64 FLRA No. 9

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 67
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OGDEN SERVICE CENTER
OGDEN, UTAH
(Agency)

0-AR-4279

DECISION

September 17, 2009

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 Carl C. Bosland 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 denied a grievance alleging that the Agency had unilaterally terminated the availability of compressed work schedules for certain Agency Accounts Management employees. [2] For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

In 1991, the parties entered into an Alternative Work Schedule Agreement (AWS Agreement), which was amended in 1992, that provided employees at the Agency's Ogden site with four AWS options: two types of flexible work schedules and two types of compressed work schedules. Exceptions, Union Ex. 15. The AWS Agreement Appendix provided specific schedules for employees in specific organizational branches. *Id.* Included in those branches listed were the Taxpayer Relations and Adjustment Correspondent Branches, which were part of the Tax Accounts Division. *Id.*

In 1998, the Agency reorganized and combined those branches with the Customer Service Branch, creating the Customer Service Division and a new Contract Representative position. Exceptions, Tr. 161-167. In 2001, the Customer Service Division was restructured into the Accounts Management Division within a national reorganization. *Id.* at 162.

In 2001, the Agency began further restructuring and entered into the Center and Call Site Restructuring Implementation Agreement [3] (Call Site Agreement), addressing the rights of employees during the continued consolidation of functions for the new operational structure. Award at 10. Article 3 of the Call Site Agreement provided work rules applicable to employees affected by the changes in working conditions. [4] Specifically, Article 3, Section 5.B of the Call Site Agreement permits those employees who were already working compressed work schedules, "to the extent possible, [to] retain their present Alternative Work Schedule Option." *Id.* at 11. Section 5.E provides that:

> [E]mployees placed into positions in Accounts Management and Compliance Services programs, that are consolidating into their sites, will have the same AWS options that are currently available to employees who perform that work or substantially similar work (e.g., EIN and Tele-TIN) at their site, unless a local agreement provides otherwise.

Id. In or around 2004, the Union filed a grievance alleging that the Union did not agree with the Agency's handling of compressed work schedules in the Accounts Management Division. *Id.* at 5.

In June of 2005, the Union filed a grievance asserting that the Agency violated Article 23 of the parties' National Agreement, the AWS Agreement, and the Call Site Agreement by refusing to allow Accounts Management Division employees the opportunity to work a

1. Member DuBester did not participate in this decision.

2. The terms "compressed work schedules," "CWS," "alternative work schedule," and "AWS" are used interchangeably by the parties. The flexible schedules at issue in this matter are compressed work schedules.

3. As the Union notes in its exceptions, the Arbitrator erroneously stated that the Call Site Agreement was entered into in 1991 instead of 2001. *See* Exceptions at 4 n.5 (citing Award at 10); Exceptions, Union Ex. 12 at 15.

4. The relevant language of Article 3 is set forth in the attached appendix.

compressed work schedule under the terms set forth in those agreements. [5] Exceptions, Joint Ex. 2. The grievance was not resolved and the matter was submitted to arbitration. *Id.* The Union asked the Arbitrator to make employees whole for time where employees used paid leave to attend appointments they would have otherwise scheduled on their compressed day off. Award at 5.

As the parties were unable to stipulate to the issues presented to the Arbitrator, the Arbitrator framed them as follows:

> 1. Did the Agency unilaterally terminate the availability of a compressed work schedule to employees in [the Accounts Management Division] in violation of the law and collective bargaining agreements?
>
> 2. If so, what is the appropriate remedy?

Award at 3.

The Arbitrator found that the 1992 AWS Agreement did not specifically cover employees of the Accounts Management Division because that group did not exist at the time the AWS Agreement was originally reached. *Id.* at 9-10. He further found that the 1992 AWS Agreement did not provide an "unfettered right" to a compressed work schedule, but that employees had a right to request to work a compressed work schedule. *Id.* at 9. He also found that the Agency retained "authority to deny that request for operational reasons." *Id.*

The Arbitrator also held that the Union failed to show that there was a contractual or legal basis for the Agency to provide the affected Accounts Management employees with the ability to work a compressed work schedule. *Id.* at 10-13. The Arbitrator found that the parties entered into a series of rollover agreements which extended the 1992 AWS Agreement during its reorganization, but that the Accounts Management Division was not among the work units identified. *Id.* at 10.

