

**67 FLRA No. 39**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
COUNCIL OF PRISON LOCALS C-33  
LOCAL 720  
(Union)

and

UNITED STATES  
DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF PRISONS  
FEDERAL CORRECTIONAL COMPLEX  
TERRE HAUTE, INDIANA  
(Agency)

0-AR-4884

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DECISION

December 20, 2013

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

**I. Statement of the Case**

Arbitrator Jacquelin F. Drucker determined that the Agency did not violate the parties' agreement when it permitted supervisory posts in the Agency's food-service department to stand vacant (vacated posts). The Union argues that the Arbitrator's award fails to draw its essence from the parties' agreement and that the Arbitrator exceeded her authority when she failed to issue her award within thirty calendar days after the conclusion of the arbitration hearing, as specified in the parties' agreement. We conclude that the Union has failed to establish that the arbitration award is implausible, irrational, or in manifest disregard of the parties' agreement. We also conclude that because the Union could have raised its exceeds-authority argument before the Arbitrator, but failed to do so, its exception is barred by §§ 2425.4(c) and 2429.5 of the Authority's Regulations. Therefore, we dismiss in part and deny in part the Union's exceptions.

**II. Background and Arbitrator's Award**

The Agency's food-service department provides meals to inmates housed at a federal correctional facility. Cook supervisors (supervisors) are assigned to oversee inmate crews who work in the kitchen area (kitchen post)

or in satellite areas where meals are delivered to inmates who are "segregated" (segregation post).<sup>1</sup>

The supervisors worked five eight-hour days per week until February 2009, when the Agency implemented a compressed work schedule of four ten-hour days (compressed schedule).

After the compressed schedule was implemented, the Agency on occasion permitted one post or the other to be "vacated" for a shift or part of a shift when a supervisor did not report to work or was reassigned to another post.<sup>2</sup> During these periods, only one supervisor was available to oversee the work of both posts.

As relevant here, the Union filed a grievance alleging that the Agency violated the parties' agreement by permitting supervisory posts to be vacated. The matter was submitted to arbitration. The parties did not agree on a statement of the issues, but the Arbitrator stated that the issue concerned the staffing of supervisory posts.

The Union argued before the Arbitrator that the Agency violated Article 27, Section a. of the parties' collective-bargaining agreement when it permitted the kitchen or segregation posts to be vacated on a recurring basis. Article 27, Section a. notes, in relevant part, the "inherent hazards" that are associated with working in a correctional environment, and states that the Agency "agrees to lower those inherent hazards to the lowest possible level."<sup>3</sup> The Arbitrator found that the evidence did not establish that the Agency violated its obligations under Article 27, Section a. Specifically, the Arbitrator found that the "occasional shifting" of personnel – from one post that management determines to be "less critical" to another that has "greater urgency" – did not raise the "inherent risks" for the supervisor assigned to either post.<sup>4</sup> In this regard, the Arbitrator found that the duties of a supervisor assigned to a segregation post frequently take the supervisor away from the kitchen area even when both posts are staffed. Accordingly, the Arbitrator found that the Agency did not violate Article 27, Section a.

The Arbitrator also rejected the Union's argument that Article 18 requires the Agency to assign overtime to cover a vacant post. Specifically, the Arbitrator found that Article 18 sets forth a process by which overtime is assigned "when [m]anagement determines that it is necessary to pay overtime."<sup>5</sup> The

<sup>1</sup> Award at 4.

<sup>2</sup> *Id.*

<sup>3</sup> Exceptions, Attach. C at 56; *see also* Award at 6.

<sup>4</sup> Award at 7.

<sup>5</sup> *Id.* at 8; *see also* Exceptions, Attach. C at 43.

Arbitrator concluded, therefore, that the Agency did not violate Article 18 when it determined that overtime was not necessary to cover vacated posts under these circumstances.

Accordingly, the Arbitrator denied the grievance.

The Union filed exceptions to the Arbitrator's award, and the Agency filed an opposition to the Union's exceptions.

### III. Analysis and Conclusions

- A. Preliminary Issue: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Union's exceeds-authority exception.

The Union argues that the Arbitrator exceeded her authority by failing to issue her award within thirty calendar days of the conclusion of the arbitration hearing, as specified in Article 32, Section g. of the parties' agreement.<sup>6</sup>

The Union's exceeds-authority exception is not properly before the Authority. "Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator."<sup>7</sup> There is no indication in the record that the Union advised the Arbitrator of the requirements of Article 32, Section g. or that the Union raised objections to the Arbitrator with respect to the time limit provided in Article 32. Furthermore, the documents submitted by the Union with the exceptions demonstrate that it was aware of, and acquiesced to, the Arbitrator's request for additional time to prepare and issue her decision.<sup>8</sup> Because the Union could have raised these arguments before the Arbitrator, but failed to do so, we dismiss the Union's exceeds-authority exception under §§ 2425.4(c) and 2429.5.<sup>9</sup>

- B. The award draws its essence from the parties' agreement.

