

66 FLRA No. 17

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
CENTRAL TEXAS
VETERANS HEALTH CARE SYSTEM
TEMPLE, TEXAS

(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2109
(Union)

0-AR-4740

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DECISION

August 31, 2011

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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 Ed W. Bankston 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 Arbitrator concluded that the Agency had failed to compensate employees for overtime work, and he awarded them overtime compensation.¹ For the reasons that follow, we dismiss the exceptions in part and deny the exceptions in part.

II. Background and Arbitrator's Award

The Union filed a "class action grievance on behalf of [t]itle 38 employees" working within the Central Texas Veterans Health Care System Medicine Service claiming that the Agency had knowingly refused

¹ The Arbitrator also found that the Agency committed acts of reprisal and retaliation and did so with union animus. As the Agency does not except to these findings, they are not addressed further.

to pay them overtime.² Award at 2, 12. The grievance was submitted to arbitration where the Arbitrator framed the issue as whether the Agency violated the parties' agreement by failing to pay overtime to title 38 employees, and, if so, what is the appropriate remedy. *Id.* at 3.

The Arbitrator first rejected the Agency's argument that the grievants are exempt from the Fair Labor Standards Act (FLSA) because they are title 38 employees.³ On the issue of the failure to pay overtime, the Arbitrator concluded that the Agency violated the FLSA and the parties' agreement. *Id.* at 12-13, 33. He found that title 38 nurse practitioners and physician assistants worked substantial hours of overtime without compensation. *Id.* at 32. The Arbitrator also concluded that the Agency failed to maintain overtime records, as required by 5 C.F.R. § 551.402(b) (§ 551.402(b)).⁴ *Id.* at 34. In this respect, he found that many of the Agency's exhibits showed only approved overtime and were not in compliance with § 551.402(b). *Id.* at 20-21. As relevant to the Agency's exceptions, the Arbitrator awarded each title 38 employee overtime compensation for 50.25 hours "for each month worked in the Medicine Service Clinic for up to 36 months." *Id.* at 32-33. The Arbitrator retained jurisdiction for purposes of interpretation, implementation, clarification, or such other purpose as requested by the parties. *Id.* at 34.

III. Positions of the Parties**A. Agency's Exceptions**

The Agency contends that the award of overtime compensation is contrary to law and regulations. Exceptions at 4-5. The Agency asserts that the employees awarded compensation include nurse practitioners and physician assistants and that these employees are exempt from coverage under the FLSA. In this regard, the Agency argues that they are exempt under the FLSA and 5 C.F.R. § 551.207 (§ 551.207) because they qualify for the professional exemption.⁵ *Id.* The Agency also argues that, by ruling that these employees are covered by the FLSA, the award is contrary to Veterans Affairs (VA) Handbook 5003, pt. 1,

² Title 38 refers to the portion of the United States Code that establishes an independent personnel system for the Agency's professional medical employees.

³ The Agency does not except to this portion of the award.

⁴ Section 551.402(b) requires agencies to "keep complete and accurate records of all hours worked by its employees."

⁵ The FLSA (29 U.S.C. § 213(a)(1)) and § 551.207 exempt from FLSA coverage professional employees who meet specified criteria.

para. 17 (VA Handbook).⁶ *Id.* at 5. The Agency alleges that it raised these arguments to the Arbitrator, but provides no citations. *Id.* at 5-6.

The Agency also contends that the award is incomplete, ambiguous, or contradictory as to make implementation impossible. *Id.* at 6. The Agency first alleges that the award is ambiguous because the Arbitrator awarded overtime compensation for work in the “Medicine Service Clinic,” which the Agency claims does not exist. *Id.* The Agency further alleges that the award is ambiguous because the Arbitrator failed to explain how he arrived at the compensation awarded and which employees are covered by the award. *Id.*

The Agency further contends that the Arbitrator was biased. *Id.* at 7. The Agency alleges that the Arbitrator’s partiality is shown by his “dismiss[al]” of evidence presented by the Agency and his “accept[ance]” of all of the evidence presented by the Union. *Id.* Specifically, the Agency disputes the Arbitrator’s treatment of its exhibits that showed only approved overtime. The Agency also argues that the Arbitrator “fail[ed] to acknowledge” another exhibit. *Id.*

Finally, the Agency contends that the Arbitrator exceeded his authority because the award “does not justify three years of overtime and the grievance does not specify three years of overtime.” *Id.* at 10.

B. Union’s Opposition

The Union contends that the Agency’s exceptions claiming that the award is contrary to law and regulations should be dismissed because the alleged professional employee exemption under the FLSA and VA Handbook could have been, but was not, presented to the Arbitrator. Opp’n at 2-4. The Union also contends that the award is not deficient on the ground that it is incomplete, ambiguous, or contradictory as to make implementation impossible. The Union asserts that the Agency’s confusion as to the award does not establish that it is deficient. *Id.* at 5-6. The Union further contends that the Agency misstates the award in claiming bias because the Arbitrator did not dismiss the Agency’s evidence. *Id.* at 7. Finally, the Union contends that the Arbitrator did not exceed his authority. *Id.* at 9.

IV. Preliminary Issue: The Authority’s Regulations bar the Agency’s exceptions contending that the award is contrary to law and regulations.

In its exceptions, the Agency argues that the Arbitrator awarded compensation to employees who are exempt from coverage under the FLSA. Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, however, the Authority will not consider any arguments or evidence that could have been, but were not, presented to the arbitrator.⁷ 5 C.F.R. §§ 2425.4(c), 2429.5. Here, an issue before the Arbitrator was whether title 38 nurse practitioners and physician assistants are covered under the FLSA. In this regard, the Agency argued that the grievants as title 38 employees are not covered under the FLSA. Opp’n, Attach. 1 at 3 (Agency’s post-hearing brief).

