64 FLRA No. 50

SOCIAL SECURITY ADMINISTRATION
SOUTHEASTERN PROGRAM
SERVICE CENTER
BIRMINGHAM, ALABAMA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2206
(Union)

0-AR-4200

DECISION

December 18, 2009

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 Harold G. Wren 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 restored to the grievant 8 ¼ credit hours which had been forfeited. For the reasons set forth below, we dismiss the Agency's contrary to law exception and deny the remaining exceptions.

II. Background and Arbitrator's Award

The grievant was granted official time for several days during a pay period. At the end of that pay period, the grievant had accumulated 32 ¼ credit hours. The Agency, based on the parties' agreement, permitted the grievant to carry over only 24 hours. [1] As a result, the additional 8 ¼ credit hours were forfeited. A grievance was filed and subsequently submitted to arbitration, where the Arbitrator framed the issue as follows: "Is [the] [g]rievant . . . entitled to have 8 ¼ credit hours reinstated." Award at 5.

The Arbitrator found that the requirement that the grievant forfeit credit hours "presupposes that there has been an accurate accounting for the accrual of all credit hours." *Id.* at 7. In this regard, the Arbitrator rejected the Agency's argument that it was the grievant's responsibility to keep track of her credit hours. According to the Arbitrator, "[t]he Agency itself is responsible for maintaining an accurate record" of credit hours and the grievant was responsible only for "checking on management's calculations." *Id.* Also according to the Arbitrator, the grievant fulfilled her responsibility and "pleaded with management to correct its records, but without success." *Id.* As such, the Arbitrator concluded that the Agency was required to restore the credit hours "to promote justice and fairness." *Id.* at 8.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is contrary to 5 U.S.C. §§ 6121, 6123(b), and 6126(a) [2] because those provisions: (1) do not permit the carry over of any hours in excess of 24 from one pay period to the next; and (2) prohibit the Agency from restoring forfeited hours.

The Agency also contends that the award is based on a nonfact because, according to the Agency, the Arbitrator based his decision on an assumption, but not a finding, that there had been an inaccurate accounting of the grievant's credit hours. Exceptions at 15. According to the Agency, there was an error — which was corrected — in the subsequent pay period, but not in the pay period in dispute. *Id.* at 15 n.1. The Agency also claims that the Arbitrator made numerous misstatements regarding testimony. *Id.* at 5.

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1. Article 10, Appendix F, Section 2.B.5 provides:

> Employees may accrue credit hours so that the total exceeds the 24 hour maximum limit every other week. However, the hours in excess of 24 must be requested and used prior to the end of the pay period. A full-time employee may carry over from one pay period to the next a maximum of 24 credit hours, regardless of when they were earned, without risk of forfeiture.

Exceptions, Attachment 2.

2. Section 6121(4) provides, in pertinent part: "'credit hours' means any hours . . . which are in excess of an employee's basic work requirement and which the employee elects to work so as to vary the length of a workweek or a workday[.]" Section 6123(b) provides, in pertinent part: "an employee shall not be entitled to be compensated for credit hours worked except to the extent authorized under section 6126 of this title[.]" Section 6126(a) provides, in pertinent part: "Subject to any limitation prescribed by the Office of Personnel Management or the agency, a full-time employee on a flexible schedule can accumulate not more than 24 credit hours . . . for carryover from a biweekly pay period to a succeeding biweekly pay period for credit to the basic work requirement for such period."

Finally, according to the Agency, the award fails to draw its essence from Article 10, Appendix F of the parties' agreement. The Agency contends that, under the agreement, the maximum number of credit hours that may be carried over is 24.

B. Union's Opposition

The Union contends that the Authority may not consider the Agency's arguments regarding 5 U.S.C. §§ 6121; 6123(b) or 6126(a) because those arguments were not raised before the Arbitrator.

In response to the Agency's nonfact exception, the Union contends that there was no evidence or testimony that the grievant's credit hour balance was correct at the beginning of the pay period in question. The Union also contends that the Arbitrator did not misstate testimony. *See* Opposition at 3. Moreover, according to the Union, the Arbitrator correctly concluded that the Agency was responsible for keeping accurate records of the grievant's credit hours.

