

**67 FLRA No. 34**

NATIONAL TREASURY  
EMPLOYEES UNION  
CHAPTER 103  
(Union)

and

UNITED STATES  
DEPARTMENT OF HOMELAND SECURITY  
U.S. CUSTOMS AND BORDER PROTECTION  
PORT OF LONG BEACH  
LONG BEACH, CALIFORNIA  
(Agency)

0-AR-4874

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DECISION

December 19, 2013

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

**I. Statement of the Case**

The Agency discontinued a past practice of allowing Customs and Border Protection officers (officers) to “give away” overtime assignments, arguing that the practice was in conflict with the parties’ agreement.<sup>1</sup> Arbitrator Joe H. Henderson determined that the Agency’s action did not violate the parties’ agreement or constitute an unfair labor practice (ULP) under § 7116(a)(5) of the Federal Service Labor-Management Relations Statute (the Statute) because the past practice conflicted with the parties’ agreement. The Union filed exceptions to the award, asserting that the award fails to draw its essence from the agreement, and the Agency filed an opposition to the Union’s exceptions. Because the Union fails to show that the Arbitrator’s award is implausible, irrational, or in manifest disregard of the parties’ agreement, we deny the Union’s exceptions.

**II. Background and Arbitrator’s Award**

The Agency had a past practice, known as “overtime give-away,” which allowed officers who were drafted for an overtime assignment to arrange for another qualified officer to take the assignment.<sup>2</sup> When the

parties’ new collective-bargaining agreement went into effect, the Agency discontinued the past practice on the ground that the parties’ agreement superseded the practice. After the Agency denied an officer’s attempt to give away his overtime assignment, the Union filed a grievance. The issue before the Arbitrator was:

Whether the Agency violated Article 3, [Section] 3 and/or Article 26, [Section] 10 of the [parties’] [a]greement<sup>[3]</sup> by unilaterally terminating the past practice of allowing officers drafted for an overtime assignment to give away the assignment to another qualified officer who was willing to accept the assignment, thereby committing [a ULP] in violation of 5 U.S.C. § 7116(a)(5)? What is the appropriate remedy for any proven [A]gency violations?<sup>[4]</sup>

The Arbitrator found that the parties intended Article 35 to contain “the sole set of procedures for scheduling overtime assignments.”<sup>5</sup> The Arbitrator noted that, in negotiating Article 35, the parties did not include a provision incorporating the overtime give-away practice.<sup>6</sup> According to the Arbitrator, if parties renegotiate a collective-bargaining agreement, discuss a past practice, and then decline to include it in the agreement, that past practice “has been or can be eliminated.”<sup>7</sup> He therefore determined that, because the parties excluded the overtime give-away practice from Article 35, the practice is in conflict with, and superseded by, the parties’ agreement. The Arbitrator concluded that, because the past practice conflicted with the agreement, the Agency did not violate the parties’ agreement or commit a ULP by discontinuing it.

**III. Analysis and Conclusions: The award does not fail to draw its essence from the parties’ agreement.**

The Union argues that the award fails to draw its essence from the parties’ agreement. 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

<sup>3</sup> The relevant provisions of the parties’ agreement are set forth in the appendix to this decision.

<sup>4</sup> Award at 2.

<sup>5</sup> *Id.* at 21.

<sup>6</sup> *Id.* at 22.

<sup>7</sup> *Id.* at 23.

<sup>1</sup> Award at 2.

<sup>2</sup> *Id.*

awards in the private sector.<sup>8</sup> Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' 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.<sup>9</sup> 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."<sup>10</sup>

#### A. Article 35

In its first essence exception, the Union claims that the award fails to draw its essence from the parties' agreement because the award modifies the agreement.<sup>11</sup> According to the Union, the Arbitrator modified Article 35 by adding the word "sole" to Article 35's statement that it "describes the procedures by which employees . . . will be scheduled and assigned overtime work."<sup>12</sup> The Agency disputes the Union's claim by asserting that the Arbitrator's finding represents an interpretation rather than a modification of Article 35.<sup>13</sup>

Where an arbitrator interprets and applies the parties' agreement, that interpretation does not constitute a modification.<sup>14</sup> It was not implausible for the Arbitrator to interpret the phrase "[t]his [a]rticle describes the procedures by which employees . . . will be scheduled and assigned overtime work" to connote the *only* procedures recognized by the parties for making such assignments.<sup>15</sup> Accordingly, we reject the Union's argument that the Arbitrator modified the parties' agreement, and deny the Union's exception.<sup>16</sup> Additionally, although the Union argues in passing that the award is contrary to law or that the Arbitrator exceeded his authority by modifying the agreement,<sup>17</sup>

those claims simply restate the Union's essence argument and do not provide a basis for finding the award deficient.<sup>18</sup>

