68 FLRA No. 25

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

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 25
(Union)

0-AR-5038

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DECISION

December 19, 2014

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

I. Statement of the Case

After the grievant sustained a work-related injury, she and her supervisor agreed that she would use leave without pay (LWOP) every Friday (the modified schedule) to accommodate her injury. After the Agency began requiring the grievant to use Family Medical Leave Act (FMLA) leave instead of LWOP, the Union filed a grievance. Arbitrator Harry Graham sustained the grievance and directed the Agency to reinstate the grievant's modified schedule – including LWOP – and to restore the grievant's previously used FMLA leave. This case presents us with seven substantive questions.

The first question is whether the Arbitrator exceeded his authority by providing a remedy without finding a violation of the parties' agreement. Because the Arbitrator found a contractual violation, the answer is no.

The second question is whether the award is contrary to an internal Agency rule. Because a memorandum of understanding (MOU) between the parties – and not the internal rule – governs this matter's disposition, the answer is no.

The third question is whether the Arbitrator's finding that the modified schedule became a binding past practice is contrary to law. Because the Arbitrator's finding that the MOU was binding is sufficient – separate and independent from his finding of a past practice – to support the award, we find it unnecessary to resolve whether the past-practice finding is deficient.

The fourth question is whether the Arbitrator's decision to sustain the grievance is contrary to § 7116 of the Federal Service Labor-Management Relations Statute (the Statute)[1] because any change in the grievant's conditions of employment was de minimis and the Arbitrator applied an erroneous presumption to the Agency's bargaining obligation. As the Arbitrator did not find a violation of the Statute, the cited statutory standards do not apply. Thus, the answer is no.

The fifth question is whether the remedy is contrary to § 7116 of the Statute. Because statutory standards do not apply here, and arbitrators are afforded great latitude in fashioning remedies for contractual violations, the answer is no.

The sixth question is whether the Arbitrator erroneously applied the requirements of the Rehabilitation Act.[2] Because the Arbitrator did not apply the Rehabilitation Act, the answer is no.

The seventh question is whether the awarded remedy conflicts with 5 C.F.R. § 340.202's requirement that full-time employees must work more than thirty-two hours per week. Because the award does not preclude the Agency from assigning the grievant more than thirty-two hours of work per week, there is no basis for finding that the remedy conflicts with § 340.202. Accordingly, the answer is no.

II. Background and Arbitrator's Award

After the grievant became injured on the job, the grievant and her supervisor memorialized the modified schedule in an MOU. Consistent with that MOU, the grievant worked under the modified schedule for over a decade, until the Agency unilaterally stopped authorizing the grievant's LWOP and advised her to either use FMLA leave or seek a reasonable accommodation in order to continue working a reduced workweek. The grievant subsequently requested a reasonable accommodation, and in the interim she used FMLA leave. In response, the Agency offered the grievant LWOP every Wednesday – rather than Friday – and clarified that, under this reasonable accommodation, the grievant's status would change from a full-time to a part-time employee. The grievant objected to both the new LWOP day and to the loss of her full-time status.

[1] 5 U.S.C. §§ 7101-7135.
[2] 29 U.S.C. § 701 (2000).

The Union filed a grievance alleging that the Agency had violated the parties' collective-bargaining agreement and the Statute when the Agency unilaterally changed the grievant's modified schedule and denied her LWOP. In the grievance, the Union asked that the Agency restore the grievant's modified schedule, including the use of LWOP. The Union also requested a fifteen-minute extension of each day of the grievant's four-day workweek to allow her to work a thirty-three-hour weekly schedule and thereby restore her full-time status. When the parties were unable to resolve the grievance, they submitted it to arbitration.

