70 FLRA No. 18

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1812
(Union)

and

BROADCASTING BOARD OF GOVERNORS
(Agency)

0-AR-5212

DECISION

December 9, 2016

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

I. Statement of the Case

The parties bargained over the temporary relocation of certain employees' workspace for several months until the Agency declared that the parties were at impasse and implemented the relocation. The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement (the agreement) by implementing the relocation before fulfilling its bargaining obligation. Arbitrator M. David Vaughn found that the Agency met its bargaining obligation and, therefore, did not violate the agreement. There are two substantive questions before us.

The first question is whether the Arbitrator's award fails to draw its essence from the agreement because – according to the Union – the Arbitrator determined, contrary to the terms of the agreement, that: (1) the Agency is never required to provide the Union with ten days' notice before implementing a change in employees' conditions of employment; and (2) the Agency fulfilled its bargaining obligation before implementing the relocation. Because the Union fails to demonstrate that the Arbitrator's interpretation of the agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement, the answer is no.

The second question is whether the Arbitrator's award is based on nonfacts. In this regard, the Union's nonfact claims either do not provide any supporting arguments, concern a factual matter that the parties disputed at arbitration, or challenge statements that were not essential to the Arbitrator's resolution of the grievance. Because such claims provide no basis for finding an arbitration award deficient on nonfact grounds, the answer is no.

II. Background and Arbitrator's Award

The Agency notified the Union that it intended to temporarily relocate certain employees' workspaces. After months of bargaining over the matter, the Agency declared that the parties were at impasse, and notified the Union that it would begin implementing its last best offer in seven days (the implementation date). On the implementation date, the Union requested assistance from the Federal Mediation and Conciliation Service (FMCS). In response to that request, the Agency maintained that it had no obligation to mediate the matter because it had satisfied its bargaining obligation. The Union then filed a request for assistance with the Federal Service Impasses Panel (Panel), but the Panel declined to assert jurisdiction because the parties had not attempted to mediate the dispute. Thereafter, the Agency implemented the temporary relocation.

The Union filed a grievance alleging, as relevant here, that the Agency violated Articles 3 and 26 of the agreement when it relocated the employees' workspace without satisfying its bargaining obligation under the agreement.

The grievance went to arbitration. At arbitration, the parties did not agree to a stipulated issue, so the Arbitrator framed the issue as: "Did the Agency violate the [a]greement or any law, rule, regulation, policy[,] or practice when it implemented [the temporary relocation]? If so, what shall be the remedy?"[1] Although the Arbitrator mentioned "law, rule, regulation, policy, [and] practice"[2] in his issue statement, he addressed only whether the Agency violated the agreement.

Article 3 of the agreement defines various terms, including "[a]dequate [n]otice" (the notice provision).[3] Under the notice provision, "adequate notice" is defined as the "period between when [the Agency] gives notice and when the Union's response is due," and "[f]or purposes of negotiations, this will normally be [ten] working days."[4] Before the Arbitrator, the Union argued that the Agency violated the notice provision because the Agency gave the Union only seven calendar days' notice before the implementation date. In this regard, the Union argued that the Agency should have provided the Union

[1] Award at 3.
[2] *Id.*
[3] *Id.*
[4] *Id.* (quoting Joint Ex. 4 at 2).

with "at least [ten] working days' notice in order to respond to the Agency's [last best offer]."[5]

The Arbitrator found that it was undisputed that the Agency gave the Union seven days' notice. However, he found that the notice provision's "language clearly does not *require* that notice be [ten] days."[6] In this regard, he found that the "[ten]-day notice period was not *mandatory* but was merely a recognition of what was 'normal.'"[7] Further, he found that the "[a]ctual moves did not occur until well after the expiration of the [ten]-day period" and, therefore, "the Union received sufficient notice prior to when implementation actually began."[8] Accordingly, the Arbitrator found that the Agency did not violate the agreement by providing the Union with only seven days' notice before the implementation date.

