68 FLRA No. 129

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1406
(Union)

0-AR-5098

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DECISION

August 13, 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 parties established a past practice (the practice) that involved a timekeeping form (the form) that certain Union representatives (representatives) used to record their use of official time. Under the practice, representatives who used official time at the end of a workday went home instead of returning to their work areas to complete the form, and then completed the form when they next returned to work. The Agency terminated the practice and began requiring representatives to return to work to complete the form before leaving for the day. Arbitrator Philip Tamoush found that the Agency violated the parties' agreement by doing so, and he directed the Agency to continue the practice. There are three questions before us.

The first question is whether the award is contrary to law because: (1) the practice conflicts with 5 U.S.C. § 6122; 5 C.F.R. §§ 610.404, 551.402, and 551.424; and 43 C.F.R. § 20.510; and (2) Authority precedent permits an agency to terminate an illegal past practice without bargaining over the substance of that decision. Because the Agency does not demonstrate that the practice is illegal, the answer is no.

The second question is whether the award fails to draw its essence from the parties' agreement because: (1) the parties' agreement allegedly prohibits local bargaining over the form; and (2) the Arbitrator's interpretation of Section 4.10 of the parties' agreement (Section 4.10) is deficient. Because the provisions in the parties' agreement regarding bargaining are not relevant to the Arbitrator's determination that the parties must continue the practice, and the Arbitrator's interpretation of Section 4.10 does not conflict with its plain wording, the answer is no.

The third question is whether the award is based on nonfacts. Because the Agency's nonfact arguments challenge statements in the award that are not factual findings, the answer is no.

II. Background and Arbitrator's Award

The parties' agreement contains procedures for how official time is approved and documented. Specifically, Section 4.10 requires that "representatives who wish to leave their assigned work area on official time" first must obtain the permission of their immediate supervisor; provide details, including the "function to be performed, destination, names(s) of employees to be contacted, estimated duration [of the official time], etc."; and complete certain parts of the form.[1] Section 4.10 further provides that "[u]pon return to the work area, the . . . representative shall advise the supervisor of his/her return[, and t]he supervisor shall sign the representative in on the [form] and retain the form for accounting purposes."[2] The parties established the practice in relation to these procedures. As discussed above, under the practice, representatives who used official time at the end of a workday went home instead of returning to their work areas to complete the form, and then completed the form when they next returned to work.

The Agency issued a memorandum terminating the practice on the ground that it was allegedly unlawful. In response to the memorandum, the Union submitted bargaining proposals. After the Agency rejected the Union's proposals, the Union filed a grievance challenging the Agency's termination of the practice. The grievance went to arbitration.

At arbitration, the Arbitrator framed the issues, in relevant part, as whether: (1) Section 4.10 applies to all representatives, including those who have specific percentages of their work time designated for official time (Union officers); (2) representatives violated Section 4.10 by following the practice; and (3) the Agency violated the parties' agreement when it terminated the practice.

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[1] Award at 2-3 (quoting Section 4.10).
[2] *Id.* at 3 (quoting Section 4.10).

Regarding the Agency's termination of the practice, the Arbitrator rejected the Agency's claim that the practice was illegal, and he directed the parties to continue the practice. In making this finding, the Arbitrator noted that because time and attendance reports must be completed accurately, "[t]he better part of valor" would be for representatives to complete the form when they "return[] to their office on the conclusion [of the official time]," but that they could complete the form when they return to work the next day.[3] The Arbitrator also found that Union officers do not have to complete the form at all.

Additionally, the Arbitrator opined that, although the Union demanded impact and implementation bargaining: (1) such bargaining would "not have produced any meaningful result considering [the Agency]'s position that the practice was illegal"; and (2) the Agency "would have concluded [that] it was illegal to even participate in bargaining."[4] Rejecting the Agency's argument that the parties' agreement precluded any local negotiations over official time, the Arbitrator found that the parties' agreement does not preclude negotiations "on any subject" unless the subject violates a provision of the parties' agreement or a local supplemental agreement.[5] Thus, the Arbitrator stated that if the parties "wish to reopen the matter" of the practice, then they could do so during the parties' next local negotiation session.[6]

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

III. Analysis and Conclusions

A. The award is not contrary to law.

The Agency argues that the award is contrary to law because the practice violates several statutory and regulatory provisions regarding time and attendance (discussed in detail below).[7] Relatedly, the Agency contends that the award is contrary to Authority precedent that permits an agency to terminate an illegal past practice without bargaining over the substance of that decision.[8]

In resolving an exception claiming that an award is contrary to law, the Authority reviews any question of law raised by an exception and the award de novo.[9] 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.[10] Under this standard, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[11]

The Agency argues that the award is contrary to 5 U.S.C. § 6122 and 5 C.F.R. §§ 610.404, 551.402, and 551.424 (the timekeeping requirements).[12] Under § 6122, an agency "may establish . . . programs which allow the use of flexible schedules which include . . . designated hours and days during which an employee on such a schedule must be present for work."[13] Under § 610.404, an agency that uses flexible schedules must "establish a time-accounting method that will provide affirmative evidence that each employee subject to the schedule has worked the proper number of hours in a biweekly pay period."[14] Section 551.402 requires an agency to: (1) "exercis[e] appropriate controls to ensure that only work for which it intends to make payment is performed"; and (2) "keep complete and accurate records of all hours worked by its employees."[15] Section 551.424 provides that official time counts as "hours of work."[16]

