66 FLRA No. 103

SPORT AIR TRAFFIC CONTROLLERS ORGANIZATION
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
AIR FORCE FLIGHT TEST CENTER
EDWARDS AIR FORCE BASE, CALIFORNIA
(Agency)

0-AR-4708

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DECISION

March 20, 2012

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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 Philip Tamoush 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 filed an opposition to the Union's exceptions.

The Arbitrator found that the parties' agreement allowed the Agency to unilaterally change the starting times of employees who were on compressed work schedules. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

Under Article 20 of the parties' agreement, the employees at issue in this case work ten hours a day, four days a week. *See* Award at 2-3. Previously, the Agency assigned the employees to one of several shifts that began in the morning. *See id.* at 2. Subsequently, the Agency unilaterally changed the starting time of some employees' shifts to noon. *See id.* at 2-3; Exceptions at 6; Opp'n at 2-3. In response, the Union filed a grievance, which was unresolved and submitted to arbitration. *See* Award at 3.

At arbitration, the Arbitrator framed two main issues: (1) whether he should rely on an award of Arbitrator John D. Perone, *see* Exceptions, Attach. 26 (the Perone award) at 2, which had found that the Agency did not violate Article 20 by unilaterally changing the starting time of certain employees' shifts, *see* Award at 2, 5-6; Perone Award at 18; and (2) whether Article 20 establishes a compressed work schedule and, if so, whether it "fall[s] under" the Federal Employees Flexible and Compressed Work Schedules Act of 1982 (the Act),[1] Award at 2. The Arbitrator stated that, if necessary, he would consider appropriate remedies. *See id.*

With regard to the first issue, the Arbitrator determined that he would rely on the Perone award. *See id.* at 5-6. Specifically, the Arbitrator stated that he would "give effect to Arbitrator Perone's analysis of Article 20, and especially its Section 4 [Article 20-4],[2] which essentially precludes, or does not require, consideration of the [Act], which the Union claims was ignored by [Arbitrator] Perone." *Id.* at 5-6. The Arbitrator found that Article 20-4 permits changes in tours of duty and working hours, i.e., "shift changes," without negotiations. *Id.* at 6-7. Also, the Arbitrator rejected the Union's reliance on Article 20, Section 3 of the parties' agreement (Article 20-3), and agreed with Arbitrator Perone that the "term 'offer' . . . does not imply an . . . intrusion into [m]anagement's reserved right to make changes pursuant to . . . [Article 20-4]."[3] *Id.* at 6.

With regard to the second issue, the Arbitrator found that Article 20 establishes a compressed work schedule and "falls under" the Act. *Id.* at 7. But he found that the Agency did not violate the parties' agreement because Article 20 "does not require negotiations" over when employees start their shifts. *Id.* Having found no violation of the parties' agreement, the Arbitrator denied the grievance. *Id.* at 6.

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the award is based on a nonfact. Exceptions at 9. Specifically, the Union challenges the Arbitrator's statement that he would "give effect to Arbitrator Perone's analysis of Article 20, and especially its Section 4, which essentially precludes, or does not require, consideration of the [Act]." Award at 5-6. According to the Union, this statement is erroneous because Arbitrator Perone did not analyze

[1] The pertinent wording of the Act is set forth *infra*.

[2] Article 20-4 states: "It is understood that tours of duty and working hours may be changed during the life of the contract without any modification/supplementation of the contract." Award at 2.

[3] Article 20-3 states, in pertinent part, that the Agency may "offer variations of the [forty-]hour workweek including changes of tours of duty and regular days off." Award at 2.

Article 20-4 and did not "reference" the Act. Exceptions at 10.

Next, the Union asserts that the award fails to draw its essence from the parties' agreement. *Id.* at 11. Specifically, the Union alleges that: (1) Article 20-4 cannot be interpreted to "preclude . . . negotiations" because the parties had negotiated shift times in the past, *id.* at 12; (2) the Arbitrator's interpretation of Article 20-4 would render Article 20, Sections 1 through 3 "meaningless,"[4] *id.* at 14; (3) Article 20-4 does not include the word "'Employer'" and therefore does not give the Agency the authority to establish a new start time, *id.*; (4) Article 20-4 cannot be interpreted to "preclude . . . consideration of the [Act]," *id.* at 12; (5) the Arbitrator should not have relied on Article 20-4, because it does not "per se . . . permit changes in tours of duty and working hours," *id.* at 13-14; (6) the Arbitrator should have considered Article 6, Section 1 (Article 6-1),[5] and a memorandum of understanding (MOU) between the parties,[6] because they address "[n]egotiating changes in . . . matters affecting working conditions," *id.* at 14; and (7) the Agency violated the MOU when it unilaterally assigned employees to the new start time, *see id.* at 12, 14. Further, the Union maintains that the Arbitrator's interpretation of Article 20-4 is "incompatible with" the Act, specifically 5 U.S.C. § 6131 (§ 6131), because it would "obviate" the authority of the Federal Service Impasses Panel (FSIP). *Id.* at 13. Additionally, the Union asserts that the Arbitrator's interpretation would "negate and nullify" a decision by the FSIP that "directed the Agency to rescind its determination to end the [compressed work schedule]." *Id.* (citing *Dep't of the Air Force, Air Force Test Flight Ctr., Edwards AFB , Cal.*, Case No. 10 FSIP 92 (2010) (*Edwards AFB*)).

