69 FLRA No. 34

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
LOCAL 141
(Union)

0-AR-5161

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DECISION

March 15, 2016

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

I. Statement of the Case

Arbitrator Joseph Harris issued an award finding that the Agency violated the parties' collective-bargaining agreement by denying six officers' (the grievants') "ad hoc" leave requests.[1] There are two substantive questions before us.

The first question is whether the award fails to draw its essence from the parties' agreement because: (1) the award imposes a leave procedure that allegedly conflicts with the agreement's requirement that local-leave procedures be placed in writing; or (2) the award is inconsistent with a provision of the agreement that permits the Agency to deny annual-leave requests based on "workload and staffing needs."[2] Because the Arbitrator's interpretation of the parties' agreement is not irrational, unfounded, implausible, or in manifest disregard of the agreement, the answer is no.

The second question is whether the Arbitrator exceeded his authority by "fashioning an award that not only applies to the six grievants but also to all other 'similarly situated'" officers.[3] Because the awarded remedy extends to non-grievants, the answer is yes. Accordingly, we modify the award to clarify that it applies only to the grievants.

[1] Award at 2.
[2] Exceptions Br. at 19 (quoting Collective-Bargaining Agreement (CBA) Art. 37, § 2(A)).
[3] *Id.* at 11 (quoting Award at 10).

II. Background and Arbitrator's Award

After the Agency denied the six grievants' leave requests, the Union filed five separate grievances on their behalf. The parties consolidated the grievances for arbitration with the "understanding . . . that the [A]rbitrator would issue a . . . decision [that] would determine the outcome for each grievant individually."[4]

At arbitration, the parties stipulated to the following issues: "Did the Agency violate Article[] 37 of the [parties' agreement] when it denied ad hoc leave to . . . one or more of the grievants? If so, what shall the remedy be?"[5]

Under Article 37, Section 2(C) of the parties' agreement, there are two types of annual leave: ad hoc leave and the annual-leave draw. The Arbitrator found that while officers may request ad hoc leave at any time during the year, officers must request leave under the annual-leave draw at the end of each calendar year. And he found that, during the annual-leave draw, officers request "the bulk of their annual [leave]" for the forthcoming year by selecting "from available slots" on a leave schedule.[6] The Arbitrator determined that the availability of slots on the leave schedule is determined by the "10% plus [one] rule"[7] – a local practice that is not contained in the parties' agreement. According to the Arbitrator, the rule operates by taking 10% of the officers in a given work unit and adding one, with the result establishing the "maximum number"[8] of officers "in a given work unit [that] can be on leave at any one time."[9]

Before the Arbitrator, the Agency acknowledged that it denied some of the grievants' leave requests because, if approved, the Agency would have needed to fill the vacant shifts by assigning overtime to other officers. The Agency contended, however, that Article 37 permitted it to deny the requests "based on workload and staffing needs," which – according to the Agency – include overtime costs.[10]

The Arbitrator determined that there was "no support in the [parties' agreement] for [the Agency's] position" that "ad hoc [leave] requests are conditional upon how they impact the Agency's overtime budget."[11] Moreover, the Arbitrator found that the 10% plus one rule applied to both annual-leave-draw and ad hoc leave

[4] Award at 10.
[5] *Id.* at 2.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 8.
[10] Exceptions Br., Tab 2 (Agency's Post-Hr'g Br.) at 9 (quoting CBA Art. 37, § 2(A)); Award at 7.
[11] Award at 9.

requests. In this regard, the Arbitrator noted that under Article 37, both types of requests are "subject to approval . . . based on workload and staffing needs."[12] Therefore, the Arbitrator concluded that "the criteria for granting annual[-]leave requests" was the same "whether they are made under the leave[-]draw process or on an ad hoc basis."[13] Because each of the six grievants submitted ad hoc leave requests for slots on the leave schedule that were available under the 10% plus one rule, the Arbitrator found that the Agency violated the parties' agreement by denying those requests.

As a remedy, the Arbitrator directed the Agency "to treat future requests for ad hoc annual leave . . . consistent with [the award]."[14] In particular, the Arbitrator directed the Agency to grant ad hoc leave requests "for leave slots appearing on the annual[-]leave schedule"[15] and to cease denying ad hoc leave requests based on "[o]vertime costs."[16] The Arbitrator further stated that the award was "intended to apply to the grievants . . . as well as other [officers] similarly situated."[17]

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

The Agency contends that the award fails to draw its essence from the parties' agreement in two respects.[18] When 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.[19] 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 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.[20] 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."[21] The Authority has found that an award fails to draw its essence from an agreement when an arbitrator's interpretation conflicts with the express provisions of that agreement.[22]

