70 FLRA No. 136

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR TRAFFIC CONTROLLERS
ASSOCIATION
(Union)

0-AR-5287

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DECISION

July 5, 2018

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

Decision by Chairman Kiko for the Authority

I. Statement of the Case

Arbitrator Kathy L. Eisenmenger issued an award finding that the Agency violated Article 108, Section 4(C) of the parties' collective-bargaining agreement (Article 108) by failing to provide a higher pay rate to a newly hired air traffic controller (the grievant). As a remedy, the Arbitrator directed the Agency to pay the grievant backpay.

The main question before us is whether the Arbitrator's interpretation of Article 108 is consistent with the plain meaning of that provision. Because it is not, we set aside the award.

II. Background and Arbitrator's Award

To attract experienced applicants for air-traffic-controller positions, the parties agreed that the Agency would provide certain new hires with a higher rate of pay than the entry-level rate. Consequently, the parties negotiated Article 108, which states that the Agency will provide a higher rate of pay to "a Military or [Department of Defense (DOD)] Civilian controller with fifty-two (52) consecutive weeks experience as a certified air traffic controller."[1] According to the Union's negotiator, when bargaining Article 108, the parties were seeking to attract "experienced individuals"[2] who "were not [just] dabbling in air traffic control."[3]

In 2014, the Agency posted a Veteran's Recruitment Appointment vacancy announcement seeking air traffic controllers who met Article 108's requirements. The Agency hired the grievant and, after he completed training, set his pay at the entry-level rate. Sometime later, the Agency discovered that the grievant should have been disqualified during the application-review process because he did not possess the requisite experience. Instead of rescinding the grievant's appointment, the Agency retained him at the entry-level pay rate.

The Union filed a grievance arguing that the grievant qualified for the higher rate of pay. The parties could not resolve the dispute and submitted it to arbitration.

According to the Arbitrator, the parties stipulated to the following joint statement of issues:

> Issue for the Union: Whether the Agency violated Article 108 . . . when it set [the] grievant['s] . . . pay . . . [?] If so, what shall be the remedy?
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> Issue for the Agency: Did the [Agency] violate[] Article 108 . . . by determining that [the grievant] did not satisfy the requirement of having fifty-two . . . consecutive weeks experience as a certified air traffic controller for pay[-]setting purposes? Based on the Arbitrator's determination, what should be the remedy, if any . . . ?[4]

Before the Arbitrator, the parties disputed whether the grievant had the requisite experience to qualify him for the higher pay rate under Article 108. The Arbitrator observed that although the grievant had worked for the Air National Guard from 2011 to 2014, he had also worked as a security officer, from October 2012 to April 2013, and as a deckhand, from June 2013 to September 2013. The Arbitrator further noted that the grievant was certified as an air traffic controller on May 15, 2012 and, to maintain his certification, was required to perform three hours of air-traffic-controller duties per month for the Air National Guard. The grievant "was unable to estimate how many hours per week he . . . actually perform[ed] air[-]traffic[-]contoller

[1] Award at 6 (quoting Collective-Bargaining Agreement (CBA), Art. 108, § 4(C)).
[2] Exceptions, Attach. 2, Hr'g Tr. (Tr.) at 58.
[3] *Id.* at 65.
[4] Award at 2 (citations omitted).

duties" after he received his certification in May 2012.[5] And the grievant "admitted that sometimes there were weeks after May 2012" when he did not perform any air-traffic-controller duties.[6]

The Arbitrator found that the term "experience" in Article 108 was "ambiguous"[7] and that Article 108 "ma[de] no mention or reference to any external sources [that would] give insight into the parties' mutual understanding or definition of [that term]."[8] Nevertheless, the Arbitrator "presumed" that the parties considered the Office of Personnel Management's (OPM's) qualification standards for General Schedule air-traffic-controller positions as well as military regulatory requirements, when negotiating the experience requirements that qualified for the higher rate of pay.[9] Ultimately, the Arbitrator decided that the grievant was entitled to the higher pay rate if, as relevant here, he had maintained his air-traffic-controller *certification* for fifty-two consecutive weeks.

Based on his finding that the grievant maintained his air-traffic-controller certification from May 2012 to June 2013, the Arbitrator concluded that the grievant met the fifty-two consecutive weeks of experience requirement, and that the Agency violated Article 108 by not providing him with the higher pay rate. As a remedy, the Arbitrator directed the Agency to pay the grievant backpay.

