65 FLRA No. 114

UNITED STATES
DEPARTMENT OF THE TREASURY
FINANCIAL MANAGEMENT SERVICE
EMERYVILLE, CALIFORNIA
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 214
(Union)

0-AR-4677

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DECISION

February 23, 2011

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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 Elinor S. Nelson 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 changing employees' work schedules, and directed the Agency to reinstate the employees' prior schedules. For the following reasons, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievants are production employees at the San Francisco Financial Center (SFFC), Payment Facilities Branch (PFB), which is responsible for printing and wrapping checks issued by the federal government. Award at 3. Because the grievants' previous supervisor arrived at the office by 6:45 a.m., the grievants were permitted to work from 6:45 a.m. until 3:15 p.m., although their official shift was 7 a.m. to 3:30 p.m. *Id.* at 5. The Agency later appointed two new supervisors, each of whom arrived at 7 a.m. *Id.* at 6. An experienced employee who arrived at 6:45 a.m. served as acting supervisor in the absence of the grievants' immediate supervisor. *Id.* In March 2008, the grievants' immediate supervisor issued a memorandum stating that employees were required to work during their official hours of duty. *Id.* at 7. He cited "a lack of cognizant supervision in the [PFB] prior to 7:00 a.m." and "production difficulties due to the different work schedules" as reasons for the change. *Id.*

The Union filed a grievance on behalf of all affected employees, alleging that the Agency violated the parties' agreement, past practice, and bargaining obligations by unilaterally changing the employees' work schedules. *Id.* at 9. The grievance was unresolved and submitted to arbitration. *Id.* at 10.

At arbitration, the parties stipulated to the following issues: "Was the Agency's . . . change in work schedules for employees . . . consistent with the [parties' agreement]? . . . If not, what shall be the remedy?" *Id.* at 2. As an initial matter, the Arbitrator found that Article 36, Section 8(B) of the parties' agreement allows for supervisor-initiated schedule changes in only two circumstances: (1) a change in workload; or (2) a lack of cognizant supervision.[1] *Id.* at 18.

With regard to workload, the Arbitrator acknowledged that "[i]n 2008, the SFFC was tasked with issuing congressionally-mandated federal stimulus payments . . . without increased staffing[,]" but found that "vague, unsupported testimony about federal stimulus mandates does not substitute for objective data showing affected employees' workloads changed and precipitated their schedule changes[.]" *Id.* at 3, 20-21. The Arbitrator then determined that "the Agency violated Article 36, Section 8[(B)] of the [parties' agreement] when it cited and used 'production difficulties due to the different work schedules' . . . as a reason for the [Agency's] change in employees' work schedules"

1. Article 36, Section 8(B) states, in pertinent part: "A supervisor may change an employee's established work schedule by providing the employee with written notice two (2) weeks before the effective date of the change if (1) the workload or (2) cognizant supervision no longer permits the employee to remain on the employee's then current schedule." Exceptions, Attach. 6, Master Labor Agreement at 128.

because the term "workload," as used in Article 36, Section 8(B), "does not equat[e] [to] 'production difficulties[.]'" *Id.* at 21, 20.

With respect to cognizant supervision, the Arbitrator found that, given the "long-standing, management-sanctioned practice of . . . consistently designating [an experienced employee] to act as a supervisor," the Agency failed to establish that a "lack of cognizant supervision[] precipitated [the] employees' work schedule changes[.]" *Id.* at 25, 24. In this regard, she determined that "the phrase 'cognizant supervision' [as] used in . . . Article 36 suggests that this phrase means 'adequate supervision.'" *Id.* at 25.

The Arbitrator concluded that the Agency violated Article 36, including the "spirit of Article 36, Section 1, when . . . it unilaterally changed the alternative employee work schedules[.]"[2] *Id.* at 19. As a remedy, she directed, among other things, that the Agency reinstate the status quo ante with respect to the affected employees' work schedules. *Id.* at 28.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award fails to draw its essence from the parties' agreement on two grounds. Exceptions at 3-4, 6-7. First, the Agency asserts that the Arbitrator's finding that the term "workload" as used in Article 36 does not encompass "production difficulties" is an implausible interpretation of the agreement. *Id.* at 3-4. Second, the Agency maintains that the Arbitrator erred in finding that the Agency violated Article 36, Section 1 by failing to provide alternative work schedules (AWS) for employees. *Id.* at 6. In this connection, the Agency asserts that the award "completely ignores that Section 1 restricts AWS for shift workers, the very category of employees at issue." *Id.* at 6-7.

