

71 FLRA No. 65

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3627
(Union)

0-AR-5501

DECISION

September 30, 2019

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

Decision by Member Abbott for the Authority

I. Statement of the Case

With this case, we inform the federal labor-management relations community that an arbitrator’s award resolving only alleged contract violations cannot draw its essence from a collective-bargaining agreement when the award provides a remedy despite having found no violation of the agreement itself.

This case involves a grievant who worked in Virginia, but asked to telework from Kentucky. The grievance alleged that the Agency violated the parties’ agreement when it, among other things, denied her telework request. Arbitrator Malcolm L. Pritzker found that the Agency’s actions did not violate the parties’ agreement and denied the grievance. Despite this finding, he ordered the Agency to reimburse the grievant for moving expenses with seemingly no explanation other than “[the grievant] was led to believe that she would be able to telework three days a week from Lexington which resulted in her . . . move to Kentucky.”¹

The Agency argues that the award fails to draw its essence from the parties’ agreement because the remedy cannot be rationally derived from the parties’ agreement if the Arbitrator found no violation.² We agree. Accordingly, we grant the Agency’s exception and vacate the award.

II. Background and Arbitrator’s Award

The grievant previously worked for the Agency as a General Schedule (GS)-14 in Virginia. In March 2014, the grievant began teleworking once a week with an alternate duty station (ADS), also in Virginia. In June 2014, she began teleworking three days a week. The grievant and her supervisor discussed the possibility of her teleworking from Lexington, Kentucky because her parents, siblings, and extended family live in Lexington. The grievant moved to Kentucky the first week of August 2014. She was subsequently notified by her supervisor via email on August 4, 2014, that having her ADS in Kentucky would not work because the telework agreement required an employee to be able to return to his or her official duty station within two hours’ notice. On August 5, 2014, the grievant responded via email stating that she had already moved and would be teleworking from Kentucky three days a week. On September 19, 2014, the Agency formally denied the grievant’s telework request.

In October 2014, the grievant requested a hardship transfer to Lexington, Kentucky based on her parents’ medical conditions. The Agency offered her a GS-12, Step 10 position, which she accepted. The grievant, represented by the Union, filed a grievance alleging a host of missteps by the Agency. The grievance was submitted to arbitration.

As relevant here, the issue before the Arbitrator was “[d]id the Agency violate the terms of the collective [b]argaining [a]greement cited in the grievance? If so, what shall be the remedy?”³ The Arbitrator methodically listed each alleged misstep by the Agency, found that the Agency did not violate the parties’ agreement in each instance, and denied the grievance. Despite this finding, he ordered the Agency to reimburse the grievant for an unspecified amount of moving expenses finding “[h]ad she been told that she could not telework from Kentucky[, she] might have kept her ADS in Virginia.”⁴

On April 24, 2019, the Agency filed exceptions to the Arbitrator’s award. On May 14, 2019, the Union filed its opposition to the Agency’s exceptions.

² Exceptions at 7-8, 11.

³ Award at 1.

⁴ *Id.* at 11.

¹ Award at 11.

III. Analysis and Conclusion: The award fails to draw its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement because the remedy cannot be rationally derived from the agreement.⁵ Specifically, the Agency argues that because the Arbitrator found no violation of any of the contested provisions of the parties' agreement, including the telework article, the remedy—requiring the Agency to reimburse the grievant for moving expenses—cannot rationally be derived from the parties' agreement.⁶

The Arbitrator here methodically considered each of the provisions the grievant alleged were violated by the Agency, and yet, found the Agency's actions did not constitute a violation. The awarded remedy does not reference or even allude to a concept that would provide for the payment of monies to the grievant. While the Authority has held that arbitrators have broad discretion in fashioning remedies,⁷ that discretion does not allow an arbitrator to issue an award based solely on his own notion of industrial justice.⁸ When parties ask an arbitrator to interpret their agreement, they do not authorize the arbitrator to fabricate new contractual obligations out of whole cloth.⁹ Furthermore, the Authority has held that an award that issues a remedy after finding no violation is contrary to law.¹⁰ Similarly, the Authority has also held that an arbitrator exceeds his authority when he issues a remedy after finding no

⁵ The Authority will find an arbitration 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. *Library of Congress*, 60 FLRA 715, 717 (2005) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

⁶ Exceptions at 7.

⁷ *AFGE, Council 215*, 66 FLRA 137, 141 (2011).

⁸ *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (finding "arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice").

⁹ See *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 755-56 (2018) (*Navy*) (Member DuBester dissenting) (holding that an agreement's silence on a matter does not authorize an arbitrator to modify – rather than interpret – the parties' agreement to create "a brand new contract provision").