According to the Agency, the Arbitrator's direction that the parties continue the practice interferes with the Agency's ability to comply with the timekeeping requirements.[17] Specifically, the Agency argues that if a representative is not required to complete the form on the same day on which the representative uses official time, then "the Agency will have no way of knowing whether the [representative] was performing functions on official time or not" and "will not have the complete and accurate records" of the representative's hours of work.[18] And the Agency contends that the law and regulations that it cites contain no provisions "requiring the Agency to verify accurate reporting of time and attendance by relying on employees' 'valor.'"[19]

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[3] *Id.* at 10.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] Exceptions at 3.
[8] *Id.* at 4-5 (citing *U.S. Dep't of Transp., FAA*, 60 FLRA 20 (2004)).
[9] *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)).
[10] *USDA*, *Forest Serv.*, 67 FLRA 558, 560 (2014).
[11] *Id.*
[12] Exceptions at 3-4.
[13] 5 U.S.C. § 6122(a).
[14] 5 C.F.R. § 610.404.
[15] *Id.* § 551.402.
[16] *Id.* § 551.424(b).
[17] Exceptions at 3-4.
[18] *Id.* at 4.
[19] *Id.* at 3 (quoting Award at 10).

However, the Agency does not explain why a representative's completion of the form whenever the representative next returns to work is inconsistent with the timekeeping requirements. And Section 4.10 requires a representative to obtain his or her supervisor's permission and to provide details such as the "function to be performed, destination, names(s) of employee(s) to be contacted, [and] estimated duration [of the official time]" before leaving on official time.[20] These requirements undercut the Agency's assertion that following the practice leaves the Agency with insufficient information about the representative's actions while on official time. Further, the Arbitrator did not find that the Agency is required to rely solely on employees' "valor."[21] As the Agency does not explain how the practice results in incomplete or inaccurate records, or cite any authority that supports its assertion that the practice violates the timekeeping requirements, the Agency's argument provides no basis for finding the award contrary to law.

In addition, the Agency argues that the practice conflicts with the statement in 43 C.F.R. § 20.510 that "special attention" is "required in the certification of time and attendance to help protect against fraud."[22] Section 20.510 provides, in relevant part, that employees shall not knowingly make false statements in their time and attendance reports.[23] However, Title 43 applies to certain employees of the U.S. Department of the Interior, not to Agency employees,[24] and the Agency does not explain how this regulation applies to the representatives at issue in this case. Even if the regulation did apply, the Agency does not explain how the practice results in representatives making fraudulent statements. For these reasons, we find that the Agency's reliance on this regulation provides no basis for finding the award contrary to law.

Finally, the Agency argues that, under Authority case law, it had no obligation to bargain substantively over the termination of the practice before terminating it because the practice was unlawful.[25] But, as the Agency has not demonstrated that the practice is unlawful, the Agency has not demonstrated that the Arbitrator's direction that the parties continue the practice is contrary to Authority case law.

[20] Award at 2 (quoting Section 4.10).
[21] Exceptions at 3 (internal quotation marks omitted).
[22] *Id.* at 4; *see* 43 C.F.R. § 20.510 ("Special attention is required in the certification of time and attendance reports . . . .").
[23] 43 C.F.R. § 20.510.
[24] *Id.* § 20.102 (defining "employee," as relevant here, as "a regular employee, a special Government employee, and a contract education employee in the Office of the Assistant Secretary – Indian Affairs or the Bureau of Indian Affairs").
[25] Exceptions at 5.

For the foregoing reasons, we find that the Agency has not established that the award is contrary to law.

B. The award does not fail to draw its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement in two respects, discussed separately below.[26] 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.[27] 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 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.[28] 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."[29] And the Authority will not find that an award fails to draw its essence from a collective-bargaining agreement when the excepting party fails to establish that the arbitrator's interpretation of that agreement conflicts with its express provisions.[30] Additionally, an arbitrator may determine whether a past practice has modified the terms of a collective-bargaining agreement, and the arbitrator's interpretation of such a past practice is subject to the deferential essence standard of review.[31]

First, the Agency contends that "the Arbitrator's ruling that substantive negotiations [over the practice] were appropriate" fails to draw its essence from the "plain meaning" of Sections 33.01 and 34.01 in the parties' agreement.[32] Those sections provide, in pertinent part, that the parties' agreement "may not be supplemented [by] local agreements,"[33] the parties will not "engage in supplemental negotiations . . . [if] the matter is expressly contained in the

[26] *Id.* at 6-7.
[27] *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[28] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*).
[29] *Id.* at 576 (citations omitted).
[30] *E.g.*, *id.* (citing *AFGE, Local 547*, 19 FLRA 725 (1985); *Overseas Educ. Ass'n*, 4 FLRA 98, 103-06 (1980)).
[31] *AFGE, Local 2145*, 66 FLRA 760, 761 & 761 n.3 (2012) (citing *U.S. DHS, CBP, El Paso, Tex.*, 61 FLRA 684, 686 (2006); *NTEU, Chapter 207*, 60 FLRA 731, 734 (2005)).
[32] Exceptions at 7.
[33] *Id.*, Attach. 3, Joint Ex. 1, Agreement at 104 (Agreement).

