INTER-AGENCY LABOR RELATIONS FORUM
FLRA CASE UPDATE
APRIL 19, 2007
SUSAN D. MCCLUSKEY, FLRA

Authority Decisions

Arbitration

***U.S. Dep't of the Navy, Puget Sound Naval Shipyard,* 62 FLRA No. 2 (January 25, 2007)**

Authority denied exceptions to an award providing backpay to grievant for overtime that was not assigned or worked due to violation of parties' agreement. Authority rejected agency's request that the Authority reconsider precedent authorizing backpay for overtime that is not worked.

***Association of Civilian Technicians, New York State Council*, 61 FLRA 664 (2006) denying reconsideration of 60 FLRA 890 (2005)**

Authority rejected union contention that the fact that the union submitted grievance regarding alleged ULP to arbitration required arbitrator to resolved ULP on the merits where parties failed to stipulate that ULP was issue to be resolved.

***AFGE, Local 1936*, 61 FLRA 645 (2006)**

Authority confirmed that "prevailing market rate" for attorney fees awarded under the Back Pay Act is determined by examining the rate in the community in which the attorney ordinarily practices, not the community where the arbitration hearing is held. In this case, fees based on the prevailing rate in Washington DC were granted even though the arbitration hearing was held in Charleston, West Virginia.

***U.S. Dep't of Commerce, PTO, Arlington, VA.*, 61 FLRA 476 (2006)**

In a case of first impression, the Authority determined it did not have jurisdiction over a "mixed case" arbitration award arising out an employee's removal for unacceptable performance where the employee claimed discrimination. While the Authority has jurisdiction under 5 U.S.C. §§ 7121(d) and 7122(a) to review arbitration awards involving discrimination, the Authority does not have jurisdiction to review arbitration awards over matters covered by 5 U.S.C. §§ 4303 or 7512, per 5 U.S.C. §§ 7121(f) and 7122(a). Where, as here, an otherwise reviewable issue is "inextricably intertwined" with the unreviewable issue, the Authority will not exercise jurisdiction to review either.

***U.S. Dep't of Transportation, FAA, Anchorage, AK.*, 61 FLRA 176 (2005)**

In setting aside an arbitrator's award the Authority held that official time negotiated pursuant to § 7131(d) of the Statute may only be used by employees on behalf of their own units, not other bargaining units of which they are not members.

***AFGE, Local 1658*, 61 FLRA 80 (2005)**

There are two different types of arbitrability claims: procedural (the subject matter of the grievance can be pursued to arbitration, but the arbitral claim has a procedural defect – such as the timeliness of the filing) and substantive (the subject matter of the grievance cannot be pursued to arbitration as a matter of law or contract). The Authority's review of these claims varies by type. Arbitrators have substantial deference in resolving procedural arbitrability claims, and the Authority will not review on the merits arbitration exceptions that directly challenge a procedural arbitrability determination. An example is an essence exception alleging an arbitrator misinterpreted an agreement's timeliness provision. Substantive arbitrability claims, on the other hand, can be challenged on the merits, usually as an essence challenge (where the substantive limitation is established by agreement) or as a contrary to law claim (where the substantive limitation is established by law). This decision addressed a substantive limitation found in the parties' agreement, and the Authority denied an exception alleging the arbitrator had improperly interpreted the agreement when he dismissed various claims as being excluded from the scope of the parties' grievance/arbitration process.

***U.S. Dep't of the Army, Ft. Polk, LA.*, 61 FLRA 8 (2005) (Member Pope dissenting)**

The Authority held that 5 U.S.C. § 7121(c)(5), which prohibits the use of grievance/arbitration procedures for classification claims (not involving the reduction of grade or pay of an employee), addresses a matter of arbitral jurisdiction that the FLRA may raise on its own and resolve, the failure of the parties to do so notwithstanding.

Negotiability

***NAGE, Local R1-109,* 61 FLRA 588 (2006)**

Authority confirmed that proposals establishing procedures for promotion of unit employees into supervisory positions constitute permissive subjects of bargaining. Authority declined union's request to reconsider long-standing precedent to this effect.

