73 FLRA No. 181

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
POPLAR BLUFF, MISSOURI
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

0-AR-5937

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DECISION

July 19, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member
(Chairman Grundmann concurring)

I. Statement of the Case

The Union filed a grievance alleging the Agency violated the parties' collective-bargaining agreement by denying an employee (the grievant) 100% official time. Arbitrator John T. Nicholas issued an award finding that the Agency's refusal to grant the grievant 100% official time violated Article 48 of the agreement (Article 48). The Agency filed exceptions to the award on contrary-to-law, nonfact, essence, and bias grounds. For the reasons discussed below, we dismiss the Agency's contrary-to-law exception and deny the remaining exceptions.

II. Background and Arbitrator's Award

The Agency assigned the grievant, an advanced medical support assistant and the Union's chief steward, to a temporary detail at a community-based outpatient clinic. During this detail, the Union requested that the grievant receive 100% official time to conduct representational activities at multiple clinics. Under Article 48, Section 10.A of the parties' agreement, Union locals "receive an allotment of hours equal to 4.25 hours per year for each bargaining[-]unit position represented."[1] As relevant here, "[w]here a local represents employees at a [community-based outpatient clinic], . . . at a duty station greater than 50 miles from the facility, that local union will be allotted 25% official time at that duty station."[2]

The Union requested that the Agency grant the grievant 75% official time to represent his duty station and two other clinics, with 25% official time allocated per clinic. The Union also noted that it was allotting the grievant 25% official time from the Union's bank of hours which, when added to the grievant's 75% official-time allotment, made the grievant eligible for 100% official time.

When the grievant submitted official-time requests totaling 100% of his duty hours, the Agency approved 25% but denied the remainder. Relying on an internal Agency memorandum interpreting Article 48 (the official-time memo), the Agency stated that the grievant was limited to 25% official time, useable only for representing employees at the grievant's duty station. The Agency also claimed that it could not grant additional official time due to operational needs, citing a backlog of beneficiary travel claims in the grievant's work unit.

The Union filed a grievance alleging, in pertinent part, that the Agency violated Article 48 by denying the grievant 100% official time. The grievance went to arbitration. The Arbitrator stated that the parties stipulated to the issue as "[w]hether the [A]gency violated the . . . parties' . . . agreement . . . when it denied 100% official time to [the grievant]? If so, what shall the remedy be?"[3]

The Arbitrator found that Section 10.A, per its plain wording, entitled the Union to "a minimum of 25% official time . . . for *each*" clinic represented.[4] Rejecting the Agency's reliance on the official-time memo, the Arbitrator determined that Section 10.A did not limit the grievant's official time to 25%, nor did it prohibit using official time to represent employees at multiple clinics. Because the Union authorized the grievant to represent three clinics and use 25% official time from the Union's own bank of hours, the Arbitrator concluded that Section 10.A permitted the grievant to be on 100% official time.

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[1] Exceptions, Enclosure 2, Joint Ex. 1, Master Collective-Bargaining Agreement (Master Agreement) at 248.
[2] *Id.*
[3] Award at 2. The Agency disputes that the parties stipulated to this issue at arbitration. Exceptions Br. at 3. However, even assuming the parties did not stipulate the issues for resolution, this would not preclude the Arbitrator from *framing* the same issue. *See, e.g.*, *NFFE, Loc. Lodge 2276, IAMAW*, 61 FLRA 387, 389 (2005). Further, the Agency does not allege that the award is deficient based on the stipulation finding. Therefore, we need not consider whether the Arbitrator erred in finding the parties stipulated to the issue.
[4] Award at 12.

At arbitration, the Agency argued that it properly denied 100% official time because the grievant's official-time requests failed to "provide[] any context."[5] Addressing this argument, the Arbitrator noted email correspondence showing the grievant's supervisor discussed official time with the grievant and "approved . . . reasonable" requests not exceeding 25% official time.[6] Further, the Arbitrator found "the Agency failed to present any evidence" demonstrating that the Union was required "to communicate . . . the context of why [the grievant] need[ed] to use . . . official time."[7] As such, the Arbitrator concluded that the alleged deficiencies were a pretext for capping the grievant at 25% official time under the terms of the official-time memo.

