65 FLRA No. 12

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1102
(Union)

and
UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL DETENTION CENTER
SEATAC, WASHINGTON
(Agency)

0-AR-4599

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DECISION

August 31, 2010

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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 Vern E. Hauck 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.

The Arbitrator concluded that: (1) the Agency was exempt from certain Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) regulations; (2) the Agency's storage of explosive material at the Federal Detention Center SeaTac Armory (FDC SeaTac Armory) did not violate Article 27 of the Master Labor Agreement (Agreement); and (3) one grievant was entitled to a hazard pay differential. For the reasons set forth below, the Union's exceptions are dismissed in part and denied in part.

II. Background and Arbitrator's Award

The grievants work at the FDC SeaTac Armory located in Seattle, Washington. *See* Award at 4; *see also* Exceptions at 2. Two of the three grievants work as full-time Lock and Security Specialists; the other grievant works only part-time in that position when the full-time Lock and Security Specialists are unavailable or need assistance. Award at 4, 15. Lock and Security Specialists maintain "the armory where institution weapons and ammunition are stored" and are required to know how to use "emergency entry equipment, riot control equipment, chemical munitions, and all Special Operations Response Team (SORT) equipment . . . ."[1] *Id.* at 16. The position involves a high "level of risk for hazardous and stressful working conditions . . . ." *Id.*

The Union filed a grievance alleging, among other things, that employees working in the Armory should receive a 25% hazard pay differential for storing explosives. *See id.* at 3. After the Agency denied the Union's grievance, the Union invoked arbitration. *Id.* The Arbitrator framed the following relevant issues:

> 1. Were the grievants entitled to be paid a hazard pay differential for working with or in close proximity to explosive material in accordance with applicable law and the [Agreement]? If so, what shall be the remedy?
>
> 2. Has the Agency failed to follow Article 27 of the [Agreement] in the storage of explosive material at the FDC SeaTac Armory? If so, what shall be the remedy?

Id.

The Arbitrator determined that the Armory room, magazines, and bins were constructed in conformance with applicable law and regulations pursuant to Articles 6 and 27 of the Agreement.[2] *Id.* at 14. According to the Arbitrator, of the "few violations of construction codes and magazine storage capability that . . . exist at the Armory[,]" all were *de minimis* and "some of these possible violations [were] attributable to code and regulation changes post Armory room, magazine and bin construction and installation." *Id.* The Arbitrator also found that, based on 27 C.F.R. § 555.141, the

1. "Weapons include rifles, carbines, stun guns, less lethal munitions, pistols, riot shotguns, gas guns, ammunition for these weapons, chemical agents, riot equipment and protective gear." Award at 16.

2. The relevant provisions of the Agreement are set forth in the appendix to this decision.

Agency was exempt from ATF regulations relating to explosives.[3] *Id.* at 15.

The Arbitrator found that the grievants who were full-time Lock and Security Specialists were not entitled to a hazard pay differential. *Id.* at 16-17. The Arbitrator noted that "the Agency has properly included an adjustment for hazardous duty in the wage rate paid to [these individuals] pursuant to the Major Duties and Responsibilities, Factor 1 and Factor 9 of the grievant's [sic] position descriptions and GS-10 wage rate." *Id.* Moreover, the Arbitrator determined that these grievants had been trained to perform hazardous duties in the FDC SeaTac Armory. *Id.* at 17. However, the Arbitrator found that the grievant who was a part-time Lock and Security Specialist was entitled to a hazard pay differential because the position description and wage rate classification of his full-time position did not adequately compensate him for the hazardous duty work that he performed as an alternate Lock and Security Specialist. *Id.*

III. Positions of the Parties

A. Union's Exceptions

First, the Union alleges that the award is contrary to law because the Arbitrator determined that certain ATF regulations did not apply to the Armory. Exceptions at 5-7. The Union claims that, in finding that the Agency is exempt from the ATF regulations, "the arbitrator fail[ed] to recognize that [the] ATF regulations are specifically applicable to the Agency through application of the Occupational Safety and Health Act – as administered by the US Department of Labor (OSHA)." *Id.* at 7.

Second, the Union alleges that the award is contrary to the Agreement. *Id.* The Union claims that, by "improvising a '*de minim[i]s*' standard by which ATF regulations can be violated, [the award] has clearly run afoul of the [Agreement's] requirement [in Article 27, Section a] that the Agency 'lower . . . inherent hazards to the lowest possible level.'" *Id.* Moreover, the Union contends that, even if the ATF regulations do not apply, the Agency has violated this contractual duty "[b]y having no policies in place regarding the storage of firearms; providing no training on the storage and handling of explosive material; and by not even implementing minimum standards of safe storage as promulgated by ATF . . . ." *Id.* at 7-8.

