65 FLRA No. 43

UNITED STATES
DEPARTMENT OF HEALTH
AND HUMAN SERVICES
OFFICE OF MEDICARE
HEARINGS AND APPEALS
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 229
(Union)

0-AR-4137

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DECISION

October 29, 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 Marvin E. Johnson filed by the Agency under § 7122 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 when it denied the grievant's request to work from home two days per week under the Agency's flexiplace program. For the reasons discussed below, we dismiss the exceptions regarding the Privacy Act and the Health Insurance Portability and Accountability Act (HIPAA), and we deny the remaining exceptions.

II. Background and Arbitrator's Awards

The grievant, an attorney, applied to participate in the flexiplace program, which is set forth in Article 36 of the parties' agreement, two days per week.[1] Award at 2. The Agency approved only one day per week, citing the Agency's "newness" and "statutory case production mandates[]" as reasons for denying the second day. *Id*. When this ruling was upheld during the Agency's administrative-review process, the Union filed a grievance, which was submitted to arbitration. *Id.* The issue, as framed by the Arbitrator, was: "Did the Agency's denial of one of the two flexiplace days requested by the [g]rievant violate the parties' [a]greement? If so, what is the appropriate remedy?"[2] *Id.* at 3.

The Arbitrator noted that it was uncontested that the grievant met the eligibility requirements for flexiplace, and he found that the parties' agreement provides for a maximum of two flexiplace days per week "under most circumstances." *Id.* at 8. He determined that, under the parties' agreement, flexiplace applications are evaluated based on the requesting employee's program eligibility and ability to perform assigned duties at an alternative work station. The Arbitrator interpreted Article 36 both as containing a rebuttable presumption in favor of approving two days per week and as permitting the Agency to approve fewer than two days for "work-related reasons." *Id.* The Arbitrator found unpersuasive the Agency's argument that the Agency was too recently created to provide specific empirical "work-related reasons" in support of its denial of the grievant's second day of requested flexiplace. *Id.* at 8-9. The Arbitrator stated that the Agency's "lack of aggregate performance data . . . should not affect its decision" in relation to the grievant, who had a position description, work plan, and performance standards. *Id.* at 9.

The Arbitrator noted that the Agency had broad discretion under the parties' agreement to monitor and restrict participation in a flexiplace program if an employee's performance "impairs the Agency's mission or operations." *Id.* However, he found that, unless there is evidence that the grievant's "performance would suffer and/or impair the Agency's mission or office operations, her request should be granted." *Id.* The Arbitrator found that there was no evidence that the grievant's performance had been adversely affected in the four months since she began working one flexiplace day and no evidence that it would be adversely affected

1. The relevant portions of Article 36 are included in the appendix to this decision.

2. Although the Arbitrator did not state that he framed the issue, the issue presented in the Agency's post-hearing brief is different from the Arbitrator's. *See* Exceptions, Ex. 3 at 2. Accordingly, we assume that the issue was not stipulated.

by working two flexiplace days. *Id.* In view of the Agency's discretion and ability to monitor the grievant's performance, the Arbitrator also found that Article 36 did not conflict with management's rights under § 7106(a) of the Statute. *Id.* at 10. Accordingly, the Arbitrator concluded that the Agency violated Article 36 by failing to grant the grievant's request for two flexiplace days. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award is contrary to management's rights to assign work and determine internal security practices under § 7106 of the Statute. Both of the Agency's management-rights arguments are based on the assertion that Agency policy does not allow Medicare files, including paper and electronic copies of these files, to be transported to an employee's home. Exceptions at 5. With regard to the right to assign work, the Agency asserts that Authority precedent provides that the location at which work is performed is related to the right to assign work if the existence of a relationship between the job location and duties can be established. *Id.* at 6. According to the Agency, such a relationship exists in this case because employees do not have access to Medicare files while at home and, thus, cannot perform all of their assigned duties from home. *Id.* at 5-6. With regard to the right to determine internal security practices, the Agency argues that its policy of not allowing employees to take Medicare files home is part of its plan to safeguard its personnel, property, and operations, and the award – which would require the grievant to take such files home – would interfere with that policy. *Id.* at 6-8. In addition, the Agency argues that the award is based on an interpretation of Article 36 that would render Article 36 unenforceable.

