68 FLRA No. 78

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3740
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
U.S. MINT
WEST POINT, NEW YORK
(Agency)

0-AR-5061

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DECISION

April 15, 2015

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

I. Statement of the Case

Arbitrator Stephen J. Rosen denied the Union's grievance and held that the ten-day suspension of the grievant did not violate the parties' collective-bargaining agreement.

The Union asks us to set aside the award and claims that it is contrary to law and does not follow Authority "past practice" precedent. Alternatively, the Union claims that the award should be set aside because it fails to draw its essence from the parties' agreement and that it is based on a nonfact. Because the Union fails to demonstrate that the award is deficient on these bases, we dismiss, in part, and deny, in part, the Union's exceptions.

II. Background and Arbitrator's Award

The Agency's national training team visited the Agency's West Point facility to train and certify the grievant – a training officer – and firearms instructors on the use of a new firearm. During this visit, the training team determined that the facility was not in compliance with the Agency's firearms training requirements. A subsequent investigation concluded that the grievant failed to comply with the training requirements by allowing firearms instructors to conduct firearms training without utilizing timers, barricades, or proper off-line and kneeling techniques. The Agency, therefore, suspended the grievant for ten days.

The Union filed a grievance on behalf of the grievant, contesting the suspension. The grievance was unresolved, and the parties submitted the matter to arbitration. The Arbitrator framed the issue as: "Was the ten[-]day suspension of the [g]rievant for just cause as required [by] the collective[-]bargaining agreement? [A]nd if not, what shall be the remedy?"[1] After a hearing, and the submission of post-hearing briefs, the Arbitrator found that the Agency had not violated the parties' agreement.

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

III. Preliminary Matter

As a preliminary matter, the Agency contends that the Authority should dismiss any of the Union's exceptions relating to an alleged failure by the Agency to notify and bargain with the Union on "changes" to the firearms training policy, because these matters could have been, but were not, previously raised in the grievance or before the Arbitrator.[2]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[3]

Here, the Union argues that the Agency did not notify and bargain over the changes made to the firearms training policies, which were allegedly past practices. The Union could have raised, but did not raise, this argument below. Therefore, we do not consider any portion of the Union's exceptions based on this argument.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Union contends that the award is contrary to law because it "does not follow [the Authority's] 'past practice' precedent."[4] The Union argues that the Arbitrator erroneously found that the grievant's failure to comply with the training requirement "result[ed] in 'a

[1] Award at 1.
[2] Opp'n at 5.
[3] *See, e.g., AFGE, Council 215*, 66 FLRA 771, 773 (2012) (declining to consider an argument that the award failed to draw its essence from the parties' agreement because the argument was not made during the arbitration hearing); *U.S. Dep't of HUD*, 64 FLRA 247, 249 (2009) (refusing to consider documents existing at the time of the arbitration hearing, but not presented to the arbitrator).
[4] Exceptions at 3.

[safety] risk to [Agency] personnel and to the public.'"[5] Specifically, the Union argues that the Arbitrator did not consider the long-standing past practice "that the Agency communicate its policies regarding firearms training and qualification."[6]

In resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.[7] In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[8] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[9] In reviewing an arbitrator's award concerning whether a past practice has altered a contract term negotiated by the parties, the Authority considers the issue as a challenge to an arbitrator's interpretation and application of the parties' agreement.[10] An allegation that an arbitrator erred in this regard does not provide a basis for finding the award contrary to law.[11] Instead, the Authority applies the deferential essence standard in reviewing the arbitrator's findings.[12]

Here, although the Union challenges the Arbitrator's finding that a past practice did not exist, it does not argue that the finding fails to draw its essence from the parties' agreement.[13] Insofar as the Union's arguments challenge the Arbitrator's factual findings, the Union does not argue that the award is based on nonfacts.[14] As stated previously, in applying de novo review, the Authority defers to an arbitrator's factual findings, absent a demonstration that those findings are nonfacts.[15]

For these reasons, we find that the Union has not demonstrated that the award is contrary to law. Accordingly, we deny this exception.

B. The award draws its essence from the parties' agreement.

The Union contends that the award fails to draw its essence from the parties' agreement because "[t]he Arbitrator improperly found that the Union's arguments fail to satisfy the 'just[-]cause' standard."[16] Specifically, the Union claims that the Arbitrator fails to recognize or give proper weight to facts as they occurred in the case, such as the manner in which firearms trainings were previously conducted by the Agency.[17] The Union also argues that "[t]he award dismisses the Union's arguments that the Agency failed to take this disciplinary action for just and sufficient cause and did not apply progressive discipline."[18]

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 awards in the private sector.[19] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining 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.[20] 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."[21] Applying these standards to the instant case, the Union does not establish that the award fails to draw its essence from the parties' agreement.

The Arbitrator considered all of the facts that were disputed by the Union, such as the manner in which firearms trainings were previously conducted by the Agency.[22]

To the extent that the Union disagrees with the Arbitrator's factual findings, that disagreement does not demonstrate that the award fails to draw its essence from the parties' agreement.[23] Accordingly, because the Union

[5] *Id.* at 5.
[6] *Id.*
[7] *AFGE, Local 2595, Nat'l Border Patrol Council*, 67 FLRA 190, 191 (2014) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).
[8] *Id.*
[9] *See U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[10] *U.S. DOJ, Fed. BOP, Mgmt. & Speciality Training Ctr., Aurora, Colo.*, 56 FLRA 943, 944 (2000).
[11] *Id.*
[12] *See U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 691 (2014).
[13] *Id.*
[14] *Id.*
[15] *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012).
[16] Exceptions at 8.
[17] *See id.*
[18] *Id.*
[19] *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[20] *See U.S. DOL*, 34 FLRA 573, 575 (1990).
[21] *Id.* at 576.
[22] *See* Exceptions at 8; Award at 12.
[23] *SSA*, 66 FLRA 6, 9 (2011) (citing *AFGE, Local 12*, 61 FLRA 507, 509 (2006)).

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

C. The award is not based on a nonfact.

The Union argues that the award is based on a nonfact because the record does not show that the failure to use barricades and timers results in Agency police officers being inadequately trained.[24]

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[25] However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.[26] In addition, the Authority has long held that disagreement with an arbitrator's evaluation of evidence and testimony, including the determination of the weight to be accorded such evidence, provides no basis for finding the award deficient.[27]

The issue of whether the failure to use barricades and timers results in officers being adequately trained was disputed before the Arbitrator. Consequently, the Union's contention does not provide a basis for establishing that the award is based on a nonfact.[28]

Accordingly, we deny this exception.

V. Decision

We deny the Union's exceptions.

[24] Exceptions at 9.
[25] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).
[26] *Id.*; *see also U.S. Dep't of the Navy, Naval Explosive Ordinance Disposal Tech. Div., Indian Head, Md.*, 56 FLRA 280, 286 (2000) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).
[27] *See U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 63 FLRA 553, 556 (2009); *AFGE, Local 3295*, 51 FLRA 27, 32 (1995).
[28] *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Dahlgren, Va.*, 44 FLRA 1118, 1122-23 (1992) (finding that the agency failed to establish that the award was based on a nonfact when it alleged that the arbitrator incorrectly determined that the performance of certain hazardous duties were not taken into account in the classification of the grievants' positions); *see also AFGE, Local 376*, 62 FLRA 138, 141 (2007).