64 FLRA No. 69

UNITED POWER
TRADES ORGANIZATION
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
NORTHWESTERN DIVISION
(Agency)

0-AR-4490
(63 FLRA 422 (2009))

DECISION

January 28, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority pursuant to a remand from the United States Court of Appeals for the District of Columbia Circuit in *United Power Trades Organization v. FLRA*, No. 09-1212 (D.C. Cir. Sept. 28, 2009) (order granting remand). In this connection, prior to resolving the merits of the Union's appeal of the Authority's decision in *United Power Trades Organization*, 63 FLRA 422 (2009), the court granted the Authority's motion to remand to the Authority for further proceedings.

This matter concerns exceptions to an award of Arbitrator William B. Gould IV filed by the Union under § 7122 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 found that the Agency did not violate either the parties' agreement or the Statute when it denied an employee's request for official time. For the reasons discussed below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Union filed a grievance on behalf of the Union's District Vice President (DVP) alleging that the Agency violated the parties' agreement and committed one or more unfair labor practices (ULPs) by refusing to grant the DVP official time to perform representational duties ordinarily performed by Project Representatives. When the grievance was not resolved, it was submitted to arbitration.

At arbitration, the parties agreed that the Arbitrator would frame the issue. As relevant here, the Arbitrator framed the issue as whether the Agency violated "the collective bargaining agreement and/or relevant law when it refused to grant [the DVP] official time when he requested it." [1] Award at 2.

The Arbitrator quoted Article 25.3 of the parties' agreement, which states, in pertinent part: "If there is no Project Representative or Alternate at a project, at any given time, the [DVP], or someone designated by the [DVP], may serve in the capacity of the Project Representative." *Id.* at 5. The Agency argued that this language made the DVP ineligible for official time to act as a Project Representative because there was an available Project Representative or Alternate at the project. *Id.* at 8-10. The Union argued that Article 25.3 could not be read to limit a DVP's ability to act as a Project Representative because this would conflict with the Union's right to designate its representatives under the Statute and as articulated in Article 22 of the agreement, which provides, in pertinent part, that the Union has the right to "designate representatives of their choosing for . . . the prosecution of grievances and employee-management relations without fear of restraint, interference, coercion or discrimination." *Id.* at 5, 8.

The Arbitrator stated that the Union was asking him to "simply ignore the contractual language" in Article 25.3, and that Article 25.3 must "mean something." *Id.* at 12. The Arbitrator rejected the Union's argument and found that "the more reasonable position is that the parties limited the rights contained in Article 22 by negotiating Article 25." *Id.* at 13.

The Arbitrator found that the DVP had requested official time in order to perform "in the capacity of the Project Representative," and that under Article 25.3, a DVP could do so only when the Project Representative and Alternate positions were vacant. *Id.* at 13-14. As the Project Representative and Alternate positions were not vacant, the Arbitrator found that the DVP was not entitled to use official time under the parties' agreement. *Id.* at 10, 13-14. Accordingly, the Arbitrator denied the grievance. *Id.* at 15.

1. The Arbitrator also found that the grievance was arbitrable. Award at 11. As no exceptions were filed to this finding, we will not discuss it further.

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the award is contrary to 5 U.S.C. §§ 7102 and 7114 because it interferes with the Union's statutory right to designate a representative of its own choosing in certain circumstances.[2] Exceptions at 4. The Union asserts that it did not clearly and unmistakably waive this statutory right and, thus, that the Agency improperly denied the DVP official time. *Id.* at 5.

The Union further argues that the award fails to draw its essence from the parties' agreement. *Id.* at 6-7. According to the Union, Article 25.3 is ambiguous and does not clearly address official time, while other provisions of the agreement do expressly address official time. *Id.* (citing Article 16.3 (delineating number of official time hours to be allotted); Article 16.5 (outlining official time request procedures and the basis by which the Agency can approve or deny official time); Article 25.1 (identifying procedure by which Union must notify the Agency of employees designated as eligible to receive official time)). The Union argues that the Arbitrator improperly interpreted Article 25.3 in a way that modifies those other provisions and interferes with the "clear representational mandate[]" of Article 22. *Id.*

B. Agency's Opposition

The Agency argues that the award is not contrary to law. In this regard, the Agency asserts that the Arbitrator was merely interpreting the parties' lawful agreement. Opp'n at 4-5. In addition, the Agency argues that the award does not fail to draw its essence from the parties' agreement because Article 25.3 unambiguously provides that a DVP can act in the capacity of the Project Representative only when there are no Project Representatives or Alternates at a project. *Id.* at 7-8.

