65 FLRA No. 70

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 220
(Union)

0-AR-4485

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DECISION

December 16, 2010

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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 Sean J. Rogers 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 Arbitrator found that the Agency violated the parties' agreement by implementing a policy that restricted when certain employees could use annual leave. For the reasons set forth below, we dismiss the Agency's exception that the award is contrary to § 7106(a)(2)(A) of the Statute and deny the Agency's remaining exceptions.

II. Background and Arbitrator's Award

The Agency employs Teleservice Representatives (Representatives). Representatives answer a nationwide toll-free number maintained by the Agency and are responsible for answering questions from individuals who call this number. Award at 7. The Agency enacted a nationwide annual leave guideline (guideline) to govern leave requests made by Representatives. At the Agency, the days of the week are designated with four different "Levels." *Id.* "Level 1" days are the days of the week with the highest volume of callers, whereas "Level 4" days are the days with lowest volume of callers. *Id.* Pursuant to the guideline, no more than 10 percent of Representatives nationwide would be permitted to use annual leave on "Level 1" and "Level 2" days, while no more than 15 percent of Representatives nationwide would be permitted to use leave on "Level 3" and "Level 4" days. *Id.* at 8.

The Union presented a grievance arguing that the Agency's implementation of the guideline violated Article 31, § 2B of the parties' agreement, which states, in relevant part, that the Agency will "make every reasonable effort to allow the maximum number of employees to use leave."[1] Award at 4 (citation omitted). The parties stipulated that the issue for resolution was "[w]hether the [Agency] violated the [parties' agreement] by implementing annual leave restriction guidelines for [the Representatives]? If so, what shall be the remedy?" Award at 3.

The Arbitrator concluded that the Agency violated Article 31, § 2B of the parties' agreement by enacting the guideline. The Arbitrator determined that § 2B is a "plain language, comprehensive and detailed provision covering the [p]arties' collectively bargained work rules and rights on the granting and denying of annual leave requests." *Id.* at 21. The Arbitrator concluded that the Agency "retains the right to deny annual leave for reasons described . . . by [§ 2B]." *Id.* at 20-21. However, he further determined that § 2B requires the Agency to "normally grant annual leave requests absent schedule conflicts and workload interference" and to make "every reasonable effort to allow the maximum number of employees to be on annual leave[.]" *Id.* at 20. Moreover, relying on his interpretation, the Arbitrator found that nothing in § 2B permitted the Agency to create or enact the guideline. *Id.* at 21, 24.

In reaching the above conclusion, the Arbitrator rejected the Agency's argument that Article 31, § 2B "limits" the Agency's management rights. *Id.* at 22; *see also id.* at 23 ("[Agency] had no management

1. Article 31, § 2B of the parties' agreement provides:

> Normally, leave requested in advance will be granted except when conflicts of scheduling or undue interference with the work of the [Agency] would preclude it. Leave may also be granted when it is not scheduled in advance and workload considerations permit . . . The [Agency] will make every reasonable effort to allow the maximum number of employees to use leave.

Award at 4 (citation omitted).

right to change the [parties' agreement]."). According to the Arbitrator, the Agency "never asserted" to the Union that § 2B violates any portion of the Statute. *Id*. at 22. Furthermore, the Arbitrator rejected the Agency's reliance on certain Authority decisions to support the proposition that the Agency had the right to create and implement the guidelines; according to the Arbitrator, those decisions were inapplicable to the resolution of the Union's grievance because they involved negotiability determinations. *Id.* at 23.

The Arbitrator sustained the Union's grievance. He ordered the Agency to rescind the guideline; "return to status quo ante" and grant and deny annual leave requests pursuant only to the criteria set forth in Article 31, § 2B; and cease and desist from imposing "unilateral changes" to § 2B. *Id.* at 24.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the Arbitrator's award restricts the Agency's ability to deny leave and that, as such, it affects management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute, respectively. Exceptions at 7. Accordingly, the Agency contends that the Authority should apply the two-prong test set forth in *United States Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C.*, 53 FLRA 146 (1997) (*BEP*) and conclude that the award violates management's rights. *Id.* Specifically, the Agency contends that the award does not satisfy prong I of *BEP* because Article 31, § 2B, as interpreted by the Arbitrator, violates management's right to deny leave requests; as such, this provision is not an arrangement. *Id.* at 8-9. Further, the Agency argues -- without elaboration -- that, even if the provision is an arrangement, it is not appropriate because it "excessively interferes" with management rights. *Id.* at 9. Last, the Agency claims -- also without elaboration -- that the award does not satisfy prong II of *BEP* because the Arbitrator failed to reconstruct what action the Agency would have taken in the absence of the contractual violation found by the Arbitrator. *Id.*

