73 FLRA No. 141

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
VICTORVILLE, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3969
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5880

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DECISION

November 13, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

The Union filed a grievance alleging the Agency bypassed the parties' negotiated overtime-selection process. At arbitration, the Agency argued that the grievance was untimely and that the Agency had sufficient justification for bypassing the negotiated process. Arbitrator Sylvia Marks-Barnett issued an award finding that the grievance was timely and that the Agency violated the parties' collective-bargaining agreement.

The Agency filed exceptions arguing that the Arbitrator's timeliness finding fails to draw its essence from the parties' agreement and that the Arbitrator's evaluation of the evidence is contrary to law. Because the Agency merely disagrees with the Arbitrator's factual finding concerning timeliness, we deny the Agency's essence exception. As the Agency does not demonstrate that the Arbitrator's evaluation of the evidence conflicts with law, we deny the contrary-to-law exception.

II. Background and Arbitrator's Award

The parties agreed to a process whereby employees add their names to a list if they want to work overtime, and the Agency selects employees to cover open overtime positions from the list. The parties' agreement specifies how the Agency will select employees from the list and when the Agency can select employees not on the list, such as when the list is "totally exhausted" or where there is a "[s]hift [c]onflict" preventing listed employees from working overtime.[1]

Around March 29, 2022, the Agency began labeling certain overtime positions as "List Exempt" and bypassing the list.[2] An employee notified the Union of the Agency's actions on April 29, and the Union sent the Agency a request for informal resolution. When the Agency did not respond, the Union filed a grievance on June 2. In the grievance, the Union asserted the Agency violated the parties' agreement on March 29—the date the employee provided. The Agency did not timely respond, and the Union invoked arbitration.

Subsequently, the Agency denied the Union's grievance. The Agency claimed the grievance was untimely under Article 31(d) of the parties' agreement, which provides that "[g]rievances must be filed within forty . . . calendar days of the date of the alleged grievable occurrence [or] . . . forty . . . calendar days from the date the party filing the grievance can reasonably be expected to have become aware . . . of the occurrence."[3] The grievance proceeded to arbitration.

The Arbitrator framed the issues as (1) "[w]hether the Union failed to timely file its grievance;" (2) "whether the Agency violated the terms of the [parties' agreement] by bypassing [b]argaining[-u]nit employees who had signed up for overtime assignments;" and (3) "[i]f so, what is the appropriate remedy."[4]

On the first issue, the Agency argued that the Union filed the grievance more than forty days after the date the Agency began bypassing the list. Based on the Union identifying March 29 in the grievance, the Agency alleged that the Union's June 2 grievance was untimely under Article 31(d). The Arbitrator credited the testimony of a Union official that the employee who reported the Agency bypassing the list contacted the Union on April 29, 2022, and that the Union did not know of the grieved Agency's action before then. Based on this testimony, the Arbitrator concluded that the Union provided the March 29 date in its grievance "as a placeholder" because that was the date the reporting employee provided.[5]

[1] Award at 6-7 (emphasis omitted).
[2] *Id.* at 4.
[3] *Id.* at 3.
[4] *Id.*
[5] *Id.* at 5.

Further, the Arbitrator observed that the "Agency produced no evidence that [the Union] was aware of the alleged grievable event sooner than April 29, 2022."[6] Accordingly, the Arbitrator concluded the grievance was timely filed within forty days of the Union becoming aware of the grieved Agency action.

