

65 FLRA No. 197

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 2724
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES BUREAU OF CUSTOMS
AND BORDER PROTECTION
OFFICE OF BORDER PATROL
RAMEY SECTOR
RAMEY, PUERTO RICO
(Agency)

0-AR-4242

DECISION

June 27, 2011

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 Thomas R. Skulina filed by the Union under § 7122 of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations.¹ The Agency filed an opposition to the Union's exceptions.

The Arbitrator denied a grievance alleging that the Agency violated Administrative Manual 2274 (AM 2274) with respect to the rotation of Border Patrol Agents (BPAs) from the Office of Border Patrol (OBP), Ramey Sector, Puerto Rico (Ramey Sector) duty location to the continental United States (CONUS). For the reasons that follow, we deny the Union's exceptions.

1. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42, 283 (2010). Because the Union's exceptions were filed before that date, we apply the prior Regulations.

II. Background and Arbitrator's Award

The OBP was formerly part of the U.S. Immigration and Naturalization Service (INS). Award at 3. The INS was abolished under the Homeland Security Act of 2002, and, in March 2003, the OBP became a part of the U.S. Department of Homeland Security, U.S. Bureau of Customs and Border Protection. *Id.* The OBP is divided into twenty sectors nationwide, one of which is the Ramey Sector.

The grievants are BPAs assigned to the Ramey Sector. *Id.* at 2. BPAs can apply for a basic tour of duty at the Ramey Sector for a period of three years and can request up to two one-year extensions of their tours. *Id.* Upon completion of their tours and on request, BPAs are rotated back to CONUS. *Id.* "When an employee seeks rotation, the employee must list five (5) location preferences"; if "a position is not available at the preferred [location], the employee may be required to supplement their request of rotation locations." *Id.*; *see also id.* at 3 (stating that "procedure for rotation is for the eligible agent to make selections from a list of potentially available stations[,] and, "[i]f the first five do [not] work, then the [BPA] may pick five more potential transfer points"); Exceptions, Attach., Jt. Ex. 2, Section 16.

In August 2005, the Union presented a grievance alleging that the Agency violated AM 2274 when it failed to rotate the grievants back to the CONUS in a timely manner.² Award at 2; Exceptions, Attach., Jt. Ex. 3(a). The parties were unable to resolve the grievance, and the matter was submitted to arbitration. Award at 1.

Because the parties could not agree on the issues, the Arbitrator framed the relevant issue as whether the Agency, with respect to the rotation of BPAs from the Ramey Sector to CONUS, violated AM 2274.³ *Id.* The Arbitrator noted that the Union asserted, in this regard, that the Agency "failed to rotate employees to one of the preferred locations picked by the employee within sixty (60) days after the tour of duty ended, failed to submit requests to the appropriate sector[,] and failed to require the individual sector to acknowledge receipt of the employee's request to rotate [to] that sector." *Id.*

2. The relevant text of AM 2274 is set forth in the appendix to this decision.

3. The Agency also asserted that the grievance was untimely. No exceptions were filed regarding this issue. Accordingly, it is not before us.

The Arbitrator found that, “[w]hatever procedural difficulties took place,” the Agency did not violate AM 2274 because the Agency had the authority “to rotate [employees] to [the] northern and southern border areas of CONUS as a priority instigated by Congress and management” *Id.* at 4.

Noting that Congress “makes appropriations,” the Arbitrator found that “[f]iscal restraints could impact on rotations.” *Id.* at 3; *see also* Exceptions, Jt. Ex. 2, Section 8a(2). The Arbitrator found that, for fiscal year 2005, Congress had earmarked funds to place more agents in the northern and southern borders and that the “evidence was clear that the [Agency] did not have the option to spend money other than how it was allocated.” Award at 4. The Arbitrator further found that, in 2004, no BPAs applied for rotation to the northern and southern borders, which, he noted, was another prerequisite for rotation. *Id.*; *see also* Tr. at 20, 22 & 199.

