

66 FLRA No. 10

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
NORTHPORT, NEW YORK
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 387
(Union)

0-AR-4180

DECISION

August 26, 2011

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 John E. Sands 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 Agency’s exceptions.

The Union filed a grievance alleging that the
Agency failed to comply with its mid-term bargaining
obligation and violated the parties’ collective bargaining
agreement (CBA) when it reduced the minimum staffing
requirement for firefighters during each shift. The
Arbitrator sustained the grievance. For the reasons set
forth below, we dismiss the Agency’s exceptions in part
and deny them in part.

II. Background and Arbitrator’s Award

The grievance arose out of the Agency’s
reduction of the minimum number of firefighters required
to be on staff at the Veterans Affairs Medical Center Fire
Department (VAMCFD) from four firefighters to three
firefighters per shift. The grievance contained two
allegations. First, the Union alleged that the Agency
failed to comply with its mid-term bargaining obligation

under the CBA before it effected the reduction.1 Interim
Award at 28. Second, the Union claimed that the
reduction violated the health and safety provision of
Article 28 of the CBA.2 Id.

The Arbitrator framed the issues to be decided
at arbitration as follows:

- 1. Whether the Department of
Veteran[s] Affairs’
“Equivalency” plan violates
Article 28, “Safety, Health,
and Environment,” Sections 1,
3, and 6 of the [CBA]?
2. If so, in either case, what shall
be the remedy?

Id.

The Arbitrator determined that the parties’ CBA
incorporates the National Technology Transfer and
Advancement Act of 1995 (NTTAA), 15 U.S.C. § 272,
which requires compliance with National Fire Protection
Association (NFPA) standards.3 Final Award at 3-4, 22.

1 This issue was resolved by the Arbitrator in an interim award
and will not be addressed further.

2 Article 28, Section 1 provides, in relevant part, that “[t]he
Department shall furnish places and conditions of employment
which are free of recognized hazards and unhealthful working
conditions. . . [.]” Final Award at 2. Article 28, Section 3
requires the Agency to “comply with Occupational Safety and
Health Standards issued under Section 6 of the Act and/or
where the Secretary of Labor has approved compliance with
alternative standards in accordance with 29 C.F.R. 1960.” Id.

3 15 U.S.C. § 272, “Utilization of consensus technical standards
by Federal agencies; reports” provides, in pertinent part:

(1) In general. -- Except as provided in
paragraph (3) . . . , all Federal agencies and
departments shall use technical standards
that are developed or adopted by voluntary
consensus standards bodies, using such
technical standards as a means to carry out
policy objectives or activities

(3) Exception. -- If compliance with
paragraph (1) of this subsection is . . .
impractical, a Federal agency or department
may elect to use technical standards that are
not developed or adopted by voluntary
consensus standards bodies if the head of
each such agency or department transmits to
the Office of Management and Budget an
explanation of the reasons for using such
standards

(5) Definition of technical standards. --
As used in this subsection, the term
‘technical standards’ means performance-
based or design-specific technical

The Arbitrator found that portions of two NFPA standards -- 1500 and 1710 -- are relevant to this case because NFPA 1500 articulates the operational standards for all fire units when they respond to incidents and NFPA 1710 expresses the minimum staffing levels for the safe operation of career fire departments. *Id.* at 5. Specifically, the Arbitrator found that NFPA 1500 provides for the “two-in-two-out” rule,⁴ which requires four firefighters to be present at a structural fire: two firefighters enter the building while two firefighters remain outside the building in the event that the rescue of the two firefighters inside the building becomes necessary. *Id.* The Arbitrator further found that NFPA 1710 requires that fire departments staff a minimum of four on-duty firefighters per shift.⁵ *Id.* at 4. The Arbitrator also determined that both NFPA 1500 and 1710 allow “equivalencies” to be used in situations where methods can be employed that will provide the Agency with alternative ways to meet the standards’ requirements.⁶ *Id.* at 6-7.

As relevant here, the Agency claimed at arbitration that staffing three firefighters per shift is an “equivalent” safety measure to staffing four firefighters per shift because: (1) all patient-occupied buildings are equipped with sprinkler systems that provide the firefighters with additional response time; (2) a mutual aid agreement with the local and county fire department provides the firefighters with adequate assistance; and (3) pre-fire plans for all structures at the facility allow the firefighters to plan ahead. *Id.* at 6-8. The Agency also argued that the reduction is permitted because

specifications and related management systems practices.

⁴ NFPA 1500, Section 8.4.7 provides that “[i]n the initial stages of an incident where only one crew is operating in the hazardous area at a working structural fire, a minimum of four individuals shall be required, consisting of two individuals working as a crew in the hazard area and two individuals present outside this hazard area available for assistance or rescue at emergency operations where entry into the danger area is required.” Final Award at 4.