Before the Arbitrator, the Union also argued that the Agency failed to fulfill its bargaining obligation under Articles 3 and 26 of the agreement. Article 3 defines "[i]mpasse" (the impasse provision) as "[t]he inability of representatives of the Agency and [the Union] to arrive at a mutually agreeable decision concerning negotiable matters through the negotiation process."[9] The impasse provision further states that when an impasse exists, FMCS "will be contacted to provide a mediator to assist the parties[,]" and "[i]f the impasse is still not resolved, the matter may be referred to the [Panel]."[10] Article 26 specifically addresses negotiations over workspace relocations and states, in relevant part, that "[t]he Agency shall fulfill its bargaining obligation before implementation."[11]

At arbitration, the Union argued that the Agency failed to satisfy its bargaining obligation under the agreement when it "refus[ed] to agree to mediate the dispute" before it implemented the relocation.[12] The Union reasoned that Article 26 "requires . . . the Agency [to] fulfill its bargaining obligation *before* implementation,"[13] and under Article 3, the Agency satisfies its bargaining obligation when "impasse has been reached *and* mediation through FMCS has been completed."[14]

The Arbitrator found that "Article 3 makes clear that the obligation to bargain is completed when impasse is reached, which is prior to any FMCS mediation efforts."[15] Accordingly, the Arbitrator found that the Agency had "no . . . obligation to engage in mediation after it declare[d] impasse and prior to implementation."[16] Therefore, the Arbitrator concluded that the Agency did not violate the agreement because "[o]nce an impasse existed, the [A]gency had the right to implement and then deal with open issues through [impact-and-implementation] bargaining."[17] The Arbitrator also "note[d] that, following implementation, the Union requested and the Agency engaged in bargaining as to the impact and implementation of the [workspace relocation]," which "[a]s a practical matter, . . . afford[ed] the Union the opportunity to address post-implementation issues of concern."[18]

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

III. Preliminary Matter: Sections 2429.5 and 2425.4(c) of the Authority's Regulations bar some of the Union's arguments.

The Union argues that the award is contrary to law and regulation.[19] Under §§ 2429.5 and 2425.4(c) of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[20]

In its exceptions, the Union argues that the award is contrary to the Federal Service Labor-Management Relations Statute (the Statute)[21] because the Arbitrator allegedly failed to apply statutory standards when he determined that the Agency was required to maintain the status quo only until the parties bargained to impasse.[22] Specifically, the Union contends that the Statute requires an agency to maintain the status quo through the Panel's impasse proceedings, and that "[t]his provision of law was plainly incorporated into the [agreement]" – specifically, Article 6, Sections 1 and 3, and Article 26, Section 4.[23] The Union asserts that Article 6, Section 1 states that the Agency is governed by "all existing and future laws,"[24] and Article 6, Section 3 requires Agency officials to "bargain in good faith."[25] Further, the Union notes that Article 26, Section 4 states that the "Agency shall fulfill its bargaining obligation

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[5] *Id.* at 14.
[6] *Id.* at 28.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 3 (quoting Joint Ex. 4 at 2).
[10] *Id.* (quoting Joint Ex. 4 at 2).
[11] *Id.* at 4 (quoting Joint Ex. 4 at 85).
[12] *Id.* at 13.
[13] *Id.* at 12.
[14] *Id.* at 26.
[15] *Id.*
[16] *Id.* at 27.
[17] *Id.* at 29.
[18] *Id.* at 28.
[19] Exceptions at 12-19.
[20] 5 C.F.R. §§ 2425.4(c), 2429.5.
[21] 5 U.S.C. §§ 7101-7135.
[22] Exceptions at 12-14.
[23] *Id.* at 13.
[24] *Id.* (citing Joint Ex. 4 at 8, 9).
[25] *Id.* (citing Joint Ex. 4 at 8, 9).

before implementation."[26] According to the Union, together these contractual provisions indicate that the term "'[b]argaining obligation' is nothing more than short hand for the 'obligation to bargain in good faith'"[27] under § 7116(a)(5)[28] of the Statute. Therefore, according to the Union, the Arbitrator's finding that the Agency fulfilled its bargaining obligation is contrary to § 7116 of the Statute.[29]

The Union does not demonstrate that it argued, at arbitration, that the Arbitrator was required to apply any statutory provisions in interpreting the agreement. And although the award quotes Article 6, Section 3 in its entirety, there is no indication that the Union made any argument concerning this provision. Moreover, the Agency argued in its post-hearing brief that the Union made no arguments concerning the Agency's bargaining obligations under Article 6, Section 3 and, thus, the Union "withdr[e]w its allegations" regarding that provision.[30] But the Union does not claim that the Arbitrator or the agreement precluded the Union from making additional arguments to the Arbitrator after the parties submitted post-hearing briefs. Thus, before the Arbitrator, the Union could have raised any argument concerning Article 6, Section 3, or argued that statutory provisions applied in interpreting the agreement, but the Union did not do so. Accordingly, we find that §§ 2429.5 and 2425.4(c) of the Authority's Regulations bar these arguments.[31]