The Agency also argues that the award is contrary to the Privacy Act because the Agency's published list of routine uses for Privacy-Act-protected information does not include transportation to and from employees' homes, and such use is contrary to the Privacy Act. *Id.* at 8-9. In addition, the Agency contends that the award is contrary to HIPAA because the notification that the Agency provides to its clients about how their Medicare files are used does not list transportation to employee homes. *Id.* at 10.

Further, the Agency alleges that the award is based on a nonfact because the Arbitrator based his award on evidence relating to matters that occurred after the Agency's decision to deny the grievant's flexiplace request. Specifically, the Agency argues that the grievant's performance on flexiplace is irrelevant to its decision to allow only one day of work from home. *Id.* at 11. The Agency also alleges that the Arbitrator exceeded his authority by considering this information. *Id.* According to the Agency, the Arbitrator avoided resolving the issue of whether the Agency's decision was improper by relying on information available only after the decision was made. *Id.* at 12.

B. Union's Opposition

In response to the Agency exception regarding the right to assign work, the Union argues that the Agency presented no evidence to support the claim that it has a policy against transporting Medicare files to employees' homes. Opp'n at 7. The Union also argues that the Agency's argument regarding the right to determine internal security practices should not be considered because it was not raised before the Arbitrator. *Id.* at 7-8. In the alternative, the Union argues that that the Agency presented no evidence to support its claim that the Agency's asserted internal security policy would restrict employees from working from home two days -- but not one day -- per week. *Id.* at 8. According to the Union, the award does not affect management rights but, if it does, then the award is not deficient because it enforces negotiable procedures. *Id.* at 10-11.

The Union argues that, under § 2429.5 of the Authority's Regulations, the Agency's exceptions related to the Privacy Act and HIPAA are barred because they were raised for the first time in exceptions. *Id.* at 4. Further, the Union maintains that the award is not based on nonfact because the Arbitrator properly considered evidence related to the grievant's performance on flexiplace. *Id.* at 11-12. The Union also maintains that the Agency has not established that the Arbitrator exceeded his authority because its exception does not fall into any of the categories recognized by the Authority. *Id.* at 12.

IV. Analysis and Conclusions

A. The award is not contrary to management's rights to assign work and to determine internal security procedures.

We review questions of law raised by exceptions to an arbitrator's award *de novo. See, e.g., NFFE, Local 1437*, 53 FLRA 1703, 1709 (1998). In

applying a standard of *de novo* review, we determine whether the arbitrator's legal conclusions are consistent with the applicable standard of law. In making that determination, we defer to the arbitrator's underlying findings of fact. *See id.* at 1710.

The Authority has long held, and has recently reaffirmed, that in resolving whether an arbitrator's award is contrary to a management right under § 7106(a) of the Statute, we first examine whether the award affects the exercise of the right.[3] *See, e.g., U.S. Envtl. Prot. Agency*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *AFGE, Local 1441*, 61 FLRA 201, 205 (2005). If it does not, then we deny the exception. *See, e.g., Fed. Deposit Ins. Corp., Div. of Supervision & Consumer Prot., S.F. Region*, 64 FLRA 79, 81-82 (2009) (Chairman Pope dissenting in part on other grounds).

The Agency's management-rights exceptions are premised on the Agency's claim that it has a policy forbidding the removal of Medicare files from its offices. However, the Arbitrator made no finding about such a policy in his award, and the record contains no evidence regarding such a policy. As there is no evidence to establish the existence of this policy, and the Agency presented no other arguments related to management's rights on appeal, we find that the Agency has not established that the award affects the cited management rights as alleged. *See SSA, Chi. Region, Cleveland, Ohio Dist. Office, Univ. Circle Branch*, 56 FLRA 1084, 1088-89 (2001) (agency must support its claim that a given action constitutes the exercise of a right).

Accordingly, we deny the Agency's management-rights exceptions.

B. We dismiss the exceptions regarding the Privacy Act and HIPAA.

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.[4] The record indicates that arguments related to the Privacy Act and HIPAA were not raised before the Arbitrator. Further, there is no basis for finding that these arguments could not have been raised at that time. As the Agency could have, but did not, raise its Privacy Act and HIPAA arguments before the Arbitrator, the claims are not properly before the Authority. *See U.S. DOD, Def. Distrib. Depot, Anniston, Ala.*, 61 FLRA 108, 109 (2005) (Authority was barred from considering arguments raised for the first time on appeal). Accordingly, we dismiss the Agency's exceptions regarding the Privacy Act and HIPAA.

