

67 FLRA No. 45

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 32
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
DENVER, COLORADO
(Agency)

0-AR-4890

—
DECISION

January 14, 2014

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Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

Arbitrator Daniel M. Winograd found that the Agency did not violate the Flexible and Compressed Work Schedules Act (the Act) or the parties' collective-bargaining agreements when it denied three employees' requests to work alternative work schedules (AWSs). There are two questions before us.

The first question concerns whether the award is based on nonfacts. Because the Union does not demonstrate that the challenged factual findings were erroneous, undisputed before the Arbitrator, and central to his award, the answer is no.

The second question concerns whether the award is contrary to law because the Arbitrator erred by concluding that the Agency did not violate the Act. Because the Arbitrator's legal conclusions are consistent with the Act, the answer is no.

II. Background and Arbitrator's Award

The Agency's specialists assist taxpayers who come to the Agency during the hours it is open to the public (business hours). Although most specialists work during business hours, three specialists asked to work an AWS. Under this AWS, some of the specialists' duty hours would not coincide with business hours, and they would have one day off during each pay period. When the specialists' supervisor denied their requests (the denial), the Union filed a grievance on behalf of the three specialists, and the grievance went to arbitration. By the time the grievance went to arbitration, only two of the three specialists still worked at the Agency.

At arbitration, the parties framed the issue differently, and the Arbitrator adopted the Union's framing of the issue, as follows: "Did the Agency violate the law or contract when it denied the grievants' request for AWS schedules? If so, what shall be the remedy?"¹ As a preliminary matter, the Arbitrator found that "[b]oth requests were denied by the [specialists' supervisor,] and both grievants filed timely grievances."²

In resolving the issues, the Arbitrator considered the explanation for the denial that the Agency had provided in its response to the Union's grievance (response). Specifically, the Arbitrator found that the Agency had acknowledged that two other specialists at the Agency were working AWSs at that time. But he found that, in the response, the Agency also had stated that AWSs "may not be appropriate for certain position[s] or organizational segments because of the nature of the work performed."³ In this regard, the Arbitrator noted that, in the response, the Agency had stated that specialists' primary duties were to provide customer service, and that they could not perform these duties when working hours that differed from the Agency's business hours.

The Arbitrator also considered the Union's arguments that the denial violated the parties' collective-bargaining agreements, and that the Agency had "terminate[d] the AWS . . . previously available to [specialists]" without following the requirements of the Act.⁴ Under the Act, an agency's decision to discontinue or "terminate" an AWS is subject to the requirements of § 6131 of the Act.⁵ The Arbitrator found that it was "not disputed" that if the Act applied to the denial, then "the

¹ Award at 2.

² *Id.* at 6.

³ *Id.* at 7 (quoting the denial) (internal quotation mark omitted).

⁴ *Id.* at 8 (quoting Union's Post-Hr'g Br. at 5) (internal quotation marks omitted).

⁵ 5 U.S.C. § 6131.

Agency failed to comply with the requirements of the [A]ct.”⁶

In determining whether the Act applied to the denial, the Arbitrator relied on the Authority’s statements in *AFGE, Local 1709 (Dover II)*⁷ that “by its terms, § 6131 applies to actions establishing and discontinuing schedules” and “[n]othing in § 6131 supports a conclusion that it applies . . . where an AWS . . . itself is not discontinued but, instead, its applicability to one employee is at issue.”⁸ “As in [*Dover II*],” the Arbitrator stated, “the grievances in the present case involve[d] the applicability of an AWS . . . to an individual employee,” and the denial did “not terminate[]” the AWS in place at the Agency.⁹

In support of his finding that the denial did not terminate the Agency’s AWS within the meaning of the Act, the Arbitrator noted that two of the Agency’s specialists were working AWSs at the time of the denial, and that one of those specialists continued to work the AWS at the time of the arbitration hearing. (The other specialist had retired.) The Arbitrator acknowledged the Union’s argument that it was “not likely the Agency [would] approve an AWS for any [specialist] in the future, thereby effectively terminating the AWS . . . [at the Agency] upon [the] resignation or retirement of the current employee working the AWS.”¹⁰ But he found that situation was “not presently before” him and that the parties were engaged in ongoing negotiations concerning the Agency’s local AWS agreement that might resolve that issue.¹¹ Accordingly, because the Arbitrator found that the Agency did not “terminate[]” the AWS,¹² he concluded that the requirements of § 6131 “[did] not apply,”¹³ and that the Agency did not violate the Act.¹⁴

Next, the Arbitrator found that the parties’ collective-bargaining agreements permitted the Agency to deny AWS requests where, as here, granting the requests would cause a “substantive work interruption.”¹⁵ Accordingly, he concluded that the Agency did not violate the agreements.

