Exceptions at 17. The wording of the proposal is provided below.

[2] Section 7106(a) of the Statute provides, in pertinent part, that "nothing . . . shall affect the authority of any management official of any agency . . . to determine . . . internal security practices of the agency . . . ." 5 U.S.C. § 7106(a).

[3] The pursuit recordings section of this final version of the VPP provided, in pertinent part:

> If emergency driving or a pursuit results in litigation, . . . [e]xcept in unusual circumstances, any employee who is

Throughout these events, the parties' dispute concerning the pursuit recordings section of the VPP revolved around one point. Specifically, the Union's pursuit recordings proposal provides that, where an emergency driving incident or vehicle pursuit results in administrative, civil, or criminal litigation or investigation, the Agency would be required to provide an employee involved in the incident with a copy of any available audio or video recordings of the incident before the Agency could require the employee to make a statement. *See id.* at 28-29. By contrast, the Agency's VPP provides that "[e]xcept in unusual circumstances," any employee "who is identified as the subject" of a non-criminal investigation "will be allowed a reasonable period of time to *review*" any available recordings, but does not entitle the employee to receive a *copy* of such recordings. *See id.* at 29 (emphasis added).

When the instant grievance was unresolved, the matter proceeded to arbitration, where the parties framed the issue before the Arbitrator as follows: "Did the Agency violate the [parties'] [a]greement and the . . . Statute . . . by unilaterally implementing the [VPP] without fulfilling its collective bargaining obligations with the Union? If so, what is the remedy?" *Id.* at 27.

Addressing these issues, the Arbitrator found that the pursuit recordings proposal was not an appropriate arrangement because it excessively interfered with management's right to determine internal security practices under § 7106(a)(1) of the Statute. *Id.* at 34. In this regard, she found that an employee who is required to provide a statement regarding a "fast-moving, chaotic event like a vehicle pursuit" would benefit from an opportunity to "refresh his or her memory through [the] use of any available audio or video recording," but noted that the Union had not explained why the employee needed to receive a copy of the recording – rather than merely being allowed to review the recording – in order to achieve this benefit. *Id.* at 33. Further, the Arbitrator found that the proposal "squarely implicates the Agency's ability to determine investigatory techniques and to control the release and dissemination of law enforcement sensitive information." *Id.* For example, the Arbitrator found that, in an organization of the Agency's size, confidential information "sometimes . . . ends up missing and in the wrong hands" and that the likelihood of widespread dissemination of recordings of vehicle pursuits on the internet or "law-enforcement-related 'reality' television shows" would be increased if the Agency provided employees with copies of such recordings. *Id.* at 34. She also found that if such recordings were disseminated in this way, then this could "compromise the safety" of agents because "criminal elements . . . would be in the position to use this information in opportunistic ways, such as implementing counter measures in order to evade those techniques or . . . setting up an ambush." *Id.* at 33. Thus, the Arbitrator determined that the proposal's interference with management's rights outweighed its benefit to employees, and that the Agency did not violate the Statute "when it implemented the revised [VPP] while maintaining its position that the Union's [pursuit recordings] proposal was outside the duty to bargain." *Id.* at 34.

Finally, the Arbitrator turned to the Union's claim that the Agency's OTD circulation of the revised VPP nonetheless violated § 7116(a)(5) of the Statute[4] because there were Union proposals other than the pursuit recordings proposal still in dispute when the Agency "implemented" the revised VPP by giving it to OTD to be used to develop employee training. *Id.* at 35. The Arbitrator found that the parties left the initial bargaining session having reached an "oral understanding" that the Agency would not implement any portion of the VPP that remained in contention, including the pursuit recordings section. *Id.* In addition, the Arbitrator found that the Agency "at least technically implement[ed]" the VPP – including the sections in dispute – by its OTD circulation. *Id.* Thus, the Arbitrator found that the Agency "appear[ed] to have prematurely cut off bargaining" and that the OTD circulation "may have run afoul of the parties' oral understanding that the Agency . . . would refrain from implementing any . . . provision which remained in dispute." *Id.* However, she also found that there was "no claim" that the OTD circulation "had any effect on the terms and conditions of employment of employees covered under the present grievance." *Id.* at 36. Further, she found that there were no effects on agents' conditions of employment as "the policy continued to be revised as [a] result of the parties' continued bargaining," and that it was undisputed that the Agency ultimately adopted all of the Union's proposed VPP wording other than the pursuit recordings proposal that she found non-negotiable. *Id.* As a result, the Arbitrator found that the Union had not established a violation of § 7116(a)(5) of the Statute or the parties' agreement. *Id.*

> identified as the subject of an administrative or civil investigation or proceeding will be allowed a reasonable period of time to review any available audio or video recordings of the incident prior to being required to submit each report or statement. This requirement will not apply to criminal investigations, which are beyond the scope of [Agency] control.

