103 FLRR-2 67

103 LRP 2130

AFGE, Council of Prison Locals 1030 and Department of Justice, Federal Bureau of Prisons, Federal Detention Center, Houston

Federal Arbitration

020221-03762-3

November 21, 2001

Related Index Numbers

17.165 Unfair Labor Practices

1.104 Unfair Labor Practices

Judge / Administrative Officer

Fox, Jr., Milden J.

Ruling

The agency did commit a ULP by not bargaining in good faith when it ordered the union's negotiating team back to work during negotiations.

Meaning

It was the agency's burden to prove the union intentionally stalled bargaining over one of its propositions. The union offered an explanation, however the agency did not challenge it or request to see the documentation. The agency did limit the caucusing time of the union and this constituted a ULP. The arbitrator ruled the agency failed to bargain in good faith.

Case Summary

The union filed an unfair labor practice charge with the agency. It claimed the agency, in violation of the collective bargaining agreement, ordered the union's negotiating team back to work while negotiations were still in progress. The agency refused to bargain in good faith, the union alleged. The union requested the agency cease and desist all CBA and 5 USC violations. The agency rejected the grievance. It claimed 5 USC 7116 not the CBA addressed this issue. The union was advised to file in the appropriate arena.

The arbitrator opined that the agency alleged the union negotiators were called back to work because of its stalling. The union did not offer any counter proposals to a negotiated item for over a week. The agency wanted to table that issue and move on. After the union refused the agency ordered everyone back to work. The arbitrator stated, as explained in NTEU Chapter 168, 99 FLRR 1-1025 there are two conditions that have to be met before an arbitrator can decide a ULP claim:

-- ULPs could not have been agreed to be excluded from the negotiated grievance procedure by the parties.

-- The arbitrator must have received the properly submitted issue of whether the agency committed a ULP in violation of the Statute.

The arbitrator decided the parties did not agree to exclude ULPs from the negotiated grievance procedure. Thereby meeting the first condition. The second condition was also met. The union properly submitted the issue to the arbitrator. Although it was somewhat broad, the issue did reference the CBA and the statute. Since both conditions were met and the grievance covered "essentially the same subject matters as the ULP" the arbitrator had the authority to rule on the ULP.

The union claimed it used the time in question to locate additional documentation to justify its proposal. However, the agency did not challenge this or request to see the documentation. The agency claimed the union stalled the negotiations and had the burden to prove its position. It did not. It did however limit the caucusing time of the union. This did constitute a ULP, the arbitrator ruled the agency failed to bargain in good faith.

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Full Text

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Stipulations

The parties stipulated the following:

1. The grievance is properly before the Arbitrator,

2. The parties were in local supplemental negotiations from approximately late September 2001 until on or about 13 December 2001.

3. Management ordered the Union negotiating team back to work on or about 13 December 2001.

4. During most of the negotiations listed in #2, Mr. Timothy Outlaw was the Agency's principal negotiator.

Statement of the Issue

The parties agreed on the following Statements of the Issue as their individual positions:

Agency: 1. Is the grievance (ULP) properly before the Arbitrator; if so

2. Did the Agency commit an ULP (i.e.. Bad Faith Bargaining) when it ordered the Union negotiating team back to work on or about 13 December 2001? If so, what should be the remedy?

Union: 1. The grievance (ULP) is properly before the Arbitrator.

2. Did the Agency commit an ULP (i.e., Bad Faith Bargaining) when it ordered the Union negotiating team back to Work on or about 13 December 2001? If so, what should be the remedy?

Grievance

The grievance, dated 12/17/01, is part of JE-2 and states in part the following:

