66 FLRA No. 91

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 160
(Union)

0-AR-4791

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DECISION

February 15, 2012

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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 Carol Kyler 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 concluded that the Agency violated the parties' collective bargaining agreement (CBA) by regularly reassigning employees from their assigned work units to other work units for a portion of their shifts.

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

II. Background and Arbitrator's Award

The Union filed a grievance claiming that the Agency violated Article 13[1] of the CBA by regularly reassigning employees from their assigned work units of cargo processing to work a portion of their shifts in passenger-processing work units. Award at 2. The grievance was not resolved and was submitted to expedited arbitration on the stipulated issues of whether the practice of reassigning these employees violated Article 13, and, if so, what is the appropriate remedy. *Id.* at 2-3.

At arbitration, the Union asserted that the Agency made these reassignments in order to avoid paying overtime, and that Article 13 did not permit the Agency to reassign employees for that reason. As a remedy, the Union requested an award of overtime pay for the affected employees. *Id.* at 3.

Before the Arbitrator, the Agency admitted that it regularly reassigned employees as alleged, and an Agency witness testified that part of the reason for doing so was to avoid overtime costs. *Id.* at 3, 9. But the Agency argued that the reassignments did not violate Article 13 because that provision states that a work unit is where an employee is "normally," but not always, assigned. *Id.* at 3 (quoting Article 13). The Agency also argued that the regular reassignments were a binding past practice. *Id.* at 3. Finally, the Agency asserted that, even if the Arbitrator sustained the grievance, she should deny the requested remedy of overtime pay because the Union had not requested the remedy at step 2 of the grievance procedure, as required by Article 13, Section 7 of the CBA.[2] *Id.*

The Arbitrator determined that the Agency had not raised the past-practice argument previously, and, accordingly, she declined to consider it. *Id.* at 6-7. And the Arbitrator interpreted Article 13 as requiring the Agency to regularly assign employees only to their assigned work units and as not allowing an exception in order to avoid paying overtime. *Id.* at 8-9. Accordingly, she concluded that the Agency's practice of regularly reassigning the employees at issue violated Article 13. *Id.* at 10.

In determining an appropriate remedy, the Arbitrator addressed the Agency's objection that the Union had not requested the remedy of overtime pay at step 2 of the grievance procedure, as required by Article 13, Section 7. She concluded that the Agency had waived this objection by failing to raise it prior to the arbitration hearing. *Id.* at 10. Accordingly, the Arbitrator sustained the grievance and directed the Agency to cease the disputed practice of regular reassignments. The Arbitrator also awarded overtime pay and attorney fees. *Id.*

[1] Article 13 provides a bid procedure under which employees are assigned to a specific work unit, with "work unit" defined as the smallest component to which employees are "normally" assigned. Award at 5 (quoting CBA).

[2] Article 13, Section 7.A.(2) provides that, if the grievance is not resolved, then "the union or employee will notify the Port Director (or designee) in writing of the claimed violation, including the nature of the error and requested remedy . . . ." Award at 6 (quoting CBA).

III. Positions of the Parties

A. Agency's Exceptions

The Agency claims that the award is contrary to management's right to determine its budget under § 7106(a)(1) of the Statute because the award will result in significant and unavoidable increases in costs that are not offset by compensating benefits. The Agency submits a declaration of the Agency's port director in support of its claim. Exceptions at 7-8. The Agency further claims that the award of overtime pay is contrary to the Back Pay Act (BPA), 5 U.S.C. § 5596, because there is no causal connection between the disputed practice and any loss of overtime pay. In addition, the Agency asserts that, without a proper award of backpay, the award of attorney fees must be set aside. *Id.* at 22-23.

The Agency also claims that the award is contrary to an explicit, well-defined public policy of conducting efficient government operations and avoiding wasteful public expenditures. *Id.* at 12. For support, the Agency cites: (1) § 7101 of the Statute;[3] (2) 5 C.F.R. § 2635.101(b)(11);[4] (3) Exec. Order No. 13,589, 76 Fed. Reg. 70,863 (Nov. 9, 2011);[5] (4) 5 U.S.C. § 2302(b)(8);[6] and (5) the legislation creating the Government Accountability Office and the offices of inspectors general. *Id.* at 12-15. The Agency asserts that the award is contrary to this policy because it results in unavoidable government waste and disregards management's efforts to prevent the needless expenditure of government funds. *Id.* at 12, 15 (citing Article 13, Section 1.J).