The Arbitrator further found that Article 3, Section 5.B of the Call Site Agreement provided employees who were currently working compressed leave schedules with the opportunity, to the extent possible, to retain their present AWS Option. *Id.* at 11. The Arbitrator found that this provision did not require the Agency to "carry over all AWS options to all [Accounts Management Division] employees into whatever function they [were] consolidated . . . ." *Id.* The Arbitrator found that the Union failed to establish that the Agency violated Article 3, Section 5.E of the Call Site Agreement because the Union failed to establish that the Accounts Management employees performing the same or similar work had the option to work a compressed work schedule. *Id.*

In addition, the Arbitrator found that the Union failed to establish that a compressed work schedule was required by Article 23.2.A of the parties' National Agreement. *Id.* The Arbitrator held that, absent negotiations, the Arbitrator lacked the authority to compel the Agency to apply a compressed schedule to a newly created job where a predecessor position with a compressed work schedule did not exist and also held that the parties' National Agreement prohibited amendment or modification by the Arbitrator. *Id.* at 13. Accordingly, the Arbitrator denied the grievance, finding that the Agency did not unilaterally terminate the availability of the compressed work schedules to the Accounts Management Division employees at issue here. [6]

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the award is contrary to 5 U.S.C. § 6130(a)(2) [7] because the award permits employees in a unit represented by an exclusive representative to work within a compressed work schedule program outside of an express agreement between the representative and the Agency. Exceptions at 4. Here, the Union alleges that the Arbitrator incorrectly inter-

5. Article 23 of the parties' National Agreement provides that "the parties agree to use the alternative work schedules that were available to the 'closest local predecessor position' for purposes of negotiating alternative work schedules for newly created jobs." Award at 12. Article 23 does not provide that "the Agency make a compressed work schedule available to the Accounts Management [Division] employees at issue [here]." *Id.*

6. Subsequent to the Arbitrator's award, the Union requested that the Arbitrator clarify his award, arguing that some Accounts Management employees were working a flexitour schedule with credit hours AWS options, asking whether the 1992 AWS Agreement applied to all non-grandfathered employees in Departments BC and BD and Operation 2. Exceptions, Attach. 5. The Agency opposed the request asserting that the Union was seeking "clarification" of an issue outside of the issues presented at arbitration and arguing that the arbitration covered the issue of whether certain employees were entitled to work a compressed work schedule. Exceptions, Attach. 6. The Arbitrator did not respond. *Id.* at 2.

7. 5 U.S.C. § 6130(a)(2) provides that:

> Employees within a unit represented by an exclusive representative shall not be included within any program under this subchapter except to the extent expressly provided under a collective bargaining agreement between the agency and the exclusive representative.

preted the 1992 AWS Agreement to permit the Agency to provide employees with a compressed work schedule in a manner that is contrary to the 1992 AWS Agreement and 5 U.S.C. § 6130(a)(2). *Id.* at 5. The Union alleges that the FCWSA prohibits including employees in a compressed or flexible work schedule program unless there is a program expressly provided in the parties' agreement. As such, the Union further asserts that the Arbitrator's interpretation of the parties' agreement —as failing to provide the Accounts Management Division employees with a flexible or compressed work schedule — violates the 5 U.S.C. § 6130(a)(2) because there are employees currently working a compressed work schedule. *Id.* at 5-6. The Union further asserts that the Authority has previously upheld an arbitrator's award regarding overtime pay and liquidated damages awarded to employees under the Fair Labor Standards Act based on a finding that the agency implemented a compressed work schedule program without an agreement between the exclusive representative and the agency. *Id.* at 4-5 (citing *Dep't of Veterans Affairs, Pittsburgh Healthcare Sys.*, 60 FLRA 516 (2004)).

