73 FLRA No. 63

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 11
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
JOINT BASE LANGLEY-EUSTIS
FORT EUSTIS, VIRGINIA
(Agency)

0-AR-5808

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DECISION

October 18, 2022

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and Susan Tsui Grundmann, Members

I. Statement of the Case

Arbitrator Richard R. Giacolone found that the Agency did not violate the parties' collective-bargaining agreement by awarding different pay increases to bargaining-unit and non-bargaining-unit employees. The Union filed exceptions challenging the award on essence and nonfact grounds. Because the Union does not demonstrate that the award is deficient on either ground, we deny the exceptions.

II. Background and Arbitrator's Award

As relevant here, the Union filed a grievance alleging that the Agency violated the parties' agreement by failing to award pay increases in a "fair and equitable manner."[1] Specifically, the Union asserted that the Agency awarded bargaining-unit employees (unit employees) a lesser increase than non-unit employees. The dispute proceeded to arbitration, where the parties stipulated the issues as whether "the Agency follow[ed] the terms of the [parties'] agreement in determining performance-based pay increases for covered bargaining[-]unit employees" and "[i]f not, what shall be the remedy?"[2]

The Arbitrator found that the Union "established" that, for at least six years, the Agency awarded unit employees 1% increases for satisfactory appraisals and 2% for outstanding appraisals, but awarded non-unit employees 2% and 4% increases for the same ratings, respectively.[3]

Article 2 of the parties' agreement defines an "employee" as a "bargaining[-]unit member described in Article 1."[4] Article 26 guarantees unit employees who receive an "outstanding" performance rating an increase of no less than 2% of their annual salary or gross income earned during the rating period, and guarantees those who receive a "satisfactory" rating an increase of no less than 1%.[5] Additionally, Article 6 provides that the Agency "agrees to treat all employees in a fair and equitable manner."[6]

The Arbitrator rejected the Union's argument that Article 6 means that the Agency was required to award unit and non-unit employees the same percentage of increases. On this point, the Arbitrator determined that Article 2's definition of employee means that the agreement only applies to unit employees. Further, the Arbitrator found that Article 26 "states clearly" that the Agency must award unit employees "who receive[d] a rating of outstanding . . . [no less than a] 2% pay increase and [no less than] 1% if rated satisfactory."[7]

The Arbitrator also rejected the Union's argument that the Agency violated the parties' agreement by treating the "no-less-than" language "as a ceiling and not a floor for awarding salary increases."[8] The Arbitrator found that the Agency awarded unit employees higher increases after the Union filed its grievance. However, the Arbitrator credited testimony from the Agency Director that the higher increases were temporary and were "directly attributed" to funding received from the Coronavirus Aid, Relief, and Economic Security Act[9] (CARES Act) "to reward employees for service to the Agency during the [COVID-19] pandemic."[10] Therefore,

[1] Award at 7.
[2] *Id.* at 2.
[3] *See id.* at 10.
[4] *Id.* at 5. In relevant part, Article 1 states that "[f]or the purposes of this Agreement the bargaining unit is described as follows: All Department of the Army NAF employees of Fort Eustis and Fort Story, Virginia, excluding employees under a Flexible appointment of ninety (90) days or less where there is no expectation of continued employment, management officials, supervisors, professional employees and employees described in 5 [U.S.C. §] 7112(b) (2), (3), (4), (6) and (7)." *Id.*
[5] *Id.* at 6-7.
[6] *Id.* at 6.
[7] *Id.* at 12.
[8] *Id.* at 12-13.
[9] Pub. L. No. 116-136, 134 Stat. 281 (2020).
[10] Award at 10, 13.

the Arbitrator found that the Union had not demonstrated that the Agency "failed to follow the terms of the [parties'] agreement in determining performance-based pay increases for covered . . . unit employees."[11] Consequently, the Arbitrator denied the grievance.

On April 26, 2022, the Union filed exceptions to the award. On May 27, 2022, the Agency filed an opposition to the Union's exceptions.[12]

III. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union argues that the award is based on nonfacts.[13] 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.[14] As relevant here, disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, does not establish that an award is based on a nonfact.[15]

First, the Union notes that the Arbitrator credited testimony that the Agency began awarding unit employees higher increases due to its receipt of the CARES Act funding, but contends that the Agency presented no evidence to support that testimony.[16] The Union's contention disagrees with the Arbitrator's evaluation of the evidence. Therefore, it does not provide a basis for finding the award is based on a nonfact.[17]

