

66 FLRA No. 176

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
LOMPOC, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3048
(Union)

0-AR-4621

DECISION

September 4, 2012

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

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

The Arbitrator found that the Agency violated the parties' agreements when the Agency refused to bargain over the issuance and use of stab-resistant vests and other non-lethal personal protection items (non-lethal weapons). For the reasons discussed below, we remand the award to the parties for resubmission to the Arbitrator, absent settlement.

II. Background and Arbitrator's Award

After an officer was stabbed to death at one of the Agency's facilities, the Union requested bargaining at the local level regarding the issuance of stab-resistant vests and other non-lethal weapons. Award at 3. At approximately the same time, the national Union requested bargaining at the national level regarding the issuance and use of stab-resistant vests for all correctional officers in the Agency's prisons. *Id.* The Agency

ultimately issued stab-resistant vests to all correctional officers who requested one. *Id.*

The Union recognized that, because the Agency had issued stab-resistant vests and had engaged in post-implementation bargaining at the national level, many of the issues relating to the vests were either "moot or resolved," but contended that negotiations still should occur at the local level regarding certain matters related to the issuance and use of the vests, as well as the issuance and use of other protective gear and equipment.¹ *Id.* at 4. Asserting that all such issues had been resolved, the Agency declined to enter into additional negotiations. *Id.* at 3, 4. The Union then filed a grievance, which the Agency denied. The matter was not resolved and was submitted to arbitration.

The Arbitrator framed the issue as whether the Agency violated the parties' agreement and a local supplemental agreement "when it refused to negotiate over the issuance, procedures[,] and appropriate arrangements involved in the use of stab[-resistant] vests, and other non-lethal [weapons]? . . . If so, what should be the remedy?" *Id.* at 3.

The Arbitrator found that the Agency violated the parties' agreement by refusing to bargain over these matters at the local level. *See* Award at 13, 14. The Arbitrator found that the evidence established that "a change in working conditions" had occurred since the parties entered into their agreement. *Id.* at 9. Specifically, the Arbitrator found that: (1) the prisons were "overcrowded with more inmates and fewer staff"; (2) violence in the prisons had increased substantially, with "greater sophistication, more aggressive, and more gang[-]related activity"; and (3) lower-level institutions, such as the prison at issue, were being assigned "maximum custody inmates." *Id.* The Arbitrator held that these changes "trigger[ed] the application of Article 3 of the [parties' agreement], calling for negotiations."² *Id.* The Arbitrator determined that local negotiations were not required on matters that had been resolved at the national level, but that the Union "ha[d] raised other [stab-resistant] vest issues" that were not necessarily covered by the national negotiations. *Id.* at 9. The Arbitrator also found that the Union's request to negotiate on matters involving the use of non-lethal weapons was appropriate under the parties' agreement. *See id.* at 13-14.

¹ On September 30, 2010, the Authority issued a decision on a negotiability appeal filed by the national Union, which concerned whether a proposal concerning stab-resistant vests was within the Agency's duty to bargain. *See AFGE, Council of Prisons Locals 33*, 65 FLRA 142 (2010).

² The text of the relevant provisions of the parties' agreement is set forth in the appendix to this decision.

Accordingly, the Arbitrator “ordered [the Agency] to begin negotiations with the Union over the issuance, procedures[,] and appropriate arrangements” concerning the use of stab-resistant vests and other non-lethal weapons. *Id.* at 15.

III. Positions of the Parties

A. Agency’s Exceptions

The Agency contends that it has no duty to bargain over the issuance of non-lethal weapons because no change occurred in the employees’ conditions of employment that would trigger bargaining. Exceptions at 7. According to the Agency, the Arbitrator “attempted to find a change in conditions of employment by finding that[,] in general . . . there ha[d] been an increase in the number of inmates . . . and that these inmates have a propensity to be more violent.” *Id.* at 9. The Agency contends that, because these changes are “external factors outside [of the Agency’s] control,” *id.*, “no obligation to bargain ar[ose],” *id.* at 10 (asserting that, “[m]anagement has not made a change, or has no control over the external factors, no obligation to bargain arises[.]”); *see also id.* at 7-10 (citing *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 715 (1999) (*Leavenworth*); *U.S. Dep’t of Veterans Affairs, Veterans Admin. Med. Ctr., Memphis, Tenn.*, 42 FLRA 712, 713 (1991)).

