70 FLRA No. 103

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 933
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
DETROIT, MICHIGAN
(Agency)

0-AR-5311

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DECISION

April 30, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members

Decision by Member Abbott for the Authority

I. Statement of the Case

The Union grieved that the Agency violated the parties' agreement by requiring housekeepers to work beyond their position description by exterminating bedbugs, entitling the grievants to backpay and environmental differential pay. Arbitrator Charles Kohler found that the Agency had not violated the agreement because the housekeepers were cleaning, not exterminating, which was within their position description, and that no changes had been made to their conditions of employment.

The Union argues that the Arbitrator erred in several respects, but primarily relitigates its case that the housekeepers were acting as exterminators and were entitled to environmental differential pay. We agree with the Arbitrator's determinations and deny the Union's exceptions.

Specifically, the Union argues that the award is based on nonfacts. We find the Union fails to demonstrate that in characterizing the housekeepers' duties, the Arbitrator made a clearly erroneous factual finding or that his reliance on "many years" of the grievants' duties is a central fact underlying the award, such that the Arbitrator would have reached a different result. Accordingly, we deny this exception.

The Union argues that the award is contrary to 5 U.S.C. § 5343(c)(4) and 5 C.F.R. § 532.511, which govern environmental differential pay, and Agency policy, which requires that bedbug extermination be performed by a licensed professional. Because we defer to the Arbitrator's factual findings and the Union misunderstands the award, we deny this exception.

The Union argues that the award is so incomplete, ambiguous, and contradictory as to make implementation impossible. Because the Union fails to explain how an award which denied the grievance entirely is impossible to implement, we deny this exception.

The Union also argues that the award fails to draw its essence from the parties' agreement. Because we defer to the Arbitrator's factual findings and the Union fails to demonstrate how the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, we deny this exception.

II. Background and Arbitrator's Award

On September 23, 2014, the Union filed a grievance, alleging that housekeepers were working beyond the scope of their position description by killing bedbugs. The Agency denied the grievance, and it proceeded to arbitration.

In relevant part, the Arbitrator framed the issue as whether: (1) the Agency violated the parties' agreement and (2) the grievants were entitled to environmental differential pay.

The Union argued that the Agency forced housekeepers to exterminate bedbugs from February 2010 until October 2016, in violation of the parties' agreement and Agency policy. It argued that housekeepers were entitled to backpay for working outside of their position description, and to environmental differential pay under 5 C.F.R. § 532.511 because they were exposed to bedbugs, which are micro-organisms that can cause potential personal injury or disease.

The Agency argued that housekeepers were not acting as exterminators, and that any work related to bedbugs is closely related to the duties listed in the housekeepers' position description. Instead, a professional pest control company was responsible for extermination at the facility. Further, the Agency provided employees with personal, protective equipment should they need it for their duties.

In the award, dated August 10, 2017, the Arbitrator found that the housekeepers were not acting as exterminators, and that the Agency used a professional extermination service. He found that the housekeepers' primary function is cleaning and sanitizing the facility and that they were working within their position description. Steam cleaning "is part of the job of sanitizing the Medical Center;" it "does not constitute extermination work, even if the effect of applying steam is to kill bed bugs and bed bug eggs."[1] Additionally, he found that the Union failed to demonstrate "that the work performed by the [g]rievants, i.e., operating a steam machine, is included in the job description of a higher classification."[2] Accordingly, the Arbitrator found that the Agency had not violated the parties' agreement because the Agency had not changed the housekeepers' conditions of employment.

Further, he found that the grievants were not entitled to environmental differential pay. Under 5 C.F.R. Part 532, an employee is entitled to environmental differential pay for a low degree hazard when they are "[w]orking with or in close proximity to micro-organisms in situations . . . wherein the use of safety devices and equipment and other safety measures have not practically eliminated the potential for personal injury."[3] The Arbitrator found that the Agency provided employees with protective equipment that effectively eliminated the potential for personal injury and that bedbugs are unlikely to cause serious injury or disease. And so, he found that the grievants were not entitled to environmental differential pay. He denied the grievance in its entirety.

The Union filed exceptions to the award on September 11, 2017,[4] and the Agency filed an opposition on November 20, 2017.[5]

III. Analysis and Conclusions

A. The award is not based on nonfacts.

The Union argues that it is "uncontroverted" that housekeepers were being used to kill bedbugs, and that the Arbitrator incorrectly characterized this as sanitization, rather than extermination.[6] The Union also contends that the Arbitrator's finding that housekeepers have been performing work related to bedbug control "for many years" is not supported as the parties primarily testified to what had occurred since 2010.[7]

To establish that an award is based on a nonfact, the appealing party must show that the arbitrator made a clearly erroneous factual finding, but for which he or she would have reached a different result.[8] The Authority will not find an award deficient based on the arbitrator's determination of any factual matter that the parties disputed at arbitration.[9] Claims that an arbitrator's factual findings are not sufficiently supported do not demonstrate that an award is deficient.[10]

With regard to the Union's claim that housekeepers were exterminating bedbugs, the Union does not demonstrate that, in characterizing the housekeepers' duties, the Arbitrator made a clearly erroneous factual finding. Regarding whether housekeepers have been performing related work "for many years,"[11] the Union does not show that this is a central fact, underlying the award, such that the Arbitrator would have reached a different conclusion.[12] Accordingly, we deny the Union's nonfact exceptions.

