68 FLRA No. 133

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 299
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY
(Agency)

0-AR-5068

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DECISION

August 21, 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 grievant teleworks four days every two-week pay period. When he asked to work an additional telework day every pay period, the Agency denied his request. The Union filed a grievance alleging that the Agency's denial of the grievant's telework request violated the parties' agreement. Arbitrator Charles Feigenbaum found that the Agency did not violate the parties' agreement when it denied the request. There are four questions before us.

The first question is whether the award is contrary to §§ 7106 and 7121 of the Federal Service Labor-Management Relations Statute (the Statute).[1] Regarding § 7106, the Union argues that the Arbitrator was required to consider whether the requested additional telework day would "excessive[ly] interfere[]" with management's rights.[2] But the Arbitrator did not find, and the Agency does not assert, that the requested additional telework day would affect a management right under § 7106(a). Thus, there is no management-rights issue in this case.

Regarding § 7121, the Union argues that the Arbitrator's "slavish[] deferen[ce]" to management "nullifies" the Union's ability to represent employees under § 7121.[3] But the Union misinterprets the award and only challenges the Arbitrator's determination as to the weight to be accorded the Agency's testimony concerning the reasons for declining the grievant's telework request – and these are not bases for finding that an award is contrary to law. Accordingly, regarding both provisions of the Statute, the answer is no.

The second question is whether the award fails to draw its essence from the parties' agreement. The Union relies on contract provisions requiring that telework decisions not be "arbitrary" and be made in a "fair and equitable manner."[4] The Union also relies on the contractual requirement that telework decisions be made "on an individual basis."[5] Because the Arbitrator found that the Agency acted "reasonabl[y]," "offer[ed] a [true,] rational, business-related reason"[6] for its telework decision, and considered the "balance" between the grievant's "time on a telework schedule and time at the office,"[7] the Union does not establish that the award is irrational, unfounded, implausible, or in manifest disregard of the agreement provisions on which the Union relies. Therefore, the answer is no.

The third question is whether the award is deficient because the Arbitrator was biased. Because the Union does not demonstrate that the award was procured by improper means, that the Arbitrator was partial or corrupt, or that the Arbitrator engaged in misconduct that prejudiced the Union's rights, the answer is no.

The fourth question is whether the award is contrary to the public policy "supporting expanding telework."[8] Assuming without deciding that the alleged public policy is sufficiently explicit, well defined, and dominant, because the Union does not clearly show that the award violates the alleged public policy, the answer is no.

II. Background and Arbitrator's Award

The grievant is an Agency ethics attorney who provides the Agency advice concerning "compliance with government-wide standards of conduct . . . [and the] rules that specifically apply to Agency employees."[9] The grievant teleworks four days every two-week pay period,

[1] 5 U.S.C. §§ 7106, 7121.
[2] Exceptions at 5-6.
[3] *Id.* at 6-7.
[4] *See id.* at 9 (quoting language from Article 19 of the parties' collective-bargaining agreement (CBA)); *see also id.* at 14.
[5] Exceptions at 9; *see also id.* at 14.
[6] Award at 32.
[7] *Id.* at 31.
[8] Exceptions at 17; *see also id.* at 15.
[9] Award at 3.

and also works an alternative work schedule – consisting of eight nine-hour shifts and one eight-hour shift every pay period – with every other Friday as a day off.

The grievant requested a fifth telework day every pay period, meaning that he would be physically in the office only two days per week. The Agency denied his request.

The Union filed a grievance alleging that the Agency violated the parties' agreement when it denied the grievant's telework request. The parties could not resolve the grievance, and submitted it to arbitration. The parties stipulated to the following issues: "Did the Agency violate the [parties'] agreement . . . when it denied the [g]rievant's request for an additional . . . telework day per pay period? If so, what shall the remedy be?"[10]

The Union argued that the Agency violated Article 19 of the parties' agreement because the Agency's decision to deny the grievant's telework request was not based on objective evidence and, as a result, the decision was arbitrary, in bad faith, and not fair and equitable. Article 19(1)(K) states, in pertinent part, that "[s]upervisors' decisions on telework will not be arbitrary, discriminatory, or in bad faith and will be made in a fair and equitable manner."[11] Article 19(2)(D) states, in pertinent part, that "[t]elework arrangements and schedules will be approved on an individual basis . . . . Additionally, supervisors should consider . . . [c]o-workers' needs and the interrelatedness of their needs; . . . [o]ffice coverage needs; [c]ustomer service needs; and [i]mpact on mission, staffing, and workload and productivity requirements."[12] The Agency argued that the Union "failed to prove[,] by a preponderance of the evidence[,] that the denial of . . . [the grievant's telework request] was unreasonable or that [the Agency violated] Article 19 of the [parties' agreement]."[13]