Despite its assertions in its exceptions to the contrary, nothing in the record substantiates that the Agency presented the VA Handbook to the Arbitrator and argued that, if the FLSA applies to the grievants even though they are title 38 employees, then the grievants are exempt under the provisions of the VA Handbook and are exempt as professional employees under the terms of the FLSA and § 551.207. In this regard, neither the award nor the Agency’s post-hearing brief mentions these arguments or cites the VA Handbook provision or the professional-exemption provisions of the FLSA and § 551.207. Moreover, the Agency expressly fails in its exceptions to provide citations to support its allegations that it had presented these arguments to the Arbitrator. As it is not apparent that the Agency presented the VA Handbook or these arguments to the Arbitrator, although it could have done so, the Agency’s evidence and arguments are not properly before the Authority under §§ 2425.4(c) and 2429.5. *See AFGE, Local 1546*, 65 FLRA 833, 833 (2011). Accordingly, we dismiss the Agency’s exceptions contending that the award is contrary to law and regulations.

⁶ The VA Handbook provides, in pertinent part: “In general, executive, administrative and professional employees are exempt from FLSA regulations.” Exceptions at 5.

⁷ Section 2425.4(c) provides, in pertinent part, that exceptions may not rely on “any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented to the arbitrator.”

Section 2429.5 provides, in pertinent part, that “[t]he Authority will not consider any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented in the proceedings before the . . . arbitrator.”

V. Analysis and Conclusions

- A. The award is not deficient on the basis that it is incomplete, ambiguous, or contradictory as to make implementation impossible.

The Authority will find that an award is deficient when it is incomplete, ambiguous, or contradictory as to make implementation of the award impossible. To establish that the award is deficient, the excepting party must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain. *E.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 65 FLRA 373, 377 (2010) (Member Beck dissenting as to another matter). However, the Authority has specifically rejected alleged ambiguities as a basis for finding an award deficient on this ground when the arbitrator has retained jurisdiction to clarify the award. The Authority advised that such ambiguities are for clarification by the arbitrator and provide no basis for finding the award deficient. *U.S. Dep't of Veterans Affairs Med. Ctr., Huntington, W. Va.*, 46 FLRA 1160, 1167 (1993).

As noted, the Arbitrator retained jurisdiction for purposes of interpretation, implementation, clarification, or such other purpose as requested by the parties. Accordingly, the alleged ambiguities can be clarified by the Arbitrator and provide no basis for finding the award deficient. *See id.* Consequently, we deny this exception.

- B. The Arbitrator was not biased.

To establish that an arbitrator was biased, the excepting party must demonstrate that the award was procured by improper means, that there was partiality or corruption on the part of the arbitrator, or that the arbitrator engaged in misconduct that prejudiced the rights of the party. *E.g., AFGE, Local 648, Nat'l Council of Field Labor Locals*, 65 FLRA 704, 711 (2011). In reviewing awards under these standards, the Authority has repeatedly held that an assertion that the arbitrator's findings were adverse to the excepting party, without more, does not establish bias. *See id.* More specifically, the Authority has rejected such assertions when the excepting party fails to establish that the arbitrator's findings did not result from a neutral assessment of the evidence. *See U.S. Small Bus. Admin., Charlotte Dist. Office, Charlotte, N.C.*, 49 FLRA 1656, 1663 (1994).

Here, the extent of the Agency's support for its exception is its reliance on the Arbitrator's alleged assessment of its evidence. The Arbitrator assessed the disputed evidence showing approved overtime as failing to comply with the requirements of § 551.402(b). The Agency has not challenged this assessment in its

exceptions. Consequently, the Agency fails to establish that the Arbitrator's treatment of this evidence did not result from a neutral assessment. The Agency's claim that the Arbitrator's failure to acknowledge one of its exhibits demonstrates partiality is without support because the Authority has repeatedly held that an arbitrator's failure to acknowledge a matter does not establish that the arbitrator did not consider the matter. *E.g., NATCA, MEBA/NMU*, 52 FLRA 787, 790 (1996).

Based on the foregoing, the Agency does not establish that the Arbitrator was biased, and we deny this exception.

- C. The Agency's exceeded-authority exception is denied under § 2425.6 of the Authority's Regulations.

Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support" private-sector grounds recognized by the Authority. 5 C.F.R. § 2425.6(e)(1). Under § 2425.6(e)(1), an exception that does not raise a recognized ground is subject to dismissal; an exception that fails to support a properly raised ground is subject to denial. *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011) (Member Beck dissenting).

Under § 2425.6(b), a party arguing that the arbitrator exceeded his or her authority has an express duty to "explain how, under standards set forth in the decisional law of the Authority or Federal courts," the award is deficient. In this regard, the standards set forth in decisional law of the Authority require the excepting party to establish that the arbitrator failed to resolve an issue that was submitted to arbitration, resolved an issue that was not submitted to arbitration, disregarded specific limitations on his or her authority, or awarded relief to individuals who were not encompassed within the grievance. *Id.*

The Agency states that the Arbitrator exceeded his authority because the award "does not justify three years of overtime and the grievance does not specify three years of overtime." Exceptions at 10. The Agency's statement fails to explain how the Arbitrator exceeded his authority under the aforementioned standards and does not support the ground of exceeded authority. Accordingly, we deny the Agency's exception under § 2425.6(e)(1).

VI. Decision

The Agency's exceptions are dismissed in part and denied in part.