64 FLRA No. 119

UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
PORTLAND, OREGON
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3917
(Union)

0-AR-4333

DECISION

April 9, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Luella E. Nelson 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 sustained a grievance alleging that the Agency had improperly denied the grievant administrative leave to volunteer at a public school. The Arbitrator directed the Agency to restore the grievant's annual leave and charge the grievant's absences to administrative leave instead.

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

II. Background and Arbitrator's Award

The Agency and Union agreed to a Volunteer Memorandum of Understanding (the MOU) addressing the range of volunteer opportunities that qualify for administrative leave under Article 50 of their agreement. [2] Relying on the MOU, the grievant requested administrative leave to volunteer at his son's public school. The Agency denied the grievant's request on the grounds that the request was incomplete and that the activity did not meet the criteria set forth in Article 2 of the MOU. When the grievant's subsequent requests were similarly denied, he took annual leave in order to volunteer. A grievance was filed, and when it was unresolved, the parties proceeded to arbitration.

At arbitration, the parties stipulated the following issues for resolution:

> 1. Is the grievance . . . patently without merit and/or frivolous?
>
> 2. Were the initial denial of administrative leave and Step 1, 2, and 3 decisions on the subject grievance consistent with the Volunteer MOU, the Agreement, and other applicable documents addressing approval of administrative

1. The dissenting opinion of Member Beck is set forth at the end of this decision.

2. The MOU states, in pertinent part:

> **SCOPE:**. . .[T]his memorandum of understanding encompasses the procedures and conditions for . . . administrative leave for volunteer services to non-profit organizations.
>
> **1.** Allowance of Time: Supervisors may approve administrative leave for non-profit volunteer[ing] . . . [up to] an average of eight (8) hours per month. . . .
>
> **2.** Required Criteria: The volunteer activity must meet one of the following four (4) criteria: . . . (4) the absence is directly related to the [Agency's] mission. Examples of the Agency's mission include, but are not limited to, any program or activity which a city or town may support under the CDBG program or other HUD program or which is related to housing or community development, such as Girls' and Boys' Clubs, Big Sisters/Big Brothers, volunteer firefighters, Red Cross emergency relief, and many more.
>
> **3.** Request/Approval Procedures: . . .The request must include . . . the location, the date(s), detailed information describing the volunteer activity and which of the required criteria contained in Article 2 apply . . . .
>
> . . . .
>
> **5.** Amount of Leave: [T]he amount of leave approved shall be reasonable under the circumstances.

Exceptions, Attach. Ex. 18.

Article 50, Section 50.02 of the parties' agreement provides, in pertinent part:

> (1) Up to eight (8) hours of administrative leave per month is allowed to participate in the Adopt-a-School Program. . . . Supervisory approval is required for use of this leave. Any management decision which results in . . . receiving less than eight (8) hours of requested administrative leave per month . . . is a grievable matter. . . .

Opp'n, Attach. Ex. 28, at 15 of 16 unnumbered pages (p. 206 in original).

> leave for Agency employees to engage in volunteer activity? If not, what shall be the remedy?

Award at 2.

Focusing on the fourth criterion of MOU Article 2 (hereinafter "criterion 4"), which states that an absence must be "directly related to the [Agency's] mission[]" in order to qualify for administrative leave, the Arbitrator noted that the Agency's Community Development Block Grant (CDBG) program monies may support "partner[ships] with local school districts." *Id.* at 8. The Arbitrator found that the primary beneficiaries of these grants include low- and moderate-income communities. She found further that the school district in which the grievant volunteers does not receive CBDG funds and – because of its affluence – does not "come[] to mind first" as requiring the Agency's assistance. *Id.* at 9.

