74 FLRA No. 33

NATIONAL LABOR
RELATIONS BOARD UNION
(Union)

and

NATIONAL LABOR RELATIONS BOARD
(Agency)

0-AR-5974

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DECISION

February 19, 2025

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Before the Authority: Colleen Duffy Kiko, Chairman and Anne Wagner, Member

I. Statement of the Case

Arbitrator Laurence M. Evans denied a Union grievance alleging the Agency violated the parties' collective-bargaining agreement concerning private-office allocations for certain employees. The Union filed exceptions to the award on the grounds that it is based on nonfact, fails to draw its essence from the parties' agreement, is so contradictory as to make implementation impossible, and is contrary to law. Because the Union does not establish that the award is deficient on these grounds, we deny the exceptions.

II. Background and Arbitrator's Award

The Union represents professional employees at the Agency's offices nationwide. In December 2022, while negotiating a new term collective-bargaining agreement, the parties agreed to immediately implement two finalized provisions. As relevant here, Article 34 increased telework availability by allowing employees to telework up to six days each pay period and Article 20 addressed requirements for Agency facilities and the procedures for changing or reallocating office space. Article 20, Section 12 (Section 12) concerns allocation of private offices, and states:

> (a) *Allocation of Offices*. Subject to the exceptions identified in [S]ection 12(c) below, professional employees who maintain work schedules where they are regularly in the office five . . . days or more per bi-weekly pay period, will be allocated private office space. Employees who are regularly in the office four . . . days or less per biweekly pay period have no entitlement to dedicated private office space.
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> (b) *Reductions in Available Offices*. Under current spatial configuration, both groups of professional employees referenced in [S]ection 12(a) will maintain dedicated private office space. If[,] due to reductions in footprint, spatial reconfiguration, or changes to staffing levels [(space actions)], private offices are not available for all professional employees, first priority for offices will be for employees who . . . [a]re regularly in the office five . . . days or more per bi-weekly pay period. . . .
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> (c) *Priority for New Employees/Employees Expanding In-Office Days*. For new professional employees, professional employees who . . . opt for more days in the office, or for employees who are determined to be ineligible for telework pursuant to Article 34, . . . office priority [will be] based on the number of in-office days per bi-weekly pay period . . . . These employees will only bump employees previously allocated private offices when those employees with offices are required to relinquish them pursuant to the conditions covered in provisions of [S]ection 13 . . . .[1]

Article 20, Section 13 (Section 13) provides:

> (a) *Professional Employees Subject to Alternative Officing.* Consistent with [S]ection 12(b), professional employees who maintain regular work schedules where they are in the office four . . . days or less per biweekly pay period, will be required to participate in and utilize alternative officing/space sharing . . . . Subject to the exceptions identified in [S]ection 12(c) above, employees who maintain regular work schedules where they are in the office five . . . days or more will not be required to participate in alternative officing/office sharing.[2]

[1] Award at 3 (quoting Section 12) (emphasis in original).

[2] *Id.* at 4 (quoting Section 13) (emphasis in original).

In June 2023, the Union filed a grievance alleging that the Agency violated Section 12's private-office allocation requirements. The grievance proceeded to arbitration, where the parties stipulated the issues as whether "Section 12 obligates the Agency to provide professional employees dedicated private offices in all space actions if the professional employee regularly comes to the office for five . . . days or more per bi-weekly pay period [and, i]f so, what is the appropriate remedy?"[3]

In resolving these issues, the Arbitrator emphasized that "the clear and unambiguous terms" of Section 12(b) "permit[] the Agency" to take actions that change the availability of private offices.[4] He found that each of Section 12's subsections "contains discrete negotiated instructions" concerning how "professional office space is to be allocated."[5] Specifically, he found Section 12(a) sets the "terms" for private-office allocations;[6] Section 12(b) addresses the "duration" of those allocations by allowing employees to "keep their private offices until . . . [they] are adversely affected by an [A]gency space action" and then establishing the process for allocating available offices thereafter;[7] and "Section 12(c) provides specific and detailed instructions" for allocating offices to employees who are new, changing telework schedules, or ineligible for telework.[8]

Based on his interpretation of Section 12 as a whole, the Arbitrator rejected the Union's argument that Section 12(a) creates "a guaranteed entitlement" for employees "who currently have their own private offices."[9] In particular, the Arbitrator found it "significant" that Section 12(b) treats allocations under "current spatial configuration" differently than those arising under future "reductions in footprint, sp[at]ial [re]configuration, or changes to staffing levels."[10] The Arbitrator was also unpersuaded by the Union's bargaining-history arguments, including "the significance of the Agency's decision to drop" the words "to the extent feasible" from Section 12(a)'s allocation of private offices to certain employees.[11] The Arbitrator determined the bargaining history of Section 12(a) did "not override the agreed-upon space[-]action provisions detailed in Section 12(b)."[12] The Arbitrator also found that, under Section 13(a), "employees occupying private offices are exempt from office[-]sharing circumstances generated by other provisions," but they are not guaranteed private offices "in perpetuity," regardless of "space actions taken under Section 12(b)."[13] Accordingly, the Arbitrator denied the grievance "in its entirety."[14]

On June 21, 2024, the Union filed exceptions to the award. On July 22, 2024, the Agency filed an opposition to the exceptions.

