65 FLRA No. 184

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3955
COUNCIL OF PRISON LOCALS 33
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
TUCSON, ARIZONA
(Agency)

0-AR-4703

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DECISION

May 31, 2011

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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 Jay C. Fogelberg 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 found that the Agency did not violate the parties' agreement by denying the grievant's request for sick leave. For the following reasons, we dismiss the Union's exceptions in part and deny them in part.

II. Background and Arbitrator's Award

The grievant, a physician's assistant in a correctional facility, requested sick leave because he was not feeling well after responding to an inmate's suicide attempt. Award at 3-4. The Agency denied his request due to a staffing shortage. *Id.* at 4. The grievant reported for his shift, but was later instructed to go home after a supervisor noticed that the grievant looked "tired and somewhat distressed." *Id.*

The Union filed a grievance on behalf of the grievant. *Id.* at 5. The grievance was unresolved and submitted to arbitration, where the Arbitrator framed the issue as: "Did the Agency violate Articles 20 and/or 27 of the [parties' agreement[2]], or the Code of Federal Regulations (if applicable) when it denied a request by the [g]rievant to take sick leave[?] If [so], what shall the appropriate remedy be?" *Id.* at 2.

1. Member Beck's separate opinion, dissenting in part, is set forth at the end of this decision.

2. Article 20 of the parties' agreement provides, in pertinent part:

> Section (a): Employees will accrue and be granted sick leave in accordance with applicable regulations, including:
>
> (1) sick leave may be used when an employee . . . is incapacitated for the performance of duties by sickness[;]
>
> . . . .
>
> (3) except in an emergency situation, any employee who will be or is absent due to illness or injury will notify the supervisor, prior to the start of the employee's shift or as soon as possible, of the inability to report for duty and the expected length of absence. . . . The actual granting of sick leave, however, will be pursuant to a personal request by the employee to the immediate supervisor, unless the employee is too ill or injured to do so, for each day the employee is absent, up to three (3) days, provided the supervisor has not approved other arrangements.

Article 27 of the parties' agreement states, in pertinent part:

> Section (a): There are essentially two (2) distinct areas of concern regarding the safety and health of employees in the [Agency]:
>
> (1) the first, which affects the safety and well-being of employees, involves the inherent hazards of the correctional environment; and
>
> (2) the second, which affects the safety and health of employees, involves the inherent hazards associated with the normal industrial operations found throughout the [Agency].

Exceptions, Attach. 4 at 52, 62.

As an initial matter, the Arbitrator stated that "it is widely held that, unless restricted by the language in a labor agreement, the granting or denial of a sick leave request is normally a right reserved to management." *Id.* at 10 (citation omitted). For support, he cited Elkouri & Elkouri, *How Arbitration Work*s, 1083 (Alan Miles Ruben, ed., BNA Books 6th ed. 2003) (the arbitration manual). *Id.* The Arbitrator also stated that Article 20, Section (a)(1) of the parties' agreement provides that "sick leave may be used when an employee . . . is incapacitated for the performance of duties by sickness[.]" *Id.* at 11 (internal quotation marks omitted). The Arbitrator examined Article 20, Section (a)(3), and found that wording in that provision stating that "the actual granting of sick leave . . . will be pursuant to a personal request by the employee . . . *provided the supervisor has not approved other arrangements*" suggests that a sick leave request is subject to the approval of management. *Id.* at 11-12 (citations omitted). The Arbitrator determined that this interpretation of the provision is "consistent with the management rights language contained in Article 5[.]"[3] *Id.* at 12. In this connection, he noted that, in *AFGE, Federal Prison Council 33*, 51 FLRA 1112 (1996) (*Council 33*), the Authority held that judgment regarding the staffing necessary to maintain a secure facility is a management right. Award at 12. In addition, he stated that "there is nearly an equal amount of testimony and documentation in the record indicating that the facility was short[-]staffed[,] . . . and consequently had legitimate security and safety concerns that needed to be considered." *Id.* at 16-17.

The Arbitrator found that Article 32, Section (a) of the parties' agreement precluded him from considering the Union's argument that the Agency violated § 630.401(a).[4] *Id.* at 13-14. In this connection, the Arbitrator determined that the Union's grievance did not cite the regulation, and that there was no evidence that the parties agreed to modify the grievance pursuant to Article 32, Section (a). *Id.*

For the foregoing reasons, the Arbitrator found that the Union failed to demonstrate that the Agency violated the parties' agreement, and he denied the grievance. *Id.* at 17.

