69 FLRA No. 29

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS
ASSOCIATION OF ADMINISTRATIVE
LAW JUDGES
(Union)

0-AR-5132

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DECISION

February 4, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The Union represents administrative law judges (the judges) employed by the Agency in hearing offices nationwide. Each hearing office is managed by a chief judge (the supervisor), who supervises the judges. The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement by removing the supervisors' discretion to authorize the judges to telework more than eight days per month. Arbitrator Ellen Saltzman found that the Agency violated the parties' agreement, and she directed the Agency to resume the practice of permitting supervisors to exercise their discretion to approve requests to telework more than eight days per month.

There are four substantive questions before us.

The first question is whether the award is based on a nonfact because the Arbitrator erroneously found that "the Agency impermissibly interfered" with the supervisors' discretion to approve telework requests.[1] Because the parties disputed the scope of the supervisors' discretion – and the Agency's alleged interference with that discretion – before the Arbitrator, the answer is no.

The second question is whether the award fails to draw its essence from the parties' agreement because the Arbitrator allegedly directed the Agency to approve requests to telework more than eight days per month "without limit."[2] As this argument is based on a misreading of the award, the answer is no.

The third question is whether the award fails to draw its essence from Article 15, Section 5C (Section 5C) of the parties' agreement because the Arbitrator discussed the parties' past practice under a prior agreement. In addition to discussing the parties' past practice, the Arbitrator interpreted the plain wording of Section 5C, and that interpretation provides a separate and independent ground for her conclusion that the Agency violated the agreement. As the Agency does not establish that this interpretation is deficient, the Arbitrator's discussion of the parties' past practice provides no basis for finding that the award is deficient.

The fourth question is whether the Arbitrator exceeded her authority. The Agency's first contention – that the Arbitrator "re-authored" one of the issues[3] – does not show that the Arbitrator exceeded her authority, because the award directly responds to the issue before the Arbitrator. The Agency's second claim – that the Arbitrator awarded a remedy that is inconsistent with the parties' agreement and the requested relief – fails because the argument is based on a misreading of the award. And the Agency's third claim – that the Arbitrator failed to issue the award within thirty calendar days of the arbitration hearing, as required by the parties' agreement – fails because there is no claim, or indication, that the Agency timely objected to the delay or that the delay caused the Agency actual harm.

II. Background and Arbitrator's Award

The parties' agreement contains a provision addressing the number of days that the judges are permitted to telework. As relevant here, this provision – Section 5C – provides that telework-eligible judges may telework up to eight days per month with certain exceptions.[4] It also provides that the judges may telework on additional days "with the approval of the [supervisor]."[5]

At some point, the supervisors routinely began denying the judges' requests to telework more than eight days per month. The Union then filed a grievance alleging that the Agency violated Section 5C by

[1] Exceptions at 18.

[2] *Id.* at 15 (emphasis omitted).
[3] *Id.* at 16.
[4] *Id.* at 5 (citing *id.*, Attach. 4, Jt. Ex. 3, Article 15 (Article 15) at 3).
[5] *Id.* (quoting Article 15 at 3).

restricting the supervisors' discretion to approve telework requests. The parties took the grievance to arbitration.

At arbitration, the parties stipulated that the issue, in pertinent part, was "[w]hether the Agency violated Section 5C . . . [and] if so, what shall the remedy be?"[6]

Before the Arbitrator, the Union alleged that the Agency directed the supervisors not to approve any requests to telework more than eight days per month, and that this interference with the supervisors' discretion violated Section 5C. In contrast, the Agency argued that the supervisors must exercise their discretion to approve telework requests in a manner that is consistent with the Agency's guidance. In this regard, the Arbitrator found that the Agency directed supervisors "to use their discretion to not use their discretion" to approve any requests to telework more than eight days per month.[7]