Considering whether there was an operational need to deny official time, the Arbitrator found it undisputed that a backlog existed. However, the Arbitrator also found "the Agency did not offer prevailing evidence" that the backlog "became a current issue" once the grievant's detail began.[8] According to the Arbitrator, the backlog "may have continued even if the Agency had filled [the grievant's] position with a full-time employee who was not a Union member."[9] Ultimately, the Arbitrator determined that the backlog resulted from "insufficient staffing" and, therefore, was not a valid basis for denying the grievant's official-time requests.[10]

Based on these findings, the Arbitrator concluded that the Agency violated Article 48 "when it continuously disapproved the [g]rievant's requests to use official time without providing a legitimate operational need."[11] For a remedy, the Arbitrator directed the Agency to restore official time to the Union and pay the grievant backpay for representational duties he performed outside of duty hours.

The Agency filed exceptions to the award on December 13, 2023, and the Union filed an opposition to the Agency's exceptions on January 10, 2024.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's contrary-to-law exception.

The Agency asserts the award is contrary to law because the Arbitrator "failed to consider [§] 7131(b)" of the Statute in finding "the Agency failed to produce any" authority requiring the Union to provide context for the grievant's official-time requests.[12] That section provides that an employee's "activities . . . relating to the internal business of a labor organization . . . shall be performed during the time the employee is in a non-duty status."[13]

Sections 2425.4(c) and 2429.5 of the Authority's Regulations state the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[14] At arbitration, the Agency argued that the Union did not provide information necessary for the Agency to determine whether the grievant's official-time requests were lawful. However, the record does not reflect that the Agency raised § 7131(b) or otherwise alleged before the Arbitrator that the grievant's official-time requests concerned the Union's "internal business."[15] Because the Agency could have, but did not, raise its § 7131(b) argument at arbitration, we dismiss the Agency's contrary-to-law exception.[16]

IV. Analysis and Conclusions

A. The Agency fails to support its exception that the award is contrary to Agency-wide regulation.

In its exceptions form, the Agency claims the award is contrary to an Agency-wide regulation.[17] However, the Agency does not identify a specific regulation with which the award conflicts, and does not otherwise explain or provide support for its claim. Section 2425.6(e)(1) of the Authority's Regulations states that "[a]n exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support" the exception.[18] Thus, we deny the Agency's claim as unsupported under § 2425.6(e)(1).[19]

B. The award is not based on a nonfact.

The Agency argues the award is based on a nonfact.[20] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which

[5] *Id.* at 6.
[6] *Id.* at 9-10.
[7] *Id.* at 12.
[8] *Id.* at 11.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 12-13.
[12] Exceptions Br. at 6-7.
[13] 5 U.S.C. § 7131(b).
[14] 5 C.F.R. §§ 2425.4(c), 2429.5.
[15] 5 U.S.C. § 7131(b).
[16] 5 C.F.R. §§ 2425.4(c), 2429.5; *see AFGE, Loc. 2344*, 73 FLRA 765, 766 (2023) (dismissing contrary-to-law arguments because excepting party could have, but did not, raise those arguments before arbitrator).
[17] Exceptions Form at 4.
[18] 5 C.F.R. § 2425.6(e)(1).
[19] *Id.*; *see AFGE, Loc. 12*, 70 FLRA 582, 583 n.17 (2018) (denying exception as unsupported where excepting party did not identify any agency-wide regulation or explain how award conflicted with such regulation).
[20] Exceptions Br. at 4-5.

the arbitrator would have reached a different result.[21] 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.[22] Disagreement with an arbitrator's evaluation of the evidence, including the weight to be accorded such evidence, does not provide a basis for finding that an award is based on a nonfact.[23]

The Agency asserts that the Arbitrator erred in finding the Agency did not have an operational need to deny official time.[24] According to the Agency, the testimony of one of its witnesses "clearly demonstrated" that " the backlog of beneficiary travel claims combined with a staffing shortfall" constituted an operational need.[25] However, based on record evidence, including witness testimony, the Arbitrator concluded the backlog did not create a "legitimate operational need,"[26] because the grievant's use of official time did not cause, and was unlikely to have any effect on, the backlog.[27] As the Agency's argument merely challenges the Arbitrator's evaluation of the evidence, it does not demonstrate that a central fact underlying the award is clearly erroneous.[28] Moreover, the record firmly establishes that the parties disputed at arbitration whether the Agency had an operational need to deny the grievant official time.[29] Consequently, the Agency's argument fails to provide a basis for finding the award deficient on nonfact grounds, and we deny the exception.[30]