Interpreting Article 19, the Arbitrator found that "[m]anagement is entitled, . . . if its actions are reasonable" and "it offers a rational, business-related reason for its decision," "to have its view [on a telework request] prevail."[14] Further, the Arbitrator required that the Agency's reason be "true."[15] Applying this interpretation of Article 19, the Arbitrator found that the Agency's reason for denying the grievant's telework request was not "arbitrary or capricious" or otherwise inconsistent with Article 19.[16] That reason, as the Arbitrator found, was that the Agency "value[d] collaboration, teamwork, and interaction, and . . . [did] not want [the grievant] less available for face-to-face interactions than" he already was under his existing telework arrangement.[17]

Upholding this Agency determination to maintain "a certain balance for the [g]rievant in terms of time on a telework schedule and time at the office," the Arbitrator considered that: "[(]1) the [parties' agreement] says nothing about how much time an employee may spend teleworking, but only that '[t]elework arrangements and schedules will be approved on an individual basis;' and [(]2) the present arrangement affords the [g]rievant twice as much telework days as his coworkers."[18] Regarding the "tru[th]" of the Agency's reason, the Arbitrator rejected the Union's argument that the Agency's decision to deny the grievant's telework request was a result of the "Agency['s] hostility to telework" and the Agency's "bad faith."[19] The Arbitrator found that the Union's claim was not supported because approximately fifty percent of employees in the grievant's department telework.[20] Accordingly, the Arbitrator concluded that the Agency did not violate the parties' agreement when it denied the grievant's telework request, and he denied the grievance.

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 is not contrary to §§ 7106 or 7121 of the Statute.

The Union argues that the award is contrary to law.[21] Specifically, the Union claims that the award is: (1) contrary to § 7106 of the Statute because the Arbitrator failed to consider a necessary issue – whether the requested additional telework day "excessive[ly] interfere[d]" with the Agency's management rights;[22] and (2) contrary to the grievance-arbitration provisions discussed in § 7121 of the Statute because the award is so "slavishly" deferential to the Agency that it "nullifies the [Union's] ability . . . to represent employees."[23]

[10] *Id.* at 2.
[11] *Id.*, Exceptions Attach. 1, CBA at 80.
[12] CBA at 82.
[13] Award at 26.
[14] *Id.* at 32.
[15] *Id.*
[16] *Id.* at 31.
[17] *Id.*
[18] *Id.*
[19] *Id.* at 32.
[20] *Id.* at 32-33.
[21] Exceptions at 5-7.
[22] *Id.* at 5-6.
[23] *Id.* at 6-7.

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.[24] 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.[25] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the appealing party establishes that those findings are deficient as nonfacts.[26] In addition, challenges to an arbitrator's evaluation of the evidence, including determinations as to the weight to be accorded such evidence, do not demonstrate that an award is contrary to law.[27]

The Union's contrary-to-law claims involve two sections of the Statute addressing different subjects. Section 7106(a) of the Statute sets forth rights reserved to management, which are "[s]ubject to" the provisions set forth in § 7106(b).[28] Section 7121 of the Statute mandates a negotiated grievance procedure and states, in relevant part, that "any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability."[29]

The Union's § 7106 claim addresses an issue not present in this case. Where a case includes an issue concerning whether there is an impermissible effect on a management right under § 7106(a), the Authority may consider whether the contract provision or proposal at issue falls within an exception to management's rights negotiated under § 7106(b) of the Statute.[30] This may include considering whether the contract provision or proposal is an "appropriate arrangement" under § 7106(b)(3).[31] In negotiability cases involving bargaining proposals, one of the questions the Authority may ask is whether the proposal "excessively interferes" with the management right involved.[32]