C. The award is not based on 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).

Although the Agency argues that the decision is based on a nonfact, it does not establish that evidence related to the grievant's performance on flexiplace was "clearly erroneous" or that the Arbitrator would have reached a different result if he had not considered the evidence. *See United Power Trades Org.*, 62 FLRA 493, 496 (2008) (nonfact exception denied where argument was "misplaced" and failed to establish elements of nonfact). Instead, the Agency challenges the Arbitrator's use of the evidence and, under Authority precedent, such challenges provide no basis for finding an award deficient. *NFFE, Local 1827*, 52 FLRA 1378, 1385 (1997). Accordingly, we deny this exception.

3. Member Beck agrees with the conclusion to deny the Agency's exceptions. He does not agree, however, with his colleagues' analysis that begins with the question whether the award affects the exercise of management's § 7106(a) rights. For the reasons discussed in his Concurring Opinion in *EPA*, 65 FLRA 113 (2010), 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 rights, it is inappropriate to assess whether the provision affects those rights. *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.* Member Beck concludes that the Arbitrator's award (directing the Agency to approve the grievant's request to work two telework days) is a reasonable implementation of the parties' agreement.

4. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including 5 C.F.R. § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Agency's exceptions in this case were filed before that date, we apply the prior Regulations.

D. The Arbitrator did not exceed his authority.

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. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In the absence of a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference. *AFGE, Local 933*, 58 FLRA 480, 482 (2003) (*AFGE*). In addition, in the absence of a stipulated issue, arbitrators do not exceed their authority when they resolve a matter relating to an issue they have formulated and their award is directly responsive to the formulated issue. *NFFE, Local Lodge 2276, IAMAW*, 61 FLRA 387, 389 (2005) (citing *AFGE, Local 1741*, 61 FLRA 118, 120 (2005)).

In this case, the parties did not stipulate to the issues before the Arbitrator, and, as such, we defer to the Arbitrator's formulation of the issue. *See AFGE*, 58 FLRA at 482. In resolving the issue that he framed, the Arbitrator found it necessary to determine whether the Agency relied on "work-related reasons" for denying the grievant's second requested flexiplace day, and, in resolving that issue, the Arbitrator found that the Agency had presented no evidence indicating that the grievant's performance would suffer or affect the Agency's mission or operations, or that it had done so. Award at 8-9. As the award is directly responsive to the formulated issue, the Agency has not demonstrated that the Arbitrator resolved an issue that was not properly submitted to arbitration. Accordingly, we find that the Agency has not demonstrated that the Arbitrator exceeded his authority, and we deny this exception.

V. Decision

The Agency's exceptions regarding the Privacy Act and HIPAA are dismissed, and the remaining exceptions are denied.

APPENDIX

Article 36: Flexiplace

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Section 2

A. All OS/AoA regional and Headquarters bargaining unit employees will have the option of applying for the flexiplace program, with the understanding that approval for participation requires meeting all program requirements . . . .

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Section 3

A. Employees who desire to work at an alternative duty station must complete a Statement of Interest to Participate in Flexible Workplace (Flexiplace) Program (Appendix 3). The employee must submit the form to his/her supervisor for consideration. The supervisor may recommend approval or disapproval, following which the form will be forwarded to the designated management official for final decision.

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Section 6

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B. For [regular and recurring] flexiplace, employees are approved to work a fixed number of days per week or per pay period.

1. Employees may be approved by supervisors for a maximum of two (2) days per week working at an alternate duty station under most circumstances.

2. If an employee requests to work at the alternate duty station two days per week, and s/he otherwise meets all eligibility requirements of the flexiplace program (including suitability and portability of her/his work to be performed at the alternate duty station), a rebuttable presumption in favor of approval of the two days will apply.

3. The [Agency] may approve less than an employee's requested two days per week of working at the alternate duty station for work-related reasons. If the supervisor reduces the number of days in this manner, the reason(s) for the reduction will be provided to the employee in writing.

Exceptions, Ex. 5.