The Agency also claims that the Arbitrator's award is contrary to law because the Arbitrator misapplied the Authority's "covered by" doctrine. *Id.* at 9-12. According to the Agency, the Arbitrator's determination that the Agency could not create the guideline because "the granting of annual leave is *covered by* Article 31, [§] 2B" inappropriately creates a "reverse covered by" doctrine that prohibits the Agency from exercising its management rights. *Id.* at 10-11 (quoting Award at 22) (emphasis in original). The Agency contends that the Arbitrator's decision inappropriately permits the parties' agreement to trump management's right to deny leave. *Id.* at 11.

Finally, the Agency contends that the Arbitrator's award fails to draw its essence from the parties' agreement. The Agency argues that Article 31, § 2B of the parties' agreement grants the Agency permission to deny leave requests to prevent "undue interference" with the Agency's workload, and that the guideline was enacted to prevent such interference. *Id*. at 12-13. According to the Agency, the Arbitrator's decision to rescind the guideline, therefore, creates doubt as to whether the Agency could *ever* deny leave requests. *Id.* at 13.

B. Union's Opposition

As a preliminary matter, the Union argues that the Agency's assertion concerning § 7106(a)(2)(A) of the Statute should be barred because it was not presented to the Arbitrator. Opp'n at 5.

Addressing the merits, the Union agrees that *BEP* applies to this case; however, it alleges that the award is nevertheless proper. The Union contends that the Arbitrator's interpretation of Article 31, § 2B satisfies prong I because this provision constitutes an arrangement for employees adversely affected by management's right to deny leave. *Id.* at 4 (citation omitted). Moreover, the Union contends that the provision is appropriate because it does not abrogate management's right to deny leave, it merely prevents the implementation of the guideline. *Id.* at 4-5 & n.2. The Union also asserts that the award satisfies prong II of *BEP* because: (1) there is a nexus between the Arbitrator's remedy -- rescinding the guideline -- and the Agency's violation of the parties' agreement; and (2) the Arbitrator properly reconstructed what action the Agency would have taken in the absence of its contractual violation. *Id.* at 5.

The Union also contends that the Arbitrator correctly found that the Agency was prohibited from implementing the guidelines because the use of leave is "covered by" Article 31, § 2B of the parties' agreement. *Id.* at 6. Based on this finding, the Union argues that the Arbitrator correctly found that the Union was not required to request to bargain over the matter. Further, the Union asserts that, regardless of whether the "covered by" doctrine applies, the

Agency was not permitted unilaterally to implement the guideline. *Id.* at 7.

The Union also rejects the Agency's claim that the Arbitrator's interpretation of Article 31, § 2B fails to draw its essence from the parties' agreement. Citing the Arbitrator's findings, the Union contends that the Arbitrator "clearly and methodically articulated his findings and rationale" in support of his conclusion that the guideline violated § 2B. *Id.* at 8. The Union asserts that it is not "reasonable to believe" that the Agency could still allow the "maximum number of employees to use leave[,]" as required by § 2B, *and* implement the guideline. *Id.* at 9.

IV. Preliminary Issue

The Authority's Regulations that were in effect when the Agency filed its exceptions provided that "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5.[2] Before the Arbitrator, the Agency argued that interpreting Article 31, § 2B to prohibit the enactment of the guidelines would interfere with management's right to assign work under § 7106(a)(2)(B). Exceptions, Attach. 4 at 12 (Agency's post-hearing brief). There is no indication in the record that the Agency also argued to the Arbitrator that such an interpretation would conflict with § 7106(a)(2)(A). Because this issue could have been, but was not, presented to the Arbitrator, § 2429.5 precludes the Agency from raising it for the first time in exceptions. *See, e.g., U.S. Dep't of Transp., FAA*, 65 FLRA 171, 172 (2010) (Member Beck concurring as to other matters) (agency's exception concerning management rights was barred by § 2429.5 of the Authority's previous Regulations). Accordingly, we dismiss this exception.

