64 FLRA No. 142

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
PLANTATION, FLORIDA
(Agency)

and

NATIONAL TREASURY EMPLOYEES UNION
CHAPTER 93
(Union)

0-AR-4360

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DECISION

May 11, 2010

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

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Philip A. LaPorte filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the exceptions.

The Arbitrator sustained a grievance alleging that the Agency committed an unfair labor practice (ULP) and violated the parties' national agreement by changing its practice concerning reimbursement for travel expenses and compensation for travel time. For the reasons that follow, we set aside, in part, the award of compensation for travel time, and we deny the remaining exceptions.

II. Background and Arbitrator's Award

At all relevant times, the grievant served on a full-time basis as the Union's Chapter 93 President and performed Union duties at the Union office. The Union office is located at an Agency facility (the Plantation Post of Duty (POD)) different from the grievant's permanent POD. Award at 2. Further, the Plantation POD is farther away from the grievant's residence than his permanent POD. *Id*. at 29-30.

In 1992, the Agency and the Union entered into an oral local agreement (the oral agreement) authorizing the grievant to charge mileage for travel from his residence to the Plantation POD for up to ten days per month and to charge mileage for additional days of travel to that POD for scheduled meetings with management officials. *Id*. at 2. The grievant was paid pursuant to this oral agreement through January of 2007. *Id.*

In September 2006, the grievant's supervisor sent the grievant a memorandum (the 2006 memorandum) notifying him that: (1) management pre-approval is required for travel for scheduled meetings with management; (2) the grievant must provide advance notice of his anticipated schedule of meetings; and (3) time spent in daily commutes is not compensable. *Id*. at 2-3. To implement the latter restriction, the memorandum stated that, rather than compensating the grievant for one hour of travel for each trip between his residence and the Plantation POD, the Agency would compensate him only for the thirty minutes of time spent traveling between his permanent POD and the Plantation POD; the Agency would no longer compensate him for the entire trip between his residence and the Plantation POD. *Id.* at 29-30.

When the Agency subsequently disapproved several of the grievant's requests for travel reimbursement based on the 2006 memorandum, the grievant filed an institutional grievance. *Id*. at 3. The parties were unable to resolve the grievance, and the Union invoked arbitration. *Id*. at 4. The Arbitrator set out the issues as follows:

> Did the Agency commit [a ULP] by failing to bargain the matter of travel reimbursement to the Union office before discontinuing the practice?
>
> Did the Agency violate Article 9, Section 2 of the [n]ational [a]greement[[1]] in limiting the grievant's travel time to the [temporary duty station]?

Id. at 1.[2]

1. Article 9, Section 2 provides, in relevant part: "Stewards shall be granted official time for participation in . . . activities described in subsection 2D below (including official time to travel to and from such meetings)."

2. The Arbitrator also set out the issue of whether the grievance was properly before him, and found that it was. *Id*. at 3-4, 31-32. As there are no exceptions to this finding, we do not address it further.

The Arbitrator noted that, among other things, the Union contended that, by "unilaterally terminating the terms of the [oral] agreement the Agency committed the [ULP] of repudiating a collective agreement . . . ." *Id*. at 28-29. The Arbitrator also noted the Agency's claim that, although an oral agreement was made in 1992, its terms were renegotiated in 1995 to comply with the terms of Article 9, § 10 (hereinafter Article 9) of the parties' national agreement, which, according to the Agency, the 2006 memorandum merely affirmed.[3] *Id*. at 35-36.

The Arbitrator found that for fourteen years after the oral agreement was reached, the Agency compensated the grievant for: (1) mileage for travel from his residence to the Plantation POD for up to ten days per month; (2) mileage for additional travel to the Plantation POD for meetings with management officials; and (3) travel time for the entirety of his trips between his residence and the Plantation POD. Award at 2, 43. The Arbitrator also found "no evidence proving that the . . . oral agreement was renegotiated" in 1995 to allow the Agency to reimburse the grievant only as to expenses he would be entitled to under Article 9. *Id*. at 44. As a result, the Arbitrator rejected the Agency's related argument that it did not commit a ULP because the subject matter of the dispute was "covered by" Article 9. *Id*. at 43-44. In doing so, the Arbitrator noted that the Agency waited for more than fourteen years before raising its "covered by" argument. *Id*. at 43. According to the Arbitrator, the Agency "cannot repudiate the agreement it entered into in 1992 by claiming the issue is covered by contract terms that existed at the time it negotiated the oral agreement."[4] *Id.*