Although this is an arbitration case, not a negotiability case, and even assuming, for the sake of argument, that the excessive-interference test is relevant in this context, the Union's claim lacks merit. Absent a claim that there is an effect on a management right, there is no reason to consider whether the contract proposal or provision involved "excessively interferes" with a management right. In this case, the Arbitrator did not find, and the Agency does not assert, that the requested additional telework day, or the contract provision on which the request is based, affect a management right. Thus, contrary to the Union's claim, there was no reason for the Arbitrator to consider whether the telework request "excessively-interfere[d]" with management's rights in resolving the grievance.[33]

The Union's § 7121 claim also lacks merit. The Union argues that the award nullifies the Union's ability to represent employees under the grievance-arbitration provisions discussed in § 7121 of the Statute.[34] Specifically, the Union claims that the Arbitrator, "slavishly" deferring to the Agency, improperly upheld the Agency's denial of the grievant's request for an additional telework day without imposing any requirement on the Agency "to support its claims with objective evidence."[35]

The Union's § 7121 claim is based on a misinterpretation of the award. Contrary to the Union's interpretation that the Arbitrator did not require the Agency to support its position with objective evidence, the Arbitrator – interpreting the parties' agreement – required the Agency to provide a "true," "rational, business-related reason" for denying the grievant's telework request.[36] Applying these requirements, the Arbitrator considered, and credited, Agency managers' testimony concerning their "managerial judgments" about the importance of maintaining "a certain balance" between the time the grievant spent teleworking and the time the grievant spent in the office.[37] Moreover, the Arbitrator considered whether the Agency's reason was "true," rejecting, for factual reasons, the Union's claims that it was not because the Agency's denial was based on the Agency's "hostility to telework" and "bad faith."[38]

In addition, the Union's claim takes issue with the weight the Arbitrator gave Agency managers' testimony concerning the reasons for declining the grievant's telework request – a matter that does not support a contrary-to-law exception.[39]

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[24] *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)).
[25] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998)).
[26] *Id.*
[27] *E.g.*, *U.S. DHS, U.S. CBP*, 65 FLRA 356, 362 (2010) (*DHS*) (citing *AFGE, Local 4044*, 65 FLRA 264, 266 (2010)); *see also NFFE, Local 1827*, 52 FLRA 1378, 1385 (1997).
[28] 5 U.S.C. § 7106(a).
[29] *Id.* § 7121(a)(1).
[30] *See U.S. Dep't of Transp., FAA*, 68 FLRA 402, 404 (2015).
[31] *EPA*, 65 FLRA 113, 114-15 (2010).
[32] *NAIL, Local 7*, 64 FLRA 1194, 1197 (2010).
[33] *Id.*
[34] Exceptions at 6-7.
[35] *Id.*
[36] Award at 32.
[37] *Id.* at 31-32.
[38] *Id.* at 32-33.
[39] *See DHS*, 65 FLRA at 362.

Because the Union's § 7121 claim is based on a misinterpretation of the award, and on the Union's disagreement with the weight the Arbitrator gave certain evidence, the Union fails to demonstrate that the award is contrary to § 7121's grievance-arbitration procedure provisions.

Accordingly, we deny the Union's contrary-to-law exceptions.

B. The award draws its essence from Article 19 of the parties' agreement.

Referring to language from Article 19 of the parties' agreement, the Union argues that the award fails to draw its essence from the parties' agreement.[40] When reviewing an arbitrator's interpretation of a parties' agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[41] Under this standard, 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 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.[42] 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."[43] In addition, challenges to an arbitrator's evaluation of the evidence, including determinations as to the weight to be accorded such evidence, do not demonstrate that an award fails to draw its essence from the parties' agreement.[44]

Referring to language from Article 19(1)(K), the Union argues that the award fails to draw its essence from the agreement.[45] The Union contends that the Arbitrator wrongly upheld the Agency's decision to deny the grievant's telework request because he did so without requiring the Agency to provide "objective evidence."[46] For this reason, the Union claims, the Arbitrator upheld a telework denial that was "arbitrary" and not "fair and equitable."[47] Article 19(1)(K) states, in pertinent part, that "[s]upervisors' decisions on telework will not be arbitrary, discriminatory, or in bad faith and will be made in a fair and equitable manner."[48]

The Union's claim does not demonstrate that the award fails to draw its essence from the parties' agreement. The Union's claim is substantially the same as its claim, discussed above in Section III.A., that the award is contrary to § 7121 of the Statute. The Union argued that the Arbitrator improperly upheld the Agency's denial of the grievant's request for an additional telework day without imposing any requirement on the Agency "to support its claims with objective evidence."[49] As indicated in the previous discussion, the Union's argument is based on a misinterpretation of the award and on the Union's disagreement with the weight the Arbitrator gave Agency managers' testimony. Because neither a disagreement with the weight an arbitrator gives evidence,[50] nor an argument based on a misinterpretation of an award,[51] provide a basis for finding that an award fails to draw its essence from the parties' agreement, the Union fails to demonstrate that the award is deficient for this reason.

