65 FLRA No. 204

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1738
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
SALISBURY, NORTH CAROLINA
(Agency)

0-AR-4751

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DECISION

June 30, 2011

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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 Bernard T. Holmes 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 exception.

The Arbitrator denied a grievance alleging that the Agency had violated the parties' agreement by failing to pay the grievants overtime for carrying pagers when they were off-duty. For the reasons that follow, we dismiss the Union's exception.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency had violated the parties' agreement by failing to pay the grievants overtime for carrying pagers when they were off-duty. *See* Award at 5. The grievance was unresolved and submitted to arbitration where the parties were unable to stipulate to an issue. *Id.* at 2. The Arbitrator analyzed the issue set forth by the Union: "Did the Agency violate the [parties'] agreement by requiring the [grievants] to carry pagers when they were not in a pay status? And if so, what is the remedy. . . [?]" *Id.*; *see also id.* at 8. The Arbitrator found that the Agency had not violated Article 20 of the parties' agreement as alleged, and denied the grievance.[2]

III. Positions of the Parties

A. Union's Exception

The Union asserts that the award "should be reversed" because it is "contrary to the plain language of the negotiated agreement." Exception at 5; *see also id.* at 3. Specifically, the Union disputes the Arbitrator's interpretation of the "plain language" of Article 20, Section 5(e). *Id.* at 3-5.

B. Agency's Opposition

The Agency asserts that, based on the facts found by the Arbitrator, the grievants have not established that they are entitled to overtime pay under the parties' agreement. Opp'n at 23-27.

IV. Analysis and Conclusion

The Authority's Regulations specifically enumerate the grounds that the Authority currently recognizes for reviewing awards. *See* 5 C.F.R. § 2425.6(a)-(b). In addition, the Regulations provide that if exceptions argue that an arbitration award is deficient based on private-sector grounds not currently recognized by the Authority, then the excepting party "must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions." 5 C.F.R. § 2425.6(c).

Further, § 2425.6(e)(1) of the Regulations provides that an exception "may be subject to dismissal or denial if: ". . . [t]he excepting party fails to raise and support" the grounds listed in § 2425.6(a)-(c), "or otherwise fails to demonstrate a legally recognized basis for setting aside the award[.]" 5 C.F.R. § 2425.6(e)(1). Thus, an exception that does not raise a recognized ground is subject to dismissal under the Regulations. *AFGE, Local 738*, 65 FLRA 931, 932 (2011) (*Local 738*); *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011) (Member Beck dissenting in part) (*Local 3955*).

1. Member Beck's separate opinion, concurring in the result, is set forth at the end of this decision.

2. The relevant portions of Article 20 are set forth in the appendix to this decision.

The Union's contention that the award is "contrary to the plain language of the negotiated agreement[,]" Exception at 5, does not constitute a ground currently recognized by the Authority for reviewing awards.[3] *See* 5 C.F.R. § 2425.6(a)-(b). As the Union does not raise a recognized ground or cite legal authority to support a ground not currently recognized by the Authority, we dismiss the exception. *See Local 738*, 65 FLRA at 932; *Local 3955*, 65 FLRA at 889.

V. Decision

The Union's exception is dismissed.

3. In accord with 5 C.F.R. § 2425.6, the Authority will "no longer construe parties' exceptions as raising grounds that the exceptions do not raise." *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011) (Member Beck dissenting in part). Thus, as the Union does not allege that the award fails to draw its essence from the parties' agreement, we do not address that issue. We note, in this regard, that three of the decisions cited by the concurrence were issued before 5 C.F.R. § 2425.6 went into effect, and are therefore inapposite. *See U.S. Dep't of Hous. & Urban Dev., Portland, Or.*, 64 FLRA 651 (2010) (Member Beck dissenting); *SSA, Office of Hearings & Appeals, Falls Church, Va.*, 59 FLRA 507 (2003); *U.S. Dep't of the Treasury, IRS*, 59 FLRA 507 (2003). In the remaining decision cited by the concurrence, the excepting party expressly raised an essence argument. *See U.S. Dep't of Homeland Sec., U.S. Immigration & Customs Enforcement*, 65 FLRA 529, 530, 534 (2011). Thus, that decision also is inapposite.

APPENDIX

Article 20 – Hours of Work and Overtime:

Section 4: General Overtime Provisions[:]

A. Overtime shall be distributed in a fair and equitable manner.

B. When an employee works overtime, whether covered by the Fair Labor Standards Act or exempt, such overtime will be paid in increments of fifteen (15) minutes.

