

**63 FLRA No. 154**

UNITED STATES DEPARTMENT  
OF VETERANS AFFAIRS  
MEDICAL CENTER  
WEST PALM BEACH, FLORIDA  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 507  
(Union)

0-AR-4047

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DECISION

July 13, 2009

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

Decision by Chairman Carol Waller Pope for the  
Authority

**I. Statement of the Case**

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

The Arbitrator concluded that the Agency abused its discretion and violated law, regulations, and the collective bargaining agreement by its personnel actions regarding employee absences during and after Hurricanes Frances and Jeanne. For the reasons that follow, we dismiss certain exceptions as barred by § 2429.5 of the Authority's Regulations, and we conclude that a portion of the award is deficient and modify it accordingly. Otherwise, we deny the Agency's exceptions.

**II. Background and Arbitrator's Award**

The Union grieved personnel actions prior to and after Hurricanes Frances and Jeanne. In particular, the Union claimed that employees were wrongfully denied excused absences without charge to leave (administrative absences) and were wrongfully charged with absence without leave (AWOL). In addition, the Union claimed that leave was not consistently administered

and that employees were treated disparately. Award at 2.

As discussed in more detail below, the Arbitrator concluded that the Agency acted improperly. He determined that all employees found to be AWOL were to be made whole consistent with the opinion accompanying the award and he ordered the Agency to provide employees with forms for reconsideration of leave and pay issues and to reconsider these issues in accordance with the opinion.<sup>1</sup> In addition, as to three employees charged with AWOL, he ordered the Agency to convert their AWOL to administrative absence. As to three additional employees, he ordered that they "should not be considered AWOL and may be consider[ed] for [administrative absence]." *Id.* at 24. The Arbitrator also awarded attorney fees and retained jurisdiction. *Id.* at 26-27.

More specifically, the Arbitrator concluded that the Agency violated Article 16 of the collective bargaining agreement<sup>2</sup> because it had been arbitrary and abused its discretion and because the Agency's emergency plan did not consider the special needs of employees. *Id.* at 20, 24. He also found that the emergency plan was never explained to the Union or employees until the hurricane emergency. *Id.* at 22. In addition, he noted that Article 19, pertaining to flexiplace, and Article 32, pertaining to time and leave, could have been incorporated into the emergency plan. *Id.* He stated that, in regard to Article 32, advance sick leave could have been granted to employees without sufficient annual leave or sick leave. *Id.*

The Arbitrator noted that Article 28, Section 6, which provides employees the "right to decline to perform their assigned tasks because of reasonable belief that it may cause imminent risk," is consistent with accepted arbitration doctrine. *Id.* at 23 (citing *Leland Oil Mill*, 91 LA 905 (1988)). He also noted that, under Article 13, notice of disciplinary actions must be in writing and found that, as to the AWOL charges, there was no such notice. In this regard, he applied Article 13 because he found that "AWOL is comparable to disci-

1. In sustaining the grievance and ordering a remedy, he noted that he had been "guid[ed]" by two decisions of the Authority and by two arbitration awards involving administrative leave. Award at 14 (citing *United States Dep't of Justice, Immigration and Naturalization Serv., Washington, D.C.*, 48 FLRA 1269 (1993) (*INS*); *AFGE Local 51, AFL-CIO*, 41 FLRA 48 (1991) (*AFGE Local 51*)).

2. Article 16, Section 1 provides that "all employees shall be treated fairly and equitably[.]" *Id.* at 10.

pline.” *Id.* at 24. The Arbitrator also found that evidence and testimony demonstrated that the Agency had frustrated the Union’s attempt to pursue this grievance by withholding information and by demanding that employees submit individual requests for adjustment of leave issues. *Id.* at 20.

As to the disputed AWOL charges, the Arbitrator determined that “no employee should have been declared AWOL during the [e]ffects of either Hurricane Frances or Hurricane Jeanne . . . . Any employee who lost Labor Day pay . . . should be made whole. The Agency had the authority to advance sick leave if needed so that Labor Day pay would not have been lost.” *Id.* at 25. As to premium pay issues, the Arbitrator noted that some overtime was denied “because no supervisor saw the actual work performed[.]” *Id.* at 26. Accordingly, he determined that the Agency “may have disallowed some overtime rightfully earned.” *Id.* Consequently, he ordered that employees may submit requests for reconsideration of premium pay. *Id.*

### III. Positions of the Parties

#### A. Agency’s Exceptions

The Agency contends that the award is contrary to law, regulation, and Authority precedent, is based on a nonfact, and fails to draw its essence from the agreement. The Agency also contends that the Arbitrator was biased and exceeded his authority.

