70 FLRA No. 110

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1482
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
U.S. MARINE CORPS LOGISTICS BASE
BARSTOW, CALIFORNIA
(Agency)

0-AR-5228

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DECISION

May 7, 2018

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

I. Statement of the Case

The American Federation of Government Employees and the U.S. Department of the Navy have a master agreement that permits local-level bargaining. Consistent with the master agreement, the parties to this case have worked under Management Instruction 1.7 – a memorandum of understanding (MOU) that governs the assignment of overtime. The parties negotiated a version of Management Instruction 1.7 in January 2015 (the original MOU), and negotiated revisions to the original MOU (the revised MOU) in April 2015.

In May 2015, the Agency announced an overtime opportunity, for which an employee (the grievant) and an Agency supervisor volunteered. The Agency assigned the overtime shift to the supervisor. On September 3, 2016, Arbitrator Anthony Miller issued an award finding, as relevant here, that the Agency did not violate the original MOU by failing to assign the overtime shift to the grievant. There are two questions before us.

The first question is whether the award is contrary to § 7114(c) of the Federal Service Labor-Management Relations Statute (the Statute)[1] because the Arbitrator applied the original MOU – as opposed to the revised MOU – to resolve the grievance. Because the Arbitrator's application of the original MOU was based on his interpretation of that agreement, the Union's contrary-to-law exception provides no basis for finding the Arbitrator's determination deficient. Thus, the answer is no.

The second question is whether the award fails to draw its essence from the master agreement. Because the Arbitrator did not rely on the master agreement – and the Union does not cite any provision in either the original MOU or the revised MOU that required the Arbitrator to apply the revised MOU – the answer is no.

II. Background and Arbitrator's Award

After the Agency assigned the overtime shift to the supervisor, the Union filed a grievance alleging, in relevant part, that the grievant was entitled to the overtime assignment under Management Instruction 1.7. The parties could not resolve the grievance, and they submitted it to arbitration.

At arbitration, each party submitted its own statement of issues. The Arbitrator adopted the Union's submission, framing the issue, in relevant part, as: "Did the Agency violate . . . M[anagement Instruction] 1.7 when it denied an overtime assignment to [the grievant]?"[2]

Before the Arbitrator, the parties disputed which version of Management Instruction 1.7 – the original MOU or the revised MOU – applied to the disputed overtime opportunity. The Union argued that the revised MOU was in effect at the time of the overtime assignment. The Agency, on the other hand, "argue[d] that [the revised MOU] was not final because it had not been approved by national . . . headquarters."[3]

In assessing which MOU applied, the Arbitrator credited the testimony of the "Associate Director of Labor Relations" for the Department of the Navy, Marine Corps, who asserted that it was "necessary for her to approve [the revised MOU,] and she had not done so."[4] Consequently, the Arbitrator found that "[t]he merits of the [g]rievant's case must stand or fall based upon the [original MOU]."[5] The Arbitrator applied the original MOU to resolve the grievance and, ultimately, found that the Agency did not violate that agreement.

[1] 5 U.S.C. § 7114(c).

[2] Award at 2 (reciting both parties' proposed issue statements); *see also id.* at 6 (adopting the Union's framing of the issue).
[3] *Id.* at 7.
[4] *Id.* at 5; *see also id.* at 7.
[5] *Id.* at 7.

On October 3, 2016, the Union filed exceptions to the Arbitrator's award; the Agency did not file an opposition to the Union's exceptions.

III. Analysis and Conclusions

A. The award is not contrary to law.

The Union contends that the Arbitrator's application of the original MOU – rather than the revised MOU – is contrary to § 7114(c) of the Statute.[6] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an exception and the award de novo.[7] In applying the de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law, but defers to the arbitrator's underlying factual findings.[8]

Here, the Union's contrary-to-law exception is misplaced. The Arbitrator's decision to apply the original MOU – rather than the revised MOU – was not based on any law, rule, or regulation but, instead, on his interpretation of those agreements.[9] The Authority applies the "essence" standard to assess challenges to an arbitrator's determination regarding which of two different agreements applies.[10] Thus, the Union's contrary-to-law exception provides no basis for finding the award deficient,[11] and we deny this exception.[12]

B. The award does not fail to draw its essence from an agreement.

The Union also claims that the Arbitrator's award fails to draw its essence from the master agreement.[13] When reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the deferential essence standard of review that federal courts use in reviewing arbitration awards in the private sector.[14] 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."[15]

The Union claims that the Arbitrator's award is inconsistent with Article 4, Section 7 of the master agreement (Article 4).[16] However, the Arbitrator did not cite Article 4, and there is no evidence that the Arbitrator interpreted or applied Article 4, in concluding that the revised MOU was not applicable. Moreover, the Union fails to cite any provision in either the original MOU or the revised MOU that required the Arbitrator to apply the latter agreement. Consequently, the Union has failed to demonstrate that the Arbitrator's application of the original MOU is irrational, unfounded, or implausible, or that it evidences a manifest disregard of any agreement.[17] Thus, we deny this exception.