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

The Agency argues that the award fails to draw its essence from Article 48, Section 1.B of the parties' agreement because the grievant did not provide sufficient information for the Agency to evaluate the grievant's official-time requests "in accordance with contractual and statutory obligations."[31] The Authority will find an award fails to draw its essence from the parties' agreement when the excepting party establishes 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.[32]

Consistent with § 7131(d) of the Statute,[33] Article 48, Section 1.B provides that "official time shall be granted as specified in law and in any additional amount the [Agency] and the Union agree to be reasonable, necessary, and in the public interest."[34] The Arbitrator found that Article 48, Section 10.A – an official-time provision the parties negotiated under § 7131(d) – entitled the grievant to 100% official time absent a conflicting operational need, which the Arbitrator did not find.[35] Although the Agency argued before the Arbitrator that the grievant's official-time requests lacked "any context,"[36] the Arbitrator found this argument inconsistent with the Agency's approval of official time up to 25%.[37] Moreover, the Agency's "fail[ure] to present any evidence" supporting its argument led the Arbitrator to conclude that

[21] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Victorville, Ca.*, 73 FLRA 835, 836 (2024).
[22] *Fed. Educ. Ass'n, Stateside Region*, 73 FLRA 747, 748 (2023).
[23] *NTEU, Chapter 46*, 73 FLRA 654, 656 (2023).
[24] Exceptions Br. at 4-5.
[25] *Id.* at 4 (citation omitted).
[26] Award at 12-13.
[27] *See id.* at 11 (finding backlog did not "bec[o]me a current issue when" the grievant's detail began and "may have continued even if the Agency had filled [the grievant's] position with a" non-Union employee).
[28] *See AFGE, Loc. 2338*, 71 FLRA 1185, 1187 (2020) (Member Abbott concurring) (finding nonfact exception challenging arbitrator's evaluation of the evidence did not establish that a central fact underlying award was "clearly erroneous"). Member Kiko notes that the Agency detailed the grievant for the express purpose of reducing the backlog, which the Arbitrator attributed to "insufficient staffing." Award at 11. Although she questions how the Agency can solve its staffing issue if that same issue provides a basis for awarding employees up to 100% official time, Member Kiko agrees that the Agency's exception does not establish that the award is based on a nonfact.
[29] Award at 5 (summarizing Union's argument that "Agency's reliance on operational need . . . was not in good faith"), *id.* at 7 (noting Agency's argument that it "denied . . . official time due to operational needs"); Opp'n, Attach. 4, Agency's Post-Hr'g Br. at 23 (arguing grievant's supervisor properly denied official time due to "operational needs"); Opp'n, Attach. 3, Union's Post-Hr'g Br. at 25 (alleging Agency did not have a "legitimate operational need" to deny official time).
[30] *See U.S. Dep't of HHS*, 73 FLRA 95, 96-97 (2022) (denying nonfact exception challenging arbitrator's "evaluation of the evidence" in resolving a "factual matter that the parties had disputed" at arbitration); *AFGE, Loc. 2516*, 72 FLRA 567, 568 (2021) (where nonfact exception asserted that arbitrator "disregard[ed] witness testimony," Authority denied exception as "merely disagree[ing] with the [a]rbitrator's evaluation of the evidence" (internal quotation mark omitted)).
[31] Exceptions Br. at 7-8.
[32] *AFGE, Loc. 2092*, 73 FLRA 596, 597 (2023).
[33] 5 U.S.C. § 7131(d) (stating that "any employee representing [a union] . . . shall be granted official time in any amount the agency and the [union] involved agree to be reasonable, necessary, and in the public interest").
[34] Master Agreement at 245.
[35] Award at 11-12.
[36] *Id.* at 6.
[37] *Id.* at 12; *see also id.* at 9-10 (noting record evidence showing grievant's supervisor discussed official time with grievant and approved official-time requests he found "reasonable").

the Agency relied solely on the official-time memo in disapproving official time.[38] The Agency's exception does not establish that the award is irrational, unfounded, implausible, or in manifest disregard of the agreement in this regard. Further, the Agency does not identify any specific contractual wording that required the Union to provide the Agency with information concerning the grievant's need for official time.