V. Analysis and Conclusions

A. The award is not contrary to law.

The Authority reviews questions of law raised by exceptions to an arbitrator's award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a standard of de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *Id.*

1. The award is not contrary to § 7106(a)(2)(B) of the Statute.

The Agency contends that the Arbitrator's award impermissibly affects management's right to assign work under § 7106(a)(2)(B) of the Statute. The Authority recently revised the analysis that it will apply when reviewing management rights exceptions to arbitration awards. *See U.S. Envtl. Prot. Agency*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *Fed. Deposit Ins. Corp., Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-07 (2010) (Chairman Pope concurring) (*FDIC, S.F. Region*). Under the revised analysis, the Authority will first assess whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115. If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b). *Id*. Also, under the revised analysis, in determining whether the award enforces a contract provision negotiated under § 7106(b)(3), the Authority assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and (2) if so, whether the arbitrator's enforcement of the arrangement abrogates the exercise of the management right. *See id*. at 116-18. In concluding that it would apply an abrogation standard, the Authority rejected continued application of an excessive interference standard. *Id*. at 118. Furthermore, in setting forth the revised analysis, the Authority rejected the continued application of the "reconstruction" requirement set forth in *BEP. FDIC, S.F. Region*, 65 FLRA at 106-07.

The parties do not dispute that the award affects management's right to assign work under § 7106(a)(2)(B) of the Statute. *See* Exceptions at 5-6; Opp'n at 3-4. Thus, we turn to whether the Arbitrator enforced a contract provision negotiated under § 7106(b). The Agency contends Article 31, § 2B does not constitute an appropriate arrangement under § 7106(b)(3) because it is neither an arrangement nor appropriate.

The Agency first asserts that § 2B, as interpreted and applied by the Arbitrator, is not an arrangement

2. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural regulations, including § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). Because the Agency's exceptions were filed before that date, we apply the earlier Regulations.

because it conflicts with management's right to assign work. Exceptions at 8-9. However, this is not the standard that the Authority relies on when it decides whether a provision constitutes an arrangement; rather, the Authority examines whether a provision, as interpreted and applied by an arbitrator, ameliorates or mitigates adverse effects that flow from management's exercise of its management rights. *E.g.*, *EPA*, 65 FLRA at 116 (citing *U.S. DOJ, Fed Bureau of Prisons, U.S. Penitentiary, Atlanta, Ga.*, 57 FLRA 406, 410 (2001) (Chairman Cabaniss dissenting)). Therefore, the Agency's claim that § 2B is not an arrangement because it conflicts with management's right to assign work is incorrect. Moreover, the Authority has held that provisions addressing the circumstances in which management can deny leave requests ameliorate the adverse affects flowing from management's right to deny leave requests. *See, e.g.*, *NTEU*, 45 FLRA 696, 724 (1992) (citation omitted). Article 31, § 2B ameliorates or mitigates the adverse effects caused by management's exercise of its right to deny leave by addressing the circumstances when the Agency can deny leave requests. Accordingly, we find that Article 31, § 2B is an arrangement under § 7106(b)(3). *See id.*

The Agency next contends -- without elaboration -- that, even if Article 31, § 2B is an arrangement, it is not appropriate because it excessively interferes with management's right to assign work. However, as stated above, the Authority no longer applies an excessive interference standard in determining whether an arbitrator has enforced a contract provision negotiated under § 7106(b)(3); rather, it applies an abrogation standard. Moreover, the Agency offers no explanation as to why its right to assign work is burdened by § 2B. Accordingly, we find that the Agency has failed to establish that § 2B, as interpreted and applied by the Arbitrator, abrogates management's right to assign work. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 61 FLRA 113, 116-17 (2005) (Member Armendariz dissenting) (citing *U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 55 FLRA 553, 558 n.3 (1999)) (rejecting claim that provision was not appropriate, and that award was therefore contrary to management rights, where agency failed to explain how provision abrogated management's right to assign work)).[3]

Based on the foregoing, we find that Article 31, § 2B was negotiated under § 7106(b)(3) of the Statute.