***NTEU*, 61 FLRA 48 (2005) (Member Armendariz dissenting)**

The Authority held that the agency failed to meet its burden to establish that a proposed action was reasonably connected to internal security practice rights under 5 USC § 7106(a)(1). In this instance, the proposed internal security matter dealt with a limitation on wearing cargo shorts by agency personnel in certain locations. The Authority held that the agency's proposed restriction on the wear of cargo shorts did not involve the agency's internal security practices.

Unfair Labor Practice

***U.S. Dep't of the Treasury, IRS, Wash., DC.*, 61 FLRA 146 (2005) (Member Pope concurring)**

On remand from the U.S. Court of Appeals for the DC Circuit, the Authority modified its standard for determining whether a ULP charge challenging the failure to comply with an arbitration award is timely under § 7118(a)(4). Rather than starting the six-month statute of limitations on the day the arbitrator's award becomes final and binding, the limitations period is

triggered when: (1) a party notifies the other party that it will not comply with the award; or (2) an award establishes a deadline for implementing the award and the deadline passes without action. The Authority also stated that in cases where these criteria are not present, the Authority will determine the triggering date based on the facts and circumstances of that case.

Representation

***U.S. Dep't of Justice*, Order Granting Application for Review March 30, 2007 (unpublished)**

In this unpublished order, the Authority granted the Agency's application for review of the Regional Director's decision that four employees who work in the Agency's Automated Booking System Program Management Office should not be excluded from a unit under § 7112(b)(6) of the Statute (which excludes employees who are engaged in "security work which directly affects national security."). The Agency argues, among other things, that the Authority should reconsider its precedent and hold that employees who encumber positions identified as "sensitive" and/or hold security clearances entitling them to review classified information should automatically be excluded under § 7112(b)(6).

***National Labor Relations Board*, 62 FLRA No. 9 (March 14, 2007)**

Authority denied the Agency's application for review of the Regional Director's decision that the National Labor Relations Board Union was permitted to consolidate units comprising professional and nonprofessional employees as well as units comprising Board-side employees and units comprising General Counsel-side employees. As relevant here, the Authority rejected the Agency's argument that § 3(d) of the NLRB's enabling statute, which provides the GC with authority over all attorneys except ALJs and those attorneys working for Board Members, precluded consolidate Board and GC units. In so doing, the Authority relied on historical, and recent, data indicating the Board and the GC conduct joint bargaining, have virtually identical collective bargaining agreements, and have centralized personnel and labor relations functions.

***U.S. Dep't of the Navy, Mid-Atlantic Regional Maintenance Center,* 61 FLRA 530 (2006)**

In case of first impression, Authority held that parties' waiver of right to file an application for review of RD's decision "based upon the parties' stipulation" was enforceable, and the Authority dismissed the union's application for review. The Authority rejected the union's argument that the RD's decision was not based on the parties' stipulation and, as a result, the waiver didn't apply. The Authority noted that because the parties waived a hearing, any RD decision would necessarily be based on the parties' stipulation.

***U.S. Dep't of Homeland Security, BCBP*, 61 FLRA 485 (2006)**

The Authority denied an application for review filed by the National Association of Agriculture Employees (NAAE) of a Regional Director's appropriate unit determination, finding a nationwide unit of former Customs Inspectors, Immigration Inspectors, and Plant Protection and Quarantine Officers to be appropriate for bargaining. Pursuant to the Homeland Security Act, the Customs Service, the Immigration Service, Border Patrol and elements of the Plant Protection and Quarantine (PPQ) were transferred to the Department of Homeland Security

(DHS). After the transfer, these functions were grouped organizationally within DHS as a part of Customs and Border Protection (CBP), although the Border Patrol was transferred intact and remained a separate organizational element within CBP.