On May 19, 2017, the Agency filed exceptions to the award, and, on June 23, 2017, the Union filed an opposition to the Agency's exceptions.[10]

III. Analysis and Conclusion: The award fails to draw its essence from Article 108.

The Agency argues that the award fails to draw its essence from Article 108.[11] Specifically, it alleges that the Arbitrator "embarked [o]n an unwarranted expedition" beyond the wording of Article 108 to find that the term "experience" was synonymous with the term "certified."[12]

The Authority will find that an arbitration award fails to draw its essence from a collective-bargaining agreement when the award, as relevant here, evidences a manifest disregard of the agreement.[13]

Here, the Arbitrator determined that Article 108 was ambiguous[14] and found that the grievant was entitled to the higher pay rate by *maintaining* his air-traffic-controller *certification* for fifty-two consecutive weeks.[15] We disagree. Article 108 specifically requires fifty-two consecutive weeks of "*experience*" to qualify for the higher pay rate.[16] In effect, the Arbitrator eliminated that requirement by interpreting Article 108 as simply requiring the grievant to *maintain* certification for fifty-two weeks. That interpretation is incompatible with the plain wording of Article 108.[17]

The Union contends that the award is rational because the Arbitrator considered OPM qualification standards as well as military regulatory requirements to determine its meaning.[18] While extrinsic evidence may be considered, in certain circumstances, to interpret a collective-bargaining agreement,[19] the Authority has held that arbitrators should not look to extrinsic evidence that is "unrelated to the context in which the parties [have]

[5] *Id.* at 31.
[6] *Id.* at 30.
[7] *Id.* at 57-58.
[8] *Id.* at 57.
[9] *Id.* at 58.
[10] Before the Authority, both the Union and the Agency offer evidence that came into existence after the arbitration hearing. *See* Opp'n at 9 n.7; Exceptions at 7-8; Exceptions, Attach. 8. Because arbitration awards are not subject to review on the basis of evidence that comes into existence after the arbitration hearing, we do not consider either the Union's or the Agency's post-arbitration evidence. *See, e.g.*, *NAIL, Local 15*, 66 FLRA 817, 817 n.1 (2012).
[11] Exceptions at 18-27.
[12] *Id.* at 19.
[13] *E.g.*, *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993) (*Tinker*) (an arbitration award fails to draw its essence from a collective-bargaining agreement where the award cannot in any rational way be derived from the agreement, is so unfounded in reason and fact and so unconnected with the wording and purpose of the agreement as to manifest an infidelity to the obligation of the arbitrator, evidences a manifest disregard of the agreement, or does not represent a plausible interpretation of the agreement).
[14] Award at 57-58.
[15] *Id.* at 60, 65.
[16] *Id.* at 6 (emphasis added) (quoting CBA, Art. 108, § 4(C)).
[17] *See Tinker*, 48 FLRA at 348; *see also United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (an arbitrator may not ignore the plain wording of an agreement); *Tootsie Roll Indus., Inc. v. Local Union No. 1, Bakery, Confectionery & Tobacco Workers' Int'l Union*, 832 F.2d 81, 84 (7th Cir. 1987) (finding that an award failed to draw its essence from an agreement where the "effect of the arbitrator's conclusion was to eliminate" a provision of that agreement).
[18] Opp'n at 20.
[19] *See NTEU v. FLRA*, 466 F.3d 1079, 1081 (D.C. Cir. 2006) (stating that "where the terms of a bargaining agreement are ambiguous, we look to evidence of the parties' contemporaneous understanding").

bargained."[20] But here, the Arbitrator simply "presumed" that the parties had considered those OPM qualification standards and military regulatory requirements when they drafted Article 108.[21] Because the Arbitrator acknowledged that Article 108 "makes no mention or reference to any external sources,"[22] the Arbitrator erred by considering that unrelated extrinsic evidence.[23]

This case turns on whether the grievant had "fifty-two . . . consecutive weeks [of] experience" working "as a certified air traffic controller."[24] The grievant was certified as an air traffic controller in May 2012, and he performed some air-traffic-controller duties for the Air National Guard from May 2012 to June 2013.[25] However, the Union concedes that the grievant did not work as a full-time air traffic controller from September 2012 to June 2013.[26] During that period, the grievant worked as a security officer[27] and as a deckhand.[28]