The Agency also asserts -- with no explanation -- that, even if Article 31, § 2B is an appropriate arrangement, the award is deficient under *BEP* because the Arbitrator failed to reconstruct what management would have done had it complied with § 2B. However, as noted above, the Authority no longer requires that an arbitrator's remedy reconstruct what management would have done had it not violated the contract provision. *FDIC*, 65 FLRA 179, 181 (2010). Moreover, as we held above, Article 31, § 2B is a properly negotiated contract provision. The Arbitrator's award enforces this provision. Accordingly, we conclude that the award does not impermissibly affect management rights by failing to reconstruct what the Agency would have done had it not violated the contract, and we deny the Agency's contrary to law exception.[4] *See, e.g., id.* (citing *FDIC, S.F. Region*, 65 FLRA at 107).

2. Covered By Doctrine.

The Agency also argues that the award is contrary to law because the Arbitrator's interpretation of Article 31, § 2B created a "reverse covered by" doctrine that improperly prohibits the Agency from exercising its management right to assign work. Exceptions at 11. The Agency's argument is flawed. Although the Arbitrator used the phrase "covered by[,]" Award at 22, his award contains no indication that he relied on the covered by doctrine or any variation thereof. Moreover, the Agency's argument is based on the flawed assumption that § 2B is contrary to management's right to assign work;

3. Member Beck agrees with the conclusion to deny the Agency's exceptions. He does not agree, however, with his colleagues' analysis of the contrary to law exception insofar as they address the question of whether the award affects the exercise of an asserted management right. For the reasons discussed in his concurring opinion in *EPA*, 65 FLRA 113, Member Beck concludes that where, as here, the Arbitrator is enforcing a contract provision that has been accepted by the Agency as a permissible limitation on its management's rights, it is inappropriate to assess whether the provision itself is an appropriate arrangement or whether it abrogates a § 7106(a) right. *Id.* at 120. The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. *Id.*; *see also FDIC, S.F. Region*, 65 FLRA at 107. Member Beck concludes that the Arbitrator's award is a plausible interpretation of the parties' agreement. Accordingly, Member Beck agrees that the Agency's contrary to law exceptions should be denied.

4. For the reasons set forth in her concurring opinion in *FDIC, S.F. Region*, 65 FLRA at 112, Chairman Pope agrees that the award is not deficient because the Arbitrator's remedy is reasonably related to the negotiated provision and the harm being remedied.

however, as we held above, § 2B is *not* contrary to this right. Accordingly, we reject this argument.

B. The award does not fail to draw its essence from the parties' agreement.

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 Agency claims that the Arbitrator's interpretation of Article 31, § 2B fails to draw its essence from the agreement because § 2B allows the Agency to deny leave when it would cause an "undue interference[,]" and the guideline was an attempt to prevent such interference. Exceptions at 13. After reviewing the language of § 2B, the Arbitrator concluded that it permits the Agency to deny leave requests when such requests would cause "undue interference" with the Agency's workload, Award at 20; however, he found that nothing in this language indicated that the Agency could create or enact any sort of leave guidelines. This conclusion was based on the Arbitrator's interpretation and application of § 2B. As set forth above, the Authority defers to the Arbitrator's interpretation of the agreement "because it is the [A]rbitrator's construction of the agreement for which the parties have bargained." *OSHA*, 34 FLRA at 576. The Agency's argument does not establish that the Arbitrator's interpretation of Article 31, § 2B is irrational, implausible, or otherwise deficient.

The Agency also argues that the Arbitrator's interpretation of Article 31, § 2B creates doubt as to whether the Agency could "ever deny requested annual leave." Exceptions at 13. However, as stated above, the Arbitrator determined that, under § 2B, the Agency unequivocally "retains the right to deny annual leave[.]" Award at 20-21; *see also id.* at 24 (Arbitrator reiterated his determination "that the granting *and denying* of annual leave" is governed by § 2B (emphasis added)). Consequently, this argument also fails to establish that the Arbitrator's interpretation is irrational, implausible, or otherwise deficient.

Accordingly, we find that the Agency has not demonstrated that the Arbitrator's interpretation of Article 31, § 2B fails to draw its essence from the parties' agreement.

VI. Decision

The Agency's exception regarding § 7106(a)(2)(A) is dismissed. The Agency's remaining exceptions are denied.