On the merits, the Arbitrator assessed whether the Agency bypassed the list and, if so, whether it had a permissible reason for doing so under the parties' agreement, such as list exhaustion. The Arbitrator found persuasive the Union's "testimony and exhibits in support of [its] claim" that the Agency bypassed the list.[7] Noting that the Agency did not dispute this claim, the Arbitrator concluded the Union proved by a "preponderance of the evidence" that the Agency bypassed the list.[8] The Arbitrator also found it was undisputed that the Agency bypassed the list before it was exhausted. Thus, the Arbitrator determined "the Agency [bore] the burden of proof to show by a preponderance of the evidence" that it did not violate the agreement.[9]

The Arbitrator found the Agency raised two "affirmative defense[s]" to the Union's allegation that the Agency improperly bypassed the list.[10] First, the Agency argued it was permitted to bypass the list because "travel time to [the] overtime assignment[s] was beyond an hour away," which the Agency claimed "constituted a shift conflict."[11] The Arbitrator found that, under the parties' agreement, a "shift conflict" occurs when the "prospective overtime assignment would overlap with a regularly assigned shift," not when an assignment merely requires travel.[12] Because the Agency did not allege the overtime assignments in question conflicted with any regularly assigned shifts, the Arbitrator found the Agency did not demonstrate a shift conflict.

Second, the Agency "argued that there was a state of emergency [that] allowed it to ignore the . . . list."[13] The Arbitrator found such an argument "require[d] more than just mere conclusionary statements with[out] corroboration."[14] As the Agency did not adequately support its claim of an emergency, the Arbitrator concluded the Agency was not "relieved . . . of its contractual obligation[]" to select employees from the list.[15]

The Arbitrator sustained the grievance and directed the Agency to make affected employees whole for missed overtime opportunities.

The Agency filed exceptions on March 29, 2023, and the Union filed an opposition on April 27, 2023.

III. Analysis and Conclusions

A. The Agency does not establish that the Arbitrator's timeliness finding fails to draw its essence from the parties' agreement.

The Agency contends the Union knew on March 29, 2022, that the Agency was bypassing the list.[16] Thus, according to the Agency, the Arbitrator's determination that the Union timely filed the June 2 grievance fails to draw its essence from Article 31(d).[17] However, the Authority has held that an arbitrator's determination of the date on which a party became aware of a grievable action constitutes a factual finding.[18] Under Authority precedent, mere disagreement with an arbitrator's factual findings does not provide a basis for finding that an award fails to draw its essence from the parties' agreement.[19] The Arbitrator found the grievance timely because there was "no evidence that [the Union] was aware of the . . . [Agency bypassing the list] sooner than April 29, 2022."[20] The Agency's exception challenges the Arbitrator's factual determination of when the Union discovered the grievable action.[21] As such, the exception provides no basis for concluding the award fails to draw its essence from the parties' agreement. Therefore, we deny the Agency's essence exception.[22]

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[6] *Id.* at 5-6.
[7] *Id.* at 9.
[8] *Id.*
[9] *Id.* at 10-11.
[10] *Id.*
[11] *Id.* at 9-10.
[12] *Id.* at 10.
[13] *Id.* at 11.
[14] *Id.*
[15] *Id.* at 11-12.
[16] Exceptions Br. at 10.
[17] *Id.* at 9-10.
[18] *AFGE, Loc. 3707*, 72 FLRA 666, 667 (2022) (*Loc. 3707*) (Chairman DuBester concurring).
[19] *E.g.*, *AFGE, Loc. 3342*, 72 FLRA 91, 92 (2021) (denying essence exception that "merely disagrees with the [a]rbitrator's [factual] finding").
[20] Award at 6.
[21] Exceptions Br. at 12 (claiming that "it is impossible for the Arbitrator . . . to believe the Union could not have known" about the Agency bypassing the list "until April 29, 2022").
[22] *See Loc. 3707*, 72 FLRA at 667 (denying essence exception challenging arbitrator's procedural-arbitrability finding because the excepting party merely disagreed with the "[a]rbitrator's determination of the date on which the grievants became aware" of the grieved event); *Int'l Bhd. of Boilermakers, Loc. 290*, 72 FLRA 769, 770 (2022) (Member Kiko concurring on other grounds) (denying essence exception challenging arbitrator's finding of the date the union became aware of "the grievable event" because exception did not demonstrate that the arbitrator's interpretation of the parties' agreement was "unreasonable or implausible").

