64 FLRA No. 17

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2382
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
CARL T. HAYDEN MEDICAL CENTER
PHOENIX, ARIZONA
(Agency)

0-AR-4067

DECISION

September 29, 2009

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator Charles S. Loughran filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency did not file an opposition to the Union's exception.

The Arbitrator denied a grievance alleging that the Agency had failed to establish the grievant's workweeks in accordance with 5 U.S.C. § 6101(a)(3)(B). [2] For the reasons that follow, we deny the Union's exception.

II. Background and Arbitrator's Award

The Agency is a medical center that provides primary care, specialty care, extended care, and related social support services in an integrated health care delivery system. The grievant is employed by the medical center as an administrative officer of the day (AOD). AODs are primarily responsible for performing administrative duties on all holidays, all weekends, and on weekday shifts from 4 p.m. until midnight and from midnight until 8 a.m. The administrative workweek established by regulation at the medical center is defined as the seven consecutive calendar days beginning on Sunday and continuing through the following Saturday. Award at 5.

The AODs are assigned to a complicated tour of duty that runs in repeating cycles of approximately five weeks, during which the AODs regularly work six days consecutively and, before the filing of the grievance, sometimes seven days consecutively. However, the workdays were scheduled in such a manner that the workweek of the AODs never involved more than five workdays (or forty hours) during the medical center's administrative workweek from Sunday through Saturday. *Id.* at 5-6. Accordingly, the regularly scheduled workweek of the AODs never resulted in regularly scheduled overtime work and their scheduled workweek of six or seven consecutive days never resulted in the payment of overtime compensation.

The Union filed a grievance contending that the grievant "worked either 48 or 56 hours over a seven[-]day workweek without any payment of overtime in a position that is subject to (non-exempt from) the [Fair Labor Standards Act (FLSA)]." *Id.* at 6 (citation omitted). The grievance was not resolved and was submitted to arbitration. As relevant here, the parties stipulated to the following issue: "Did the agency establish the tour of duty of [the grievant] as an AOD in accordance with [5 U.S.C. § 6101]?" *Id.* at 9.

The Union argued that the Agency had established workweeks that did not comply with § 6101(a)(3)(B) because they were not Monday through Friday and the head of the Agency (or designee) had not determined that, with a Monday through Friday workweek, the "organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased." *Id.* at 18. The Agency claimed that the AODs' workweek had been established in accordance with § 6101(a)(3)(B) because "a Monday through Friday work schedule for the AOD position would be impractical" and "the 7 day/24 hour operation of the

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1. Chairman Pope's dissenting opinion is set forth at the end of this decision.

2. 5 U.S.C. § 6101(a)(3)(B) provides:

> Except when the head of an Executive agency . . . determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide, with respect to each employee in his organization, that—
>
> . . . (B) the basic 40-hour workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 days outside the basic workweek are consecutive[.]

Medical Center requires such a schedule[.]" *Id.* at 18. The Arbitrator ruled that the Agency had established the grievant's workweeks in accordance with § 6101(a)(3)(B). [3]

In so ruling, the Arbitrator determined that the words "when possible" in § 6101(a)(3)(B) modified the 5-day, Monday through Friday workweek, and "are not simply an elaboration of the serious hardship/increased costs conditions outlined in (a)(3)[.]" *Id.* at 19. According to the Arbitrator, "[i]t seems rather clear that Congress intended to add a particular qualification to the 5-day, Monday through Friday schedule, i.e., that such a schedule only needed to be followed 'when possible.'" *Id.* at 20.

In assessing whether it was possible for the Agency to schedule AODs on a Monday through Friday basis, the Arbitrator cited the testimony of an Agency official who responded to a question concerning whether it was possible to schedule AODs to a workweek without seven consecutive workdays. The official testified that "it was not impossible, but with respect to working less than six days in a row it was 'not too possible . . . unless we have established tours for everything.'" *Id.* (quoting Tr. at 71). The Arbitrator also cited the requirements of the AOD position to provide administrative services on holidays, weekends, and weekdays from 4 p.m. until midnight and from midnight until 8 a.m. *See id.* at 21. He further found that, "[a]s in virtually all other hospitals, a life support services unit (or 'emergency room') is a 24/7 operation." *Id.* Based on these factors, the Arbitrator found that "it is not possible to avoid scheduling AODs on the weekends[.]" *Id.* Consequently, the Arbitrator concluded that "it is simply not possible to schedule AODs to a Monday through Friday schedule." *Id.*

III. Union's Exception

The Union contends that the Arbitrator's ruling that the grievant's workweeks had been established in accordance with § 6101 is contrary to law. In this regard, the Union asserts that the Arbitrator misinterpreted and misapplied the words "when possible" in § 6101(a)(3)(B). The Union argues that the words should be given their plain and ordinary meaning and that it is clear that it is possible to schedule AODs to a Monday through Friday, eight hours per day work schedule.

