66 FLRA No. 148

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2128
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE CONTRACT MANAGEMENT AGENCY
SAN ANTONIO, TEXAS
(Agency)

0-AR-4815

_____

DECISION

July 19, 2012

_____

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 Ronald F. Talarico 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 denied a grievance alleging that the Agency violated the parties' agreement and the Fair Labor Standards Act (FLSA) by changing the work schedules of certain bargaining unit employees to avoid overtime. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Union presented a grievance concerning the weekend work of certain bargaining unit employees. The grievance alleged that the Agency's scheduling of these employees violated Article 38 of the parties' agreement, including that provision's "prohibition on a change of work schedules solely to avoid paying overtime."[1] Award at 6; *see also id.* at 10. The grievance was denied and was submitted to arbitration. The Arbitrator framed the issues as follows:

> 1. Whether the Agency violated the [parties'] agreement by rotating [certain bargaining unit employees] through a Tuesday-Saturday schedule?
>
> 2. Whether the Tuesday-Saturday schedule violate[d] the [FLSA]?
>
> 3. Whether the Agency committed bad faith bargaining in the manner in which it created the Tuesday-Saturday scheduling rotation?

Id. at 10.[2]

The Arbitrator determined that the dispute concerned "a straight-forward matter of contract interpretation." *Id.* at 26. According to the Arbitrator, "in keeping with the authority set forth in" 5 U.S.C. § 6101,[3] the parties included in their agreement "provisions regarding the [workweek] and the payment of overtime." *Id.* at 27. In this regard, the Arbitrator found that Article 37, Section 2 of that agreement defined the Agency's "administrative work week as being *normally* Monday through Friday." *Id.* (internal quotation marks omitted). The Arbitrator also found that Article 37, Section 3B provides that "supervisors may adjust a standard work schedule to meet mission needs" and that, "unless a manager finds that it would adversely impact his/her organization in carrying out its function[s], or would substantially increase operating costs, he/she is required to schedule work on five days, Monday through Friday, when possible[,] with two consecutive days off." *Id.* (citing Article 37, Section 3D2). Moreover, the Arbitrator found that Article 38, Section 7 "specifically recognizes that an employee's work schedule may be changed to meet missions/operational needs," but that "an employee's regularly scheduled [workday] or [workweek] shall not be changed *solely* to avoid payment of overtime or earning of compensatory time." *Id.*

The Arbitrator examined documentary and testimonial evidence, and found that Agency management testified that Tuesday through Saturday work is scheduled to support a defense contractor, which always has performed work on Saturdays. *Id.* at 27-28.

[1] The text of the relevant provisions of the parties' agreement is set forth in the appendix to this decision.

[2] The Arbitrator found that the Tuesday-Saturday schedule did not violate the Fair Labor Standards Act and that the Agency did not bargain in bad faith when it created the Tuesday-Saturday rotation. The Union does not challenge these conclusions. Accordingly, we do not address them further.

[3] The pertinent text of 5 U.S.C. § 6101 and 5 C.F.R. § 610.121 is set forth in the appendix to this decision.

The Arbitrator further found that the Agency always has scheduled some bargaining unit employees to work on Saturdays to support the contractor "because some work is time-sensitive and cannot be delayed until Monday." *Id.* Based on the evidence, the Arbitrator concluded that: (1) it was "clear" that "recurring work" needed to be performed on Saturdays, *id.* at 28; (2) under Article 38 of the parties' agreement, the Agency had "the right to change" the normal Monday-Friday workweek to Tuesday-Saturday to meet mission/operational needs, *id.*; (3) the Union had not established that management had "abused [its] discretionary authority" by scheduling Saturday work, *id.* at 29; and (4) because "there is recurring work on Saturdays which is necessary to meet mission requirements," the Agency had not scheduled Saturday work solely to avoid paying overtime, *id.* The Arbitrator thus found that the Union was "unable to substantiate" its claim that the Agency had violated Article 38, Section 7, *id.*, and denied the grievance, *id.* at 33.

III. Positions of the parties

A. Union's Exceptions

The Union contends that Articles 37 and 38 of the parties' agreement "reiterate[]" 5 U.S.C. § 6101 and "incorporate[]" 5 C.F.R. § 610.121. Exceptions at 9, 12; *see also id.* at 13. The Union asserts that the award is contrary to 5 U.S.C. § 6101 and 5 C.F.R. § 610.121(a) because the Arbitrator "made no finding[s]" that the Agency "would be seriously handicapped in carrying out its functions or that costs would be substantially increased" before changing the employees' normal Monday through Friday work schedule. *Id.* at 13; *see also id.* at 9-10 (citing *AFGE, Local 3137*, 44 FLRA 1570, 1576 (1992)).

