65 FLRA No. 103

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY
ADJUDICATION AND REVIEW
(Agency)

and

ASSOCIATION OF ADMINISTRATIVE
LAW JUDGES
JUDICIAL COUNCIL ONE
INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS
(Union)

0-AR-4572

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DECISION

January 31, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Andrée Y. McKissick filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator found that the Agency violated the parties' agreement by denying a Union representative's requests to receive travel authorizations identified as "no-cost travel orders" (NCTOs), and denying another Union representative's request for official time. For the reasons that follow, we set aside the award in part and deny the exceptions in part.

II. Background and Arbitrator's Award

This matter involves two grievances. In the first grievance, the Union alleged that the Agency violated the parties' agreement when it refused to issue a Union representative three NCTOs to travel on official time to represent Union members before the Merit Systems Protection Board. *See* Award at 2. In this connection, an NCTO is a type of travel authorization provided for by Article 9, Sidebar 2 of the parties' agreement.[1] Prior to its decision to end the practice, the Agency issued NCTOs to Union representatives for travel that was: (1) "on official time"; and (2) not paid for by the Agency. Award at 7. *See id.* at 9-10, 12, 16-17. *See also* Exceptions at 3 n.4, 8-9; Opp'n at 13-14; Opp'n, Attach. 2 at 19. Under Article 9, Sidebar 2, a Union representative who has received an NCTO is permitted to use his or her government "travel card," Award at 7, to book travel through the Agency's contracted travel agency and, thus, access discounted airfares that the U.S. General Services Administration (GSA) has negotiated with the airlines, also referred to as the GSA's "City Pair Program." Tr. at 225; Exceptions at 9, 12, 13 n.16, 14. *See* Award at 7, 17. *Cf.* Opp'n, Attach. 2, Union's Brief at 16 (Union's Brief).

In the second grievance, the Union alleged that the Agency violated the parties' agreement when it refused to: (1) grant another Union representative official time to attend a training seminar that was paid for by the Union and hosted by the Federal Mediation and Conciliation Service (FMCS); and (2) issue the representative an NCTO to attend the seminar. *See* Award at 2, 14-15. *See also* Exceptions, Attach. 5, Step Three Grievance at 7-9.

The grievances were unresolved and submitted to arbitration.[2] *See* Award at 2-3.

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1. Article 9, Sidebar 2 of the parties' agreement states, in pertinent part:

> To the extent not precluded by law and regulation, for those situations in which [Union] representatives who are also unit employees and are on official time are not authorized the payment of transportation expenses by [the Agency, the Agency] agrees to issue [NCTOs]. This provision is limited to [Union] representatives who have a government travel card and who use that card for full payment of affected transportation expenses. [NCTOs] issued pursuant to this provision will not be used for personal travel.

Opp'n, Attach. 1, parties' agreement at 39. *Accord* Award at 7.

2. The Arbitrator did not frame the issues before her, but noted each party's statement of the issues. *See* Award at 3.

With regard to the first grievance, the Arbitrator found that, in Article 9, Sidebar 2 of the parties' agreement, "'the Agency agree[d] to issue [NCTOs].'" *Id.* at 15. The Arbitrator rejected the Agency's argument that *NTEU*, 30 FLRA 690 (1987) (*NTEU*), precludes the Agency from issuing NCTOs. Award at 13. Specifically, the Arbitrator stated that the "expansive language and inclusion of representational activities of Article 9, Section 1" of the parties' agreement "significantly widens the scope of 'official time' and its parameters."[3] *Id.* at 15. Thus, "the [parties' agreement] and its definitions in this regard has superseded the narrow limitations" of *NTEU*. *Id.* Accordingly, the Arbitrator determined the Agency was required to comply with Article 9, Sidebar 2, and directed the Agency to "cease and desist the denial of [NCTOs] and comply with Article 9, Sidebar [2] of the [parties' agreement]." *Id.* at 15-17. Additionally, the Arbitrator "disagree[d]" with the Agency's claim that Article 9, Sidebar 2 conflicts with the "Federal Travel Regulations (FTR), the Agency's Administrative Instructions Manual System (AIMS)[, and] Smartpay[,]"[4] *id.* at 16, and "disagree[d]" with the Agency's argument that employees are "protected under the Office of Workers Compensation Program (OWCP) of the Federal Employee[]s['] Compensation Act or the Federal Torts Claims Act (FTCA) without the concurrence of a[n] NCTO[.]" *Id.* at 17.