Further, the Agency contends that the Arbitrator's refusal to consider its past-practice argument is based on a nonfact that the Agency had not raised this argument prior to arbitration. *Id.* at 17-18. The Agency asserts that this is a central fact underlying the award because the Union never disputed that a past practice existed. *Id.* at 20. For support, the Agency cites a declaration of an Agency representative who attended the arbitration hearing. *See id.* (citing *id.*, Attach. 9).

Finally, the Agency argues that the Arbitrator's award of overtime pay fails to draw its essence from Article 28, Section 8.C of the CBA[7] because the Union failed to request that remedy at step 2 of the grievance procedure. *Id.* at 21-22.

B. Union's Opposition

As a preliminary matter, the Union notes that the Agency submitted declarations concerning what transpired at the expedited arbitration hearing for which no transcript was prepared. Opp'n at 6. The Union states that it has no objection to the submissions as long as the Authority considers them only as arguments in support of the exceptions. *Id.*

The Union contends that the award is not contrary to management's right to determine its budget. *Id.* at 8. As to the BPA, the Union contends that the Agency projected that implementing the disputed practice would reduce overtime costs, which demonstrates that employees lost overtime as a result of that practice. *Id.* at 19. The Union also contends that the Agency has not demonstrated that the award is contrary to public policy. *Id.* at 12-13. As to nonfact, the Union contends that the parties disputed at arbitration whether the Agency had raised its past-practice argument prior to arbitration and that the Agency's asserted nonfact pertains to the Arbitrator's determination on this disputed matter. *Id.* at 14-16. Finally, as to essence, the Union contends that the Agency's reliance on Article 28, Section 8.C is

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[3] The Agency cites the congressional finding, set forth in § 7101(a)(2), that "the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government." The Agency also cites § 7101(b), which provides that the Statute "should be interpreted in a manner consistent with the requirement of an efficient and effective Government."

[4] Section 2635.101(b) sets forth general principles of public service, including: "(11) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities."

[5] Executive Order No. 13,589 is entitled "Promoting Efficient Spending" and specifies a policy of "cutting waste in Federal Government spending and identifying opportunities to promote efficient and effective spending."

[6] Section 2302(b)(8) provides, in pertinent part, that an employee who has authority to take personnel actions may not take an action because of

> (A) any disclosure of information by an employee . . . which the employee . . . reasonably believes evidences . . . (ii) gross mismanagement [or] a gross waste of funds . . . if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or (B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee . . . reasonably believes evidences . . . (ii) gross mismanagement [or] a gross waste of funds[.]

[7] Article 28, Section 8.C provides that the "arbitrator's award will be limited to the issues presented and remedies requested during the grievance procedure at step two." Exceptions at 20 (quoting CBA).

misplaced because at arbitration the Agency did not rely on that provision. *Id.* at 17.

IV. Preliminary Matters

A. We dismiss several of the Agency's exceptions under §§ 2425.4(c) and 2429.5 of the Authority's Regulations.

Under the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator. 5 C.F.R. §§ 2425.4(c), 2429.5. [8]

The Agency argues that the award is contrary both to management's right to determine its budget under § 7106(a)(1) and to the BPA. Before the Arbitrator, the Union specifically requested an award of overtime pay. But there is no indication in the record that the Agency argued to the Arbitrator that awarding overtime pay would be improper on either ground. As the Agency could have made these arguments to the Arbitrator, but did not do so, we dismiss these exceptions under §§ 2425.4(c) and 2429.5. *See Fraternal Order of Police, Pentagon Police Labor Comm.*, 65 FLRA 781, 783-84 (2011) (*FOP*) (dismissing exception regarding BPA under §§ 2425.4(c) and 2429.5); *cf. U.S. DOD, Def. Contract Mgmt. Agency*, 66 FLRA 53, 55-56 (2011) (*DOD*) (dismissing exception under § 2429.5 regarding management's right to determine its budget).