¹⁰ *U.S. Small Bus. Admin.*, 70 FLRA 745, 746-47 (2018) (*SBA*) (finding an award contrary to law when the arbitrator awarded backpay after finding no violation of law or the parties' agreement); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex – Allenwood, White Deer, Penn.*, 68 FLRA 841, 843 (2015) (*Allenwood*) (Chairman Pope concurring) (finding an award contrary to law because it provided the grievant with backpay but did not find a violation of law or contract); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 60 FLRA 728, 730 (2005) (*Marion*) (citing *U.S. Dep't of HHS*, 54 FLRA 1210, 1218-19 (1998) (finding an award contrary to law when the arbitrator found no violation of the parties' agreement or any unwarranted or unjustified personnel action, yet ordered the Agency to compensate the grievant for the difference in pay as a result of the reassignment)).

violation of law or the parties' agreement.¹¹ Because the Authority has vacated awards on exceeds authority and contrary-to-law grounds when an arbitrator issued a remedy after finding no violation of law or contract,¹² we cannot conclude that an award issuing a remedy when there was no violation somehow draws its essence from the parties' agreement. Therefore, we find that where the only issues before the arbitrator are alleged contractual violations, an award that provides a remedy after finding no violation of the parties' agreement fails on essence grounds because it cannot be rationally derived from the agreement.¹³

Because the Arbitrator, after finding no violation and denying the grievance, took it upon himself to award a remedy based on nothing more than his own sense of industrial justice,¹⁴ we find that the award does not rationally derive from the parties' agreement.¹⁵ Accordingly, we grant the exception and we vacate the award.

IV. Order

We vacate the award.

¹¹ *U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 65 FLRA 969, 973 (2011) (*Womack*) (finding that an arbitrator exceeds his authority when he finds no violation of law or contract, yet issues a remedy); *SSA, Indianapolis, Ind.*, 66 FLRA 62, 66 (2011) (*SSA II*) (Member DuBester dissenting, in part) (citing *U.S. Dep't of Navy, Naval Sea Logistics Ctr., Detachment Atl., Indian Head, Md.*, 57 FLRA 687, 688-89 (2002) (finding arbitrators exceed their authority when they find no violation but award a remedy)); *SSA, Balt., Md.*, 64 FLRA 516, 518 (2010) (*SSA I*) (citing *NLRB, Tampa, Fla.*, 57 FLRA 880, 881 (2002) (finding that "when an arbitrator decides the merits of a dispute and finds no violation of law or contract, the arbitrator has no authority to provide a remedy")); *Washington Plate Printers Union, Local 2, IPPDSPMEU & Graphic Commc'ns Int'l Union, Local 4B, AFL-CIO*, 59 FLRA 417, 421 (2003) (*Plate Printers*) (finding an arbitrator exceeded his authority and "fashioned his 'own brand of industrial justice'" by issuing a remedy after finding the agency did not violate the parties' agreement).

¹² *SBA*, 70 FLRA at 746-47; *Allenwood*, 68 FLRA at 843; *Marion*, 60 FLRA at 730; *Womack*, 65 FLRA at 973; *SSA II*, 66 FLRA at 66; *SSA I*, 64 FLRA at 518; *Plate Printers*, 59 FLRA at 421.

¹³ Member Abbott notes that in *U.S. Department of VA, John J. Pershing Medical Center, Poplar Bluff, Missouri*, then-Member Pizzella dissented arguing that awards based on "equitable largesse" are nothing more than "what some might call a taxpayer shakedown." 68 FLRA 852, 856 (2015) (Member DuBester concurring; Member Pizzella dissenting) (Dissenting Opinion of Member Pizzella). I agree with Member Pizzella, and feel that an award based solely on equitable largesse should not be upheld.

¹⁴ Award at 8-11.

¹⁵ *Cf. Navy*, 70 FLRA at 755-56 (award that modified agreement by creating a contractual obligation not based in the agreement's wording failed to draw its essence from the agreement).

Member DuBester, concurring:

When reviewing an arbitrator's interpretation of a collective-bargaining agreement, Authority precedent applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.¹ In reviewing awards under this standard, the Authority should never overturn an award simply because it disagrees with the arbitrator's ruling on the merits. On the other hand, while arbitrators "may of course look for guidance from many sources," they "[are] confined to interpretation and application of the collective[-]bargaining agreement [and] do[] not sit to dispense [their] own brand of industrial justice."²

Here, the Arbitrator awards a remedy despite finding no violation of the parties' collective-bargaining agreement and denying the grievance.³ Absent a finding that the Agency violated the parties' agreement, or any reference to the agreement on which to base the remedy provided, I am constrained to agree that the award fails to draw its essence from the parties' agreement.⁴

¹ *IFPTE, Ass'n Admin. Law Judges*, 70 FLRA 316, 317 (2017) (citing *AFGE, Council 220*, 54 FLRA 156, 159 (1998)).

² *U.S. Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

³ It appears that the Arbitrator endeavors to provide an equitable solution given the circumstances between the grievant and the Agency. While the Agency could choose to take this action voluntarily, based on the record before us, it is not the Arbitrator's province to do so.

⁴ See, e.g., *In re Marine Pollution Serv.*, 857 F.2d 91, 96 (2d Cir. 1988) (concluding that award failed to draw its essence from the parties' collective-bargaining agreement where the arbitrator "never explicated his reasons [for the award] under the contract" and "did not purport to base his award on any express or implied term" in the agreement).