However, the Arbitrator found that insisting on a strict, "direct" connection between the Agency's mission and eligible volunteering would be mistaken, in light of criterion 4's wording and illustrative examples – such as "volunteer firefighters" and "Girls' and Boys' Clubs" – which indicate that criterion 4 calls for a "broad reading" of the "community development" mission. *See id.* at 23. In line with that "broad reading," the Arbitrator determined that the grievant's requests satisfied criterion 4. *See id.* at 24. Specifically, the Arbitrator rejected the Agency's contention that public-school activities fall outside the scope of the MOU because public schools do not qualify as "non-profits[,]" according to certain statutory definitions, such as the Internal Revenue Code (I.R.C.) § 501(c)(3).[3] *Id.* The Arbitrator also found it significant that public-school activities further the Agency's "community development" mission, as the requisite "broad reading" characterizes it. *Id.*

The Arbitrator determined that although the grievant's initial leave request failed to explain how the proposed activity satisfied any of the Article 2 criteria, the grievant, prior to the Agency's final review and denial, corrected that defect and explained how the activity satisfied criterion 4. *See id.* at 22-23. In addition, the Arbitrator found that the grievant's familial connection to his volunteer activity did not render him ineligible under the MOU. *Id.* at 21.

Further, the Arbitrator found that although supervisors possess discretion to determine which activities qualify under the MOU, "supervisors may [not] deny leave requests arbitrarily." *Id.* at 22. Specifically, she determined that, although "the permissive language of the MOU gives supervisors discretion to grant or deny leave requests[,] . . . [i]t is well settled that discretion must be exercised reasonably and with due regard for the intent behind the negotiated language. . . . The permissive term 'may' simply recognizes that leave may be inadvisable in some circumstances, or the request may not meet the purposes of the MOU[, but i]t does not suggest that supervisors may deny leave requests arbitrarily." *Id.*

Based on the foregoing, the Arbitrator sustained the grievance and ordered the Agency to: (1) restore the annual leave that the grievant used in order to volunteer in the school district; and (2) charge the grievant's volunteering to administrative leave under the MOU. *Id.* at 24-25.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award fails to draw its essence from the parties' agreement. Exceptions at 8. According to the Agency, neither the school district in which the grievant volunteers nor the grievant's son's classroom is a "non-profit organization," within the terms of the MOU. Therefore, the Agency argues that the Arbitrator ignored the plain language of the MOU by relying on the Internal Revenue Code to determine whether the school district is a non-profit entity. *Id.* at 9-10. The Agency argues further that the grievant's initial leave request provided no explanation of how the proposed activity met the MOU Article 2 criteria, despite clear language requiring that it do so. *Id.* at 2, 12. The Agency contends that once the grievance reached step three, the grievant added only conclusory assertions that he met the MOU criteria, and the Agency points to witness testimony that the grievant provided no supplementary information at step three to substantiate those assertions. *Id.* at 12. In addition, the Agency asserts that the Arbitrator ignored the fact that the MOU "is permissive as to the supervisor's approval of administrative leave for volunteer purposes." *Id.* at 7. The Agency also contends that the Arbitrator, unlike the supervisors, ignored the MOU's clear language requir-

3. I.R.C. § 501(c)(3), which lists organizations that are exempt from normal federal income taxes and surtaxes when performing certain functions, covers the following entities, among others:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, . . . literary, or educational purposes, . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, . . . and which does not participate in, or intervene in . . . any political campaign . . . .

ing a "direct relationship between the volunteer activity and the Agency's mission." *Id.* at 10-11.

Further, the Agency maintains that, insofar as the award directs the Agency to grant leave for volunteering at a school that neither receives nor is likely to receive any funding from the CDBG program, the award is deficient because it disregards 42 U.S.C. § 5301(c),[4] which authorizes the CDBG program. *See id.* at 10-11. Finally, the Agency argues that the award contravenes the Oregon Revised Statutes (the ORS) because the ORS contains a narrower definition for "non-profit" entities than that which the Arbitrator applied for purposes of interpreting the MOU.[5] *See id.* at 9.

B. Union's Opposition[6]

The Union argues that the Arbitrator's interpretation of "non-profit" represents "the most plausible" reading of the MOU, and therefore, the interpretation draws its essence from the parties' agreement. *See* Opp'n at 18.

IV. Analysis and Conclusions

A. The award draws its essence from the parties' 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, e.g.*, *U.S. Dep't of Homeland Sec., U.S. CBP, JFK Airport, Queens, N.Y.* 62 FLRA 129, 132 (2007) (*JFK Airport*). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the 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 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. *Id.* at 132-33. 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 133.

