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**FEDERAL LABOR RELATIONS AUTHORITY  
WASHINGTON, D.C.**

**UNITED STATES DEPARTMENT OF LABOR (OSHA)**

**and**

**NATIONAL COUNCIL OF FIELD LABOR LOCALS**

**0-AR-1637**

**DECISION**

**January 24, 1990**

*USE OF A COURT  
REPORTER AT  
ORAL + WRITTEN  
PRESENTATION - FOR  
ADVERSE ACTION*

**Before Chairman McKee and Members Talkin and Armendariz.**

**I. Statement of the Case**

This matter is before the Authority on exceptions to the award of Arbitrator Robert H. Kubie. The Arbitrator found that the United States Department of Labor, Occupational Safety and Health Administration (the Agency)

~~violated the parties' collective bargaining agreement by using a court reporter to make a verbatim of an employee's oral answer to a proposed adverse action.~~

The Agency filed exceptions under section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Rules and Regulations. The National Council of Field Labor Locals (the Union) did not file an opposition to the exceptions.

We conclude that the Agency has failed to establish that the award is deficient because: (1) the award does not draw its essence from the parties' collective bargaining agreement; (2) the award is contrary to section 7106(b)(1) of the Statute; or (3) the Arbitrator exceeded his authority by ruling on a negotiability matter. Accordingly, we will deny the exceptions.

**II. Background and Arbitrator's Award**

A grievance was filed by the Union and submitted to arbitration which disputed the Agency's use of a court

reporter to keep a verbatim stenographic transcript of an employee's oral answer to a proposed adverse action. The Union claimed that the Agency's use of the court reporter violated the parties' collective bargaining agreement.

The Arbitrator sustained the grievance. The Arbitrator noted that Article 14, Section 2 of the parties' collective bargaining agreement pertained to proposed adverse actions and the employee's right to respond orally and in writing. The Arbitrator found that the Agency's use of a court reporter violated the collective bargaining agreement. He concluded that the Agency was precluded by Article 14 of the agreement from using a court reporter to keep a verbatim stenographic transcript of an employee's oral answer to a proposed adverse action.

### III. Exceptions

The Agency contends that the award is deficient because: (1) the award does not draw its essence from the parties' collective bargaining agreement; (2) the award is contrary to section 7106(b)(1) of the Statute; and (3) the Arbitrator exceeded his authority by ruling on a negotiability matter.

The Agency contends that the award fails to draw its essence from the collective bargaining agreement because Article 14, Section 2 of the agreement does not address the use of court reporters in the oral answer stage of adverse action proceedings. The Agency argues that the award is deficient because the Arbitrator did not interpret Article 14, Section 2. The Agency maintains that the Arbitrator amended the agreement to impose a prohibition not provided in it.

The Agency also notes that under 5 U.S.C. § 7513(b), an employee against whom an adverse action is proposed is entitled to advance written notice of the action and a reasonable period of time in which to answer orally and in writing. The Agency further states that under 5 U.S.C. § 7513(e) and 5 C.F.R. § 752.406, the agency must maintain a summary of the employee's oral answer. The Agency argues that how an employee's oral answer is to be summarized concerns management's right to determine the technology, methods, and means of performing work under section 7106(b)(1) of the Statute. Although the Agency acknowledges that it could have bargained over this matter, the Agency maintains that it never elected to bargain on how the oral answer to a proposed adverse action would be summarized. The Agency claims that its election not to bargain is clear

from Article 14, Section 2 of the collective bargaining agreement because that section is silent on the matter of how the oral answer is to be summarized. Therefore, the Agency contends that the award is contrary to section 7106(b)(1) of the Statute because the award conflicts with its right to determine the technology, methods, and means of performing work.

The Agency also argues that the extent to which the use of a court reporter at an oral answer meeting is within the duty to bargain is a matter for determination by the Authority alone. The Agency claims that the Arbitrator ruled on a negotiability issue and found the use of a court reporter at an oral answer to be within the duty to bargain. Therefore, the Agency contends that the award is deficient because the Arbitrator exceeded his authority.