More specifically, the Agency maintains that 5 C.F.R. § 630.101 “require[s] that leave requests for adjustments be handled on a personal basis.” Exceptions at 3. Consequently, the Agency argues that the Arbitrator’s finding that the Agency “frustrated” the Union’s attempt to pursue a group grievance by requiring employees to submit personal requests is contrary § 630.101. *Id.* at 3-4 (quoting Award at 20). The Agency also argues that the Arbitrator’s order permitting employees denied overtime to submit a claim for reconsideration is deficient because, under applicable law and regulation, management must approve all overtime. *Id.* at 8. The Agency further argues that the Arbitrator’s statement that the emergency plan should consider the special needs of employees is deficient because, according to the Agency, there is no such requirement.

The Agency asserts that the Arbitrator’s determination that no employee should have been declared AWOL is contrary to law and regulation. In this regard, the Agency references its arguments pertaining to “5 C.F.R. Part 630” and argues that the determination is contrary to management’s right to assign work under § 7106(a)(2)(B). *Id.* at 7. The Agency asserts that the

order to reconsider requests for administrative absences and overtime is also contrary to management’s right to assign work. *Id.* at 10.

Next, the Agency contends that the Arbitrator’s finding that the Agency violated Article 13 by failing to provide written notice of AWOL decisions is erroneous because, according to the Agency, AWOL is not a disciplinary action. *Id.* at 4. The Agency further contends that the Arbitrator’s finding that Article 19, pertaining to flexiplace, could have been incorporated into the emergency plan is contrary to the Agency’s mission to provide care to veterans, as set forth in 38 U.S.C. § 7301. *Id.* The Agency also contends that the Arbitrator’s finding that advance sick leave could have been granted to employees without sufficient annual leave or sick leave and to employees to avoid the loss of holiday pay is contrary to § 630.401. *Id.* at 4-5. Further, the Agency maintains that the Arbitrator found that, under Article 28, “an employee may decline a work assignment involving patient care during a hurricane” and claims that this finding is contrary to management’s right to assign work. *Id.* at 6-7, 10. The Agency also claims that this finding violates 29 C.F.R. § 1960.2(u)<sup>3</sup>, which, the Agency asserts, applies only to hazardous work assignments. *Id.* at 6.

As to nonfact, the Agency argues that the Arbitrator’s finding that the emergency plan was not explained in advance ignores testimony from Agency and Union witnesses that the plan was explained to them. *Id.* at 5. As to exceeded authority, the Agency argues that the order “is not based upon law or contract.” *Id.* at 7. As to essence, the Agency argues that the Arbitrator’s finding that the Agency violated Article 16, Section 1 is deficient because there was no evidence that any employee was treated unfairly or inequitably. *Id.* at 6. In contending that the award is contrary to precedent, the Agency argues that the Arbitrator “erred in his reliance upon four FLRA cases that he cites in his opinion.” *Id.* at 8. The Agency claims that the cited cases are distinguishable because administrative leave was denied to all employees in those cases, while, in this case, administrative absence was granted to many employees. *Id.* 8-9. Finally, the Agency maintains that “the Arbitrator has displayed bias in his opinion, by ignoring controlling federal law and by retaining jurisdiction, with the

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3. Section 1960.2(u) defines “imminent danger[.]” for purposes of occupational safety and health, to mean “any conditions or practices in any workplace which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through normal procedures.”

apparent expectation of earning thousands of dollars in hundreds of leave and pay disputes.” *Id.* at 12.

#### B. Union’s Opposition

The Union argues that § 630.101 does not require that leave requests be handled on a personal basis. Opposition at 6. The Union further argues that the award does not fail to draw its essence from Article 13 of the agreement and that no basis is provided for finding deficient the Arbitrator’s ruling that the emergency plan should have considered the special needs and circumstances of employees and that employees in imminent danger should have been accommodated. In addition, the Union asserts that the award is not based on a nonfact because the Arbitrator’s finding concerning the explanation of the emergency plan is not a central fact underlying the award. *Id.* at 9-10. The Union also asserts that the Agency has made no showing that the Arbitrator was biased, exceeded his authority, or improperly relied on the Authority cases he cited or that the award is contrary to public policy. *Id.* at 13-15, 22-23. Finally, the Union argues that the award is not contrary to management’s right to assign work under § 7106(a)(2)(B). *Id.* at 15-19.