Award at 14.

[4] Section 7116(a) of the Statute provides, in pertinent part, that "it shall be an unfair labor practice for an agency . . . to refuse to consult or negotiate in good faith with a labor organization" as required by the Statute. 5 U.S.C. § 7116(a)(5).

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the Arbitrator's finding that the pursuit recordings proposal was not negotiable as an appropriate arrangement is contrary to law. Exceptions at 17. In this regard, the Union asserts that the proposal is a sufficiently tailored arrangement that protects employees from the adverse effect of being required to participate in an investigation of their involvement in a vehicle pursuit without being given an opportunity to refresh their memory in order to "avoid making a false or erroneous statement that could lead to discipline or liability." *Id.* at 20. According to the Union, this benefit to employees outweighs the intrusion on management's right to determine internal security practices because the proposal would permit the Agency to withhold a recording from an employee as long as the Agency does not compel the employee to submit a report or statement regarding that pursuit, "although it can request that an employee voluntarily do so." *Id.* at 21.

In addition, the Union argues that the Arbitrator erred as a matter of law in finding that the Agency's "implementation prior to reaching agreement on . . . [the Union's] outstanding proposals" was lawful. *Id.* at 1. In this regard, the Union argues that: (1) there is "no dispute" that the revised VPP had a greater than de minimis impact on agents' conditions of employment; (2) the supervisor circulation's instruction that employees complete training on the revised VPP demonstrates that the Agency had already implemented the revised VPP at that point; and (3) the Arbitrator erred by "essentially declaring . . . moot" the issue of the Union's proposals (other than the pursuit recordings proposal) that were outstanding when the Agency ended the initial bargaining session. *Id.* at 10-11. The Union asserts that all of these proposals were negotiable, *id.* at 11, and that "if even one of these proposals was negotiable, then the Agency's failure to complete the negotiations was a violation of law" because the Agency was free to proceed with implementation only if all of the Union's proposals were outside the duty to bargain, *id.* at 9-10. In addition, the Union argues that the Agency breached its statutory duty to bargain in good faith. *Id.* at 16, 22.

B. Agency's Opposition

The Agency argues that the Arbitrator correctly found that the Union's pursuit recordings proposal was not an appropriate arrangement because it excessively interferes with management rights. Opp'n at 10-14. The Agency also argues that the Arbitrator correctly found that the Agency's alleged implementation of the revised VPP did not violate the Statute because the Union "failed to even allege a change in terms and conditions of employment of employees covered by the grievance." *Id.* at 6 (citing Award at 36).

IV. Analysis and Conclusions

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998) (*Local 1437*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

A. The Arbitrator's finding that the pursuit recordings proposal was non-negotiable is not contrary to law.

The pursuit recordings proposal provides, in pertinent part:

> If emergency driving or a pursuit results in litigation, . . . [a]ny bargaining unit employee who is required by a representative of the [A]gency to submit a written report or oral statement (other than the initial vehicle pursuit report) in connection with an administrative, civil, or criminal investigation or proceeding will be provided with a copy of any available audio and/or video recording(s) of the incident prior to being required to submit such a report or statement. If such audio [and]/or video recording(s) exist but are not provided to the employee, the employee will not be required by a representative of the [A]gency to submit any additional report(s) or statement(s).

Exceptions at 17. *See also* Award at 13, 28-29. There is no dispute that, under the proposal, where an emergency driving incident or vehicle pursuit results in litigation or an investigation, the Agency could not require an employee involved in the incident to submit a statement or report unless the Agency first provided the employee with a copy of any available audio or video recordings of the incident. *See* Exceptions at 20-21. There also is no dispute that the Agency's version of the VPP provides that "[e]xcept in unusual circumstances," any employee "who is identified as the subject" of a non-criminal investigation "will be allowed a reasonable period of time

to review" any available recordings of the incident "prior to being required to submit" a statement. Award at 29-30.