First, the Agency argues that the award fails to draw its essence from Article 37, Section 2(C)(1)(d) because the Arbitrator imposed the unwritten 10% plus one rule "for purposes of considering ad hoc leave requests."[23] In the Agency's view, applying that unwritten rule conflicts with Section 2(C)(1)(d)'s requirement that the parties place in writing "*any* local agreement concerning annual[-]leave procedures."[24] In contrast, the Union argues that Section 2(C)(1)(d)'s requirement for written local agreements applies only to agreements incorporating the leave procedures specified in Article 37, Section 2(C)(1)(a).[25]

Section 2(C)(1) of the parties' agreement provides that the Agency and Union may adopt a local annual-leave procedure.[26] While Section 2(C)(1)(d) states that any agreement reached under Section 2(C)(1) "must be placed in writing,"[27] Section 2(C)(1)(a) specifies the four types of annual-leave procedures that the parties "may include" in an agreement: the timeframes during which employees will compete for available leave; the dates on which employees will submit leave requests; the requirements for the posting of leave schedules; and the methods for resolving conflicts between leave requests.[28]

As the Union points out, the plain language of Section 2(C)(1)(a) "does not directly [or] expressly" include the 10% plus one rule[29] – a procedure that limits leave availability based on a work unit's size.[30] And the Agency provides no basis for finding that the Arbitrator's application of that rule to ad hoc leave requests conflicts

[12] *Id.* at 3 (quoting CBA Art. 37, § 2(A)).
[13] *Id.* at 8.
[14] *Id.* at 10.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] Exceptions Br. at 16-23.
[19] *U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Louisville Dist., Louisville, Ky.*, 66 FLRA 426, 428 (2012) (*Louisville*) (citing 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998)).
[20] *Id.* (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*)).
[21] *Id.* (quoting *OSHA*, 34 FLRA at 576).
[22] *SSA*, 63 FLRA 691, 693 (2009) (*SSA*) (citing *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993); *U.S. Dep't of the Air Force, Hill Air Force Base, Utah*, 39 FLRA 103, 108 (1991)).
[23] Exceptions Br. at 18.
[24] *Id.* (emphasis added).
[25] Opp'n Br. at 5 (citing CBA Art. 37, § 2(C)).
[26] Exceptions Br., Tab 3(a), Jt. Ex. 1 (CBA) at 183.
[27] *Id.* at 184.
[28] *Id.* at 183.
[29] Opp'n Br. at 5.
[30] Award at 2, 8.

with the express provisions of Section 2(C)(1)(d). Accordingly, the Agency's first essence argument does not demonstrate that the Arbitrator's application of the 10% plus one rule is irrational, unfounded, implausible, or in manifest disregard of the agreement.[31]

Second, the Agency contends that the award is inconsistent with Article 37, Section 2(A),[32] which provides that annual-leave requests are subject to approval "based on workload and staffing needs."[33] The Agency claims that, contrary to the Arbitrator's conclusion, "workload and staffing needs" include overtime considerations.[34]

In support of this argument, the Agency relies on "multiple references to 'staffing requirements' and 'workload requirements'" in Article 35[35] – the article governing the assignment of overtime.[36] However, neither Article 35 nor 37 defines the phrase "workload and staffing needs."[37] Moreover, as the Union argues,[38] nothing in Article 35's wording conflicts with the Arbitrator's interpretation of the phrase "workload and staffing needs"[39] in Article 37. That is, the references to "staffing requirements" and "workload requirements" in Article 35[40] do not establish that the Arbitrator's conclusion – that overtime costs are not a valid justification for denying ad hoc leave requests under Article 37[41] – is irrational, unfounded, implausible, or in manifest disregard of the agreement.[42]

As further support for its argument that "workload and staffing needs" in Article 37 necessarily includes overtime considerations,[43] the Agency cites *U.S. Department of Transportation, FAA* (*DOT*).[44] But *DOT* – where the Authority found that a *different agreement* concerning overtime assignments "pertain[ed] to the [a]gency's staffing patterns within the meaning of [5 U.S.C.] § 7106(b)(1)"[45] – does not show that the Arbitrator's interpretation of *Article 37* is irrational, unfounded, implausible, or in manifest disregard of *this agreement*. Thus, the Agency's reliance on *DOT* does not demonstrate that the award fails to draw its essence from the parties' agreement.

Based on the foregoing, we deny the Agency's essence exceptions.

B. The Arbitrator exceeded his authority to the extent that the awarded remedy applies to non-grievants.

The Agency contends that the Arbitrator exceeded his authority by directing the Agency to treat "all future [ad hoc leave] requests," including those submitted by "similarly situated" officers, consistent with the award.[46] Arbitrators exceed their authority, as relevant here, when they resolve an issue not submitted to arbitration or award relief to those not encompassed within the grievance.[47] In this regard, if a grievance is limited to a particular grievant, then the remedy must be similarly limited.[48]

As an initial matter, we note that the Authority has dismissed, as moot, a party's exception when the opposing party concedes to an interpretation of the award that avoids the alleged deficiency.[49] While the Union, here, claims at one point that the award does not provide a remedy to individuals other than the grievants,[50] it also

