64 FLRA No. 136

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1633
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MICHAEL E. DEBAKEY
VETERANS AFFAIRS MEDICAL CENTER
HOUSTON, TEXAS
(Agency)

0-AR-4232

DECISION

April 30, 2010

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 Samuel J. Nicholas, Jr., filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency did not file an opposition to the exceptions.

The Arbitrator denied the Union's grievance seeking compensation for hospital chaplains during the time they are on-call, and seeking overtime pay when the chaplains respond to calls to return to work from on-call status. The Agency provides chaplains no compensation for being on-call, and offers only compensatory time when chaplains respond to calls to return to work. For the reasons discussed below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The grievance alleges that the Agency violated the parties' collective bargaining agreement (CBA) by failing to compensate the grievants, hospital chaplains, for on-call duty and by offering them only compensatory time, rather than overtime pay, for on-call responses. When the grievance was not resolved, it was submitted to arbitration.

The parties were unable to agree on the statement of the issue, so the Arbitrator framed the issue as follows:

> Did [the] Agency violate any provision of the [CBA], federal statute/ regulation and well recognized established past practice thereon when it did not compensate [the grievants] for call-back status as urged in the grievance? If so, what remedy do [the grievants] qualify for, and what may be deemed appropriate?

Award at 9.

The Arbitrator concluded that the Agency did not violate the CBA by following the compensation policies that the Union grieved. *Id.* at 12-13. The Arbitrator found that the parties had reached an "understanding/ agreement" modifying the CBA. *Id.* at 10. Under this "understanding/agreement," chaplains would not receive compensation for on-call duty and would receive only compensatory time for on-call responses. *Id.* at 10-11.

The Arbitrator based his finding that the parties had reached an "understanding/ agreement" on two determinations. *Id.* at 10. The Arbitrator determined that both parties consistently followed this practice concerning the compensation of chaplains for on-call duty for eight years. *Id.* at 9,10. In addition, the Arbitrator determined that the Union acquiesced in the practice, based on the absence of record evidence showing that the Union had filed any grievances or other complaints regarding the practice during the eight-year period. *Id.* at 11.

The Arbitrator found further support for his conclusion in the practice's conformity with government-wide Fair Labor Standards Act requirements that covered, among others, the chaplains' positions. Under these requirements, employees such as the chaplains may be required to accept compensatory time, in lieu of overtime pay, for irregular overtime work. *Id.* at 10-11 (citing 5 U.S.C. § 5543(a)(2) & 5 C.F.R. § 550.114(c)). The Arbitrator therefore denied the grievance.

III. Union's Exceptions

The Union contends that: (1) the Arbitrator exceeded his authority; and (2) the award fails to draw its essence from the CBA.

The Union claims that the Arbitrator exceeded his authority when he found that the parties had a past practice that modified the CBA. Exceptions at 17-19. As discussed below, the CBA has a number of provisions

that arguably require compensation for on-call duty and the time chaplains spend returning to duty from on-call status. Although the Union does not dispute the existence of a past practice, the Union argues that a past practice cannot rewrite a contract or create new contractual terms when the contract is clear and unambiguous. *Id.* at 16-21 (citing *Judsen Rubber Works, Inc. v. Mfg., Prod. & Serv. Workers Union, Local No. 24,* 889 F. Supp. 1057, 1064 (N.D. Ill. 1995) (*Judsen Rubber Works*)).

The Union relies on a "no modification clause" in the CBA which the Union argues limits the scope of the Arbitrator's authority to the CBA's provisions. *Id.* at 17 (citing Article 61, Section 5 of the CBA). In the Union's view, the award improperly disregards a number of those provisions addressing on-call compensation for chaplains. For example, the Union cites Article 20, Section 5, Paragraph E of the CBA, [1] which, it alleges, obligates the Agency to pay chaplains overtime for on-call duty because chaplains are required to wear and respond to pagers. *Id.* at 18-19. Similarly, the Union points to Article 20, Section 4, Paragraphs B and F, and Article 20, Section 5, Paragraph D of the CBA, [2] which, it alleges, allow chaplains to choose compensatory time or overtime pay for on-call responses. *Id.* at 19-20.

The Union also claims that the award fails to draw its essence from the CBA. In support, the Union cites the Arbitrator's alleged disregard of the same CBA provisions, discussed above, that the Union relies on as part of its "exceeds authority" claims. *Id.* at 18-21.

IV. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

For the reasons set forth below, we deny the Union's exception that the Arbitrator exceeded his authority.

The Union's "exceeds authority" exception lacks a foundation. The Union's exception is premised in substantial part on the CBA's "no modification clause." Exceptions at 17. The Union argues that this clause limits the Arbitrator's authority to a consideration of only the CBA's provisions. The Union contends that the Arbitrator's conclusion, that the parties had modified the CBA by establishing a past practice concerning chaplain on-call compensation, disregards this limitation on the Arbitrator's authority.