5. Federal Prison System Directive, Executive Order or Statute violated:

The Master Agreement and 5 DSC Chapter 71

6. In what way were each of the above violated? Be specific.

This grievance is being filed as an ULP (Unfair

Labor Practice) for being that the Agency (Federal Detention Center, Houston, Texas) has refuse (sic) to negotiate a Local Supplemental Agreement in good faith by ordering the Union's Negotiation Team back to their regular duties at FDC Houston. By ordering the team back to work, the Agency has violated the Ground Rules that were negotiated and mutually agreed upon by the Union and the Agency. On December 13, 2001, the Union and Agency met to continue negotiating a Local Supplemental Agreement. Prior to meeting up to discuss this proposal, the Union's Negotiation Team was on caucus to conduct research and gather information to present it's (sic) position to the Agency why they had a duty to bargain over this proposal. The Union gave the Agency case laws showing that this particular proposal was negotiable. The Agency continues to say lets (sic) table this proposal. All of a sudden one of the Agency's negotiators, Ed Porter, stated, "we're not negotiating this proposal; I'm declaring this an impasse and I'm ordering all of you back to work tomorrow." At that point, the Chief Negotiator for the Union advise (sic) Mr. Porter that this was a violation of the Master Agreement and 5 USC Chapter 71. Mr. Porter stated again that we're at impasse and that all of you report back to work tomorrow.

7. Date(s) of violation(s) December 13, 2001

8. Request remedy (i.e., what you want done)

1. Cease and desist all Master Agreement Violations.

2. Cease and desist violations of 5 USC.

3. A Cease and Desist Order With Notice to All Employees to be posted for not less than 60 days.

4. Union Negotiation Team be made whole in regard to pay and allowance,

5. Any other remedy an arbitrator deems appropriate.

The Agency's answer, dated 15 January 2002, is part of JE-2 and states the following:

This is in response to your grievance dated December 17, 2001. In your grievance, you allege that the agency refused to negotiate a Local Supplement Agreement in good faith by ordering the Union's Negotiation team back to their regular duties at FDC Houston.

The requested remedy includes a cease and desist all Master Agreement and 5 USC violations, a cease and desist Order with notice to all employees to be posted for not less than 60 days, and that the Union Negotiation team be made whole in regard to pay and allowance.

In your grievance, you state this issue is filed as an Unfair Labor Practice (ULP) because the agency refused to negotiate a Local Supplement Agreement. In accordance with the Master Agreement, grievances do not address these areas or issues and there are additional forums for these particular charges. Therefore, you are further directed to file in the appropriate arena should you choose to pursue your allegations.

Based on the foregoing, your grievance is rejected.

Position of the Parties

The parties agreed that the grievance was properly before the Arbitrator so that he could make an award based on the parties' Statement of the issue which is divided into two parts, arbitrability and substance.

Arbitrability

Union: It is the Union's position that the ULP grievance is properly before the Arbitrator to rule on the substance of grievance.

Agency: It is the Agency's position that the instant matter is not properly before the Arbitrator (not arbitrable) because it is exclusively a matter covered under 5 USC 7116 and, therefore, under relevant law is not within the jurisdiction of the grievance arbitration process.

Background

The instant case is between Local #1030, Houston, Texas, of the AFGE, Council of Prison Locals (hereinafter referred to as the Union) and the

Department of Justice, Federal Bureau of Prisons, Federal Detention Center, Houston, Texas (hereinafter referred to as Management or the Agency),

The Union filed the instant grievance alleging that the Agency acted in bad faith when, during local contract negotiations, it ordered the Union negotiating team back to work following what the Agency alleges was the Union "stalling" in the contract negotiations. The Union contends that it was caucusing regarding proposed 109. The Agency wanted to table proposal 109 and move on to the next item on the negotiation's list. This was unacceptable to the Union, so after about a week of no counter proposals from the parties on proposal 109, and the negotiations not moving forward, the Agency ordered the Union's negotiating team back to work.

As a result of the Agency's action, the Union filed the instant grievance as an unfair labor practice for the Agency's alleged failure to bargain in good faith.

The matter is now before this Arbitrator to answer one or both of the questions set forth in the Statement of Issue. If the answer to question number one is "No," the grievance is denied and that ends this case. If the answer to questions number one is "Yes," then question number two (substantive issue) must be answered so that an award (or decision) can be obtained for the grievance.