The Union also makes an essence claim based on language from Article 19(2)(D) of the parties' agreement.[52] Specifically, the Union claims that the award does not draw its essence from the parties' agreement because the Arbitrator violated the requirement to consider telework requests "individually."[53] More specifically, the Union argues that the Arbitrator should have rejected the Agency's "artificial limit" on telework,[54] and that he should not have considered that "the [g]rievant already had more recurring telework than other employees."[55] Article 19(2)(D) states, in pertinent part, that "[t]elework arrangements and schedules will be approved on an individual basis . . . . Additionally, supervisors should consider . . . [c]o-workers' needs and the interrelatedness of their needs; . . . [o]ffice coverage needs; [c]ustomer service needs; and [i]mpact on mission, staffing, and workload and productivity requirements."[56]

The Union's claim that the Arbitrator should have rejected the Agency's "artificial limit" on telework[57] does not demonstrate that the award fails to draw its essence from Article 19(2)(D). The award does not reflect that the Arbitrator accepted any "artificial limit"

[40] Exceptions at 9-15.
[41] *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[42] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[43] *Id.* at 576.
[44] *E.g., AFGE, Council 215*, 68 FLRA 137, 141 (2011) (*Council 215*).
[45] Exceptions at 9.
[46] *Id.* at 14.
[47] *Id.*
[48] CBA at 80.
[49] Exceptions at 7.
[50] *Council 215*, 68 FLRA at 141.
[51] *U.S. DHS, ICE*, 67 FLRA 711, 713-14 (2014).
[52] Exceptions at 11; *see also* CBA at 82.
[53] *Id.* at 12.
[54] *Id.*
[55] *Id.* at 11.
[56] CBA at 82.
[57] Exceptions at 14.

on telework. Instead, the Arbitrator found that "the [parties' agreement] says nothing about how much time an employee may spend teleworking," and that, with specific reference to the grievant's individual situation, the "balance" the Agency sought between the grievant's "time on a telework schedule and time at the office" was within the "boundaries of Article 19."[58] Because the Arbitrator gave individual consideration to the grievant's telework schedule and the Agency's specific interest in the grievant's presence in the office, the Union fails to show that the Arbitrator's interpretation of Article 19(2)(D) is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. Consequently, we find that the Union's Article 19(2)(D) claim in this regard lacks merit.

Additionally, the Union's claim that the Arbitrator should not have considered that "the [g]rievant already had more recurring telework than other employees"[59] does not demonstrate that the award fails to draw its essence from the parties' agreement. As set forth above, Article 19(2)(D) requires that telework requests be considered "individually"[60] (on a case-by-case basis). Although, the parties' agreement provides factors that the Agency "should consider" in approving or denying a telework request,[61] there is nothing to suggest – and the Union does not assert – that these factors are exhaustive or that they preclude the Arbitrator from considering other relevant factors on a case-by-case basis. Such factors could include, as in this case, the grievant's existing telework schedule. Therefore, the Union also does not provide a basis for finding that the award fails to draw its essence from the parties' agreement for this reason.

The Union also claims that the award fails to draw its essence from the parties' agreement because the Arbitrator's "almost unlimited deference" to the Agency "effectively nullified the Union's ability to defend what it has negotiated" and "rendered the contractual grievance procedure meaningless."[62] These claims are substantially the same as the Union's claims that the Arbitrator was biased, as discussed below in Section III.C. For example, the Union claims in its bias exception that the Arbitrator gave "excessive and unwarranted deference to management."[63] Because we reject the Union's bias claims on their merits, the Union's substantially similar claims in support of its essence exceptions do not provide a basis for finding the award deficient on essence grounds.

Accordingly, we deny the Union's essence exceptions.

