70 FLRA No. 105

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1633
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MICHAEL E. DEBAKEY VA MEDICAL CENTER
HOUSTON, TEXAS
(Agency)

0-AR-5319

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DECISION

May 2, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members

I. Statement of the Case

The Union filed a grievance on September 9, 2016 when the Agency instructed its supervisors regarding overtime eligibility. The instruction effectively precluded any further approval for health technicians to work overtime as nursing assistants, positions they formerly held. According to the Union, the Agency was required to, but did not, provide it notice and an opportunity to bargain "prior to changing a condition of employment."[1] Arbitrator Paul Chapdelaine found that the Agency's actions did not violate any provision of the parties' collective-bargaining agreement, and he denied the grievance.

The Union argues that the Agency had a statutory obligation to respond to the Union's demand to bargain. Therefore, according to the Union, the award is contrary to § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute).[2] We conclude that, because the Arbitrator framed and resolved a purely contractual issue and was not required to apply statutory standards, the award is not deficient on the grounds raised in the Union's contrary-to-law exception.

The Union also argues that the award is based on nonfacts concerning when the technicians were last approved to work overtime. Because the exception does not demonstrate that, but for these allegedly erroneous findings, the Arbitrator would have reached a different result, we deny the Union's nonfact exception.

II. Background and Arbitrator's Award

On August 4, 2016, the Agency instructed its supervisors to only approve overtime for employees to positions of the same grade and job series as their official positions.

The Union considered this instruction to be a change in overtime eligibility and demanded to bargain. The Agency did not respond to the Union's request, and the Union filed a grievance after several (GS-0640-06) health technicians were denied the opportunity to work overtime shifts as (GS−0621-05) nursing assistants, as a result of the instruction. The matter was unresolved and proceeded to arbitration.

At arbitration, the parties did not stipulate to an issue and, as relevant here, the Arbitrator framed the issue as whether the Agency violated *the parties' agreement* when it failed to notify and bargain with the Union prior to implementing changes in overtime eligibility. The Union argued that, in the past, health technicians had been approved to work overtime as nursing assistants. According to the Union, the Agency violated Articles 32.5 and 49.4 of the parties' agreement when it failed to provide notice and an opportunity to bargain prior to issuing its instruction that precluded supervisors from approving such overtime work.

The Agency argued that all employees were only eligible to work overtime in the position they officially hold. According to the Agency, when it became aware that some supervisors were approving overtime to employees who were not eligible, it issued its instruction to clarify the eligibility requirements. The Agency acknowledged that it did not reply to the Union's request to bargain, but argued that it had no obligation to do so because the grievants were never entitled to overtime work as nursing assistants.

In his award on September 9, 2017, the Arbitrator found that it was undisputed that several health technicians had been approved overtime as nursing assistants prior to August 2016. However, the Arbitrator found that, in Article 21, the parties agreed to avoid excessive use of overtime, which did not support the Union's argument that the parties intended to make overtime eligibility a subject of bargaining. Therefore, the Arbitrator concluded that the health technicians were not entitled to work overtime as nursing assistants, and

[1] Award at 3.
[2] 5 U.S.C. § 7116(a)(1), (5).

that the Agency's actions did not violate any provision of the parties' agreement. Accordingly, the Arbitrator denied the grievance.

The Union filed these exceptions on October 16, 2017.

III. Analysis and Conclusions

A. The award is not contrary to law.

The Union argues that the award is contrary to § 7116(a)(1) and (5) of the Statute[3] because the Agency refused to respond to the Union's request to bargain.[4] We review this exception de novo.[5]

Here, the parties did not stipulate to an issue, and the issue framed by the Arbitrator did not include an unfair labor practice or any other statutory claim.[6] Rather, according to the Arbitrator, the Union argued that the Agency violated Articles 32.5 and 49.4 of the parties' agreement.[7] The Arbitrator found that the Agency did not violate those provisions.

The Authority has long held that where an arbitrator is not required to apply a statutory standard, any alleged misapplication of that standard does not provide a basis for finding the award deficient.[8] Because the issue, as framed by the Arbitrator, addressed only a contractual claim, the Arbitrator was not required to apply a statutory standard. While the Authority has applied statutory standards in assessing the application of contract provisions that mirror, or are intended to be interpreted in the same manner as, the Statute, the Arbitrator did not find, the Union does not claim, and the record does not otherwise demonstrate, that either Article 32.5 or 49.4 of the parties' agreement mirrors, or was intended to be interpreted in the same manner as, the Statute.[9] Consequently, the Union has not demonstrated that the award is contrary to law.[10]

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

B. The award is not based on nonfacts.

The Union argues that the award is based on nonfacts because the Arbitrator found that two health technicians were no longer approved to work overtime as nursing assistants in September 2016.[11] According to the Union, the health technicians were denied overtime as early as April 2016.[12]

To establish that an award is based on a nonfact, the appealing party must show that the arbitrator made a clearly erroneous factual finding, but for which the arbitrator would have reached a different result.[13] Here, the Union does not demonstrate that, but for the allegedly erroneous findings, the Arbitrator would have reached a different result.[14] We deny the exception.

IV. Decision

We deny the Union's exceptions.

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[3] Exceptions at 3-5. (citing 5 U.S.C. § 7116(a)(1), (5)).

[4] Section 7116(a)(1) provides that it is an unfair labor practice (ULP) for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under the Statute. Section 7116(a)(5) provides that it is an ULP for an agency to refuse to consult or negotiate in good faith with a labor organization as required by the Statute.

[5] *E.g.*, *AFGE, Local 342*, 69 FLRA 278, 278 (2016) (Member DuBester concurring) *(citing NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).

[6] Award at 2.

[7] *Id.* at 3.

[8] *AFGE, Local 54*, 67 FLRA 369, 370-71 (2014) (citing *SSA*, 65 FLRA 286, 288 (2010)).

[9] *AFGE, Local 2152*, 69 FLRA 149, 151 (2015) (citing *AFGE, Local 1164*, 64 FLRA 599, 600-01 (2010)).

[10] Similarly, we also reject the Union's argument that the change in overtime eligibility had more than a de minimis effect, requiring the Agency to bargain. Exceptions at 6-7. The de minimis doctrine pertains only to the issue of whether an agency has the obligation to bargain under the Statute. *U.S. Dep't of the Navy, Marine Corps Combat Dev. Command, Marine Corps Base, Quantico, Va.*, 67 FLRA 542, 547 (2014) (Member Pizzella dissenting on other grounds). The Union has not demonstrated that the Arbitrator was required to apply the statutory "de minimis" doctrine. *Id.* (citing *NTEU*, 63 FLRA 198, 200 (2009)).

[11] Exceptions at 6-7.

[12] *Id.*

[13] *E.g.*, *AFGE, Local 3294*, 70 FLRA 432, 434-35 (2018) (Member DuBester concurring) (citing *U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010)).

[14] *Id.* (citing *U.S. Dep't of VA, VA Med. Ctr., Dayton, Ohio*, 65 FLRA 988, 992-93 (2011) (denying nonfact exception alleging that arbitrator mischaracterized testimony absent a demonstration that, but for this finding, the arbitrator would have reached a different result)).