Discussion

A recent governing case is *AFGE Local 3529 and Defense Contract Audit Agency, Irving, Texas,* 57 FLRA No, 87. 101 FIRR1-1171. The AFGE in this case filed a grievance claiming the Agency violated the agreement and committed a "statutory" unfair labor practice when it failed to bargain over the substance or the impact of the change in working conditions. Each side submitted its own version of the Statement of the Issue, and the Arbitrator feeling the two issues were essentially the same, set forth both in his decision and did not formulate his own issue statement. The Arbitrator ruled that the Agency did not change the employees' conditions of employment, but concluded "It is not within my authority as an Arbitrator to decide on the merits of the Unfair Labor Practice charge as referenced in the grievance."

The FLRA ruled that arbitrators do have the authority to decide ULP claims, but only if the two conditions set forth in *NTEU Chapter 168,* 99 FLRR 1-1025, are met. These two conditions are:

1. The parties must not have agreed to exclude ULPs from the scope of the negotiated grievance procedure, and

2. The issue of whether the Agency committed a ULP in violation of the Statute must have been properly submitted to the arbitrator.

In the FLRA's decision in *APGE, National Council of HUD Locals,* 98 FLRR 1-1184, the union argued, "When a grievance under § 7121 of the Statute Involves an alleged unfair labor practice, arbitrators must apply the same standards and burdens that would be applied by an administrative law judge in a ULP proceeding."

With the above case at hand, this Arbitrator will arrive at a decision in regard to the first questions in the Statement of Issue. Of course the Union says that the grievance is arbitrable. The Agency says the grievance is not arbitrable.

In the Master Agreement at Article 31, Section a. it says that: "The purpose of this article is to provide employees with a fair and expeditious procedure covering all grievance properly grievable under 5 USC 7121." The parties at the national level have agreed that all grievances properly grievable under 5 USC 7121 would be covered under their Master Labor Agreement. There is nothing in the MLA or 5 USC 7121 which states that the parties have agreed to exclude ULPs from the scope of the negotiated grievance procedure. The Agency is alleging that the parties in the instant matter have not agreed to include ULPs within the scope of their negotiated grievance procedure. But NTEU Chapter 168, 99 FLRR 1-1025 says that the parties must not have agreed to exclude ULPs from the scope of the negotiated grievance

procedure.

The Agency has failed to carry the laboring oar that the ULPs were excluded from the parties negotiated grievance procedure.

The second prong of the *NTEU Chapter 168* ruling is that, "the issues of whether the Agency committed a ULP, in violation of the Statute, must have been properly submitted to the arbitrator." The Union in filing its grievance specifically stated that the Agency was in violation of the Master Agreement and 5 DSC Chapter 71. In addition, in its #2 Statement of the Issue the Union specifically stated, "Did the Agency commit a ULP d.e., Bad Faith Bargaining) when it ordered the Union negotiating team back to work on or about 13 December 2001?"

The Union's issue is rather broad, but the Union did reference the Statute as well as the Master Agreement. As such, the Union has met the second prong set forth in *NTEU Chapter 168.*

In summary, the Arbitrator has found that both prongs of the *NTEU Chapter 168* requirements have been met using the same standards and burdens that would be applied by an ALJ in a ULP proceeding, Therefore, when these requirements have been met and the grievance covers essentially the same subject matters as the ULP (failure to bargain in good faith), this Arbitrator has the authority to rule on this ULP.

Substantive Issue

The instant case involves the action taken by the Agency during the negotiations of a supplemental agreement (local issues) as permitted by the Master Agreement (JE-1). As per stipulation No. 2, the parties were in the local supplement negotiations from approximately late September 2001 until on or about 13 December 2001.

According to the Agency the parties talked for five (5) or six (6) days about proposal 109, but the Union refused to table the proposal as had been done with the previous proposals. Again, according to the Agency, the Union did not submit any additional proposals regarding the subject of 109 (parking).

The Agency took the position that the time spent on proposal 109 was an unnecessary delay, so on 13 December 2001, it ordered the negotiating team back to work alleging that the union would not move forward and would not declare an impasse; hence the unnecessary delay.

The instant grievance was filed. During April of 2002 a federal mediator worked with the parties, but did not obtain a solution to the proposal 109 actions or the subsequent actions of both parties.