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the award is deficient because the Arbitrator erred by: (1) relying on Article 32 of the parties' agreement as a basis for not considering the Union's argument concerning § 630.401(a); and (2) citing *Council 33*, 51 FLRA 1112, in support of his award. Exceptions at 7-9. The Union also argues that, by finding that the Agency's right to assign work justified its denial of the sick-leave request, the Arbitrator exceeded his authority. *Id.* at 7-8.

In addition, the Union asserts that the Arbitrator erred by failing to find that the Agency violated § 630.401(a). *Id.* at 5. The Union further claims that, by failing to find such a violation, the award fails to draw its essence from the parties' agreement because Article 20, Section (a) "clearly states [that] employees will accrue and be granted sick leave in accordance with applicable regulations." *Id.* In this regard, the Union also claims that the Arbitrator erred by: (1) relying on Article 20, Section (a)(3) because the grievance cited only the first clause of Article 20, Section (a); and (2) citing the arbitration manual, rather than the parties' agreement and applicable regulations, in rendering his decision. *Id.* at 4-5.

Finally, the Union argues that the Arbitrator's finding that "there is nearly an equal amount of testimony and documentation in the record indicating that the facility was short[-]staffed" is a "non-fact[]." *Id.* at 8 (emphasis omitted). Specifically, the Union maintains that, although there was "a small amount of testimony to the fact that the [facility] was short[-]staffed[,]" there is "no documentation in the record" to support the Arbitrator's finding. *Id.*

B. Agency's Opposition

The Agency argues that the award is not contrary to § 630.401. Opp'n at 6. With respect to the Union's essence exception, the Agency contends that

3. Article 5 of the parties' agreement mirrors § 7106 of the Statute. Exceptions, Attach. 4 at 8-9.

4. Article 32, Section (a) of the parties' agreement states, in relevant part: "[T]he party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of any applicable time limit. . . . However, the issues, the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement." Exceptions, Attach. 4 at 76.

Section 630.401(a) provides, in pertinent part: "[A]n agency must grant sick leave to an employee when he or she . . . (2) [i]s incapacitated for the performance of his or her duties by physical or mental illness, injury, pregnancy, or childbirth[.]" 5 C.F.R. § 630.401(a); *see also* Award at 7.

the Arbitrator "properly read the relevant provision of the [parties' agreement] to give management the discretion to grant or deny sick leave requests." *Id.* at 4. Further, with regard to the Union's contention that the Arbitrator made "non-factual" findings, the Agency maintains that the Union's "assessment of the sufficiency of the evidence is not controlling." *Id.* at 6.

IV. Analysis and Conclusions

A. The Union's exceptions that fail to raise recognized grounds for review are dismissed under § 2425.6(e)(1) of the Authority's Regulations.

The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, were revised effective October 1, 2010 and, thus, apply in this case. *See* 75 Fed. Reg. 42,283 (2010). The revised Regulations specifically enumerate the grounds that the Authority currently recognizes for reviewing awards. *See* 5 C.F.R. § 2425.6(a)-(b). In addition, the Regulations provide that if exceptions argue that an arbitration award is deficient based on private-sector grounds not currently recognized by the Authority, then the excepting party "must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions." 5 C.F.R. § 2425.6(c).

Further, § 2425.6(e)(1) of the Regulations provides that an exception "may be subject to dismissal or denial if: . . . [t]he excepting party fails to raise and support" the grounds listed in § 2425.6(a)-(c), "or otherwise fails to demonstrate a legally recognized basis for setting aside the award[.]" 5 C.F.R. § 2425.6(e)(1). As originally proposed, § 2425.6(e)(1) provided for dismissal of exceptions that fail to raise or support an established ground. *See* 75 Fed. Reg. 22,540, 22,542 (2010). However, the final Regulation added the term "or denial," and explained that "a party's failure to *support* a properly raised ground for review may be subject to 'denial' rather than 'dismissal.'" *See* 75 Fed. Reg. 42,283, 42,285 (2010) (emphasis added). In other words, while an exception that does not *raise* a recognized ground is subject to dismissal under the Regulations, an exception that fails to *support* a properly raised ground is subject to denial.

