68 FLRA No. 48

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 17
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
FLEET READINESS CENTER MID-ATLANTIC
NEW ORLEANS, LOUISIANA
(Agency)

0-AR-5018

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DECISION

February 18, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The Agency required employees to submit proposed furlough schedules (schedules) consistent with a negotiated memorandum of understanding (MOU). The Agency denied schedules that three bargaining-unit employees submitted.

Arbitrator Norman Bennett concluded that the Agency violated the MOU when it denied the grievants' schedules. The Arbitrator found that the Agency was required to approve the schedules, as there was no impact on mission or workload requirements. But the Arbitrator awarded a remedy – restoration of annual leave or compensatory time off – to only two of the grievants, finding that the third grievant did not provide any evidence that he had used any kind of paid leave when the Agency denied his furlough-schedule request. The Arbitrator also did not award other remedies that the Union requested. The Arbitrator therefore found that neither party was the "losing party" for the purpose of apportioning the Arbitrator's fees and expenses. There are four questions before us.

The first question is whether the award fails to draw its essence from the parties' agreement because the Arbitrator did not find that the Agency was the "losing party" for the purpose of apportioning the Arbitrator's fees and expenses.[1] As Article 45.6 of the parties' agreement does not define the term "losing party," and the Union has not demonstrated that the Arbitrator's interpretation of the parties' agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement, the answer is no.

The second question is whether the award is based on the alleged nonfact that "neither party can be designated as the losing party."[2] Because an arbitrator's contractual interpretations cannot properly be challenged on nonfact grounds – and the Union's nonfact exception attempts to do so – the answer is no.

The third question is whether the Arbitrator's losing-party determination is contrary-to-law. Because the Union fails to support this exception with citation to legal authority, the answer is no.

The fourth question is whether the Authority should resolve the Union's request for attorney fees. Because the Arbitrator is the appropriate authority under 5 C.F.R. § 550.807(a) for resolving attorney-fee requests, the answer is no.

II. Background and Arbitrator's Award

The Budget Control Act of 2011[3] required Congress to pass a budget reduction plan by November 2011. However, Congress was unable to pass a budget plan, triggering a process known as "sequestration," which required across-the-board cuts to the federal discretionary budget.[4] Sequestration required many federal agencies, including the Agency, to furlough employees. The Agency notified the Union, which represents thirteen bargaining-unit employees, that employees would be furloughed for up to twenty-two days.

Upon Agency notification, the Union requested bargaining over the impact and implementation of the pending furloughs. The parties were unable to reach an agreement and contacted the Federal Mediation and Conciliation Service for assistance. Mediation was unsuccessful, and the Union requested assistance from the Federal Service Impasses Panel to resolve the parties' impasse.

During the impasse process, the parties continued negotiations. Also, the number of potential furlough days was reduced from twenty-two to eleven. The parties reached an agreement and signed an MOU that provided that an employee's "normal schedule for

[1] *See* Exceptions at 7.
[2] *Id.* at 9 (internal quotation marks omitted).
[3] Pub. L. 112-25 (Aug. 2, 2011).
[4] *SPORT Air Traffic Controllers Org.*, 68 FLRA 9, 9 (2014).

furlough would be one . . . eight[-]hour day per week."[5] But the MOU also provided that "mission/workload permitting, [bargaining-unit employees] may elect and be permitted to complete the furlough requirements in increments of between eight . . . and forty . . . hours per week . . . [i]f the schedule does not impact mission/workload requirements."[6]

Three bargaining-unit employees submitted different schedules that accounted for the eleven furlough days throughout the approved furlough period. But none of the schedules included at least eight furlough hours per week. Although the Agency initially approved the schedules, it later denied them because they were "not in compliance with the . . . MO[U], which states that employees shall [be furloughed at least] eight . . . hours per week during the furlough period."[7]

The Union filed a grievance, which the parties could not resolve, and the matter was submitted to arbitration. The Arbitrator framed the issues as, "whether the Agency violated the MO[U] by the manner in which it required employees to schedule furlough days resulting from sequestration. If so, the issue becomes the remedy."[8]

