74 FLRA No. 6

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 310
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS ADMINISTRATION MEDICAL CENTER
COATESVILLE, PENNSYLVANIA
(Agency)

0-AR-5960

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DECISION

September 13, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko and Anne Wagner, Members

I. Statement of the Case

Arbitrator Lawrence J. Spilker issued an award denying a Union grievance alleging the Agency failed to compensate an employee (the grievant) for overtime. The Union excepted to the award on essence, nonfact, and contrary-to-law grounds. For the reasons explained below, we deny the exceptions.

II. Background and Arbitrator's Award

The grievant is the Union president and is exempt from the Fair Labor Standards Act. His work group holds daily meetings to discuss current issues, upcoming assignments, and other work-related topics. On March 30, 2020, the Agency emailed employees to remind them that the Agency's overtime policy states overtime "can be requested in advance but should not be requested retroactively," and that "[w]ithout prior approval from your supervisor, you should not work outside of your scheduled tour."[1] During shutdowns related to COVID-19, the grievant's daily morning meetings started at 8:15 a.m., and his daily afternoon meetings started at 12:45 p.m. The grievant's tour of duty is from 8:30 a.m. to 5:00 p.m., including an unpaid lunch break from 12:30 p.m. to 1:00 p.m.

From March 31, 2020, through May 24, 2023, the grievant kept a daily record of each meeting that he attended outside of his tour of duty. However, during that period, the grievant neither requested overtime pay for attending the daily meetings nor informed his supervisor that he was attending the meetings outside of his tour of duty. Then, on May 24, 2023, the grievant emailed his supervisor requesting over three years' worth of overtime pay for his participation in the daily meetings that occurred outside of his tour of duty.[2] On May 31, 2023, the Agency denied the grievant's request.

On June 23, 2023, the Union filed a grievance claiming the Agency violated the parties' collective-bargaining agreement, an Agency handbook, and law by refusing to pay the grievant for overtime from March 2020 to May 2023. The Agency alleged the grievance was untimely and denied it on its merits, and it went to arbitration.

The Arbitrator framed the issue as "whether the Agency violated the [parties' agreement], policy, or law by refusing to pay the [g]rievant overtime for time worked during non-duty times from March 2020 to May 2023."[3] However, as an initial matter, the Arbitrator addressed whether the grievance was timely. The Arbitrator cited Article 43, Section 7 of the parties' agreement (Section 7), which states that a grievance must be filed "within [thirty] calendar days of the date that the employee or Union became aware, or should have become aware, of the act or occurrence; or, anytime if the act or occurrence is of a continuing nature."[4] The Arbitrator found that, beginning on March 31, 2020, the grievant "kept a daily record of each instance of allegedly missed overtime throughout the more than three[-]year period."[5] The Arbitrator also found the grievant "testified that he knew on March 31, 2020[,] that he had a potential claim for overtime and did not raise the issue until May 2023."[6]

Additionally, the Arbitrator rejected a Union claim that the loss of overtime pay was a continuing violation from March 31, 2020, until the grievant raised the issue with his supervisor in May 2023. The Arbitrator stated that "the concept of a continuing violation is predicated on the suggestion that some alleged violations persist or are regularly repeated without the awareness of the employee or union."[7] The Arbitrator also stated that the "concept of continuing violation does not justify casting aside the contractual time limits in this case."[8] The

[1] Award at 4.
[2] *Id.* at 3 (finding overtime request covered March 31, 2020, to May 24, 2023, and requested $17,910.20 in allegedly unpaid overtime).
[3] *Id.* at 5.
[4] *Id.*
[5] *Id.* at 14.
[6] *Id.*
[7] *Id.* at 13.
[8] *Id.* at 14.

Arbitrator determined Section 7 expressly required the Union to file the grievance within thirty days of March 31, 2020 – the date when the grievant began keeping his daily record of missed overtime and the Union or the grievant "knew or should have known" there was an alleged act or occurrence of failure to pay overtime.[9] Therefore, the Arbitrator denied the grievance as untimely.

Nevertheless, the Arbitrator then stated that, to the extent it was "necessary to reach the merits" of the grievance, the grievance was denied on the merits as well.[10] The Arbitrator found the grievant, as Union president, was aware that employees needed express authorization before they could work outside of their tours of duty. Finding no such express authorization, the Arbitrator concluded the grievant had not established an entitlement to unpaid overtime.

On May 6, 2024, the Union filed exceptions to the award. The Agency did not file an opposition.