The matter has now been brought before this Arbitrator for a solution (award),

The Negotiated Ground Rules (JE-2) are set forth in their entirety on the next two pages, 13 and 14:

Position of the Parties

Union: it is the position of the Union that the Ground Rules for the Local Supplemental Agreement (JE-2) were negotiated, agreed upon, and signed by the Chief Negotiators for both sides. The Agency violated the established ground rules. Proposals were submitted by the Union as established by the ground rules, prior to starting the negotiation process. The Agency never submitted any proposals. In the Master Labor Agreement, Article 1, Section a., it states that the Union is recognized as the sole and exclusive representative for all bargaining unit employees. It was established that the warden has full disciplinary authority over every employee assigned at FDC-Houston, to include the Union negotiation team. It was established that the Warden ordered the Union's team back to work and ended negotiations. The Agency abused its authority and control over the Union's

Ground Rules for Negotiation of Supplemental Agreements

FDC Houston, Texas

1. Contract negotiations will take place at a mutually agreed upon site.

2. Negotiations will commence on an agreed upon Monday morning and continue, on consecutive

days, through Friday, if necessary. If additional time is needed to conclude negotiations, the same Monday through Friday schedule will be used for consecutive weeks, proposals will be exchanged no less than one week prior to the commencement of negotiations.

3. Negotiations will be conducted during the regular day shift hours (7:00 am-3:30pm).

4. Members of the Union negotiating team will be assigned to day shift hours, with a Monday through Friday schedule, for the duration of actual negotiations.

5. Union negotiators will be on official time during the course of negotiations, to exclude mutually agreed upon breaks.

6. Shift changes and up to eighty (80) hours of official time will be granted to the Union to prepare for negotiations.

7. Management will notify the Union at least fourteen (14) calendar days prior to the beginning of negotiations of the number of negotiators assigned to the Management team, The Union will be entitled to a minimum of five (5) negotiators on official time' or the number of Management negotiators, whichever is greater.

8. Negotiators may be replaced by alternates who will have the same rights to speak for and bind their principals as the members they replace. The chief negotiators will give advance notice of a substitution so as to allow for appropriate reliefs, if possible.

9. The chief negotiators may designate any members of their teams to make appropriate presentations.

10. Articles for negotiation will be considsred in numerical order. Either party may move to table an article or any part of an article, but the tabling of an article will only be done by the mutual consent of the parties. Any article, or part of an article, that is tabled will be brought from the table prior to the conclusion of the negotiations. Either party may move to bring an article, or part of an article, from the table; however, the bringing of an article or part of an article will only be done by mutual consent while other articles are still pending, in numerical order. When all articles have been Initially addressed, and the parties cannot agree as to bringing which tabled articles from the table, tabled articles will again be addressed In numerical order.

11. Either party may call a caucus. The party calling the caucus will leave the negotiating room and will meet in another suitable location.

12. Copies of needed laws, rules, regulations, or policies will be made available to the Union by the Agency upon request.

13. As proposals are agreed upon, the chief negotiator for each party will initial the final language, thereby certifying the agreement.

14. Either party may request the services of the Federal Mediation and Conciliation Service.

15. The Union negotiating team has the authority to speak for the local membership; however, the local supplemental agreement will not be binding upon the Union unless ratified by the membership.

16. Review of the local supplement will be conducted in accordance with Article 9, Section d. of the Master Agreement.

17. By mutual agreement, any provisions of the ground rules may be altered or modified at any time.

Negotiating Team, which put the Union's Team at an unfortunate disadvantage. This prevented the Union's Team from being an equal at the table during negotiations, thus giving the Agency an unfair advantage, and shows that the Agency refused to honor Article 6, Section a. "freely and without fear of penalty or reprisal," which institutes bad faith bargaining on the Agency's part. This is a clear violation of the Statute, the Master Agreement, and the negotiated ground rules. The Warden's actions revealed that he showed no regard to the Union as the exclusive representative and obligation imposed by 5 USC 7114 and 7117.

The Union has met its burden of proof in this case, and respectfully requests the Arbitrator grant any and all appropriate remedies to correct the

Agency's violations regarding the CBA, which is signed off on by both parties at the National Level.

Agency: It is the Agency's position that the Union's ULP claim is totally without merit. The Union fails to recognize the goals and proposals of collective bargaining in the federal sector.