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[1] Award at 35.
[2] *Id.* at 36.
[3] *Id.* at 37 (quoting 5 C.F.R. Pt. 532, Subpt. E, App. A).
[4] The Union argues that the award is contrary to 5 U.S.C. § 7116(a)(1), (5), and (8). Exceptions Br. at 18. However, 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. Since the Union failed to argue any statutory violation to the Arbitrator, and could have done so, we dismiss this argument. *See* 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bennettsville, S.C.*, 70 FLRA 342, 343 (2017); *AFGE, Local 2302*, 70 FLRA 259, 260 (2017) (*Local 2302*). The Union also argues that the Arbitrator exceeded his authority. Exceptions Form at 10. However, the Union fails to support this exception, so we deny it. *See* 5 C.F.R. § 2425.6(e)(1) (exception subject to denial if excepting party fails to support the exception).
[5] The parties filed a number of supplemental submissions related to the Union's service of its exceptions on the Agency. Ultimately, the Union perfected its service and the Agency filed a timely opposition, which we consider.
[6] Exceptions Br. at 30.
[7] *Id.* at 31 (quoting Award at 36).
[8] *E.g.*, *AFGE, Local 2382*, 66 FLRA 664, 667 (2012) (*Local 2382*) (citing *NFFE, Local 1984*, 56 FLRA 38, 41 (2000)).
[9] *Id.*
[10] *Pension Benefit Guar. Corp.*, 64 FLRA 692, 696 (2010) (*PBGC*) (citing *U.S. DOD Educ. Activity, Arlington, Va.*, 56 FLRA 836, 842 (2000); *NAGE, Local R4-45*, 55 FLRA 695, 697, 700 (1999)).
[11] Exceptions Br. at 31.
[12] *Local 2382*, 66 FLRA at 667; *PBGC*, 64 FLRA at 696.

B. The award is not contrary to law.

1. The award is not contrary to 5 U.S.C. § 5343(c)(4) and 5 C.F.R. § 532.511.

The Union argues that the award is contrary to law,[13] specifically 5 U.S.C. § 5343(c)(4) and 5 C.F.R. § 532.511, which provide for environmental differential pay for hazardous environments, and which the Union argues, the Arbitrator "ignored."[14] The Arbitrator determined that under § 532.511, environmental differential pay is not warranted if protective equipment eliminates the potential for personal injury.[15] He found that protective equipment was available to the grievants that eliminated the potential for personal injury.[16] He also noted that bedbugs are unlikely to cause serious injury or disease.[17]

Here, the Union's restatement of its arguments presented before the Arbitrator[18] fails to demonstrate that his legal conclusions violated 5 U.S.C. § 5343(c)(4) and 5 C.F.R. § 532.511. The Arbitrator found that the Agency provided the grievants with protective equipment that would prevent injury, and further, that the harm posed by bedbugs was minimal, being limited to "soreness, skin irritations, itching[,] and other types of discomfort."[19] The Arbitrator's findings support his conclusion that the grievants were not entitled to environmental differential pay.[20] Consequently, the Union has failed to demonstrate that the award violates 5 U.S.C. § 5343(c)(4) and 5 C.F.R. § 532.511, and we deny this exception.[21]

2. The award is not contrary to Agency-wide policy.

The Union argues that the award is contrary to law because Agency-wide policies[22] require that bedbug extermination must be performed by a licensed professional.[23]

The Union appears to misunderstand the award.[24] The Arbitrator concluded that the housekeepers were not employed as exterminators and that the Agency used a licensed professional company for extermination services.[25] Therefore, he did not address the Agency-wide policies that the Union argues the award is contrary to. Because the Union's contrary-to-law exception challenges conclusions that the Arbitrator did not make, we deny the Union's contrary-to-law exception.[26]

[13] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception de novo. *AFGE, Local 12*, 70 FLRA 348, 349-50 (2017) (citing *Fraternal Order of Police Lodge No. 158*, 66 FLRA 420, 423 (2011)). In reviewing de novo, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.* at 350 (citing *Overseas Private Inv. Corp.*, 68 FLRA 982, 984 (2015)). In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts. *Local 2302*, 70 FLRA at 260 (citing *AFGE, Nat'l INS Council*, 69 FLRA 549, 552 (2016)). Section 7122(a)(1) of the Federal Service Labor-Management Relations Statute provides that an arbitration award will be found deficient if it conflicts with any rule or regulation. 5 U.S.C. § 7122(a)(1). For purposes of 7122(a)(1), the Authority has defined rule or regulation to include both government-wide and governing agency rules and regulations. *AFGE, Local 1203*, 55 FLRA 528, 530 (1999) (*Local 1203*) (citing *U.S. Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 FLRA 186, 191-92 (1990)).

[14] Exceptions Br. at 24.

[15] Award at 38.