III. Preliminary Matter: An expedited, abbreviated decision is inappropriate in this case.

The Union requests we resolve its exceptions in an expedited, abbreviated decision.[15] An expedited, abbreviated decision is one that "resolves the parties' arguments without a full explanation of the background, arbitration award, parties' arguments, [or] analysis of those arguments."[16] Under § 2425.7 of the Authority's Regulations, when a party requests such a decision, the Authority will determine whether it is appropriate by considering "all of the circumstances of the case," including whether the opposing party objects to issuance of such a decision, and "the case's complexity, potential for precedential value, and similarity to other, fully detailed decisions involving the same or similar issues."[17]

The Agency neither objects to nor supports the Union's request.[18] After considering the circumstances of this case, and the complexity of the arguments presented, we find that an expedited, abbreviated decision is inappropriate. Accordingly, we deny the Union's request.[19]

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Union argues that the award is based on two nonfacts.[20] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which

[3] *Id.* at 12.
[4] *Id.* at 15.
[5] *Id.*
[6] *Id.*
[7] *Id.* (emphasis omitted).
[8] *Id.* at 16.
[9] *Id.* at 13.
[10] *Id.* at 14-15 (mistyping "spatial reconfiguration" as "special configuration").
[11] *Id.* at 16; *see also id.* at 7-8 (summarizing Union's argument).
[12] *Id.* at 16.
[13] *Id.* (internal quotation marks omitted).
[14] *Id.* at 17.
[15] Exceptions at 3.
[16] 5 C.F.R. § 2425.7.
[17] *Id.*
[18] Opp'n at 9 (acknowledging, but not responding to, Union's request).
[19] *See AFGE, Loc. 2338*, 73 FLRA 24, 24 n.7 (2022) (denying unopposed request for an expedited, abbreviated decision where Authority determined such a decision was not appropriate under the circumstances of the case (citing *AFGE, Loc. 1148*, 70 FLRA 713, 715 n.8 (2018) (Member DuBester concurring))).
[20] Exceptions at 43-44.

the arbitrator would have reached a different result.[21] Arbitrator statements that do not constitute factual findings provide no basis for finding awards deficient on nonfact grounds.[22]

The Union challenges as a nonfact the Arbitrator's statement that some of the Union's contract-interpretation arguments were "convoluted, baffling[,] and unpersuasive."[23] When addressing the Union's arguments about the "significance" of Section 12(b),[24] the Arbitrator characterized the Union's view of Section 12(b) as "represent[ing] a 'doomsday' office[-]space scenario."[25] The Union also excepts to this statement as a nonfact.[26] Both of these statements are characterizations of the Union's legal and contractual arguments. As such, they are not factual findings, and, thus, not a basis for finding the award deficient on nonfact grounds.[27]

We deny the nonfact exception.

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

The Union asserts that the award fails to draw its essence from Section 12.[28] The Authority will find an award is deficient as failing to draw its essence from a collective-bargaining agreement when the appealing party establishes 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 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.[29] Mere disagreement with an arbitrator's interpretation and application of an agreement does not provide a basis for finding an award deficient.[30] Further, disagreement with the weight an arbitrator gives evidence does not provide a basis for finding an award fails to draw its essence from an agreement.[31]

The Union challenges the Arbitrator's finding that Section 12 does not guarantee private offices to those who meet the five-day in-office requirement.[32] As described previously, Section 12 establishes the procedures for allocating offices to professional employees in a variety of situations, and differentiates between "current spatial" configurations and those that follow Agency space actions.[33] As relevant here, Section 12(a) allocates private offices for employees scheduled to work in-office five or more days each pay period, and Section 12(b) gives these employees "first priority" when "private offices are not available for all professional employees" due to "reductions in footprint, spatial reconfiguration, or changes to staffing levels."[34] Section 13(a) requires employees who work in-office four days or less each pay period – but not those who work in-office five days or more per pay period – to "participate in . . . space sharing."[35]

The Arbitrator interpreted these provisions as providing employees who are in-office more than five days each pay period a private office under *current* office configurations and priority in allocation of private offices following Agency space actions, but as not entitling those employees to a private office "in all space actions."[36]