IV. Decision

We deny the Union's exceptions.

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[6] Exceptions Br. at 9-11; Exceptions Form at 4-5.

[7] *E.g.*, *SSA, Office of Disability Adjudication & Review*, 64 FLRA 527, 529 (2010) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).

[8] *Id.* (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998)).

[9] *See* Award at 7.

[10] *See U.S. Dep't of the Treasury, IRS, Kan. City, Field Compliance Serv.*, 60 FLRA 401, 403 (2004) (*IRS*) (applying the essence standard to review an arbitrator's determination that one agreement, rather than another, applied); *U.S. Dep't of HHS, Indian Health Serv., Alaska Area Native Health Servs., Anchorage, Alaska*, 56 FLRA 535, 539-40 (2000) (*HHS*) (same).

[11] *See IFPTE, Local 4*, 65 FLRA 167, 169 (2010) (finding a party's contrary-to-law exception "misplaced" where it was "based on the erroneous premise that the [a]rbitrator relied on [a statute], and not on the parties' agreement," to reach his conclusion); *AFGE, Local 779*, 64 FLRA 672, 674 (2010) (*Local 779*) (finding a party's contrary-to-law exception "misplaced" where the arbitrator's determination was based on an agreement and not on "any law, rule, or regulation").

[12] *See, e.g.*, *Local 779*, 64 FLRA at 674.

[13] Exceptions Br. at 11-13; Exceptions Form at 10-12.

[14] *See* 5 U.S.C. § 7122(a)(2); *e.g.*, *IRS*, 60 FLRA at 403 (citation omitted).

[15] *E.g.*, *IRS*, 60 FLRA at 403 (quoting *U.S. DOL (OSHA)*, 34 FLRA 573, 576 (1990)).

[16] Exceptions Br. at 12; Exceptions Form at 11.

[17] *See IRS*, 60 FLRA at 403 (dismissing an essence exception where the excepting party did not "point to any provision . . . that necessarily required the [a]rbitrator to apply" one agreement over another); *see also HHS*, 56 FLRA at 539-40.

Member DuBester, dissenting:

Contrary to the majority's decision, I would grant the Union's essence exception. As the majority acknowledges, the Arbitrator neither interpreted nor applied the provisions of Article 4, Section 7 (Article 4) of the Master Labor Agreement (MLA).[1] However, Article 4 determines whether the parties' locally negotiated memorandum of understanding (MOU), agreed to on April 1, 2015, is applicable.[2] This is a pivotal issue in the case. Because the Arbitrator failed to consider Article 4's crucial contract language when he determined not to apply the April 2015 MOU, I would find that the award evidences a manifest disregard of the MLA. Accordingly, I would grant the Union's essence exception.

The issues before the Arbitrator include whether the Agency violated the parties' MOU.[3] And the Arbitrator had to decide which version of the parties' MOU, the April 2015 version or an earlier January 2015 version, is "effective."[4] That issue is controlled by Article 4 of the MLA. Article 4 requires that "[a]ny agreement reached between an activity and a local union . . . shall become effective after a consistency review by the parties at the level of recognition *not to exceed fifteen . . . days*."[5]

The Union specifically argued before the Arbitrator that the revised MOU became effective because the Agency did not meet Article 4's fifteen-day requirement.[6] But "there is no evidence that the Arbitrator interpreted or applied Article 4, in concluding that the revised MOU was not applicable."[7] Because applying Article 4 determines whether the April 2015 MOU is "effective,"[8] and the Arbitrator did not consider Article 4, I would find that the award evidences a manifest disregard of the MLA, and remand the award to the Arbitrator to apply Article 4.[9]

Accordingly, I dissent.

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[1] Majority at 4.
[2] Exceptions, Attach. 7, MLA, Art. 4, § 7 at 13-14.
[3] Award at 2, 6 (Arbitrator adopting the broader issue submitted by the Union).
[4] Exceptions, Attach. 7, MLA, Art. 4, § 7(a)(7) at 14.
[5] *Id.* (emphasis added).
[6] Exceptions, Attach. 1, Union Post-Hr'g Br. at 12-13.
[7] Majority at 4.
[8] Exceptions, Attach. 7, MLA, Art. 4, § 7(a)(7) at 14.
[9] *Cf. NTEU, Chapter 207*, 60 FLRA 731, 743 (2005) (finding award evidences manifest disregard for parties' agreement where arbitrator applied two-step process for reassignment but agreement does not provide for two-step process for only one qualified applicant); *AFGE, Local 547*, 19 FLRA 725, 727 (1985) (finding award evidences manifest disregard for parties' agreement where agreement expressly excludes matter decided by arbitrator).