71 FLRA No. 222

UNITED STATES
DEPARTMENT OF EDUCATION
FEDERAL STUDENT AID
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3899
(Union)

0-AR-5515

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DECISION

December 10, 2020

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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

In this case, we reaffirm that an Agency must adhere to limitations to which it has agreed throughout the term of a collective-bargaining agreement (CBA).[1]

Arbitrator Angela R. Murphy found that the Agency violated the parties' CBA and the Telework Enhancement Act when it changed its telework policy and subsequently denied the grievant's request to continue working under her existing telework agreement. The Agency excepts on several grounds, including that the award fails to draw its essence from the parties' agreement, is contrary to law, and is ambiguous. For the reasons discussed below, we deny the exceptions, in part. However, we grant the Agency's sovereign immunity exception, and set aside the portion of the award requiring the Agency to reimburse the grievant for expenses incurred after the Agency revoked her prior telework agreement.

[1] We note that this is at least the second case before us, although involving a different union, that flows from the Agency changing its telework policy. *See U.S. Dep't of Educ., Office of Fed. Student Aid*, 71 FLRA 1105, 1108 (2020) (finding that the Agency changed a condition of employment by implementing a new telework policy).

II. Background and Arbitrator's Award

The grievant was assigned to the Agency's San Francisco office. In May 2016, the grievant began teleworking full-time in order to better care for her disabled son. However, beginning in January 2017, the grievant began to report to the office two days per pay period pursuant to a new telework agreement with the Agency. In February 2017, the grievant moved to Florida to be closer to family members who could help with the care of her son. She continued teleworking and reporting to the San Francisco office two days per pay period, and the new telework agreement was renewed in August 2017.

On September 1, 2017, the Agency notified all employees that they would be required to report to their assigned office at least three days per week beginning October 2, 2017. The grievant requested, and the Agency denied, an exception that would have permitted the grievant to maintain her prior telework schedule. The grievant subsequently requested that the Agency change her duty station from San Francisco to Chicago, where she believed it would be more feasible for her to satisfy the Agency's new requirement while maintaining her residence in Florida. The Agency granted the request.

Shortly thereafter, the grievant filed two grievances regarding the Agency's new telework policy and the Agency's denial of the grievant's request for an exception. After the parties could not resolve the grievances, they were consolidated and submitted to arbitration.

Because the parties were unable to agree upon an issue, the Arbitrator framed the issue as: "Did the Agency violate the [CBA] or . . . federal law when it unilaterally changed the telework policy applicable to bargaining unit employees and revoked the [g]rievant's telework agreement? If so what shall the remedy be?"[2]

The Agency argued that the grievance became moot when it granted the grievant's request to change her duty station to the Chicago office, but the Arbitrator rejected that argument because the grievant's initial request was never granted. As to the merits, the Arbitrator noted that Article 44, Section 44.01 of the parties' CBA provides that "[e]ligible employees may participate in teleworking to the maximum extent possible without diminished employee or organizational performance."[3] The Arbitrator found that the grievant never had any issues completing her duties while teleworking, that the vast majority of the grievant's duties can be performed remotely, and that the Agency was

[2] Award at 6.
[3] *Id.* at 7.

unable to identify an operational need for the grievant to report to an office. The Arbitrator concluded that, "[b]ased on the totality of the evidence," the Agency failed to show that the grievant's performance "would be significantly diminished by . . . maintaining her prior telework schedule."[4]

The Arbitrator also noted that the Agency "failed to provide compelling evidence of the operational needs to revise" the telework guidelines.[5] She agreed with the Union that the Telework Enhancement Act does not allow unilateral modification of telework policies unless there is proof that the policies diminish employee performance or agency operations, and that there was no such proof in this case. In addition, the Arbitrator found that the parties' CBA "does not allow the Agency to make sweeping Agency-wide unilateral limitations on telework availability" because the CBA provides for the discontinuation of telework only for certain reasons and Article 44, Section 44.04(C) states that "an employee request will be approved if the employee meets the eligibility criteria."[6]