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[31] *SSA*, 63 FLRA at 693 (denying essence exception where arbitrator's interpretation did not conflict with the "express provisions of the agreement").
[32] Exceptions Br. at 19-23.
[33] Award at 3 (quoting CBA Art. 37, § 2(A)); CBA at 183.
[34] Exceptions Br. at 20.
[35] *Id.* at 21 (quoting CBA Art. 35).
[36] CBA at 165.
[37] *Id.* at 165-75,182-200.
[38] Opp'n Br. at 8 ("[T]here is no prohibition [in Article 35] that the Arbitrator would have had to consider in his decision."); *id.* (stating that "the Agency did not show . . . that there is any language in Article 35 . . . that limits annual[-]leave approval if the Agency has to [backfill] with overtime").
[39] Award at 8 (quoting CBA Art. 37).
[40] CBA at 165.
[41] Award at 10.
[42] *See, e.g.*, *NTEU, Chapter 83*, 68 FLRA 945, 949 (2015) (no basis for concluding that the award failed to draw its essence from the agreement, in part, because the agreement did not define the interpreted term); *Louisville*, 66 FLRA at 429 ("Merely providing the Authority with an interpretation of the parties' agreement different than the arbitrator's is not sufficient to support an essence exception." (citing *OSHA*, 34 FLRA at 575)).
[43] Exceptions Br. at 22 (quoting CBA Art. 37).
[44] 61 FLRA 854 (2006).
[45] *Id.* at 857.
[46] Exceptions Br. at 14 (quoting Award at 10).
[47] *U.S. Dep't of the Army, U.S. Corps of Eng'rs, Nw. Div.*, 65 FLRA 131, 133 (2010) (*Army*) (Member Beck dissenting in part) (citation omitted); *see also AFGE, AFL–CIO, Nat'l INS Council*, 15 FLRA 355, 356 (1984) (*AFGE*) (arbitrators exceed authority by "award[ing] relief to employees who did not file grievances on their own behalf or who did not have the union file grievances for them" (citing *IRS, Birmingham Dist. Office*, 6 FLRA 143 (1981)).
[48] *E.g.*, *Army*, 65 FLRA at 133 (citing *U.S. Dep't of Energy, Oak Ridge Office, Oak Ridge, Tenn.*, 64 FLRA 535, 538 (2010) (*Energy*)).
[49] *U.S. DHS, U.S. CBP, U.S. Border Patrol, Yuma Sector*, 68 FLRA 189, 193 (2015) (citing *U.S. Dep't of VA, VA Long Beach Healthcare Sys., Long Beach, Cal.*, 63 FLRA 332, 334 (2009); *U.S. Food & Drug Admin., Detroit Dist.*, 59 FLRA 679, 683 (2004); *U.S. DOJ, INS, Jacksonville, Fla.*, 36 FLRA 928, 932 (1990)).
[50] Opp'n Br. at 12 (arguing that the award does "not provide relief to employees, who are not encompassed by the grievance" because "there is no evidence that there are any other [officers] who either requested or require relief").

alleges at another point that the award applies to "more than just the grievants in the case."[51] Given the Union's conflicting claims on this point, we find that the Union does not concede that the award applies only to the grievants. Therefore, the Union's claims do not moot the Agency's contention that the awarded remedy impermissibly extends to non-grievants, and we address the merits of the exception.

Here, the Union filed the grievances on behalf of the six grievants;[52] the parties stipulated before the Arbitrator that the issues concerned only the six grievants' leave requests;[53] and the Arbitrator specifically acknowledged that it was the parties' "understanding" that the award "would determine the outcome for each grievant individually."[54] Nevertheless, the Arbitrator directed the Agency to approve future ad hoc leave requests – including from "similarly situated" officers – "consistent with" his award.[55] By failing to limit the awarded remedy's applicability to the grievants, the Arbitrator exceeded his authority.[56] And, to the extent that the Arbitrator determined the contractual rights of "similarly situated" officers and other non-grievants, the Arbitrator resolved an issue beyond the scope of the stipulated issue.[57]

Based on the foregoing, we find that the Arbitrator exceeded his authority, and we modify the award to clarify that the remedy applies only to the grievants.[58]

IV. Decision

We modify the award to apply only to the grievants, and we deny the essence exceptions.

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[51] *Id.* at 10.
[52] Award at 2.
[53] *Id.*
[54] *Id.* at 10.
[55] *Id.*
[56] *See Army*, 65 FLRA at 133-34; *Energy*, 64 FLRA at 538.
[57] *See U.S. EPA*, 57 FLRA 648, 651 (2001) (finding that the award went "beyond the scope of the stipulated issue by defining the rights of employees who were not a part of the issue submitted to the [a]rbitrator"); *AFGE*, 15 FLRA at 356-57 (arbitrator "decided an issue not presented to him" by directing the agency to take "remedial action with respect to the grievant and with respect to other employees similarly situated").
[58] *E.g., Army*, 65 FLRA at 134.