The Union challenges the Arbitrator's interpretation as contrary to the plain meaning[37] and context[38] of Section 12, and the general rules of contract interpretation.[39] According to the Union, Section 12(a) requires the Agency to consider "in-office schedules during [the office-]space planning" discussed in Section 12(b).[40] However, in considering the Union's arguments presented in support of this interpretation, the

[21] *NTEU, Chapter 46*, 73 FLRA 654, 655-56 (2023) (*Chapter 46*) (citing *AFGE, Loc. 4156*, 73 FLRA 588, 590 (2023)).
[22] *U.S. Dep't of the Air Force, Edwards Air Force Base, Cal.*, 68 FLRA 817, 820 (2015) (*Edwards AFB*) (citing *U.S. DOJ, U.S. Marshals Serv.*, 66 FLRA 137, 142 (2012); *U.S. Dep't of the Interior, Nat'l Park Serv., Valley Forge Nat'l Hist. Park, Valley Forge, Pa.*, 57 FLRA 258, 260 (2001) (*Valley Forge*); *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div., Keyport, Wash.*, 55 FLRA 884, 888 n.2 (1999)).
[23] Exceptions at 43 (internal quotation mark omitted).
[24] Award at 14.
[25] *Id.* at n.7.
[26] Exceptions at 43-44.
[27] *See Edwards AFB*, 68 FLRA at 820 (denying nonfact exception to arbitrator's speculative statements because they were not factual findings); *Valley Forge*, 57 FLRA at 260 (same); *see also Chapter 46*, 73 FLRA at 656-57 (denying nonfact exception to arbitrator's "characterization of the grievant's actions").
[28] Exceptions at 28-43.
[29] *AFGE, Loc. 2369*, 73 FLRA 772, 773 (2023) (*Local 2369*) (citing *Chapter 46*, 73 FLRA at 657).
[30] *Id.* (citing *Consumer Fin. Prot. Bureau*, 73 FLRA 670, 671 (2023) (*CFPB*)).
[31] *Id.* (citing *SSA*, 70 FLRA 227, 230 (2017) (*SSA*); *U.S. Dep't of VA, James J. Peters VA Med. Ctr., Bronx, N.Y.*, 71 FLRA 1003, 1005 (2020) (*VA*) (Member Abbott dissenting on other grounds)).
[32] Exceptions at 28-29.
[33] *See* Award at 3 (quoting Section 12(b)).
[34] *See id.* (quoting Section 12(b)).
[35] *Id.* at 4 (quoting Section 13(a)).
[36] *Id.* at 15-16; *id.* at 12 (noting stipulated issue of whether the Agency was "obligate[d]" to provide certain employees "private offices in all space actions").
[37] Exceptions at 29-32.
[38] *Id.* at 32-34.
[39] *Id.* at 34-35.
[40] *Id.* at 30.

Arbitrator found that neither Section 12(a) nor 13(a) guaranteed any employee a private office "in perpetuity," given the Agency's "clear and unambiguous" right under Section 12(b) to make changes that affect the availability of private offices.[41]

The Union has not identified any wording in Section 12 that conflicts with the Arbitrator's interpretation.[42] Rather, the Union merely argues for its preferred interpretation, which does not demonstrate that the Arbitrator's interpretation is irrational, unfounded, implausible, or in manifest disregard of Section 12.[43] Therefore, the Union does not prove the award is deficient on this ground.

The Union also argues that the Arbitrator wrongly discounted evidence – including Section 12's bargaining history and the actions of some Agency officials – that supports the Union's position.[44] As these arguments challenge the Arbitrator's weighing of the evidence, they are not a basis for finding the award deficient on essence grounds.[45]

We deny the essence exception.

C. The award is not incomplete, ambiguous, or contradictory so as to make implementation impossible.

The Union argues that the award is impossible to implement because it contradicts Article 34's telework provisions.[46] In order for the Authority to find an award deficient as incomplete, ambiguous, or contradictory, the appealing party must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain.[47]

The Union asserts the award contradicts Article 34's "voluntary" telework provisions by "allow[ing] the Agency to strip employees of their private office without any regard to how many days they elect to work in the office."[48] Although the Union expresses concerns with how the Agency could apply Section 12(b), it provides no explanation as to how the award – which denied the grievance and awarded no remedies – is impossible to implement.[49]

We deny this exception.

D. The award is not contrary to law.

The Union argues the award is contrary to common law governing contract interpretation.[50] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[51] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[52] In conducting that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.[53]

According to the Union, the award "allows the Agency to use arbitration to gain a benefit it did not negotiate," contrary to the principles of contract interpretation outlined in § 201(2)(a) of the Restatement

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[41] Award at 15-16; *see also id.* at 16 (reasoning that Section 13 "merely means that professional employees occupying private offices are exempt from office[-]sharing circumstances generated by other provisions of Sections 12/13," but only "in the absence of Agency space actions taken under Section 12(b)").