The Agency also contends that the remedy -- directing the Agency to reinstate the status quo ante with regard to employees' work schedules -- conflicts with the parties' agreement because it would permit some employees to work without supervision for up to thirty minutes. *Id.* at 8. In this regard, the Agency claims that "it is undisputed that Article 36 of the [p]arties' agreement contemplates the supervision of employees while they work." *Id.* The Agency also claims that "[a]rbitration awards that fail to reflect a reconstruction of the action management would have taken . . . are deficient and may be set aside." *Id.* (citing *U.S. Dep't of the Treasury, Bureau of Engraving & Printing*, 53 FLRA 146, 154 (1997) (*BEP*)).

The Agency further argues that the Arbitrator erred in finding that, despite the Agency's role in issuing the 2008 stimulus payments, the Agency failed to demonstrate that a change in workload precipitated the Agency's alteration of employees' work schedules. *Id.* at 4-5. In this connection, the Agency contends that the Arbitrator rejected "unchallenged testimony of an increased workload in 2008[.]" *Id.* at 5. Further, the Agency requests that the Authority take official notice of the "economic stimulus payments authorized by the U.S. Congress in 2008" because the payments were "widely discussed and reported by national news media[.]" *Id.* (citing *U.S. Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 56 FLRA 381, 384 (2000)).

B. Union's Opposition

The Union argues that the Agency's essence exceptions constitute "nothing more than a disagreement with the Arbitrator's interpretation of the [a]greement." Opp'n at 4, 6-8. The Union also argues that, assuming that the Agency challenges the award on nonfact grounds, this exception is deficient because the "factual matter of workload was vigorously disputed at [the] hearing[.]" *Id.* at 6.

IV. Analysis and Conclusions

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

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard 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

2. The relevant wording of Article 36, Section 1 is set forth *infra*.

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. *U.S. Dep't of Labor (OSHA)*, 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.

The Agency contends that the Arbitrator erred by finding that the term "workload," as used in Article 36, Section 8(B), does not encompass "production difficulties." Exceptions at 3-4. As noted previously, Section 8(B) provides, in pertinent part: "A supervisor may change an employee's established work schedule . . . if . . . the workload . . . no longer permits the employee to remain on the employee's then current schedule." Exceptions, Attach. 6, Master Labor Agreement (Master Labor Agreement) at 128. The Arbitrator found that "[p]roduction difficulties may indeed result in an increased, or decreased employee workload, but production difficulties and workload are not synonymous." Award at 20. The agreement does not define the term "workload," and the Agency provides no basis for concluding that the Arbitrator's interpretation was irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. Accordingly, we deny the exception.

The Agency further argues that the Arbitrator erred in finding that the Agency violated Article 36, Section 1 by failing to provide AWS for affected employees in this case. *Id.* at 6. In this connection, the Agency asserts that the award "completely ignores that Section 1 restricts AWS for shift workers, the very category of employees at issue." *Id.* at 6-7. Article 36, Section 1(B) states, in pertinent part: "[The Agency] and [the Union] with the concurrence of affected employees is able to design a schedule that . . . would accommodate AWS where excluded by contractual provision (for example, shift workers), [and] the local parties will work in partnership to review the availability of AWS to these employees." Master Labor Agreement at 122. Contrary to the Agency's contention, this provision does not preclude the Agency from developing an enforceable practice whereby shift workers and other contractually excluded employees are permitted to participate in AWS. The Agency provides no basis for finding that the Arbitrator's interpretation of that provision was irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, and, accordingly, we deny the exception.

The Agency also claims that the remedy -- directing the Agency to reinstate the status quo ante with regard to employees' work schedules -- conflicts with Article 36 of the parties' agreement because it would permit some employees to work without supervision for up to thirty minutes. Exceptions at 8-9. We construe this as a claim that the remedy fails to draw its essence from the agreement. The Arbitrator found that "the way in which the phrase 'cognizant supervision' is used in . . . Article 36 suggests that this phrase means 'adequate supervision[,]'" and "may encompass a 'knowledgeable [employee]' or a [l]ead who is directed to act for a supervisor during his/her absence[.]" Award at 25-26. However, the Arbitrator's interpretation of the agreement does not preclude the Agency from changing supervisors' schedules or designating a senior employee to serve as an acting supervisor, such that no work is performed without adequate supervision. Thus, the Agency's claim does not demonstrate that the remedy requires that employees perform work without "cognizant supervision" within the meaning of Article 36.

We note that, as an attachment to its exceptions, the Agency includes its post-hearing brief to the Arbitrator, along with two documents, drafted by external entities, that contain the word "cognizant" and allegedly demonstrate that the Arbitrator erroneously interpreted the term "cognizant supervision" as used in the parties' agreement. *See* Exceptions, Attach. 3. Although the Union moves to strike these documents, even assuming that the documents are properly before the Authority, they do not provide a basis for finding that the Arbitrator misinterpreted "cognizant" as the parties intended it to be used in the agreement. As such, the documents provide no basis for finding that it was irrational, implausible, unfounded, or in manifest disregard of the agreement for the Arbitrator to direct the remedy. Accordingly, we find it unnecessary to resolve the Union's motion to strike.