Prior to their transfer to CBP, employees of the Customs Service were represented by NTEU, employees of the Immigration and Naturalization Service were represented by AFGE, and employees of PPQ were represented by NAAE. In May 2004, CBP filed a representation petition seeking clarification of the appropriate unit and exclusive representative(s) of employees transferred to CBP, seeking a nationwide unit including, as relevant here, all professional and non-professional employees. Subsequently, NAAE filed petitions seeking a determination as to whether a professional unit including Agriculture Specialists, and a non-professional unit including Agriculture Technicians, were appropriate as separate units within CBP. The RD found that separate units of former PPQ employees were not appropriate and that the Agricultural Specialists were not professional employees within the meaning of § 7103(a)((15) of the Statute. The RD ordered an election for representation of the agency-proposed unit.

NAAE petitioned for review in the U.S. Court of Appeals for the 9th Circuit, arguing that the court had jurisdiction over this normally non-reviewable action because it was not appealing whether the unit was appropriate but only whether the Authority erred in finding that Agricultural Specialists were not professionals. The court dismissed the petition for lack of jurisdiction after oral argument. *NAAE v. FLRA*, No. 06-71671 (9th Cir.) (unpublished).

***Pension Benefit Guaranty Corp*., 61 FLRA 447 (2006) (Chairman Cabaniss separate opinion)**

When an outside union seeks to replace an incumbent union, the challenging union files a petition with the applicable FLRA regional director. Once the RD determines the petition makes out a *prima facie* showing of interest, the challenging union can then be entitled to "equivalent status" with the incumbent union in terms of access to "customary and routine facilities and services" of the employer like meeting rooms and bulletin boards, provided those facilities and services would also available to any other union that might achieve equivalent status. In a 1992 decision (44 FLRA 419) the Authority stated that equivalent status did not commence until the RD notified the employer and other parties that the petition includes a *prima facie* showing of interest, that the Authority would be processing the petition further, and that a notice of the petition would be posted to advise employees of this fact. However, since that decision, the Authority's precedent on this point dropped out the notification requirement to the parties of the *prima facie* showing of interest.

In this decision, the Agency did not provide the challenging union with any customary and routine services until some time after the Authority notified the agency of the petition, and the employee posting of the petition took place, because the RD did not advise the Agency that a *prima facie* showing of interest had been made. When the challenging union lost the election, it appealed to the RD, who ruled that a new election had to take place because of the error. Both the incumbent union and the Agency then appealed. The Authority clarified that the rule set out in the 1992 was still valid. The Authority found that error (by the RD) had taken place, but that it was not possible from the record to determine whether the error had the potential to interfere with "the free choice of the voters." Consequently, the Authority remanded the case to the RD to determine whether the error so affected the free choice of the voters.

JUDICIAL DECISIONS

***AFGE, Local 446 v. Dep't of Veterans Affairs,* No. 05-5365 (D.C. Cir. January 16, 2007)**

Agency filed untimely exceptions to an arbitration award granting certain VA employees premium pay. After the Authority dismissed the exceptions, the agency refused to implement the award, causing the Union to file a ULP charge with the Authority. During the ULP litigation the VA Under Secretary for Health issued an opinion that the award concerned employee compensation and was, thus, unreviewable in administrative proceedings. In 57 FLRA 681 (2002), the Authority rejected the General Counsel's contention that the VA could not challenge the jurisdiction of the arbitrator and the Authority after the award issued and dismissed the complaint.

Subsequently, the union filed suit in U.S. District Court contending that the VA Under Secretary's determination was arbitrary and capricious within the meaning of the APA. The district court concluded that the union's suit was an attempt to appeal the Authority's decision in 57 FLRA 681 and, as such, could not be lodged in the district court. On appeal, the U.S. Court of Appeals for the D.C. Circuit reversed the district court, holding that the union was attempting only to obtain APA review of the Under Secretary's determination, for which there is jurisdiction in the district court. Instead of remanding to the district court, the D.C. Circuit proceeded to resolve the case, finding that the VA Under Secretary's determination was timely (because there are no time limits) and was not arbitrary and capricious.