With regard to the second grievance, the Arbitrator determined that Article 9, Section 1 of the parties' agreement defines "official time" as including "'representational activities.'" *Id.* at 13 (quoting Article 9, Section 1). *See* Opp'n, Attach. 1, parties' agreement (Agreement) at 24. The Arbitrator also determined that Union-sponsored training is a "representational activity[.]" *See id.* at 13-14. In this connection, the Arbitrator found it persuasive that "the [s]tandard [f]orms located in Article 9, Section 11" of the parties' agreement "specif[y] 'Union-Sponsored training."[5] *Id.* at 14. The Arbitrator determined that the FMCS seminar was "not specifically excluded from coverage" in the parties' agreement, and concluded that the training seminar that the Union representative attended "falls within the ambit of 'Union-Sponsored training.'" *Id.* at 14-15. Additionally, the Arbitrator considered a contract between the Agency and the American Federation of Government Employees (AFGE) (AFGE contract), which states that "'Union-Sponsored training is an appropriate representational activity for which official time may be used[.']" *Id.* at 14 (quoting AFGE contract). The Arbitrator stated that "both the [parties' agreement] and the [AFGE contract] are supportive of training for representational purposes" and that both are "supportive of representational work and the development of those skills." *Id.* Accordingly, the Arbitrator found that the Agency violated the parties' agreement by failing to grant the Union representative official time, and she directed the Agency to "reinstate[] . . . three . . . days annual leave" that the representative was forced to use in lieu of official time to attend the training seminar.[6] *Id.* at 17. *See also id.* at 2.

III. Positions of the Parties

A. Agency's Exceptions

With regard to NCTOs, the Agency contends that the award is contrary to the Authority's decision in *NTEU*, 30 FLRA 690, because requiring the Agency to issue NCTOs results in Union representatives having access to government discount airfares through the City Pair Program even when their travel is not paid for by U.S. government. *See* Exceptions at 9, 12. Additionally, the Agency argues that the award is contrary to several of the FTR because they require that travel booked through the City Pair Program be for employees on "official business" traveling at "government expense." *Id.*

3. Article 9, Section 1 of the parties' agreement states, as relevant here, that "the term 'official time' shall include the purposes set forth in 5 U.S.C. § 7131, as well as other representational activities[.]" Award at 4.

4. The Arbitrator did not cite a specific section of the FTR or the AIMS. In addition, although the Arbitrator did not define "Smartpay[,]" there is no dispute what "Smartpay" is a government charge card program administered by the GSA. *See* Exceptions at 9, 14-15; *id.*, Attach. 11; Opp'n at 12, 20; Union's Brief at 16 & n.5.

5. Article 9, Section 11 of the parties' agreement states: "It is understood that nothing in this agreement is intended to limit the statutory rights to official time provided pursuant to 5 U.S.C. § 7131 or any other statute or regulation." Agreement at 32.

6. The Arbitrator further found that this Union representative "should have been granted a[n] [NCTO] to Washington DC for that representational training." Award at 15. However, the Arbitrator did not issue a remedy with regard to the NCTO, because the Union "waive[d] the issuance of any retroactive [NCTOs]." *Id.* at 12.

(citing 41 C.F.R. § 300-1.1, 301-1.3, 301-10.106, 301-10.110; *NTEU*, 30 FLRA at 691).[7] Because the award would result in Union representatives booking travel through the City Pair Program that was not "at government expense," the Agency further claims that the award would cause it to violate the GSA's City Pair contract with the airlines.[8] *See id.* at 13 (citing Exceptions, Attach. 13). The Agency further argues that the award is contrary to law because: (1) Union representatives traveling pursuant to Article 9, Sidebar 2, do not meet the "official travel" requirement allegedly set forth in *NTEU*, Exceptions at 12; (2) it is contrary to the "GSA's Smart[p]ay policy on the use of government credit cards[,]" *id.* at 14-15; (3) it is contrary to "the FTR governing the use of the government credit card[,]" *id.* at15 (citing 41 C.F.R. § 301-51.7).[9] Moreover, the Agency contends that the award fails to draw its essence from the parties' agreement, *id.* at 21, is based on nonfacts, *id.* at 25, 28, and is deficient because the Arbitrator exceeded her authority, *id.* at 26-27.