The Arbitrator concluded that the Agency wrongfully terminated the grievant's telework agreement in violation of the CBA and federal law.[7] The Arbitrator clarified that "even though some of the findings and the underlying reasoning could be seen to apply to national-level issues, her decision and the related remedy is confined to the [g]rievant in the instant case."[8] As a remedy, the Arbitrator ordered the Agency to permit the grievant to return to her prior telework schedule and reimburse her for any expenses incurred as a result of its cancellation. She retained jurisdiction "[f]or the purpose of resolving any disputes over the question of remedy."[9]

The Agency filed exceptions to the award on June 13, 2019, and the Union filed an opposition on July 26, 2019.[10]

III. Analysis and Conclusions

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

The Agency argues that the award fails to draw its essence[11] from the parties' agreement because the Arbitrator framed the issue as a national-level grievance instead of an employee grievance and the two are processed differently under the parties' CBA.[12] The Agency contends this was a "fatal error"[13] and thus that the award is "deficient."[14] We are unpersuaded. Although the Agency may have preferred the issue statement to be worded differently, the issue statement clearly refers to the individual grievant here, and furthermore, the Arbitrator explicitly noted that "even though some of the findings and the underlying reasoning could be seen to apply to national-level issues, her decision and the related remedy are confined to the

[4] *Id.* at 11.
[5] *Id.*
[6] *Id.* at 12. In addition, the Arbitrator noted that "[t]he Union argues that the change implemented by the Agency is more than a change in policy: it is a change in the conditions of employment of bargaining unit employees. As a change in the conditions of employment, the Agency's action was an impermissible modification of the valid telework agreement that was renewed in August 2017. The Union characterizes the Agency's action[] as a violation of both the [CBA] and the law." *Id.* at 12-13. The Arbitrator stated that "[i]n [her] view the Union's characterization is correct." *Id.* at 13.
[7] Although the Arbitrator does not identify the specific federal law that the Agency violated in her conclusion, the only federal law that she mentions by name in the award is the Telework Enhancement Act. *See id.* at 12 ("[T]he Union argues that the Agency does not have unfettered discretion regarding the process of approving and denying telework under either the Telework Enhancement Act or the [CBA]. The [A]rbitrator is persuaded by the Union's argument that the [Telework Enhancement] Act does not allow unilateral modification of telework policies absent proof that the policies 'diminish employee performance or agency operations.' The Union asserts that such proof is absent in the instant case, and the [A]rbitrator agrees.").
[8] *Id.* at 13.
[9] *Id.* at 14.
[10] In its opposition, the Union argues that the Agency's exceptions are interlocutory because the Arbitrator retained jurisdiction to resolve disputes over the remedy. Opp'n at 4. The Authority has held that an arbitrator's award is final even where the arbitrator retains jurisdiction solely to assist the parties in the implementation of awarded remedies. *U.S. Dep't of the Interior, Nat'l Park Serv.*, 67 FLRA 489, 490 (2014) (citing *AFGE, Nat'l Council of EEOC Locals No. 216*, 65 FLRA 252, 253-54 (2010)). Because the Arbitrator only retained jurisdiction to assist the parties in implementing the awarded remedies – permitting the grievant to return to her prior telework schedule and reimbursing her for any expenses incurred as a result of its cancellation – her award is final, and we review the Agency's exceptions. *See, e.g.*, *U.S. Dep't of the Treasury, IRS*, 63 FLRA 157, 158 (2009); *U.S. Dep't of the Air Force, Kirtland Air Force Base, Air Force Materiel Command, Albuquerque, N.M.*, 62 FLRA 121, 123 (2007).
[11] An award fails to draw its essence from a CBA 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. *U.S. Dep't of State, Passport Servs.*, 71 FLRA 12, 13 n.18 (2019) (citing *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 755 (2018)).
[12] Exceptions at 56.
[13] *Id.*
[14] *Id.* at 58.