The Agency also argues that the award is contrary to the Statute because the Union’s request to bargain was not made at the national level, which is the exclusive level of recognition. *Id.* at 6-7. The Agency further contends that it has no obligation to bargain at the local level regarding matters related to either non-lethal weapons or stab-resistant vests because such matters were negotiated at the national level and the parties did not agree that any matters relating to such vests would be negotiated at the local level. *Id.*; *see also id.* at 14 n.3.

Relying on the above arguments, the Agency further asserts that, because it had no obligation to bargain over either non-lethal weapons or stab-resistant vests, “any attempt to require” it to negotiate over “the procedures and appropriate arrangements” involved in the issuance of such items is also contrary to law. *Id.* at 14 n.3 (citing 5 U.S.C. § 7106(b)(2) and (b)(3)).

The Agency also argues that the portion of the award requiring the Agency to bargain over the issuance of non-lethal weapons is contrary to law because it directly interferes with management’s right to determine its internal security practices. *Id.* at 13. The Agency states that employees are not allowed to carry non-lethal weapons on their persons in prisons and asserts that “only the Warden . . . may authorize the use of these types of

weapons in very specific and limited circumstances.” *Id.* (citing 28 C.F.R. § 552.25).

B. Union’s Opposition

The Union contends that the Agency’s claim that no change in conditions of employment occurred that would trigger bargaining “ignores factual findings” made by the Arbitrator. *Opp’n* at 8. The Union also contends that, contrary to the Agency’s contention, “external changes routinely call into play bargaining obligations.” *Id.*

The Union asserts that, contrary to the Agency’s contention, the award is not contrary to law because it requires bargaining at the local level. *Id.* at 5-7. According to the Union, several provisions of the parties’ agreement provide for bargaining at the local level. *Id.* The Union further contends that the cases relied upon by the Agency are inapposite. *Id.* at 7.

The Union argues that the Agency’s management-rights exception is misplaced because no specific proposals have been proposed. *Id.* at 9. According to the Union, the Arbitrator’s award did not specify any equipment that had to be provided, but, rather, only generally addressed the Agency’s obligation to bargain over matters related to safety and health. *Id.* at 10.

IV. Analysis and Conclusions

When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by the 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 the standard of *de novo* review, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the applicable standard of law. *See U.S. Dep’t of Def., Dep’ts of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator’s underlying factual findings. *See id.*

- A. The award is remanded to determine whether a change in conditions of employment occurred, thereby triggering an obligation to bargain with regard to non-lethal weapons.

The Agency contends that the portion of the award requiring the Agency to bargain over non-lethal weapons is contrary to law because no change in the employees’ conditions of employment occurred that

would “trigger bargaining.”³ Exceptions at 7. According to the Agency, the changes relied upon by the Arbitrator – an increase in the number of prisoners and greater prison violence – were “external factors outside [of the Agency’s] control,” *id.* at 9; as a result, the Agency contends, “no obligation to bargain ar[ose],” *id.* at 10 (citing *Leavenworth*, 55 FLRA at 715).

The Authority has applied statutory standards in assessing the application of contract provisions that mirror, or are intended to be interpreted in the same manner as, the Statute. See *AFGE*, 59 FLRA 767, 769-70 (2004) (*AFGE*) (Chairman Cabaniss concurring and then-Member Pope dissenting on other grounds). Here, the agreement provision at issue, Article 3, expressly requires bargaining only “where required by 5 [U.S.C. §§] 7106, 7114, and 7117.” Award at 5 (citation omitted). Because Article 3 expressly requires bargaining only where required by the Statute, the award will be reviewed consistent with applicable standards of law. See, e.g., *AFGE*, 59 FLRA at 769-70.

To determine whether an agency has violated the Statute by failing to provide a union with notice and an opportunity to bargain over changes to conditions of employment, there must first be a finding that the agency made a change in a policy, practice, or procedure affecting unit employees’ conditions of employment. See *U.S. Dep’t of Labor, OSHA, Region 1, Bos., Mass.*, 58 FLRA 213, 215 (2002) (Chairman Cabaniss concurring) (citing, among others, *U.S. INS., Houston Dist., Houston, Tex.*, 50 FLRA 140, 143 (1995) (*INS, Houston*)). The determination of whether a change in conditions of employment has occurred involves a case-by-case analysis, inquiring into the facts and circumstances regarding an agency’s conduct and employees’ conditions of employment. See *id.* at 215 (citing *92 Bomb Wing, Fairchild Air Force Base, Spokane, Wash.*, 50 FLRA 701, 704 (1995); *INS, Houston*, 50 FLRA at 144)).

