

63 FLRA No. 146

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 66
(Union)

and

UNITED STATES DEPARTMENT
OF THE TREASURY
INTERNAL REVENUE SERVICE
KANSAS CITY ACCOUNTS
MANAGEMENT CENTER
KANSAS CITY, MISSOURI
(Agency)

0-AR-4230

DECISION

June 30, 2009

Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Charles E. Krider filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator concluded that the Agency did not violate the parties' collective bargaining agreements when it moved certain employees from one alternative work schedule to another schedule.

For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The grievants are assigned to the Accounts Management Center. Award at 1. The parties' 1998 Alternate and Compressed Work Schedules Agreement (local AWS agreement) provides different alternative work schedules for employees who work in different branches of the Accounts Management Center. *Id.* The alternative work schedule designated as the "Customer Service Branch I and II" (Customer Service Branch I and II AWS) is for employees who handle telephone calls from taxpayers. *Id.* Under that schedule, employees

may start work no earlier than 7:30 a.m., so that they are available during hours when telephone calls are expected. *Id.* The schedule designated as the "Adjustments/Correspondence Branch" (Adjustment/Correspondence Branch AWS) is for employees who handle only written correspondence. *Id.* Under that schedule, employees may start work as early as 5:30 a.m. *Id.*

In December 1998, the duties of employees who worked on the two alternative work schedules were combined into one "CSR position" that handled both telephone calls and written correspondence. *Id.* Employees on both alternative work schedules were given the opportunity to convert to the new CSR position and, if they converted, were given a promotion. Initially, the employees on the Adjustment/Correspondence Branch AWS who converted to the new CSR position continued to work on that schedule and started work as early as 5:30 a.m.

In February 2005, the Agency required all CSR employees on the day shift to work on the Customer Service Branch I and II AWS and start work no earlier than 7:30 a.m. *Id.* at 1-2. The Union requested assistance from the Federal Service Impasses Panel (FSIP) challenging the change in schedule for employees who formerly worked on Adjustment/Correspondence Branch AWS, and the FSIP declined jurisdiction. *Id.* at 2. The Union then filed a grievance, which was submitted to arbitration, where the parties stipulated the following issues for resolution by the Arbitrator:

1. Is the grievance properly before the arbitrator?
2. Did the Agency violate the National Agreement, and a local AWS agreement, when it moved those day shift Customer Service Representatives... who were on the [Adjustment/Correspondence Branch] AWS to the Customer Service [Branch I and II] AWS?
3. Did the Agency violate 5 U.S.C. Sections 7116(a) (1) and (5) when it took the actions noted above?

Id. at 2-3.

Before the Arbitrator, the Union argued, as relevant here¹, that the Agency violated the parties' national agreement and local AWS agreement as well as part

1. The parties also addressed whether the grievance was timely filed. As there are no exceptions to the Arbitrator's finding that it was timely filed, we will not address the matter further.

practice when it “eliminated” the Adjustment/Correspondence AWS for employees formerly on that schedule. *Id.* at 4. The Union also contended that the Agency violated its obligation to bargain under § 7116(a) (1) and (5) of the Statute because its action did not comply with the Federal Employees Flexible and Compressed Work Schedules Act, 5 U.S.C. §§ 6120-6133 (Work Schedules Act). *Id.*

The Agency maintained that it did not terminate an existing AWS and, instead, it merely moved employees from one schedule to another. *Id.* The Agency explained that the Adjustment/Correspondence AWS has not been abolished and continues in effect for those Adjustment/Correspondence employees who did not convert to the new CSR position. *Id.* The Agency also contended that it was not obligated to bargain because its action was consistent with the local AWS agreement. *Id.*

The Arbitrator stated that the “key question” was whether the Agency was required to continue the Adjustment/Correspondence AWS for employees who had converted to the CSR position. *Id.* at 8. The Arbitrator concluded that the Agency was not required to do so. Specifically, the Arbitrator found that the local AWS agreement “provides for alternative work schedules that reflect not only the employee preference but also the needs of the Agency to provide services to tax payers.” *Id.* at 9. In this regard, the Arbitrator found that the local AWS agreement permitted the Agency to move employees on the Adjustment/Correspondence AWS to the Customer Service Branch I and II AWS because their new duties included answering the telephones. *Id.* at 9.