[g]rievant in the instant case."[15] Moreover, aside from generally asserting that the Arbitrator's framing of the issue statement renders the award "deficient,"[16] the Agency fails to otherwise explain how the award is irrational, implausible, or in manifest disregard of the agreement.[17] Accordingly, we deny the exception.[18, 19]

B. The award is contrary to law, in part.

The Agency raises several arguments that the award is contrary to law.[20, 21]

1. The award does not excessively interfere with management's right to assign work and direct its employees.

The Agency asserts that the award is contrary to law because it excessively interferes with the Agency's right to determine its organization under § 7106(a)(1) of the Statute,[22] and its rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute.[23] Specifically, the Agency contends that the portion of the award allowing the grievant to resume her prior telework schedule should not be allowed to stand because the Agency "has the unfettered right to determine" where its employees work as their official duty station and the frequency of telework.[24]

Under the framework we adopted in *U.S. DOJ, Federal BOP* (*DOJ*),[25] in order to determine whether a remedy is contrary to a management right, the first question that must be answered is whether the Arbitrator found a violation of the parties' agreement.[26] Here, because the Arbitrator concluded that the Agency violated the parties' CBA when it wrongfully revoked her telework agreement, the answer to the first question is

[15] Award at 13.
[16] Exceptions at 58.
[17] *See Int'l Ass'n of Firefighters, Local F-283*, 70 FLRA 601, 601 (2018) (Member DuBester concurring; Member Abbott concurring) (citing *Nat'l Nurses United*, 70 FLRA 166, 168 (2017)) (denying an essence exception when a party fails to show how the award fails to draw its essence from the parties' agreement).
[18] The Agency also argues that the award is based on a nonfact for the same reason it argues here. Exceptions at 47. However, because the Agency's nonfact exception is premised on the same argument we reject above – that the Arbitrator framed the issue as a national union grievance in conflict with the parties' CBA – and the Agency failed to put forth any argument as to how this is a nonfact, we deny its exception. *AFGE, Local 466*, 70 FLRA 973, 974 (2018) (denying a nonfact exception premised on the same essence argument and for failing to establish that the award was deficient). In addition, the Agency also argues that the Arbitrator exceeded her authority for the same reason it argues here. Exceptions at 64. However, we deny this exceeds-authority exception because the Agency's argument is identical to the essence argument. *U.S. DOD, Def. Contract Mgmt. Agency*, 66 FLRA 53, 58 (2011) (when the Authority denies an essence exception, and an exceeded-authority exception repeats the same argument, the Authority also denies the exceeded-authority exception); *see also AFGE, Local 2258*, 70 FLRA 210, 213 (2017) (rejecting the union's argument that the arbitrator exceeded his authority in framing the issue by not explicitly specifying that the issue was limited to a particular event because the arbitrator's interpretation of the scope of issues before him is entitled to substantial deference and the arbitrator clearly interpreted the issue as being constrained to that event).
[19] Furthermore, the Agency also argues that the award is based on a nonfact because the Arbitrator misinterpreted and "misapplied" Article 44, Section 44.04(B) of the parties' CBA – which states that "[e]mployee requests that meet the requirements of Section 44.03 (Eligibility) will be approved" – in finding that the Agency should have approved the grievant's telework request. Exceptions at 42. Because conclusions based on the arbitrator's interpretation of a CBA cannot be challenged as nonfacts, we deny this exception. *U.S. Dep't of VA, VA Reg'l Office, St. Petersburg, Fla.*, 70 FLRA 799, 800-01 (2018) (Member DuBester concurring, in part, and dissenting, in part) (denying exception that challenges arbitrator's contractual interpretations on nonfact grounds).
[20] When an exception involves an award's consistency with law, the Authority reviews any question of law de novo. *NAIL, Local 5*, 70 FLRA 550, 552 (2018) (Member DuBester concurring) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bennettsville, S.C.*, 70 FLRA 342, 344 (2017)). In reviewing de novo, the Authority assesses whether an arbitrator's legal conclusions are consistent with the relevant legal standards. *Id.*
[21] As mentioned above, the Arbitrator stated that she agreed with the Union that the change in the Agency's telework policy was a change to a condition of employment. *Supra* note 6. Although the Agency, in eighty-plus pages of single-spaced long-winded argument, makes numerous haphazard references to conditions of employment and its bargaining obligation, it fails to put forth any coherent or cognizable contrary-to-law claim in this respect. *See, e.g.*, Exceptions at 22, 46, 49, 72. Accordingly, we deny the exception for failure to support. *U.S. Dep't of HHS, Office of Medicare Hearings & Appeals*, 71 FLRA 677, 679 (2020) (*HHS, Medicare Appeals*) (Member Abbott concurring; Chairman Kiko dissenting) (citing 5 C.F.R. § 2425.6(e)(1)) (denying an exception containing only a brief assertion as unsupported).
[22] Exceptions at 24; 5 U.S.C. § 7106(a)(1).
[23] Exceptions at 24; 5 U.S.C. § 7106(a)(2)(A), (B).
[24] Exceptions at 24.
[25] 70 FLRA 398, 405-06 (2018) (Member DuBester dissenting) (establishing framework for evaluating whether award excessively interferes with management's rights).
[26] *Id.* at 405.

