64 FLRA No. 113

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1395
(Union)

and

SOCIAL SECURITY ADMINISTRATION
(Agency)

0-AR-4321

DECISION

March 30, 2010

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

I. Statement of the Case

The matter is before the Authority on exceptions to an award of Arbitrator Angela R. Murphy 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 filed an opposition to the Union's exceptions.

The Arbitrator concluded that the Agency had fulfilled its contractual obligation to provide training to certain employees, and that those employees were not entitled to overtime compensation. For the reasons set forth below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

In 1999, the Agency created a new position — the Technical Support Technician (Technician) — which is responsible for: (1) answering an Agency telephone number (hotline) that is used to answer questions from the public; (2) resolving Medicare issues; and (3) addressing matters concerning the United States Department of the Treasury. *See* Award at 2. The Agency reassigned some of its employees to fill Technician positions; however, many of these employees required additional training because they were unfamiliar with some or all of the position's duties. To facilitate this training, in 1999, the Agency and the Union entered into a Memorandum of Understanding (1999 MOU). *See id.* at 2-3. The MOU provides, among other things, that Technicians would not be "disadvantaged" by the training schedule; that the training schedule would not set a precedent; that the Agency would provide hotline training "as soon as feasible"; and that Technicians "w[ould] not be disadvantaged when overtime is available." *Id.* at 2-3, 7. Due to continuing difficulties with the training process, in 2001, the Agency and the Union entered into another MOU (2001 MOU), which expired in 2003. *See id.* at 3. This MOU also provided that certain Technicians would not be "disadvantaged" with respect to overtime assignments.[1] *Id*. at 2-3. As a result of both MOUs, the Agency decided that it would give overtime assignments to Technicians as long as those assignments involved duties for which a Technician had received training. *See id.* at 4. Previously, Technicians could not earn overtime unless they had completed all aspects of their training. *See id.*

In 2005, the Agency decided that it would give overtime assignments only to Technicians that, at a minimum, had Medicare training. *See id*. The Union filed a grievance arguing that the Agency had "disadvantaged" fifty-five Technicians by failing to provide them with Medicare training, which in turn prevented them from earning overtime. *See id.* at 3, 5. Following the filing of this grievance, the Agency decided that it would end overtime opportunities for all Technicians, regardless of how much training they had completed. *See id.* at 4.

The matter was unresolved and was submitted to arbitration. The parties did not stipulate to, and the Arbitrator did not specifically frame, any issues. However, in a section titled "Statement of Issue," the Arbitrator noted that the Union, in its post-hearing brief, had submitted its issue as: "[d]id [the Agency] disadvantage the [Technicians] . . . by not fully training all of them, and if so, what should the remedy be?" *Id.* at 5 (quoting Union's Post-Hearing Brief at 1). The Agency submitted a similar issue. *See id.* at 5-6.

The Arbitrator concluded that the Agency had not violated the parties' collective bargaining agreement or either MOU because the Agency had administered overtime and training opportunities in accordance with these agreements. *See id.* at 15. The Arbitrator found that "disadvantaged," as used under both MOUs, meant that the Agency would no longer adhere to its past practice of assigning overtime only to fully trained Technicians; rather, Technicians would be permitted to earn overtime if their assignments involved one of the three duties for which they had completed training. *Id.* at 14. However, the Arbitrator found that neither MOU required the Agency to provide overtime to Technicians who were

1. The 2001 MOU states, in relevant part, that "no [Technician] selected under this agreement will be disadvantaged in assignment of overtime." Award at 7.

unable to perform duties for which they had not received training. Although the Arbitrator stated that the Agency could have "done a more aggressive job" of providing training, she found that the Agency's conduct did not violate the parties' agreement or either MOU because: (1) the Agency had a legitimate reason for the manner in which it prioritized training, *see id.* at 14-15; (2) the parties agreed to the training structure, *see id.* at 15; and (3) the delay in training was caused, in part, by Technicians who were unable to promptly complete the training. *See id.* In addition, the Arbitrator found that neither MOU established a time limit for the completion of training. *See id.* at 12.

Because the Technicians did not have the training to perform overtime duties, the Arbitrator determined that the Technicians were not entitled to backpay for missed overtime. *See id.* at 15. The Arbitrator also noted that the Union conceded that it could not prove that all Technicians would have worked overtime if they had been given the opportunity to do so. *See id.* at 10.