#### IV. Analysis and Conclusions

A. The exceptions, which contend that the award is contrary to § 7106 of the Statute and § 630.101, are barred by § 2429.5.

Section 2429.5 of the Authority’s Regulations bars Authority consideration of any issue that could have been, but was not, presented to the arbitrator. *E.g., United States Dep’t of the Navy, Puget Sound Naval Shipyard and Intermediate Maint. Facility, Bremerton, Wash.*, 62 FLRA 4, 6 (2007) (*Puget Sound Naval Shipyard*). As set forth above, the Agency contends in its exceptions that the award is contrary to § 7106(a)(2)(B) and § 630.101. There is no indication in the record that these provisions were presented to the Arbitrator. In view of the grievance claims submitted to arbitration, the issues to which these arguments pertain were before the Arbitrator and did not arise as the result of the award. *See United States Dep’t of Labor, Mine Safety and Health Admin.*, 61 FLRA 232, 235 (2005). Therefore, as these arguments could have been, but were not, raised to the Arbitrator, we dismiss these exceptions. *See Puget Sound Naval Shipyard*, 62 FLRA at 6-7.

B. The award is not based on a nonfact.

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

would have reached a different result. *E.g., United States Dep’t of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993). The Agency argues that the Arbitrator’s finding that the emergency plan was not explained to employees or the Union in advance constitutes a nonfact because there was extensive evidence to the contrary. As noted, the Arbitrator sustained the grievance because he concluded that the Agency abused its discretion and violated law, regulations, and the agreement by its personnel actions. In these circumstances, the Agency fails to establish that a central fact underlying the award was the Arbitrator’s finding as to the explanation of the emergency plan. Consequently, the Agency’s exception provides no basis for finding that the award is based on a nonfact. *See, e.g., AFGE Local 1546*, 52 FLRA 94, 97 (1996) (award not deficient as based on a nonfact when appealing party fails to demonstrate that the asserted nonfact was central to the arbitrator’s decision). Accordingly, we deny this exception.

C. The award does not fail to draw its essence from the agreement.

To establish that the award is deficient because it fails to draw its essence from the collective bargaining agreement, the Agency must show 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. *E.g., United States Dep’t of Labor (OSHA)*, 34 FLRA 573, 575 (1990).

Article 16, Section 1 provides that “all employees shall be treated fairly and equitably[.]” Award at 10. The Agency does not argue that the Arbitrator’s interpretation of Article 16, Section 1 is unfounded, implausible, or irrational or that it disregards the agreement. Instead, the Agency argues that there was no evidence that any employee was treated unfairly or inequitably. However, in finding a violation of Article 16, Section 1, the Arbitrator found that the record evidenced many inconsistencies in the medical center’s personnel actions. Award at 20. The Agency’s claim that to the contrary does not establish that the award fails to draw its essence from the agreement under any of the essence tests. *E.g., AFGE Local 1637*, 49 FLRA 125, 131 (1994). Accordingly, we deny this exception.

D. The award is not contrary to overtime law and regulation.

When an exception involves the award's consistency with law, we review *de novo* any question of law raised by the exception and the award. *E.g.*, *NTEU Chapter 24*, 50 FLRA 330, 332 (1995). In applying a standard of *de novo* review, we assess whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *E.g.*, *NFFE Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, we defer to the arbitrator's underlying factual findings. *Id.*

Under 5 U.S.C. § 5542(a), covered employees are paid overtime for "hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day[.]" Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an officer or employee to whom this authority has been delegated. 5 C.F.R. § 550.111(c). As specifically found by the Arbitrator, some overtime was denied on the basis that "no supervisor saw the actual work performed[.]" Award at 26. Accordingly, he ordered that employees may submit requests for reconsideration of the payment of premium pay because some employees were denied premium pay on an improper basis. The Agency fails to establish that, as a matter of law, employees must be observed by their supervisors to be entitled to overtime. Consequently, nothing in the award conflicts with applicable law. Moreover, in ordering reconsideration, the Arbitrator has not ordered payment of premium pay when, in the Agency's view, the standards of § 5542 and § 550.111 have not been met. Accordingly, we deny this exception.