The Congress enacted the Federal Sector Labor Management Relations Statute (the "Statute") with a specific purpose in mind. "It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirements of an effective and efficient Government." (5 USC 7701 (b)).

The Agency acknowledges that it did order the Union negotiating team back to work. It is uncontested that the parties were engaged in negotiating a local supplemental agreement and that, during those negotiations, the parties became "stalled" on a particular provision which was before them. After a lengthy period of making no progress, it became apparent to the Agency that negotiations could only resume-after the immediate stalemate was resolved. The Agency, not knowing how long that might take and seeing that there was no useful or productive purpose achieved by remaining in a negotiating posture, determined that effectiveness and efficiency of public business would best be served by returning to work until the stalemate was resolved. It seems clear this decision was the only reasonable course of action for the Agency to take under the circumstances. To act in any other manner would have been inconsistent with the purpose of the Statute.

The Union, by making this allegation, fails to recognize the intent of collective bargaining in the federal sector. The overriding consideration of collective bargaining in the federal sector is to improve effectiveness and efficiency in governmental operations and functions. It can hardly be seen as promoting effectiveness and efficiency to allow or permit government workers to sit idle during a negotiations stalemate while the Agency waits for some break in that stalemate. This is especially true after a reasonable period of time has passed before directing a return to work.

The Agency fully recognizes and appreciates its obligations under the Statute and Its collective bargaining agreement, but it also has a duty and obligation to provide for efficient operations. The Agency believes that the Union has failed to show that a OLP has been committed in this matter.

The Agency asks that the Arbitrator consider the whole record carefully, taking careful notice of the cited regulations and law and the Grievent's case, and DENY the grievance.

Discussion

The first question that needs to be addressed is "who has the burden of proof and what level of proof is necessary?" The instant case is not a disciplinary type case. Nor is the case one in which Management is the grieving party. Hence, the Union in the instant case, as the grieving party, has the burden of proof. What level of proof is necessary for a grieving party to achieve its burden of proof? The normally accepted level is the preponderance of evidence. With the Union having the burden of proof, this is not to say that Management cannot necessarily have the burden of the affirmative on a particular aspect within the development of the case, as indicated above.

In the area of burden of proof or burden of the affirmative, the Union has the initial burden to justify its allegations. Once this burden has been shouldered, the burden of the affirmative passes to Management which must, if it is to prevail, successfully refute the Union's case.

The burden of the Union can be satisfied through the establishment of a "prima facie" case. This condition has generally been defined as a presentation of evidence, sufficient in quantity and quality to warrant a ruling by an arbitrator in favor of the presenting party "if no contrary evidence" is proffered

by the opposing party (I.B. Jones, Evidence, 1205, 5th Ed., 1958 Supp, 1971 as cited in Owen Fairweather, Practice and Procedure in Labor Arbitration. BNA. Inc., Washington, D.C., 1973, p. 201).

If the instant case involves, among other things, matters of credibility, in order to establish proof, it is possible for an arbitrator not to make an uneasy, highly uncertain credibility choice between opposing witnesses merely by using a legal device for determining the facts from conflicting evidence in the record. This device is the introduction of a presumption which places the burden of proof on one of the parties to produce sufficient evidence to avoid a ruling against that party on the issue. The party having the burden of proof is said to have the "affirmative of the issue," meaning that it is the party that would be defeated if the bare question to be answered were put to the arbitrator and no evidence were given on either side. Furthermore, in imposing the "affirmative of the issue," it is done by imposing same "upon the party whose contentions depart further from normal likelihood' (John MacArthur, Evidence: Common Sense and Common Law, The Foundation Press. Inc., Mineola, N.Y., 1947, p. 179).

In Article 3 of the MLA it says in part:

Section a. Both parties mutually agree that this agreement takes precedence over any Bureau policy, procedure, arid/or regulation which is not derived from higher government-wide law, rules, and regulations.

In Article 4 of the MLA it says in part:

Section a. In prescribing regulations relating to personal policies and practices and to conditions of employment, the employer and its Union shall have due regard for the obligation imposed by 5 USC 7106, 7114, and 7117."