Based on the foregoing, the Arbitrator concluded that "[t]he Agency's action to unilaterally change the terms and conditions established by the parties' past practice repudiated their agreement[,]" and that the Authority "has ruled that such an action constitutes a violation of [§] 7116[(a)](5) of the Statute."[5] *Id.* at 44. In addition, the Arbitrator found that the Agency violated the oral agreement and Article 9 by placing an "artificial cap or limit" on the "reasonable time" that Article 9 allows the grievant to devote to representational activities. *Id*. at 45. To remedy the violations, the Arbitrator directed a return to the *status quo ante* concerning reimbursement of travel expenses and compensation for travel time for the grievant as negotiated in 1992. *Id*. at 45-46.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that it had no duty to bargain over reimbursement of travel expenses because it is "covered by" Article 9. Exceptions at 4-6. In this regard, the Agency contends that the 2006 memorandum contains the same requirements as Article 9 and was simply an enforcement of that Article. *Id*. at 7-8. According to the Agency, "[t]he oral agreement is null and void" because it was "superseded" by Article 9. *Id*. at 8. The Agency notes that the grievance asserted violations of Article 9 and that, therefore, the Union "cannot credibly argue that [travel expenses] are not covered by the [national agreement]." *Id*. at 7. In the alternative, the Agency argues that, even if travel expenses are not covered by Article 9, there was no obligation to bargain because the impact of the September 2006 memorandum was only *de minimis*. *Id*. at 15.

In addition, the Agency asserts that the parol evidence rule, contained in Restatement (Second) of Contracts § 215 (1981)[6], barred the Arbitrator from using the oral agreement to contradict the unambiguous terms of Article 9. Exceptions at 9. The Agency asserts further that the travel expenses at issue constitute commuting expenses in connection with activities that were not conducted in the primary

3. Article 9, Section 10 provides, in pertinent part:

> D. The Employer will reimburse travel and per diem expenses for travel outside of the commuting area consistent with the above [list of authorized activities].
>
> E. The Employer will reimburse travel and per diem expenses for travel within the commuting area. . . .

Award at 18.

4. Neither party challenges the Arbitrator's finding that Article 9 existed, in one form or another, since 1992.

5. As this statement demonstrates, the Arbitrator, at times, refers to the oral agreement as a past practice and the Agency's violation as a unilateral change in conditions of employment. Despite this confusion, however, and consistent with the Union's claim noted above, the thrust of the award is that the Agency committed a ULP by repudiating the oral agreement; we proceed on that basis.

6. Restatement (Second) of Contracts § 215 (1981) provides that "where there is a binding agreement, either completely or partially integrated, evidence of prior or contemporaneous agreements or negotiations is not admissible in evidence to contradict a term of the writing."

interest of the government and, thus, are prohibited by the Travel Expense Act (TEA) and the Federal Travel Regulations (FTRs). *Id*. at 10. In addition, the Agency contends that the award fails to draw its essence from Article 9. *Id*. at 13.

Regarding compensation for travel time, the Agency argues that the award is contrary to 5 C.F.R. § 551.422(b)[7] to the extent it requires the Agency to compensate the grievant for time spent commuting between his residence and his permanent POD. Exceptions at 12. The Agency contends that, as a result, the award fails to draw its essence from Article 47, Section 4.T. of the national agreement, which requires that mid-term agreements "be consistent with . . . [g]overnment-wide rules and regulations." *Id*. at 13. Further, the Agency contends that the Union submitted no evidence or argument that the oral agreement provided that the grievant's commute between his residence and his permanent POD would be included in his work hours. *Id*. at 14.

B. Union's Opposition

The Union contends that the "covered by" defense does not apply because the oral agreement was in effect when the national agreement took effect and Article 54, Section 2 of the national agreement provides that local agreements continue in effect unless either party proposes to terminate or renegotiate them.[8] Opp'n at 6-7. As for the Arbitrator's alleged violation of the parol evidence rule, the Union cites Authority decisions holding that the rule is not a basis for setting aside an arbitrator's award Opp'n at 7-8 (citing *The Ass'n of Civilian Technicians, Inc., N.Y. Council*, 2 FLRA 703, 706 (1980); *Nat'l Border Patrol Council*, 3 FLRA 401, 404 (1980)), as well as Article 43, Section 14 of the national agreement, which provides that strict rules of evidence do not apply to arbitration proceedings. Opp'n at 8.

Regarding the TEA and the FTRs, the Union contends that the decisions cited by the Agency are inapposite or distinguishable. *Id*. at 9. The Union also contends that the award of travel expenses draws its essence from the oral agreement. *Id*. at 12. According to the Union, the basis for its grievance was the oral agreement and, therefore, it was appropriate for the Arbitrator to focus on that agreement. *Id*.