Next, the Union argues that the award is contrary to the Panel's regulations[32] because the Arbitrator determined that the Agency was not required to maintain the status quo after it declared impasse.[33] According to the Union, under Article 3's impasse provision, the term "impasse" means an "*apparent* impasse," but under the Panel's regulations there "is no *actual* impasse until the [Panel] determines there is one."[34] Therefore, the Union argues that the Arbitrator's finding that the Agency fulfilled its bargaining obligation is contrary to the Panel's regulations.[35]

However, the Union does not cite any evidence that it argued that the Arbitrator was required to interpret the terms "impasse" and "bargaining obligation" from the agreement consistent with the Panel's regulations. The Union also does not cite any evidence that it argued that the Agency violated the Panel's regulations by failing to mediate the dispute. Rather, the Union argued that the Agency "violated the *[a]greement*" by failing to mediate the dispute.[36] Thus, at arbitration, the Union could have raised any argument concerning the Panel's Regulations, but did not do so. Accordingly, we dismiss this argument under §§ 2429.5 and 2425.4(c) of the Authority's Regulations.[37]

IV. Analysis and Conclusions

A. The award does not fail to draw its essence from the agreement.

The Union contends that the award fails to draw its essence from the agreement in two respects, which we discuss below.[38] When 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.[39] 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."[40] 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 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.[41]

The Union argues that the award fails to draw its essence from the agreement because Article 3's notice provision requires the Agency to give the Union at least ten working days between when the Agency gives notice of its intent to change employees' conditions of employment and when the Union's response is due, but the Arbitrator "in essence determined that . . . the Agency

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[26] *Id.* (citing Joint Ex. 4 at 85).
[27] *Id.*
[28] 5 U.S.C. § 7116(a)(5).
[29] Exceptions at 12-14.
[30] Exceptions, Attach., Agency's Post-Hr'g Br. at 9.
[31] *U.S. DOJ, Fed. BOP, Wash., D.C.*, 64 FLRA 1148, 1152 (2010) (holding that § 2429.5 barred consideration of contrary-to-law exception concerning attorney-fee award where excepting party failed to address the attorney-fee issue before the arbitrator, even though it had almost two months between the date on which the opposing party filed the attorney-fee request in its post-hearing brief and the date on which the arbitrator issued his award).
[32] 5 C.F.R. §§ 2470-2473.
[33] Exceptions at 21-23; *see also id.* at 13.
[34] *Id.* at 20 (emphasis added).
[35] *Id.* (citing 5 C.F.R. §§ 2471.1, 2470.2(e)); *see also id.* at 17.
[36] Award at 13 (emphasis added); *see also* Exceptions, Attach., Union's Post-Hr'g Br. at 14.
[37] *SSA, Office of Hearings & Appeals, Falls Church, Va.*, 59 FLRA 507, 509-10 (2003).
[38] Exceptions at 19-24.
[39] *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (*Bremerton*) (citing 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998) (*Council 220*)).
[40] *Id.* (quoting *Council 220*, 54 FLRA at 159).
[41] *Id.* (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

is *never* required to provide [ten] days' notice."[42] As noted above, the notice provision states that the period between when the Agency gives notice and when the Union's response is due "will normally be [ten] working days."[43] The Arbitrator found that because the notice provision's wording "does not *require* that notice be [ten] days," the "[ten]-day notice period was not *mandatory* but was merely a recognition of what was 'normal.'"[44] Moreover, he found that because the "[a]ctual moves did not occur until well after the expiration of the [ten]-day period," under the circumstances of this case, "the Union received sufficient notice prior to when implementation actually began."[45] The Union provides no basis for concluding that the Arbitrator's interpretation of the agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement. Accordingly, we deny this exception.