The Arbitrator found that the Agency violated the parties’ agreement by refusing to bargain over non-lethal weapons. See Award at 13-14, 15. In finding a duty to bargain, the Arbitrator found that “[v]iolence in the prisons has increased substantially over the years with . . . more aggressive and more gang related activity”; “[l]ower level institutions,” such as the Agency’s facility, were “being assigned maximum custody inmates”; and “prisons are overcrowded with more inmates and fewer staff.” *Id.* at 9. The Arbitrator found that these factors

“constitute[d] a change in working conditions [that] trigger[ed] the application of Article 3 of the [parties’ agreement] calling for negotiations.” *Id.* However, the award contains no factual findings regarding whether these factors resulted from any change the Agency had made in its policies, practices, or procedures. *Id.* at 4, 5, 13-14. As such, the record does not contain sufficient factual findings to determine whether the Agency violated the Statute by failing to provide the Union with notice and an opportunity to bargain over changes to conditions of employment.

Therefore, we are unable to assess whether the award is deficient under the Statute. Where an arbitrator has not made sufficient factual findings for the Authority to determine whether the award is contrary to law, and those findings cannot be derived from the record, the Authority will remand the award to the parties for further action. See, e.g., *AFGE, Local 2054*, 63 FLRA 169, 172-73 (2009); *U.S. Dep’t of Transp., Maritime Admin.*, 61 FLRA 816, 822 (2006); *NFFE, Local 1437*, 53 FLRA 1703, 1710-11 (1998). Accordingly, we remand this portion of the award to the parties for resubmission to the Arbitrator, absent settlement, to clarify whether the factors upon which the Arbitrator relied in finding a change in conditions of employment resulted from any change that the Agency made in its policies, practices, or procedures.

- B. The award is remanded to clarify the basis for the Arbitrator’s finding that the Agency was obligated to bargain locally over both stab-resistant vests and non-lethal weapons.

The Agency contends that the award is contrary to the Statute because the Union’s request to bargain regarding both stab-resistant vests and non-lethal weapons was not made at the national level, which is the level of exclusive recognition, and the parties did not agree to bargain at the local level. Exceptions at 6. The Agency further asserts that, because it has no obligation to bargain over either item, “any attempt to require” it to negotiate over “the procedures and appropriate arrangements” involved in the issuance of such items is also contrary to law. *Id.* at 14 n.3 (citing 5 U.S.C. § 7106(b)(2) and (b)(3)).

Under Authority precedent, it is well established that there is no statutory obligation to bargain below the level of recognition. See, e.g., *U.S. FDA Admin., Ne. & Mid-Atl. Regions*, 53 FLRA 1269, 1274 (1998) (*FDA*); *U.S. Dep’t of the Air Force, Ogden Air Logistics Ctr., Hill Air Force Base, Utah*, 39 FLRA 1409, 1417-18 (1991) (*Hill AFB*). But the Authority also has held that parties at the national level may “authorize local components to bargain supplemental and other agreements over particular subjects or in particular

³ The Agency excepts on this basis only with respect to the Arbitrator’s determination regarding non-lethal weapons. Thus, the Agency has waived any such argument with respect to the Arbitrator’s determination regarding stab-resistant vests. See, e.g., *U.S. Dep’t of Justice, Wash., D.C.*, 56 FLRA 556, 559 (2000) (agency’s failure to raise issue in exception to the Authority precluded Authority from considering issue).

circumstances.” *FDA*, 53 FLRA at 1274; *see also Hill AFB*, 39 FLRA at 1417.

As noted above, the Arbitrator found that changes in working conditions had occurred that “trigger[ed] the application of Article 3 of the [parties’ agreement] calling for negotiations.” Award at 9. The Arbitrator also noted that “the Union contend[ed] that the Agency’s permissive use of certain protective equipment under ‘limited circumstances’ violates Article 27 of the [parties’ agreement,] which requires the Agency to lower inherent hazards to the lowest possible level.” *Id.* at 12-13 (internal quotation marks omitted). The Arbitrator further found that the parties had agreed in Article 28 to negotiate at the local level over additional uniform items when appropriate for health and safety reasons, however, the Arbitrator did not identify whether either stab-resistant vests or non-lethal weapons were appropriate subjects for negotiation under this provision. *Id.* at 13-14. As a result, it is not clear from the award whether the Arbitrator’s finding of an obligation to bargain at the local level over either or both of these items is based solely on Article 3, Section c of the parties’ agreement or is based on another provision of the parties’ agreement, such as Article 27 or Article 28.