E. The Arbitrator's finding pertaining to Article 13 of the agreement is not contrary to law or public policy.

The Agency argues that the Arbitrator's finding that the Agency violated Article 13 of the agreement by failing to provide written notice of AWOL decisions is contrary to law and public policy because AWOL is not a disciplinary action. However, the Agency's reliance on law and public policy is misplaced. The Arbitrator applied the notice and writing provisions of Article 13 because he interpreted AWOL to be comparable to discipline. The Agency fails to cite any law or public policy that precludes a collective bargaining agreement from obligating an agency to provide such notice.<sup>4</sup> Accordingly, we deny this exception.

F. The finding pertaining to Article 19 of the agreement is not contrary to law.

In assessing the Agency's emergency preparedness plan, the Arbitrator found that "Flexiplace, Article 19 . . . could have been incorporated into the Agency's Emergency Plan." Award at 22. The Agency contends that this finding is contrary to its statutory mission to provide care to veterans as set forth in 38 U.S.C. § 7301. Section 7301(b) provides that the primary function of the Veterans Health Administration is "to provide a complete medical and hospital service for the medical care and treatment of veterans[.]" The Agency fails to demonstrate how this function prohibits a reference in the Agency's emergency plan to the parties' collective bargaining agreement provision pertaining to flexiplace. Accordingly, we deny this exception.

G. The Arbitrator's finding pertaining to Article 28 of the agreement is not contrary to law.

The Agency alleges that the Arbitrator found that Article 28 allows employees to decline to perform their duties during a hurricane and that such finding is contrary to law and regulation. However, the Agency fails to establish that the Arbitrator made such a finding. In this regard, the Arbitrator noted that Article 28, Section 6 recognizes situations of imminent danger and gives employees the "right to decline to perform their assigned tasks because of reasonable belief that it may cause imminent risk." Award at 23. That is, the Arbitrator accurately paraphrased the language of Article 28.<sup>5</sup> Award at 23. He did not order any employee's leave status changed on the ground that the employee had a reasonable belief of imminent danger within the meaning of Article 28. As such, the Agency has misconstrued the award, and its arguments provide no basis for finding the award deficient. Accordingly, we deny the Agency's exception.

H. The Arbitrator's finding as to the emergency plan is not contrary to law.

The Arbitrator's statement that the emergency plan should consider the special needs and circumstances of employees does not require the Agency to take any

4. We note that, unlike Article 16, the Agency did not except to the Arbitrator's interpretation and application of Article 13 on the ground that it fails to draw its essence from the agreement.

5. Article 28, Section 6B pertinently provides: "The employee has a right to decline to perform their assigned tasks because of reasonable belief that, under the circumstances, the task poses an imminent risk of death or serious bodily harm . . ." Award at 10.

action. As such, it constitutes *dicta*. Consequently, this exception provides no basis for finding the award deficient. *See, e.g., United States Dep't of the Treasury, Bureau of Engraving and Printing, Fort Worth, Tex.*, 58 FLRA 397, 399 (2003). Accordingly, we deny this exception.

I. The award is not deficient because it is contrary to Authority precedent.

The Agency contends that the Arbitrator “erred in his reliance upon four FLRA cases that he cites in his opinion.” Exceptions at 8. Although the Agency identifies the four cases as “FLRA cases[,]” exceptions at 8, only two of the cases are Authority cases. The others are arbitration awards. In the two Authority decisions, arbitrators awarded employees administrative leave, and the Authority denied agency exceptions to the awards. *See INS*, 48 FLRA 1269; *AFGE Local 51*, 41 FLRA 48. The Agency fails to demonstrate how the Authority’s denial of exceptions in those cases establishes that the award in this case is contrary to law. The Agency claims that these decisions are distinguishable because, unlike the agencies in those cases, it granted administrative absence to many employees. The Agency’s claim is unpersuasive because it was the Agency’s grant of administrative absence to some employees, but not others, that was the basis for the Arbitrator’s conclusion that the Agency had abused its discretion. Accordingly, we deny this claim. *See, e.g., AFGE Local 919*, 61 FLRA 625, 627 (2006) (appealing party failed to demonstrate that cited Authority precedent established that the arbitrator’s award was deficient).

In the arbitration awards cited by the Agency, arbitrators awarded employees administrative leave, and no exceptions were filed to the awards. Even if the Arbitrator’s award conflicted with these two awards, such conflict provides no basis for finding the award deficient because arbitration awards are not precedential. *E.g., Soc. Sec. Admin., Office of Hearings and Appeals, Falls Church, Va.*, 55 FLRA 349, 352 (1999).