At arbitration, the stipulated issue before the Arbitrator was whether "the [Agency] violate[d] Article[s] 4, 5, 8, 41, and 47 of the [parties' agreement] and the [MOU]? If so, what shall the remedy be?"[3] The Arbitrator concluded that the Agency had promised to accommodate the grievant's work-related injury by permitting her to work the modified schedule. Specifically, the Arbitrator found that the Agency was bound by both the MOU and the parties' past practice. In this regard, the Arbitrator rejected the Agency's argument that the grievant's supervisor lacked the authority to bind the Agency when she executed the MOU with the grievant. Similarly, he rejected the Agency's argument that it did not knowingly acquiesce to the past practice established over the "approximately ten . . . years" that the grievant worked the modified schedule using LWOP.[4] In addition, the Arbitrator found that the longstanding nature of the past practice was consistent with the permanence of the grievant's work-related injury, and that providing the grievant with LWOP did not cause the Agency "undue hardship."[5] Because the Agency was bound by the MOU and the past practice, and the Agency had not sought to negotiate a change in the grievant's conditions of employment, the Arbitrator concluded that "the longstanding practice must continue."[6] Accordingly, the Arbitrator sustained the grievance in its entirety. As a remedy, he directed the Agency to reinstate the grievant's modified work schedule, including "permitt[ing]" her to use LWOP, and to restore her previously used FMLA leave.[7]

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

[3] Award at 1.
[4] *Id.* at 12.
[5] *Id.*
[6] *Id.* at 13.
[7] *Id.* at 14.

III. Preliminary Matter

In its exceptions, the Agency argues that the awarded remedy is "contrary to" Article 22 of the parties' agreement.[8] The Authority will review an award in which the exception alleges that the award is deficient: "(1) [b]ecause it is contrary to any law, rule, or regulation; or (2) [o]n any other grounds similar to those applied . . . in private[-]sector labor-management relations."[9] However, § 2425.6(e)(1) of the Authority's Regulations states that an exception "may be subject to dismissal or denial if: [t]he excepting party fails to raise and support" a ground listed in 5 C.F.R. § 2425.6(a)-(c).[10] For example, the Authority has held that an excepting party's argument that an award is "contrary to" a collective-bargaining agreement does not raise a ground for review recognized by the Authority.[11] Similarly, here, the Agency's argument that the award is "contrary to"[12] the parties' agreement does not raise one of the private-sector grounds currently recognized by the Authority. And the Agency does not cite legal authority to support any ground not currently recognized by the Authority.[13] Accordingly, we dismiss this exception.[14]

IV. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Agency argues that the Arbitrator exceeded his authority when he awarded a remedy without finding

[8] Exceptions at 12-13.
[9] 5 C.F.R. § 2425.6(a)(1)-(2).
[10] *Id.* § 2425.6(e)(1); *see AFGE, Local 1367*, 67 FLRA 378, 379 (2014).
[11] *AFGE, Local 2198*, 67 FLRA 498, 499 (2014) (*Local 2198*) (Member Pizzella concurring); *AFGE, Local 1738*, 65 FLRA 975, 976 (2011) (*Local 1738*) (Member Beck concurring in the result); *cf. USDA, Forest Serv.*, 67 FLRA 558, 559 (2014) (dismissing claim that arbitrator "overlook[ed]" a provision of agreement); *AFGE, Local 1858*, 67 FLRA 330, 331 (2014) (Member Pizzella concurring) (dismissing claim that agency violated the parties' agreement); *AFGE, Local 1858*, 66 FLRA 942, 943 (2012) (dismissing claim that arbitrator violated the parties' agreement).
[12] Exceptions at 12.
[13] *E.g.*, *Local 2198*, 67 FLRA at 499; *Local 1738*, 65 FLRA at 976.
[14] Member Pizzella notes that he would not dismiss the exception as "not rais[ing] a ground for review recognized by the Authority" for the reasons that he explained in his concurring opinions in *Local 2198*, 67 FLRA at 500 (Concurring Opinion of Member Pizzella) and *AFGE, Local 1897*, 67 FLRA 239, 243 (2014) (Concurring Opinion of Member Pizzella). Member Pizzella would conclude that the Agency's argument that the award is "contrary to" Article 22 properly establishes an essence exception and, instead, would deny the exception on its merits.

a contractual violation.[15] When evaluating exceptions to an arbitration award, the Authority considers the award and the record as a whole.[16] That is, the Authority interprets the language of an award in context.[17]

The stipulated issue before the Arbitrator asked whether the Agency violated the parties' agreement and the MOU.[18] In "sustain[ing]" the grievance "in its entirety,"[19] the Arbitrator emphasized that the Agency violated its obligation under the MOU and the parties' binding past practice.[20] Thus, read in context, the most reasonable reading of the award is that the Arbitrator found a contractual violation. Accordingly, the Arbitrator did not grant a remedy without finding a contractual violation, and we deny the exceeded-authority exception.

