

**72 FLRA No. 110**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 2516  
(Union)

and

UNITED STATES  
DEPARTMENT OF THE ARMY  
U.S. ARMY DENTAL ACTIVITY  
FORT BLISS, TEXAS  
(Agency)

0-AR-5628

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DECISION

December 13, 2021

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Before the Authority: Ernest DuBester, Chairman, and  
Colleen Duffy Kiko and James T. Abbott, Members

**I. Statement of the Case**

Arbitrator Mark D. Keyl denied a Union grievance alleging that the Agency violated the parties' collective-bargaining agreement regarding changing and cleaning times and breaks, and law by failing to pay certain employees overtime. The Union filed exceptions on grounds that the award is based on nonfacts, fails to draw its essence from the parties' agreement, is contradictory, is contrary to Agency regulations, and is contrary to law. Because the Union failed to demonstrate that the award is deficient on any of these grounds, we deny the exceptions.

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

The Agency implemented changes to improve the dental services it provides to soldiers with a program called Go First Class (GFC). Subsequently, the Union filed a grievance on behalf of certain dental employees<sup>1</sup> alleging that the Agency violated Article XI, Sections 2 (Section 2) and 3 (Section 3) of the parties' agreement and law as a result of the changes. The grievance was unresolved and the parties submitted it to arbitration.

As relevant here, the five issues that the Union submitted to the Arbitrator were whether the Agency violated the parties' agreement "or any rule, regulation[,] or law" when the grievants: (1) "worked before and after their scheduled shifts and/or during lunch breaks without compensation"; (2) "worked during work breaks"; (3) "were not allowed rest breaks away from the worksite"; (4) "were not allowed a reasonable amount of time to clean the worksite before the end of their shift"; and (5) "were not allowed [ten] minutes to change clothing at the start of the duty day, before and after their meal break and/or at the end of their duty day[.]"<sup>2</sup>

In relevant part, Section 2 provides that "[e]ach employee is authorized one [fifteen] minute rest break within each four hour period of the normal workday [and] [e]mployees shall be allowed to take rest breaks away from the immediate worksite."<sup>3</sup> Additionally, Section 3 provides that "employees . . . will be allowed a reasonable amount of official time [to clean their dental operatories] prior to the end of their work day/shift. Employees . . . will have [ten] minutes to change clothing [before and after their shifts]."<sup>4</sup>

After evaluating the conflicting evidence presented by the parties, the Arbitrator concluded that the Union did not present "sufficient evidence" to demonstrate that employees were working during breaks, lunch, or after their shifts.<sup>5</sup> In reaching this conclusion, the Arbitrator credited testimony that the grievants' supervisors "counseled employees" to take their breaks and leave the worksite on time.<sup>6</sup> In addition, the Arbitrator found that the Union did not produce sufficient evidence to demonstrate that the Agency denied employees their opportunity to take their paid breaks. Lastly, the Arbitrator found that the Union failed to present sufficient evidence to support its claims that employees were not allowed cleaning or changing time.

On June 3, 2020, the Union filed exceptions to the award. Subsequently, on June 23, 2020, the Union filed a motion for leave to submit supplemental documents. On July 6, 2020, the Agency filed an opposition.<sup>7</sup>

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<sup>2</sup> Award at 3.

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 63.

<sup>6</sup> *Id.*

<sup>7</sup> The Agency first filed an opposition to the Union's exceptions on June 17, 2020. However, it timely refiled its opposition on July 6, 2020, and requested that the Authority not consider the earlier filed opposition. See July 6, 2020 Opp'n Br. at 3 n.1 ("This [o]pposition replaces the earlier filed Agency [o]pposition.").

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<sup>1</sup> The grievants are Dental Hygienists and Expanded Function Dental Assistants.