[parties' agreement],"[34] and "[t]he [p]arties agree to give notice and bargain over proposed changes in conditions of employment unless the matter is expressly contained in the [parties' agreement]."[35] The Agency argues that under Sections 33.01 and 34.01, the parties cannot negotiate over practices concerning the completion of the form because Section 4.10 already addresses that matter.[36]

Here, although the Arbitrator stated that "if the parties wish to reopen the matter" of the practice at their next local negotiation session, then they "are welcome to [do so]," he did not direct the parties to bargain substantively over the practice.[37] Therefore, the wording in Sections 33.01 and 34.01 concerning renegotiation and supplemental agreements is irrelevant to what the Arbitrator actually directed, and does not provide a basis on which to find the award deficient as failing to draw its essence from the parties' agreement.

Second, the Agency contends that the Arbitrator's finding that Union officers do not have to complete the form at all fails to draw its essence from the official-time procedures in Section 4.10.[38] Section 4.10 refers to "representatives" who must obtain permission from their supervisors before using official time, but is silent as to Union officers who have a specific percentage of their work time set aside for official time.[39] However, whether Section 4.10 – which does not expressly refer to Union officers[40] – applies to Union officers is a matter of interpretation of the parties' agreement left to the Arbitrator.[41] Because Section 4.10 does not expressly refer to Union officers, the Arbitrator's finding that Union officers do not need to complete the form does not conflict with the plain wording of Section 4.10. As discussed above, the Authority will not find that an award fails to draw its essence from a collective-bargaining agreement when the excepting party fails to establish that the arbitrator's interpretation of that agreement conflicts with its express provisions.[42] Thus, the Agency's argument does not demonstrate that the award fails to draw its essence from the parties' agreement.

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

[34] *Id.*
[35] *Id.* at 100.
[36] Exceptions at 6-7.
[37] Award at 10; *see also id.* at 11.
[38] Exceptions at 7.
[39] Agreement at 10.
[40] *Id.*
[41] *See, e.g.*, *NAGE, SEIU, Local 551*, 68 FLRA 285, 288 (2015) (finding that an arbitrator's interpretation of a contract provision was not implausible when the provision at issue did not expressly exclude that interpretation).
[42] *E.g.*, *OSHA*, 34 FLRA at 576.

C. The award is not based on nonfacts.

The Agency argues that two of the Arbitrator's statements were nonfacts.[43] To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[44] Arbitrators' statements that do not constitute factual findings do not provide a basis for finding awards deficient on nonfact grounds.[45]

According to the Agency, the Arbitrator's statements are "nothing more than speculation and conjecture."[46] Specifically, the Agency challenges the Arbitrator's statements that: (1) it was "not necessary" for the Union to demand impact and implementation bargaining; and (2) such bargaining "would not have produced any meaningful result considering [the Agency]'s position that the practice was illegal."[47] In making these statements, the Arbitrator merely discussed what he thought the Agency's conclusions regarding bargaining *might* have been. These statements do not constitute factual findings. Accordingly, the Agency's arguments provide no basis for finding the award deficient on nonfact grounds,[48] and we deny the Agency's nonfact exceptions.

IV. Decision

We deny the Agency's exceptions.

[43] Exceptions at 2, 7-8.
[44] *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 623 (2014) (citing *U.S. Dep't of VA, Med. Ctr., Wash., D.C.*, 67 FLRA 194, 196 (2014)).
[45] *E.g.*, *U.S. DOJ, U.S. Marshals Serv.*, 66 FLRA 137, 142 (2012) (*Marshals*) ("even assuming [that] the [a]rbitrator's speculation . . . was erroneous, it does not establish that a central fact underlying the award is clearly erroneous"); *U.S. Dep't of the Interior, Nat'l Park Serv., Valley Forge Nat'l Historical Park, Valley Forge, Pa.*, 57 FLRA 258, 260 (2001) (*Valley Forge*) ("by its very nature [the arbitrator's] statement is not a finding of fact, but rather mere speculation[;] [a]s such, the . . . nonfact exception [based on this statement] is unfounded"); *see also U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div., Keyport, Wash.*, 55 FLRA 884, 888 n.2 (1999) (arbitrator's use of a particular term was not a factual finding where "nothing else in the record or the award [indicated] that the [a]rbitrator used the term in a technical sense and as a resolution of a factual dispute between the parties").
[46] Exceptions at 8.
[47] *Id.* at 7-8 (quoting Award at 10) (emphasis omitted).
[48] *E.g.*, *Marshals*, 66 FLRA at 142; *Valley Forge*, 57 FLRA at 260.