As for compensation for travel time, the Union argues that 5 C.F.R. § 551.422(b) is not relevant because the travel at issue is not between the grievant's residence and his permanent POD, and because there was no award of overtime or compensatory time. *Id*. at 11. In addition, the Union contends that the award draws its essence from Article 9, which, by providing the grievant official time for representational duties, also provides official time to travel to perform these duties. *Id*.

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

As set forth above, the Arbitrator rejected as unsupported the Agency's claims that the oral agreement was renegotiated in 1995 and that, thereafter, Article 9 governed. *See* Award at 43-44. In its exceptions, the Agency continues to claim that the oral agreement was "superseded" by Article 9. Exceptions at 8. We construe this claim as alleging that the award is based on a nonfact. To establish that an award is based on 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). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id*.

At arbitration, the Agency argued, and the Union disputed, that the oral agreement was renegotiated. *See* Award at 36, 38, & 43. As the parties disputed whether the oral agreement was renegotiated, the Agency's exception provides no basis for finding that

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7. 5 C.F.R. § 551.422(b) provides, in relevant part, that

> normal home to work travel . . . is not hours of work. When an employee travels directly from home to a temporary duty location outside the limits of his or her official duty station, the time the employee would have spent in normal home to work travel shall be deducted from hours of work[.]

8. Article 54, Section 2 of the national agreement provides, in relevant part:

> A. All local agreements in effect upon the effective date of this Agreement may continue in effect (rollover) for the duration of this Agreement, subject to subsection 2B below.
>
> B. Either party to any local agreement referred to in subsection 2A above, or either of the National Parties, may propose to terminate or re-negotiate such Agreement . . . .

Opp'n, Jt. Ex. 1 at 162.

the award is based on a nonfact. Accordingly, we deny this exception.[9]

B. The award is contrary to law in part.

The Agency contends that the award, as it pertains both to travel expenses and compensation for travel time, is contrary to law. 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 *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. The award of travel expenses is not contrary to law.

a. The Arbitrator did not err in finding that the Agency committed a ULP.

As discussed previously, the Arbitrator found that the Agency violated § 7116(a)(5) of the Statute by repudiating the oral agreement. In arguing that the Arbitrator erred by finding a ULP, the Agency contends only that the subject matter of the alleged change in conditions of employment was "covered by" the national agreement.[10] However, the "covered by" defense does not apply to allegations that an agency repudiated a collective bargaining agreement. *Dep't of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.*, 51 FLRA 858, 864 n.7 (1996) (*Scott AFB*) (citation omitted). Thus, the Agency's reliance on the "covered by" doctrine does not provide a basis for concluding that the Arbitrator erred by finding that the Agency violated § 7116(a)(1) and (5) of the Statute by repudiating the oral agreement.[11]

b. The award is not deficient as contrary to the rule against parol evidence.

The Authority has held that the parol evidence rule does not provide a basis for finding an award deficient. *See, e.g., NTEU*, 63 FLRA 299 (2009); *Nat'l Border Patrol Council & Nat'l INS Serv. Council*, 3 FLRA 401, 404 (1980) (*NBPC*). In this regard, the Authority has recognized the interest of an arbitrator in "gathering all the relevant facts he [or she] can" in order to "render a viable decision[.]" *NBPC*, 3 FLRA at 404.

The issues before the Arbitrator required him to assess whether the Agency breached the oral agreement. Accordingly, the Arbitrator gathered evidence regarding the oral agreement. Consistent with the above-cited precedent, the Agency's exception provides no basis for setting aside the award. Therefore, we deny the exception.

c. The award is not contrary to the TEA and the FTRs.

The payment of employee travel expenses is governed by the TEA and FTRs. 5 U.S.C. §§ 5701-5702, 5704, 5706-5707 and 41 C.F.R. Part 300-1 *et seq*. *See also SSA*, 63 FLRA 313 (2009) (*SSA*). Under the TEA, when an employee is "traveling on official business away from the employee's designated post of duty[,]" he or she is entitled to a per diem allowance, reimbursement for "the actual and necessary expenses

9. As the Agency has not demonstrated that the Arbitrator's finding that the oral agreement governed the grievant's travel expense reimbursements is deficient, we deny the Agency's exception that this portion of the award fails to draw its essence from Article 9.