### III. Preliminary Matter: We do not consider the Union's supplemental submission.

Section 2425.4 of the Authority's Regulations provides that an exception must be "self-contained" and include "legible copies of any documents" referenced in support of a party's arguments.<sup>8</sup> On June 3, 2020, the Union filed timely exceptions to the award, but did not attach its post-hearing brief.<sup>9</sup> On June 23, 2020, the Union filed a motion for leave to submit a post-hearing brief that was not part of the previously filed exceptions.<sup>10</sup>

The Authority's Regulations do not provide for the filing of supplemental submissions, but provide that the Authority may, in its discretion, grant leave to file "other documents" as it deems appropriate.<sup>11</sup> Generally, a party must request leave to file a supplemental submission, as well as explain why the Authority should consider the submission.<sup>12</sup> However, where a party seeks to raise issues that it could have addressed, or did address, in a previous submission, the Authority ordinarily denies requests to file supplemental submissions concerning those issues.<sup>13</sup>

The Union maintains that it failed to attach the post-hearing brief to its exceptions because of "a technical error."<sup>14</sup> However, the Union does not allege that the technical error was due to the Authority's eFiling system. Nor does it explain why it waited twenty days before attempting to correct the alleged error.<sup>15</sup> Because the Union could have included its brief with its exceptions and the failure to timely file the attachment was caused by the Union's own "clerical error" and "technical difficulties," we find that the Union has not established extraordinary circumstances warranting consideration of its supplemental submission.<sup>16</sup>

<sup>8</sup> 5 C.F.R. § 2425.4(a).

<sup>9</sup> Exceptions at 13.

<sup>10</sup> See Mot. to Supplement at 2.

<sup>11</sup> 5 C.F.R. 2429.26; see *IFPTE, Loc. 4*, 70 FLRA 20, 21 (2016) (*IFPTE*) (citing 5 C.F.R. § 2429.26; *AFGE, Loc. 3652*, 68 FLRA 394, 396 (2015) (*Local 3652*)).

<sup>12</sup> *IFPTE*, 70 FLRA at 21 (citations omitted).

<sup>13</sup> *Id.*; see, e.g., *AFGE, Loc. 446*, 72 FLRA 54, 55 (2021) (*Local 446*); *Sport Air Traffic Controllers Org.*, 70 FLRA 274, 275 (2017) (citing *U.S. Dep't of HUD*, 69 FLRA 213, 218 (2016); *Local 3652*, 68 FLRA at 396); *AFGE, Loc. 1667*, 70 FLRA 155, 156 (2016) (*Local 1667*) (declining to consider supplemental submission filed "outside the time limit for submitting its exceptions . . . that was available when the [u]nion filed its exceptions" and could have been filed "with its exceptions").

<sup>14</sup> Mot. to Supplement at 2.

<sup>15</sup> See *id.*

<sup>16</sup> See *Local 446*, 72 FLRA at 55; *U.S. Dep't of the Army, U.S. Army Med. Dep't Activity, Fort George G. Meade, Md.*, 71 FLRA 368, 369 n.7 (2019) (declining to consider an

Accordingly, we deny the Union's motion and do not consider the supplemental submission.<sup>17</sup>

### IV. Analysis and Conclusions

#### A. The award is not based on nonfacts.

The Union argues that the award is based on nonfacts because the Arbitrator "disregard[ed]" witness testimony.<sup>18</sup> As relevant here, an appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result, in order to establish that an award is based on a nonfact.<sup>19</sup>

Here, the Arbitrator evaluated the conflicting testimony and found that the evidence did not support the Union's claims.<sup>20</sup> Because the Union merely disagrees with the Arbitrator's evaluation of the evidence, it fails to demonstrate that a central fact underlying the award is clearly erroneous. Accordingly, we deny this exception.

#### B. The award is not contrary to law.

The Union argues that the award is contrary to the Fair Labor Standards Act (FLSA) and its

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untimely supplemental submission); *Local 1667*, 70 FLRA at 156.

<sup>17</sup> Member Abbott notes that he would accept the Union's arguments concerning its closing brief. Certain documents from an arbitration – grievance, grievance response, opening briefs, closing briefs, and of course the arbitrator's decision and award – are part of that case record. Although it is prudent to attach any such documents in submissions to the Authority, the documents noted above should not be ignored just because one party or the other failed to attach the document to its submission to the Authority. The stark line that is cast by my colleagues would prevent the Union from referencing its closing brief even if that brief was attached to the Arbitrator's award and to the Agency's response. The purpose of this regulation is to prevent the addition of documents that may not have been presented to, or considered by, the other party and the arbitrator. The purpose of our regulations that establish filing requirements is to ensure that the Authority has a complete record to consider and that no party is caught by surprise by the introduction of new matters or evidence that were not presented to the Arbitrator. Because the Union's closing brief is part of the record of this case, it should be considered.

<sup>18</sup> Exceptions at 9.