In Article 6 of the MLA it says in part:

Section a. Each employee shall have the right to ... assist a labor organization ... without fear of penalty or reprisal

to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees in accordance with 5 USC.

In Article 9 of the MLA it says in part:

Section b. ... the parties may negotiate locally and include in any supplemental agreement any matter which does not specifically conflict with this article and the Master Bargaining Agreement.

4. a standard set of ground rules are contained in Appendix A to the Agreement. The local parties may negotiate their own ground rules;

The parties negotiated a set of Ground Rules For Negotiations of Supplemental Agreements (JE-2) sometime after 15 September 2001, and are set forth in their original form earlier in this Award.

In *SSA* and *AFGE*, 18 FLRA 511 (1985) the ALJ said that,

good faith bargaining is not established if the agency unilaterally sets dates for negotiations rather than through mutual agreements, imposes deadlines on the submission of proposals, *seeks to limit the union's caucus time during negotiations*, or refuses to return to the bargaining table on the matter after negotiations are disbanded (emphasis added).

In the instant case, it is undisputed that once proposal 109 came to the table the Agency requested that the proposal be tabled. In accordance with item #10 of JE-2, the proposal was not tabled as there was not mutual consent of the parties, that is, the Union did not agree to the tabling. Negotiations over #109 continued for about a week or from eight (8) to nine (9) days, depending on which witness is correct. According to the Agency, during this period there were not any counter proposals by either side. Also according to the Agency, each morning a call was made to the Human Resource Office to find out if the parties were going back to the table that day. According to the Agency, because of what it believed to be an unnecessary delay on 13 December 2001. It ordered the Union negotiating team back to work. According to the Agency, the Union team was an official time thereby costing the government unnecessary expenses. The Agency did admit that during the proposal 109 negotiating period, there was

not any emergency that arose prior to ordering the Union teams back to work.

The Union presented testimony that it was using the time in questions to gather additional Information in regard to the justification for proposal 109. This testimony was not challenged nor was the Union asked to produce any of the additional Information it has obtained during the time period in question. The Agency is the side that is saying that the Union is not doing anything but stalling, so it has the burden of the affirmative to prove Its position, which it has not done. Furthermore, the Agency witnesses did not really agree on why the 13 December 2001 action was taken. The point is that the Agency in effect was seeking to limit the Union's caucusing time during the negotiations. In fact it did limit this time by ordering the Union negotiating team back to work. In addition, the Agency violated the negotiating agreement it signed by not obtaining the Union's consent to table proposal 109. The warden let it be known that if the Union would table proposal 109, then the Agency would return to the table, which is contrary to *SSA* and *AFGE*.

In summary, the Arbitrator can only say that the Agency has failed to bargain in good faith. This failure to bargain in good faith violated the Ground Rules for Negotiation of Supplemental Agreements, item #10 (JE-2). Since this agreement is an extension of the MLA, the Agency also violated the MLA. The Agency also violated the Statute when it sought to limit the Union's caucusing time during negotiation. These violations constitute a ULP.

Award

The grievance is sustained. The following remedies are ordered:

1. The Arbitrator does not have the authority to issue a Cease and Desist Order to FDC, Houston, Texas, for its failure to negotiate in good faith. The FLRA can issue this document if it supports this Arbitrator's finding for a ULP for failure of the FDC Houston facility to bargain (or negotiate) in good faith.

2. The Federal Detention Center, Houston, Texas, is directed to writer letter to all bargaining unit employees notifying them of this Arbitrator's finding that FDC Houston failed to bargain in good faith by ordering the Union negotiating team back to work on 13 December 2001.

3. The Union requested that the Union negotiating team be made whole in regard to pay and allowance. What this request means was not brought up by the Union at the arbitration hearing. In its post-hearing brief, or in any submitted evidence. Because of this lack of knowledge, said team is not to be made whole in regard to pay and allowances, as set forth in the grievance.

Statutes Cited

5 USC 7116
5 USC 7121
5 USC 7114
5 USC 7117
5 USC 7701(b)

Cases Cited

57 FLRA No. 87
101 FIRR 1-1171
99 FLRR 1-1025
98 FLRR 1-1184
18 FLRA 511