Further, the Union contends that the award is contrary to law. Specifically, the Union contends that the award conflicts with: (1) § 6131, because the Arbitrator interpreted Article 20-4 to "allow [the Agency] to . . . terminate a [compressed work schedule] without . . . [finding an] adverse agency impact," *id.* at 5-6; and (2) § 7106 of the Statute, and court and Authority precedent, because the Arbitrator "appl[ied] management rights clause of the [parties' agreement] to the [compressed work schedules]," *id.* at 6 (citations omitted), despite the fact that the Agency does not have a statutory right to unilaterally terminate compressed work schedules that have been established under the Act.

Finally, the Union alleges that the Arbitrator exceeded his authority. *Id.* at 14. Specifically, the Union asserts that by finding that Article 20-4 "essentially precludes, or does not require, consideration of the [Act]," Award at 5-6, the Arbitrator "rejected the stipulation" that Article 20 establishes a compressed work schedule that falls under the Act, Exceptions at 15.

B. Agency's Opposition

The Agency disputes the Union's exceptions. With regard to nonfact, the Agency asserts that an arbitrator's decision to rely on another award is generally "not subject to challenge." Opp'n at 7 (citing *AFGE, Local 2459*, 51 FLRA 1602, 1606 (1996)). With regard to essence, the Agency argues that: (1) Article 20-4 permitted the Agency to unilaterally change the starting times of employees' shifts, *see id.* at 16; (2) the Agency fulfilled any obligation it had to negotiate over such a change when it negotiated Article 20-4, *see id.* at 11; and (3) the MOU, which "only sets forth what is required . . . by statute," is not a basis for finding the award deficient, *id.* at 9-10 (internal quotation marks omitted). With regard to the Union's contrary-to-law exceptions, the Agency asserts that: (1) the Agency did not terminate a compressed work schedule, *see id.* at 2; and (2) the Agency fulfilled any obligation it had under § 6131 to negotiate over a new start time when it negotiated Article 20-4, *see id.* at 4-5. Finally, the Agency argues that the Arbitrator did not exceed his authority. *See id.* at 15-16.

IV. Analysis and Conclusions

A. The award is not 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.

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[4] Article 20, Section 1 (Article 20-1) states, in pertinent part, that the "current tour of duty" for employees is "four [ten]-hour days," and that the "established hours of duty within the tour of duty are" shifts starting at six, seven, and ten in the morning. Award at 2. Article 20, Section 2 (Article 20-2) pertains to another group of employees who are not involved in the grievance, and states that the tour of duty for those employees is five, eight-hour days, with shifts starting at four and seven in the morning, and at noon. *See id.*

[5] Article 6, Section 1 states, in pertinent part, that "personnel policies, practices, and matters affecting working conditions . . . will not be changed without providing the Union, when required, the opportunity to negotiate." Exceptions, Attach. 5 (CBA) at 3.

[6] The MOU states, in pertinent part:

> [The Agency] will not implement any change in personnel policies, practices and matters affecting working conditions, which are within the scope of management[']s authority until negotiations are complete.
>
> This means, that if the [p]arties cannot agree, there will be no implementation of the issue being negotiated until after attempted resolution by the Federal Mediation [and] Conciliation Service and/or until a decision or order has been issued by the Federal Service Impasses Panel.

Exceptions, Attach. 8 (MOU). *See also* Exceptions at 11.

See NFFE, Local 1984, 56 FLRA 38, 41 (2000) (*Local 1984*). An arbitrator's conclusion that is based on an interpretation of the parties' agreement does not constitute a fact that can be challenged as a nonfact. *See NLRB*, 50 FLRA 88, 92 (1995).