IV. Analysis and Conclusions

A. Section 2429.5 precludes consideration of the contrary to law exception.

Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues or evidence that could have been, but were "not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5. The Union claims that the Agency's arguments that the Arbitrator's award is contrary to §§ 6121, 6123(b), and 6126(a) are barred by § 2429.5.

There is no evidence in the award or the record that the Agency ever argued to the Arbitrator that the requested remedy would violate §§ 6126(a), 6123(b), and 6121. As the basis of the grievance was the grievant's claim that the forfeited credit hours should be restored, such an argument could and should have been made to the Arbitrator. As it was not, we find that consideration of the Agency's contrary to law claims is barred by § 2429.5 of the Authority's Regulations. *See, e.g., U.S. Dep't of the Treasury, Internal Revenue Serv., Kansas City Field Compliance Serv.*, 60 FLRA 401, 403 (2004) (Authority did not consider the agency's contrary to law claim where the agency could have, but did not, raise the claim below).

Accordingly, we dismiss the Agency's contrary to law claim.

B. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, 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. *See id.* In addition, an arbitrator's conclusion that is based on an interpretation of the parties' collective bargaining agreement does not constitute a fact that can be challenged as a nonfact. *See NLRB*, 50 FLRA 88, 92 (1995).

The Agency contends that the award is based on nonfact because the Arbitrator: (1) misstated testimony; and (2) "apparently based his assessment on the erroneous belief that the Agency had made an error . . . even though he made no finding that any error occurred." Exceptions at 15. With respect to the first contention, the Agency makes no claim that the alleged misstatements concerned central facts that were clearly erroneous. With respect to the second contention, the Agency concedes that the Arbitrator did not find that the Agency committed an error. *Id*. In these circumstances, we find that the Agency has not established that the award is deficient. *See Soc. Sec. Admin., Huntington Park Dist. Office, Huntington Park, Cal.*, 63 FLRA 391, 392 (2009).

Accordingly, we deny the exception.

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

The Agency contends that the award fails to draw its essence from Article 10, Appendix F, Section 2.B.5 of 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 U.S. Dep't of Labor (*OSHA*), 34 FLRA 573, 575 (1990). 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." *Id*. at 576.

The parties' agreement provides that "[a] full-time employee may carry over from one pay period to the next a maximum of 24 credit hours, regardless of when they were earned, without risk of forfeiture." Article 10, Appendix F, Section 2.B.5. The Agency claims that the award is inconsistent with this provision.

The Arbitrator found that the grievant was entitled to restoration of her credit hours because "[t]he Agency, and not the Union or [g]rievant," had the primary responsibility of keeping accurate records. Award at 8. According to the Arbitrator, the Agency was required to restore the credit hours "to promote justice and fairness." *Id.* The parties' agreement provides that employees may carry over a maximum of 24 credit hours without "risk" of forfeiture. Article 10, Appendix F, Section 2.B.5. Thus, the plain wording of the provision does not require forfeiture in all cases. More importantly, the contract is silent with respect to restoration of credit hours deemed necessary by an arbitrator as a remedy. In this regard, the Authority previously rejected an agency's claim that 5 U.S.C. § 6126, which contains wording similar to the parties' agreement,[3] precluded an arbitrator from awarding a grievant credit hours in excess of the number that otherwise can be accrued. *U.S. Dep't of Housing & Urban Dev., Grand Rapids, Mich.*, 55 FLRA 219, 220 (1999). The Authority stated that "[s]ection 6126 contains no limit on what an *arbitrator* can do to remedy an unjustified or unwarranted personnel action." *Id*. (emphasis in original). Likewise, in this case, the parties' agreement does not expressly limit arbitral remedial authority. In these circumstances, we find that the Agency has not demonstrated that the award is implausible or otherwise fails to draw its essence from the agreement. *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 63 FLRA 237, 240 (2009).

For the above-stated reasons, we deny the exception.

V. Decision

We dismiss the Agency's contrary to law exception and deny the remaining exceptions.

3. *See* n.2, *supra*.