The Union filed exceptions to the Arbitrator’s award, and the Agency filed an opposition to the Union’s exceptions.

III. Analysis and Conclusions

A. The award is not based on nonfacts.

The Union argues that the award is based on nonfacts. 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.¹⁶ However, the Authority will not find an award deficient on the basis of an arbitrator’s determination of a factual matter that the parties had disputed at arbitration.¹⁷

The Union argues that the Arbitrator repeatedly mischaracterized the Union’s “mass grievance” as “multiple grievances by multiple [g]rievants.”¹⁸ For example, the Union points out that the Arbitrator found that “both grievants filed timely grievances,” when, in fact, the Union filed one grievance on behalf of all three specialists whose AWS requests the Agency denied.¹⁹ We note, however, that the Arbitrator also entitled his award “Mass Grievance,”²⁰ and denied “[t]he grievance” at the conclusion of his award.²¹ So it appears that the Arbitrator did not misunderstand the number of grievances before him. But even if he did, the Union provides no basis for finding that this error was a central fact underlying the award, but for which the Arbitrator would have reached a different result. Thus, the Union’s argument does not demonstrate that the award is based on a nonfact.²²

In addition, the Union asserts that the Arbitrator erred by failing to find that the Agency “terminated” the AWS at the Agency.²³ Specifically, the Union asserts that the Agency *effectively* terminated the AWS for all specialists because the Agency’s rationale for the denial “made it clear that no future requests would be treated any differently.”²⁴ But the issue of whether the Agency terminated the AWS was disputed before the Arbitrator,²⁵ and factual matters that were disputed at arbitration

⁶ Award at 15.

⁷ 57 FLRA 711 (2002).

⁸ Award at 16 (quoting *Dover II*, 57 FLRA at 712) (emphasis omitted) (internal quotation mark omitted).

⁹ *Id.*

¹⁰ *Id.* at 16 n.11.

¹¹ *Id.*

¹² *Id.* at 16.

¹³ *Id.* at 17.

¹⁴ *Id.* at 20.

¹⁵ *Id.* at 18 (quoting parties’ local AWS agreement) (internal quotation marks omitted).

¹⁶ *U.S. Dep’t of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry AFB*).

¹⁷ *See id.* at 593-94.

¹⁸ Exceptions at 10.

¹⁹ *Id.* at 9.

²⁰ Award at 1.

²¹ *Id.* at 20.

²² *Lowry AFB*, 48 FLRA at 593; *see, e.g., AFGE, Council 215*, 66 FLRA 137, 142 (2011).

²³ Exceptions at 11.

²⁴ *Id.* at 9.

²⁵ *See* Award at 8, 11, 16.

cannot be challenged as nonfacts.²⁶ And the Arbitrator specifically acknowledged the Union's argument that it was "not likely the Agency [would] approve an AWS for any [specialist] in the future, thereby effectively terminating the AWS . . . [at the Agency] upon [the] resignation or retirement of the current employee working the AWS," but found that situation was "not presently before" him.²⁷ Thus, the Arbitrator did not make a factual finding on this issue that the Union can challenge as a nonfact. In addition, we note that the Union does not claim that the Arbitrator exceeded his authority by failing to resolve this issue.

For these reasons, the Union has not demonstrated that the award is based on nonfacts.

B. The award is not contrary to law.

The Union argues that the award is contrary to law. When an exception involves an award's consistency with law, the Authority reviews any question of law de novo.²⁸ In conducting de novo review, the Authority assesses the arbitrator's legal conclusion, not his or her underlying reasoning.²⁹ In making that assessment, the Authority defers to the arbitrator's underlying factual findings.³⁰

The Union argues that the award is contrary to the Act because the Agency terminated the AWS without complying with the requirements of § 6131.³¹ Specifically, the Union argues that the Agency's explanation for the denial shows that it terminated the AWS,³² that the Arbitrator erred in relying on *Dover II*,³³ and that the Arbitrator should have relied on other Authority precedent interpreting the Act.³⁴

"[B]y its terms, § 6131 applies [only] to actions establishing and discontinuing schedules."³⁵ And, as discussed above, the Union has not established that the Arbitrator's underlying factual finding – that the Agency

did not discontinue the AWS – is erroneous. As the Union has not demonstrated that the Agency discontinued the AWS, the Arbitrator's finding that the Agency did not violate § 6131 is not contrary to law. The Union's arguments challenge the Arbitrator's underlying reasoning. But such arguments do not establish that the award is deficient.³⁶ Accordingly, the Union's exceptions do not provide a basis for finding the award contrary to law.

IV. Decision

We deny the Union's exceptions.

²⁶ *Lowry AFB*, 48 FLRA at 593-94; *see, e.g., AFGC, Local 1770*, 67 FLRA 93, 94 (2012).

²⁷ Award at 16 n.11.

²⁸ *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)).