10. In determining whether an agreement has been repudiated, the Authority examines: (1) the nature and scope of the breach of the agreement (*i.e.*, was the breach clear and patent); and (2) the nature of the agreement provision allegedly breached (*i.e.*, did the provision go to the heart of the parties' agreement). *See Scott AFB*, 51 FLRA at 862. The Agency does not assert that the award is deficient under this test.

11. As set forth *supra* note 5, the Arbitrator also stated that the Agency improperly changed conditions of employment without bargaining. As the finding that the Agency repudiated the oral agreement supports a conclusion that the Agency violated § 7116(a)(1) and (5) , it is unnecessary to determine whether the Agency also violated § 7116(a)(1) and (5) by effecting a unilateral change in conditions of employment. *Cf. U.S. DHS, Border & Transp. Sec. Directorate, Bureau of Customs & Border Prot., Wash., D.C.*, 63 FLRA 406, 408 n.1, *reconsideration denied*, 63 FLRA 600 (2009) (after finding respondent unlawfully failed to provide notice and opportunity to bargain, Authority found it unnecessary to also address whether respondent repudiated agreement "because a finding of repudiation would be only cumulative and would not materially affect the remedy[.]") Consequently, it also is unnecessary to resolve the Agency's contention that the effects of the alleged unilateral change were *de minimis*. *See NTEU*, 64 FLRA 462, 464 (2010) (*de minimis* doctrine applies to determine whether there is an obligation to bargain).

of official travel[,]" or a combination of both. 5 U.S.C. § 5702 (a)(1).

The FTRs provide, in relevant part, that an agency "may pay only those expenses essential to the transaction of official business[.]" 41 C.F.R. § 301-2.2. The Authority has looked to the Comptroller General for guidance on issues concerning the administration of the TEA and FTRs. *See Naval Public Works Ctr., San Diego*, 34 FLRA 750, 754 (1990). The Comptroller General's successor with respect to administration of the TEA and the FTRs, the General Services Board of Contract Appeals (GSBCA),[12] found that an employee's travel between his or her residence and regular place of work was a personal expense. *In re Delgado*, 01-1 BCA P31,272 (2001) (citing *Comptroller Gen. Warren to G.A. Schehr, Dep't of Commerce*, 32 Comp. Gen. 235 (1952)). However,

> [w]hen an employee is assigned to a *nearby temporary duty post*, it is *within* [the agency's] *administrative discretion to allow mileage without deduction for normal commuting expenses*, but employing agency officials *may refuse to authorize* reimbursement for such expenses if no additional travel costs are incurred or *may limit reimbursement* to such additional costs.

In re Delgado, 01-1 BCA P31,272 (emphasis added) (citation omitted).

Here, there is no dispute that the Plantation POD is the grievant's temporary duty post. *See, e.g.*, Exceptions at 12 (the grievant is "traveling to a temporary duty [station] outside the limits of his official duty station . . . in order to perform representational duties."). The Agency exercised its administrative discretion in the oral agreement and allowed the practice of mileage reimbursement between the grievant's residence and the Plantation POD to go "unchallenged from 1992 through 2007." Award at 44. Accordingly, there is no basis for finding the award of mileage reimbursement contrary to the TEA and the FTRs, and we deny this exception.

2. The award is contrary to law insofar as it compensates the grievant for his normal home to work travel.

5 C.F.R. § 551.422(b) provides, in pertinent part: "When an employee travels directly from home to a temporary duty location outside the limits of his or her official duty station, the time the employee would have spent in normal home to work travel shall be deducted from hours of work[.]" The plain wording of this regulation excludes "normal home to work travel" from hours of work and, thus, allows no compensation for those hours. *NTEU v. FLRA*, 418 F.3d 1068, 1071-72 (9th Cir. 2005).

The award, which directs the Agency to compensate the grievant for time spent on "normal home to work travel," is contrary to 5 C.F.R. § 551.422(b). Accordingly, we conclude that the award of compensation for travel time is deficient in part.[13]

V. Decision

The award is set aside to the extent that it compensates the grievant for his normal home to work travel, and the Agency's remaining exceptions are denied.

12. Jurisdiction for resolving claims involving the TEA and FTRs was transferred to the GSBCA in March 1997, s*ee Transfer of Claims Settlement and Related Advance Decisions, Waivers, and Other Functions*, B-275605 (March 17, 1997), which applied the same rules as the Comptroller General. *In re Delgado*, 01-1 BCA P31.272 (2001). On January 6, 2007, the GSBCA was replaced by the Civilian Board of Contract Appeals within the General Services Administration.

13. Therefore, we find it unnecessary to address the Agency's exception that this portion of the award also is deficient because it fails to draw its essence from Article 9. *See* Exceptions at 14.