The Agency further argues that the Arbitrator's consideration of the Union's request for overtime pay fails to draw its essence from Article 28, Section 8.C of the CBA because the Union failed to request overtime pay at step 2 of the grievance procedure. But there is no indication in the record that the Agency relied on this contract provision before the Arbitrator. The Agency could have done so. Accordingly, we dismiss this exception under §§ 2425.4(c) and 2429.5. *See FOP*, 65 FLRA at 783-84; *cf. U.S. Dep't of the Navy, Naval Air Station, Pensacola, Fla.*, 65 FLRA 1004, 1007 n.8 (2011) (dismissing under § 2429.5 essence exception based on CBA provision that was not cited at arbitration).

With regard to the Agency's public-policy exception, the Authority in *United States Department of Commerce, Patent & Trademark Office*, 60 FLRA 869, 880 (2005) (*PTO*), dismissed a public-policy exception under § 2429.5 because the excepting party could have, but did not, present and cite to the arbitrator the specific asserted policy that the excepting party cited in its exception. Here, there is no claim or indication in the record that the Agency argued public policy to the Arbitrator or cited to the Arbitrator any of the authorities that it cites in its public-policy exception. Although the Agency asserts that it argued to the Arbitrator that the disputed practice was based on a general fiduciary duty to operate in an efficient manner, *see* Exceptions at 12, that argument was not sufficient to raise to the Arbitrator a public-policy argument based on the authorities cited in the Agency's exception. Accordingly, we dismiss this exception under §§ 2425.4(c) and 2429.5. *See FOP*, 65 FLRA at 783-84; *cf. PTO*, 60 FLRA at 880.

B. We consider one of the Agency's submitted declarations in part, but we do not consider the other declaration.

The Union notes that the Agency submitted with its exceptions two declarations concerning what transpired at the expedited arbitration hearing for which no transcript was prepared. Opp'n at 6. In *United States Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California*, 50 FLRA 96, 99 (1995) (*McClellan AFB*), the Authority held that, when parties have elected to use an expedited arbitration procedure with no formal transcript of the proceeding, the Authority will not permit submissions to the Authority by the excepting party to substitute for a formal record of the proceeding, but will consider such submissions as arguments in support of exceptions.

One of the Agency's declarations is submitted to support the merits of the Agency's exception regarding management's right to determine its budget. As we have dismissed the Agency's budget exception, we do not consider that declaration. We note, in this regard, that the Agency does not assert that it presented its budget argument to the Arbitrator and that the declaration was not submitted as support for such an assertion.

The Agency's other submitted declaration relates to the Agency's nonfact exception. Consistent with *McClellan AFB*, we will consider the declaration as support for the exception, but not as a substitute for the record of the arbitration proceedings. *See* 50 FLRA at 99.

V. Analysis and Conclusions

The Agency contends that the award is based on a nonfact. To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *E.g.*, *U.S. DOT, FAA*, 65 FLRA 171, 172 (2010) (*FAA*). The Authority will not find an award deficient on

[8] Section 2425.4(c) provides that exceptions may not rely on any "evidence [or] arguments . . . that could have been, but were not, presented to the arbitrator." Section 2429.5 provides that the "Authority will not consider any evidence [or] . . . arguments . . . that could have been, but were not, presented in the proceedings before the . . . arbitrator."

the basis of an arbitrator's determination on any factual matter that the parties disputed at arbitration. *Id.*

The Agency claims that the Arbitrator erroneously found that the Agency had not raised its past-practice argument prior to arbitration. But at arbitration, when the Agency raised its past-practice argument, the Union alleged that the Arbitrator should not consider the argument because the Agency had not raised it previously. Award at 6. The Arbitrator found that there was no evidence that the Agency had raised the argument previously and declined to consider it. Consequently, the matter of whether the Agency had previously raised its past-practice argument was disputed at arbitration and, as such, the Agency's exception provides no basis for finding that the award is based on a nonfact. *FAA*, 65 FLRA at 173. Accordingly, we deny the exception.

VI. Decision

The Agency's nonfact exception is denied, and its remaining exceptions are dismissed.