yes.[27] The second question is whether the Arbitrator's remedy reasonably and proportionally relates to the violation.[28] Here, the remedy – ordering the Agency to permit the grievant to return to her prior telework schedule – is reasonably and proportionally related to the violation.[29]

The final question is whether the arbitrator's interpretation of the parties' agreement excessively interferes with a management right.[30] If the answer to that final question is yes, then the arbitrator's award is contrary to law and must be vacated.[31] Here, Article 44, Section 44.01 of the parties' CBA states that "[e]ligible employees may participate in teleworking to the maximum extent possible without diminished employee or organizational performance" and the Arbitrator found that the Agency failed to show that the grievant's performance would be diminished by maintaining her prior telework schedule.[32] While the Authority recently held that determining the frequency of telework is an exercise of management's right to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute,[33] that does not allow an Agency to get out of a lawful provision that it agreed to pursuant to § 7106(b)(2).[34] Because the Arbitrator's award simply requires the Agency to abide by the procedures to which it agreed in the CBA, it does not excessively interfere with its management rights.[35] Accordingly, we conclude that the answer to the third question is no.[36] We deny the exception.[37]

2. The remedy, in part, is contrary to the doctrine of sovereign immunity.

The Agency also argues that the remedy ordering the Agency to reimburse the grievant for any expenses incurred as a result of the Agency's cancellation of her prior telework schedule is contrary to the doctrine

[27] Award at 11; *see also U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 387, 390 (2019) (*Comptroller*) (Member DuBester dissenting, in part) (finding the first prong of *DOJ* met).

[28] *DOJ*, 70 FLRA at 405.

[29] Award at 14; *see also Comptroller*, 71 FLRA at 390 (finding the second prong of *DOJ* met); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 70 FLRA 596, 597 (2018) (Member DuBester dissenting) (same).

[30] *DOJ*, 70 FLRA at 405.

[31] *Id.* at 405-06.

[32] Award at 7.

[33] *NTEU*, 71 FLRA 703, 706-07 (2020) (Member DuBester dissenting in part) (holding that "the frequency of telework – the 'when' an eligible employee may perform his or her duties away from the duty station and 'when' that eligible employee must report to the duty station – is inherent to management's right to assign work" and also affects the right to direct employees).

[34] *See* 5 U.S.C. § 7106(b)(2) ("Nothing in this section shall preclude any agency and any labor organization from negotiating . . . procedures which management officials of the agency will observe in exercising any authority under this section."). We note that the Agency does not contend that the telework procedures in the parties' agreement are themselves unlawful. Therefore, as explained further in this section, there is no basis to conclude that directing the Agency to comply with lawfully negotiated procedures excessively interferes with the Agency's management rights.