As part of its essence exception, the Agency also asserts that the Arbitrator's interpretation and application of the parties' agreement "undermines" and "fails to consider" management's right to assign work under § 7106(a)(2)(B) of the Statute.[39] When a party does not explain how an award is deficient, the Authority will deny the party's exception as unsupported.[40] The Agency's sole management-rights argument is that the award "excessively interferes with management's right to assign work" because the Agency "denied [the grievant's] request for official time" in order to "recover from the backlog."[41] Although the Agency identifies § 7106(a)(2)(B) and the Authority's decision in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Miami, Florida*,[42] the Agency neither explains how the award violates management's right to assign work nor cites any authority pertaining specifically to § 7106(a)(2)(B). Therefore, the Agency does not adequately support its argument that the award violates management's rights.[43]

Accordingly, we deny the Agency's essence exception.[44]

D. The Arbitrator was not biased.

The Agency claims that the Arbitrator was biased.[45] To establish bias, the excepting party must demonstrate that (1) the award was procured by improper means, (2) there was partiality or corruption on the arbitrator's part, or (3) the arbitrator engaged in misconduct that prejudiced the party's rights.[46] A party's assertion that an arbitrator's findings were adverse to that party, without more, does not demonstrate that an arbitrator was biased.[47]

The Agency maintains that "a reasonable person would conclude the Arbitrator was partial and biased" because the award does not appropriately consider "the lack of specificity in the [grievant's] official[-]time requests."[48] In the award, the Arbitrator found that the Agency, without identifying a particular right to information, could not limit the grievant to 25% official time based on a general allegation that the grievant's official-time requests lacked context.[49] As discussed above, we have denied the Agency's essence exception arguing that the Arbitrator erroneously interpreted Article 48 in making that finding. Because the Agency's disagreement with the Arbitrator's adverse contract interpretation does not establish that the Arbitrator was partial or corrupt, we deny the exception.[50]

V. Decision

We partially dismiss and partially deny the exceptions.

[38] *Id.* at 12.
[39] Exceptions Br. at 8 (citing 5 U.S.C. § 7106(a)(2)(B)).
[40] 5 C.F.R. § 2425.6(e)(1) (stating that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground" listed in § 2425.6(a)-(c)); *AFGE, Loc. 480, Council of Prison Locs. #33*, 73 FLRA 839, 840 (2024) (*Loc. 480*) (Chairman Grundmann concurring).
[41] Exceptions Br. at 9.
[42] 71 FLRA 1247 (2020) (Member DuBester dissenting).
[43] *See Loc. 480*, 73 FLRA at 840 (denying contrary-to-law exception as unsupported where excepting party argued that certain authorities required bargaining but "d[id] not explain how the [a]rbitrator[] . . . err[ed]" or "offer any rationale as to how those authorities" required bargaining); *AFGE, Loc. 153*, 73 FLRA 792, 793 (2024) (finding excepting party failed to support argument that award was contrary to § 7106(a) of the Statute because party "d[id] not explain how the award violate[d] that provision").
[44] *See Fed. Educ. Ass'n, Stateside Region*, 73 FLRA 32, 34 (2022) (denying essence exception that did not identify any contractual wording conflicting with arbitrator's findings).
[45] Exceptions Br. at 10.
[46] *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 498, 504 (*VA*), *recons. denied*, 73 FLRA 628 (2023).
[47] *Id.*
[48] Exceptions Br. at 10.
[49] Award at 9-10, 12.
[50] *See AFGE, Loc. 1012*, 73 FLRA 704, 706-07 (2023) (denying bias exception where excepting party disputed adverse contract interpretation raised in previously-denied essence exception); *VA*, 73 FLRA at 504 (finding excepting party did not establish bias by challenging arbitrator's adverse contract interpretations and conclusions).

Chairman Grundmann, concurring:

I agree with the decision in all respects. I write separately simply to note the following. Although the Agency relies on the Authority's decision in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Miami, Florida* (*FCI Miami*),[1] I have previously stated that I am open to revisiting *FCI Miami* in a future, appropriate case.[2] Nevertheless, for the reasons stated in the decision, I agree that the Agency's reliance on *FCI Miami* does not establish the Arbitrator's award is deficient.

Therefore, I concur.

[1] 71 FLRA 1247 (2020) (Member DuBester dissenting).

[2] *AFGE, Loc. 2382*, 73 FLRA 584, 587 (2023) (Concurring Opinion of Chairman Grundmann).