64 FLRA No. 87

NATIONAL LABOR RELATIONS BOARD
REGION 18
MINNEAPOLIS, MINNESOTA
(Agency)

and

NATIONAL LABOR RELATIONS
BOARD UNION
(Union)

0-AR-4241

DECISION AND ORDER

February 25, 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 on exceptions to an award of Arbitrator Gil Vernon filed by the Agency under § 7122 of the Federal Service Labor Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition.

The Arbitrator concluded that the Agency violated the parties' collective bargaining agreement (CBA) when it prohibited the grievant from earning credit hours while performing duties on official time. For the following reasons, we deny the exceptions.

II. Background and Arbitrator's Award

The grievant is a Union official who is authorized under Article 28 of the CBA to perform Union duties on official time for fifty percent of her work time. Award at 4. In addition, the grievant received approval under Article 21 of the CBA to work on a "flexitime schedule," under which employees, subject to approval, may elect to work more than a normal, daily schedule in order to earn "credit hours" to be used, subject to various restrictions, at a later time. *Id.* at 2-3, 6. The parties stipulated that, during the negotiations for the CBA, neither party offered a proposal addressing the ability to earn credit hours while performing duties on official time. *Id.* at 6.

Subsequently, the grievant sought approval to work beyond her regular schedule and, thereby, earn credit hours. *Id.* When approval was granted on the condition that credit hours could be earned only when the grievant performed "agency work" and not duties performed on official time, a grievance was filed. *Id.* When the grievance was not resolved, it was submitted to arbitration, where the parties did not agree on, and the Arbitrator did not state, an issue.

The Arbitrator found that nothing in the CBA prohibited the grievant from earning credit hours while performing duties on official time. *Id.* at 19. In particular, the Arbitrator concluded that the grievant was entitled to earn credit hours on the "same basis as any other employee." *Id.* The Arbitrator found that "none of the eligibility and use limitations" on earning credit hours set forth in the CBA applied to the grievant. *Id.* at 20. In so doing, the Arbitrator rejected the Agency's argument that, under law and the CBA credit hours may be earned only while performing "work," not duties performed on official time. *Id.* at 20-21. The Arbitrator stated that his conclusion was consistent with the Flexible and Compressed Work Schedule Act of 1978, 5 U.S.C. §§ 6120-6133 (FCWSA), as well as Article 21 of the CBA. [1] *Id.* In this respect, the Arbitrator referenced guidance from the Office of Personnel Management (OPM) that, in accordance with FLRA precedent, credit hours may be earned while performing representational duties on official time. [2] *Id.* at 21-22.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is contrary to the FCWSA because, under § 6130, employees may participate in flexible or compressed work schedule programs only to the extent "expressly" provided for in a collective bargaining agreement. Exceptions at 4. According to the Agency, the parties' CBA does not expressly permit earning credit hours while performing duties on official time. The Agency further contends that the Arbitrator misinterpreted the *NTEU* cases. *Id.* at 5. In this respect, the Agency argues the *NTEU* cases stand for the "limited" proposition that proposals covering credit hours for representational activity during work hours are negotiable, not that such proposals are "either meritorious or part of the contract." *Id.* at 5-6. Finally, the Agency contends that the term "work" for

1. As relevant here, Article 21, Section 2 defines "credit hours" as hours in excess of an employee's basic requirement during which the employee elects to "work." Award at 2.

2. The Arbitrator cited *NTEU*, 30 FLRA 690 (1987) and *NTEU, Chapter 65*, 25 FLRA 373 (1987) (hereinafter *NTEU* cases).

purposes of earning credit hours means the performance of Agency work only. *Id.* at 8.