In support of its argument that such a workweek is possible, the Union notes that the medical center, itself, scheduled four to five AODs to eight-hour shifts, Monday through Friday, during the time period in dispute. According to the Union, the "when possible" language applies to situations where work is not performed Monday through Friday. In sum, the Union asserts that, on the record before the Arbitrator, the grievant's workweeks were not established in accordance with § 6101(a)(3)(B) and the Arbitrator's ruling to the contrary is deficient as contrary to law.

In addressing what action the Authority should take with respect to the deficient award, the Union asserts that the award should not be remanded to the Arbitrator to address the statutory exceptions, and the Authority should direct the Agency to determine the overtime compensation the grievant would have received if the Agency had established his work schedule in accordance with § 6101(a)(3)(B) and make the grievant whole in accordance with the FLSA.

IV. Analysis and Conclusions

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. *See United States Dep't of Def., Dep'ts of the Army and the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making this determination, the Authority defers to the arbitrator's underlying factual findings. *See id.* As the Authority has explained, it defers to the arbitrator's findings of fact because it was the arbitrator's evaluation of the record for which the parties bargained and not the Authority's. [4] *See e.g., United States Dep't of Commerce, Patent & Trademark Office, Arlington, Va.*, 60 FLRA 869, 880 (2005) (*PTO*) (citing *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987)).

3. As the Union does not challenge the Arbitrator's additional rulings that the grievance properly raised the grievant's FLSA status, the grievant's status was grievable and arbitrable, and the grievant's position was non-exempt, we do not address them further.

4. To preclude the Authority from deferring to an arbitrator's factual finding in determining whether the arbitrator's legal conclusion is consistent with the applicable standard of law, the appealing party would need to establish that the factual finding was deficient as based on a nonfact. *See IAMAW, Dist. Lodge 725, Local Lodge 726*, 60 FLRA 196, 199 (2004). Here, the Union does not contend that any of the Arbitrator's factual findings are based on nonfacts.

The head of each agency is directed by 5 U.S.C. § 6101(a)(2) to establish workweeks and work schedules. Agency heads first establish an "administrative workweek," which is defined in 5 C.F.R. § 610.102 as "any period of 7 consecutive 24 hour periods[.]" Pursuant to § 6101(a)(2) and § 610.111(a)(1), they must also establish a "basic workweek of 40 hours which does not extend over more than 6 of any 7 consecutive days." 5 C.F.R. § 610.111(a)(1). Under § 6101(a)(3)(B) and § 610.121(a)(2), that basic forty-hour workweek must be scheduled on five days, Monday through Friday, when possible, with the two days outside the basic workweek consecutive unless the agency head determines that such a schedule would seriously handicap the agency in carrying out its functions or would substantially increase costs. *See, e.g., Acuna v. United States*, 202 Ct. Cl. 206, 213-14 (1973); *see also United States Dep't of the Navy, Norfolk Naval Shipyard, Portsmouth, Va.*, 42 FLRA 804, 808 (1991).

In contending that the award is deficient, the Union asserts that the Arbitrator misinterpreted and misapplied the words "when possible" in § 6101(a)(3)(B). According to the Union, as a matter of law, the words have a certain meaning and the Arbitrator did not apply that meaning when he found that the Agency established the grievant's workweeks in accordance with § 6101(a)(3)(B). That is, the Union argues that the Arbitrator's interpretation of the words "when possible" is a question of law that the Authority should review *de novo*.

Contrary to the Union's assertion, the question of whether it is possible to schedule a Monday through Friday workweek is a question of fact. *Cf. AFGE, Local 446*, 59 FLRA 461, 464 (2003) (arbitrator's determination that the nonuse of sick leave did not constitute a "superior accomplishment" or a "personal effort" under 5 C.F.R. § 451.104 constituted a finding of fact). In this regard, the United States Supreme Court has repeatedly recognized "the vexing nature of the distinction between questions of fact and questions of law." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (*Pullman-Standard*). The Court has acknowledged that there is no "rule or principle that will unerringly distinguish a factual finding from a legal conclusion." *Id.* Despite the vexing nature of the distinction and the lack of a clear rule or principle, the issue of whether it was possible for the Agency to establish a Monday through Friday workweek for the grievant was a factual matter for the Arbitrator, as the trier of fact. Deferring to this factual finding in determining whether the Arbitrator's legal conclusion is consistent with the applicable standard of law, it is clear under the terms of § 6101(a)(3)(B) that the Agency was not obligated to establish a Monday through Friday workweek for the grievant.

There is nothing in the language of § 6101(a)(3)(B) to suggest that, in establishing workweeks, there is some legal concept of "when possible." To the contrary, the inquiry into the possibility of establishing Monday through Friday workweeks is essentially fact and case specific. *Cf. Pullman-Standard*, 456 U.S. at 288 (because issues of intent are essentially factual, they have been held to be questions of fact for the trier of fact). Furthermore, there is nothing in the legislative history of § 6101 or case precedent involving § 6101 to suggest otherwise. The structure of § 6101(a)(3)(B) further supports viewing the matter of "when possible" as factual.