The Agency argues that the Arbitrator ignored the "plain language of the MOU with regard to non-profit organizations" because the award does not define "non-profit organizations" in accordance with the ORS, which states that "nonprofit corporations" are "mutual benefit corporations, public benefit corporations and religious corporations." *See* OR. REV. STAT. § 65.001(31) (2005). However, the Arbitrator did not find that the parties agreed or intended to incorporate the ORS definition of "non-profit" into the MOU, and the Agency produces no evidence to support such a finding. Accordingly, the Agency's argument provides no basis for finding that the Arbitrator's interpretation of "non-profit organizations" is irrational, unfounded, implausible, or in manifest disregard of the agreement or the MOU. *See JFK Airport*, 62 FLRA at 132-33.

In addition, the Agency claims that the grievant's initial leave request did not meet the MOU's specificity requirements and that the Arbitrator failed to recognize that supervisors have discretion to grant or deny leave requests. With regard to leave-request specificity, the Arbitrator addressed the MOU requirements and found that the grievant corrected his request to include the required specifics prior to the Agency's final decision to deny leave. *See* Award at 22-23. Although the Agency cites witness testimony to the effect that the grievant provided only conclusory statements to support his request at step three, the Agency proffers no basis for finding that the Arbitrator was required to credit this particular testimony above other all considerations in making her determination about the degree of specificity that the leave request exhibited at step three. *Cf. AFGE, Local 3295*, 51 FLRA 27, 32 (1995) (holding that disagreement with an arbitrator's evaluation of testimony and the weight accorded such testimony provides no basis for finding an award deficient). In this regard, the parties bargained for the Arbitrator's construction of the MOU, and the Arbitrator determined that the grievant provided sufficient information at step three to satisfy the MOU's requirements, as she construed them. *See JFK Airport*, 62 FLRA at 133.

With regard to supervisory discretion to grant or deny leave requests, the Arbitrator acknowledged that such discretionary authority exists but found that "[i]t is well settled that discretion must be exercised reasonably

4. *See infra* section IV.B. for the pertinent text of 42 U.S.C. § 5301(c).

5. *See infra* section IV.A. for the relevant text of the ORS.

6. The Union timely filed its opposition but did not provide the required number of copies. In its timely response to the Authority's subsequent Order, the Union provided the necessary copies but also included two exhibits (Exs. 7 & 43) from the arbitration proceeding, which were not part of the original opposition filing. Because the Union did not seek leave or permission to submit these exhibits according to 5 C.F.R. § 2429.26, and because they were not filed by the deadline for the Union's original opposition, they were untimely filed, and we do not consider them. *See* 5 C.F.R. § 2429.26. *See also, e.g.*, *U.S. Dep't of HHS, FDA*, 60 FLRA 250, 250 n.1 (2004).

and with due regard for the intent behind the negotiated language." [7] Award at 22. The Agency's argument in this respect does not support a finding that the Arbitrator erred in determining that the Agency's supervisors improperly exercised their discretion in denying the grievant's leave requests.

The Agency further asserts that the grievant's volunteer activities do not satisfy criterion 4 because they are not directly related to the Agency's mission. *See* Exceptions at 10-11. As discussed above, the Arbitrator found that criterion 4 calls for a "broad reading" of the Agency's "community development" mission because of its expansive wording and various illustrative examples, such as "volunteer firefighters" and "Girls' and Boys' Clubs." *See* Award at 24. According to this "broad reading," the Arbitrator found that the grievant's proposed activity was "directly related" to the Agency's mission, as those words operate within criterion 4. *See also* MOU Article 2, criterion 4 (stating that mission-related activities are "not limited to" the examples cited therein and explaining that eligible activities would include "many more" than those mentioned in the MOU). The Agency's arguments to the contrary provide no basis for finding that the Arbitrator's determination of the volunteer activity's mission-relevance is irrational, unfounded, implausible, or in manifest disregard of the agreement or the MOU. *See JFK Airport*, 62 FLRA at 132-33.

For the foregoing reasons, we deny the Agency's essence exceptions.