The Union also asserts that the award fails to draw its essence from the parties' agreement. *See id.* at 8. The Union contends that the Arbitrator "failed to give effect" to Article 37, Sections 3B and D, and Article 38, Section 7. *Id.* at 11. The Union maintains that these provisions were intended "to limit management to normally assigning work on Saturday and Sunday only on an overtime basis and not chang[ing] the employee's schedule solely to avoid paying overtime." *Id.* The Union contends that the award fails to draw its essence from the parties' agreement because Saturday work "was normal[,] recurring work that was not abnormal, unforeseen, or unusual." *Id.* at 12.

B. Agency's Opposition

The Agency asserts that the Union has failed to explain how the Arbitrator's award violates law or fails to draw its essence from the parties' agreement. Opp'n at 4. According to the Agency, Article 37, Section 3B permits the Agency to adjust schedules to cover the recurring Saturday work at issue. *Id.* The Agency maintains that, although the Union claims that the Agency may change an employee's schedule only if the work is "'abnormal, unforeseen or unusual,'" this standard is not found in the parties' agreement. Opp'n at 4 (quoting Exceptions at 12). The Agency also notes that Article 38, Section 7 provides that "'[a]n employee's work schedule may be changed to meet mission/operational needs.'" *Id.* at 5 (quoting Article 38, Section 7); *see also id.* at 2. According to the Agency, it was undisputed that there was Saturday work. *Id.* at 5. As a result, the Agency maintains, there "were mission/operational needs that permitted the Agency to adjust schedules by giving notice and the reason for the adjustment." *Id.*

IV. Analysis and Conclusions

A. 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*.

The Union asserts that the award is contrary to law, specifically, 5 U.S.C. § 6101 and 5 C.F.R. § 610.121(a), because the Arbitrator "made no findings" that the Agency "would be seriously handicapped in carrying out its functions or that costs would be substantially increased" before changing the employees' normal Monday through Friday work schedule. Exceptions at 13; *see also id.* at 9-10.

The Authority has applied statutory standards in assessing the application of contract provisions that mirror, or are intended to be interpreted in the same manner as, the Statute. *See, e.g., AFGE, Local 1164*, 64 FLRA 599, 600-01 (2010) (statutory principles applied in circumstance where provision of the parties' agreement was virtually identical to provision of Statute). However, in circumstances where an arbitrator finds that a contract provision did not mirror, or was not intended to be interpreted in the same manner as the provision of law and regulation involved, the Authority has not applied statutory standards in assessing the arbitrator's

application of the contract provision. *See, e.g., U.S. Dep't of the Army Headquarters, I Corps & Fort Lewis, Fort Lewis, Wash.*, 65 FLRA 699, 702 (2011) (statutory standards not applied to contract provision where arbitrator did not find that provision mirrored, or was intended to be interpreted in the same manner as provision of law and regulation).

The record shows that the Arbitrator viewed the issue before him as "a straight-forward matter of contract interpretation." Award at 26. In this regard, the Arbitrator did not frame the issue as whether the Agency had violated 5 U.S.C. § 6101 and 5 C.F.R. § 610.121, but, rather, as whether it had violated the parties' agreement. *Id.* at 10. Moreover, the wording of Articles 37 and 38 of the parties' agreement does not mirror 5 U.S.C. § 6101 and 5 C.F.R. § 610.121. *See* Award at 2-3; *see also* Appendix at 7-8. Consequently, we do not apply statutory standards to resolve the Arbitrator's interpretation of Articles 37 and 38.

The Union does not contend that the parties' agreement is contrary to law. As a result, in these circumstances, we find that the Union has not demonstrated that the award is contrary to law. Accordingly, we deny the Union's exception.

B. 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 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). 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 Union contends that the award fails to draw its essence from the parties' agreement because Saturday work "was normal[,] recurring work that was not abnormal, unforeseen, or unusual." Exceptions at 12. This contention provides no basis for finding the award deficient. As the Arbitrator found, the parties' agreement specifically provides that an employee's work schedule may be changed to meet mission and operational needs. *See* Award at 27, Article 37, Section 3B (providing that supervisors "may adjust a standard work schedule to meet mission needs, or for performance or conduct problems"); *id.* at 2-3, Article 38, Section 7 (providing that an "employee's work schedule may be changed to meet mission/operational needs" and "[a]n employee's regularly scheduled workday or worksheet shall not be changed solely to avoid payment of overtime or earning of compensatory time"); *see also id.* at 2, 3. The Arbitrator further found that there was "time-sensitive" work that needed to be performed on Saturdays, and, therefore, consistent with Articles 37 and 38, the Agency had the right to change the normal Monday through Friday workweek to Tuesday through Saturday in order "to meet mission/operational needs." Award at 28. The Union has failed to establish that the Arbitrator's interpretation of these provisions is unfounded, irrational, implausible, or manifest disregard of the agreement.

The Union further contends that the Arbitrator "failed to give effect" to Article 37, Sections 3B and D, and Article 38, Section 7. Exceptions at 11. As previously mentioned, the Arbitrator interpreted Articles 37 and 38 and found that: (1) the agreement "recognizes that [an] employee's work schedule may be changed to meet mission[]/operational needs," Award at 27, and (2) the Agency had the right, under Article 38, to change the normal Monday through Friday workweek to a Tuesday through Saturday schedule to meet mission/operational needs, *see id.* at 28. The Union has failed to establish that the Arbitrator's interpretation of these provisions is irrational, unfounded, implausible, or in manifest disregard of the agreement.