The Union asserts that the award is deficient because the Arbitrator erred by: (1) relying on Article 32 of the parties' agreement as a basis for not considering the Union's arguments concerning § 630.401(a); and (2) citing *Council 33*, 51 FLRA 1112, in support of his award. Exceptions at 7-9. These exceptions fail to raise grounds currently recognized by the Authority, *see* 5 C.F.R. § 2425.6(a)-(b), and do not cite any legal authority to support a ground not currently recognized by the Authority, *see* 5 C.F.R. § 2425.6(c). For these reasons, we conclude that § 2425.6(e)(1) supports dismissing these two exceptions.

In reaching that conclusion, we emphasize that we decline to construe the exceptions as raising recognized grounds for review. In this connection, we acknowledge that, under the Authority's former arbitration regulations, the Authority frequently "construe[d]" parties' exceptions to raise recognized grounds when they could reasonably be construed as raising such grounds. *See, e.g., U.S. Dep't of the Navy, Supervisor of Shipbuilding, Conversion & Repair, Gulf Coast, Pascagoula, Miss.*, 62 FLRA 328, 330 (2007) (construing argument contesting arbitrator's interpretation of agreement provision as an essence exception). However, unlike the former regulations, as discussed above, the current Regulations both list each specific recognized ground for review and expressly provide that a failure to raise a recognized ground may result in dismissal of the exceptions. *Cf. former* 5 C.F.R. § 2425.1. One of the main purposes of the Authority's regulatory revisions was to clearly set forth the parties' burdens and explain the consequences of a failure to meet those burdens. We find that this purpose would be undercut by continuing to "construe" parties' exceptions as raising recognized grounds when parties have failed to state such grounds. Accordingly, for cases that are processed under the new Regulations, we will no longer construe parties' exceptions as raising grounds that the exceptions do not raise.

For the foregoing reasons, we dismiss these two exceptions.

B. The Arbitrator did not exceed his authority.

The Union contends that, by finding that the Agency's right to assign work justified its denial of the grievant's request for sick leave, the Arbitrator exceeded his authority. Exceptions at 7-8. Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to persons who are not encompassed within the grievance. *See U.S. Dep't of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 307-08 (1995).

The Union's contention does not assert that the Arbitrator failed to resolve an issue that was properly before him, resolved an issue that was not properly before him, disregarded specific limitations on his authority, or awarded relief to persons not encompassed within the grievance. Thus, the Union has not supported its exceeded-authority exception, and, consistent with 5 C.F.R. § 2425.6(e)(1) and the above-cited Authority precedent, we deny the exception.

C. The Union's exceptions that challenge the Arbitrator's determination regarding § 630.401(a) do not provide a basis for finding the award deficient.

The Union argues that the Arbitrator erred by failing to find that the Agency violated § 630.401(a). Exceptions at 5. The Union also argues that, by failing to find such a violation, the award fails to draw its essence from the parties' agreement because Article 20, Section (a) "clearly states [that] employees will accrue and be granted sick leave in accordance with applicable regulations." *Id.*

The Authority has held that questions of whether the "'preliminary steps of the grievance procedure have been exhausted or excused"' are questions regarding the procedural arbitrability of a grievance. *AFGE, Local 1815*, 65 FLRA 430, 431 (2011) (*Local 1815*) (quoting *Fraternal Order of Police, N.J. Lodge 173*, 58 FLRA 384, 385 (2003) (Chairman Cabaniss dissenting)). Here, the Arbitrator found that he could not consider the Union's argument with respect to § 630.401(a) because the Union's grievance did not cite the regulation, and there was no evidence that the parties agreed to modify the original grievance pursuant to Article 32, Section (a) of the parties' agreement. Award at 13-14. The Union's arguments essentially challenge the Arbitrator's determination that the Union failed to satisfy the procedural requirements set forth in the grievance procedure, which is a procedural arbitrability determination. *See Local 1815*, 65 FLRA at 431.

The Authority generally will not find an arbitrator's ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the procedural arbitrability ruling itself. *AFGE, Local 933*, 65 FLRA 9, 11 (2010) (*Local 933*). However, a procedural arbitrability determination can be found deficient as contrary to law. *E.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 122, 124 (2005) (*DHS*). In this connection, the Authority has recognized that "procedural requirements may be established [by statute] that apply to negotiated grievance procedures and . . . that a statute could be enacted establishing a filing period for grievances." *AFGE, Local 933*, 58 FLRA 480, 481 (2003) (citation omitted). Consequently, in order for a procedural arbitrability determination to be found deficient as contrary to law, the appealing party must establish that the determination is contrary to procedural requirements established by statute that apply to the parties' negotiated grievance procedure. *DHS*, 61 FLRA at 124.

