69 FLRA No. 13

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 73
(Union)

0-AR-5145

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DECISION

November 30, 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 Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement when it denied the requests of eight employees (the grievants) to perform "[f]requent [t]elework."[1] Arbitrator Margo R. Newman found that the Agency relied on an improper basis to deny the requests, and she sustained the grievance. As a remedy, the Arbitrator ordered the Agency to consider the grievants' requests on an individual basis.

We must decide two substantive questions. The first question is whether the Arbitrator relied on one or more nonfacts in rendering her award. Because the claimed nonfacts either concern the Arbitrator's evaluation of the evidence or are not central facts underlying the award – and because the parties disputed the claimed nonfacts before the Arbitrator – the answer to the first question is no.

The second question is whether the award fails to draw its essence from the parties' agreement. Because one of the Agency's essence arguments is premised on a misinterpretation of the award and the other has no foundation in Authority precedent, the answer to the second question is no.

II. Background and Arbitrator's Award

The grievants work as "full-scope"[2] financial technicians in the Agency's Innocent Spouse Operation (ISO), an office that reviews taxpayer requests to be relieved of joint tax liability. After a taxpayer inquires about relief, either by letter or by calling the ISO's toll-free line, a "first-read"[3] employee screens a taxpayer request. If the first-read employee determines that the taxpayer meets the Agency's basic eligibility requirements, the Agency sends the taxpayer a letter requesting information to use in determining whether to grant relief, and assigns the request to a full-scope employee for processing. The full-scope employee then determines whether the taxpayer is eligible for relief; however, in making this determination the full-scope employee must occasionally communicate with the taxpayer to obtain additional information or answer questions.

The grievants all requested to work "frequent telework" – which is available to employees who "ha[ve] regular and recurring duties that may be performed at [an] approved [t]elework site for more than eighty . . . hours each month."[4] The Agency denied these requests, contending that the grievants' positions did not permit them to perform frequent telework. Specifically, the Agency claimed that, because employees could not access the Agency's telephone system (Aspect) remotely, the grievants would not be able to return taxpayers' calls or assist the first-read employees in answering the toll-free line when call volumes were high.

Article 50, Section 2(E) of the parties' agreement permits the Agency to deny a request for frequent telework if

> the employee's work at the time of the request: (1) does not encompass regular and recurring duties that can be effectively accomplished outside of the traditional office/team setting; or (2) cannot be accomplished by an employee working independently of other co-workers, support staff, and/or his or her supervisor, without any adverse impact on individual and/or

[1] Award at 4 (quoting Exceptions, Attach. G, Joint Ex. 1 (Agreement) at 147).

[2] *Id.* at 6.

[3] *Id.*

[4] *Id.* at 4 (quoting Agreement at 147).

> overall team or office productivity or customer service.[5]

The Union then filed a grievance, which was unresolved, and the parties submitted the matter to arbitration.

Before the Arbitrator, the Union argued, as relevant here, that permitting the grievants to utilize frequent telework would not adversely affect customer service. Specifically, the Union observed that Agency policy only required full-scope employees to return taxpayer calls within three days. The Union further argued that placing and responding to telephone calls was a minor part of full-scope employees' job duties, with full-scope employees receiving an average of three and a half calls per week. The Union also argued that frequent telework would not adversely affect the Agency's ability to staff the toll-free line because full-scope employees received toll-free calls infrequently enough that assigning the grievants to answer calls only when they were in the office would not affect the Agency's ability to staff the toll-free line or burden non-teleworking full-scope employees. Finally, the Union argued that the Agency had technology that would make it possible for the grievants to place and receive calls from home.

Conversely, as relevant here, the Agency argued that because the grievants' jobs required them to use Aspect, productivity and customer service would suffer if they teleworked frequently. The Agency further argued that, although Agency policy gave full-scope employees up to three days to return taxpayer calls, the Agency feared that the quality of customer service would nevertheless decline if taxpayers experienced unnecessary delays in having their calls returned. Such delays would, the Agency argued, lead to frustrated taxpayers calling the Agency's toll-free line for assistance, resulting in more work for the first-read employees and harming overall productivity. The Agency also claimed that having the grievants unavailable to provide backup support staffing the toll-free line would be unfair to full-scope employees who did not telework and would harm customer service by making it more difficult for the Agency to timely respond to increases in call volume.