The Agency asserts that the proposal interferes with management's right to determine internal security practices under § 7106(a)(1) of the Statute. Opp'n at 10. Where a union does not respond to an agency argument that a proposal affects a management right under § 7106 of the Statute, the Authority finds that the union has conceded that the proposal affects the claimed management right. *See, e.g.*, *AFGE, Local 1164*, 65 FLRA 836, 838 (2011). As the Union does not dispute the Agency's assertion that the pursuit recordings proposal affects management's right to determine internal security practices, the Union concedes that the proposal affects that right. *See id.*

In determining whether a proposal is within the duty to bargain as an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute, the Authority applies the analysis set forth in *NAGE, Local R14-87*, 21 FLRA 24 (1986) (*KANG*). Under that analysis, the Authority first determines whether the proposal is intended to be an arrangement for employees adversely affected by the exercise of a management right. *Id.* at 31. To establish that a proposal is an arrangement, a union must identify the effects or reasonably foreseeable effects that flow from the exercise of management's rights and demonstrate how those effects are adverse. *Id.* Additionally, the claimed arrangement must be sufficiently tailored to compensate those employees suffering adverse effects attributable to the exercise of management's rights. *AFGE, Local 1164*, 55 FLRA 999, 1001 (1999).

Even assuming that Proposal 2 constitutes an arrangement, for the following reasons, we find that it is not appropriate because it excessively interferes with management's right to determine internal security practices.

With respect to the benefits that the proposal would afford employees, the Union argues that the proposal would protect an employee from being required to participate in an investigation of his or her involvement in a vehicle pursuit without being given an opportunity to refresh his or her memory in order to "avoid making a false or erroneous statement that could lead to discipline or liability." Exceptions at 20. However, the Arbitrator found that the Union "provided no explanation of why this benefit can be achieved only by providing a copy of such a recording to the employee rather than, for example, permitting the employee to review the recording before submitting the required statement or report." Award at 33. Similarly, in its exceptions, the Union does not explain why an employee needs to receive a copy of the recording in order to be protected from making false or erroneous statements. Because the VPP provides an employee who is the subject of a non-criminal investigation with the opportunity to *review* any vehicle pursuit recordings before providing a statement "[e]xcept in unusual circumstances," Award at 29, the claimed benefit of receiving a *copy* of such recordings is relatively limited.[5]

With respect to the burdens on management's right to determine internal security practices under § 7106(a)(1) of the Statute, that right includes the authority to determine the policies and practices that are a part of an agency's plan to secure or safeguard its personnel, physical property, or operations against internal or external risks. *See, e.g.*, *NATCA*, 64 FLRA 161, 163 (2009). The Authority has held that this right also includes the right to determine the investigative techniques management will employ to attain its internal security objectives. *See, e.g.*, *NTEU*, 55 FLRA 1174, 1186 (1999) (Member Wasserman dissenting in part); *NFFE, Local 28*, 47 FLRA 873, 877 (1993).

Here, the Arbitrator found that the proposal would significantly hamper the Agency's "ability to determine investigatory techniques and to control the release and dissemination" of vehicle recordings, which are "law enforcement sensitive information." Award at 33. In the Arbitrator's view, this would "seriously interfere with management's right to determine internal security." *Id.* The Union has not demonstrated that the Arbitrator erred in this regard, particularly given that the proposal conditions the Agency's ability to require an employee to make a statement on the Agency's prior provision of a copy of the "sensitive" recording to that employee. *Id.*

In addition, the Arbitrator found that the likelihood of widespread dissemination of recordings of vehicle pursuits on the internet or "law-enforcement-related 'reality' television shows" would be increased if the Agency provided employees with copies of such recordings. *Id.* at 34. She also found that, if the recordings were disseminated in this way, then this could "compromise the safety" of agents because "criminal elements . . . would be in the position to use this information in opportunistic ways, such as implementing counter measures in order to evade those techniques or . . . setting up an ambush." *Id.* at 33. The Union did not except to any of these factual findings by the Arbitrator, to which we defer in conducting a de novo review of the Arbitrator's legal conclusions.[6] *See Local 1437*, 53 FLRA at 1710. Further, the

[5] Although the Union notes that its proposal would extend to criminal investigations, its only argument in this regard relates to whether an employee can be compelled to testify. *See* Exceptions at 18. As that matter is not addressed by the proposal, we do not assess it as a benefit to employees.

[6] The Union does not claim that the award is based on a nonfact.

Arbitrator's finding that, by increasing the likelihood of dissemination of pursuit recordings on the internet or television, the proposal could pose a threat to the safety of agents, supports a conclusion that the proposal would excessively interfere with the Agency's right to determine the policies and practices that are a part of the Agency's plan to secure or safeguard its personnel, physical property, or operations against internal or external risks. *See NATCA*, 64 FLRA at 163.

Balancing the parties' respective interests, we find that the benefits to employees do not outweigh the burdens that the proposal would place on management. Accordingly, the Arbitrator correctly found that the proposal excessively interferes with the right to determine internal security practices under § 7106(a)(1) and, thus, is not an appropriate arrangement.