"Ultimately," the Arbitrator stated, "the question to be decided [was] whether the Agency's actions interfered with the discretion and the authority of the [supervisors] to approve telework days as provided for in . . . Section 5C."[8] The Arbitrator noted that "[c]ontract interpretation may involve an analysis of past practice,"[9] and she briefly discussed the parties' past practice under their prior agreement.[10] However, she also noted that contract interpretation "may involve an analysis of the language of the contract clause."[11] In this regard, she found that, under the terms of Section 5C – specifically the phrase "[a]dditional days may be worked on telework with the approval of the [supervisor]"[12] – the supervisors had the discretion to permit judges to telework more than eight days per month.[13] And she found that, when the Agency instructed the supervisors to "use their discretion to not use their discretion" to approve additional telework,[14] the Agency "unilaterally change[d]," and violated, "the terms of" Section 5C.[15]

As a remedy, the Arbitrator directed the Agency to: (1) "rescind the directive that [supervisors] have no or limited discretion to approve more than eight telework days in a calendar month"; (2) "permit[supervisors] to approve requests [to telework] more than eight . . . days [per month], without limit"; and (3) permit supervisors to "exercise discretion regarding approval of additional days of telework in the same fashion as they had done . . . in the past."[16]

The Agency filed exceptions to the award, and the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Agency's arguments.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, exceptions may not rely on "any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented to the arbitrator,"[17] and the Authority "will not consider any [such] evidence, factual assertions, [or] arguments."[18]

The Agency argues that the Arbitrator's remedy is contrary to law in two respects. First, the Agency argues that directing it to stop "interfering with" the supervisors' discretion[19] impermissibly affects management's rights to direct employees under § 7106(a)(2)(A) of the Federal Service Labor-Management Relations Statute (the Statute)[20] and assign work under § 7106(a)(2)(B) of the Statute.[21] Second, the Agency argues that the awarded remedy is contrary to the Telework Enhancement Act of 2010 (the Act),[22] because the award prioritizes personal considerations over the Agency's mission objectives.[23] However, at arbitration, the Union requested that the Arbitrator direct the Agency to "rescind"[24] its directive instructing the supervisors to "use their discretion to not use their discretion."[25] As a remedy, the Arbitrator directed the Agency to rescind that directive.[26] Yet the Agency does not provide any evidence that it argued below that the requested remedy would interfere with the Agency's rights under § 7106(a) of the Statute or would violate the Act. Because the Agency could have presented these arguments before the Arbitrator, but failed to do so, we find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar these exceptions. Accordingly, we dismiss these exceptions.[27]

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[6] Award at 2.
[7] *Id.* at 19 (internal quotation marks omitted); *accord id.* at 17 (citing Exceptions, Attach. 2, Tr. Vol. II (Vol. II) at 17)).
[8] *Id.* at 14.
[9] *Id.*
[10] *Id.* at 15.
[11] *Id.* at 14.
[12] Article 15 at 3.
[13] Award at 14 (citing Article 15 at 3).
[14] *Id.* at 19 (internal quotation marks omitted).
[15] *Id.*
[16] *Id.* at 21.
[17] 5 C.F.R. § 2425.4(c).
[18] *Id.* § 2429.5.
[19] Exceptions at 11.
[20] 5 U.S.C. § 7106(a)(2)(A).
[21] *Id.* § 7106(a)(2)(B).
[22] *Id.* §§ 6501-6506.
[23] Exceptions at 14.
[24] Award at 12; *accord* Opp'n, Ex. C, Union's Post-Hr'g Br. at 9.
[25] Award at 19 (internal quotation marks omitted).
[26] *Id.* at 21.
[27] *See, e.g., U.S. EPA*, 68 FLRA 139, 140 (2014); *USDA, Farm Serv. Agency, Kan. City, Mo.*, 65 FLRA 483, 484 n.4 (2011).

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency argues that the award is based on a nonfact.[28] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[29] But the Authority will not find an award deficient based on an arbitrator's determination of a factual matter that the parties disputed at arbitration.[30]

The Agency contends that the Arbitrator erred by finding that "the Agency impermissibly interfered with the [supervisors'] authority to approve" requests to telework more than eight days per month.[31] However, even assuming that the challenged finding is a factual finding, the parties disputed it at arbitration.[32] Consequently, the Agency's contention provides no basis for finding that the award is based on a nonfact, and we deny this exception.