C. Employees shall be paid differential and premium pay in addition to the overtime compensation in accordance with applicable regulations.

D. It is agreed that nonbargaining unit employees shall not be scheduled on overtime to perform the duties of bargaining unit employees for the sole purpose of eliminating the need to schedule bargaining unit employees for overtime.

. . . .

F. Employees who are called back to work for a period of overtime unconnected to their regularly scheduled tour or who work overtime on their day(s) off are entitled to a minimum of two (2) hours overtime pay. Employees called in for emergency work outside their basic workweek shall not normally be required to perform nonemergency functions. This does not preclude employees from being called in to provide coverage in nonemergency situations.

. . . .

J. Those employees eligible by Title 5 or Title 38 can accrue and use compensatory time when approved by Management.

Section 5: Paid On-Call/Standby:

A. Normally, volunteers will be used to perform on-call or standby duty before assigning such duty to nonvolunteers.

> B. Scheduled on-call will be rotated among all qualified staff. Records of on-call shall be kept by management and made available to the Union upon request. If funding permits, employees scheduled for on-call duty shall be issued pagers or other mobile technology which will be used to notify them of a need for their return to duty.
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> . . . .
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> D. If on-call employees are called back to the station, they shall receive a minimum two (2) hours of pay.
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> E. Employees will not be required to stay at home or wear and respond to beepers/pagers unless they are in a pay status.
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> F. Employee participation in nonpaid, on-call status shall be voluntary.
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> G. Employees shall not be scheduled on-call while on annual leave.
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> . . . .
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> J. Those employee[s] currently in a standby pay retention status will continue to be paid under the provision of 38 USC 7457(c).
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> . . . .

Award at 2-4.

Member Beck, Concurring in the Result:

While I agree with my colleagues that the Union's exception should not be granted, I disagree with their conclusion that the Union's exception should be dismissed because it does not raise a private-sector ground that is recognized by the Authority.

As I stated in my dissent in *American Federation of Government Employees Local 3955, Council of Prison Locals* 33, 65 FLRA 887, 891 (2011) (Member Beck dissenting in part) (*Local 3955*), the Authority's revised regulations "do not require parties to invoke any particular magical incantations when filing exceptions." *Id.* The Union asserts both that the Arbitrator "ignored the plain language" of the parties' agreement and that his award is contrary to "[t]he plain language of Article 20, Section 5[.E.]" of that agreement. Exceptions at 3; *see also id.* at 5 (contending that "[t]he [a]ward is contrary to the plain language of the negotiated agreement"). Moreover, the Union claims, the Arbitrator based his determination "on a finding of ambiguity in a contract provision where none exists." *Id.* at 4. These assertions constitute an argument that the Arbitrator's award fails to draw its essence from the parties' agreement. *See, e.g., U.S. Dep't of the Treasury, IRS*, 59 FLRA 34, 37 (2003) (award fails to draw its essence from parties' agreement when it is implausible, irrational or in manifest disregard of the agreement). Indeed, in cases involving essence exceptions, the Authority has considered almost identical language to that used by the Union here. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Immigration & Customs Enforcement*, 65 FLRA 529, 534 (2011) (agency claimed that arbitrator's finding was "contrary to the plain language of [contract] provision"); *U.S. Dep't of Housing & Urban Dev., Portland, Or.*, 64 FLRA 651, 653 (2010) (Member Beck dissenting) (agency argued that "[a]rbitrator ignored the 'plain language of the MOU'"); *SSA, Office of Hearings & Appeals, Falls Church, Va.*, 59 FLRA 507, 508-509, 510 (2003) (agency contended that award "ignor[ed] the plain language of [a]rticle 20").

I would find that the award does not fail to draw its essence from the agreement. Article 20, Section 5.E. provides that "[e]mployees will not be required to stay at home or wear and respond to beepers/pagers unless they are in a pay status." Award at 3 (quoting Article 20, Section 5.E.). The Arbitrator found that this provision requires the Agency to have placed "sufficiently restrictive limits on the movement and off duty activities" of the grievants to warrant placing them in a pay status, i.e. "'on-call.'" *Id.* at 16. The Arbitrator found "no such restrictive limits" had been placed on the grievants. *Id.* Thus, contrary to the Union's claim, the Arbitrator's factual findings show that he did not ignore Article 20, Section 5.E. Further, the Union has not provided any basis for finding that the Arbitrator erred in his interpretation and application of this provision. Accordingly, I would deny this exception.