65 FLRA No. 79

UNITED STATES
DEPARTMENT OF THE AIR FORCE
EDWARDS AIR FORCE BASE, CALIFORNIA
(Agency)

and

SPORT AIR TRAFFIC
CONTROLLERS ORGANIZATION
(Union)

0-AR-4625

_____

DECISION

December 22, 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 Philip Tamoush, 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 determined that the Agency violated the parties' collective bargaining agreement (CBA) by unilaterally eliminating supervisory discretion to grant the grievants up to fifty-nine minutes of administrative leave during the last hour of the grievants' shifts when no duties are required.

For the reasons discussed below, we deny the Agency's exceptions in part and dismiss them in part.

II. Background and Arbitrator's Award

The grievants are air traffic controllers who support test and training missions in restricted airspace. Exceptions at 2. The grievants work four ten-hour shifts weekly. *Id.* at 3. During the final hour of a shift, the grievants may have no duties to perform, depending on varying mission needs and operational requirements. Award at 8; Exceptions at 2. In these situations, first-level supervisors have had the discretion to grant the grievants up to fifty-nine minutes of administrative leave. Award at 6.

The Agency unilaterally eliminated supervisory discretion to grant up to fifty-nine minutes of administrative leave at the end of the grievants' shifts. *Id.* at 3-7. The Union subsequently filed a grievance alleging that the Agency violated Article 24, Section 2 of the CBA[1] by eliminating supervisory authority to grant this leave in situations where no air traffic control operations are required. *Id.* at 6. When the grievance was not resolved, it was submitted to arbitration. *Id*. at 7.

At arbitration, the Union argued that Article 24, Section 2 of the CBA gives first-line supervisors the authority to grant the grievants up to fifty-nine minutes of administrative leave when they have no duties to perform at the end of their shifts. *Id.* at 8. Conversely, the Agency argued that Article 24, Section 2 gives first-line supervisors the authority to grant administrative leave for hazardous weather conditions only. *Id.* at 10.

In his award, the Arbitrator framed the issue, in relevant part, as follows:

> Did [the Agency] violate the [CBA] when it decided to abolish the "59-minute shove," as practiced previously? If so, what is the appropriate remedy?

Id. at 2.

The Arbitrator concluded that the Agency violated Article 24, Section 2 of the CBA by unilaterally eliminating the "59-minute shove." *Id.* at 14. The Arbitrator defined the "59-minute shove" as the first-line supervisors' authority to grant the grievants up to fifty-nine minutes of "time off with pay" during the final hour of the grievants' shifts. *Id.* at 11-12. The Arbitrator also construed Article 24, Section 2 as giving supervisors discretion to grant such leave only when "operations permit," which are times when the grievants have no duties to perform at the end of a shift because no air traffic control operations are required. *Id.* at 8, 12.

1. The relevant portion of Article 24, Section 2 of the CBA provides that "[t]he first[-]level supervisor has the authority to grant administrative leave up to 59 minutes." Exceptions, Attach., J. Ex. 1 at 10.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award unlawfully requires the Agency to maintain a workweek amounting to less than the forty hours required by 5 U.S.C. § 6101(a)(2)(A).[2] Exceptions at 1. Specifically, the Agency argues that granting paid absences of fifty-nine minutes at the end of the grievants' shifts regularly occurs on about three out of every four shifts. *Id*. at 5. Therefore, the Agency maintains that granting such absences has become so routine as to reduce the workweek to thirty-seven hours on average, thereby contravening the forty-hour requirement of § 6101(a)(2)(A). *Id*. (citing *U.S. Dep't of Transp., FAA, Chi., Ill.*, 41 FLRA 1441, 1449-450 (1991) (*FAA*); *AFGE, AFL-CIO, Local 3231*, 25 FLRA 600, 603 (1987) (*AFGE*)). The Agency also argues that permitting supervisors to grant up to fifty-nine minutes of paid leave would establish a precedent in future CBAs eliminating any limits on the amount of administrative leave supervisors could grant. *Id*. at 7.

The Agency further contends that the Arbitrator's interpretation of the CBA renders the CBA "illegal" and "void in its entirety." *Id*. at 7-8. In support of this contention, the Agency claims that the Arbitrator interpreted the CBA to allow first-line supervisors "unfettered authority" to grant paid absences. *Id.* The Agency also argues that "as interpreted, the provision determines which manager performs a given task contrary to exclusive management rights." *Id.* at 8.

B. Union's Opposition

The Union asserts that the issue of whether Article 24, Section 2 contravenes 5 U.S.C. § 6101(a)(2)(A) was not raised during the arbitration. Opp'n at 2. The Union also contends that the CBA does not require employees to work less than a forty-hour workweek. *Id.* at 3.

In response to the Agency's argument that the Arbitrator's interpretation of the CBA renders it "illegal" and "void in its entirety," Exceptions at 7-8, the Union argues that the Agency has never sought to renegotiate Article 24, Section 2 during contract negotiations or any other period when the parties can reopen an existing agreement. Opp'n at 4.

IV. Analysis and Conclusions

The Agency argues that when the award upheld the routine granting of fifty-nine minutes of paid leave at the end of the grievants' shifts, it unlawfully reduced the workweek to thirty-seven hours on average, thereby contravening the forty-hour requirement of 5 U.S.C. § 6101(a)(2)(A). Exceptions at 5. As the Agency's exception challenges the award's consistency with law, the Authority reviews the 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 this standard, 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*.