The Union further alleges that the award is based on several nonfacts. First, the Union asserts that the Arbitrator erroneously found that the compressed work schedule option was not available to employees consolidated into the Accounts Management Division as a result of the 2001 restructuring, a nonfact, but for which, the Arbitrator would have reached a different result. *Id.* at 7. The Union also contends that the compressed work schedule was an option available under the 1992 AWS Agreement and that the Agency did not dispute that "flexitours with credit hours were available to all [Accounts Management] employees." *Id.* The Union also argues that the "only legally permissible vehicle" for the Agency to offer its employees a compressed work schedule option is in a negotiated agreement. *Id.* Second, the Union asserts that the Arbitrator erroneously found that the Accounts Management employees did not perform the same or similar work as the prior divisions at the time of the 2001 Call Site Agreement, which the Union argues led to the Arbitrator's failure to properly interpret the parties' existing agreements. *Id.* at 8-9.

B. Agency's Opposition

The Agency asserts that the award is not contrary to 5 U.S.C. § 6130(a)(2). Opposition at 3. The Agency alleges that the Arbitrator's finding that the employees at issue had no contractual right to work a compressed schedule is not contrary to 5 U.S.C. §6130(a)(2). *Id.* The Agency agrees with the Union that the 5 U.S.C. § 6130(a)(2) permits agencies to establish alternative work schedules for bargaining unit employees under negotiated agreements; however, the Agency argues that 5 U.S.C. § 6130(a)(2) does not require that agencies establish such schedules in the absence of a negotiated agreement. *Id.* at 4. The Agency also disagrees with the Union's interpretation of 5 U.S.C. § 6130(a)(2). *Id.* The Agency contends that 5 U.S.C. § 6130(a)(2) addresses the rights of employees who are already subject to alternative work schedules in the absence of negotiated agreements, and, here, the Union filed a grievance on behalf of employees who were not permitted to work compressed work schedules. *Id.*

Further, the Agency argues that the Union's assertion that the award is based on nonfacts is merely a request by the Union that the Authority determine matters beyond the scope of the issues presented in the underlying arbitration. *Id.* at 5. The Agency contends that the Union is incorrect in its interpretation of the award as allowing the Agency to place employees in an alternative work schedule without regard to any agreement, and, as such, asserts that the Authority should not consider this claim. *Id.* The Agency asserts that the arbitration arose as a result of the Union challenging the Agency's refusal to allow employees to work alternative work schedules, and the Agency asserts that there was no contention in the arbitration that the Agency "involuntarily" placed employees in an alternative work schedule. *Id.* at 6.

The Agency asserts that the parties' grant of contractual rights to a specific group of employees does not mean that those rights would apply to a separate group of employees not covered by the agreement. *Id.* at 7. The Agency contends that the Arbitrator was correct in his finding that the parties' agreement only provided those employees already working a compressed work schedule with the right to continue to work such a schedule and that such a right did not apply to the employees at issue in the arbitration who were not already working such a schedule. *Id.* Further, the Agency argues that allowing certain employees to work credit hours does not mean that the parties have agreed to allow employees to work compressed work schedules. *Id.* at 8. The Agency also asserts that the Union's argument regarding credit hours was not presented before the Arbitrator, and therefore, should not be considered by the Authority. *Id.* at 9.

As such, the Agency argues that the Union merely disagrees with the arbitrator's factual conclusions that were disputed at arbitration and therefore the Agency asserts that the award is not based on nonfact. *Id.* at 10-11. Further, the Agency contends that the Union has failed to set forth how the Union's alleged nonfacts were

clearly erroneous and how the alleged nonfacts were central to the underlying award. *Id.* at 12.

IV. Analysis and Conclusions

A. The award is not contrary to the 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*. *See 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. *See 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. *See id.*

The Union contends on the basis of 5 U.S.C. § 6130(a)(2) that the Arbitrator's interpretation of the parties' agreement is contrary to law. Specifically, the Union asserted that the Arbitrator's interpretation of the parties' agreements is contrary to 5 U.S.C. § 6130(a)(2) because it permits employees in a unit represented by an exclusive representative to work within a compressed work schedule program outside of an express agreement between the exclusive representative and the Agency. Exceptions at 4. 5 U.S.C. § 6130(a)(2) prohibits employees represented by an exclusive representative from participating in a compressed work schedule program unless such a program is provided under the parties' agreement. *See AFGE, Local 1709*, 57 FLRA 711, 713 n.5 (2002).