Because we are unable to determine the source of the bargaining obligation, we also are unable to assess whether the award is deficient under the Statute. In this regard, if the source of the bargaining obligation is Article 3, then the award would be contrary to law because, as explained previously, Article 3 mirrors the Statute and the Statute does not require bargaining below the level of recognition. If, however, the Arbitrator is applying a contract provision that does not mirror the Statute, such as Article 27 or Article 28, then the question is one of contract interpretation, and the award would not be contrary to law. *See Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 891 (2010) (where grievance involves dispute regarding bargaining obligation as defined by the parties’ agreement, issue of whether parties have complied with the agreement becomes matter of contract interpretation). Moreover, because the basis for this portion of the award is unclear, we also cannot assess whether the Arbitrator appropriately required the Agency to bargain over the “procedures and appropriate arrangements” involved in the issuance of such items. Award at 15. Accordingly, we remand this portion of the award to the parties for resubmission to the Arbitrator, absent settlement, for the Arbitrator to clarify the basis for his finding that the Agency was obligated to bargain locally regarding the use of non-lethal weapons and stab-resistant vests.

V. Decision

The award is remanded to the parties for resubmission to the Arbitrator, absent settlement, consistent with this decision.⁴

⁴ In view of the above determination, we find it unnecessary to address the Agency’s remaining exception that requiring the Agency to negotiate over the issuance of non-lethal weapons impermissibly affects its right to determine its internal security practices under § 7106(a)(1) of the Statute. As discussed above, we are remanding the award to the parties for resubmission to the Arbitrator, absent settlement, for the Arbitrator to clarify, among other things, his findings that: (1) a change in conditions of employment occurred that triggered bargaining with regard to non-lethal weapons; and (2) the Agency was contractually obligated to bargain over non-lethal weapons. As such, we find it premature to address the Agency’s argument. *See, e.g., U.S. Dep’t of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Terre Haute, Ind.*, 58 FLRA 327, 330 (2003), *reconsid. denied*, 58 FLRA 587, 587 (2003) (finding it premature to address cross-exceptions where award was remanded to the parties for resubmission to the arbitrator on matter in dispute). However, we remand this case to the parties without prejudice for the Agency to resubmit this exception to the Authority if any dispute remains after completion of matters related to the remand. *See, e.g., SSA*, 30 FLRA 1003, 1005-06 (1988) (remanding case without prejudice, noting that parties could resubmit to the Authority any dispute they could not resolve).

APPENDIX

The pertinent text of the parties' agreement is set forth below:

Article 3, Section c

The Union and Agency representatives, when notified by the other party, will meet and negotiate on any and all policies, practices, and procedures which impact conditions of employment, where required by 5 [U.S.C. §§] 7106, 7114, and 7117, and other applicable government-wide laws and regulations, prior to implementation of any policies, practices, and/or procedures.

Award at 5 (quoting Jt. Ex. 1).

Article 28 – Uniform Clothing

Section a. For uniformed employees, adequate foul weather gear and/or clothing will be provided and worn if the employee is required to work an outside assignment or post in inclement weather. This foul weather gear will be issued to employees for the duration of the assignment to the outside post or for the duration of the foul weather season, whichever is more practical, and will then be returned to the [Agency] to be cleaned, if necessary, prior to reissuance. . . . The type of foul weather and/or clothing may be negotiated locally.

Section b. The [Agency] will ensure that adequate supplies of security and safety equipment are available for issue to and/or use by employees during the routine performance of their duties. This includes, but is not limited to, whistles, key chains, key clips, belts for equipment, disposable resuscitation masks and rubber gloves, handcuffs, two-way radios, body alarms, flashlights, hand-held metal detectors, weapons, ammunitions, etc. Cases or holders, whichever is appropriate, to carry such equipment will also be available for these particular items of

equipment normally using such cases or holders. Employees receiving such items will be accountable for them until they are returned to the [Agency].

....

Section c. The [Agency] will provide additional equipment or clothing for safety and health reasons when necessary due to the nature of the assignment and as prescribed by the Safety Officer.

....

Section d. On armed posts, if the wearing of a bullet-proof vest is mandated or requested, there will be a sufficient supply of such vests provided by the [Agency]. The [Agency] will ensure that adequate numbers and sizes of such vests are available, including vests sized for female employees. The cleaning of these vests may be negotiated locally.

....

Section g. Safety-toed footwear for uniformed and non-uniformed employees (when such employees work in a designated foot hazard area) will be shoes or boots at the discretion of the individual employee. The cost and quality of said footwear will be negotiated locally.

....

Section i. Any additional uniform items, when appropriate for health and safety reasons, will be negotiated at the local level.

....

Id. at 6-8 (quoting Jt. Ex. 1).

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