The Arbitrator found that, in accordance with the MOU, the grievants' schedules should have been approved if they included the required number of mandatory furlough days, and did not impact mission or workload requirements. He also found "no evidence regarding any impact on mission/workload requirements that would have precluded [the Agency from] approving the submitted furlough schedules."[9] As a remedy, the Arbitrator awarded restoration of annual leave or compensatory time off to two of the three grievants because they had used annual leave or compensatory time as a result of the improperly rejected schedules. The Arbitrator awarded a third grievant nothing because the Arbitrator did not find that he used any annual leave or compensatory time as a result of his rejected schedule. And the Arbitrator did not award other remedies that the Union requested, such as "order[ing] the [A]gency to acknowledge to bargaining[-]unit employees that the [MOU] had been violated."[10]

The Arbitrator then considered how his fees and expenses would be split, in accordance with the parties' collective-bargaining agreement. Article 45.6 of the parties' agreement states:

> The Arbitrator's fees and expenses shall be borne by the losing party. The Arbitrator shall determine the losing party. If there is a split decision in which neither party can be designated as the losing party, the fees and expenses will be shared equally by the [Agency] and the Union.[11]

The Arbitrator concluded that "neither party can be designated as the losing party" for the purpose of apportioning fees and expenses because he denied "a significant part of the remedy requested by the Union."[12] Accordingly, he evenly split his fees and expenses between the parties. The Arbitrator also retained jurisdiction, at the Union's request,[13] "in the event the Union submits an application for attorney's fees."[14]

The Union filed exceptions to the Arbitrator's award, and the Agency filed an opposition to the Union's exceptions.

III. Analysis and Conclusions

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

The Union argues that the award fails to draw its essence from Article 45.6 of the parties' agreement by determining that the Agency is not the "losing party."[15] The Union maintains that the Agency should be designated the "losing party" because the Arbitrator found that "the [A]gency violated the parties' [MOU,] and awarded the remedy requested by the Union."[16] Accordingly, the Union argues, the Agency should pay the Arbitrator's fees and expenses because Article 45.6 of the parties' agreement requires the Arbitrator's fees and expenses to "be borne by the losing party."[17]

The Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' 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

[5] Award at 3.
[6] *Id.*
[7] *Id.* at 4.
[8] *Id.* at 1.
[9] *Id.* at 6.
[10] Exceptions, Attach., Union's Post-Hr'g Br. (Post-Hr'g Br.) at 15.
[11] Award at 8.
[12] *Id.* at 9.
[13] Post-Hr'g Br. at 15.
[14] Award at 9. *See* Part III.D below.
[15] *See* Exceptions at 7.
[16] *Id.* at 10.
[17] *Id.* at 11.

parties' 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.[18] 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."[19]

Article 45.6 of the parties' agreement provides that "[i]f there is a split decision in which neither party can be designated as the losing party, the fees and expenses will be shared equally by the [Agency] and the Union."[20] In evaluating Article 45.6 of the agreement, the Arbitrator determined that a "significant part of the remedy requested by the Union is not granted" and therefore neither party "can be designated as the losing party."[21] For example, the Union requested that the Arbitrator "order the [A]gency to acknowledge to bargaining[-]unit employees that the [MOU] had been violated."[22] Moreover, the Arbitrator awarded an individual remedy to only two of the three grievants.[23]

Although the Arbitrator found that the Agency violated the MOU, the Union does not point to any language in the parties' agreement that requires the Arbitrator to conclude that a party has "lost" under such circumstances.[24] Moreover, the Union does not point to any language in the parties' agreement, and none is apparent, defining what it means to be "the losing party."

For these reasons, the Union does not establish that the Arbitrator's interpretation and application of Article 45.6 of the parties' agreement fails to draw its essence from the parties' agreement. Accordingly, we deny the Union's essence exception.

