66 FLRA No. 68

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
SHERIDAN, OREGON
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3979
COUNCIL OF PRISON LOCALS
(Union)

0-AR-4645

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DECISION

November 25, 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 Martin Henner 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 Authority issued an Order requiring the Agency to show cause why its exceptions should not be dismissed as untimely, to which the Agency filed a response.

For the reasons that follow, we dismiss in part and deny in part the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency maintains three types of institutions in Sheridan, Oregon: the Federal Correctional Institution (FCI), the Federal Detention Center (FDC), and the Satellite Prison Camp (SPC). Award at 8. The housing units in these institutions have unit management teams (housing management teams) consisting of five individuals: two counselors, two case managers, and a clerk. *Id.* A housing unit has two sections. Each section has a counselor and a case manager. The clerk handles work for both sections. *Id.*

In the past, the Agency's leave policy permitted up to two housing management team staff members to schedule leave at the same time. *Id.* at 9. A few years back, taking an action that was later to have significance in this case, the Union filed a grievance when one of the housing managers imposed additional restrictions on his teams' scheduling of annual leave. *Id.* The Union's grievance claimed that the restriction conflicted with the collective bargaining agreement (CBA's) leave provision and with the equal treatment of employees. *Id.* The grievance was not resolved and went to arbitration. The Arbitrator ruled in favor of the Union. He found that the Agency imposed the leave restrictions arbitrarily in violation of the CBA. *Id.*

The grievance in this case also concerns a change in the Agency's leave policy. The Union's grievance claims that the Agency violated the CBA when it revised its leave policy for its housing management team staff. *Id.* at 2. Prior to the revision, the leave policy permitted two employees to schedule leave at any one time in the FCI and the FDC units, or three employees in the SPC unit. *Id.* The new policy reduced scheduled leave to only one member in the FCI and FDC units, and two in the SPC. *Id.* As pertinent here, the Union's grievance requested that the Agency reinstate the number of leave slots to two employees at a time in the FCI and the FDC units, and three employees in the SPC unit. The grievance also requested that the Arbitrator take "[a]ny other action deemed necessary and appropriate." Exceptions, Attach. E, Grievance.

The grievance was not resolved and went to arbitration. The Arbitrator framed the issue: "Did the Agency violate the [CBA] when it reduced the available slots for scheduled leave for bargaining unit employees in [the housing management teams]?" Award at 3.

Before the Arbitrator, the Union argued that the Agency changed the policy arbitrarily, without prior consultation with the Union, and without justifying the change based on safety, security, or mission accomplishment needs. *Id.* at 2, 7. In addition, the Union claimed that the "real reason" for the new change in the scheduled leave policy was retaliation. *Id.* The Union

asserted that after it filed its first grievance, the Agency threatened to change its leave policy if the Union "pursued th[e] case." *Id.* at 7. The Union asserted that the change in leave policy intended to "punish" the Union for taking to arbitration the prior grievance because, as a result of that award, the Agency had to change its leave practices. *Id.* at 2-3. As a remedy, the Union requested that the Arbitrator reinstate two scheduled leave slots for the FCI and FDC units, and three scheduled leave slots at the SPC. Exceptions, Attach. E, Grievance. The Union's requested remedy was not limited to any particular period of time.

The Arbitrator first addressed and rejected the Union's claim that the Agency failed to justify the change in scheduled leave policy. The Arbitrator found that Article 19, Section l., Subsection 2. of the CBA authorized the Agency to determine how many scheduled leave slots it would authorize per week. Award at 10. The Arbitrator also found that the Agency was not required to justify its decision by reference to safety, security, or mission accomplishments.[1] *Id.* at 10-11. And the Arbitrator found that the Agency had notified the Union regarding its proposal to reduce scheduled leave slots. *Id.* at 10. The Arbitrator further found that it was not necessary to consider evidence offered by both sides on whether the Agency's actions were justified. In the Arbitrator's view, the Agency had discretion under the CBA to determine how many scheduled leave slots to authorize per week. *Id.* at 10-11.