III. Analysis and Conclusions

A. The Union does not demonstrate the award fails to draw its essence from the parties' agreement.

The Union argues the Arbitrator's timeliness determination fails to draw its essence from Section 7.[11] The Authority will find an award is deficient as failing to draw its essence from a collective-bargaining agreement when the appealing party establishes 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.[12] Mere disagreement with an arbitrator's interpretation and application of a collective-bargaining agreement does not provide a basis for finding an award deficient.[13]

As noted above, Section 7 states that grievances must be filed "within [thirty] calendar days of the date that the employee or Union became aware, or should have become aware, of the act or occurrence; or, anytime if the act or occurrence is of a continuing nature."[14] The Union argues the award fails to draw its essence from Section 7 because the Union filed its grievance less than thirty days from the Agency's May 2023 denial of the grievant's request for more than three years' worth of overtime.[15] However, based on Section 7's express wording and the grievant's testimony, the Arbitrator found the grievance was untimely because it was not filed within thirty days of when the grievant or the Union knew or should have known there was a violation. The Union merely argues for its preferred interpretation and application of Section 7, but provides no basis for finding the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. Therefore, its first essence argument lacks merit.[16]

The Union also contends the Arbitrator erred in finding no continuing violation under Section 7.[17] According to the Union, the Arbitrator added requirements to Section 7 by finding a continuing violation occurs only when the violation is "regularly repeated without the awareness of the employee or union."[18] However, in finding no continuing violation under Section 7, the Arbitrator was merely *interpreting* Section 7's use of the term "act or occurrence . . . of a continuing nature,"[19] and concluded that term did not apply in the circumstances of this case.[20] The Union does not cite any provision of the parties' agreement that prohibited the Arbitrator from interpreting Section 7 in this manner.[21] Thus, its second essence argument lacks merit.

We deny the essence exceptions.

B. The Union does not demonstrate the award is based on nonfacts.

The Union alleges the award is based on nonfacts.[22] To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different

[9] *Id.*
[10] *Id.*
[11] Exceptions Br. at 12-16.
[12] *U.S. Dep't of VA, John J. Pershing Veterans' Admin. Ctr., Poplar Bluff, Mo.*, 73 FLRA 842, 842-43 (2024).
[13] *Consumer Fin. Prot. Bureau*, 73 FLRA 670, 671 (2023) (*CFPB*).
[14] Exceptions, Ex. 4, Collective-Bargaining Agreement (CBA) at 230.
[15] Exceptions Br. at 13-14.
[16] *See, e.g.*, *CFPB*, 73 FLRA at 672 (denying essence exception because the excepting party "merely argue[d] for its preferred interpretation of the agreement").
[17] Exceptions Br. at 14-15.
[18] *Id.* at 14 (internal quotation marks omitted).
[19] CBA at 230.
[20] Award at 14.
[21] *See, e.g.*, *NTEU, Chapter 46*, 73 FLRA 654, 657 (2023) (rejecting essence argument where excepting party "d[id] not cite any provision of the agreement that prohibited the [a]rbitrator from interpreting" the agreement in a particular way).
[22] Exceptions Br. at 16.

result.[23] An arbitrator's contractual interpretations cannot be challenged as nonfacts.[24]

According to the Union, the following three matters are nonfacts: (1) the Arbitrator's finding that the Union's grievance was untimely;[25] (2) the Arbitrator's failure to find the Union's grievance timely based on a continuing violation;[26] and (3) the Arbitrator's finding that the entire grievance was untimely, rather than "just the claims predating the Union's grievance by more than [thirty] days."[27] All of these arguments challenge the Arbitrator's interpretation of Section 7 to find the grievance untimely. As they challenge the Arbitrator's contract interpretation, they do not demonstrate the award is deficient on nonfact grounds.[28] Therefore, we deny the nonfact exceptions.

C. The remaining exceptions challenge dicta.

The Union claims the Arbitrator's determination that the grievance lacked merit is contrary to law and is based on a nonfact.[29] When an arbitrator finds a matter not arbitrable, any comments the arbitrator makes concerning the merits of that matter are dicta, and cannot form the basis for finding an award deficient.[30] Here, the Arbitrator's findings as to the merits of the Union's claims constitute nonbinding dicta. As such, the Union's claims that the Arbitrator's merits determinations are contrary to law and based on a nonfact do not establish that the award is deficient. Accordingly, we deny the Union's remaining exceptions because they challenge dicta.

IV. Decision

We deny the Union's exceptions.

[23] *NAIL, Loc. 11*, 73 FLRA 328, 329 (2022) (citing *U.S. Dep't of HHS*, 73 FLRA 95, 96 (2022)).
[24] *NTEU, Chapter 149*, 73 FLRA 133, 135 (2022) (*Chapter 149*) (citing *SSA*, 71 FLRA 580, 582 (2020) (Member DuBester concurring)).
[25] Exceptions Br. at 16-17.
[26] *Id.* at 17-18.
[27] *Id.* at 18.
[28] *Chapter 149*, 73 FLRA at 135-36.
[29] Exceptions Br. at 19-24.
[30] *Fed. Educ. Ass'n, Stateside Region*, 73 FLRA 32, 34-35 (2022) (where an arbitrator finds a grievance not arbitrable, any comments the arbitrator makes concerning the merits of the grievance are non-binding dicta, and do not provide a basis for finding the award deficient); *NAIL, Loc. 17*, 68 FLRA 97, 100 (2014) (Member DuBester concurring on other grounds) (same); *AFGE, Council of Prison Locs., Council 33*, 66 FLRA 602, 605 (2012) (same).