The Union asserts that a particular statement by the Arbitrator — specifically, that he would "give effect to Arbitrator Perone's analysis of Article 20, and especially its Section 4, which essentially precludes, or does not require, consideration of the [Act]," Award at 5-6 — is erroneous because Arbitrator Perone did not analyze Article 20-4 and did not reference the Act, *see* Exceptions at 10. But the Arbitrator did not conclude that Arbitrator Perone interpreted Article 20-4 as not requiring consideration of the Act. Rather, the Arbitrator concluded, under his own interpretation of the parties' agreement, that Article 20-4 does not require consideration of the Act. *See* Award at 5-6. Thus, even assuming that the Arbitrator's characterization of the Perone award is clearly erroneous, the Union does not demonstrate that, but for the error, the Arbitrator would have reached a different result. *See Local 1984*, 56 FLRA at 41. Further, to the extent that the Union is challenging the Arbitrator's interpretation of Article 20-4, his interpretation does not constitute a fact that can be challenged as a nonfact. *See NLRB*, 50 FLRA at 92.

Based on the foregoing, we find that the Union has not demonstrated that the award is based on a nonfact, and we deny the exception.

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 Union claims that the award fails to draw its essence from Article 20-4. *See* Exceptions at 12-14. Article 20-4 states that "tours of duty and working hours may be changed during the life of the contract without any modification/supplementation of the contract." Award at 2. Based on this wording, the Arbitrator determined that Article 20-4 permitted the Agency to change the starting times of the employees' shifts. *See id.* at 7. None of the Union's claims, *see* Exceptions at 12-14, provides a basis for finding that the Arbitrator's interpretation of Article 20-4 is irrational, unfounded, implausible, or in manifest disregard for the agreement, *see OSHA*, 34 FLRA at 575. Accordingly, we find that the Union has not demonstrated that the award fails to draw its essence from the parties' agreement, and we deny the exception.

C. The award is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the 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 the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.* Exceptions that are based on misunderstandings of an arbitrator's award do not show that an award is contrary to law. *See AFGE, Nat'l Joint Council of Food Inspection Locals*, 64 FLRA 1116, 1118 (2010) (*Food Inspection Locals*).

The Union asserts that the award is contrary to § 6131 because it would "allow [the Agency] to . . . terminate a [compressed work schedule] without . . . [finding an] adverse agency impact." Exceptions at 5-6. As relevant here, § 6131 provides that if the head of an agency finds that a compressed work schedule "has had or would have an adverse agency impact, the agency shall promptly determine not to . . . continue such schedule." 5 U.S.C. § 6131(a). Once an agency head has determined not to continue a compressed work schedule, the agency may "reopen the agreement to seek termination of the schedule." *Id.* § 6131(c)(3)(A). If the agency and the union "reach an impasse . . . with respect to terminating such schedule, the impasse shall be presented to the [FSIP]." *Id.* § 6131(c)(3)(B). Nothing in the plain wording of these statutory provisions bars parties from agreeing to contract provisions that allow an agency to unilaterally change starting times of shifts, *see id.* § 6131(a), (c), and the Union provides no basis for finding that § 6131 bars the Arbitrator's interpretation of Article 20-4 as allowing the Agency to do so here, *see* Exceptions at 5-6. The Union's citation to *Edwards AFB* does not support a contrary conclusion, as that decision did not involve a contract provision that, as interpreted by an arbitrator, allowed the Agency to

unilaterally change starting times of shifts. *See Edwards AFB*, 10 FSIP 92 at 3, 8-9. Thus, the Union provides no basis for finding the award contrary to § 6131.

The Union also asserts that the award is contrary to § 7106 of the Statute because the Arbitrator "appl[ied] management rights clause of the [parties' agreement] to the [compressed work schedules]," Award at 6, despite the fact that the Agency does not have a statutory right to unilaterally terminate compressed work schedules that have been established under the Act. But that is based on a misunderstanding of the award. The Arbitrator did not rely on § 7106 to find that the Agency did not need to negotiate over the start time. Rather, the Arbitrator relied on Article 20-4. *See* Award at 5-6. As the Union's assertion is based on a misunderstanding of the award, it provides no basis for finding that the award is deficient. *See Food Inspection Locals*, 64 FLRA at 1118.

Based on the foregoing, we deny the Union's contrary-to-law exceptions.

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).

The Union asserts that the Arbitrator "rejected" the parties' stipulation that Article 20 is a compressed work schedule that falls under the Act. Exceptions at 15. Contrary to the Union's claim, the Arbitrator found that Article 20 established a "compressed work schedule" that "falls under the [Act]." Award at 7. Accordingly, the Arbitrator did not "reject" the stipulation, and the Union's exception provides no basis for finding that the Arbitrator exceeded his authority. *See AFGE, Local 1617*, 51 FLRA at 1647-48. Thus, we deny the exception.

V. Decision

The Union's exceptions are denied.