***AFGE, Local 2924 v. FLRA*, 470 F.3d 375 (D.C. Cir 2006), reviewing 60 FLRA 895 (2005) (Member Pope dissenting)**

Authority concluded that agency did not repudiate parties' agreements regarding employee drug testing and rehabilitation because the agency acted on a reasonable interpretation of the agreements and, as a result, did not commit a "clear and patent" breach of the agreements under the first prong of the repudiation test. In reaching this conclusion, the Authority relied on the testimony of Agency negotiators regarding the intent of the relevant provisions.

On review, the U.S. Court of Appeals for the D.C. Circuit held that the Authority's interpretation of the agreements could not be squared with the plain wording of the agreements and that the Authority erred in considering "self-serving testimony from employer witnesses" to refute the plain wording. The court remanded the case to the Authority to apply the second prong of the repudiation test -- whether the Agency's breach went "to the heart" of the agreements.
PENDING

***National Weather Svc. Employees Org. v. FLRA*, No. 05-1397 (D.C. Cir. July 17, 2006) (unpublished), reviewing 61 FLRA 241 (2005). Reconsideration denied by court.**

The FLRA decision found the union's proposal to negotiate over how many employees were to be assigned to a particular organization outside the duty to bargain because the proposal excessively interfered with the Agency's right under 5 U.S.C. § 7106(b)(1) to determine staffing patterns. The court reversed and remanded, ordering the Authority to consider to what extent the "implementation of the [Union's proposal] would hamper the ability of the [Agency] to perform its work in an effective and efficient manner." ***PENDING***

***AFGE, Local 2510 v. FLRA*, 453 F.3d 500 (D.C. Cir. 2006), reviewing 60 FLRA (No. 62) 281 (2004) reconsideration denied 60 FLRA 636 (2005)**

The union sought review of an Authority decision in an arbitration case reducing the amount of attorney fees awarded by an arbitrator pursuant to the Back Pay Act. The court dismissed the petition for review for lack of jurisdiction because the Authority's order on exceptions to the arbitrator's award did not involve a ULP -- even though the arbitrator's underlying merits award expressly resolved a ULP. According to the court, the Authority's order for which review was sought involved only attorney fees, not the underlying ULP. In addition, the court held that jurisdiction was not available under *Leedom v. Kyne*, because *Leedom* can only provide jurisdiction in district courts, not the courts of appeals.

***NTEU v. FLRA*, 453 F.3d 506 (D.C. Cir. 2006), reviewing 60 FLRA 922 (2005)**

The court denied the union's petition for review. In the decision at issue, the Authority denied the union's exceptions to an arbitrator's award finding that the agency did not violate the Statute and provisions of the parties' collective bargaining agreement by refusing to bargain at the local level over the impact and implementation of changes concerning the duration of certain assignments and regular days off. The Authority had determined that the agency effectively revoked its agreement to bargain over inspectional assignment matters at the local level when it implemented a revised National Inspectional Assignment Policy (RNIAP). The court held that the Authority reasonably concluded that the expansive language of the relevant section of the RNIAP provided the union with adequate notice that the agency was disclaiming its obligation to bargain at the local level. The court also rejected the union's alternative argument that, even if the RNIAP effectively terminated the agency's obligation to bargain matters within the scope of the RNIAP at the local level, the obligation to bargain locally continued over the matters at issue here because these matters were not addressed by the RNIAP. In that regard, the court held that the changes in assignment policy at issue here were reasonably encompassed within the subject matters addressed by the RNIAP.