The Arbitrator found in favor of the Union. The Arbitrator concluded that the grievants had portable work which could be performed from home. The Arbitrator also concluded that, even if they were required to use Aspect, permitting the grievants to perform frequent telework would not adversely affect customer service because the Agency could schedule them to return to the office every three days. In reaching these conclusions the Arbitrator relied on the Agency's policy requiring full-scope employees to return calls within three days, reasoning that the Agency could not hold the grievants "to a higher standard than that required for their jobs in order to defeat a telework request."[6] The Arbitrator further opined that if the Agency "deemed" "more prompt call back . . . important, the Agency has the option of providing technology to accomplish this from home."[7] The Arbitrator further found that the grievants' absence from the workplace would not affect the Agency's ability to staff the toll-free line because full-scope employees who did not volunteer to answer the toll-free line staffed the line infrequently enough – fewer than five days in a six-month period – that the grievants' absence would still leave enough full-scope employees available to staff the toll-free line on any given day. Thus, the Arbitrator concluded that "[w]hatever customer[-]service impact [that] may occur is speculative and has not been shown to be other than de minimis."[8]

Accordingly, the Arbitrator sustained the grievance, and, as a remedy, ordered the Agency to consider the grievants' frequent-telework requests on an individualized basis. The Agency then filed exceptions to the Arbitrator's award, and the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's contrary-to-law exception.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations,[9] the Authority will not consider arguments that could have been, but were not, presented to the arbitrator.[10]

Here, the Agency argues that by "requir[ing] the Agency to consider [alternative] technology" or "altering the requirement that the [g]rievants . . . use A[spect] daily," the award conflicts with its "reserved right to determine the method, technology, and means of performing work"[11] under § 7106(b)(1) of the Federal Service Labor-Management Relations Statute (the Statute).[12] But, although the Agency argued that it "[wa]s not required to alter the [g]rievants' job duties or

[5] *Id.* (quoting Agreement at 147).

[6] *Id.* at 21.
[7] *Id.*
[8] *Id.* at 23 (italicization omitted) (citation omitted).
[9] 5 C.F.R. §§ 2425.4(c), 2429.5.
[10] *E.g.*, *U.S. Dep't of VA, Bos. Healthcare Sys., Bos., Mass.*, 68 FLRA 116, 117 (2014) (citing 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012)).
[11] Exceptions at 25-26.
[12] 5 U.S.C. § 7106(b)(1).

the A[spect] phone system" or "to implement . . . workarounds to the requirement that the grievants use the A[spect] phone system"[13] before the Arbitrator, its arguments do not mention § 7106(b)(1) of the Statute or the terms "management rights" or "technology, methods, and means of performing work." Thus, because the Agency did not raise this management-rights argument before the Arbitrator, §§ 2425.4(c) and 2429.5 prohibit it from doing so here.

We therefore dismiss the Agency's contrary-to-law exception.

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Agency argues that the Arbitrator relied on several nonfacts.[14] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[15] Further, the Authority will not find an award deficient on the basis of the arbitrator's determination on any factual matter that the parties disputed at arbitration.[16] Moreover, the Authority has long held that disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be accorded such evidence, provides no basis for finding an award deficient as based on a nonfact.[17]

The Agency first argues that the Arbitrator's conclusion that "any impact upon customer service that would occur from telework is speculative"[18] is a nonfact because (1) "[u]nchallenged testimony . . . makes clear that the impact upon customer service when taxpayers do not receive immediate calls back is real and significant,"[19] and (2) the Arbitrator failed to consider that "taxpayer[s] will not be able to reach a representative when they call" if that representative is teleworking.[20] However, both of these arguments challenge the Arbitrator's evaluation of the evidence, and in any event, the parties disputed the effect of the grievants' telework on customer service before the Arbitrator.[21] Therefore, these arguments do not establish that the award is deficient on nonfact grounds.

The Agency also argues the award is deficient because the Arbitrator "erroneously conclude[d] . . . that technology exists that enables the [g]rievants to make telephone calls using A[spect] remotely."[22] But even assuming that this finding is clearly erroneous, it is not a central fact underlying the award. In this regard, the Arbitrator found that customer service would not suffer if the grievants teleworked because "[e]ven if the employee w[ere] required to use the Aspect phone system, the employee could return calls within [three] business days . . . as long as the [f]requent[-t]elework agreement ha[d] the employee reporting to the office at least every third business day."[23] Thus, even if the Arbitrator erred in finding that the Agency could "provid[e] technology to accomplish [more prompt return calls] from home"[24] to address its "speculative" customer-service concerns,[25] the Agency cannot show that but for this finding, the Arbitrator would have reached a different result. Moreover, as with the Agency's first two nonfact arguments, the parties disputed the availability of technology that would enable the grievants to use Aspect remotely,[26] and as noted above, a party may not challenge, on nonfact grounds, an arbitrator's resolution of a factual dispute.[27]

We therefore deny the Agency's nonfact exception.