For the foregoing reasons, we deny the Union's exception arguing that the Arbitrator's finding that the pursuit recordings proposal was non-negotiable is contrary to law.

B. The Arbitrator's finding that the Agency's implementation of the revised VPP was lawful is not contrary to law.

The Union alleges that the Arbitrator erred in finding that the Agency's implementation of the revised VPP – despite the existence of outstanding, negotiable, Union proposals when the Agency ended the initial bargaining session – was lawful. When resolving a grievance that alleges an unfair labor practice (ULP) under § 7116 of the Statute, an arbitrator functions as a substitute for an Authority administrative law judge (ALJ). *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 431 (2010) (*IRS*). Consequently, in resolving the grievance, the arbitrator must apply the same standards and burdens that are applied by ALJs under § 7118 of the Statute. *Id.* In a grievance that alleges a ULP by an agency, the union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence. *Id.* As in other cases, in determining whether the award is contrary to the Statute, the Authority defers to the arbitrator's findings of fact. *Id.*

It is well established that, prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain if the change will have more than a de minimis effect on conditions of employment. *See, e.g.*, *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 65 FLRA 870, 872 (2011). Where a union submits bargaining proposals in response to a proposed change in conditions of employment, and the agency refuses to bargain over those proposals based on the contention that they are outside the duty to bargain, the agency acts at its peril if it then implements the proposed change. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 63 FLRA 505, 508 (2009). In this connection, if any of the union's proposals are found to be negotiable, then the agency will have violated the Statute by implementing the change. *Id.* However, if none of the union's proposals is found to be negotiable, then the agency does not violate the Statute by implementing the change. *See id.*

Here, the date on which the Agency implemented the revised VPP is not clear from the record because the Arbitrator's award and the Union's arguments treat two events as the possible implementation date: the OTD circulation and the supervisor circulation. *See* Award at 11-12, 15; Exceptions at 10, 22. Regarding the OTD circulation, the Arbitrator found that the Agency "at least technically implement[ed]" the VPP via the OTD circulation. Award at 35. However, the Arbitrator also found that there was "no claim" that the OTD circulation "had any effect on the terms and conditions of employment of employees covered under the present grievance." *Id.* at 36. In its exceptions, the Union argues that there is "no dispute" that this implementation "had an impact that was greater than de minimis on the bargaining unit," Exceptions at 10, but does not argue that the award is based on a nonfact or otherwise demonstrate that the Arbitrator erred in this regard. Accordingly, the Union's arguments regarding the OTD circulation do not demonstrate that the award is contrary to law.

After the OTD circulation, the Union filed the instant grievance, which included the seven proposals that it asserted were outstanding from the initial bargaining session. Award at 9. The Agency granted the grievance with respect to all of the proposals except the pursuit recordings proposal, revised the VPP consistent with its disposition of the grievance, and later circulated this "interim version" of the VPP via the supervisor circulation. *Id.* at 9, 11-12. Subsequently, the parties met for additional bargaining, and the Agency adopted all of the Union's proposals other than the pursuit recordings proposal. *Id.* at 12-13. During this period, the Arbitrator found that there were no effects on agents' terms and conditions of employment "as the policy continued to be revised as the result of the parties' continued bargaining." *Id.* at 36. Thus, the Arbitrator effectively found that the supervisor circulation did not constitute implementation because it did not change agents' conditions of employment. The Union does not argue that the award is based on a nonfact or otherwise demonstrate that the Arbitrator erred in this regard. Accordingly, the Union's

arguments regarding the supervisor circulation do not demonstrate that the award is contrary to law. [7]

For the foregoing reasons, we deny the Union's exception arguing that the Arbitrator erred as a matter of law in finding that the Agency lawfully implemented the revised VPP.

V. Decision

The Union's exceptions are denied.

[7] To the extent that the Union attempts to raise a separate contrary to law exception arguing that the Arbitrator erred by failing to find that the Agency engaged in bad-faith bargaining, *see* Exceptions at 16, 22, the issue before the Arbitrator, in pertinent part, as agreed upon by the parties, was whether the Agency violated the Statute "by unilaterally implementing the [VPP] without fulfilling its collective bargaining obligations with the Union," Award at 27. Thus, the agreed-upon issue did not expressly reference a bad-faith-bargaining claim, and the Union provides no basis for finding that the Arbitrator was required to address such a claim separate and apart from the unilateral implementation issue. Accordingly, the Union's exception provides no basis for finding that the award is contrary to law.