71 FLRA No. 41

UNITED STATES
DEPARTMENT OF THE AIR FORCE
DAVIS-MONTHAN AIR FORCE BASE, ARIZONA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2924
(Union)

0-AR-5387

_____

DECISION

July 12, 2019

_____

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

Decision by Member Abbott for the Authority

I. Statement of the Case

Here, the parties disputed whether the grievant provided sufficient information to the Agency to support her official time requests. We agree with the Arbitrator that the grievant provided sufficient information and that the requests constituted a "[s]pecial situation[]"[1] as set forth in the parties' memorandum of agreement (MOA).

Arbitrator Katherine J. Thomson found that the Agency violated the parties' collective-bargaining agreement (CBA) and MOA when it denied official time requests made by the grievant, the Vice President of AFGE, Local 2924. The Agency filed exceptions and argued that the award failed to draw its essence from the agreements and is contrary to law.

Because the Arbitrator's interpretation of the agreements—that an increase in representational activity constituted a special situation under the MOA and that the grievant had provided sufficient information to support the requests—is not irrational, unfounded, implausible, or in manifest disregard of the agreements, we deny the Agency's essence exception. Further, as the Arbitrator interpreted the CBA and MOA and did not interfere with management's right to assign work, we also deny the Agency's contrary-to-law exception.

II. Background and Arbitrator's Award

In 2015, the Agency and the Union entered into an MOA that resolved twenty-three grievances, four unfair-labor-practice (ULP) cases, and two Equal Employment Opportunity complaints concerning the grievant's use of official time. As relevant here, the MOA guaranteed the grievant fifty percent official time and established procedures for her to request additional official time for "special situations."[2]

Between June and December 2017, the Agency denied a number of additional official time requests made by the grievant because they did not establish "special situations" and the grievant did not provide sufficient information to allow the Agency to determine whether the time requested was reasonable.[3] The Union filed several grievances concerning the denials, and they were consolidated for this arbitration.[4]

In her award, the Arbitrator found that, although the MOA did not define "special situation," the Union and Agency both recognized that representational activity had increased, even while they disagreed over whether increased litigation was a special situation.[5] The Arbitrator found that the increased representational activity established a special situation.

According to the Arbitrator, the increase in the number of ULPs and grievances demonstrated that the grievant "could not reasonably complete [her representational duties] in the allotted 50% official time guaranteed by the MOA."[6] She further found that the grievant's official time requests provided to the Agency the information required by the agreements.[7] The Arbitrator also relied upon evidence that the Agency's current labor relations officer was aware of the increase in representational activity, and the former labor

[1] Exceptions, Attach. 3, MOA at 1. The MOA uses the term "[s]pecial situations" to refer to occasions when the grievant might request additional official time, and was disputed by the parties at arbitration. *Id.*

[2] Award at 4 (quoting MOA).

[3] *Id.* at 4, 6.

[4] The Arbitrator found that some of the grievant's requests did not comply with the parties' agreements and denied those grievances. *Id.* at 17-18. These grievances are not at issue in the exceptions.

[5] *Id.* at 16.

[6] *Id.* at 19.

[7] The proposed time of departure, the time needed, the purpose of the request, and the ULP or grievance case numbers associated with the requests. *Id.* at 17; Exceptions, Attach. 2, CBA (CBA) at 11.

relations officer—who negotiated the MOA—had said that the grievant's requests should have been approved.[8]

Therefore, the Arbitrator concluded that the Agency violated the parties' agreements. As a remedy, the Arbitrator ordered the Agency to cease and desist from violating the parties' agreements and to restore annual leave that the grievant used on July 24, 2017, to perform representational duties, provided that the grievant presented an accounting of the time.

The Agency filed exceptions to the award on June 18, 2018, and the Union filed an opposition on July 6, 2018.

III. Analysis and Conclusions

A. The award draws its essence from the agreements.

In its exceptions, the Agency argues that the award fails to draw its essence[9] from the CBA, specifically Article 6, § 4, as it provides that "[i]f the supervisor is unable to determine for what purpose the official time is going to be used, the requestor will contact the [l]abor [r]elations [o]fficer . . . to clarify the request."[10] On this point, the Agency argues that the grievant failed to provide sufficient information in her official time requests.[11]

The Arbitrator found that the labor relations officer had an obligation to communicate with the Union about the requests, because the MOA provides that "[i]n the event management believes [the grievant] has failed to properly account for her official time, the [l]abor [r]elations officer will meet with [the grievant and the Union p]resident to discuss the deficiencies and reparation for proper accountability *prior* to official time being denied."[12] The Arbitrator also noted that the labor relations officer did not explain why she did not meet with the grievant.[13] The Arbitrator noted that Article 6, § 3, which provides for a "reasonable amount of official time" to perform representational duties,[14] obligated the Agency to allow the grievant additional official time for the increased representational activity.