Next, the Union argues that the award fails to draw its essence from the agreement because the Arbitrator erred by finding that the Agency had "no . . . obligation to engage in mediation after it declare[d] impasse and prior to implementation."[46] According to the Union, the Arbitrator's finding "plainly contradicts the clear wording" of Article 3's impasse provision.[47] Specifically, the Union contends that, under the Arbitrator's interpretation of the agreement, the Agency could "implement a change in working conditions before an impasse was heard by a third[-]party mediator, and therefore prevent the Union from having the ability to have the matter heard by the [Panel]" – a result that the Union claims was "not the intent of . . . Article 3."[48]

As noted above, the impasse provision states that an impasse is "[t]he inability of representatives of the Agency and [the Union] to arrive at a mutually agreeable decision concerning negotiable matters through the negotiation process."[49] The impasse provision further provides that "[w]hen an impasse exists," FMCS will be contacted.[50] The Arbitrator found that the Agency could implement as soon as the parties reached an impasse because "Article 3 makes clear that the obligation to bargain is completed when impasse is reached, which is prior to any FMCS mediation efforts."[51] Nothing in the wording of the impasse provision precluded the Arbitrator from determining that the Agency could implement before engaging in mediation. And, as the Union acknowledges, the agreement does not define the term "bargaining obligation."[52] Thus, the Union does not demonstrate that the Arbitrator's interpretation is irrational, unfounded, implausible, or in manifest disregard of the agreement.[53] Therefore, we deny this exception.

B. The award is not based on nonfacts.

The Union argues that the award is based on several nonfacts.[54] 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.[55] 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.[56] Moreover, an "[a]rbitrator's statement [that] is unnecessary to the disposition of his [or her] decision . . . constitutes dictum and provides no basis" on which to find an award deficient.[57]

First, the Union challenges as nonfacts the Arbitrator's alleged findings that: (1) after a certain date, "the Union had not submitted a concrete proposal";[58] and (2) the Union "failed to submit a substantive proposal."[59] Under § 2425.6(b) of the Authority's Regulations,[60] a party arguing that an award is deficient on private-sector grounds must "explain how, under standards set forth in the decisional law of the Authority or [f]ederal courts[,]" the award is deficient.[61] In addition, § 2425.6(e)(1) provides that an exception "may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground as required in"[62] § 2425.6(b).[63] Here, the Union provides no evidence or argument to support its contention that the Arbitrator's alleged findings are nonfacts. Consequently, we deny this exception under § 2425.6(e)(1).[64]

Next, the Union claims that the award is based on a nonfact because the Arbitrator allegedly "concluded that the Union was not quick in its responses and . . .

[42] Exceptions at 24.
[43] Award at 3 (quoting Joint Ex. 4 at 2).
[44] *Id.* at 28.
[45] *Id.*
[46] Exceptions at 21 (quoting Award at 27).
[47] *Id.*
[48] *Id.* at 23.
[49] Award at 3 (quoting Joint Ex. 4 at 2).
[50] *Id.* (quoting Joint Ex. 4 at 2).
[51] *Id.* at 26.
[52] Exceptions at 13.
[53] *E.g.*, *Bremerton*, 68 FLRA at 155 (citation omitted).
[54] Exceptions at 24-25.
[55] *NLRB Prof'l Ass'n*, 68 FLRA 552, 554 (2015) (*NLRB*).
[56] *Id.*
[57] *Int'l Bhd. of Elec. Workers, Local 2219*, 69 FLRA 431, 433 (2016) (*IBEW*) (quoting *AFGE, Local 2152*, 69 FLRA 149, 151 (2015) (*Local 2152*)).
[58] Exceptions at 7 (purporting to quote Award at 25).
[59] *Id.* (quoting Award at 25).
[60] 5 C.F.R. § 2425.6(b).
[61] *AFGE, Nat'l Immigration & Naturalization Serv. Council*, 69 FLRA 549, 553 (2016) (quoting 5 C.F.R. § 2425.6(b)).
[62] *Id.*
[63] 5 C.F.R. § 2425.6(e)(1).
[64] *E.g.*, *AFGE, Local 836*, 69 FLRA 502, 504 (2016).

failed to respond" to the Agency during bargaining.[65] However, before the Arbitrator, the parties disputed the issue of whether the Union timely responded to the Agency during bargaining.[66] Therefore, the Union's argument does not provide a basis for finding that the award is based on a nonfact, and we deny this exception.[67]

Finally, the Union argues that the award is a based on a nonfact "because the Arbitrator based his decision on a specific finding that the Agency had engaged in post-implementation bargaining with the Union on the [workspace relocation]," when, according to the Union, such bargaining "was over a *different* change in working conditions."[68] However, the Arbitrator found, based on his interpretation of the agreement, that the Agency fulfilled its bargaining obligations *prior* to implementation – rather than post-implementation.[69] Specifically, the Arbitrator "note[d] that, following implementation, the Union requested and the Agency engaged in bargaining as to the impact and implementation of the [workspace relocation]," which "afford[ed] the Union the opportunity to address post-implementation issues of concern."[70] The Arbitrator's statements on this point were unnecessary to the disposition of the grievance. As such, they are dicta and provide no basis for finding the award deficient as a nonfact.[71] Accordingly, we deny this exception.