The issue raised by the Union concerning the CBA's "no modification clause" is not properly before the Authority. 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. *E.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008). There is no indication in the record that the Union raised the modification clause issue before the Arbitrator, even though the clause was clearly germane. The clause was clearly germane because a principal issue at arbitration was whether the parties' past practice modified their CBA. Therefore, the issue is not properly before the Authority. *See id.*

The Union's remaining claims that the Arbitrator exceeded his authority are also without merit. The Union claims that the Arbitrator exceeded his authority by disregarding certain CBA provisions. 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. *E.g., AFGE, Local 1617,* 51 FLRA 1645, 1647 (1996).

The Arbitrator's consideration of the CBA's provisions, as well as whether the parties had established a past practice modifying the CBA, is encompassed by the issue that was framed by the Arbitrator. As noted previously, that issue was, in pertinent part, "Did [the] Agency violate any provision of the [CBA], . . . and well recognized established past practice thereon" when the Agency followed the chaplain on-call compensation policies that the grievance challenges. Award at 9. Therefore, this aspect of the Union's "exceeds authority" exception is also without foundation.

---

1. The relevant portion of Article 20, Section 5, Paragraph E states, "Employees will not be required to stay at home or wear and respond to beepers/pagers unless they are in a pay status." Exceptions, J. Ex. 1A at 67.

2. The relevant portion of Article 20, Section 4, Paragraphs B and F state:

> B. When an employee works overtime . . . such overtime will be paid in increments of fifteen (15) minutes.
>
> . . . .
>
> F. Employees who are called back to work for a period of overtime unconnected to their regularly scheduled tour . . . are entitled to a minimum of two (2) hours of overtime pay.

Exceptions, J. Ex. 1A at 66-67. The relevant portion of Article 20 Section 5, Paragraph D states, "If on-call employees are called back to the station, they will receive a minimum of two (2) hours of pay." *Id.* at 67.

We therefore deny the Union's "exceeds authority" exception.

B. The award does not fail to draw its essence from the CBA.

For the reasons set forth below, we deny the Union's exception that the award fails to draw its essence from the CBA.

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*, 34 FLRA 573, 575 (1990). 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.

Here, the Arbitrator's interpretation of the CBA is based on his finding that the parties had modified the CBA by establishing a past practice on chaplain on-call compensation. Moreover, the Union disputes neither the Arbitrator's finding of a past practice, embodied in the parties' "understanding/agreement," nor what the past practice was. The principle employed by the Arbitrator to interpret the CBA is consistent with Authority precedent. Under Authority precedent, an arbitrator may appropriately determine whether a past practice has modified the terms of a collective bargaining agreement. Such a determination is a matter of contract interpretation subject to the deferential essence standard of review. *See, e.g., U.S. Dep't of Homeland Sec. Customs & Border Prot., El Paso, Tex.,* 61 FLRA 684, 686 (2006); *NTEU, Chapter 207*, 60 FLRA 731, 734 (2005); *see also* Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 630 (Sixth ed. 2003) (Elkouri) ("[A]n arbitrator's award that appears contrary to the express terms of the agreement may nevertheless be valid if it is premised upon reliable evidence of the parties' intent") (quoting *Int'l Bhd. of Elec. Workers, Local 199 v. United Tel. Co. of Fla.*, 738 F.2d 1564, 1568 (11th Cir. 1984) (*IBEW*)). [3]

It follows that the Union's "essence" exception to the award is baseless. As discussed above, the Arbitrator ruled that the Agency did not violate the CBA when it followed a past practice that modified the CBA. An award such as the award in this case, upholding agency action that is admittedly consistent with the parties' agreement as they have modified it, is not irrational, unfounded, implausible, or in manifest disregard of the modified agreement.

Similarly, the Union's claims, that the Arbitrator improperly disregarded CBA provisions that the past practice modified, should be rejected. There is nothing improper about the Arbitrator's determination to interpret the CBA as the parties modified it, rather than look to CBA provisions that had been superseded by the parties' past practice.

We therefore deny the Union's "essence" exception.

V. Decision

The Union's exceptions are denied.

3. The cases cited by the Union in its exceptions (at 16-21) do not undercut Authority precedent. Only one case cited by the Union, *Judsen Rubber Works*, stands for the proposition that an arbitrator cannot properly rely on the parties' past practice to modify the parties' unambiguous agreement. 889 F. Supp. at 1064. However, judicial and arbitral decisions on this issue are mixed. *See, e.g., IBEW*, 738 F.2d at 1568; *Loveless v. Eastern Air Lines, Inc.*, 681 F.2d 1272, 1278-79 (11th Cir. 1982) (*Loveless*); *see generally* Elkouri at 627-30. Furthermore, the principle on which the Authority is relying to resolve the essence exception in this case clearly effectuates the parties' intent with regard to the meaning of their collective bargaining agreement. *Cf. Loveless*, 681 F.2d at 1279 ("In construing any contract, including a collective bargaining agreement, determining the intent of the parties is the essential inquiry.").