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[13] Exceptions, Attach. B (Agency Post-Hr'g Br.) at 34-35.
[14] Exceptions 14-18.
[15] *E.g.*, *U.S. Dep't of VA, Bd. of Veterans Appeals*, 68 FLRA 170, 172 (2015) (*VA*) (Member Pizzella dissenting) (citing *NLRB, Region 9, Cincinnati, Ohio*, 66 FLRA 456, 461 (2012)); *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*Local 1984*) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry*)).
[16] *Local 1984*, 56 FLRA at 41 (citing *Lowry*, 48 FLRA at 594).
[17] *E.g.*, *U.S. Dep't of the Air Force, Whiteman Air Force Base, Mo.*, 68 FLRA 969, 971 (2015) (Member Pizzella dissenting) (citing *AFGE, Local 2382*, 66 FLRA 664, 668 (2012)).
[18] Exceptions at 14.
[19] *Id.* at 15.
[20] *Id.* at 17.
[21] *Compare* Award at 15 ("The Union asserts that working at home would have no adverse impact on . . . customer service.") *with id.* at 17 ("The Agency argues that . . . [the grievants] cannot work [f]requent [t]elework without having a negative impact upon . . . customer service.").
[22] Exceptions at 18.
[23] Award at 21.
[24] *Id.*
[25] *Id.* at 23.
[26] *Compare id.* at 14-15 ("[The Union] contends that if employees are required to use the Aspect phone system, calls could be forwarded automatically to the employee's home using . . . software which has been used elsewhere in the Agency for a number of years . . . .") *with id.* at 18 ("[The Agency] asserts that [the adoption of new technology] is impractical and impossible to implement . . . .").
[27] *E.g.*, *VA*, 68 FLRA at 172-73 (citing *NFFE, Local 2030*, 56 FLRA 667, 672 (2000); *AFGE, Local 1858*, 56 FLRA 422, 424 (2000); *Local 1984*, 56 FLRA at 41).

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

The Agency also claims that the award fails to draw its essence from the parties' agreement on two bases.[28] To establish that an arbitration award is deficient as failing to draw its essence from the parties' agreement, the excepting party must show 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.[29] 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."[30]

The Agency claims that the Arbitrator sustained the grievance based on a finding that "any impact upon customer service that would occur from granting telework to the [g]rievants is 'de minimis.'"[31] And it argues that this alleged finding "contravene[s] the wording and purpose of the . . . [a]greement,"[32] which permits telework only where an employee can work remotely "without *any* adverse impact on . . . customer service."[33] Even assuming that finding a de minimis exception would be "*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*,'"[34] the Agency's exception provides no basis for finding the award deficient because the Agency misconstrues the award.

Contrary to the Agency's claim, the Arbitrator did not find that the effect of frequent telework on customer service would be de minimis, but rather that the Agency's "speculative" concerns "ha[d] not been shown to be other than de minimis."[35] Thus, the Arbitrator found that "the Union . . . met its burden of proving that there would be *no* adverse impact on . . . customer service if [the grievants] were permitted to telework."[36] Accordingly, because the Agency's essence argument is based on a misinterpretation of the award, it provides no basis for finding that the award fails to draw its essence from the parties' agreement.[37]

The Agency further argues that the award fails to draw its essence from the parties' agreement because the Arbitrator "ignores the intent of the Agency with respect to its obligations under Article 50 of the [parties' agreement]."[38] But allegations that an arbitrator ignored the intent of one of the contracting parties do not demonstrate that an award is deficient on essence grounds.[39] Further, the only legal precedent that the Agency cites in support of this argument[40] is inapposite because it involved a situation where, unlike here, the arbitrator's interpretation of the agreement clearly conflicted with the agreement's plain terms.[41] Thus, the Agency's claim provides no basis for finding the award deficient.

As such, we deny the Agency's essence exception.

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

[28] Exceptions at 20-23.
[29] *E.g.*, *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*) (citing *U.S. Army Missile Materiel Readiness Command (USAMIRCOM)*, 2 FLRA 432, 437 (1980) (*USAMIRCOM*)).
[30] *Id.* at 576 (citing *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987); *Dep't of HHS, SSA, Louisville, Ky. Dist.*, 10 FLRA 436, 437 (1982)).
[31] Exceptions at 21 (italicization omitted).
[32] *Id.*
[33] *Id.* (emphasis added by Agency) (quoting Agreement at 147) (internal quotation marks omitted).
[34] *OSHA*, 34 FLRA at 575 (emphasis added) (quoting *USAMIRCOM*, 2 FLRA at 437).
[35] Award at 23 (italicization omitted).
[36] *Id.* at 22 (emphasis added).
[37] *E.g.*, *NTEU, Chapter 299*, 68 FLRA 835, 838 (2015) (citing *U.S. DHS, ICE*, 67 FLRA 711, 713-14 (2014)).
[38] Exceptions at 22.
[39] *See IFPTE, Local 77, Prof'l & Scientists Org.*, 65 FLRA 185, 189-90 (2010) *overruled in part not relevant here by U.S. DHS, U.S. CBP*, 68 FLRA 1015 (2015) (Member Pizzella dissenting); *U.S. Dep't of the Navy, U.S. Marine Corps, Fin. Ctr., Kan. City, Mo.*, 38 FLRA 221, 228-29 (1990).
[40] Exceptions at 23 (citing *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 58 FLRA 553, 554 (2003) (*Guaynabo*).
[41] *Guaynabo*, 58 FLRA at 554 (arbitrator construed provision stating "[t]he employer will pay [a uniform] allowance each year to each employee who is required by policy to wear a uniform in the performance of their duties," to require payment of uniform allowance to employees who were *not* required to wear uniforms (alterations in original) (citation omitted) (internal quotation marks omitted)).