B. The award is not contrary to law, rule, or regulation.

The Agency argues that the award is contrary to law, rule, or regulation in several respects. When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo.[21] In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[22] In making that assessment, the Authority defers to the Arbitrator's underlying factual findings, unless the appealing party establishes that those findings are "nonfacts."[23]

1. The award is not contrary to an internal Agency rule.

The Agency argues that the award is contrary to a rule because the MOU violates the Agency's Internal Revenue Manual (IRM).[24] According to the Agency, the terms of the IRM dictate that the grievant's supervisor lacked the authority "to approve discretionary LWOP for such a prolonged period" when she and the grievant signed the MOU.[25]

Section 7122(a)(1) of the Statute provides that an arbitration award will be found deficient if it conflicts with any law, rule, or regulation.[26] For purposes of § 7122(a)(1), the Authority has defined rule or regulation to include both government-wide and governing agency rules and regulations.[27] However, when both a collective-bargaining agreement and an agency-specific – as opposed to government-wide – rule or regulation apply to a matter, the negotiated agreement governs the matter's disposition.[28] Thus, when an agency negotiates an agreement that conflicts with an internal agency regulation, the agency is nonetheless bound by its agreement.[29]

Here, the Arbitrator found that the Agency was bound by the MOU to permit the grievant to work the modified schedule using LWOP, and he rejected the Agency's claim that the grievant's supervisor lacked the authority to bind the Agency through the MOU.[30] The Authority has held that an arbitrator's determination of the existence of a collective-bargaining agreement is a factual determination.[31] And the Agency has not filed a nonfact exception to the award. Thus, we defer to the Arbitrator's factual determination that the grievant and her supervisor entered into an MOU. And because the MOU governs over the allegedly inconsistent IRM, the IRM provides no basis for finding the MOU unenforceable – or the award contrary to the IRM. Accordingly, we deny this exception.

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[15] Exceptions at 2.
[16] *U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot, Red River, Texarkana, Tex.*, 67 FLRA 609, 611 (2014) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Terre Haute, Ind.*, 65 FLRA 460, 463 (2011)).
[17] *Id.* (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 66 FLRA 1046, 1049 (2012)).
[18] Award at 1.
[19] *Id.* at 14.
[20] *See id.* at 11-13.
[21] *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).
[22] *Id.* (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[23] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012)).
[24] Exceptions at 14.
[25] *Id.*
[26] 5 U.S.C. § 7122(a)(1).
[27] *USDA, Forest Serv., Monongahela Nat'l Forest*, 64 FLRA 1126, 1128 (2010) (citing *USDA, Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 51 FLRA 1210, 1216 (1996)).
[28] *Id.* (citing *U.S. Dep't of the Army, Ft. Campbell Dist., Third Region, Ft. Campbell, Ky.*, 37 FLRA 186, 195 (1990)).
[29] *E.g., U.S. Dep't of the Air Force, Seymour Johnson Air Force Base, N.C.*, 55 FLRA 163, 166 (1999) ("Any alleged inconsistency between the agency regulation and the award does not provide a basis for vacating the award, because the award is based on the parties' agreement, and the agreement – not the regulation – governs the matter.").
[30] Award at 11.
[31] *U.S. Dep't of the Army, Corps of Eng'rs, Nw. Div. & Seattle Dist.*, 64 FLRA 405, 407 (2010) (citing *IRS, N. Fla., Tampa Field Branch, Tampa, Fla.* 55 FLRA 222 (1999)); *U.S. DHS, U.S. CBP, JFK Airport, Queens, N.Y.*, 62 FLRA 129, 131-32 (2007).

2. We find it unnecessary to resolve the Agency's past-practice exception.

The Arbitrator found not only that the Agency was bound by the MOU, but also that the parties established a binding past practice by permitting the grievant to work the modified schedule for over ten years.[32] The Agency argues that the Arbitrator's past-practice finding is contrary to law because responsible management did not "knowingly acquiesce" to the grievant's modified schedule.[33]

The Authority has held that where an arbitrator has based an award on separate and independent grounds, an excepting party must establish that all of the grounds are deficient in order to show that the award is deficient.[34] In those circumstances, if the excepting party does not allege and demonstrate that one of the separate and independent grounds for the award is deficient, then it is unnecessary for the Authority to resolve exceptions concerning the other separate and independent grounds.[35] Here, the Arbitrator's finding of a binding MOU provides a separate and independent ground for his award. As the Agency has not demonstrated that the Arbitrator's findings regarding the MOU render the award deficient, the award would stand regardless of whether the Arbitrator made erroneous findings regarding the past-practice issue.[36] Accordingly, we find it unnecessary to resolve the Agency's past-practice exception.

