66 FLRA No. 143

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER
RICHMOND, VIRGINIA
(Agency)

0-AR-4831

_____

DECISION

July 12, 2012

_____

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 Stephen M. Schmerin filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

As relevant here, the Arbitrator found that the Agency distributed overtime in a fair and equitable manner, in accordance with the parties' agreement. For the following reasons, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Agency required employees to perform mandatory overtime by directing them to stay after their regular shifts until the arrival of the employee scheduled for the following shift. Award at 14. The Agency also used a voluntary overtime-assignment process, whereby the employees placed their names on an assignment schedule. *Id.* The employees could request an unlimited number of hours, and "there [wasn't] any restriction as to the number of times [that employees] could request voluntary overtime during a monthly schedule." *Id.* In addition, the employees could "decline voluntary overtime by simply not placing their name[s] on the schedule." *Id.*

The Union filed a grievance alleging that the Agency failed to "distribut[e] overtime [on] a fair and equitable basis." *Id.* at 4. The grievance was unresolved and submitted to arbitration, where the Arbitrator framed the relevant issue as: "Did the Agency violate the [parties'] [a]greement by not assigning overtime work in a fair and equitable manner to [employees]?" *Id.* at 5.

As relevant here, the Arbitrator found that the "overtime procedures had existed for at least [fifteen] years" without objection from the Union or the employees. *Id.* at 13-14. He also found that the Agency's mandatory overtime procedure "did not give [any employee] an advantage or limit overtime opportunities." *Id.* at 15. The Arbitrator further determined that the employees "ha[d] been given the opportunity to work voluntary overtime . . . as well as [the ability] to decline that opportunity." *Id.* at 14. Thus, he found that "overtime ha[d] been distributed in a fair and equitable manner," *id.*, and that the Agency did not violate the parties' agreement,[1] *id.* at 15-17.

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the award fails to draw its essence from Article 20, Section 4 of the parties' agreement.[2] Exceptions at 3-6. Quoting Section 4(A) of that Article (Section 4(A)) and citing Section 4(G) of that Article (Section 4(G)), the Union claims that the award "ignores the plain language of the [parties' agreement] requiring, among other things, the use of overtime rosters to spread overtime in a fair manner." *Id.* at 3; *see also id.* at 1-2. In this connection, the Union asserts that "rosters and call back lists were not used or followed," and that "[n]o effort was made to track overtime distribution or assign overtime in any organized way." *Id.* at 4. The Union further contends that the Arbitrator "attempts to circumvent the plain contractual requirements by arguing that the practice has been going on long enough that it should be accepted." *Id.* at 5.

The Union also argues that the award is based on a nonfact. *Id.* at 6. Specifically, the Union maintains that the Arbitrator erred in finding that "overtime had

[1] We note that the Arbitrator also found that the Agency violated the parties' agreement by failing to maintain proper records regarding overtime hours, but found "no obligation for the Agency to provide records or documentation" in connection with overtime that was worked prior to his award. Award at 15. He directed the Agency to maintain accurate records in the future to ensure fair and equitable distribution of overtime. *Id.* at 15-16. As the Union does not except to these findings, we do not address them further.

[2] The relevant wording of Article 20, Section 4 of the parties' agreement is set forth *infra.*

been distributed fairly and that all of the [employees] had an equal opportunity to work overtime." *Id.*

B. Agency's Opposition

The Agency contends that the award draws its essence from the parties' agreement and is not based on a nonfact. Opp'n at 3-4.

IV. Analysis and Conclusions

A. The award draws its essence from the parties' agreement.

The Union argues that the award fails to draw its essence from Article 20, Section 4 of the parties' agreement because the award "ignores the plain language of the [parties' agreement] requiring, among other things, the use of overtime rosters to spread overtime in a fair manner." Exceptions at 3; *see also id.* at 4-6. 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 addition, an arbitrator may appropriately determine whether a past practice has modified the terms of a collective bargaining agreement. *U.S. Dep't of Homeland Sec., Customs & Border Prot., El Paso, Tex.*, 61 FLRA 684, 686 (2006) (*DHS*). Such a determination is a matter of contract interpretation subject to the deferential essence standard of review.[3] *Id.*; *NTEU, Chapter 207*, 60 FLRA 731, 734 (2005); *see* Elkouri & Elkouri, How Arbitration Works, 630 (Alan Miles Ruben, ed., BNA Books 6th ed. 2003) ("an arbitrator's award that appears contrary to the express terms of the agreement may nevertheless be valid if it is premised upon reliable evidence of the parties' intent") (quoting *Int'l Bhd. of Elec. Workers, Local Union No. 199 v. United Tel. Co. of Fla.*, 738 F.2d 1564, 1568 (11th Cir. 1984)).

Section 4(A) provides that "[o]vertime shall be distributed in a fair and equitable manner." Exceptions, Attach. B, Master Agreement at 67. Here, the Arbitrator found that "overtime ha[d] been distributed in a fair and equitable manner." Award at 14. The Union provides no basis for finding that the Arbitrator's determination is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement.

Section 4(G) provides, in pertinent part, that "[r]osters of employees will be utilized to determine voluntary or mandatory overtime," but "[t]he mechanics and eligibility of the rosters are subjects for local negotiations and seniority will be a criterion." Exceptions, Attach. B, Master Agreement at 67. The Arbitrator found that "the current overtime procedures had existed for at least [fifteen] years" without objection from the Union or the employees. *Id.* at 13-14. In so finding, the Arbitrator essentially determined that the parties' past practice of distributing overtime had modified the terms of the agreement. *See DHS*, 61 FLRA at 686. As stated above, this determination is a matter of contract interpretation subject to the deferential essence standard of review. *DHS*, 61 FLRA at 686. And the Union does not demonstrate that the Arbitrator's finding regarding past practice is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, as modified by their past practice. *See AFGE, Local 1633*, 64 FLRA 732, 734 (2010).

For the foregoing reasons, we deny the Union's essence exception.

B. The award is not based on a nonfact.

The Union asserts that the award is based on a nonfact because the Arbitrator erred in finding that "overtime had been distributed fairly and that all of the [employees] had an equal opportunity to work overtime." Exceptions at 6. 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. *E.g., Soc. Sec. Admin., Dall. Region*, 65 FLRA 405, 407 (2010). The Authority will not find an award deficient on the basis of the arbitrator's determination of any factual matter that the parties disputed at arbitration. *E.g., NAGE, SEIU, Local R4-45*, 64 FLRA 245, 246 (2009) (*Local R4-45*).

[3] The Authority views an exception to an arbitrator's finding of whether a past practice exists as asserting a nonfact. *E.g., U.S. Dep't of the Army, Corps of Eng'rs, Nw. Div. & Seattle Dist.*, 64 FLRA 405, 408 n.5 (2010). The Authority views an exception to an arbitrator's interpretation of a past practice as asserting that the award fails to draw its essence from an agreement. *Id.*

Here, the Arbitrator found, and the Union concedes, that the parties disputed before the Arbitrator whether the Agency distributed overtime to the employees in a fair and equitable manner. *See* Award at 6-12; Exceptions at 6. As 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 Local R4-45*, 64 FLRA at 246, we deny the Union's nonfact exception.

V. Decision

The Union's exceptions are denied.