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the Arbitrator's award is "incomplete," and therefore deficient, because the Arbitrator failed to: (1) frame any issues for resolution, *see* Exceptions at 1; (2) resolve whether the Agency "disadvantaged" Technicians by ending all overtime opportunities for them, *id.*; and (3) define "disadvantaged" under the 1999 MOU. *Id.*

The Union also alleges that the Arbitrator's award fails to draw its essence from the parties' agreement and the MOUs because the Arbitrator ignored: (1) the requirement under the parties' agreement that the Agency is responsible for providing training to employees for "their assigned duties[,]" *id.* [2]; (2) that, under the MOUs, the Agency agreed that it would train the Technicians, *see id.*; and (3) witness testimony that established that the Agency was responsible for training the Technicians. *See id.* at 1-2.

The Union further asserts that the Arbitrator's award is based on nonfacts. The Union specifically contends that: (1) the Arbitrator improperly relied on the 2001 MOU, which had expired by the time the Union filed its grievance, *see id.* at 2; (2) the Arbitrator "misstated" the Union's position with respect to the issue it presented, *id.*; (3) the Arbitrator ignored witness testimony regarding the meaning of "disadvantaged" under the 1999 MOU, *id.*; (4) the Arbitrator ignored testimony from Agency witnesses regarding the Agency's failure to request additional training resources, *see id.*; (5) the Arbitrator incorrectly concluded that the Agency treated Technicians fairly, *see id.* at 2-3; (6) the Agency's reasons for failing to train the Technicians were "false" or a result of the Agency's own actions, *id.* at 3; (7) the record establishes that the Agency failed to allocate sufficient resources to facilitate the completion of this training, *see id.*; (8) the "essence" of the parties' agreement and the 1999 MOU requires the Agency to allow Technicians to continue working overtime to the extent they are capable of doing so, *id.*; (9) it was impossible for the Union to prove whether Technicians would have completed Technician training, *see id.* at 3-4; (10) it was also impossible for the Union to prove whether Technicians would have worked overtime if they had been given the opportunity, *see id.* at 4; (11) the Arbitrator incorrectly determined that training for other positions was a greater priority for the Agency, *see id.*; (12) the Arbitrator's conclusion that the Agency was not entirely at fault for failing to fully train the Technicians is illogical. [3] *See id.*

B. Agency's Opposition

The Agency disagrees with the Union's contention that the award is "incomplete." The Agency specifically contends that: (1) the Arbitrator's failure to frame an issue does not render the award deficient because she stated the Union's submitted issue verbatim and resolved this issue; (2) the Arbitrator was not required to address whether Technicians who were not fully trained were entitled to overtime compensation as a result of the Agency's decision to end all overtime opportunities because this issue was not before the Arbitrator; and (3) the Arbitrator defined "disadvantaged" under the 1999 MOU. Opposition at 6-8.

The Agency also rejects the Union's assertion that the Arbitrator's award fails to draw its essence from the parties' agreement. The Agency argues that, under the agreement, the Agency is only responsible for providing training in conjunction with an employee's assigned duties. *See id.* at 9. The Agency alleges that it did not assign duties to any employees for which they lacked

2. The Union does not cite which portion of the parties' agreement that the award allegedly violates.

3. The Union also argues that the award "does not conform to law, rule, and regulation." Exceptions at 1. As the Union has failed to identify which law, rule, or regulation the award does not conform with, we reject this claim as a bare assertion. *See, e.g., AFGE, Council 236 of GSA Locals,* 63 FLRA 210, 211 n.2 (2009).

training; accordingly, the Agency contends that it did not violate the agreement. *See id.*

The Agency also counters the Union's arguments that the award is based on nonfacts. The Agency specifically contends that: (1) the Arbitrator's reliance on the 2001 MOU was not a central fact to the award because she also based her award on the 1999 MOU, *see id.* at 11; (2) the Arbitrator did not misstate the Union's position; rather, she stated the Union's submitted issue "verbatim" and resolved the issue, *id.* at 12; (3) the Union has not cited any specific factual errors regarding the Arbitrator's interpretation of "disadvantaged" under the 1999 MOU, *see id.* at 13; (4) matters concerning witness testimony were disputed below, *see id.* at 14; (5) the Union's assertion that the Agency failed to treat technicians "fairly" does not identify any erroneous factual findings, *id.*; (6) the parties disputed the Agency's reasons for not providing training before the Arbitrator, *see id.* at 15; (7) the Union's claim that the Agency had the resources to provide training is contrary to the evidence and was likewise disputed below, *see id.*; (8) the amount of training required under the 1999 MOU was disputed below, *see id.* at 15-16; (9) the Union has not established that the Arbitrator's conclusion that the Union was unable to prove that Technicians would have successfully completed their training was clearly erroneous, *see id.* at 16; (10) the Union has likewise not established that the Arbitrator's conclusion that the Union was unable to prove that Technicians would work overtime was clearly erroneous, *see id.* at 17; (11) the Arbitrator's conclusion that the 1999 MOU does not make Technician training a priority was disputed below, *see id.* at 18; and (12) the Union's disagreement with the Arbitrator's conclusion that the Agency was not entirely responsible for the Technicians' lack of training does not identify any erroneous factual findings. *See id.*