<sup>19</sup> *AFGE, Loc. 0922*, 70 FLRA 34, 35 (2016) (*Local 0922*). The Authority will not find an award deficient on the basis of an arbitrator's determination on any factual matter that the parties disputed at arbitration. *Id.* Additionally, mere disagreement with an arbitrator's evaluation of the evidence and his determination of the weight to be accorded such evidence provides no basis for finding an award deficient. *AFGE, Loc. 12*, 70 FLRA 582, 583 (2018) (*Local 12*) (citing *U.S. Dep't of the Air Force, Whiteman Air Force Base, Mo.*, 68 FLRA 969, 971 (2015)).

<sup>20</sup> Award at 63-64.

implementing regulations because the Arbitrator incorrectly determined that there was insufficient evidence to conclude that the Agency “suffer[ed] or permit[ed]” the grievants to work overtime.<sup>21</sup> When an exception involves an award’s consistency with law, rule, or regulation the Authority reviews any question of law raised by the exception and the award de novo.<sup>22</sup> In applying the standard of de novo review, the Authority assesses whether the arbitrator’s legal conclusions are consistent with the applicable standard of law.<sup>23</sup> In making that assessment, the Authority defers to the arbitrator’s underlying factual findings, unless the appealing party establishes they are nonfacts.<sup>24</sup>

The Authority has explained that, under 5 C.F.R. § 551.104, an employer may be found to have “suffer[ed] or permit[ted] . . . work” when “the employee’s supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed.”<sup>25</sup> Here, the Arbitrator found that the testimony of Agency supervisors established that the grievants’ supervisors “counseled employees” to take breaks and to leave the worksite on time.<sup>26</sup> Therefore, the Arbitrator concluded that there was insufficient evidence that employees had been permitted to work during their lunch or outside of their scheduled shifts.<sup>27</sup>

The Arbitrator’s conclusion that the evidence was insufficient to establish that the Agency knew or had reason to believe that the grievants were performing overtime work is a factual finding to which the Authority defers because the Union has not demonstrated that it is a

nonfact.<sup>28</sup> This finding supports the legal conclusion that the Agency did not violate the FLSA.<sup>29</sup> Moreover, the Union’s argument that the Arbitrator “disregard[ed]” witness testimony merely disagrees with his evaluation of the evidence, which does not provide a basis for finding the award deficient.<sup>30</sup> Therefore, we find that the award is not contrary to law, and we deny this exception.

C. The Union fails to support its contrary-to-Agency-regulation exception.

As noted above, the Authority reviews questions of law, including an award’s consistency with agency regulations, de novo.<sup>31</sup> Here, the Union disputes the Arbitrator’s interpretation of the GFC’s requirements.<sup>32</sup> However, the Union did not provide a copy of the GFC with its exceptions and nothing in the record before us provides the text of the GFC. Section 2425.6(e)(1) of the Authority’s regulations provides that an exception “may be subject to dismissal or denial if . . . [t]he excepting party fails to . . . support a ground” listed in § 2425.6(a)-(c).<sup>33</sup> Because the Union failed to provide evidence to support its argument that the Arbitrator erred in his interpretation, we deny this exception as unsupported.<sup>34</sup>

<sup>21</sup> Exceptions at 5. Specifically, the Union argues that the award is contrary to 5 C.F.R. §§ 551.104, 551.401, 551.501(a), 551-10; 29 C.F.R. § 553.221, and 29 C.F.R. § 778.106. In its opposition, the Agency contends that the grievants are exempt employees under the FLSA. Opp’n at 7-15. Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority will not consider arguments that a party could have, but did not, raise before an arbitrator. Because the record indicates that the Agency did not raise this argument before the Arbitrator even though it could have done so, we decline to consider it. See *U.S. Dep’t of the Army*, 72 FLRA 363, 366 (2021).

<sup>22</sup> *NAGE*, 71 FLRA 775, 775 (2020) (*NAGE*) (citing *U.S. Dep’t of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017) (*VA*); *U.S. Dep’t of the Treasury, IRS*, 68 FLRA 145, 147 (2014)); see also *AFGE, Loc. 2145*, 70 FLRA 873, 874 (2018) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollack, La.*, 68 FLRA 151, 152 (2014)).

<sup>23</sup> *NAGE*, 71 FLRA at 775 (citing *VA*, 70 FLRA at 177).