Article 6, § 5(b) states that "[o]fficial time requests will include the proposed time of departure, an estimated amount of time needed, the purpose of the request, [and] the type of representation."[15] The Arbitrator found that the grievant's requests for additional time—which listed the proposed time of departure, the time needed, the purpose of the request, and case numbers—were sufficiently specific and met the requirements of Article 6, § 5(b).[16] Thus, the Agency does not demonstrate that the Arbitrator's conclusions are irrational, unfounded, implausible, or in manifest disregard of the agreements. Accordingly, we deny this exception.[17]

B. The award is not contrary to law.

The Agency also argues that the award is contrary to law[18] because the Arbitrator interfered with its right to assign work.[19] According to the Agency, the Arbitrator "substituted her judgment for that of the Agency" when she found that the Agency should have approved the grievant's official time requests.[20] The

[8] Award at 16, 19.

[9] The Authority will find that an award is deficient as failing to draw its essence from a collective-bargaining agreement when the excepting 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. *E.g.*, *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

[10] CBA at 11.

[11] Exceptions at 7-8.

[12] Award at 4 (emphasis added).

[13] *Id.* at 15-16, 19.

[14] Award at 3; CBA at 10.

[15] CBA at 11.

[16] Award at 17; CBA at 11. Member Abbott notes that this case is distinguishable from *U.S. DHS, U.S. CBP*, 71 FLRA 119 (2019) (*DHS*) (Member DuBester dissenting), in which the Authority set aside an award because it absolved the union representative from "provid[ing] sufficient information for an approving official to determine whether the [official-time] request is consistent with an agreement." *DHS*, 71 FLRA at 119. at 119. In contrast, here, the Arbitrator did not absolve the Union representative from providing sufficient information, but found that when she provided the approving official with the proposed time of departure, the time needed, the purpose of the request, and the case numbers worked on, that that information was sufficient to allow the approving official to determine if the official-time request was consistent with the parties' agreement.

[17] *See U.S. Dep't of State, Passport Servs.*, 71 FLRA 12, 13-14 (2019); *AFGE, Local 2145*, 70 FLRA 873, 875 (2018); *SSA, N.Y.C., N.Y.*, 60 FLRA 301, 304 (2004).

[18] When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo. In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the appealing party establishes that those findings are "nonfacts." *E.g.*, *U.S. Dep't of State, Bureau of Consular Affairs, Passport Servs. Directorate*, 70 FLRA 918, 919 (2018).

[19] Exceptions at 8-10 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Big Spring, Tex.*, 70 FLRA 442, 444 (2018) (*Big Spring*) (Member DuBester concurring)).

[20] *Id.* at 9 (citing *Big Spring*, 70 FLRA at 444).

Agency argues that, because official time constitutes work and the Agency has the right to assign work, only the Agency may determine whether official time is appropriate.[21]

However, the Arbitrator found only that the grievant complied with the procedures the parties agreed to in the CBA and MOA.[22] Therefore, the Agency relies on a misinterpretation of the award,[23] and we deny the Agency's exception.[24]

IV. Decision

We deny the Agency's exceptions.

Member DuBester, concurring:

I agree that the award draws its essence from the agreements and that the award is not contrary to law. Accordingly, I concur with the decision to deny the Agency's exceptions.

[21] *Id.* at 8-10.
[22] Award at 16-18.
[23] *SSA*, 71 FLRA 57, 58 (2019) (Member DuBester concurring); *AFGE, Local 1101*, 70 FLRA 644, 648 (2018) (Member DuBester concurring) (citing *AFGE, Nat'l Joint Council of Food Inspection Locals*, 64 FLRA 1116, 1118 (2010)); *AFGE, Local 1441*, 70 FLRA 161, 163 (2017) (citing *AFGE, Local 1415*, 69 FLRA 386, 390 (2016); *U.S. DHS, U.S. CBP*, 66 FLRA 838, 844 (2012)).
[24] We also deny the Agency's exceeds authority exception on the same grounds. *U.S. DHS, U.S. CBP, Seattle, Wash.*, 70 FLRA 180, 183 (2017) (citing *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 692 (2014)).