B. The award is not based on a nonfact.

The Union argues that "[t]he [A]rbitrat[or] relied on a nonfact, incorrectly claiming there is no losing party, when in fact the Union is the prevailing party and the Agency is the losing party."[25] The Union also claims as part of its nonfact exception that the Arbitrator's conclusion – that neither party can be designated as the "losing party" – is inconsistent with Authority precedent addressing when a union is a "prevailing party."[26]

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.[27] The Authority will not find an award deficient on nonfact grounds based on a party's disagreement with an arbitrator's interpretation and application of the parties' agreement.[28]

The Union's nonfact exception is unpersuasive for two reasons. First, the Arbitrator's determination that "neither party can be designated as the losing party"[29] is an interpretation and application of the parties' agreement which, as indicated, cannot be challenged as a nonfact.[30] Second, the Union's reliance on Authority case law is misplaced. The case the Union cites, *U.S. GSA, Northeast & Caribbean Region, New York, New York*,[31] deals with determining which party is the "prevailing party" for purposes of determining eligibility for attorney fees under 5 U.S.C. § 7701(g)(1), an issue having nothing to do with the Arbitrator's interpretation of specific language in the parties' agreement in this case. Accordingly, we deny the Union's nonfact exception.[32]

C. The Union fails to support its contrary-to-law exception.

The Union also claims that the Arbitrator's finding that the Agency is not "the losing party" is contrary-to-law.[33] The Authority's Regulations enumerate the grounds that the Authority currently recognizes for reviewing awards.[34] And § 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to dismissal or denial if: [t]he excepting party fails to raise *and support*" a ground listed in § 2425.6(a)-(c).[35]

Although the Back Pay Act is cited as a "[r]elevant [statutory p]rovision,"[36] the Union fails to provide any support for its contrary-to-law exception. Therefore, we deny the Union's contrary-to-law exception under § 2425.6(e)(1).

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[18] *See U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[19] *Id.* at 576.
[20] Award at 8.
[21] *Id.* at 9.
[22] Post-Hr'g Br. at 15.
[23] Award at 8-9.
[24] *See NTEU, Chapter 32*, 67 FLRA 354, 355 (2014).
[25] Exceptions at 10.
[26] *Id.* (citing *U.S. GSA, Ne. & Caribbean Region, N.Y.C., N.Y.*, 61 FLRA 68 (2005)).
[27] *NLRB, Region 9, Cincinnati, Ohio*, 66 FLRA 456, 461 (2012) (citation omitted).
[28] *U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 56 FLRA 498, 501 (2000) (*Warner Robins*); *NLRB*, 50 FLRA 88, 92 (1995).
[29] Award at 9.
[30] *Warner Robins*, 56 FLRA at 501; *NLRB*, 50 FLRA at 92.
[31] 61 FLRA 68.
[32] *See U.S. DOD, Def. Logistics Agency, Def. Distrib. Ctr., New Cumberland, Pa.*, 55 FLRA 1303, 1305 (2000).
[33] Exceptions at 7, 9.
[34] *See* 5 C.F.R. § 2425.6(a)-(b); *see also AFGE, Local 1858*, 67 FLRA 147, 147-48 (2013).
[35] 5 C.F.R. § 2425.6(e)(1) (emphasis added).
[36] Exceptions at 8.

D. The Authority is not the appropriate authority to award attorney fees in this case.

The Union requests that the Authority order "the [A]gency to pay reasonable attorney fees and expenses incurred in this matter as supported by appropriate documentation."[37] However, under 5 C.F.R. § 550.807(a), a request for attorney fees under the Back Pay Act "may be presented only to the appropriate authority that corrected or directed the correction of the unjustified or unwarranted personnel action."[38] Under the Back Pay Act, a request for attorney fees must be made to the arbitrator, who is the "appropriate authority" under § 550.807(a) to render such an award in the case of an arbitration proceeding.[39] Moreover, the Arbitrator expressly retained jurisdiction – at the Union's request[40] – "in the event the Union submits an application for attorney's fees."[41]

Accordingly, as the Arbitrator is the appropriate authority under 5 C.F.R. § 550.807(a) for resolving an attorney-fee request in this case, we deny the Union's request.

IV. Decision

We deny the Union's exceptions and its request for attorney fees.

[37] *Id.* at 11.
[38] 5 C.F.R. § 550.807(a).
[39] *U.S. Dep't of the Army, U.S. Army Garrison, Fort Drum, N.Y.*, 66 FLRA 402, 404-405 (2011).
[40] Post Hr'g Br. at 15.
[41] Award at 9.