63 FLRA No. 176

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
(Union)

and

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

0-AR-4300

DECISION

August 13, 2009

Before the Authority: Carol Waller Pope, Chairman and Thomas M. Beck, Member

I. Statement of the Case

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

As relevant here, the Union filed a grievance arguing that the Agency violated the parties' agreement by failing to notify the Union before it changed conditions of employment by creating a task force and relocating several employees to different offices. For the reasons set forth below, we dismiss the Union's contrary to law exception as barred by § 2429.5 of the Authority's Regulations and deny the Union's remaining exceptions.

II. Background and Arbitrator's Award

The Agency is responsible for issuing decisions for claims of Social Security disability benefits. In this regard, Administrative Law Judges (ALJs) employed by the Agency adjudicate claims and issue decisions on the claims. The ALJs are assisted by staff attorneys and case technicians.

The Agency accumulated a substantial backlog of cases that were more than 1,000 days old, otherwise known as "aged" cases. Award at 15. As a result of this backlog, the Agency directed its Chief ALJ to quickly issue decisions for these cases. In response to this directive, the Chief ALJ created the Aged Task Force (Task Force). *Id.* The Task Force's goal was to issue decisions for aged cases within ninety days of the Task Force's creation. The Chief ALJ assigned himself, another ALJ, two staff attorneys, and two case technicians, who are also bargaining unit employees, to the Task Force. *Id.* Further, the Chief ALJ relocated the Task Force employees from the second floor of the Agency's building to the building's fourth floor for the duration of the Task Force. The case technician assigned to the Chief ALJ was assigned to the Chief ALJ prior to the creation of the Task Force; the other case technician was assigned to the second ALJ because that ALJ did not have a case technician. *Id.* at 16. Although the case technicians worked primarily on the aged cases, they were also expected to work on their other cases to the extent that was possible. *Id.* at 8. The remaining case technicians continued to work on their own cases, but also had to work on cases that the Task Force case technicians were unable to handle. *Id.* at 9, 11. The Chief ALJ disbanded the Task Force after the ninety day period ended.

The Union filed a grievance arguing that: (1) the creation of the Task Force was a "detail" assignment, as defined by Article 27, § 1 of the parties' agreement, because employees received new assignments and were relocated to a new duty station, and, as such, the Agency was required to follow certain procedures before it created the Task Force; and (2) the Agency violated Article 4 of the parties' agreement because it failed to notify the Union before it changed conditions of employment by creating the Task Force and relocating case technicians to different offices. [1] *Id.* at 3-4. The matter was unresolved and was submitted to arbitration. The Arbitrator framed the issue as: "[d]id the establishment of the [Task Force] . . . violate the provisions of Articles 3, 4, and 27 by setting up [the Task Force] without asking for volunteers to become part of [the Task Force], and was the work considered 'detail' work for the purposes of this assignment." *Id.* at 2.

The Arbitrator concluded that the Agency did not violate Article 4, § 1 of the parties' agreement because the creation of the Task Force did not change

1. Article 27, § 1, provides: "A detail is the temporary assignment of an employee to a different position or to the same position at a different duty station for a specific period, with the employee returning to his/her regular duties or duty station at the end of the detail." Award at 6. In addition, Article 4, § 1.A. provides, in pertinent part: "The [Agency] will provide the Union reasonable advance notice prior to implementation of changes affecting conditions of employment subject to bargaining under 5 U.S.C. 71." *Id.* at 5.

any conditions of employment. *Id.* at 17, 18-19. In this regard, the Arbitrator found that the creation of the Task Force did not change any conditions of employment; rather, it merely resulted in employees doing more of the same type of work. *Id.* at 17, 19.

The Arbitrator also concluded that the Agency did not violate Article 27, § 1. In this regard, the Arbitrator found that the Task Force was not a "detail" assignment because the clerical employees were not assigned to different positions. *Id.* at 17. The Arbitrator also found that these employees were not assigned to a different duty station, but were only relocated to different offices in the same building. *Id.* at 17-18. Based on the foregoing, the Arbitrator denied the grievance.

III. Positions of the Parties

A. Union's Exceptions

The Union claims that the Arbitrator's conclusion that the Agency was not required to notify the Union prior to the creation of the Task Force because the Agency did not change any conditions of employment is contrary to law and fails to draw its essence from the parties' agreement. In this regard, the Union alleges that, under § 7113(b) of the Statute and Article 4, § 1.A. of the parties' agreement, the Agency is required to notify the Union before it changes conditions of employment. [2] Exceptions at 4-5. The Union asserts that the Agency changed conditions of employment for case technicians by creating the Task Force and relocating technicians to different offices. *Id.* at 6. As such, the Union contends that the Agency was legally and contractually required to provide the Union with notice. [3]

B. Agency's Opposition

The Agency contends that the Union's exceptions should be denied because they are nothing more than an attempt to relitigate the issues that were presented to the Arbitrator. Opposition at 2-3.