IV. Analysis and Conclusions

A. The award is not incomplete, ambiguous, or contradictory.

The Union contends that the Arbitrator's award is "incomplete" because she failed to address several issues. Exceptions at 1. The Authority will find an award deficient when it is incomplete, ambiguous, or so contradictory as to make implementation of the award impossible. *See, e.g., U.S. Dep't of Labor, Mine Safety & Health Admin., Se. Dist.,* 40 FLRA 937, 943 (1991). In order for an award to be found deficient on this ground, the appealing party must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain. *See U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.,* 56 FLRA 1057, 1074 (2001).

The Union contends that the award is incomplete because the Arbitrator failed to: (1) state the issues for resolution; (2) decide whether all Technicians were entitled to backpay as a result of the Agency's decision to withdraw overtime opportunities for all Technicians; and (3) define the term "disadvantaged" under the 1999 MOU. Exceptions at 1. The Union's assertion that the Arbitrator failed to address the foregoing issues, even if true, does not explain how implementation of the award is impossible because the meaning and effect of the award is too unclear or uncertain. *See, e.g., AFGE, Local 2206,* 59 FLRA 307, 311 (2003) (party's claim that arbitrator failed to address party's requested remedy did not establish that award was incomplete, ambiguous, or contradictory).

Accordingly, we find that the award is not incomplete, ambiguous, or contradictory.

B. The Arbitrator did not exceed her authority.

We also construe the Union's claim that the award is incomplete because the Arbitrator failed to address the above three issues as an assertion that the Arbitrator exceeded her authority. An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority or awards relief to persons who are not encompassed within the grievance. *U.S. Dep't of Def., Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996). In the absence of a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference. *U.S. Dep't of the Air Force,* 61 FLRA 797, 801 (2006).

The Union asserts that the Arbitrator failed to frame any issues for resolution. The Union, in its post-hearing brief, submitted its issue as: "[d]id [the Agency] disadvantage the [Technicians] . . . by not fully training all of them, and if so, what should the remedy be?" Union's Post-Hearing Brief at 1. The Arbitrator set forth this issue verbatim in her "Statement of Issue" and resolved the issue. Award at 5. The Union's argument, therefore, does not provide a basis for finding the award deficient. *See U.S. DOJ, Fed. Bureau of Prisons, Med. Facility for Fed. Prisons,* 51 FLRA 1126, 1139 (1996) (although arbitrator failed to frame any issues, arbitrator did not exceed his authority because his award was directly responsive to party's submitted issue).

The Union also claims that the Arbitrator failed to address the issue of whether the Agency "disadvantaged" all Technicians by ending overtime opportunities for all of them. Exceptions at 1. As discussed above, the Arbitrator indicated that the Union's sole issue before her, as submitted by the Union, was whether the Technicians were disadvantaged by the Agency's failure to fully train them. The Union did not submit the issue of whether the Agency disadvantaged all Technicians by ending overtime opportunities for all of them; the Arbitrator, accordingly, was not required to address this issue. *See AFGE, Local 3957, Council of Prison Locals,* 61 FLRA 841, 843 (2006) (arbitrator not required to resolve an issue where it was not part of the framed issues).

The Union also asserts that the Arbitrator failed to define "disadvantaged" under the 1999 MOU. While discussing the 1999 and 2001 MOUs, the Arbitrator stated that she agreed with the Agency's definition of "disadvantaged" as it is used under "the *[a]greements*." Award at 14 (emphasis added); *see also id.* at 13 (stating that a resolution of the case required an analysis of "the *two* [a]greements") (emphasis added). Thus, contrary to the Union's assertion, the Arbitrator considered the definition of disadvantaged as it is used under the 1999 MOU; the award, accordingly, is directly responsive to the issues she identified.

Accordingly, we find that the Arbitrator did not exceed her authority.

C. The award does not fail to draw its essence from the parties' agreements.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining 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 collective bargaining 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. *See U.S. Dep't of Labor* (*OSHA*), 34 FLRA 573, 575 (1990). 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." *Id*. at 576.

The Union contends that the award fails to draw its essence from the parties' agreement and the MOUs because the Arbitrator erroneously concluded that the Agency was not responsible for training Technicians. In addition, the Union asserts that the Arbitrator's interpretation of the agreements ignores witness testimony concerning the Agency's duty to provide training. Contrary to the Union's assertion, the Arbitrator found that, under all three agreements, the Agency was indeed responsible for providing training to Technicians. *See* Award at 15. Further, the Arbitrator found that the Agency had provided training to Technicians to the best of its ability and in accordance with its contractual responsibilities. *See id.* at 14, 15. The Union has not demonstrated that the Arbitrator's interpretation of the parties' agreements is irrational, implausible, unfounded, or in manifest disregard of the parties' agreements. *See U.S. Dep't of Transp., FAA,* 63 FLRA 15, 18 (2008).