B. The award does not fail to draw its essence from Section 5C.

The Agency argues that the award fails to draw its essence from Section 5C in several respects.[33] To demonstrate that an award fails to draw its essence from a collective-bargaining agreement, an excepting party must establish that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[34] The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained."[35] Further, exceptions that are based on a misunderstanding of an arbitrator's award do not provide a basis for finding that the award fails to draw its essence from the agreement.[36]

The Agency argues that the Arbitrator "inserted her own standard" into Section 5C because she found that it required the supervisors to *approve* telework requests "*without limit*."[37] The Agency also argues that this "standard" conflicts with the Arbitrator's direction that the supervisors "approve additional telework days 'in the same fashion as they had done . . . in the past.'"[38] However, the Agency misreads the award. The Arbitrator found that Section 5C granted the supervisors the discretion to approve or deny the judges' requests to telework more than eight days per month. Accordingly, the Arbitrator directed the Agency to permit the supervisors to approve such telework requests "without limit" *to the supervisors' discretion*.[39] Contrary to the Agency's assertion, the award does not mandate that the supervisors exercise their discretion by *approving all* telework requests. Because the Agency misreads the award, its argument provides no basis for finding that the award fails to draw its essence from Section 5C. Thus, we deny this exception.

Additionally, the Agency argues that, in interpreting Section 5C, the Arbitrator improperly relied on the parties' "past practice" under a prior collective-bargaining agreement.[40] The Agency argues that, as a result, the Arbitrator's conclusion that the Agency violated Section 5C fails to draw its essence from the parties' agreement.[41]

An arbitration award is based on separate and independent grounds when more than one ground independently would support the remedy that the arbitrator awards.[42] And when an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient

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[28] Exceptions at 18.
[29] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry*)).
[30] *U.S. DHS, U.S. CBP*, 68 FLRA 1015, 1019 (2015) (citing *Lowry*, 48 FLRA at 593-94).
[31] Exceptions at 18.
[32] *See* Award at 9; Exceptions, Attach 1, Tr. Vol. I at 10, 105-109, 113-16, 136, 166-68, 201, 209-12, 216-17, 233-34, 243-44; Vol. II at 9-10, 18.
[33] Exceptions at 14-15.
[34] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*) (citing *U.S. Army Missile Materiel Readiness Command (USAMIRCOM)*, 2 FLRA 432, 437 (1980)); *see also NTEU, Chapter 32*, 67 FLRA 354, 355 (2014) (citing *OSHA*, 34 FLRA at 575).
[35] *OSHA*, 34 FLRA at 576 (citing *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987); *Dep't of HHS, SSA, Louisville, Ky. District*, 10 FLRA 436, 437 (1982)).
[36] *AFGE, Local 1897*, 67 FLRA 239, 241 (2014) (citing *U.S. Dep't of HHS, Substance Abuse & Mental Health Servs. Admin.*, 65 FLRA 568, 572 (2011)); *U.S. DOD, Def. Contract Mgmt. Agency*, 66 FLRA 53, 57 (2011) (citing *NAGE, Local R4-45*, 55 FLRA 789, 794 (1999)).
[37] Exceptions at 15.
[38] *Id.* (quoting Award at 21).
[39] Award at 21.
[40] Exceptions at 15 (internal quotation marks omitted).
[41] *Id.*
[42] *NTEU, Chapter 83*, 68 FLRA 945, 951 (2015) (Member Pizzella dissenting) (citing *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, San Juan, P.R.*, 66 FLRA 81, 86 (2011)).

in order to have the Authority find the award deficient.[43] In those circumstances, if the excepting party has not demonstrated that the award is deficient on one of the grounds relied on by the arbitrator, and the award would stand on that ground alone, then it is unnecessary to address exceptions to the other ground.[44]

Here, although the Arbitrator briefly discussed the parties' past practice under their prior agreement,[45] she also noted that "[c]ontract interpretation . . . may involve an analysis of the language of the contract clause."[46] In this regard, she found that Section 5C's statement that "[a]dditional days may be worked on telework with the approval of the [supervisor]" meant that the supervisors had the discretion to approve requests to telework more than eight days per month.[47] And, on the basis of this express contract wording, she concluded that the Agency "unilaterally change[d]," and violated, "the terms of" Section 5C.[48] Thus, the Arbitrator's interpretation of Section 5C's plain wording provides a separate and independent ground for the award. As we deny the Agency's other essence exception, and the Agency has not otherwise established that the Arbitrator's interpretation of Section 5C's plain wording fails to draw its essence from the agreement, the Agency's past-practice argument provides no basis for finding the award deficient. Accordingly, we deny this exception.