[35] *See U.S. Dep't of VA, Med. & Reg'l Ctr., Togus, Me.*, 55 FLRA 1189, 1195 (1999) (where work remains the same regardless of shift to which employees are assigned, and where employees are qualified to perform such work, criteria governing the assignment of employees to a shift are enforceable procedures under § 7106(b)(2)). Furthermore, Member Abbott notes, again, that the purpose of the *DOJ* test is not to get agencies *out* of the choices that they make at the bargaining table. *See SSA, Office of Hearings Operations*, 71 FLRA 589, 591 n.20 (2020) (Member DuBester dissenting in part) (citing *AFGE, Local 3294*, 70 FLRA 432, 436 n.47 (2018) (Member DuBester concurring)) (discussing the parties' agreed-to contract language and Member Abbott noting that "[t]he purpose of the *DOJ* test was never to get agencies *out* of their agreements").

[36] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Tallahassee, Fla.*, 71 FLRA 622, 623-24 (2020) (Member DuBester concurring) (denying the agency's contrary-to-law exception and argument that the award excessively interfered with a management right); *see also HHS, Medicare Appeals*, 71 FLRA at 679 (denying the agency's contrary-to-law exception because the arbitrator found that the agency violated the parties' CBA in denying telework requests).

[37] In addition, the Agency argues that the award, in allowing the grievant to resume her prior telework schedule, is contrary to the Agency's revised regulation on telework, which became effective after the date of the grievances but before the award was issued. Exceptions at 33. The Union, however, asserts that the Agency's argument is barred because the Agency did not present this argument to the Arbitrator. Opp'n at 6. Under the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator. 5 C.F.R. §§ 2425.4(c), 2429.5. Although the Agency contends that it presented this argument to the Arbitrator at the hearing through employee testimony about a forthcoming telework policy that would require all employees to report to the office at least four days per week, we find this representation too general to preserve arguments about a subsequently issued policy for review. *See* Exceptions, Attach. 6, Tr. at 205-07. Accordingly, we find that the Agency could have made this argument to the Arbitrator, but because it did not, we do not consider it here. *U.S. Dep't. of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 176 (2017) (finding a contrary-to-law argument not raised before arbitrator even though party submitted handbook into evidence); *SSA, Fredericksburg Dist. Office*, 65 FLRA 946, 948-49 (2011) (dismissing a contrary-to-law exception where argument before arbitrator was too general to be considered preserved for exceptions).

of sovereign immunity.[38] Specifically, the Agency contends that there is no statutory waiver of sovereign immunity to support reimbursement for expenses in this case.[39]

The United States is immune from suit except as it consents to be sued.[40] Sovereign immunity can be waived by statute, but a waiver will be found only if "unequivocally expressed in statutory text."[41] Thus, an agency is subject to a monetary claim only if the statute on which the claim is based unambiguously establishes that: (1) the government has waived its sovereign immunity to permit suit, and (2) the scope of that waiver extends to an award of money damages.[42] Accordingly, the Authority has found that when an arbitrator directs an agency to pay monetary damages to an employee, there must be statutory support for such a remedy.[43]

Here, the Arbitrator does not cite any statutory authority that supports a reimbursement for costs.[44] Consequently, the expense reimbursement remedy violates the doctrine of sovereign immunity, and we set it aside.[45]

C. The award is not incomplete, ambiguous, or contradictory as to make it impossible to implement.

The Agency argues that the award is ambiguous[46] because it does not indicate which telework schedule the grievant is to resume.[47] The Agency's argument is unavailing. The crux of this case is the Arbitrator's finding that the Agency violated the parties' CBA by not allowing the grievant to telework and report to the San Francisco office two days per pay period per her August 2017 telework agreement. When the Arbitrator ordered the Agency to permit the grievant "to resume her prior telework schedule," she was clearly referring to that telework agreement.[48] The August 2017 telework agreement was the only agreement in effect at the time of the Agency's change in telework policy. Furthermore, the Agency does not demonstrate that the award is impossible to implement, and, in any event, the Arbitrator explicitly retained jurisdiction to assist the parties in disputes over her awarded remedy. Thus, the award is neither ambiguous nor impossible to implement.[49] Accordingly, we deny the Agency's exception.