The Arbitrator also found that AM 2274 provides management with “the authority to adjust tours of duty as needed to meet operational/administrative requirements” and that “there [was] no proof that there is any limitation” on such authority. Award at 3, 4. According to the Arbitrator, this authority is “well grounded” because the Agency deals with “awesome responsibilities generated by 911,” as well as “many other potential border problems” *Id.* at 4.

Accordingly, the Arbitrator denied the grievance.

III. Positions of the Parties

A. Union’s Exceptions

The Union argues that the award fails to draw its essence from AM 2274, Section 16. Exceptions at 13-25. According to the Union, although the Arbitrator acknowledged Section 8a(2) of the agreement, the Arbitrator did not address: (1) “whether the tours of duty were properly extended”; (2) whether the Agency improperly limited the stations available to Ramey Sector BPAs for rotation; or (3) the impact of Section 16a(3) of the agreement. *Id.* at 13-14. The Union asserts that Section 16a(3) of AM 2274 provides, in part, that “[i]f an employee indicates locations where appropriate positions are not available or where turnover is limited, he/she will be requested to expand the area of availability.” *Id.* at 16 (quoting Jt. Ex. 2 at 2274.10). The Union asserts that Section 16a(3) further provides, in part, that “[w]henever an

employee has not been rotated within 60 days after his/her tour of duty ends, the responsible Headquarters program manager will direct placement to a position at one of the preferred locations designated by the employee.” *Id.* at 22-23 (quoting Jt. Ex. 2 at 2274.10). According to the Union, this provision requires that, once the Agency has decided to fill a BPA position, Ramey Sector BPAs who are eligible for rotation must be allowed to request that location and must be considered for that position. *Id.* at 23. The Union contends that this provision further requires that, “once [an employee’s] tour of duty has ended, if the employee has not been rotated within sixty days, the [Agency] should direct placement of the employee to one of the locations designated by the employee, assuming that there is an appropriate position available” *Id.*

The Union further asserts that the award is contrary to law, rule or regulation. *Id.* at 26. In particular, the Union asserts that the Arbitrator’s conclusion that “management’s rights under [§] 7106 [of the Statute] take precedence over AM 2274, and therefore the Agency need not comply with the procedures set out in AM 2274” is contrary to law. *Id.* The Union asserts that § 7106(b)(2) and (3) is the “legal basis for the negotiation” of AM 2274 and, as such, AM 2274 is “an appropriate arrangement for employees adversely affected by the exercise of management’s rights” *Id.*

The Union claims that the award is based on a nonfact because, according to the Union, the Arbitrator found that the Agency “did not have the option to spend money on the rotation of Ramey [Sector BPAs] back to CONUS.” *Id.* at 29. The Union contends that testimony “does not support a finding that the Agency had no discretion in how its budget was spent[,]” but, rather, shows that the Agency did have discretion to spend money on the rotation of BPAs back to CONUS. *Id.*

The Union asserts that the award is “ambiguous, incomplete and contradictory.” *Id.* at 30. According to the Union, the award is “replete with misstatements of fact” regarding the description of the parties’ bargaining history, the rotation of BPAs during the relevant time period, and the procedure for BPAs to request rotation. *Id.* at 30-32 (citing Award at 3). The Union also contends that the Arbitrator “incorrectly summarized the issues raised by the Union when he failed to note that the Union also asserted that the [A]gency improperly limited the stations available to the Ramey [Sector BPAs] for rotation, and failed to timely rotate the employees after their tour of duty had ended.” *Id.* at 30.