#### IV. Discussion

We conclude that the Agency has not established that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute. The Agency has failed to establish that the award is contrary to any law, rule, or regulation or that the award is deficient on any other grounds similar to those applied by Federal courts in private sector labor relations cases.

##### A. Essence of the Collective Bargaining Agreement

The Agency fails to establish that the award does not draw its essence from the collective bargaining agreement. In order for an award to be found deficient as failing to draw its essence from the collective bargaining agreement, it must be established that the award: (1) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to "manifest an infidelity to the obligation of the arbitrator"; or (2) does not represent a plausible interpretation of the agreement; or (3) cannot in any rational way be derived from the agreement or evidences a manifest disregard of the agreement. For example, United States Army Missile Materiel Readiness Command (USAMIRCOM) and American Federation of Government Employees, Local 1858, AFL-CIO, 2 FLRA 432, 437 (1980).

These tests and the private sector cases from which they are derived make it clear that an arbitrator's award will not be found to fail to draw its essence from the agreement merely because a party believes that the arbitrator misinterpreted the agreement. Department of

Health and Human Services, Social Security Administration, Louisville, Kentucky District and National Federation of Federal Employees, Local 1790, 10 FLRA 436, 437 (1982). The question of the interpretation of the collective bargaining agreement is a question solely for the arbitrator because it is the arbitrator's construction of the agreement for which the parties have bargained. Id. at 437; Paperworkers v. Misco, Inc., 484 U.S. 29, 38 (1987) (Misco) (as long as an arbitrator is even arguably construing the collective bargaining agreement, that a court is convinced that the arbitrator committed serious error does not suffice to find the award deficient).

The Arbitrator's conclusion that Article 14, Section 2 of the collective bargaining agreement prohibited the Agency from using a court reporter to record an employee's oral answer to a proposed adverse action constituted his interpretation and application of the agreement. The Agency's argument that the Arbitrator imposed a prohibition not provided by the agreement does not establish that the award fails to draw its essence from the collective bargaining agreement under any of the tests recognized by the Authority.

Unlike the awards which the Authority has found deficient because they failed to draw their essence from the collective bargaining agreement, the Agency fails to establish that the Arbitrator's interpretation of Article 14, Section 2 conflicts with express provisions of the agreement. See American Federation of Government Employees, Local 547 and Tampa Veterans Administration Hospital, 19 FLRA 725 (1985); Overseas Education Association and Office of Dependents Schools, Department of Defense, 4 FLRA 98 (1980). Instead, the Agency's argument constitutes mere disagreement with the Arbitrator's interpretation and application of the agreement and an attempt to have its interpretation of the agreement substituted for that of the Arbitrator. Disagreement with an arbitrator's interpretation and application of a collective bargaining agreement provides no basis for finding that the award does not draw its essence from the agreement or for finding that the award is otherwise deficient under the Statute. See, for example, Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO, 32 FLRA 79, 88 (1988) (that the agency or the Authority may have interpreted the agreement differently provides no basis for finding the award deficient; the question of the interpretation of the collective bargaining agreement was a question solely for

the arbitrator because it was the arbitrator's construction of the agreement for which the parties bargained); Misco, 484 U.S. at 37-38.

B. Technology, Methods, and Means of Performing Work

The parties negotiated a provision--Article 14, Section 2--pertaining to an employee's right to respond orally and in writing to proposed adverse actions. The Arbitrator determined that the provision precluded the Agency from using a court reporter to keep a verbatim transcript of an employee's oral answer to a proposed adverse action. The Agency argues that (1) the method by which an employee's oral answer to a proposed adverse action is summarized constitutes the "technology, methods and means of performing its legal duties"; and (2) it did not "surrender, waive, or nullify" its right to determine the technology, methods, and means of performing its legal duties under section 7106(b)(1) of the Statute. Agency's Exceptions at 3. ✓

For the following reasons, we reject the Agency's assertion that the award is deficient because it conflicts with the Agency's right to determine the technology, methods, and means of performing work under section 7106(b)(1) of the Statute. 2

Section 7106(b)(1) provides that nothing in section 7106 shall preclude an agency and a labor organization from negotiating "at the election of the agency," on, among other things, the "technology, methods, and means of performing work[.]" Consistent with section 7106(b)(1), an agency may elect to bargain on and agree to provisions in a collective bargaining agreement which determine the technology, methods, or means of performing the agency's work.