With regard to official time, the Agency asserts that the award is contrary to management's rights under § 7106 of the Statute. *See id.* at 16-20. In this connection, the Agency quotes § 7106(b)(1) and asserts that the award fails to satisfy both prongs of the two-pronged test set forth in *United States Department of the Treasury, Bureau of Engraving & Printing, Washington, District of Columbia*, 53 FLRA 146, 151-54 (1997) (*BEP*).[10] *See* Exceptions at 17, 20. The Agency also alleges that the award fails to draw its essence from the parties' agreement because Article 9, Section 1 is "silent regarding the question of whether the Union's representational activities include the use of official time to attend third-party seminars." *Id.* at 22. Finally, the Agency claims that the Arbitrator was not authorized under the parties' agreement to consider the AFGE contract. *Id.* at 23.

B. Union's Opposition

The Union contends that the award is "consistent with . . . governing laws and regulations." Opp'n at 11. First, in response to the Agency's claim that use of the City Pair Program is limited to those traveling "at government expense[,]" the Union asserts that "although not traveling at government expense, the [U]nion representatives were on 'official government business' satisfying the requirement for use of the City Pair[] Program." *Id.* at 14. Moreover, the Union contends that travel under Article 9, Sidebar 2 constitutes "official government travel" and that Article 9, Sidebar is enforceable. *Id.* at 13 (citing *NTEU*, 21 FLRA 6 (1986)). Additionally, the Union argues that *NTEU*, 30 FLRA 690, is "distinguishable" because it pertained to the negotiability of a bargaining proposal, not an agreed-upon contract. Opp'n at 12.

Next, the Union contends that the award is not contrary to § 7106. *Id.* at 14. In this regard, the Union asserts that the Agency "does not claim that the [a]ward interferes with any right delineated in [§] 7106(a)." *Id.* at 15. As to the Agency's argument regarding the AFGE contract, the Union argues that the award is "clearly based on the parties' . . . agreement and not on any collateral document." *Id.* at 17. As to the Agency's claim that the award is based on nonfacts, the Union asserts that "all of the alleged [nonfacts] are related to matters that were disputed below." *Id.*

7. 41 C.F.R. § 300-1.1 states, in pertinent part, that the FTR "implement[] statutory requirements . . . for travel by Federal civilian employees and others authorized to travel at [g]overnment expense."

41 C.F.R. § 301-1.3 states, in pertinent part, that "[e]mployees on official business" are "eligible for TDY allowances[.]" We note, in this regard, that "TDY" means temporary duty location, a "place, away from an employee's official station, where the employee is authorized to travel." 41 C.F.R. § 300-3.1.

41 C.F.R. § 301-10.106 states, in pertinent part, that "[i]f you are a civilian employee . . . you must always use a contract city-pair fare for scheduled air passenger transportation service unless one of the limited exceptions in § 301-10.107 exist."

41 C.F.R. § 301-10.110 states, in pertinent part, that an employee may not use "contract passenger transportation service for personal travel[.]" *See also* 41 C.F.R. § 300-2.22 (chapter 301, subchapter B addresses employees).

8. We note that the record indicates that an NCTO issued pursuant to Article 9, Sidebar 2, generally results in a Union representative using the City Pair Program. *See* Award at 7, 17; Exceptions at 9, 13. *Cf.* Union's Brief at 16. *Accord* 41 C.F.R. § 301-10.106.

9. 41 C.F.R. § 301-51.7 states, in pertinent part, that an employee "may not use the [g]overnment contractor-issued travel charge card for personal reasons while on official travel."

10. The *BEP* analysis, which the Authority no longer applies, is discussed below.

IV. Analysis and Conclusions

A. The portion of the award regarding NCTOs is contrary to law, but the portion of the award regarding official time is not contrary to law.