⁵ NFPA 1710, Section 5.2.3.1.1, provides that engine companies “shall be staffed with a minimum of four on-duty personnel.” Final Award at 3 (emphasis omitted). NFPA 1710, Section 5.2.3.2.1, provides that ladder or truck companies “shall be staffed with a minimum of four on-duty personnel[.]” *Id.* at 3-4 (citing Union Ex. 52 at 1710-18).

⁶ As relevant here, NFPA 1500, Section 1.4.1, provides that “[t]he authority having jurisdiction shall be permitted to approve an equivalent level of qualifications for the requirements specified in Chapter 5 of this standard.” Final Award at 6. NFPA 1710, Section 1.3, provides that “[n]othing in this standard is intended to prohibit the use of systems, methods, or approaches of equivalent or superior performance to those prescribed by this standard. Technical documentation shall be submitted to the authority having jurisdiction to demonstrate equivalency.” *Id.* at 7.

“management has the right to assign staffing levels.” *Id.* at 19.

The Arbitrator rejected the Agency’s claims. First, the Arbitrator found that NFPA 1500’s provisions apply only to emergency situations and as this case pertains to minimum staffing requirements, and not emergency situations, NFPA 1500 is not applicable. *Id.* at 25.

Second, the Arbitrator concluded that the Agency did not take the procedural steps required to obtain an equivalency exception to NFPA 1710’s four-person rule and that the sprinkler systems, mutual aid program, and fire plans used by the Agency to justify the staffing equivalency are not “alternative systems, methods or approaches” of equivalent or superior performance to staffing four firefighters as required for an equivalency under NFPA 1710. *Id.* at 24. Specifically, the Arbitrator found that the sprinklers affect response time and not staffing requirements. The Arbitrator also concluded that the voluntary fire departments involved in the mutual aid program do not guarantee a timely or adequate response. In addition, the Arbitrator found that the pre-fire plans address response time and training and not staffing requirements. In the Arbitrator’s view, none of the three alternatives provided by the Agency offer the equivalent or superior performance to staffing the required number of four firefighters at one time. *Id.*

Based on the foregoing, the Arbitrator determined that, by reducing staffing from four fighters per shift to three, the Agency violated the NTTAA and Article 28 of the CBA. *Id.* at 25-26. Consequently, the Arbitrator directed the Agency to rescind the change and staff four firefighters at its fire department at all times. *Id.* at 27.

III. Positions of the Parties

A. Agency’s Exceptions

The Agency excepts to the Arbitrator’s award on several grounds. Initially, the Agency claims that the Arbitrator exceeded his authority by directing the Agency to rescind the change. Exceptions at 2. In the Agency’s view, NFPA 1710 permits the Agency to establish equivalent provisions to that standard. *Id.*

The Agency also claims that the award violates several management rights under § 7106 of the Statute. Specifically, the Agency contends that the award violates its rights to “determine the number of its employees and its internal security operations and staffing levels, and assign work[.]” *Id.* at 2. Further, the Agency argues that the arbitration award “distorts,” “confuses,” and

“misstat[es]” the testimony of the VAMCFD Manager regarding the ability of volunteer fire departments to replace the VAMCFD. *Id.* at 2, 7.

B. Union’s Opposition

The Union argues that the Arbitrator made the appropriate factual findings to determine that the Agency violated the parties’ CBA. *Opp’n* at 4. The Union alleges that the Arbitrator appropriately found that the parties’ CBA incorporates the provisions of the NTTAA, requiring that the parties follow NFPA standards. *Id.* The Union claims that the Arbitrator properly found that NFPA 1500 is not applicable to this case and that the Agency did not follow the proper statutory procedure as prescribed by NFPA 1710 to obtain a staffing equivalency. The Union also argues that the Agency fails to adequately support its assertion that the award violates management rights. *Id.* at 7-12.

IV. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to persons who are not encompassed within the grievance. *See U.S. Dep’t of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 307-08 (1995) (*Dep’t of the Navy*).

The Agency claims that the Arbitrator exceeded his authority by directing the Agency to rescind the staffing equivalency. *Exceptions* at 2. However, the Agency does not elaborate on its claim and, in particular, does not assert that the Arbitrator resolved an issue not submitted to arbitration, disregarded specific limitations on his authority, or awarded relief to persons not encompassed in the grievance in making that finding. *See Dep’t of the Navy*, 51 FLRA at 307-08. When a party fails to provide any arguments or authority to support an exception, the Authority will deny the exception as a bare assertion. *See U.S. Dep’t of Homeland Sec., U.S. Customs & Border Prot., Port of Seattle, Seattle, Wash.*, 60 FLRA 490, 492 n.7 (2004) (Chairman Cabaniss concurring). As the Agency fails to provide any support for its claim, we deny this exception as a bare assertion.