However, agreeing with the Union, the Arbitrator found that the Agency retaliated against the Union when it reduced the number of scheduled leave slots available per week. The Arbitrator examined the CBA and found that Article 6, Section b. of the CBA protected employees from any reprisal for the exercise of their union rights, and that such protection extended to taking grievances to arbitration.[2] *Id.* at 11. The Arbitrator credited the Union witnesses' testimony and found that the Agency's actions were retaliatory. *Id.* at 13. The Arbitrator concluded that the Agency reduced the scheduled leave slots available per week in retaliation for the Union's pursuing and winning the prior grievance related to scheduled leave. *Id.*

As a remedy, the Arbitrator ordered the Agency to restore the number of scheduled leave slots for housing management employees to two employees at a time in the FCI and the FDC units, and three employees in the SPC unit. *Id.* at 13-14. The Arbitrator also ordered that no reduction in the number of scheduled leave slots be made before the fall of 2011 for leave to be taken in 2012. *Id.* at 14.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award's restoration of the number of scheduled leave slots is contrary to management's rights to assign work under § 7106(a)(2)(B), and to determine its internal security practices under § 7106(a)(1) of the Statute. Exceptions at 8-11.

The Agency also argues that the Arbitrator exceeded his authority in two ways. *Id.* at 14. First, the Agency claims the Arbitrator exceeded his authority because he based his findings on the retaliation issue and not on the "leave slot" issue. *Id.* at 15. According to the Agency, the "leave slot" issue was the "crux" of the case. *Id.*

Second, the Agency asserts that the Arbitrator exceeded his authority because he awarded a remedy "beyond the scope of the matter submitted." *Id.* According to the Agency, when the Arbitrator ordered that there be no reduction in the number of scheduled leave slots before the fall of 2011 for leave to be taken in 2012, he awarded a remedy that the Union did not request. *Id.* at 15-16.

Finally, the Agency claims that the Arbitrator's award, ordering as a remedy that there be no reduction in the number of scheduled leave slots before the fall of 2011 for leave to be taken in 2012, does not draw its essence from the CBA. *Id.* at 16-17. The Agency argues that the remedy is inconsistent with Article 19, Section 1., Subsection 2. of the CBA. According to the Agency, the remedy improperly prevents the Agency from choosing the number of leave slots it wishes to authorize before the fall of 2011 for leave to be taken in 2012. *Id.* In addition, the Agency asserts that the award is inconsistent with Article 32 of the CBA. According to the Agency, Article 32 of the CBA does not authorize the Arbitrator to

[1] Article 19, Section l., Subsection 2. of the CBA provides, in pertinent part:

> [A]fter considering the views and input of the Union, the Employer will determine the maximum number of employees that may be on scheduled annual leave during each one (1) week [seven (7) consecutive days] period, and when scheduled annual leave will be curtailed because of training and/or other causes such as military leave. . . .

Award at 6.

[2] Article 6, Section b. of the CBA provides, in pertinent part: "The parties agree that there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights provided for in this [CBA] and any other applicable laws, rules [or] regulations. . . ." Award at 4.

add to, subtract from, disregard, alter, or modify the substantive terms of Article 19.[3] *Id.*

B. Union's Opposition

The Union argues that the award is not contrary to management's rights. Opp'n at 3, 5-6. In this regard, the Union asserts that the Agency did not raise any management rights claim before the Arbitrator and that, therefore, this exception should be dismissed. *Id.* at 3-4.

The Union also argues that the Arbitrator did not exceed his authority. *Id.* at 4. First, the Union asserts that the Arbitrator framed the issue in terms of whether the Agency violated the CBA, and his remedy is responsive to the issue he framed. *Id.* And, the Union asserts, the remedy requested in the grievance -- that the Arbitrator take any other action necessary and appropriate -- did not place a limitation on the Arbitrator's authority and gave him "a broad spectrum of remedies." *Id.* The Union further claims that the Agency did not raise before the Arbitrator any objection to either his formulation of the issue, or the authority given to the Arbitrator to fashion any remedy he deemed necessary and appropriate. *Id.* Finally, the Union argues that the award draws its essence from the CBA. *Id.* at 4-5.