C. The Union does not demonstrate that the Arbitrator was biased.

The Union argues that the Arbitrator was biased.[64] To establish bias, the excepting party must demonstrate that the award was procured by improper means, that there was partiality or corruption on the part of the arbitrator, or that the arbitrator engaged in misconduct that prejudiced the rights of the party.[65] In reviewing awards under these standards, the Authority has repeatedly held that an assertion that an arbitrator's findings were adverse to the excepting party, without more, does not establish bias.[66]

The Union makes a number of arguments. The Union claims that "the Arbitrator's ruling demonstrates partiality in favor of the Agency" and demonstrates that "the Arbitrator gave excessive and unwarranted deference to management."[67] The Arbitrator "ignored all of the Union's evidence," the Union alleges, even though that evidence was "overwhelming and uncontested."[68]

The Union's claims do not demonstrate that the Arbitrator was biased. Here, the Arbitrator weighed the Agency's testimony concerning the reason for denying the grievant's telework request, and "g[a]ve deference to [its] . . . managerial judgments," which he found to not be "arbitrary or capricious, or outside the boundaries of Article 19."[69] The Arbitrator also considered the Union's assertions that the Agency was "hostil[e] to telework" and was acting in "bad faith," but rejected them based on factual findings, concluding that the Agency's reason was "true."[70] Because an assertion that an arbitrator's findings are adverse to the excepting party, without more, does not establish bias,[71] these bias claims do not provide a basis for finding the award deficient.

The Union also claims that the Arbitrator's failure to consider "excessive[-]interference" issues, and his failure to require "objective evidence" from the Agency, are indicative of bias.[72] Because we have found that these claims either are not relevant to this case, or are based on a misinterpretation of the award,[73] they also do

[58] Award at 31.
[59] Exceptions at 11.
[60] CBA at 82.
[61] *Id.*
[62] Exceptions at 13.
[63] *Id.* at 7.
[64] *Id.* at 7-8.
[65] *AFGE, Local 788*, 67 FLRA 291, 292 (2014) (citing *AFGE, Local 1938*, 66 FLRA 741, 743 (2012) (*Local 1938*)).
[66] *Local 1938*, 66 FLRA at 743.
[67] Exceptions at 7.
[68] *Id.* at 8.
[69] Award at 31.
[70] *Id.* at 32.
[71] *Local 1938*, 66 FLRA at 743.
[72] Exceptions at 7.
[73] *See* Section III.A., *supra*.

not provide a basis for finding that the Arbitrator was biased.

Accordingly, we deny the Union's bias exceptions.

D. The award is not contrary to public policy.

The Union argues that the award is contrary to the public policy "supporting expanding telework."[74] For an award to be found deficient on this basis, the asserted public policy must be "explicit," "well defined," and "dominant," and a violation of the policy "must be clearly shown."[75] In addition, the appealing party must identify the policy "by reference to the laws and legal precedents and not from general considerations of supposed public interests."[76]

Here, the Union relies on the same arguments that it relies on in making its contrary-to-law, essence, and bias exceptions.[77] Specifically, the Union claims that the award "undermines . . . [this] public policy" because the Arbitrator gave "excessive deference" to the Agency, did not require the Agency to support its decision with "objective" evidence and did not rule on the "tru[th]" of the Agency's reason for denying the grievant's telework request.[78] As discussed above, we find that these various claims lack merit. Therefore, even assuming, without deciding, that the asserted public policy is sufficiently explicit, well defined, and dominant,[79] the Union has not "clearly shown"[80] that the award violates the alleged public policy supporting expanding telework.

Accordingly we deny the Union's public-policy exception.

IV. Decision

We deny the Union's exceptions.

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[74] Exceptions at 17.
[75] *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 622 (2014) (*White Sands*) (quoting *NLRB, Region 9, Cincinnati, Ohio*, 66 FLRA 456, 459 (2012) (*NLRB*)).
[76] *Id.* (quoting *NLRB*, 66 FLRA at 459).
[77] *See* Exceptions at 15-17.
[78] *Id.* at 15.
[79] *NLRB*, 66 FLRA at 459 (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers of Am.*, 461 U.S. 757, 766 (1993)).
[80] *White Sands*, 67 FLRA at 622 (quoting *NLRB*, 66 FLRA at 459).