<sup>24</sup> *Id.* at 775-76 (citing *VA*, 70 FLRA at 177).

<sup>25</sup> *AFGE, Loc. 4044*, 65 FLRA 264, 266 (2010) (*Local 4044*) (quoting 5 C.F.R. § 551.104).

<sup>26</sup> Award at 63.

<sup>27</sup> *Id.* (noting conflicting testimony from employees that they worked overtime to complete tasks and from management that it did not permit employees to work overtime).

<sup>28</sup> *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 70 FLRA 186, 188-89 (2017) (citing *AFGE, Loc. 3723*, 67 FLRA 149, 150 (2013)) (“The [a]rbitrator’s analysis of the evidence presented by the [u]nion to satisfy its burden under the FLSA is treated as a factual finding to which the Authority defers.”); *Local 4044*, 65 FLRA at 266; see also *Local 0922*, 70 FLRA at 35 (“The Authority has repeatedly stated, in the context of the FLSA, that an arbitrator’s determination of whether a supervisor knew, or had reason to believe, that overtime work was being performed is a *factual* finding.”).

<sup>29</sup> *Local 4044*, 65 FLRA at 266.

<sup>30</sup> Exceptions at 9; see *Local 12*, 70 FLRA at 582; see also *USDA, U.S. Forest Serv. Law Enft & Investigations, Region 8*, 68 FLRA 90, 94 (2014); *IFPTE, Loc. 386*, 66 FLRA 26, 31 (2011) (denying contrary-to-law exception where union claimed that the arbitrator erred in finding insufficient evidence to show that witnesses worked unpaid overtime hours under the FLSA).

<sup>31</sup> See *NAGE*, 71 FLRA at 775 (citing *VA*, 70 FLRA at 177; *IRS*, 68 FLRA at 147).

<sup>32</sup> Exceptions at 5-7.

<sup>33</sup> 5 C.F.R. § 2425.6(e)(1); see, e.g., *AFGE, Loc. 2959*, 70 FLRA 309, 311 (2017) (citing 5 C.F.R. § 2425.6(e)(1); *NTEU, Chapter 67*, 67 FLRA 630, 630-31 (2014)).

<sup>34</sup> 5 C.F.R. § 2425.6(e)(1); see also *AFGE, Loc. 1336, AFL-CIO*, 49 FLRA 529, 532 (1994) (denying contrary-to-agency-regulation exception where union failed to provide regulation).

- D. The award is not incomplete, ambiguous, or contradictory, so as to make implementation impossible.

The Union argues that the award is contradictory because the Arbitrator stated that the Agency had mismanaged grievants' break time, but also found that the Union did not present sufficient evidence to support its claim that the grievants were denied their breaks, time to clean operatories, and donning and doffing time.<sup>35</sup> In order to prevail on this ground, "the appealing party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain."<sup>36</sup> Because the Union fails to argue, let alone demonstrate, that the implementation of the award would be impossible because the meaning and effect of the award are too unclear or uncertain, we deny this exception.

- E. The award draws its essence from the parties' agreement.

The Union argues that the award fails to draw its essence from Sections 2 and 3. When reviewing an arbitrator's interpretation of an agreement, the Authority will find that an arbitration award is deficient as failing to draw its essence from the agreement when the appealing party establishes 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.<sup>37</sup>

In support of its essence exception, the Union asserts that the Arbitrator incorrectly concluded that the Union failed to present sufficient evidence to support its argument that the Agency did not violate the parties' agreement. This argument, however, merely challenges the arbitrator's evaluation of the evidence, which does not provide a basis on which to conclude that the award fails to draw its essence from the parties' agreement.<sup>38</sup> Therefore, we deny this exception.

## V. Decision

We deny the Union's exceptions.

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<sup>35</sup> Exceptions at 8.

<sup>36</sup> *OPM*, 68 FLRA 1039, 1043 (2015).

<sup>37</sup> See *AFGE, Loc. 3342*, 72 FLRA 91, 92 (2021); see also *U.S. DHS, ICE*, 66 FLRA 13, 17 (2011).

<sup>38</sup> See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 1262, 1263 n.16 (2020) (then-Member DuBester concurring) (noting that "challenges to an arbitrator's evaluation of the evidence, including determinations as to the weight to be accorded such evidence . . . do not demonstrate that an award fails to draw its essence from the parties' agreement").