IV. Decision

We deny the Agency's exceptions, in part, and grant the exceptions in part, setting aside the portion of the award requiring the Agency to reimburse the grievant for expenses.

[38] Exceptions at 6.
[39] *Id.* at 9.
[40] *E.g., U.S. Dep't of Transp., FAA*, 52 FLRA 46, 49 (1996) (citing *United States v. Testan*, 424 U.S. 392, 399 (1976)); *see U.S. Dep't of HHS, Food & Drug Admin.*, 60 FLRA 250, 252 (2004) (*HHS)* (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996) (*Lane*)).
[41] *HHS*, 60 FLRA at 252 (citing *Lane*, 518 U.S. at 192).
[42] *Id.* (citing *Lane*, 518 U.S. at 192; *INS, L.A. Dist., L.A., Cal.*, 52 FLRA 103, 104-05 (1996)).
[43] *E.g., id.*; *see generally U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Beaumont, Tex.*, 70 FLRA 477, 478 (2018) (Member DuBester dissenting) (setting aside expense reimbursement remedy where arbitrator cited no statutory support).
[44] Award at 14.
[45] *See HHS*, 60 FLRA at 252 (finding portion of award providing money damages violated sovereign immunity because it lacked statutory basis). The Agency also argues that the awarded reimbursement costs are contrary to the Federal Travel Regulations and excessively interfere with management's right to determine its budget, and that the Arbitrator exceeded her authority in awarding such costs. Exceptions at 13-24, 72. However, because we grant the Agency's exception that this portion of the remedy is contrary to the doctrine of sovereign immunity, we find it unnecessary to address these arguments. *U.S. Dep't of the Air Force, Luke Air Force Base, Ariz.*, 65 FLRA 820, 822 n.3 (2011) (finding it unnecessary to address remaining exceptions after setting aside award as contrary to law).
[46] In order for an award to be found deficient as incomplete, ambiguous, or contradictory, the excepting party must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain. *AFGE, Local 2846*, 71 FLRA 535, 536 n.13 (2020) (*Local 2846*) (citing *AFGE, Local 1395*, 64 FLRA 622, 624 (2010); *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1074 (2001)).
[47] Exceptions at 34. The Agency also argues that the award is ambiguous because it requires the Agency to reimburse the grievant for "any expenses" incurred as a result of the Agency cancelling her telework schedule. *Id.* For reasons set forth above, we modify the award to set aside this remedy.
[48] Award at 14.
[49] *Local 2846*, 71 FLRA at 536 (denying an ambiguous exception); *AFGE, Local 2338*, 71 FLRA 371, 372 (2019) (same).

Member DuBester, concurring:

I agree that the Agency's exceptions asserting that the award fails to draw its essence from the parties' collective-bargaining agreement and is ambiguous should be denied. I also agree that the remedy directing the Agency to reimburse the grievant for expenses is contrary to law and should be vacated.

And I agree that the Agency's exception arguing that the award is contrary to law because it impermissibly interferes with the Agency's right to direct employees and assign work should be denied. However, as I explained in my dissenting opinion to the decision upon which the majority relies to find that the award affects these management rights,[1] I believe that the majority's reversal of long-standing precedent governing this issue was fundamentally flawed. And on that basis, I agree that the award does not impermissibly encroach upon a management right.

[1] *NTEU*, 71 FLRA 703, 709-12 (2020) (Dissenting Opinion of Member DuBester).