In addition, the Arbitrator rejected the Union’s argument that the Agency’s action was inconsistent with past practice. The Arbitrator found that, “even though the Agency allowed these employees to continue on the Adjustment/Correspondence AWS from 1998 to 2005, there was no agreement that this would continue indefinitely. *Id.* at 10. The Arbitrator also rejected the Union’s argument that the Agency violated § 7116(a) (1) and (5). According to the Arbitrator, the Agency had no obligation to bargain because the Agency did not eliminate an alternative work schedule. *Id.* at 10.

Based on the foregoing, the Arbitrator denied the grievance.

III. Positions of the Parties

A. Union’s Exceptions

The Union contends that the award is based on a nonfact because the Arbitrator erroneously referred to the Adjustment/Correspondence AWS as “Customer Service Representative AWS” or “CSR AWS.” Exceptions at 3, 5. The Union asserts that the local AWS agreement provides different work schedules for different branches, not different job positions. *Id.* at 5. The Union argues that but for the Arbitrator’s errors, he would have reached a different conclusion. *Id.* The Union adds that the Arbitrator failed to recognize there was a past practice that allowed employees to continue on the Adjustment/Correspondence AWS. *Id.* at 7-8.

For the same reasons, the Union argues that the award fails to draw its essence from the local AWS agreement. *Id.* at 7. In addition, the Union argues that the award violates 5 U.S.C. § 6131 because it permits the Agency to terminate an alternative work schedule without following the procedures of that statute.² *Id.* at 10.

B. Agency’s Opposition

The Agency asserts that the Arbitrator’s references to the “Customer Service AWS” or the “CSR AWS” are merely a lack of consistency in terminology and do not constitute nonfacts. Opposition at 4. In addition, the Agency argues that the Union’s contentions that the award fails to draw its essence from the agreement and is contrary to law do not demonstrate that the award is deficient. *Id.* at 6, 7.

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the

2. 5 U.S.C. § 6131 provides, in pertinent part, that:

(a) Notwithstanding ... any collective bargaining agreement... if the head of an agency finds that a particular... schedule... has had... an adverse agency impact, the agency shall promptly determine not to--

....

(2) continue such schedule, if the schedule has already been established.

....

(c)(3)(B) If the [parties] reach an impasse... with respect to terminating such schedule, the impasses shall be presented to the [FSIP].

arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2001). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.*

The Arbitrator's references to "Customer Service Representative AWS" or "CSR AWS" appear to be inadvertent and not factual findings. Even assuming they are, the Union has failed to establish that the Arbitrator would have reached a different conclusion but for this use of the terms. *AFGE, Local 3295*, 51 FLRA 27, 31 (1995) (a matter of semantics did not constitute a fact). Moreover, we construe as a nonfact exception the Union's claim that the Arbitrator failed to recognize a past practice that allowed employees to continue on the Adjustment/Correspondence AWS.³ Exceptions at 7-8. However, the record reflects that the parties disputed the existence of this past practice before the Arbitrator. Award at 4, 10. As such, the Union's argument provides no basis for finding the award deficient.

Accordingly, we deny the exception.

B. The award draws its essence from the agreement.

For an award to be found deficient as failing to draw its essence from the parties' collective bargaining agreement, it must be established 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 collective bargaining 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. *United States Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990) (OSHA).

The Union has offered no support for its argument that the award fails to draw its essence from the local AWS agreement. The Arbitrator found that the agreement provides, as relevant here, for two different work schedules for employees who work in different branches of the Agency. Award at 1. As noted above, the Arbitrator's reference to "Customer Service Branch I and II AWS" as "Customer Service Representative AWS" or

"CSR AWS" appears to be inadvertent and does not establish that the Arbitrator ignored the wording of the local AWS agreement.

Accordingly, we deny the exception.

C. The award is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. *United States Dep't of Def., Dep'ts of the Army and the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *Id.*

The Union's claim that the award violates 5 U.S.C. § 6131 because it permits the Agency to terminate an alternative work schedule without following statutory procedures is misplaced. Section 6131, by its terms, applies to actions establishing and discontinuing schedules. *AFGE, Local 1709*, 57 FLRA 711, 712 (2002). It does not apply to a situation like that here, where an alternative work schedule is not discontinued. *See id.*

Accordingly, we deny the exception.

V. Decision

The Union's exceptions are denied.

3. In arbitration cases, the Authority addresses issues as to whether a past practice exists under the nonfact framework. *PASS*, 56 FLRA 124, 125 (2000). Where the issue concerns whether the arbitrator improperly interpreted a past practice, the Authority considers the issue under the essence framework. *United States Dep't of Veterans Affairs, Med. and Reg'l Ctr., Togus, Me.*, 55 FLRA 1189, 1192-93 (1999).