B. Agency's Opposition

The Agency asserts that the Union's contention that the award fails to draw its essence from AM 2274 constitutes "mere disagreement" with the Arbitrator's interpretation and application of the agreement. Opp'n at 5-6. The Agency also asserts that, because determination of the budget is a management right, the Union "cannot demand or force the [Agency] to reallocate or spend money on rotations that is not already designated for that . . . purpose." *Id.* at 7. Further, the Agency disputes the Union's claim that the Arbitrator did not address Section 16a(3) of AM 2274. *Id.* (citing Award at 3). The Agency contends that the Arbitrator "found that the [Agency] ha[s] the right under . . . § 7106 to adjust tours of duty and that this right is expressly preserved in AM 2274." *Id.* at 8.

The Agency asserts that the Union has not demonstrated that the award is contrary to law, rule, or regulation. *Id.* at 10. The Agency contends that the Union's assertion that the Arbitrator concluded that management's rights take precedence over AM 2274 "is an incorrect interpretation" of the award. *Id.* The Agency asserts that the Arbitrator "found, as a matter of contract interpretation, that AM 2274 did not waive management's right to assign employees." *Id.*

The Agency asserts that the Union has not shown that the Arbitrator's determination that the Agency could not spend money on rotating BPAs back to CONUS is a nonfact. *Id.* at 12. The Agency contends that this assertion is "merely a disagreement" with the Arbitrator's finding that Congress placed restrictions on the Agency's appropriations for the relevant years. *Id.* at 13. The Agency asserts that, in its closing brief to the Arbitrator, it provided an "in[-]depth explanation" of how it received its funding and how funding was earmarked for the relevant time period. *Id.* at 13 n.10 (citing Ex. B, Agency's Closing Brief at 8-11).

The Agency disputes the Union's assertion that the award is ambiguous, incomplete, and contradictory. *Id.* at 13. According to the Agency, because the Union has failed to show that implementation of the award is impossible, it has not shown that the award is deficient in this regard. *Id.*

IV. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Union contends that that the Arbitrator did not address whether the BPAs' tours of duty were properly extended and whether the Agency improperly limited the stations available to the Ramey Sector BPAs for rotation. We construe this claim as an assertion that the Arbitrator exceeded his authority by failing to resolve an issue submitted to arbitration.

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 those not encompassed within the grievance. *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue, or the arbitrator's formulation of an issue to be decided in the absence of a stipulation, the same substantial deference that it accords an arbitrator's interpretation and application of a collective bargaining agreement. *See U.S. Info. Agency, Voice of Am.*, 55 FLRA 197, 198 (1999).

Because the parties did not stipulate the issue, the Arbitrator framed the relevant issue as whether the Agency violated AM 2274 with respect to the rotation of BPAs from the Ramey Sector to CONUS. Award at 1. The Arbitrator also stated that, in this regard, the Union asserts that the Agency "failed to rotate employees to one of the preferred locations picked by the employee within sixty (60) days after the tour of duty ended, failed to submit requests to the appropriate sector[,] and failed to require the individual sector to acknowledge receipt of the employee's request to rotate [to] that sector." *Id.*; *see also* Exceptions, Attach., Nov. 9, 2006, Tr. at 98-100 (Arbitrator stated that, if the parties could not agree on the issue, he could formulate the issue after he "hear[d] the case").

Based on the issue before him and the record evidence, the Arbitrator denied the grievance, finding that the evidence did not support the Union's contention that the Agency violated AM 2274 with respect to the rotation of the Ramey Sector BPAs. The Arbitrator's finding is directly responsive to the issue before him. The Union has not demonstrated that the Arbitrator's determination exceeds his authority.

Accordingly, we deny this exception.

- B. The award draws its essence from the parties' agreement.

The Union asserts that the award fails to draw its essence from AM 2274.⁴ Exceptions at 13-25. In this regard, the Union contends that, although the Arbitrator "acknowledged" Section 8a(2) of the agreement, he failed to address the impact of Section 16a(3), which, the Union claims, sets out the Agency's obligations if an employee has not been rotated sixty days after his or her tour has ended. *Id.* at 13-14.

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* 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. *See 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.