When an exception involves an award's consistency with law the Authority reviews any question of law raised by the exception and the award de novo. *E.g.*, *AFGE, Local 3506*, 65 FLRA 30, 32 (2010). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.* In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *Id.*

1. NCTOs

The Authority has previously found that the City Pair Program "applies only to individuals who are engaged in official travel conducted *at [g]overnment expense*[,]" based on the wording of a formerly-effective regulation, FPMR A-30. *NTEU*, 30 FLRA at 691 (emphasis added). FPMR A-30 prescribed policies and procedures "govern[ing] the use of carriers under contract to GSA to provide specified transportation services to 'Federal employees and other persons authorized to travel at *[g]overnment expense.*'"[11] *Id.* at 692 (emphasis added). The wording in FPMR A-30 is substantively identical to the wording in the current FTR. In this regard, 41 C.F.R. § 300-1.1 states that the FTR "implement[] statutory requirements and Executive branch policies for travel by Federal civilian employees and others authorized to travel *at [g]overnment expense.*" 41 C.F.R. § 300-1.1 (emphasis added). *Accord* 41 C.F.R. § 300-3.1 (defining "[c]ontract carriers" as U.S. air carriers which are "under contract with the government to furnish Federal employees and other persons authorized to travel *at [g]overnment expense* with passenger transportation service") (emphasis added). Thus, consistent with the Authority's interpretation of substantively identical language in *NTEU*, the FTR indicate that the City Pair Program does not apply to travel that is not at government expense. As it is undisputed that the award results in Union representatives having access to the City Pair Program for travel that is not at government expense, *see* Exceptions at 3 n.4, 8-9; Opp'n at 13-14; Agreement at 39; Union's Brief at 19, the award is contrary to the FTR.[12]

We note that, although the Union cites *NTEU*, 30 FLRA 690, for the proposition that travel on official time may constitute official travel, *see* Opp'n at 12, and *NTEU* 21 FLRA 6, for the proposition that what constitutes "official government travel" is left to the discretion of the Agency, Opp'n at 13, neither decision demonstrates that a Union representative may access the City Pair Program for travel that is not at government expense. *See NTEU*, 30 FLRA at 691; *NTEU*, 21 FLRA at 6-12. In this connection, although the Union claims that an employee "satisf[ies] the requirement for use of the City Pair[] Program" if he or she is on "'official government business[,]'" Opp'n at 14, the Union cites no law, regulation, or precedent to support its assertion that a Union representative who is not traveling at government expense may nevertheless access the City Pair Program. *See id.* at 12-14. Additionally, while the Arbitrator stated that *NTEU*, 30 FLRA 690, had been "superseded" by the parties' agreement, Award at 15, there is no basis for finding that the agreement can "supersede" the requirement of the FTR that the City Pair Program applies only to individuals who are engaged in official travel conducted at government expense. *See* 41 C.F.R. § 300-1.1; *NTEU*, 30 FLRA at 691-93.

For the foregoing reasons, we find that the Arbitrator's direction that the Agency cease and desist issuing NCTOs pursuant to Article 9, Sidebar 2 is inconsistent with the FTR. Thus, we set aside the award with regard to NCTOs.[13]

11. FPMR A-30 stated, in pertinent part: "This regulation prescribes policies and procedures governing the use of U.S. certified carriers in furnishing [g]overnment employees and other persons authorized to travel at [g]overnment expense with scheduled airline/rail passenger service between selected U.S. and international cities/airports at reduced fares." 51 Fed. Reg. 40805 (Nov. 10, 1986) (then to be codified at 41 C.F.R. Chapter 101, subchapter A, appendix). *Accord NTEU*, 30 FLRA at 691 & n.1.

12. The Authority has held that the FTR are government-wide regulations. *See, e.g.*, *U.S. Dep't of Def. Dependents Sch., Arlington, Va.*, 52 FLRA 3, 7 (1996). Insofar as an arbitrator's award construes an agreement contrary to a government-wide regulation, the award is unenforceable. *See Soc. Sec. Admin., Office of Disability Adjudication & Review*, 64 FLRA 1000, 1002 n.5 (2010).

13. As we have found that the award is deficient on this ground, it is not necessary to address the Agency's remaining exceptions to the portion of the award that pertains to NCTOs.

