68 FLRA No. 74

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
SERVICE EMPLOYEES
INTERNATIONAL UNION
LOCAL R1-134
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL UNDERSEA
WARFARE CENTER DIVISION
NEWPORT, RHODE ISLAND
(Agency)

0-AR-5097

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DECISION

April 9, 2015

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

This matter is before the Authority on exceptions to an award of Arbitrator Roger I. Abrams filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute)[1] and part 2425 of the Authority's Regulations.[2] The Agency filed an opposition to the Union's exceptions.

We have determined that this case is appropriate for issuance as an expedited, abbreviated decision under § 2425.7 of the Authority's Regulations.[3]

Under § 7122(a) of the Statute,[4] an award is deficient if it is contrary to any law, rule, or regulation, or it is deficient on other grounds similar to those applied by federal courts in private sector labor-management relations. Upon careful consideration of the entire record in this case and Authority precedent, we conclude that the award is not deficient on the grounds raised in the exception and set forth in § 7122(a).[5]

Accordingly, we deny the Union's exceptions.

[1] 5 U.S.C. § 7122(a).
[2] 5 C.F.R. pt. 2425.
[3] *Id.* § 2425.7 ("Even absent a [party's] request, the Authority may issue expedited, abbreviated decisions in appropriate cases.").

[4] 5 U.S.C. § 7122(a).
[5] *E.g.*, *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593-94 (1993) (award not deficient as based on a nonfact where excepting party either challenges a factual matter that the parties disputed at arbitration or fails to demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (award not deficient as failing to draw its essence from the parties' collective-bargaining agreement where excepting party fails to establish that the award cannot in any rational way be derived from the agreement; is so unfounded in reason and fact and so unconnected to the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; does not represent a plausible interpretation of the agreement; or evidences a manifest disregard of the agreement).

Member DuBester, concurring:

I agree with the decision to deny the Union's exceptions. I write separately primarily because the manner in which the case is resolved, in an abbreviated format, does not in my view make clear the Authority's rationale for denying the exceptions.

Arbitrator Roger Abrams sustained a grievance largely over bonus pay. Working with an "innovative" pay system[1] that was an alternative to the General Schedule, the parties negotiated how an Agency-determined pool of incentive pay would be split between pay raises and bonuses. The total pool was 3% of salaries in 2013, with 1.3% going to pay raises and 1.7% going to bonuses. But the congressional sequester in 2013 led the Agency to cancel bonuses as not "legally required."[2]

The Arbitrator found that the Agency violated the parties' agreement when it cancelled bonuses. As a remedy, he ordered the Agency to "use the ratio between [pay raises] and [bonuses] in allocating available funds to covered employees."[3] The Arbitrator ruled that the Agency had to maintain the "negotiated ratio . . . even if the 'fiscal condition' changed and the total amount of funds available for pay increases was reduced."[4]

The Union sought a make-whole remedy. Although the Union is not explicit in its exceptions, this presumably would be a bonus pool that was 1.7% of salaries for 2013. Apparently reading the award as sanctioning the Agency's reduction of the total pool below 3% of salaries, and thus sanctioning a reduction in the bonus pool below 1.7% of salaries, the Union's complaint in its exceptions is, primarily, that there was never an issue raised before the Arbitrator about any "lack of funding" for bonuses.[5] The Union challenges the award's alleged reliance on such a lack of funding on nonfact and, indirectly, essence grounds.

My main concern is that the abbreviated decision does not make clear that the Arbitrator never sanctioned any particular reduction in the bonus funding level. Instead, the Arbitrator refers only to "available funds" in requiring funding for bonuses.[6] So, were a reader to misread the Authority's decision, the reader might think that the Authority is effectively sanctioning an award that authorizes reduced funding for bonuses. But, as far as the record discloses, what funding is "available" remains an issue that the award does not resolve.

Regarding the decision's specific holdings, the decision's resolution of the Union's nonfact exception deserves some explanation. To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[7] Because the Arbitrator did not base his award on a finding that there was a lack of funding for bonuses, the Union's nonfact exception challenging that asserted finding does not challenge a "central fact underlying the award." Accordingly, I agree with the decision's denial of the Union's nonfact exception.

[1] Award at 3.
[2] *Id.* at 4 (internal quotation marks omitted).
[3] *Id.* at 13.
[4] *Id.*
[5] *See* Exceptions at 2.
[6] Award at 13.
[7] *E.g., U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993).