IV. Preliminary Issue

The Union argues that the Arbitrator's conclusion that Agency was not required to provide the Union with notice is contrary to § 7113(b) of the Statute. Under 5 C.F.R. § 2429.5, an issue that could have been, but was not, presented before an arbitrator will not be considered by the Authority. *See, e.g., United States DHS, United States Customs & Border Prot., JFK Airport, N.Y, N.Y.,* 62 FLRA 416, 417 (2008). There is no indication in the record that the Union raised its claim that the Agency violated § 7113(b) before the Arbitrator. In this regard, the Union's grievance alleges only that the Agency violated provisions of the parties' agreement. *See* Award at 2-4. In addition, in its post-hearing brief, the Union argued only that the Agency's decision to create the Task Force violated the parties' agreement. *See* Opposition, Union's Post-Hearing Brief at 5-7; *see also id.* at 2 (Union stated that the issue for resolution was whether the Agency violated the parties' agreement). Accordingly, as the foregoing establishes that the Union did not raise its claim concerning § 7113(b) before the Arbitrator, we dismiss the Union's contrary to law claim as barred by § 2429.5 of the Authority's Regulations.

V. The award does not fail to draw its essence from the parties' agreement.

In 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. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). 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 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 United States Dep't of Labor* (*OSHA*), 34 FLRA 573, 575 (1990). The Authority and the courts defer to

2. Under § 7113(b) of the Statute, any union that has "national consultation rights" with an agency must be informed of any proposed "substantive change in conditions of employment" and must also be given an opportunity to "present its views and recommendations" regarding the substantive changes. 5 U.S.C. § 7113(b)(1)(A) and (B); *Nat'l Guard Bureau,* 57 FLRA 240, 243 (2001).

3. The Union also argues that the Arbitrator exceeded his authority, but does not support this contention. *See* Exceptions at 8. As such, we reject this claim as a bare assertion. *See, e.g., SSA, Balt., Md.,* 57 FLRA 690, 694 n.9 (2002) (dismissing unsupported claim that arbitrator exceeded his authority as a bare assertion). In addition, the Union asserts that the Arbitrator's conclusion that the Agency did not change a condition of employment lacks "analysis" and is therefore based on a nonfact. Exceptions at 9. The Union's assertion does not challenge a factual finding; rather, it challenges the Arbitrator's legal conclusion based on his interpretation of the evidence. Accordingly, we find that it does not provide a basis for finding that the award is based on a nonfact. *See, e.g., AFGE, Nat'l Border Patrol Council, Local 2455,* 62 FLRA 37, 40 (2007) (Authority denied nonfact exception that only challenged arbitrator's legal conclusion).

arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id*. at 576.

The Union contends that the Arbitrator erred in concluding that the creation of the Task Force did not constitute a change in conditions of employment that required notification to the Union under Article 4, § 1.A. of the parties' agreement. Article 4, § 1.A., a contractual notice provision, states, in relevant part, that the Agency "will provide the Union with reasonable advance notice prior to implementation of changes affecting conditions of employment subject to . . . 5 U.S.C. 71." Award at 5. The Arbitrator concluded that the creation of the Task Force did not constitute a change in conditions of employment, and, as such, the Agency did not violate Article 4, § 1.A. *Id.* at 17. The Union has not indentified any language in the parties' agreement that defines the term "changes affecting conditions of employment." *Id.* at 5. Further, nothing else in the parties' agreement or the record establishes that the Arbitrator was required to find, as a matter of contractual interpretation, that the creation of the Task Force and the relocation of employees to a different floor constituted a change in conditions of employment. As such, the Union has failed to demonstrate that the Arbitrator's interpretation of Article 4, § 1.A. manifests a disregard of the agreement or is implausible, irrational, or unfounded. Accordingly, we find that the Union's exception provides no basis for finding that the Arbitrator's award fails to draw its essence from the parties' agreement, and deny the exception. *See AFGE, Local 2328,* 61 FLRA 510, 512 (2006) (Chairman Cabaniss concurring in part) (as parties' agreement did not define term "chang[es] [in] conditions of employment," award did not fail to draw its essence from the agreement where arbitrator concluded that union was not entitled to notice over the creation of an optional compressed work schedule because it did not change a condition of employment).

VI. Decision

We dismiss the Union's contrary to law exception as barred by § 2429.5 of the Authority's Regulations and deny the Union's remaining exceptions.