²⁹ *See, e.g., U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 432-33 (2010) (*IRS*).

³⁰ *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).

³¹ *See* Exceptions at 5-8.

³² *Id.* at 3, 6, 8.

³³ *Id.* at 3, 5.

³⁴ *Id.* at 6-8 (citing *U.S. Dep't of the Treasury, IRS, Austin, Tex.*, 60 FLRA 606 (2005); *NFFE, Local 1998, IAMAW, Fed. Dist. 1*, 60 FLRA 141 (2004) (Chairman Cabaniss dissenting); *AFGC, Local 1709*, 57 FLRA 453, 455-56 (2001)).

³⁵ *Dover II*, 57 FLRA at 712 (emphasis omitted); *see also* 5 U.S.C. § 6131.

³⁶ *See, e.g., IRS*, 64 FLRA at 432-33.

Member Pizzella, concurring:

I agree with my colleagues to the extent that our decision denies the Union's exceptions.

However, as I noted in my very first concurring opinion as a Member of the Authority, in *U.S. DHS, CBP*,¹ I conclude that this grievance fails to contribute to the "effective conduct of public business"² or to those "progressive work practices [that] facilitate and improve employee performance."³

It is apparent to me that an effective bargaining relationship is not fostered when the Union frivolously grieves interpretations of the parties' collective bargaining agreement that torture any commonsense reading of its various provisions.

The Treasury Inspector General for Tax Administration (TIGTA) reports that 6.4 million taxpayers annually visit 401 walk-in taxpayer assistance centers (centers) located throughout the United States.⁴ The grievants in this case are taxpayer advisory specialists (specialists) whose primary duty is to staff one of these Centers during the hours when it is open – typically, 8:30 a.m. - 4:30 p.m., Monday through Friday.⁵ The Arbitrator found that the Agency had been unable to meet its goal to provide direct face-to-face assistance in a timely manner – defined as a wait time of less than thirty minutes eighty percent of the time – with its existing staffing.⁶ The grievants, nonetheless, requested that the Agency approve alternative work schedules (AWS) for themselves that would permit them to work as many as two hours per day outside the hours when the center is open to the public and to be absent one or two days per pay period.⁷ The Agency denied the requests.

The Union argues that the Agency violated the parties' agreement and the Federal Compressed Work Schedule Act (FCWSA) by "terminat[ing]" AWS.⁸ The Arbitrator found, however, that the FCWSA did apply because the Agency never approved an AWS for these employees and that approval of an AWS for the

employees would substantially hinder the Agency's ability to perform its fundamental mission.⁹

The Union does not dispute that, under both the FCWSA and the parties' agreement, the Agency carries the sole responsibility to determine whether an AWS is or is "not . . . appropriate" because of "the nature of the work performed" by the position and whether the approval of an AWS would "substantially disrupt" its operations.¹⁰ Applying these factors, the Agency denied the AWS requests after it determined that the grievants would be unable to perform their primary duty – to provide "face-to-face assistance to taxpayers"¹¹ – and that the schedules would "cause a 'substantive work interruption.'"¹²

Under these circumstances, the Arbitrator reached a commonsense conclusion that the FCWSA does not apply and that the Agency did not violate the parties' agreement.

The filing of a frivolous grievance – that has no support in the plain language of either the parties' agreement or, as here, a statutory determination that is left entirely to the discretion of the Agency – unwisely consumes federal resources: time, money, and human capital; serves to undermine "the effective conduct of [the government's] business";¹³ and completely fails to take into account the resulting costs to the taxpayers, who fund the Agency's operations and pay for the significant costs of Union official time to process a grievance, which, in this case, would directly inconvenience those same taxpayers if the grievance had been sustained.

Thank you.

¹ 67 FLRA 107, 112 (2013) (Concurring Opinion of Member Pizzella).

² *Id.* (quoting 5 U.S.C. § 7101(a)(1)(B) (internal quotation marks omitted)).

³ *Id.* (quoting 5 U.S.C. § 7101(a)(2) (internal quotation marks omitted)); see also *INS v. FLRA*, 855 F.2d 1454, 1460 (9th Cir. 1988) (citing 5 U.S.C. § 7101(b)) (Congress directed the Authority to interpret the act to promote governmental effectiveness and efficiency).

⁴ TIGTA Interim Results of 2012 Filing Season, Reference #2012-40-036, p.13 (3/30/12).

⁵ Award at 12-13.

⁶ *Id.* at 12, 16-17.

⁷ *Id.* at 19-20.

⁸ *Id.* at 8.

⁹ *Id.* at 17, 20.

¹⁰ *Id.* at 17-18 (emphasis added).

¹¹ *Id.* at 12.

¹² *Id.* at 16-17.

¹³ 5 U.S.C. § 7101(a)(1)(B).