B. The Agency does not establish that the award is contrary to law.

The Agency argues the award is contrary to law because the Arbitrator "incorrectly applied standard legal precedent by dismissing the Agency's arguments as affirmative defenses."[23] When an exception involves an arbitration award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[24] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[25] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[26]

The Agency contends the Arbitrator erred by requiring "the Agency [to] prove an affirmative defense without ever requiring the Union to . . . prove any of its allegations."[27] However, the Arbitrator considered the Union's allegation that the Agency improperly bypassed the list, and she explicitly found the Union proved its claim by a "preponderance of the evidence."[28] Only then did the Arbitrator consider the Agency's proffered justifications for bypassing the list as "affirmative defense[s]."[29] Thus, contrary to the Agency's contention, the Arbitrator required the Union to prove its allegations. As the Agency's argument is premised on a misunderstanding of the award, it does not demonstrate that the award is deficient.[30]

The Agency also challenges the Arbitrator's finding that "the Agency b[ore] the burden of proof to show by a preponderance of the evidence" that it had not violated the parties' agreement.[31] It is well established that arbitrators may apply whatever burden of proof they consider appropriate in resolving claims under an agreement, unless a specific burden is required.[32] The Agency does not assert that the parties' agreement sets forth any specific burden of proof governing the issues in this case.[33] Moreover, the Agency does not identify any laws, regulations, or precedent that required the Arbitrator to apply a specific burden.[34] Thus, there is no basis for concluding the Arbitrator erred in placing the burden on the Agency to justify bypassing the list. Consequently, we deny this exception.[35]

V. Decision

We deny the Agency's exceptions.

[23] Exceptions Br. at 12.
[24] *U.S. Dep't of the Army, Ariz. Dep't of Emergency & Mil. Affs., Ariz. Army Nat'l Guard*, 73 FLRA 617, 618 (2023) (citing *AFGE, Council 222*, 73 FLRA 54, 55 (2022)).
[25] *Id.*
[26] *Id.*
[27] Exceptions Br. at 16.
[28] Award at 9.
[29] *Id.* at 10-11.
[30] *See AFGE, Loc. 2338*, 71 FLRA 1039, 1041 (2020) (denying contrary-to-law exception arguing that arbitrator failed to make a necessary finding because it was based on misunderstanding of award); *AFGE, Loc. 12*, 67 FLRA 387, 390 (2014) (Member Pizzella concurring on other grounds) (finding exception based on misunderstanding of an arbitrator's application of burden of proof did not demonstrate that the award was deficient).
[31] Exceptions Br. at 15 (quoting Award at 10-11).
[32] *AFGE, Loc. 1858*, 73 FLRA 565, 566 (2023) (*Loc. 1858*) (citing *AFGE, Loc. 3320*, 69 FLRA 136, 139 (2015) (Member Pizzella concurring)).
[33] *See* Exceptions Br. at 12-16 (arguing only that the Agency's claims at arbitration were not affirmative defenses).
[34] *See, e.g.*, *id.* at 13-14 (referring to Authority decisions explaining how affirmative defenses operate in the context of cases involving discrimination under the Federal Service Labor-Management Relations Statute and cases involving the Fair Labor Standards Act (citing *AFGE, Loc. 2571*, 67 FLRA 593, 594 (2014) (Member Pizzella concurring); *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990))).
[35] *See Loc. 1858*, 73 FLRA at 566 (denying contrary-to-law exception because the excepting party did "not assert that the parties' agreement set[] forth any specific burden of proof governing the issues in th[at] case"); *AFGE, Loc. 038, Nat'l Citizenship & Immigr. Serv. Council*, 73 FLRA 159, 160 (2022) (denying contrary-to-law exception that did "not identify any provision in the parties' agreement or law that required the [a]rbitrator to apply a particular burden of proof to the grievance").