[42] *See NTEU*, 73 FLRA 315, 320-21 (2022) (Chairman DuBester concurring on other grounds) (rejecting essence exception where party "fail[ed] to identify any language" in negotiated agreement that "conflict[ed] with the [a]rbitrator's determination").

[43] *See USDA, Food & Nutrition Serv.*, 73 FLRA 822, 824 (2024) (rejecting arguments that "merely disagree[d] with" interpretation, where arbitrator "thoroughly discussed the agreement's terms and fully explained" his rationale (citing *Fed. Educ. Ass'n, Stateside Region*, 73 FLRA 747, 749 (2023))); *CFPB*, 73 FLRA at 672 (rejecting exception that "merely argues for its preferred interpretation of the agreement" (citations omitted)).

[44] Exceptions at 35-42.

[45] *See Local 2369*, 73 FLRA at 773 (finding party's disagreement with weight arbitrator gave witness testimony did "not provide a basis for setting aside the award on essence grounds" (citing *SSA*, 70 FLRA at 230; *VA*, 71 FLRA at 1005)).

[46] Exceptions at 33-34.

[47] *U.S. Dep't of the Army, Fort Huachuca, Ariz.*, 74 FLRA 18, 21 (2024) (*Army*) (citing *U.S. Dep't of the Army, U.S. Army Garrison, Picatinny Arsenal, N.J.*, 73 FLRA 700, 702 (2023), *recons. denied*, 73 FLRA 827 (2024)).

[48] Exceptions at 33-34; *see also id.* at 33 ("Telework always has been[,] and remains[,] optional, . . . and it requires affirmative steps on the part of the employee to request and be approved.").

[49] *See AFGE, Loc. 25*, 74 FLRA 3, 5 (2024) (denying exception where party did not explain how award denying grievance was impossible to implement) (citing *U.S. Dep't of VA, John J. Pershing Veterans Admin. Ctr., Poplar Bluff, Mo.*, 73 FLRA 842, 843 (2024)).

[50] Exceptions at 45-46.

[51] *Army*, 74 FLRA at 20 (citing *U.S. Dep't of the Army, U.S. Army Garrison, Directorate of Emergency Servs., Fort Huachuca, Ariz.*, 73 FLRA 919, 920 (2024)).

[52] *Id.*

[53] *Id.* (citing *AFGE, Loc. 2338*, 73 FLRA 845, 848 (2024)).

(Second) of Contracts (the Restatement).[54] However, the Authority has found that the Restatement "itself does not constitute a law within the meaning of [§] 7122(a) of the [Federal Service Labor-Management Relations Statute[55]] on which exceptions to an arbitration award can be predicated."[56] Moreover, the Union does not establish that "the common[-]law principles reflected in the Restatement govern[] the parties' collective[-]bargaining relationship."[57] Accordingly, this argument does not demonstrate that the award is contrary to law.

To the extent this exception challenges the Arbitrator's interpretation of Section 12, it is based on the same arguments as the previously rejected essence exception and we, likewise, reject it.[58]

We deny the contrary-to-law exception.

As we have denied all of the Union's exceptions, we need not consider its arguments concerning an appropriate remedy.[59]

V. Decision

We deny the Union's exceptions.

[54] Exceptions at 45-46 (arguing "the Agency negotiated in a manner specifically estopped under the Restatement" and the award "grant[s] a loophole that does not bind the Agency to th[e] negotiated agreement"); *see* Restatement (Second) of Conts. § 201(2)(a) (Am. L. Inst. 1981) ("Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made . . . that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party.").

[55] 5 U.S.C. § 7122(a).

[56] *NAGE, Loc. R3-10*, 51 FLRA 1265, 1271 (1996) (*NAGE*) (finding alleged violation of the "Restatement (Second) of the Law of Contracts" was not a basis for contrary-to-law exception); *see also id.* ("The Restatement [of Law series] is not promulgated by a legislative or executive body of any governmental entity, but rather is a publication by a private organization of legal scholars, and, as such, does not constitute a controlling authority." (citing *C.L. Maddox, Inc. v. Coalfield Servs., Inc.*, 51 F.3d 76, 81 (7th Cir. 1995))).

[57] *NAGE*, 51 FLRA at 1271-72 (denying exception alleging violation of the Restatement).

[58] *AFGE, Loc. 2052, Council of Prison Locs. 33*, 73 FLRA 59, 61 n.20 (2022) (Chairman DuBester concurring) (denying contrary-to-law exception based on the same arguments as rejected essence exception (citing *U.S. Dep't of VA, Denver Reg'l Off.*, 70 FLRA 870, 871 n.16 (2018) (Member DuBester concurring))).

[59] *See* Exceptions at 47-52; *see also NTEU*, 66 FLRA 611, 615 n.4 (2012) (finding it "unnecessary to address the [party's] requested remedies" after denying all exceptions).