#### B. Articles 3 and 26

The Union's second essence exception claims that the award fails to draw its essence from the parties' agreement because the award is contrary to the agreement's language. Specifically, the Union argues that the award is contrary to Articles 3 and 26, which preserve past practices that are not in conflict with the agreement.<sup>19</sup> According to the Union, the overtime give-away practice cannot conflict with the agreement because Article 35 of the parties' agreement does not address the practice.<sup>20</sup>

As discussed above, the Arbitrator reasonably interpreted Article 35 to contain the sole procedures for scheduling or assigning overtime. It, therefore, follows that his conclusion that the overtime give-away practice conflicts with the agreement because Article 35 does not authorize the practice is not deficient. And Article 3, Section 3 expressly states that, where a practice is in conflict with the parties' agreement, the agreement supersedes the practice.<sup>21</sup> For these reasons, we find that the Union has failed to show that the award is contrary to the agreement's language and deny this exception.

#### C. Article 26, Section 4

The Union's third essence exception claims that the award fails to draw its essence from the parties' agreement because the Arbitrator manifestly disregarded Article 26, Section 4 of the agreement.<sup>22</sup> The Union argues that Article 26, Section 4 gives the Union the right to bargain over matters not "[s]pecifically addressed in [the parties'] agreement."<sup>23</sup> The Union contends that, because the overtime give-away practice is not specifically addressed in the parties' agreement, the Arbitrator erred when he found that the Agency did not violate the agreement when it discontinued the practice without bargaining with the Union.<sup>24</sup>

The Union's contention, that the overtime give-away practice is not specifically addressed in the parties' agreement, does not demonstrate that the award is deficient. As discussed above, the Arbitrator found that Article 35 specifically addresses the *only* overtime

<sup>8</sup> See 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

<sup>9</sup> *AFGE, Local 2128*, 66 FLRA 801, 803 (2012); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*DOL*).

<sup>10</sup> *DOL*, 34 FLRA at 576.

<sup>11</sup> Exceptions at 16-17.

<sup>12</sup> *Id.* at 17.

<sup>13</sup> *Opp'n* at 9.

<sup>14</sup> See *AFGE, Local 701*, 55 FLRA 631, 633 (1999) (rejecting exception as "merely an attempt to recast the [a]rbitrator's contract interpretation as an improper contract modification").

<sup>15</sup> Exceptions at 16-17.

<sup>16</sup> See *U.S. DOD, Def. Contract Mgmt. Agency*, 66 FLRA 53, 57 (2011) (citing *U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 413, 414 (2003)).

<sup>17</sup> Exceptions at 17.

<sup>18</sup> See *SSA, Balt., Md.*, 57 FLRA 690, 693 n.6 (2002).

<sup>19</sup> Exceptions at 14-15.

<sup>20</sup> *Id.* at 13-14.

<sup>21</sup> Exceptions, Attach. 12 at 5.

<sup>22</sup> Exceptions at 18.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 19-20.

practices authorized by the parties' agreement. That Article 35 does not provide for the overtime give-away practice establishes that the practice is not authorized by, rather than that it is not specifically addressed in, the agreement.<sup>25</sup>

Accordingly, because the Union fails to establish that the Arbitrator's award is irrational, implausible, or in manifest disregard of the parties' agreement, we deny the Union's exceptions.

#### IV. Decision

We deny the Union's exceptions.

#### APPENDIX

Article 3, Section 3 of the parties' agreement provides:

This Agreement supersedes all previous agreements and past practices in conflict with it. Otherwise, all practices and agreements will continue until otherwise modified by the parties.

Exceptions, Attach. 12, Collective-Bargaining Agreement (CBA) at 5.

Article 26, Section 4 of the parties' agreement provides, in relevant part:

The Union, in accordance with law and the terms of this Agreement has the right to initiate bargaining on its own and engage in mid-term bargaining over proposed changes in conditions of employment with the exception of the following areas:

- A. Matters specifically addressed in this Agreement or another negotiated agreement between the parties. This section does not apply to bargaining in accordance with Section 15 below.

Exceptions, Attach. 13, CBA at 104-05.

Article 26, Section 10 of the parties' agreement provides:

Local . . . past practices will stay in place unless they conflict with this Agreement or are re-negotiated in accordance with law and this Agreement.

*Id.* at 107.

Article 35 of the parties' agreement provides, in relevant part:

This Article describes the procedures by which employees covered by this Agreement will be scheduled and assigned overtime work.

Exceptions, Attach. 14, CBA at 165.

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<sup>25</sup> See *U.S. Dep't of the Treasury, IRS*, 66 FLRA 342, 346 (2011) (denying an essence exception where the agency did not establish that the wording of the agreement precluded the arbitrator's finding).