Here, the Arbitrator found that the Accounts Management Division employees at issue not currently working a compressed work schedule were not entitled to work a compressed work schedule under the parties' agreement. Exceptions at 4. This finding is consistent with 5 U.S.C. § 6130(a)(2) as it does not permit employees to work a compressed schedule after finding that the compressed work schedule option, for the Accounts Management Division employees at issue, is not provided for under the parties' agreement. *Id.* at 4-5. Accordingly, we deny this exception.

B. The award is not based on 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 arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). 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.* In addition, an arbitrator's conclusion that is based on an interpretation of the parties' collective bargaining agreement does not constitute a fact that can be challenged as a nonfact. *See NLRB,* 50 FLRA 88, 92 (1995). Further, the Authority has long held that disagreement with an arbitrator's evaluation of evidence and testimony, including the determination of the weight to be accorded such evidence, provides no basis for finding the award deficient. *See AFGE, Local 3295*, 51 FLRA 27, 32 (1995).

The Union claims that the Arbitrator's findings that the 1992 AWS Agreement and the Call Site Agreement do not provide compressed work schedules for the Accounts Management Division employees at issue should render the award deficient as based on nonfacts. Exceptions at 7. The Arbitrator's finding that the 1992 AWS Agreement and Call Site Agreement do not provide compressed work schedules for the employees at issue constitutes the Arbitrator's interpretation of the parties' agreement and is not subject to challenge as a nonfact. *See NLRB*, 50 FLRA at 92. Moreover, to the extent that there is a factual element to the Arbitrator's finding, the matter was clearly disputed at arbitration. *See* Award at 9; *AFGE, Local 3295,* 51 FLRA at 27.

The Union argues that the Arbitrator erred in finding that the Accounts Management Division employees did not perform the same or similar work as the prior divisions at the time of the 2001 Call Site Agreement. Exceptions at 8-9. Further, the Union contends that the Arbitrator erroneously found that the compressed work schedule option was not available to employees consolidated into the Accounts Management Division. *Id.* at 7. A review of the award and the record submitted shows that these alleged nonfacts were disputed at arbitration, and, as such, the Authority will not find the award deficient on this basis. *See* Award at 9-11; *NFFE, Local 1984*, 56 FLRA at 41. Accordingly, we deny this exception.

V. Decision

The Union's exceptions are denied. [8]

8. As we uphold the Arbitrator's award for the reasons previously described, it is unnecessary to address the Union's contention that the awarded remedy should contain liquidated damages.

APPENDIX

ARTICLE 3

WORK RULES

SECTION 5 — SHIFTS AND ALTERNATIVE WORK SCHEDULES

B. Subject to the provisions of 5 U.S.C. § 7106, the Employer has determined that, to the extent possible, employees will retain their present Alternative Work Schedule (AWS) option.

1. The Employer has determined that changes to days off and hours of duty (start and stop times) within the employee's present shift may be necessary to implement ACS site consolidation and back-end program consolidation.

2. Changes to days off and hours of duty will be made consistent with the applicable local agreement.

3. Should the Employer determine that an adverse Agency impact, as defined in 5 U.S.C. § 6131, cannot be avoided under the applicable local agreement, it will so notify NTEU.

4. The parties will locally negotiate a one-time supplement to the applicable local agreement to address the adverse Agency impact. The negotiations will be limited to adjusting days off under existing AWS and changes to hours of duty (start and stop times), as well as any appropriate arrangements for employees impacted by the changes.

5. The negotiations, including impasse procedures, will be completed within forty-five (45) days of providing NTEU notice and documentation of the existence of, or potential existence of adverse impact.

C. The Employer has determined that employees required to involuntarily change days off within an AWS option or hours of duty (start and stop times) within an employee's present shift will be permitted, upon request, a sixty (60) day transition period.

. . . .

E. Employees placed into positions in Accounts Management and Compliance Services programs, that are consolidating into their sites, will have the same AWS options that are currently available to employees who perform that work or substantially similar work (e.g., EIN and TeleTIN) at their site, unless a local agreement provides otherwise.

Exceptions, Union Ex. 12 at 15-16.