3. The Arbitrator's decision to sustain the grievance is not contrary to § 7116 of the Statute.

The Agency argues that the award conflicts with § 7116 of the Statute because: (1) any change to the grievant's conditions of employment was not more than de minimis;[37] and (2) the Arbitrator erroneously presumed that the Agency could not deviate from an established past practice "absent a change in circumstances."[38]

Although the grievance alleged a violation of both the parties' agreement and the Statute,[39] the stipulated issue before the Arbitrator was limited to whether the Agency violated the parties' agreement and the MOU.[40] Moreover, the Arbitrator did not refer to the Statute or make unfair-labor-practice findings in his decision to sustain the grievance. Therefore, read in context, we find that the most reasonable reading of the award is that the Arbitrator found only a contractual, and not a statutory, violation.

Both of the Agency's arguments presume that the Arbitrator resolved a statutory bargaining issue. As for the first argument – that any change was de minimis – an analysis of whether a change in conditions of employment is greater than de minimis applies in cases involving the duty to bargain under the Statute.[41] And the second argument is that the Arbitrator "applied an erroneous presumption of law"[42] by requiring the Agency to "present a reason for changing a bargaining[-]unit employee's working conditions."[43] In support of its argument, the Agency cites *Department of the Air Force, March Air Reserve Base, California*,[44] which concerns the statutory duty to bargain.

As the Arbitrator did resolve a statutory bargaining issue, the cited principles do not apply here, and the Agency's arguments do not establish that the award is contrary to law.

4. The remedy is not contrary to § 7116 of the Statute.

The Agency argues that the awarded remedy conflicts with § 7116 of the Statute because the Agency interprets the Arbitrator's finding that the parties' "longstanding practice must continue"[45] as an unlawful order that the Agency "permanently" return the grievant to her modified schedule.[46] According to the Agency, even assuming that it violated the MOU and the established past practice, the only remedy available to the Arbitrator was to direct the Agency to bargain.[47] The Agency cites *NTEU*[48] and *NTEU, Chapter 68*,[49] and argues that the Arbitrator was required to base his remedy

[32] Award at 11-12.
[33] Exceptions at 18.
[34] *E.g., Union of Pension Emps.*, 67 FLRA 63, 66 (2012) (citing *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000)).
[35] *Id.*
[36] *E.g., U.S. DOD, R.I. Nat'l Guard, Cranston, R.I.*, 57 FLRA 594, 597-98 (2001).
[37] Exceptions at 16.
[38] *Id.* at 22 (internal quotation marks omitted).
[39] Exceptions, Attach. G, Grievance (Grievance) at 4.
[40] Award at 1.
[41] *U.S. Dep't of the Navy, Marine Corps Combat Dev. Command Marine Corps Base, Quantico, Va.*, 67 FLRA 542, 547 (2014) (citing *Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 852 (1999)).
[42] Exceptions at 22.
[43] *Id.*
[44] 57 FLRA 392, 395 (2001).
[45] Award at 13.
[46] Exceptions at 22-23.
[47] *Id.* at 23.
[48] 66 FLRA 577 (2012).
[49] 57 FLRA 256 (2001).

on the violated provisions of the parties' agreement. According to the Agency, under Article 47 of the agreement, which governs mid-term bargaining, the only lawful remedy available to the Arbitrator was to order bargaining.[50] As such, the Agency argues that the Arbitrator's restoration of the grievant's modified schedule is contrary to law.[51]

The Authority has held that arbitrators have "great latitude in fashioning remedies" for contractual violations.[52] In this regard, where an arbitrator crafts a remedy to redress a contractual violation, the arbitrator is not required to adopt a remedy that might be appropriate in disposing of a statutory violation.[53] As particularly relevant here, where an arbitrator finds that an agency's refusal to bargain violates a collective-bargaining agreement, the propriety of status quo ante (SQA) relief is governed by the arbitrator's remedial authority under the violated agreement, rather than the factors that govern such relief in cases involving statutory violations.[54]