For the foregoing reasons, we deny the Agency's essence exceptions.

B. The award is not contrary to law.

We construe the Agency's claim that "arbitration awards that fail to reflect a reconstruction of the action management would have taken to resolve a

[violation of] a . . . provision . . . are deficient and may be set aside[,]" and its citation to *BEP*, as a contention that the award's remedy is contrary to § 7106 of the Statute. When a party's exceptions involve an award's consistency with law, the Authority reviews the questions of law raised by the arbitrator's award and the party's exceptions de novo. *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 de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id*.

The Authority recently revised the analysis that it will apply when reviewing management-rights exceptions to arbitration awards. *See U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *FDIC, 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.[3] If so, then the Authority examines whether the award provides a remedy for a violation of either an applicable law, within the meaning of § 7106(a)(2) of the Statute,[4] or a contract provision that was negotiated pursuant to § 7106(b) of the Statute. *Id*. In setting forth its revised analysis, the Authority specifically rejected the continued application of the reconstruction standard set forth in *BEP*. *FDIC, S.F. Region*, 65 FLRA at 106-107. Accordingly, under the revised analysis, exceptions based on an alleged failure to reconstruct are denied. *See, e.g., FDIC, Div. of Supervision & Consumer Prot., Dallas Reg'l Office*, 65 FLRA 348, 352-353 (2010); *FDIC*, 65 FLRA 179, 181 (2010).

Here, the Agency's exception is based entirely on the Arbitrator's alleged failure to reconstruct what the Agency would have done if it had not violated the agreement. As discussed above, the Authority has rejected continued application of the former reconstruction standard. Accordingly, we deny the exception.[5]

C. The award is not based on a nonfact.

We construe the Agency's claim that the Arbitrator erred in finding that, despite the Agency's role in issuing the 2008 stimulus payments, the Agency failed to demonstrate that a change in workload precipitated the Agency's alteration of employees' work schedules as an argument that the award is based on a nonfact. To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.*

Before the Arbitrator, the parties disputed whether a change in workload had occurred. *See* Award at 14 (Agency argued that SFFC "was tasked with issuing congressionally-mandated federal stimulus payments . . . which increased the workload without a staffing increase"); *id*. at 12 (Union argued that "[t]he workload in [PFB] did not justify a change to employees' work schedules"). With regard to the Agency's request that the Authority take official notice that Congress authorized stimulus payments in

3. For the reasons articulated in his recent concurring opinion and footnotes, Member Beck would conclude that it is unnecessary to assess whether the award affects the exercise of the asserted management right. The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. *See EPA*, 65 FLRA at 120 (Concurring Opinion of Member Beck); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Terre Haute, Ind.*, 65 FLRA 460, 462 n.2 (2011); *Soc. Sec. Admin., Dallas Region*, 65 FLRA 405, 408 n.5 (2010); *U.S. Dep't of the Air Force, Air Force Materiel Command*, 65 FLRA 395, 398 n.7 (2010); *U.S. Dep't of Health & Human Servs., Office of Medicare Hearings & Appeals*, 65 FLRA 175, 177 n.3 (2010); *U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 171, 173 n.5 (2010). Member Beck would conclude that the Arbitrator's award is a plausible interpretation of the parties' agreement and deny the exception.

4. We note that the "applicable law" examination is applied only in cases involving management rights under §7106(a)(2). *See U.S. Dep't of Transp., Fed. Aviation Admin.*, 58 FLRA 175, 178 (2002).

5. For the reasons set forth in her concurring opinion in *FDIC, S.F. Region*, 65 FLRA at 112 (Concurring Opinion of Chairman Pope), Chairman Pope agrees that the award is not deficient because the remedy is reasonably related to the negotiated provisions and the harm being remedied.

2008, the Arbitrator acknowledged those payments, but found that "vague, unsupported testimony about federal stimulus mandates does not substitute for objective data showing affected employees' workloads changed and precipitated their schedule changes[.]" *Id.* at 20-21. Thus, the Agency's reliance on those payments does not demonstrate that the Arbitrator clearly erred in finding that no change in workloads occurred. In addition, in an attachment to its exceptions, the Agency includes its post-hearing brief, along with a graph that purports to show that the Agency's workload increased in 2008 due to the stimulus payments. *See* Exceptions, Attach. 3. Although the Union moves to strike this graph, even assuming that the graph is properly before the Authority, it does not demonstrate that the Arbitrator clearly erred in her factual findings. Accordingly, we find it unnecessary to resolve the Union's motion.

For the foregoing reasons, we find that the Agency has not demonstrated that the award is based on a nonfact, and we deny the exception.

IV. Decision

The Agency's exceptions are denied.