We, accordingly, deny this exception.

D. The award is not based on nonfacts.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984,* 56 FLRA 38, 41 (2000). 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 hearing. *AFGE, Local 376,* 62 FLRA 138, 141 (2007) (Chairman Cabaniss concurring). In addition, an arbitrator's conclusion that is based on an interpretation of the parties' collective bargaining agreement does not constitute a finding that can be challenged as a nonfact. *U.S. DHS, U.S. Customs & Border Prot., JFK Airport, Queens*, *N.Y.*, 62 FLRA 129, 131 (2007) (*DHS*). Further, a challenge to the weight accorded testimony does not provide a basis for finding that an award is based on nonfacts. *U.S. Dep't of Veterans Affairs Med. Ctr., Richmond, Va.,* 63 FLRA 553, 556 (2009) (*VAMC*).

The Union alleges that the award is based on a nonfact because the Arbitrator improperly based her award on the 2001 MOU, which had expired before the Union filed its grievance. *See* Exceptions at 2. Regardless of whether the 2001 MOU had expired, the Arbitrator clearly based her award on separate and independent grounds, namely, the parties' agreement and the 1999 MOU. The Union has not challenged the Arbitrator's consideration of the parties' agreement or the 1999

MOU. Therefore, even assuming that the Arbitrator erroneously relied on the 2001 MOU, the Union has provided no basis for finding that the Arbitrator would have reached a different result but for this alleged error. *See Bremerton Metal Trades Council, Int'l Ass'n of Machinists & Aerospace Workers,* 63 FLRA 336, 338-39 (2009) (award not based on nonfact where party failed to establish that arbitrator's reliance on erroneous fact, even if true, would have resulted in a different outcome).

The Union also claims that the award is based on a nonfact because the Arbitrator "misstated" the Union's position. Exceptions at 2. As discussed above, the Arbitrator stated the Union's submitted issue verbatim in her "Statement of Issue." Award at 5. Because the Arbitrator did not misstate the Union's position, the award is not deficient in this respect. *See NFFE, Local 1636*, 45 FLRA 1045, 1047-48 (1992) (Authority denied party's claim that award was based on the nonfact that arbitrator "misstated" the issues where arbitrator correctly stated party's claims and arguments).

The Union further asserts that the award is based on nonfacts because: (1) the Arbitrator incorrectly concluded that the Agency treated Technicians fairly, *see* Exceptions at 2-3; (2) the Agency's reasons for its inability to provide training were "patently false" or a result of the Agency's own wrongdoing, *id.* at 3; (3) the Agency failed to allocate sufficient resources to complete the training, *see id.*; and (4) the Union could not have possibly proven that all Technicians would have fully completed Technician training if they had been given training opportunities, or that Technicians would have worked overtime if they had been given the opportunity. *See id*. at 3, 4. All of these matters were disputed before the Arbitrator. *See* Union's Post-Hearing Brief at 2-4, 6. Consequently, these arguments do not provide a basis for establishing that the award is based on nonfacts. *See, e.g., AFGE, Local 376,* 62 FLRA at 141.

The Union also contends that the award is based on nonfacts arising from the Arbitrator's interpretation of the parties' agreement and the 1999 MOU because: (1) the Arbitrator ignored witness testimony regarding the meaning of "disadvantaged" under the 1999 MOU, Exceptions at 2; (2) the "essence" of the parties' agreement and the 1999 MOU requires the Agency to fully train all Technicians or allow them to work overtime to the extent that they have been trained, *id.* at 3; and (3) the 1999 MOU establishes that the Agency is required to make Technician training a greater priority than other training. *See id.* at 4. These arguments challenge the Arbitrator's interpretation and application of the three agreements involved in this case, and, as such, do not provide a basis for establishing that the award is based on nonfacts. *See DHS,* 62 FLRA at 131.

Finally, the Union alleges that the award is based on a nonfact because the Arbitrator ignored witness testimony concerning the Agency's failure to obtain additional resources for Technician training. *See* Exceptions at 2. This argument challenges the weight the Arbitrator accorded witnesses testimony and, therefore, consistent with Authority precedent, does not establish that the award is based on nonfacts. *See VAMC*, 63 FLRA at 556.

Based on the foregoing, we find that the award is not based on nonfacts.

V. Decision

The Union's exceptions are denied.