The Union asserts that the Arbitrator's finding that vacating the kitchen or segregation posts did not violate Articles 18 and 27 fails to draw its essence from

the parties' agreement. Specifically, the Union argues that vacating posts increases the risk to supervisors in violation of Article 27 and conflicts with the procedures for manning the posts as set forth in Article 18.<sup>10</sup>

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.<sup>11</sup> Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' agreement when, among other things, the appealing party establishes that the award does not represent a plausible interpretation of the agreement or evidences a manifest disregard of the agreement.<sup>12</sup> 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."<sup>13</sup>

As set forth above, the Arbitrator found that the Union did not establish that the "occasional shifting" of personnel from the kitchen or segregation posts raised the "inherent risks" of the correctional environment.<sup>14</sup> The Arbitrator also found that: (1) Article 18 obligates the Agency to follow specific procedures to cover vacated posts only when the Agency determines that overtime is necessary; and (2) in this case, the Agency decided that overtime was not necessary.<sup>15</sup> Accordingly, the Arbitrator found that the Agency did not violate the parties' agreement when it vacated posts and did not assign overtime.

As stated above, Article 27, Section a. recognizes that certain "inherent hazards"<sup>16</sup> are associated with working in a correctional environment, and that the Agency agreed to lower these inherent hazards to the lowest possible level. The Arbitrator's determination that the Agency did not violate Article 27, Section a. rests upon her conclusion that the "occasional shifting" of personnel from posts did not raise "inherent risks."<sup>17</sup> Further, the Arbitrator's finding that the Agency did not violate Article 18 rests upon her conclusion that the Agency was obligated to use the overtime-assignment process only when it determined that overtime was "necessary"<sup>18</sup> and that, in the circumstances presented here, the Union failed to establish that the Agency's

<sup>6</sup> Exceptions at 5 (citing Art. 32, § g.).

<sup>7</sup> *U.S. DHS, U.S. CBP*, 66 FLRA 745, 747 (2012) (citing 5 C.F.R. §§ 2425.4(c) & 2429.5); *see also U.S. DOL, Bureau of Labor Statistics*, 67 FLRA 77, 79-80 (2012) (*DOL*) (dismissing exception under § 2429.5 where record established agency could have raised arguments before arbitrator but did not).

<sup>8</sup> *See* Exceptions, Attach. D; *see also* Opp'n, Attach. A.

<sup>9</sup> *See, e.g., DOL*, 67 FLRA at 79-80.

<sup>10</sup> Exceptions at 4.

<sup>11</sup> *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

<sup>12</sup> *See U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

<sup>13</sup> *Id.* at 576.

<sup>14</sup> Award at 7.

<sup>15</sup> *Id.* at 8.

<sup>16</sup> Exceptions, Attach. C at 56; *see also* Award at 6.

<sup>17</sup> Award at 7.

<sup>18</sup> *Id.* at 8.

determination that overtime was not necessary violated the overtime-assignment process.

The Union has not demonstrated that the Arbitrator's construction of either Article 27, Section a. or Article 18 is implausible or evidences a manifest disregard of the agreement. Moreover, the Union does not contest the Arbitrator's factual findings as nonfacts. As the Arbitrator's findings are not contested as nonfacts, the Authority defers to these findings.<sup>19</sup>

The Union also relies on prior Authority decisions upholding arbitral awards that interpreted Article 27 differently to support its assertion that the award does not draw its essence from the parties' agreement.<sup>20</sup> The Union asserts that the award conflicts with these awards.<sup>21</sup> But arbitration awards are not precedential, and an arbitrator is not bound to follow prior arbitration awards, even if they involve the interpretation of the same or similar contract provisions.<sup>22</sup> Therefore, the decisions relied on by the Union do not provide a basis for finding that the award fails to draw its essence from the parties' agreement.<sup>23</sup>

Accordingly, we deny the Union's essence exception.

#### **IV. Decision**

We dismiss in part and deny in part the Union's exceptions.

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<sup>19</sup> See *AFGE, Local 1199*, 67 FLRA 71, 72 (2012).

<sup>20</sup> Exceptions at 4-5 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 65 FLRA 892 (2011); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atlanta, Ga.*, 57 FLRA 406 (2001); *U.S. DOJ, Fed. BOP, Metro.Det. Ctr., Guaynabo, P.R.*, 57 FLRA 331 (2001); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Marianna, Fla.*, 56 FLRA 467 (2000)).

<sup>21</sup> *Id.*

<sup>22</sup> *AFGE, Local 2382*, 66 FLRA 664, 667 (2012).

<sup>23</sup> *Id.*