With respect to the Union's contention that the Arbitrator erred by failing to find a violation of § 630.401(a), that regulation does not establish procedural requirements that apply to the parties' negotiated grievance procedure. Thus, the Union's contention does not provide a basis for finding the Arbitrator's procedural arbitrability determination contrary to law. *See id.* Similarly, the Union's essence argument regarding the failure to apply applicable regulations directly challenges the Arbitrator's procedural arbitrability finding and, thus, does not provide a basis for finding the award deficient. *See Local 933*, 65 FLRA at 11. Accordingly, we deny these exceptions.

D. 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 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. *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.

The Union argues that the Arbitrator erred by: (1) relying on Article 20, Section (a)(3) because the

grievance cited only the first clause of Article 20, Section (a)[5]; and (2) citing the arbitration manual in rendering his decision. Exceptions at 4-5. With respect to the first argument, the Union provides no basis for finding that the Arbitrator erred by relying on an agreement provision not specifically cited in the grievance. In fact, in similar circumstances, the Authority looks to the entire agreement in determining whether an award fails to draw its essence from the parties' agreement. *See Overseas Educ. Ass'n*, 4 FLRA 98, 102 (1980). As neither of the Union's arguments provides a basis for finding that the Arbitrator's interpretation of the agreement is implausible, irrational, or unconnected to the wording of the agreement, we deny the exceptions.

E. The award is not based on a nonfact.

The Union asserts that the Arbitrator's finding that "there is nearly an equal amount of testimony and documentation in the record indicating that the facility was short[-]staffed" is a nonfact. Exceptions at 8 (emphasis omitted). In this regard, the Union maintains that, although there was "a small amount of testimony to the fact that the [facility] was short[-] staffed[,]" there is "no documentation in the record" to support the Arbitrator's finding. *Id.*

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.*

The Union's assertion does not demonstrate that the Arbitrator's finding regarding documentation in the record is a clearly erroneous central fact, but for which the Arbitrator would have reached a different conclusion. Accordingly, the assertion does not demonstrate that the finding is a nonfact, and we deny the exception.

V. Decision

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

5. As noted previously, the first clause of Article 20, Section (a) of the parties' agreement states that "[e]mployees will accrue and be granted sick leave in accordance with applicable regulations[.]" Exceptions, Attach. 4 at 52.

Member Beck, Dissenting in Part:

I part ways with the Majority when they conclude that two of the Union's exceptions should be dismissed because the exceptions do not raise private-sector grounds that are recognized by the Authority.

Our recently revised regulations do not require parties to invoke any particular magical incantations when filing exceptions. A party is required only to "explain how" the award is deficient as contrary to law or on grounds similar to those applied by federal courts in private-sector arbitrations (5 C.F.R. § 2425.6(a)) or to "provide *sufficient citation* to legal authority" if the exception is based on a private-sector ground that is not listed in § 2425.6(b)(1)(i) through (b)(2)(iv). 5 C.F.R. § 2425.6(c) (emphasis added).

Here, the Union's arguments are sufficient to establish essence and contrary to law exceptions.[*] In one exception, the Union argues that the Arbitrator "erroneously interpret[ed] Article 32" when he failed to consider 5 C.F.R. § 630.401. Exceptions at 7. In the other exception, the Union argues that the Arbitrator erred by interpreting *AFGE, Fed. Prison Council 33*, 51 FLRA 1112 (1996) to support his conclusion that determinations regarding what manpower is required "to maintain a secure facility is a right reserved [to management] . . . with regard to denial [of] sick leave." Exceptions at 9 (emphasis omitted). Accordingly, I disagree with my colleagues that we would need to "construe" these arguments in order to find a recognized exception.

I would deny these additional exceptions using essence and contrary to law analyses but would not dismiss them under § 2425.6(e)(1).

[*] I contrast this case from our recent decision in *Fraternal Order of Police, Pentagon Police Labor Committee*, 65 FLRA 781, 784-85 (2011), where we dismissed the union's contrary to law exception because the union failed to explain how the award was deficient.