There is also a question about the number of hours that the grievant spent in order to *maintain his certification*.[29] Article 108 does not suggest that time spent in certification-*maintenance* equates to "*experience as a* certified air traffic controller."[30] In fact, Article 108's bargaining history establishes that the parties intended to attract "experienced individuals,"[31] not those just "dabbling in air traffic control."[32] As noted above, after the grievant received his air-traffic-controller certification, he worked in other professions[33] – performing air-traffic-controller duties so sporadically that he "was unable to estimate how many hours per week he . . . perform[ed] [such] duties."[34]

Based on the above, we find that the Arbitrator's interpretation of Article 108 – as entitling the grievant to the higher pay rate – is so unconnected with the wording and purpose of the parties' agreement as to manifest an infidelity to the obligation of the Arbitrator.[35] Therefore, we set aside the award as failing to draw its essence from the parties' agreement.[36]

IV. Decision

We set aside the award.

[20] *IRS, Wash., D.C.*, 47 FLRA 1091, 1110 (1993) (quoting *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430 (1967)); *see also Boise Cascade Corp. v. Paper Allied-Indus., Chem. & Energy Workers (PACE), Local 7-0159*, 309 F.3d 1075, 1083-84 (8th Cir. 2002) (noting that an "arbitrator must restrict his inquiry to evidence that will aid him in divining the parties' intent; he may not rely on outside sources [outside] the parties' contemplation at the time they drafted their agreement").

[21] Award at 58.

[22] *Id.* at 57.

[23] *Cf. AFGE, Local 2924 v. FLRA*, 470 F.3d 375, 383 (D.C. Cir. 2006) (finding that the Authority erred by considering extrinsic evidence that directly contradicted the unambiguous meaning of a provision).

[24] Award at 6 (quoting CBA, Art. 108, § 4(C)).

[25] *Id.* at 60, 65.

[26] Opp'n at 4-5.

[27] Award at 30 (finding that the grievant worked as a security officer from October 2012 to April 2013).

[28] *Id.* (noting that the grievant began working as a deckhand in June 2013).

[29] *Id.* at 62; *see also* Exceptions, Attach. 5, Union Ex. 11 at 19 (stating that an air traffic controller must perform three hours of certain air-traffic-controller duties per month to maintain a certification).

[30] Award at 6 (emphasis added) (quoting CBA, Art. 108, § 4(C)).

[31] Tr. at 58 (testimony of Union negotiator).

[32] *Id.* at 65 (testimony of Union negotiator); *see also* Award at 62 (finding that the Union was "the drafter of . . . Article 108").

[33] Award at 30.

[34] *Id.* at 31.

[35] *See Tinker*, 48 FLRA at 348.

[36] The Agency also contends that: the award is contrary to law; the Arbitrator exceeded her authority; and the award is based on nonfacts. However, because we set aside the award as failing to draw its essence from Article 108, we need not address the Agency's remaining exceptions or the Union's opposition to those exceptions. *See, e.g., U.S. DHS, Fed. Emergency Mgmt. Agency*, 69 FLRA 444, 445 (2016).

Member DuBester, dissenting:

Contrary to the majority, I would not find that the Arbitrator's award fails to draw its essence from Article 108. I therefore dissent.

In making this determination, I disagree with the majority that the Arbitrator found the term "experience," as stated in Article 108, to be synonymous with the term "certified."[1] Rather, as the majority acknowledges, the Arbitrator found that the term "experience" in Article 108 was "ambiguous."[2] Given that finding, it was reasonable for the Arbitrator to consider both the parties' bargaining history and the effect of extrinsic sources. And as part of her consideration of these sources, the Arbitrator also made the reasonable presumption that, in negotiating Article 108, the parties had considered OPM's qualification standards for air-traffic-controller positions, as well as military requirements.[3] Here, the parties' bargaining history confirms that OPM's qualification standards and the military's requirements for certified air-traffic controllers relate to the kind of "experience" the parties intended in Article 108.[4]

Based on this and the Arbitrator's consideration of the entire record, the Arbitrator found that the evidence supports a finding that the grievant met the quantity of experience requirement intended by Article 108.[5] There is not a sufficient basis, in my view, to find that the Arbitrator's interpretation of Article 108, based on her review of the evidence, is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. Accordingly, I dissent.

[1] *See* Majority at 4.
[2] *Id.* at 3 (quoting Award at 57-58).
[3] Award at 58-60.
[4] *Id.* at 58-59.
[5] *Id.* at 60.