***NTEU v. FLRA*, 453 F.2d 793 (D.C. Cir. 2006), reviewing 60 FLRA 572, reconsideration denied 60 FLRA 893 (2005)**

The union sought review of an Authority decision granting agency exceptions to an arbitrator's award ruling that the agency violated the Statute when it refused to bargain with the union over certain portions of the union's leave-swapping proposal. On review, the D.C. Circuit denied the union's petition. The court concluded that the issue of whether a matter proposed for bargaining is "covered by" an existing agreement was a question of law and not an interpretation of the agreement. The court held the Authority properly decided *de novo* whether the union's bargaining proposals were covered by the parties' national agreement and, therefore, did not err in failing to defer to the arbitrator. Further, the court concluded that the Authority's determination that the leave swapping program was "covered by" the national agreement conclusion was, if not compelled, reasonable.

***AFGE, National Border Patrol Council, AFL- CIO v. FLRA*, 446 F.3d 162 (D.C. Cir. 2006), reviewing 60 FLRA 943 (2005)**

The union sought review of an Authority ULP decision finding that the agency's unilateral change reducing authorized remedial firearms training from 80 to 8 hours did not require bargaining because the change did not have a greater than *de minimis* effect on working conditions. The court granted the union's petition for review finding that the FLRA's application of the *de minimis* standard was unreasonable. In that regard, the court concluded that the change had a greater than *de minimis* effect because the change affected the conditions under which an employee could be terminated. The court also held that the Authority improperly disregarded evidence of the effect of the change on employees in a different bargaining unit who were, nonetheless, subject to the same firearms policy. The court remanded the case to the Authority for further proceedings not inconsistent with the opinion. ***PENDING***

***NTEU v. FLRA*, 437 F.3d 1248 (D.C. Cir. 2006), reviewing 60 FLRA 367 (2005)**

Granting the union's petition for review, the court reversed the Authority's determination that a bargaining proposal was not a negotiable appropriate arrangement and directed the Authority to clarify its rationale concerning a similar determination with respect to another proposal. The case involved two proposals submitted in response to the agency's revised firearms policy.

The first proposal would have required the agency to permit employees not certified for 24-hour carry of firearms to make "reasonable diversions and stops" between their residence and work. Applying the KANG balancing test, the Authority held that the proposal was not an appropriate arrangement finding that the "minimal benefit" to employees was outweighed by the safety concerns of the agency. The court held that the Authority failed to adequately explain its dismissal of the employee benefit as "minimal," and remanded the matter for further explanation. The second proposal required the agency to expedite "on a priority basis" any internal investigation relating to an employee's carriage of firearms. The Authority found that the proposal required the agency to give firearms-related investigations absolute priority over all other investigations and that that burden outweighed the benefit to employees. The court reversed, finding, among other things, that that the proposal did not require the agency to give absolute priority to these investigations. The court also noted that the agency had not asserted the burden that the Authority relied upon. ***PENDING***

***NATCA, AFL-CIO v. FSIP*, 437 F.3d 1256 (D.C. Cir. 2006)**

The court affirmed the district court's judgment that it was without jurisdiction to review a determination of the Federal Service Impasses Panel to decline jurisdiction over a bargaining dispute between the FAA and two of the unions representing its employees. After failing to reach agreement with the FAA, the unions filed a request for assistance with the Panel, where the FAA contended that the Air Traffic Management System Performance Act deprived the Panel of jurisdiction over the dispute. The Panel declined to assert jurisdiction over the dispute, stating that these questions should be resolved in an appropriate forum. The unions sought an order from the district court directing the Panel to resolve the bargaining dispute. The court noted that Panel orders are generally not subject to judicial review, citing *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1500-01 (D.C. Cir. 1984). The court also found that under the circumstances of this case, the doctrine of *Leedom v. Kyne* was not applicable.

***NTEU v. FLRA*, 418 F.3d 1068 (9th Cir. 2006) reviewing 59 FLRA 119**

Denying the union's petition for review, the court affirmed the Authority's determination that a collective bargaining provision providing for compensation for excess commuting time required for temporary assignments within an employee's official duty station. The Authority held that the provision was inconsistent with OPM regulations stating that "home to work" travel is not hours of work. The union argued that, like the private sector, compensation for commuting time may be made compensable by contract. The Authority and the court disagreed, finding the OPM regulations clear and without exception.