B. Union's Opposition

The Union contends that the Agency's exception that the award is contrary to law constitutes disagreement with the Arbitrator's interpretation of the CBA. Opp'n at 4. In this respect, the Union points out that there is no express limitation in the contract on earning credit hours while performing duties on official time. *Id.* The Union also contends that the Agency's interpretation of the *NTEU* cases is erroneous. *Id.* at 5. According to the Union, the Authority concluded in the *NTEU* cases that duties performed on official time is "work" that counts toward an employee's basic work requirement under the FCWSA. *Id.*

IV. Analysis and Conclusions

A. The award is not contrary to the FCWSA.

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*. *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 the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. 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. *See id.*

Here, the crux of the Agency's contrary-to-law exception is that the parties' CBA does not "expressly" encompass earning credit hours while performing duties on official time, as required by the FCWSA. *See* Exceptions at 4-5. However, the Agency does not contend that the award fails to draw its essence from the parties' agreement. Moreover, the Agency cites no precedent to support its implicit argument that contractual provisions such as those in this case may not, as a matter of law, be interpreted as the Arbitrator did. In these circumstances — and noting that it is the Arbitrator's construction of the CBA for which the parties have bargained, *see U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 576-77 (1990) — we deny the Agency's exception.

B. The award is not inconsistent with FLRA precedent and OPM regulations.

The Agency asserts that the award is inconsistent with the *NTEU* cases. The Agency claims, in this regard, that "the fact that a proposal may properly be the subject of . . . bargaining does not . . . render the proposal either meritorious or part of a contract." Exceptions at 6. The Agency is correct that finding a proposal negotiable, as in the *NTEU* cases, does not require agreement on the proposal. However, the Agency does not demonstrate how this fact renders the award deficient. Consistent with the *NTEU* cases, the Arbitrator found that credit hours may be earned for duties performed on official time.

Similarly, we find that other Authority cases cited by the Agency for the proposition that the term "work" does not include the performance of representational duties on behalf of a union are inapposite in this case. *See* Exceptions at 7-8. Specifically, in none of those decisions did the Authority address whether employees may earn credit hours while performing duties on official time. For example, in *AFGE National Council of HUD Locals 222, AFL-CIO*, 60 FLRA 311, 313-14 (2004), the Authority determined that an arbitrator's award finding that union representatives are not authorized to telecommute while on official time was not deficient. In so holding, the Authority found the union's reliance on *NTEU, Chapter 65* to be misplaced because the issue of whether credit hours could be earned on official time was not before it. *Id.* at 314. Equally inapposite are the Authority's decisions in *U.S. Dep't of Transportation, FAA*, 60 FLRA 20, 23-24 (2004) (premium pay cannot be awarded for the performance of representational work); *U.S. Dep't of Health & Human Servs., Soc. Sec. Admin., Office of Hearings & Appeals*, 48 FLRA 357, 364 (1993) (arbitrator's award requiring agency to carry over prior performance appraisals of union officials granted 100 percent official time found not to be deficient); *AFGE, Council 214*, 31 FLRA 1259, 1262 (1988) (use of telephone during official time does not involve "technology of performing work" per § 7106(b)(1) of the Statute); and *U.S. Dep't of Defense, Army & Air Force Exch. Serv., Dallas, Tex.*, 53 FLRA 20, 25 (1997) (awards that exempt employees from maintaining fixed schedules for official time or pertain to scheduling of LWOP for 100 percent official time employees do not affect management's right to assign work).

Finally, the Agency's citation to OPM regulations concerning compensatory time for travel is not applicable here. *See* Exceptions at 8. Those regulations provide for earning compensatory time while in a travel status — a matter different from earning credit hours under the FCWSA. *See NTEU, Chapter 41*, 57 FLRA 640, 644-45 (2001) (employees earn credit hours only for hours elected to perform duties outside basic work

requirement while employees in travel status normally have no choice in when they perform duties). Applying the FCWSA, OPM guidance provides that employees may earn credit hours while they are performing representational duties on official time. *See* OPM Negotiating Flexible and Compressed Work Schedules at 6, http://www.opm.gov/cplmr/html/flexible.asp.

Accordingly, we deny this exception.

V. Decision

The Agency's exceptions are denied.