In finding that the Agency did not violate AM 2274, the Arbitrator examined and applied Section 8a(2), which concerns tours of duty, and Section 16, which concerns rotations, including Section 16a(3). *See* Award at 3. Under Section 8a(2), the Agency retains the authority to adjust tours of duty as needed to meet operational/administrative requirements. *See id.*; *see also* Exceptions, Jt. Ex. 2 at 2274.05. Section 16 provides for the rotation of an employee upon completion of a tour of duty, including the submission of the employee's list of preferred locations. *See* Exceptions, Attach., Jt. Ex. 2 at 2274.10. However, Section 16a(3) further provides that "[p]lacement at one of these offices [employee's preferred location] is not guaranteed" and that, "[i]f an employee indicates locations where appropriate positions are not available or where

turnover is limited, he/she will be requested to expand the area of availability." *Id.*

Interpreting these provisions, the Arbitrator found that, for fiscal year 2005, funds were earmarked "to get more agents in the [n]orthern and [s]outhern borders" and that the "evidence was clear that the [Agency] did not have the option to spend money other than how it was allocated." Award at 3. In so finding, the Arbitrator determined that the Agency's authority was "well grounded" because the Agency deals with "awesome responsibilities generated by 911," as well as "many other potential border problems . . ." *Id.* at 4. The Arbitrator considered the "procedural" requirements under Section 16, but found that the Agency did not violate AM 2274 because it had the authority to rotate employees to the northern and southern borders of CONUS as a "priority." *Id.*; *see also id.* at 3.

Based on the wording of Sections 8a(2) and 16a(3) of AM 2274, the Union has failed to demonstrate that the Arbitrator's interpretation and application of AM 2274 manifests a disregard of the agreement or is implausible, irrational, or unfounded. Moreover, an arbitrator's failure to set forth specific findings, or to specify and discuss all allegations in a grievance, does not provide a basis for finding an award deficient. *See, e.g., Nat'l Ass'n of Indep. Labor, Local 5*, 65 FLRA 502, 505 (2011); *see also U.S. Dep't of Justice, Fed. Bureau of Prisons, Corr. Inst., McKean, Pa.*, 49 FLRA 45, 49 (1994) (disagreement with an arbitrator's interpretation of the parties' agreement and his evaluation of the evidence provides no basis for finding an award deficient). The Union's exception, thus, provides no basis for finding the award deficient.

Accordingly, we deny this exception.

- C. The Union's contrary to law exception does not provide a basis for finding the award deficient.

The Union asserts that the award is contrary to law, rule or regulation. Exceptions at 26. In particular, the Union asserts that the Arbitrator's conclusion that "management's rights under [§] 7106 [of the Statute] take precedence over AM 2274, and therefore the Agency need not comply with the procedures set out in AM 2274" is contrary to law. *Id.*

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award

4. The parties concede that AM 2274 "is a negotiated agreement." *See* Exceptions at 3-4, 1; Opp'n at 1.

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.*

Here, the issue before the Arbitrator concerned whether the Agency violated AM 2274 with respect to the rotation of BPAs from the Ramey Sector. *See* Award at 1; Exceptions at 2; Opp'n at 1. The Arbitrator interpreted AM 2274 as permitting the Agency to adjust tours of duty as needed to meet operational/administrative requirements. *See* Award at 3-4; *see also* Exceptions, Jt. Ex. 2 at 2274.05. We have denied the Union's essence exception. Thus, even assuming that the Arbitrator also based his award on § 7106 of the Statute, the Union's assertion would not provide a basis for finding the award was contrary to law. *Cf. U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.* 56 FLRA 292, 299 (2000) (finding that, when excepting party fails to demonstrate that award is deficient on one of the grounds relied on by the arbitrator, it is unnecessary to address exceptions to other grounds).

Accordingly, we deny this exception.

D. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must demonstrate that the central fact underlying the award is clearly erroneous, but for which a different result would have been reached by the arbitrator. *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993). However, the Authority will not find an award deficient on the basis of an arbitrator's determination on any factual matter that the parties disputed at arbitration. *Id.* at 594 (citing *Nat'l Post Office Mailhandlers v. U.S. Postal Serv.*, 751 F.2d 834, 843 (6th Cir. 1985)).

The Union's nonfact exception challenges the Arbitrator's finding that the Agency "did not have the option to spend money" on the rotation of Ramey Sector BPAs back to CONUS. Exceptions at 29; *see also* Award at 3. This issue was disputed before the Arbitrator. *See, e.g.,* Opp'n, Attach., Nov. 9, 2006, Tr. at 90, 105-06 & 108. As a result, the Union's exception provides no basis for finding the award

deficient. *See, e.g., AFGE, Local 1658*, 57 FLRA 658, 661 (2001).

Accordingly, we deny this exception.

E. The award is not ambiguous, incomplete, or contradictory.

The Union asserts that the award is ambiguous, incomplete, and contradictory because the award is "replete with misstatements of fact" regarding the description of the parties' bargaining history, the rotation of BPAs during the relevant time period, and the procedure for BPAs to request rotation. Exceptions at 30-32 (citing Award at 3). The Union also contends that the Arbitrator "incorrectly summarized" certain issues that it raised. *Id.*

The Authority will find an award deficient when it is incomplete, ambiguous, or so contradictory as to make implementation of the award impossible. *See U.S. Dep't of Labor, Mine Safety & Health Admin., Se. Dist.*, 40 FLRA 937, 943 (1991). For an award to be found deficient on this ground, the appealing party must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain. *See U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1074 (2001).

To the extent that the Union contends that the Arbitrator incorrectly summarized the issues that it raised, we construe this contention as a claim that the Arbitrator exceeded his authority by failing to address these issues, a claim that we rejected above.

As to the Union's claim that the award contains misstatements of fact, the Union has failed to show that, even if its claim is true, implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain. As a result, the Union has provided no basis for finding that the award is incomplete, ambiguous, or contradictory. *See, e.g., AFGE, Local 1395*, 64 FLRA 622, 624 (2010) (party's claim that arbitrator failed to address several issues and failed to define a certain term did not establish that award was incomplete, ambiguous, or contradictory).

Accordingly, we deny this exception.

V. Decision

The Union's exceptions are denied.

APPENDIX

The relevant Sections of AM 2274 are set forth below:

Section 8

8. TOURS OF DUTY

a. Tours of Duty:

....

- (2) Bargaining Unit: 2+1+1+1
Employees will serve a two-year initial tour of duty. When an employee requests an extension of tour, one year extensions may be granted at the discretion of appropriate management officials. (Exception: [BPA] positions in Puerto Rico – the tour of duty is 3 +1+1.)

....

Management retains the authority to adjust tours of duty as needed to meet operational/administrative requirements.

....

Exceptions, Attach., Jt. Ex. 2 at 2274.04-2274.05; *see also* Award at 3.

Section 16

16. ROTATION UPON COMPLETION OF TOUR OF DUTY

- a. Employees who are completing their tours of duty outside the [CONUS], those not requesting extensions and those whose extensions are denied will, six months prior to completion of their tours:

- (1) Submit a memorandum through official channels . . . designating at least five office locations in order of preference which are acceptable to them for return placement.

- (2) If the request for rotation is to a location under the jurisdiction of another office, a copy of the request will be forwarded to the appropriate personnel officer. A further acknowledgement will be sent to the employee upon receipt by that office.

- (3) Placement at one of these offices is not guaranteed. Whenever an employee has not been rotated within 60days after his/her tour of duty ends, the responsible Headquarters program manager will direct placement to a position at one of the preferred locations designated by the employee. . . . If an employee indicates locations where appropriate positions are not available or where turnover is limited, he/she will be requested to expand the area of availability.

....

Exceptions, Attach., Jt. Ex. 2 at 2274.10-2274.11; *see also* Award at 3.