Chairman Kiko, dissenting:

Unlike the majority, I would find that the Arbitrator's award fails to draw its essence from the parties' agreements.[1] Accordingly, I dissent.

As with any essence exception, it is vital that we focus upon the wording of the parties' written agreements. Here, Article 6, Section 4 (Section 4) of the parties' collective-bargaining agreement (CBA) commits the Agency to permitting "a reasonable amount of official time" and states that "it is the Agency's responsibility to determine what constitutes a reasonable amount of time."[2] Any employee requesting official time must provide "sufficient information whereby the Agency can determine whether or not official time for the requested purpose is justified."[3] And if the supervisor cannot determine the official time's purpose, then "the requestor will contact the Labor Relations Officer . . . to clarify the request."[4]

Although the grievant was hired as an education technician, her use of official time resulted in the parties negotiating a memorandum of agreement (MOA) under which the grievant was detailed to perform receptionist and front-desk duties rather than child-care duties in the classroom. Additionally, the MOA grants the grievant 50% official time, provided that she will "*usually not*" use official time between 6:00 a.m. and 10:00 a.m., and notes that *"*[*s*]*pecial situations* that involve a *temporary* change to that schedule will be requested in advance, [in accordance with] the CBA, via the previously established form."[5]

For the first year, the MOA operated as anticipated. The grievant "[o]ccasionally" requested extra official time, and the Agency would deny those requests only if it "had an urgent need for the [g]rievant to be at the [childcare] [c]enter" – usually because there was no one else to cover the front desk.[6] But those "occasional" requests became more regular: the grievant requested an extra one to two-and-a-half hours "nearly every workday from January until August 2017."[7] At a certain point, the Agency began to question the grievant about what "special circumstances" justified these constant requests for additional official time.[8] And when the Agency "began disapproving her requests, the [g]rievant began asking for [four] hours nearly every workday."[9]

And so began a pattern: the grievant would ask for more official time than the parties had negotiated, the Agency would ask what made this request special, unusual, or temporary, and the grievant would respond that she needed more official time because the Union was filing more grievances and unfair-labor-practice charges than had been typical when the parties negotiated the MOA.

In her award, the Arbitrator found that Section 4 obligated the Agency's Labor Relations Officer to clarify the purpose and reasonableness of the grievant's official time requests. But, as noted above, that section provides that where, as here, the supervisor asserts a need for more information, "*the requestor*" – here, the grievant – "will contact the Labor Relations Officer . . . to clarify the request."[10] Thus, the Arbitrator's interpretation of this section as putting the burden on *the Agency* to follow up with the grievant evidences a manifest disregard of the agreement's plain wording.

Moreover, in Section 4, "[b]oth parties acknowledge that it is *the Agency's* responsibility to determine what constitutes a reasonable amount of time."[11] And the MOA provided that the grievant would work only 50% of her duty hours on official time, ordinarily not between the hours of 6:00 a.m. to 10:00 a.m. unless *"[s]pecial situations* that involve a *temporary* change to that schedule" arise.[12] During the time period at issue, the grievant appears to have requested more official time than provided in the MOA on an almost daily basis. It is incomprehensible that the grievant's constant requests for more official time than she negotiated would constitute "special" situations involving a "temporary" change to the agreed-upon schedule. Accordingly, the Arbitrator's conclusion – that the parties' agreements required the Agency to grant

[1] The Authority will find that an arbitration award is deficient as failing to draw its essence from the collective-bargaining 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. *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

[2] Award at 3 (quoting Section 4); *see also id.* ("Official time may be denied based on urgent workload" (quoting Article 6, Section 5)).

[3] *Id.* (quoting Section 4).

[4] *Id.* (quoting Section 4).

[5] *Id.* at 4 (emphasis added) (quoting MOA).

[6] *Id.* at 5.

[7] *Id.* at 6.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 3 (emphasis added) (quoting Section 4).

[11] *Id.* (emphasis added) (quoting Section 4).

[12] *Id.* at 4 (emphasis added) (quoting MOA).

these requests – is implausible and cannot in any rational way be derived from the CBA and the MOA.

For the foregoing reasons, I would grant the Agency's essence exception and set aside the award.[13] Thus, I dissent.

[13] Accordingly, I would find it unnecessary to reach the Agency's remaining exceptions.