Second, the Union asserts that the Arbitrator erroneously found that unit employees' performance system "differed significantly" from non-unit employees' performance system.[18] The Union maintains that, while the Arbitrator does not appear to have relied on the differences between the performance systems to conclude that the Agency did not violate the agreement, "it is unclear what exactly the [A]rbitrator's decision and award is based on."[19] Although the Arbitrator discussed testimony regarding differences between the performance systems, the Arbitrator relied on provisions in the parties' agreement to resolve the issues[20] – and found that the pay increases were consistent with Article 26's requirements.[21] Therefore, the Union's argument does not demonstrate that a central fact underlying the award is clearly erroneous, but for which the Arbitrator would have reached a different result.[22]

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

The Union asserts that the award fails to draw its essence from the agreement because the Arbitrator "declin[ed] to apply the undisputed facts" that the Agency did not treat unit employees fairly and equitably as compared to non-unit employees, and improperly capped the pay increases available to unit members.[23] The Authority will find that an award fails to draw its essence from an 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

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[11] *Id.* at 13.

[12] On June 9, 2020, the Authority's Office of Case Intake and Publication issued an order directing the Agency to show cause why its opposition should not be dismissed as untimely because the Union served its exceptions on the Agency via email and first-class mail on April 26, 2022. *See* Order to Show Cause at 1-2 ("Assuming that the Agency consented to being served via email, any opposition had to be postmarked by the United States Postal Service, eFiled, or deposited with a commercial delivery service no later than May 26, 2022, in order to be timely filed.") (citing 5 C.F.R. §§ 2425.3, 2429.21, 2429.22, 2429.24(e), (f))). In its response to the Authority's Order, the Agency stated that it "had not [consented to] service by email" on April 26 and provided evidence to support its assertion. Resp. to Order to Show Cause (Resp.) at 2; Resp., Attach. at 1. Because the Agency had not agreed to email service, the service by first-class mail controls for the purpose of calculating the due date for the opposition. 5 C.F.R. §§ 2429.22(b); 2429.27(b)(6) (permitting service by email "only when the receiving party has agreed to be served by email"). Accordingly, the opposition was due on May 31, 2022 and we find it was timely filed. 5 C.F.R. § 2429.22(a)-(b) (allowing a party to add five days to the due date when served by first-class mail).

[13] Exceptions Br. at 11-13.

[14] *U.S. Dep't of HHS*, 73 FLRA 95, 96 (2022) (citing *U.S. Dep't of HHS, Food & Drug Admin., San Antonio, Tex.*, 72 FLRA 179, 179-80 (2021) (Chairman DuBester concurring)).

[15] *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 67, 69-70 (2022) (*VA Pershing*) (Member Kiko concurring on other grounds) (citing *Fed. Educ. Ass'n, Stateside Region*, 72 FLRA 724, 725 (2022); *Int'l Bhd. of Boilermakers, Loc. 290, Bremerton Metal Trades Council*, 72 FLRA 694, 696 (2022); *NTEU*, 69 FLRA 614, 619 (2016)).

[16] Exceptions Br. at 11-12.

[17] *AFGE, Loc. 2142*, 72 FLRA 764, 765-66 (2022) (*Local 2142*) (Chairman DuBester concurring).

[18] Exceptions Br. at 13.

[19] *Id.*

[20] *See* Award at 11 ("The key question to be addressed in this case is the interpretation of multiple sections of the Collective Bargaining Agreement.").

[21] *See id.* at 12-13.

[22] *See Local 2142*, 72 FLRA at 765-66; *see also U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1168 n.19 (2020) (then-Member DuBester concurring) (denying nonfact exception because challenges to an arbitrator's contractual interpretation do not provide a basis for finding the award deficient on nonfact grounds).

[23] Exceptions Br. at 9-11.

interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[24]

Here, the Arbitrator found that, because Article 2 defines employees as unit employees, Article 6 only applied to how the Agency treated unit employees.[25] The Arbitrator also found that the increases awarded to unit employees complied with the percentages established in Article 26.[26] These conclusions are consistent with the relevant provisions' wording. Therefore, the Union's argument does not demonstrate that the Arbitrator's interpretation of any of these provisions is irrational, unfounded, implausible, or in manifest disregard of the agreement.[27]

IV. Decision

We deny the Union's exceptions.

[24] *VA Pershing*, 73 FLRA at 69 (citing *SSA, Off. of the Gen. Couns.*, 72 FLRA 554, 555 (2021)).
[25] *See* Award at 12.
[26] *See id.*
[27] *Bremerton Metal Trades Council*, 73 FLRA 212, 214 (2022) (denying essence exception where arbitrator's interpretation was consistent with agreement's wording); *see also U.S. Dep't of the Treasury, IRS*, 61 FLRA 304, 306 (2005) (denying essence exception because arbitrator's interpretation that agreement applied to a particular group of employees was consistent with agreement's plain wording).