Even if the phrase "when possible" were deemed to raise a legal issue, the dissent's argument would lack merit. It is a matter of simple logic, as well as sound legal reasoning, that statutory language must be interpreted in context. *Bailey v. United States*, 516 U.S. 137, 145 (1995) ("[T]he meaning of statutory language, plain or not, depends on context."). To suggest that an agency's establishment of basic workweeks for employees must be undertaken turning a blind eye to the agency's mission-related needs, considering only that a week has 7 days and a day 24 hours, overlooks this principle. Thus, apart from other considerations, we find the dissent's views on this issue unpersuasive.

As set forth in § 6101(a)(3)(B), "when possible" is an element of the requirement or obligation to establish a Monday through Friday workweek. As an element of the obligation or requirement, there must be a factual basis on which to prove the element. That is, the obligation to establish a Monday through Friday workweek rests on a factual inquiry outside the text of the statute. In this case, the Arbitrator conducted the factual inquiry necessary to the statutory construction of the obligation to establish Monday through Friday workweeks. Here, he found that it was not possible for the Agency to establish such a schedule. Consequently, he ruled that the Agency was not obligated to have established such schedule and that it had established the grievant's workweeks in accordance with § 6101(a)(3)(B).

The Arbitrator made a case-specific inquiry into the possibility of the Agency establishing a Monday through Friday workweek for the grievant. That inquiry did not implicate the governing legal principles pertaining to the establishment of workweeks and work schedules set forth in § 6101. Accordingly, the Authority defers to the Arbitrator's factual finding underlying his legal conclusion and denies the Union's exception. *See*

PTO, 60 FLRA at 881 (applying the law to the facts found by the arbitrator, there was no basis for finding the award contrary to law).

V. Decision

The Union's exception is denied. [5]

Dissenting Opinion of Chairman Pope:

The issue in this case is whether, by finding it was not "possible," within the meaning of 5 U.S.C. § 6101(a)(3)(B), for the Agency to provide grievant a Monday through Friday work schedule, the award is deficient. The majority concludes that the award is not deficient because: (1) the Arbitrator's finding that a Monday through Friday schedule was not possible is factual; and (2) the Union does not contend that the award is based on a nonfact. For the reasons that follow, I believe that the majority is wrong on both counts.

As for the first matter, there are factual elements to the Arbitrator's finding. That does not mean, however, that the finding is purely factual. Instead, the issue before the Arbitrator — whether a Monday through Friday schedule is *possible within the meaning of § 6101(a)(3)(B)* — requires the application of law to facts. Thus, the finding presents a mixed question of fact and law that is subject to *de novo* review. *See, e.g., United States v. McConney*, 728 F.2d 1195, 1205 (9th Cir. 1984) (determination of whether "exigent circumstances" exist to justify certain law enforcement actions constitutes a mixed question of law and fact subject to *de novo* review). Reviewing the award *de novo*, I would find it contrary to § 6101(a)(3)(B). There is no dispute that the work performed by the grievant is scheduled by the Agency 24 hours a day, 7 days a week. Award at 20-21. As such, it is a matter of simple logic that the grievant could be provided a Monday through Friday schedule.

As for the second matter, even if I agreed that the "possible" finding is purely factual, I would find the award deficient as based on a nonfact. *See IAMAW, Dist. Lodge 725, Local Lodge 726*, 60 FLRA 196, 199 (2004). To begin, the majority clearly errs in finding that the Union does not contest the Arbitrator's factual finding. Majority Opinion at 4 n.4. Indeed, the Union specifically contests the finding *eight separate times*. Exception at 7, 8, 9, 11. Although the Union does not use the word "nonfact," such precision is not required. *See, e.g., United States Dep't of Labor, Wash., D.C..*, 59 FLRA 511, 515 (2003) ("We construe the . . . contention . . . as a claim that the award is based on a nonfact."). Moreover, while an award may not be found deficient as based on a nonfact if the alleged nonfact was disputed before the arbitrator, *id.*, there is no basis for concluding that the Agency asserted below that it was not possible to provide the grievant a Monday through Friday schedule. In this regard, as the majority notes (Majority Opinion at 3), an Agency official testified only that a schedule of fewer than 7 days in a row was not "impossible" and that a schedule of fewer than 6 days in a row was not "too possible." Award at 20.

An award is deficient as based on a nonfact if a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *E.g., United States Dep't of Def., Def. Logistics Agency*, 62 FLRA 134, 136 (2007) (*DLA*). As noted above, since the Agency operates 24 hours a day, 7 days a week, it is beyond dispute that it is possible to schedule the grievant to a Monday through Friday workweek. Consequently, a central fact underlying the denial of the grievance is clearly erroneous and, but for the error, the Arbitrator would have reached a different result. *See DLA*, 62 FLRA at 136.

In sum, I would find the award deficient and remand it to the parties with instructions that, absent settlement, the award should be resubmitted to the Arbitrator to determine a remedy. Accordingly, I dissent.

5. In view of this finding, we do not address the Union's contentions regarding what action would be appropriate if the Authority were to find the award deficient.