An agency may withdraw from bargaining on a matter within the coverage of section 7106(b)(1) prior to reaching final agreement on the matter. National Association of Government Employees, Local R4-75 and U.S. Department of the Interior, National Park Service, Blue Ridge Parkway, 24 FLRA 56, 61 (1986). However, once a provision which concerns matters which are covered by section 7106(b)(1) is included in a collective bargaining agreement, the provision is enforceable through grievance arbitration. See, for example, Bureau of Engraving and Printing, Department of the Treasury and Washington Plate Printers Union, Local No. 2, International Plate Printers, Die Stammers and Engravers, 29 FLRA 467 (1987); Local 1917, American Federation of Government Employees and United States Immigration and Naturalization Service, Eastern Region, 13 FLRA 77 (1983).

It is unnecessary for us to decide whether Article 14, Section 2 of the parties' collective bargaining agreement concerns the technology, methods, or means of performing the Agency's work under section 7106(b)(1). Even if Article 14, Section 2 determines the technology, methods, or means of performing work, the provision was negotiable at the Agency's election. Since the provision was negotiable and was included in the parties' collective bargaining agreement, it is enforceable.

The Agency's argument that it never bargained over how an employee's oral answer to a proposed adverse action is to be summarized provides no basis for finding the award contrary to section 7106(b)(1). By arguing that Article 14, Section 2 does not evidence an express election to bargain over how an employee's oral answer is to be summarized, the Agency is merely disagreeing with the Arbitrator's conclusion that Article 14, Section 2 precluded the use of a court reporter. Disagreement with the Arbitrator's interpretation and application of a collective bargaining agreement provides no basis for finding the award deficient. See National Treasury Employees Union and U.S. Customs Service, 18 FLRA 780 (1985) (argument that arbitrator's award conflicted with section 7106(b)(1) provided no basis for finding the award deficient because the exception constituted nothing more than disagreement with the arbitrator's interpretation of the agreement); American Federation of Government Employees, AFL-CIO and Equal Employment Opportunity Commission, 15 FLRA 283 (1984) (argument that collective bargaining agreement fails to clearly evidence an election by the agency to bargain over a permissive subject of bargaining constitutes nothing more than disagreement with the arbitrator's interpretation and application of the agreement and provides no basis for finding the award deficient).

### C. Exceeded Authority

Finally, the Agency fails to establish that the Arbitrator exceeded his authority by ruling on a negotiability issue which must be resolved by the Authority alone. The matter submitted to arbitration concerned a grievance over whether the Agency violated the parties' collective bargaining agreement by using a court reporter to record an employee's oral answer to a proposed adverse action. The Arbitrator resolved a dispute between the parties concerning the interpretation and application of a specific provision of the parties' agreement. A dispute over the interpretation and application of a provision of a collective bargaining agreement is properly resolved under

negotiated grievance procedures. Panama Canal Commission and International Organization of Masters, Mates and Pilots, 27 FLRA 907 (1987); Louis A. Johnson Veterans Administration Medical Center, Clarksburg, West Virginia and American Federation of Government Employees, Local 2384, 15 FLRA 347 (1984). Moreover, the Statute does not preclude a grievance arbitrator from considering "a collateral issue of whether an agency is obligated to bargain in the course of resolving an allegation that the agency violated a collective bargaining agreement." Panama Canal Commission, 27 FLRA at 910-11. Consequently, the Agency's exception provides no basis for finding the award deficient.

Accordingly, we will deny the Agency's exceptions.

V. Decision

The Agency's exceptions are denied.

FEDERAL LABOR RELATIONS AUTHORITY  
WASHINGTON, D.C.

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UNITED STATES DEPARTMENT OF LABOR (OSHA)

and

NATIONAL COUNCIL OF FIELD LABOR LOCALS

O-AR-1637

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STATEMENT OF SERVICE

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I hereby certify that copies of the Order of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the following parties:

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DATED: January 24, 1990  
WASHINGTON, D.C.

Deborah D. Johnson  
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