2. Official Time

The Agency argues that the portion of the award regarding official time is contrary to management's rights. The Authority recently revised the analysis that it will apply when reviewing management-rights exceptions to arbitration awards. *See U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-07 (2010) (Chairman Pope concurring) (*FDIC*). Under the revised analysis, the Authority first assesses whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115. If so, then the Authority examines whether the award provides a remedy for a violation of either an applicable law, within the meaning of § 7106(a)(2) of the Statute, or a contract provision that was negotiated pursuant to § 7106(b) of the Statute. *Id.* Also under the revised analysis, in determining whether the award enforces a contract provision negotiated under § 7106(b)(3), the Authority assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and (2) if so, then whether the arbitrator's enforcement of the arrangement abrogates the exercise of the management right.[14] *See id.* at 118. In concluding that the Authority would apply an abrogation standard, the Authority rejected continued application of an excessive-interference standard. *Id.* at 113. In addition, in setting forth the revised analysis, the Authority rejected the continued application of the reconstruction requirement (i.e. the "second prong") set forth in *BEP*. *FDIC*, 65 FLRA at 106-07.

Here, although the Agency asserts that the award is contrary to management's rights, it does not cite a management right under § 7106(a). In addition, although the Agency quotes § 7106(b)(1) of the Statute, the Agency does not assert what right under § 7106(b)(1) is affected by the award. Accordingly, we deny the claim that the award affects management's rights as a bare assertion. *See U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 55 FLRA 553, 558 n.3 (1999) (rejecting unsupported management right argument as a bare assertion). Additionally, with regard to the Agency's claim that the award fails to satisfy the second prong of *BEP*, as stated above, the Authority no longer applies a reconstruction standard. *See FDIC*, 65 FLRA at 106-07. Thus the Agency's claim does not demonstrate that the award is deficient.

For the foregoing reasons, we deny the Agency's management rights exception.

B. The award regarding official time does not fail to draw its essence from the parties' agreement.

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 collective bargaining 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. *See U.S. Dep't of Labor* (*OSHA*), 34 FLRA 573, 575 (1990). The Authority and the courts defer to the arbitrator in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained[.]" *Id.* at 576. Additionally, when an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient in order to demonstrate that the award is deficient. *E.g., Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 892 (2010) (*Cuba Broad.*).

Here, as stated previously, the Arbitrator found that the parties' agreement grants official time for "representational activities," including Union-sponsored training. Award at 13 (quoting Article 9, Section 1 of the parties' agreement). The Arbitrator determined that representational activities includes training, in part because "[s]tandard [f]orms located in Article 9, Section 11" of the parties' agreement "specif[y] 'Union-Sponsored training.'" *Id.* at 14. Additionally, the Arbitrator noted that official time for training is "not specifically excluded from coverage," and further found that the third-party held training was "Union-sponsored" because the Union

14. For the reasons articulated in his recent concurring opinion and footnotes, Member Beck would conclude that it is unnecessary to assess whether the contract provision is an appropriate arrangement or whether it abrogates a § 7106(a) right. The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. *See EPA*, 65 FLRA at 120 (Concurring Opinion of Member Beck); *FDIC*, 65 FLRA at 107; *U.S. Dep't of the Air Force, Air Force Materiel Command*, 65 FLRA 395, 398 n.7 (2010); *U.S. Dep't of Health & Human Servs., Office of Medicare Hearings & Appeals*, 65 FLRA 175, 177 n.3 (2010); *U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 171, 173 n.5 (2010).

paid for the seminar. *Id.* These findings support the Arbitrator's conclusion that the Agency violated the parties' agreement when it refused to grant official time to the Union representative who attended the Union-sponsored training, and there is no basis for finding the Arbitrator's interpretation of the parties' agreement to be irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. With regard to the AFGE contract, the Arbitrator's interpretation of the parties' agreement is a separate and independent basis for the award. Thus, the Agency's claim that the Arbitrator's consideration of the AFGE contract is erroneous does not render the award deficient. *See Cuba Broad.*, 64 FLRA at 892-93.

Based on the foregoing, we deny this exception.

V. Decision

The portion of the award regarding NCTOs is set aside. The Agency's remaining exceptions are denied.