74 FLRA No. 34

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL TRANSFER CENTER
OKLAHOMA CITY, OKLAHOMA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS #33
LOCAL 171
(Union)

0-AR-5961

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DECISION

February 27, 2025

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

I. Statement of the Case

Arbitrator Peter J. Clarke issued an award sustaining a Union grievance concerning the Agency's failure to offer an employee (the grievant) an overtime opportunity. As a remedy, the Arbitrator awarded the grievant backpay with interest. The Agency filed an exception to the award on contrary-to-law grounds. For the reasons explained below, we deny the exception.

II. Background and Arbitrator's Award

The Agency transports detainees outside of the prison by bus for a variety of reasons, including transporting inmates to and from other prison facilities. It also uses its buses for other purposes, including assisting other federal law-enforcement agencies. The Agency requires that all trips are staffed with two bus-certified officers and a bus-certified lieutenant.

The Agency received requests to assist another agency with bus trips to the Texas-Mexico border. The Agency offered the grievant an opportunity to work a planned bus trip beginning in November 2022, and the grievant accepted that opportunity. However, that bus trip did not occur. Later, the Agency provided staff for a bus trip beginning in December 2022 (December trip).

When the Agency did not offer the grievant the opportunity to staff the December trip as a bus officer, the Union filed a grievance alleging the Agency deprived the grievant of substantial overtime and violated Article 18 of the parties' agreement (Article 18) and a local memorandum of understanding (MOU). The Agency denied the grievance, and the parties proceeded to arbitration.

The parties did not stipulate an issue. The Arbitrator framed the issues as "[d]id the Agency violate the [Federal Service Labor-Management Relations] Statute, [l]aw, or [m]aster [a]greement . . . when [the grievant] was not deployed on [the December trip]? If so, what is the proper remedy?"[1]

Article 18 provides, in relevant part, that "qualified employees in the bargaining unit will receive first consideration for [overtime], which will be distributed and rotated equitably among bargaining unit members."[2] This provision also states that "[s]pecific procedures regarding overtime assignments may be negotiated locally."[3] Section 27 of the MOU states, in part: "[b]us overtime will be hired [two] days in advance or when authorization is received before the run. The bus crews assigned to the quarterly roster will take all scheduled and unscheduled bus runs unless they are unavailable."[4]

The Arbitrator noted the Union's claims that the parties have previously applied the term "qualified employees" in Article 18 to be "determined by seniority," and that the MOU "has been previously understood to assign overtime by seniority."[5] The Arbitrator found that neither the parties' agreement nor the MOU addressed seniority, but he stated that a "bona fide past practice" may become part of the parties' agreement to clarify an ambiguous contract provision.[6] Therefore, he considered the Union's argument that the parties had an established past practice of assigning overtime for the bus-trip assignments by seniority.

On this point, the Arbitrator found there was "unrefuted" witness testimony that "[b]us [o]fficers who are available for each bus trip, are assigned based on seniority" and that "the higher, more seniority" an officer has, the "more say [the officer has] in what trips [they]

[1] Award at 2.
[2] *Id.* at 3.
[3] *Id.*
[4] *Id.*
[5] *Id.* at 8.
[6] *Id.* at 8-9.

want."[7] Based on this testimony, the Arbitrator determined the Union established an enforceable past practice, and that the Agency violated that practice when it offered the December trip to officers with less seniority than the grievant. As a remedy, the Arbitrator awarded the grievant backpay with interest for the lost overtime.

On May 13, 2024, the Agency filed an exception to the award, and on July 1, 2024, the Union filed an opposition.[8]

III. Analysis and Conclusions: The Agency does not establish that the Arbitrator's finding of a past practice is deficient.

The Agency argues the award is contrary to law because the Arbitrator concluded the parties had a past practice without conducting the proper analysis.[9] However, the Agency relies on the past-practice framework that applies in unfair-labor-practice cases litigated before an administrative law judge. Within the context of exceptions to arbitration awards – even in cases that involve an unfair-labor-practice allegation – the Authority reviews whether a past practice exists under the nonfact framework.[10] Although the Agency asserts that the evidence relied on by the Arbitrator was insufficient, it does not challenge any findings as nonfacts.[11] Accordingly, the Agency's argument provides no basis for finding the award deficient.[12]

IV. Decision

We deny the Agency's exception.[13]

[7] *Id.* at 9 (quoting Exception, Attach. E, Tr. at 89) (internal quotation mark omitted).
[8] The Union requested, and the Authority's Office of Case Intake and Publication granted, an extension of time to file the opposition. *See* Extension of Time Order at 1. Therefore, the opposition is timely.
[9] Exception at 5, 6-8.
[10] *Broad. Bd. of Governors, Off. of Cuba Broad.*, 66 FLRA 1012, 1017 (2012), *pet. for review dismissed, Broad. Bd. of Governors, Off. of Cuba Broad. v. FLRA*, 752 F.3d 453, 459 (D.C. Cir. 2014).
[11] Exception at 7-8.
[12] *AFGE, Loc. 1012*, 73 FLRA 704, 706 (2023) (citing *U.S. Dep't of VA, Nashville Reg'l Off., VA Benefits Admin.*, 72 FLRA 371, 374 (2021) (Member Abbott concurring on other grounds)).
[13] Chairman Kiko notes that the Authority has previously held that arbitrators may not look beyond a collective-bargaining agreement – to extraneous considerations such as past practice – to modify an agreement's clear and unambiguous terms. *E.g.*, *U.S. HUD*, 72 FLRA 450, 452 (2021) (Chairman DuBester dissenting). Assuming the Arbitrator examined a past practice in this case to interpret *ambiguous* contract terms, he failed to identify the wording that he found sufficiently ambiguous to warrant resorting to past practice. However, the Agency did not file an essence exception to the Arbitrator's interpretation of the parties' agreement, and Chairman Kiko agrees that the Agency's contrary-to-law exception lacks merit because, as explained above, the nonfact framework applies in this context.