B. The award is not contrary to law.

The Agency argues that by requiring it to staff no fewer than four firefighters at VAMCFD on every shift, the award violates management’s rights to “determine the number of its employees and its internal

security operations and staffing levels, and assign work[.]” *Exceptions* at 2.

There is no indication in the record that the Agency raised its management rights claims regarding number of employees, internal security, and the assignment of work before the Arbitrator. Under § 2429.5 of the Authority’s Regulations, the Authority will not consider issues that could have been, but were not, presented in the proceedings before the arbitrator.⁷ *See, e.g., U.S. Dep’t of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 59 FLRA 542, 544 (2003). Here, the Agency authorized the Arbitrator to determine whether it violated the CBA by reducing the number of firefighters required to be on duty during each shift. Before the Arbitrator, the Union clearly stated its position that no fewer than four firefighters are to be on duty during each shift. *Final Award* at 20. However, the record does not demonstrate that the Agency presented an argument that requiring it to return to staffing each shift with four firefighters would violate management rights. As these arguments could have been, but were not, raised below, we find that § 2429.5 bars the Agency from raising them in its exceptions. Accordingly, we dismiss these exceptions.

The Agency did claim before the Arbitrator that the award violates its right to “assign staffing levels.” *Id.* at 19. However, no such management right is articulated in the Statute and the Agency provides no authority otherwise supporting this contention. Accordingly, we deny this exception.⁸

⁷ The Authority’s Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including 5 C.F.R. § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Agency’s exceptions in this case were filed before that date, we apply the prior Regulations.

⁸ Member Beck disagrees with his colleagues when they refer to the Agency’s argument that it has a management right “to assign staffing levels” and then say of that argument that “no such management right is articulated in the Statute.” Majority at 5-6. Member Beck concludes that, in making this argument, the Agency is invoking its management right “to determine the . . . number of employees.” 5 U.S.C. § 7106(a)(1). Member Beck would deny the exception for the reasons discussed in his Concurring Opinion in *EPA*, 65 FLRA 113 (2010). The Arbitrator merely enforced -- in a reasonable and reasonably foreseeable fashion -- a contract provision (Article 28) that was accepted by the Agency as a permissible limitation on a § 7106(a)(1) right (the right to determine the number of employees). *EPA*, 65 FLRA at 120. In such circumstances, agency arguments about statutory management rights are misplaced.

C. The award is not based on nonfacts.

We construe the Agency's arguments that the Arbitrator "distorts," "confuses," and "misstat[es]" the testimony of the VAMCFD Manager as a contention that the award is based on nonfacts. Exceptions at 2, 7. 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. *E.g.*, *AFGE, Local 200*, 64 FLRA 769, 770 (2010); *AFGE, Local 1395*, 64 FLRA 622, 625 (2010). The Authority has long held that disagreement with an arbitrator's evaluation of evidence and testimony, including the determination of the weight to be accorded such evidence, provides no basis for finding the award deficient. *See U.S. Dep't of the Interior Nat'l Park Serv., Women's Rights Nat'l Historical Park, Ne. Region, Seneca Falls, N.Y.*, 62 FLRA 378, 380 (2008) (*Nat'l Park Serv.*) (citing *AFGE, Local 3295*, 51 FLRA 27, 32 (1995)).

The Agency claims that the Arbitrator erroneously interpreted the VAMCFD Manager's testimony that the "local volunteer fire departments are unable to guarantee a minimum response time" as pertaining to the staffing equivalency, rather than the potential replacement of the VAMCFD with local volunteer fire departments. Exceptions at 7. However, nothing in the record demonstrates that the VAMCFD Manager's conclusion regarding the volunteer fire departments was limited to determining whether it was feasible for the Agency to close down the VAMCFD in favor of using volunteer fire departments. Moreover, even if the Arbitrator erred in this respect, the Agency does not establish that, but for that error, the Arbitrator would have reached a different result. As the Agency's nonfact exception merely disputes the Arbitrator's evaluation of the VAMCFD Manager's testimony regarding the availability of local fire departments to assist VAMCFD and has not otherwise demonstrated that the award is based on a nonfact, we deny the exception. *See Nat'l Park Serv.*, 62 FLRA at 380.

V. Decision

The Agency's exceptions that the award affects management's rights to determine the number of its employees, determine its internal security, and assign work are dismissed. The Agency's remaining exceptions are denied.