C. The Arbitrator did not exceed her authority.

The Agency argues that the Arbitrator exceeded her authority in three respects.[49] Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.[50] However, arbitrators do not exceed their authority by addressing an issue that is necessary to decide a stipulated issue or by addressing an issue that necessarily arises from issues specifically included in a stipulation.[51] And the Authority accords an arbitrator's interpretation of a stipulated issue the same substantial deference that it accords an arbitrator's interpretation and application of a collective-bargaining agreement.[52] Additionally, the Authority has found that a party's misreading of the award provides no basis on which to find that the arbitrator exceeded his or her authority.[53]

First, the Agency argues that the Arbitrator exceeded her authority by "decid[ing] an issue other than the stipulated issue."[54] Specifically, the Agency asserts that the Arbitrator "re-authored"[55] one of the issues before her by stating that "the question to be decided . . . [was] whether the Agency's actions interfered with the discretion and the authority of the [supervisors] to approve telework days as provided for in . . . Section 5C."[56] As relevant here, the stipulated issue was "[w]hether the Agency violated Section 5C."[57] The Arbitrator found that Section 5C gave the supervisors discretion to permit judges to telework more than eight days per month.[58] Thus, by addressing whether the Agency's actions interfered with the supervisors' discretion under Section 5C, the Arbitrator was resolving an issue necessary to resolve the stipulated issue. Accordingly, the Agency's argument does not demonstrate that the Arbitrator exceeded her authority,[59] and we deny this exception.

Second, the Agency asserts that the Arbitrator awarded a remedy that is inconsistent with both the parties' agreement and the Union's requested relief.[60] In particular, the Agency argues that the Arbitrator directed the Agency to approve telework requests "*without limit*."[61] As we have explained in denying the Agency's similar essence argument above, the Arbitrator did not direct the Agency to approve all telework requests without limit. And, again, as the Agency's argument is based on its misreading of the award, it provides no basis for finding the award deficient.[62] Therefore, we deny this exception.

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[43] *Id.* (citation omitted).
[44] *Id.* (citing *U.S. Dep't of VA Med. Ctr., Hampton, Va.*, 65 FLRA 125, 129 (2010); *Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 892 (2010)).
[45] Award at 15.
[46] *Id.* at 14.
[47] *Id.* (emphasis omitted) (internal quotation marks omitted).
[48] *Id.* at 19.
[49] Exceptions at 16-18.
[50] *U.S. Dep't of Interior, Bureau of Reclamation, Great Plains Region, Colo./Wyo. Area Office*, 68 FLRA 992, 993 (2015) (Member Pizzella dissenting) (citing *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996) (*Local 1617*)).
[51] *U.S. DHS, U.S. ICE*, 65 FLRA 529, 532 (2011) (*ICE*) (citing *NATCA, MEBA/NMU*, 51 FLRA 993, 996 (1996) (*NATCA*); *Air Force Space Div., L.A. Air Force Station, Cal.*, 24 FLRA 516, 519 (1986)).
[52] *NTEU*, 68 FLRA 654, 655 (2015) (*NTEU*) (citing *ICE*, 51 FLRA at 532).
[53] *E.g., id.* at 656.
[54] Exceptions at 16 (citations omitted).
[55] *Id.*
[56] *Id.* at 17 (quoting Award at 14) (internal quotation marks omitted).
[57] Award at 2.
[58] *Id.* at 14.
[59] *E.g., U.S. Dep't of the Treasury, IRS*, 68 FLRA 1027, 1030 (2015); *Local 1617*, 51 FLRA at 1647-48 (citing *NATCA*, 51 FLRA at 996).
[60] Exceptions at 17-18.
[61] *Id.*
[62] *NTEU*, 68 FLRA at 656.