B. The award is not contrary to law, rule, or regulation.

The Agency alleges that the award impermissibly conflicts with the ORS and that it disregards 42 U.S.C. § 5301(c), which authorizes the CDBG program. *See* Exceptions at 9, 11-12. 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 & 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.*

As previously discussed, the ORS states that "non-profit corporations" are "mutual benefit corporations, public benefit corporations and religious corporations." OR. REV. STAT. § 65.001(31) (2005). Nothing in the ORS indicates that the MOU must be interpreted in accordance with the ORS's definitions for non-profit entities. Conversely, nothing in the MOU affects the operation of the ORS within the State of Oregon. Moreover, as previously mentioned, the Arbitrator did not find that the parties agreed or intended to incorporate the ORS definition of "non-profit" into the MOU, and the Agency produces no evidence to support such a finding. Thus, there is no basis for finding that the award conflicts with the ORS.

Although the Agency argues that the award disregards 42 U.S.C. § 5301(c), which states that "[t]he primary objective . . . of the community development program of each [CDBG] grantee . . . is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income[,]" the Agency does not produce any evidence that the parties intended to restrict MOU-eligible volunteer activities to those that actually receive or are likely to receive CDBG funds. Moreover, the Arbitrator found that the Agency's "community development" mission is "'not limited to' the examples [in the MOU, such as CDBG programs,] but include[s] 'many more.'" *See* Award at 23 (quoting the second sentence of criterion 4). Consequently, without any indication that MOU-eligible volunteer activities are limited by the scope of the CDBG program, there is no basis for finding that the award contravenes 42 U.S.C. § 5301(c).

For the foregoing reasons, we deny the Agency's contrary-to-law exceptions.

V. Decision

The Agency's exceptions are denied.

7. In this regard, the Arbitrator did not find that the MOU imposes a "mandate on Agency management to grant leave" or "an affirmative obligation . . . to approve" requests for administrative leave. Dissent. Instead, she found that the Agency agreed, when exercising discretion under the MOU, to review and grant or deny leave requests in a reasonable manner, and that, in this case, the Agency exercised its discretion in an unreasonable manner. Award at 22; s*ee also* MOU Article 5 ("The amount of leave approved should be reasonable under the circumstances."). Moreover, although the dissent argues that the award fails to draw its essence from the agreement because "the parties were capable of using mandatory language like 'must' when they wished to do so," Dissent, the parties were equally capable of using language to indicate that the Agency's discretion to grant or deny leave requests would be completely unfettered and need not be exercised according to any standard of reasonableness. However, the parties did not use such language. *Cf.* MOU Article 5.

Member Beck, Dissenting:

I do not agree with my colleagues that the Arbitrator's Award draws its essence from the parties' agreement.

The pertinent contractual language provides that "[s]upervisors *may* approve administrative leave for non-profit volunteer purposes . . . ." MOU Article 1; Award at 3 (emphasis added). This language is plainly permissive and creates no contractual entitlement that leave will be granted. That a supervisor "may" grant leave necessarily carries the corollary proposition that a supervisor "may not" grant leave. *See U.S. Dep't of VA, Augusta, Ga.,* 59 FLRA 780, 784 (2004) (permissive language that permits agency to conduct interviews does not obligate agency to interview any candidate).

The MOU imposes no mandate on Agency management to grant leave in any particular circumstances or with any particular frequency. To the contrary, the only mandatory language is directed at limiting grants of leave. To be approved for leave, an applicant "must meet" at least one of four specified criteria. MOU Article 2; Award at 3. Further, leave requests "must be made in advance and in writing" and "must include" detailed information about the volunteer activity for which leave is sought. MOU Article 3; Award at 3.

Clearly, the parties were capable of using mandatory language like "must" when they wished to do so, and they used such language to impose inflexible requirements on applicants seeking leave. In contrast, the parties chose to use permissive language when referring to the Agency's decision whether to grant leave requests.

The Arbitrator's conclusion that the MOU imposed an affirmative obligation on Agency management to approve the grievant's request for administrative leave does not represent a plausible interpretation and demonstrates a manifest disregard of the agreement. *SSA, Office of Labor Management Relations*, 60 FLRA 66, 67 (2004) (award deficient as not representing plausible interpretation of agreement); *U.S. Small Business Admin*., 55 FLRA 179, 182 (1999) (award deficient because arbitrator's interpretation of agreement was incompatible with its plain wording).

Accordingly, I cannot conclude that the Award draws its essence from the agreement.