In the award, the Arbitrator states that the Agency did not seek to negotiate the change in the grievant's modified schedule, and concludes that, absent the Agency's showing of a change in operations that affects the grievant's accommodation, "the longstanding practice must continue."[55] Nowhere in the award does the Arbitrator impose a remedy of "permanent[]"[56] SQA relief that would preclude bargaining between the parties. In addition, because the Arbitrator did not find a violation of § 7116, the rules governing SQA relief in statutory violations are inapplicable here.[57] As the Arbitrator sustained the grievance on contractual grounds, his award of SQA relief falls within the great latitude afforded to arbitrators to fashion remedies in contractual violations.[58]

Moreover, the Agency's reliance on *NTEU* and *NTEU, Chapter 68* is misplaced. In those decisions, the Authority held than an arbitrator was not *required* to award SQA relief to remedy a contractual violation.[59] Neither decision establishes that an arbitrator is *prohibited* from awarding SQA relief to remedy a contractual violation. Thus, the Agency's reliance on those decisions provides no basis for finding the remedy contrary to § 7116.

For the foregoing reasons, we deny this exception.

5. The award is not contrary to the Rehabilitation Act.

The Agency asserts that the Arbitrator failed to properly apply the standards of the Rehabilitation Act (the Act) because he erroneously required the Agency to demonstrate that the modified schedule posed an "undue hardship" to the Agency.[60] Under the Act, federal agencies must provide reasonable accommodations for qualified employees with disabilities unless they can show that to do so would impose undue hardship on their operations.[61]

Here, the Arbitrator did state that the modified schedule did not pose an "undue hardship" on the Agency.[62] But, as the Agency acknowledges, the Arbitrator did not apply the requirements of the Act in resolving the grievance,[63] and there is no indication that he found a violation of the Act. As a result, the legal standards that apply in addressing alleged violations of the Act do not apply, and the Agency's reliance on those standards provides no basis for finding the award deficient. Accordingly, we deny this exception.

6. The remedy is not contrary to 5 C.F.R. § 340.202.

The Agency argues that the award is contrary to 5 C.F.R. § 340.202 because it requires the Agency to permit the grievant "to work thirty-two hours per week while remaining a full-time employee."[64] In response, the Union asserts that the grievant is a full-time employee because, even under the modified schedule, she "regularly works in excess of [thirty-two] hours per week."[65]

Section 340.202, in relevant part, defines part-time career employment as "regularly scheduled work of from [sixteen] to [thirty-two] hours per week performed by an employee of an agency."[66] In the

[50] Exceptions at 23.
[51] *Id.* at 22-23.
[52] *Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 891 (2010) (*BBG*).
[53] *E.g., id.*; *U.S. DHS, ICE*, 67 FLRA 711, 713 (2014).
[54] *BBG*, 64 FLRA at 891.
[55] Award at 12-13.
[56] Exceptions at 22.
[57] *See, e.g., BBG*, 64 FLRA at 891.
[58] *See, e.g., id.*
[59] *NTEU*, 66 FLRA at 581-82; *NTEU, Chapter 68*, 57 FLRA at 257.
[60] Exceptions at 9-10.
[61] *AFGE, Local 2206*, 59 FLRA 307, 310 (2003).
[62] Award at 12.
[63] Exceptions at 11 ("the Arbitrator's finding that the [g]rievant was 'accommodated' . . . was not the same thing as a determination that she received a 'reasonable accommodation' under the . . . Act"); *see also id.* at 10 ("there was no reasonable[-]accommodation issue . . . before the Arbitrator").
[64] Exceptions at 12.
[65] Opp'n at 13.
[66] 5 C.F.R. § 340.202(a).

grievance, the Union asked that the Agency extend the grievant's workdays by fifteen minutes "to allow for a [thirty-three] hour week, [f]ull-[t]ime employment."[67] In sustaining the grievance and restoring the grievant's modified schedule – including one day of LWOP per week – the Arbitrator did not specify the number of hours the grievant should work each week.[68] Thus, nothing in the award precludes the Agency from assigning the grievant a thirty-three-hour work week – and thereby complying with § 340.202. Consequently, there is no basis for setting aside the remedy as contrary to § 340.202, and we deny the exception.

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

[67] Grievance at 4.
[68] Award at 14.