IV. Analysis and Conclusions

A. The Arbitrator's decision is not contrary to law, rule and/or regulation.

The Union argues that the award is contrary to 5 U.S.C. §§ 7102 and 7114 because it upholds the Agency's denial of official time. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an exception and the award *de novo*. *See NTEU, Chapter 24,* 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA,* 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a *de novo* standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437,* 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

Section 7131 of the Statute sets forth the rights and restrictions associated with the use of official time.[3] Subsections (a) and (c) guarantee union representatives official time for bargaining and certain Authority-related activities, and subsection (b) bars the use of official time for internal union matters. 5 U.S.C. § 7131(a)-(c). The use of official time for all other types of representational activities is subject to negotiation under subsection (d), which provides that union representatives in the bargaining unit "shall be granted official time in any amount the agency and the exclusive representative

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2. 5 U.S.C. § 7102 provides, in pertinent part, that employees have the right "to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government." 5 U.S.C. § 7114(a) provides, in pertinent part, that "[a] labor organization which has been accorded exclusive recognition . . . is entitled to act for . . . all employees in the unit."

3. 5 U.S.C. § 7131 provides:

> (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.
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> (b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a nonduty status.
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> (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.
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> (d) Except as provided in the preceding subsections of this section —
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> > (1) any employee representing an exclusive representative, or
> >
> > (2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,
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> shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

involved agree to be reasonable, necessary, and in the public interest." 5 U.S.C. § 7131(d).

The Authority has held that the parties may negotiate all matters concerning use of official time under § 7131(d), including, as relevant here, which union officials may use official time. *See U.S. Dep't of the Navy, Naval Mine Warfare Eng'g Activity, Yorktown, Va.*, 39 FLRA 1207, 1213-14 (1991) (*Navy*) (provision that official time allocated to union president cannot be allocated to other union officials is enforceable). Consequently, any entitlement to official time to engage in activities covered by § 7131(d) is a contractual, not statutory, entitlement. *See id*. Because any entitlement to official time to perform § 7131(d) activities flows only from the parties' agreement, the Authority has previously rejected the argument "that section 7114 of the Statute entitles an exclusive representative to perform representational activities of the type covered by section 7131(d) on official time." *Navy*, 39 FLRA at 1214. Similarly, the Authority has stated that a limitation in the parties' agreement on the number of representatives entitled to official time "in no way constrains the Union in its statutory right to designate its representatives." *U.S. Dep't of the Air Force, HQ Air Force Materiel Command*, 49 FLRA 1111, 1120 (1994) (*Air Force*).

In this case, there is no indication in the record, and the Union does not argue, that the DVP's official time requests were in order to negotiate or participate in Authority proceedings under subsections (a) or (c) of § 7131. Therefore, § 7131(d) applies, and any entitlement to official time in these circumstances must be based in the parties' agreement. *See Navy*, 39 FLRA at 1213-14. Consequently, the Arbitrator's interpretation of the parties' agreement to find that the Agency properly denied the DVP's request for official time does not implicate the Union's right to choose its own representatives under the Statute. *See id.*; *Air Force*, 49 FLRA at 1120. Accordingly, the Union provides no basis for finding that the award is contrary to law, and we deny this exception.

B. The award draws its essence from the agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing 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 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. *See U.S. Dep't of Labor* (*OSHA*), 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

As discussed above, Article 25.3 of the parties' agreement provides, in pertinent part, that "*[i]f* there is no Project Representative or Alternate at a project, at any given time, the [DVP] . . . may serve in the capacity of the Project Representative." Award at 5 (emphasis added). The Arbitrator interpreted this wording to mean that a DVP may perform in the capacity of a Project Representative only when the Project Representative and Alternate positions are vacant. *Id.* at 14. As one or more Project Representatives or Alternates were available, the Arbitrator found that the DVP was not entitled to official time. *Id.*

The Union argues that nothing in the agreement makes a DVP ineligible for official time to perform project representational duties. *Id.* at 7. In this regard, the Union argues that provisions other than Article 25.3 govern official time. With respect to the Union's reliance on Article 22, which addresses generally the Union's right to designate its representatives, the Arbitrator found that Article 25 limits the rights granted by Article 22. *See id.* at 13. With regard to the remaining provisions cited by the Union, none of those provisions sets forth the circumstances under which a DVP is entitled to official time. *See* Exceptions at 6-7 (citing Article 16.3 (delineating number of official time hours to be allotted); Article 16.5 (outlining official time request procedures and the basis by which the Agency can approve or deny official time); Article 25.1 (identifying procedure by which Union must notify the agency of employees designated as eligible to receive official time)). Thus, none of the cited provisions demonstrates that the Arbitrator's interpretation of Article 25.3 is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. Accordingly, the Union does not demonstrate that the award fails to draw its essence from the parties' agreement, and we deny this exception.

V. Decision

The Union's exceptions are denied.