Third, the Agency argues that the Arbitrator exceeded her authority by failing to issue the award within thirty days of the conclusion of the arbitration hearing, as required by Article 11 of the parties' agreement.[63] Article 11 states, in relevant part, that "[t]he arbitrator will be requested by the parties to render his or her decision as soon as possible, but no later than [thirty] days after the conclusion of the hearing unless the parties agree otherwise."[64]

The Authority, following the approach of federal courts reviewing private-sector arbitration awards, has held that an arbitrator's failure to issue an award within an applicable time limit does not render the award deficient if the excepting party did not object to the delay before the award's issuance.[65] Federal courts, when reviewing private-sector arbitration awards, also consider whether the objecting party demonstrates that the delay caused it actual harm[66] – a principle that we find appropriate to apply here.[67] Although contractual time limits for arbitration awards may reinforce the effectiveness and efficiency of the arbitration process, finding an award deficient simply on the basis that an arbitrator failed to issue a timely award does not. We therefore decline to adopt such "an arbitration rule[,] which encourages postaward technical objections by a losing party as a means of avoiding an adverse arbitration decision."[68]

In this case, the Agency does not allege, and the record does not demonstrate, that the Agency objected to the delayed award before the award's issuance, or that the delay caused the Agency actual harm.[69] Consequently, consistent with the above principles, the Agency has not established that the Arbitrator exceeded her authority in this regard. Accordingly, we deny this exception.

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

[63] Exceptions at 17 (citing *id.*, Attach. 3, Jt. Ex. 1 at 3-4).
[64] *Id.*, Attach. 3, Jt. Ex. 1 at 3-4.
[65] *AFGE, Local 2029*, 48 FLRA 95, 100-01 (1993) (citing *W. Rock Lodge No. 2120 v. Geometric Tool Co.*, 406 F.2d 284 (2d Cir. 1968); *U.S. Dep't of HHS, SSA, Office of Hearings & Appeals*, 44 FLRA 550, 555 (1992)); *see also* Revised Unif. Arbitration Act, § 19(b) (2000); Unif. Arbitration Act, § 8(b) (1956).
[66] *E.g.*, *W. Rock Lodge No. 2120*, 406 F.2d at 286.
[67] *See, e.g.*, 5 U.S.C. § 7122(a)(2) (Authority may find arbitration awards deficient on "grounds similar to those applied by [f]ederal courts in private[-]sector labor-management relations").
[68] *W. Rock Lodge No. 2120*, 406 F.2d at 286.

[69] Member Pizzella notes that he does not agree that the Authority's ability and responsibility, to consider whether or not an arbitrator's failure to issue an award in a timely manner renders the award deficient, is limited only to those circumstances where the objecting party has specifically objected or demonstrated "actual harm." Member Pizzella does not agree with his colleagues' assessment that this consideration will "encourage postaward technical objections." To the contrary, before arbitrators accept an appointment to arbitrate a dispute, they should decline such appointment, if they believe they cannot comply with the timeframes set forth in the parties' grievance and arbitration procedures, rather than simply ignoring those requirements. Those timeframes cannot be ignored any more than an arbitrator may simply ignore burdens of proof, or any other procedural requirements, that are established by the parties in their agreement. As Member Pizzella has noted in prior concurring and dissenting opinions, all costs of federal arbitrations are paid for by the American taxpayer. *AFGE, Local 3320*, 69 FLRA 136, 141 (2015) (Concurring Opinion of Member Pizzella) (citations omitted). Accordingly, Member Pizzella again notes that, in keeping with the Authority's statutory charge to "interpret [the Statute] in a manner consistent with the requirement of an effective and efficient [g]overnment," 5 U.S.C. § 7101(b), and to preserve our responsibilities to the American taxpayers, an arbitrator's failure to issue a timely award may constitute a sufficient basis to find it deficient.