IV. Preliminary Issues

A. The Agency's exceptions are timely.

The Authority issued an Order directing the Agency to show cause why its exceptions should not be dismissed as untimely. The Agency filed a response explaining that it "inadvertently and erroneously" stated in its exceptions that the Arbitrator had issued the award by e-mail when he had actually served it by first class mail. Agency's Response to Order to Show Cause at 1. In support, the Agency provided a copy of the envelope showing the postmark.

Under the regulations applicable at all times relevant to this case, the time limit for filing exceptions to an arbitration award is 30 days beginning on the date the award is served on the filing party. 5 C.F.R. § 2425.1(b) (2010).[4] As relevant here, the date of service is the date the arbitration award is deposited in the United States mail. 5 C.F.R. § 2429.27(d). If the last day of the thirty-day period falls on a weekend or federal holiday, then the due date for the exceptions is the end of the next day that is not a weekend day or federal holiday. 5 C.F.R. § 2429.21(a). If the award is served by mail, five days are added to the period for filing exceptions. 5 C.F.R. § 2429.22.

Based on the date the award was postmarked, the thirty-day period for filing exceptions ended on a Saturday. Therefore, the due date is moved to the following Monday and, because the award was served by mail, five days are added. However, because that results in a due date again falling on a Saturday, the due date is again moved to the following Monday. As the exceptions were filed with the Authority by personal delivery five days earlier, the Agency's exceptions are timely.

B. The Agency's management rights exceptions are barred by § 2429.5 of the Authority's Regulations.

The Agency claims that the award's restoration of the number of scheduled leave slots is contrary to management's rights to assign work under § 7106(a)(2)(B), and to determine its internal security practices under § 7106(a)(1) of the Statute. Exceptions at 8-11.

Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, raised or presented to the arbitrator.[5] *See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 64 FLRA 841, 843 (2010).

The record indicates that the Agency did not raise before the Arbitrator issues concerning management rights. In its grievance, the Union specifically requested that the Arbitrator reinstate two scheduled leave slots for the FCI and FDC units, and three scheduled leave slots at the SPC. Exceptions, Attach. E, Grievance. The Union's requested remedy was not limited to any particular period of time. Thus, even if the Agency could

[3] The Agency cites Article 31 of the CBA. However, the cited language corresponds to Article 32, Section h. of the CBA. Article 32, Section h. provides, in pertinent part, that "[t]he arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of: (1) this [CBA], (2) published Federal Bureau of Prisons policies and regulations." Exceptions, Attach. C, CBA at 78.

[4] The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). However, as the Agency's exceptions were filed before that date, we apply the prior Regulations.

[5] As previously noted, *supra* note 4, certain of the Authority's Regulations were revised effective October 1, 2010. These included § 2429.5. As the Agency's exceptions were filed before the Regulations were revised, we apply the prior Regulations.

not have anticipated that the Arbitrator would direct the Agency not to reduce the number of restored leave slots until a certain date had passed, the Agency should have known to raise any management rights objections to the remedy that it had.

Consequently, as the Authority will not consider issues that could have been, but were not raised before the Arbitrator, the Agency cannot raise these issues now. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, USP Admin. Maximum (ADX) Florence, Colo.,* 64 FLRA 1168, 1170 (2010) (dismissing exceptions where agency had notice of specific remedy sought by union at arbitration and could have, but did not, present its argument to the arbitrator disputing that remedy); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Oakdale, La.,* 63 FLRA 178, 179-80 (2009) (dismissing exceptions where evidence presented at hearing established that agency was aware that resolution of dispute entailed enforcement of a management right limitation but did not raise management right issue before arbitrator).

Based on the foregoing, we dismiss the Agency's management rights exceptions.

V. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Agency claims the Arbitrator exceeded his authority because he based his findings on the retaliation issue and not on the "leave slot" issue, which the Agency describes as the "crux" of the case. Exceptions at 15.

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 those not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue, or the arbitrator's formulation of an issue to be decided in the absence of a stipulation, the same substantial deference that it accords an arbitrator's interpretation and application of a collective bargaining agreement. *See U.S. Info. Agency, Voice of Am.*, 55 FLRA 197, 198 (1999).

The Arbitrator did not exceed his authority by basing his findings on the retaliation issue. The issue the Arbitrator framed was whether the Agency violated the CBA when it reduced available slots for scheduled leave for bargaining unit employees. Award at 3.