Accordingly, we deny this exception.

J. The award is contrary to 5 C.F.R. § 630.401.

Under § 630.401, an agency shall, on request, grant sick leave to an employee when the employee:

(1) Receives medical, dental, or optical examination or treatment; (2) Is incapacitated for the performance of his or her duties by physical or mental illness, injury, pregnancy, or childbirth; (3)(i) Provides care for a family member who is incapacitated by a medical or mental condition or attends

to a family member receiving medical, dental, or optical examination or treatment; or (ii) Provides care for a family member with a serious health condition; (4) Makes arrangements necessitated by the death of a family member or attends the funeral of a family member; (5) Would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by his or her presence on the job because of exposure to a communicable disease; or (6) Must be absent from duty for purposes relating to his or her adoption of a child, including appointments with adoption agencies, social workers, and attorneys, court proceedings; required travel; and any other activities necessary to allow the adoption to proceed.

The award contains two references to the grant of sick leave. In particular, the Arbitrator authorized the grant of sick leave to employees without sufficient annual leave and to employees to avoid the loss of holiday pay. Award at 22, 25. As these two circumstances are not encompassed by § 630.401, the award conflicts with § 630.401. Accordingly, we conclude that this portion of the award is deficient, and we modify the award to strike the noted references to the grant of sick leave. *E.g., United States Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 60 FLRA 46 (2004) (award modified to strike remedy inconsistent with 5 C.F.R. § 335.103).

K. The Arbitrator did not exceed his authority.

Arbitrators exceed their authority by failing to resolve an issue submitted to arbitration, resolving an issue not submitted to arbitration disregarding specific limitations on their authority, or awarding relief to persons who are not encompassed by the grievance. *E.g., United States Dep't of Transp., Fed. Aviation Admin.*, 61 FLRA 854, 855 (2006). The Agency does not assert that the Arbitrator failed to resolve an issue, resolved an issue not submitted, or awarded relief to persons not encompassed by the grievance. Instead, the Agency asserts that the reconsideration process is not based on law or contract. Viewing this as a claim that the Arbitrator disregarded specific limitations on his authority, the Agency fails to identify any specific limitation on the Arbitrator’s authority to have ordered the disputed process. As such, the Agency’s exception provides no basis for finding the award deficient. *E.g., Puget Sound Naval Shipyard*, 62 FLRA at 8. Accordingly, we deny this exception.

L. The Arbitrator was not biased.

The Authority will find an arbitration award deficient when the appealing party establishes that there was bias, partiality, or corruption on the part of the arbitrator. *E.g.*, *AFGE Local 3979, Council of Prisons Locals*, 61 FLRA 810, 813 (2006). To establish that the award is deficient, the appealing party must demonstrate one of the following: (1) the award was procured by improper means; (2) there was partiality or corruption on the part of the arbitrator; or (3) the arbitrator engaged in misconduct that prejudiced the rights of the appealing party. *Id.* When assessing whether an award is deficient, we apply the approach of federal courts, which requires the appealing party to prove specific facts establishing improper motives, and the courts to ascertain whether the arbitrator's conduct was so biased and prejudiced as to destroy fundamental fairness. *Id.*

The Agency alleges that the Arbitrator displayed bias in his opinion by retaining jurisdiction and "ignoring" federal law. Exceptions at 12. The Agency has not demonstrated that the Arbitrator's retention of jurisdiction in this case was improper. In this regard, the Authority has uniformly upheld the retention of jurisdiction by arbitrators for the purpose of resolving disputes over implementation of an award. *United States Dep't of Veterans Affairs, Denver Reg'l Office, Denver, Colo.*, 60 FLRA 235, 238 (2004) (Chairman Cabaniss dissenting on other grounds). In addition, the Agency also has not demonstrated that the Arbitrator ignored federal law. With the exception of § 630.401, we have denied or dismissed the Agency's numerous claims that the award is contrary to federal law or regulation. Accordingly, we deny this exception.

## **V. Decision**

We dismiss the Agency's exceptions, which contend that the award is contrary to § 7106 and § 630.101. We conclude that the award is deficient as it pertains to the grant of sick leave and modify the award to strike the deficient references. Otherwise, we deny the Agency's exceptions.