[16] *Id.* at 39-40.

[17] *Id.* at 38-39.

[18] Exceptions Br. at 24-28.

[19] Award at 38.

[20] *Id.* at 39-40.

[21] *Local 2302*, 70 FLRA at 260.

[22] Exceptions Br. at 23 (citing Environmental Management Section Policy & Procedure Manual May 2004; Department of VA, Under Secretary for Health Information Letter; VHA Handbook 1850.02 Transmittal Sheet; Dingell VA Medical Center Policy 118N-7).

[23] *Id.* The Agency argues that one of the Union's cited pieces of policy, an Informational Letter from the Under Secretary for Health, does not qualify as an Agency-wide rule or regulation under § 7122(a)(1). Opp'n at 8-9. However, in the past, the Authority has evaluated other policies cited by the Union, such as Agency Directives and Handbooks, as Agency regulations, and so we continue to evaluate those policies as Agency regulations. *See Local 1203*, 55 FLRA at 530-31 (reviewing de novo whether award was contrary to Veterans' Health Administration Directive and Handbook as an Agency-wide rule or regulation); *U.S. Dep't of VA, Med. Ctr., Dayton, Ohio*, 68 FLRA 360, 361-62 (2015) (reviewing interpretation of a cited VA Directive).

[24] *AFGE, Local 12*, 67 FLRA 387, 389 (2014) (*AFGE*) (citing *AFGE, Local 2382*, 66 FLRA 664, 667 (2012) (*Local 2382*)) (exceptions based on misunderstandings of an arbitrator's award do not demonstrate that the award is contrary to law).

[25] Award at 34-35.

[26] *IFPTE, Ass'n Admin. Law Judges*, 70 FLRA 316, 318 (2017); *Local 2302*, 70 FLRA at 260; *AFGE*, 67 FLRA at 389; *Dep't of the Air Force, Scott Air Force Base*, 4 FLRA 712, 715 (1980) (denying exception that relitigates same arguments made before arbitrator, merely disagreeing with the arbitrator's reasoning and conclusion).

C. The award is not so incomplete, ambiguous, or contradictory as to make implementation of the award impossible.

The Union argues that the award is so incomplete, ambiguous, and contradictory as to make implementation impossible[27] because it: (1) does not specify whether housekeepers sanitize rooms before or after bedbugs are exterminated; and (2) creates an ambiguity over whether housekeepers can be used to kill bedbugs.[28] However, the Union fails to explain how this award, which denied the grievance in its entirety, is impossible to implement because the meaning and effect of the award are too unclear or uncertain.[29] To the contrary, we find that the award is easy to implement.

D. The award does not fail to draw its essence from the parties' collective bargaining agreement.

The Union argues that the award fails to draw its essence from the parties' agreement because the grievants are "being unfairly worked beyond their position description without payment" in violation of Article 9 of the parties' agreement.[30] But, the Arbitrator found that there was no evidence that the work they performed was part of a higher-paying position description.[31]

In the absence of a successful nonfact exception, we defer to the Arbitrator's factual findings.[32] Despite the Union's impassioned reargument of the contentions it made at arbitration, it has failed to demonstrate how the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement.[33] Therefore, we deny the Union's exception.[34]

IV. Decision

We deny the Union's exceptions.[35]

[27] In order for an award to be found deficient on this ground, the appealing party must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain. *E.g.*, *AFGE, Local 1395*, 64 FLRA 622, 624 (2010) (*Local 1395*). The mere allegation that an award is confusing or inconsistent does not demonstrate that an award is impossible to implement. *AFGE, Local 2923*, 61 FLRA 725, 728 (2006); *see also U.S. DOD, Def. Contract Mgmt. Agency*, 59 FLRA 396, 404 (2003).

[28] Exceptions Br. at 29-30.

[29] *Local 1395*, 64 FLRA at 624; *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1074 (2001).

[30] Exceptions Br. at 34 (Art. 9 provides that position descriptions must be accurate).

[31] Award at 36.

[32] *AFGE, Local 1164*, 66 FLRA 74, 78 (2011); *see also AFGE, Local 3354*, 64 FLRA 330, 333 (2009) (party's exceptions to arbitrator's factual findings in the course of applying agreement at arbitration do not demonstrate that award fails to draw its essence from agreement).

[33] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998) ("In reviewing an arbitrator's interpretation of a collective[-]bargaining agreement, the Statute provides that the Authority apply the deferential standard of review that Federal courts use in reviewing arbitration awards in the private sector."); *U.S. DOL* (*OSHA*), 34 FLRA 573, 575 (1990) (the Authority will find that an arbitration award is deficient as failing to draw its essence from the 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 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).

[34] *SSA*, 70 FLRA 227, 230 (2017) (citing *NTEU, Chapter 299*, 68 FLRA 835, 838 (2015) (denying essence exceptions where union was merely disagreeing with arbitrator's evaluation of evidence)).

[35] The Union also argues that it is entitled to attorney fees under 5 U.S.C. § 5596. Exceptions Br. at 24, 28. As no violation was found, there is no provision for backpay or attorney fees under 5 U.S.C. § 5596.