The Union further disagrees with the Arbitrator's factual findings that there was recurring work on Saturday, which was necessary to meet mission requirements, *see id.* at 29, and that such work was not scheduled solely to avoid overtime, *see id.* The Union does not assert that the award is based on a nonfact. As such, this assertion provides no basis for finding the award fails to draw its essence from the agreement. *See, e.g., SSA*, 66 FLRA 6, 9 (2011) (citing *AFGE, Local 12*, 61 FLRA 507, 509 (2006)) (finding a party's disagreement with an arbitrator's factual findings in the course of applying an agreement at arbitration does not demonstrate that an award fails to draw its essence from the agreement).

Based on the above, we find that the Union has not established that the award fails to draw its essence from Articles 37 and 38 of the parties' agreement. *See, e.g., SSA, Balt., Md.*, 66 FLRA 569, 572 (2012) (denying essence exception where the agency disagreed with the

arbitrator's interpretation of agreement and factual findings).[4] Accordingly, we deny the Union's exception.

V. Decision

The Union's exceptions are denied.

APPENDIX

The pertinent text of the parties' agreement is set forth below:

ARTICLE 37

HOURS OF DUTY

SECTION 2 – DEFINITIONS

A. Administrative work week: Normally Monday through Friday.

. . . .

SECTION 3 – PROCEDURES FOR ESTABLISHING STANDARD WORK SCHEDULES

. . . .

B. Supervisors may adjust a standard work schedule to meet mission needs or for performance or conduct problems. The employee will receive a reasonable amount of notice of the change and the reason for it.

D. Consistent with regulations, unless a manger finds that it would adversely impact his/her organization in carrying out its function or would substantially increase operating costs, the following rules apply in initially establishing or changing standard work schedules within an organization:

1. assign tours of duty at least one week in advance.

2. schedule work on 5 days, Monday through Friday, when possible, with 2 consecutive days off;

. . . .

ARTICLE 38

OVERTIME ASSIGNMENTS

SECTION 7 – CHANGES TO EMPLOYEE'S WORK SCHEDULES

An employee's work schedule may be changed to meet mission/operational needs. An employee's regularly

[4] To the extent the Union also asserts that the award fails to draw its essence from the parties' agreement because the Arbitrator "failed to correctly interpret the statute," Exceptions at 11, this claim is based on the Union's contrary-to-law claim that the Arbitrator erroneously applied 5 U.S.C. § 6101. Because the Authority does not analyze separately the Union's essence exception, we find that this claim provides no basis for finding the award deficient. *See, e.g., U.S. Dep't of Agric., Farm Serv. Agency, Kan. City, Mo.*, 65 FLRA 483, 484 n.3 (2011) (declining to analyze separately essence exception that was "substantively the same" as a contrary-to-law exception).

> scheduled workday or workweek shall not be changed solely to avoid payment of overtime or earning of compensatory time.

Exceptions, Attach. 1; see also Award at 1-3; Opp'n at 2-3.

The pertinent text of 5 U.S.C. § 6101 and 5 C.F.R. § 610.121 is set forth below:

5 U.S.C. § 6101(a) provides, in relevant part, as follows:

> § 6101. Basic 40–hour workweek; work schedules; regulations
>
> (a)(1) For the purpose of this subsection, "employee" includes . . . an employee whose pay is fixed and adjusted from time to time under section 5343 or 5349 of this title, or by a wage board or similar administrative authority serving the same purpose, but does not include an employee or individual excluded from the definition of employee in section 5541(2) of this title, except as specifically provided under this paragraph.
>
> (2) The head of each Executive agency, military department . . . shall—
>
> (A) establish a basic administrative workweek of 40 hours for each full-time employee in his organization[.]
>
> . . . .
>
> (3) Except when the head of an Executive agency, . . . determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide, with respect to each employee in his organization, that—
>
> (A) assignments to tours of duty are scheduled in advance over periods of not less than 1 week;
>
> (B) the basic 40-hour workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 days outside the basic workweek are consecutive[.]

5 C.F.R. § 610.121(a) and (b) provides:

> § 610.121 Establishment of work schedules
>
> (a) Except when the head of an agency determines that the agency would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he or she shall provide that—
>
> (1) Assignments to tours of duty are scheduled in advance of the administrative workweek over periods of not less than 1 week;
>
> (2) The basic 40–hour workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 days outside the basic workweek are consecutive[.]
>
> . . . .
>
> (b)(1) The head of an agency shall schedule the work of his or her employees to accomplish the mission of the agency. The head of an agency shall schedule an employee's regularly scheduled administrative workweek so that it corresponds with the employee's actual work requirements.
>
> . . . .