Under 5 U.S.C. § 6101(a)(2)(A), the head of each agency is directed to establish a "basic administrative workweek of 40 hours for each full-time employee in [the] organization[.]" The Agency does not demonstrate that the award is contrary to this obligation.[3] In this connection, although the Agency asserts that the award effectively allows employees to work a thirty-seven-hour workweek, the Union disputes this assertion, and the Arbitrator made no finding that the parties' current practice allows such a situation. There is no basis for the Authority to make a factual finding, not present in the award, that either the parties' current practice or the Arbitrator's award allows a thirty-seven-hour workweek on a regular basis. *See U.S. Nuclear Regulatory Comm'n*, 65 FLRA 79, 85 (2010) (Authority declined to make disputed factual finding not present in arbitrator's award). Thus, there is no basis for finding that the award requires the Agency to establish a thirty-seven-hour workweek.

The award simply enforces the Agency's agreement to permit supervisors broad discretion to approve administrative leave. In this regard, the

2. The relevant portion of 5 U.S.C. § 6101 provides that "(2) [t]he head of each Executive agency . . . shall—(A) establish a basic administrative workweek of 40 hours for each full-time employee in his organization . . . ."

3. The Union's assertion that the Agency did not raise the issue of whether Article 24, Section 2 contravenes § 6101 during the arbitration is without merit, as the record makes clear that the Agency did address this issue. *See* Exceptions, Attach., Agency's Post-Hearing Brief at 23.

Authority has recognized that agencies have broad discretion to grant administrative leave to employees for brief, occasional or sporadic periods of time when warranted by specific circumstances which are not a part of the daily routine of work. *See SSA, Balt., Md.*, 58 FLRA 630, 633 (2003) (administrative leave before Christmas holiday); *AFGE*, 25 FLRA at 603 ("essence of such leave is that it is only occasional or sporadic—when warranted by specific circumstances which are not a part of the daily routine of work"); *NLRB, Region 5*, 2 FLRA 327, 329-31 (1979) (*NLRB*) (administrative leave to cover tardiness in reporting to work); *see also U.S. Dep't of the Air Force, 439th Airlift Wing, Westover Air Reserve Base, Mass.*, 55 FLRA 945, 949 (1999) (administrative leave for time spent engaging in mandatory crew rest periods after long distance flights).

The award in this case is consistent with this Authority case law. As the Arbitrator noted, supervisory discretion to grant such leave is limited to fifty-nine minute increments. Award at 8, 11-12. Therefore, the leave is granted for brief periods only. As the Arbitrator also found, the supervisory discretion to grant this leave is limited to situations where "operations permit," which means where the grievants have no duties to perform because no air traffic operations are required. *Id*. Therefore, the leave is be granted on an occasional or a sporadic rather than a routine basis because whether employees have duties to perform varies depending on mission needs and operational requirements. *Id.* at 8; Exceptions at 2; *see also AFGE*, 25 FLRA at 603. Because the leave at issue here is brief and not granted on a routine basis, it does not unlawfully reduce the grievants' workweek to less than forty hours per week.

The circumstances in this case are distinguishable from the circumstances in cases the Agency relies on, *supra* Part III, where agencies were found to have no authority to grant administrative leave. In those cases, the Authority held that paid leave granted to cover employees' routine meal periods cannot count towards the forty-hour workweek. In both cases, the administrative leave was granted on a "regular, daily basis." *AFGE*, 25 FLRA at 603. Here, in contrast, the award does not require the Agency to regularly grant administrative leave at the end of the grievants' shifts. As discussed above, such leave is limited to brief, occasional periods when "operations permit." Therefore, the Agency has not demonstrated that its authority to grant administrative leave does not properly extend to the type of circumstance involved in this case. For these reasons, the award is consistent with § 6101(a)(2)(A) because it does not reduce employees' workweek to less than forty hours.

The Agency also argues that permitting supervisors to grant up to fifty-nine minutes of paid leave would establish a precedent in future CBAs eliminating any limits on the amount of administrative leave supervisors could grant. Exceptions at 7. However, this decision does not alter controlling Authority precedent that agency discretion is limited only to granting brief, occasional or sporadic periods of administrative leave.[4]

In sum, the Agency has not established that the Arbitrator's award unlawfully reduced the grievants' workweek to less than forty hours. Therefore, the Agency's exception provides no basis for finding that the award is contrary to 5 U.S.C. § 6101(a)(2)(A). Accordingly, we deny the Agency's exception.

V. Decision

The Agency's exceptions are denied in part and dismissed in part.

4. The Agency also excepts to the award on the basis that the Arbitrator's interpretation of the CBA renders the CBA "illegal" and "void in its entirety" because it allows first-line supervisors "unfettered authority" to grant paid absences. Exceptions at 7-8. We construe this as a contention that the award is contrary to law. However, this exception relies on the premise that the grievants' workweek has been unlawfully reduced to less than forty hours a week. As explained above, we reject this premise. Therefore, because the award does not unlawfully reduce the grievants' workweek, the Arbitrator's interpretation of the CBA is not "illegal" and the award cannot be found to be contrary to law on this basis. Accordingly, we deny this exception. In addition, the Agency asserts for the first time in its exceptions that the award is contrary to management rights because "as interpreted, the provision determines which manager performs a given task[.]" Exceptions at 8. There is no indication in the record that the Agency presented this argument to the Arbitrator. Because the issue was not presented to the Arbitrator, it is not properly before the Authority under § 2429.5 of the Authority's Regulations. *See, e.g. U.S. Dep't of the Army, The Adjutant General, Mo. Nat'l Guard, Bridgeton, Mo.*, 56 FLRA 1104, 1106 (2001). For these reasons, we dismiss this exception. We note, in this regard, that § 2429.5 was amended effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). For purposes of this case, we apply the prior Regulation that was in effect at all times relevant to the processing of this case.