V. Decision

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

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[65] Exceptions at 7.
[66] *See* Union's Post-Hr'g Br. at 9-10; Agency's Post-Hr'g Br. at 11.
[67] *E.g.*, *NLRB*, 68 FLRA at 555; *Fed. Energy Regulatory Comm'n*, 58 FLRA 596, 598 (2003).
[68] Exceptions at 12.
[69] *See* Award at 26-27.
[70] *Id.* at 28.
[71] *IBEW*, 69 FLRA at 434 (2016) (citing *Local 2152*, 69 FLRA at 151).

Member DuBester, dissenting:

I disagree with my colleagues' decision to uphold the Arbitrator's award. As the Arbitrator determined when he framed the issue, this case is about whether the Agency violated the parties' agreement when it relocated certain employees.[1] Period. But my colleagues focus solely on the Arbitrator's narrower findings concerning whether the Agency fulfilled its bargaining obligation before it implemented its relocation plan. If that was all this case is about, I might be able to agree with my colleagues' denial of the Union's exceptions. But – acknowledging the Arbitrator's broader framing of the issue – the case is about more. That is, as the Arbitrator recognized, the parties' agreement requires more than simply that the parties fulfill their bargaining obligation. And it is to one of these other agreement requirements that the award – and my colleagues' decision – fail to give proper weight and consideration.

Specifically, my colleagues' decision does not acknowledge or resolve one of the Union's key contentions supporting its claim that the award fails to draw its essence from the parties' agreement. That contention is that the Arbitrator erred – for essence reasons – when he rejected "[t]he Union['s] conten[tion] that, pursuant to Article 3 of the [p]arties' [a]greement, the Agency had an obligation to mediate, even after impasse, but refused to do so."[2] The Union argues in its exceptions that "[t]he Agency's refusal to engage in mediation violates the parties' [agreement]" and the Arbitrator's determination to the contrary "is simply not grounded in the actual language of the contract."[3]

The Arbitrator erred for essence reasons because his determination is expressly contrary to the parties' agreement.[4] Article 3 states – expressly and plainly -- that "[w]hen an impasse exists, the Federal Mediation and Conciliation Service[(FMCS)] will be contacted to provide a mediator to assist the parties."[5] And the Arbitrator found that the parties were at impasse.[6]

But the FMCS did not "provide a mediator to assist the parties"[7] because, as the Arbitrator found, the Agency refused to "engage in mediation."[8] And the Arbitrator's excusal of the Agency's decision "not [to] 'engage in mediation'" is based solely on the Arbitrator's flawed interpretation of Article 3; i.e., that "[t]here was no obligation," under Article 3, to engage in mediation after impasse.[9] Article 3's plain language expressly provides otherwise.

Accordingly, I would find that the Arbitrator's determination that the Agency was not obligated to engage in mediation is flawed – because it fails to draw its essence from the parties' agreement. Moreover, this erroneous determination affected the Arbitrator's rationale for denying the Union's grievance. Because clearly, the Agency's compliance with its mediation obligations might have altered the Agency's actions when it relocated the employees involved. FMCS mediation might have resulted in an agreement modifying the Agency's plans. And even if it did not, subsequent proceedings before the Federal Service Impasses Panel (FSIP) could have resulted in the FSIP's resolution of the impasse with an agreement modifying how the Agency would undertake the relocation. So I would set the award aside and remand for further proceedings.

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[1] Award at 3.
[2] *Id.* at 26.
[3] Exceptions at 22.
[4] *See, e.g., U.S. Small Business Admin.*, 55 FLRA 179, 182 (1999).
[5] Award at 3.
[6] *Id.* at 24.
[7] *Id.* at 3.
[8] *Id.* at 27.
[9] *Id.*