The Arbitrator resolved this issue. The Arbitrator found that the Agency violated Article 6, Section b. of the CBA, which protects employees from any reprisal for the exercise of their rights including taking grievances to arbitration. Specifically, the Arbitrator found that in reducing the number of leave slots available per week, the Agency acted in retaliation for the Union's pursuit of its prior grievance. *Id.* at 11, 13. Therefore, the Arbitrator's determination is responsive to the issue he framed. Consequently, the Agency has not demonstrated that the Arbitrator's determination exceeds his authority. *AFGE, Nat'l Border Patrol Council, Local 2724*, 65 FLRA 933, 935 (2011) (exceeded authority exception denied where arbitrator's determination was responsive to issue as framed).

The Agency also argues that the Arbitrator exceeded his authority when he ordered the Agency not to reduce the number of scheduled leave slots before the fall of 2011 for leave to be taken in 2012. The Agency contends that the remedy goes "beyond the scope of the matter submitted" to arbitration because the Union did not request this remedy. Exceptions at 15-16.

The Arbitrator did not exceed his authority by awarding this particular remedy. Authority precedent gives arbitrators broad discretion to fashion remedies. *See AFGE, Local 916*, 50 FLRA 244, 246-47 (1995). Therefore, that the Union did not request this particular remedy does not provide a basis for setting it aside. *See U.S. Dep't of Justice, U.S. Fed. Bureau of Prisons, U.S. Penitentiary, Lewisburg, Pa.* 39 FLRA 1288, 1301 (1991) (holding that as arbitrators have great latitude in fashioning remedies, that a particular remedy was not requested by the union provides no basis for setting it aside as exceeding the arbitrator's authority). Moreover, the remedy awarded by the Arbitrator is responsive to the issue he framed; the remedy addresses the harm caused by the Agency's improper reduction in the number of available leave slots. *See AFGE, Local 916*, 50 FLRA at 246-47.

Based on the foregoing, we find that the Arbitrator did not exceed his authority and deny the Agency's exception.

B. The award draws its essence from the CBA.

The Agency asserts that the Arbitrator's award, ordering as a remedy that there be no reduction in the number of scheduled leave slots before the fall of 2011 for leave to be taken in 2012, cannot be derived from the CBA. Exceptions at 17. Specifically, the Agency asserts that the remedy is inconsistent with Article 19, Section 1., Subsection 2.[6] and Article 32[7] of the CBA. *Id.*

[6] *See supra* note 1.
[7] *See supra* note 3.

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) (*OSHA*). 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 award draws its essence from the CBA. The Arbitrator found that, in changing the number of available scheduled leave slots, the Agency acted in retaliation in violation of Article 6, Section b. of the CBA. He then crafted a remedy that he deemed necessary and appropriate to resolve the violation. As discussed previously in section V.A., the Authority has held that arbitrators enjoy broad discretion in fashioning remedies. *See AFGE, Local 916*, 50 FLRA at 246-47. Given this broad remedial discretion, the Agency provides no basis for finding that, by requiring restoration of the improperly changed leave slot policy for a certain period of time, the award fails to draw its essence from the CBA. Moreover, the Agency does not cite to any provisions in the CBA that address the Arbitrator's remedial discretion. *See, e.g.*, *AFGE, Council 215*, 66 FLRA 137, 141 (2011).

As to the Agency's argument based on Article 32, that the Arbitrator is precluded from altering the substantive terms of Article 19, this argument does not provide a basis for finding that the award fails to draw its essence from the CBA. As discussed above, arbitrators have broad discretion in fashioning remedies. In addition, as also discussed (in section V.A.), the remedy to which the Agency objects is responsive to the issue he framed. Finally, nothing in Article 19 requires a reduction in the number of scheduled leave slots mandated by the award during the period to which the Arbitrator's remedy applies. Consequently, the Agency has not demonstrated that the remedy it contests is irrational, unfounded, implausible, or in manifest disregard of the CBA. *OSHA*, 34 FLRA at 575.

Consistent with the foregoing, we find that the Arbitrator's award does not fail to draw its essence from the CBA and deny the Agency's exception.

VI. Decision

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