Third, the Union alleges that the Arbitrator's failure to award a hazard pay differential is based on a nonfact because the Arbitrator incorrectly found that the disputed hazardous duties were taken into account in the classification of the grievants' position. *Id.* at 13-14. The Union contends that it introduced sufficient evidence and testimony at arbitration demonstrating that the disputed hazardous duties were not considered when the grievants' position was classified; according to the Union, the position description does not mention the performance of certain hazardous duties, and testimony demonstrates that the classifiers could not have considered the performance of certain hazardous duties in classifying the grievants' position. *Id.* (citing Tr. at 254, 260).

Finally, the Union argues that the award is contrary to law because, if the classification of the Lock and Security Specialist position does not account for the hazardous duties performed by the grievants, then all of the requirements entitling them to a hazard pay differential are met. *See id.* at 9-14.

B. Agency's Opposition

First, the Agency argues that the award is not contrary to law. Opp'n at 3-5. The Agency contends that the OSHA regulation cited by the Union does not cover the Agency because "part 1926 of 29 CFR applies to the Safety and Health Regulations for *Construction* [and] . . . 29 CFR 1926.904(a) falls under 1926 Subpart U-Blasting and the Use of Explosives." *Id.* at 4. Moreover, the Agency argues that, because the Union failed to raise, before the Arbitrator, its argument that the ATF regulations apply to the Agency through OSHA, it is barred from doing so now. *Id.* at 5.

Second, the Agency argues that the award is in accordance with the Agreement. *Id.* at 5-7. The Agency contends that "the Arbitrator found that the Armory room, magazines and bins [were] constructed in conformance with all relevant law and regulations pursuant to Article 6 and 27 of the labor agreement." *Id.* at 7. The Agency argues that the Arbitrator's finding that a few *de minimis* violations of construction codes and magazine storage capability exist at the FDC SeaTac Armory does not undermine the Arbitrator's conclusion that the Armory, magazines, and bins were constructed in accordance with the Agreement. *Id.* According to the Agency,

3. 27 C.F.R. § 555.141(a)(6) states that "[a]rsenals, navy yards, depots, or other establishments owned by, or operated by or on behalf of, the United States" are exempt from part 555.

"the Arbitrator has done nothing more than interpret the parties' agreement in a rational and reasonable way, which is exactly what the parties enlisted him to do." *Id.*

Third, the Agency argues that the award is not based on a nonfact. *Id.* at 7-9. The Agency contends that, while the Arbitrator may not have made any specific findings regarding whether "the Lock and Security Specialist's exposure to explosive munitions was considered when the position was classified[,]" the Arbitrator did find that "the Agency properly considered, took into account and adjusted the wage rate to reflect the hazards faced by the occupants of the job explained in the [Lock and Security Specialist] Position Description in the Armory." *Id.* at 8. The Agency argues that, for the Union to prove that the Arbitrator's award is based on a nonfact, it must specifically show a clearly erroneous mistake involving a central fact, rather than merely dispute the Arbitrator's findings. *Id.* at 8-9.

IV. Analysis and Conclusions

A. The Union's exception alleging that ATF regulations apply to the Agency through OSHA is dismissed.

Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, presented to the arbitrator. *See, e.g., U.S. DHS, U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 64 FLRA 841, 843 (2010) (finding § 2429.5 barred arguments that the arbitrator's remedy was contrary to law because arguments could have been, but were not, presented to the arbitrator). However, where an issue arises from the issuance of the award and could not have been presented to the arbitrator, it is not precluded by § 2429.5. *U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 57 FLRA 4, 5 (2001).

The Union raises a new issue -- that the ATF regulations apply to the Agency through OSHA -- for the first time in its exceptions. There is no indication in the record that the Union ever mentioned OSHA, or any regulation promulgated pursuant to it, during arbitration, although the Union could have done so. Accordingly, we find that § 2429.5 bars the Union's exception, and we dismiss the exception.

B. The award does not fail to draw its essence from the 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 Union contends that the award fails to draw its essence from the Agreement because it conflicts with Article 27, Section a of the Agreement, which requires the Agency to lower certain inherent hazards to the lowest possible level. Exceptions at 7-8. The Union argues that "in improvising a '*de minim[i]s*' standard by which ATF regulations can be violated," the Arbitrator "has clearly run afoul" of this requirement. *Id.* at 7.

Contrary to the Union's argument, it is not implausible or irrational to interpret Article 27, section a as permitting *de minimis* violations of regulations that the Arbitrator found do not even apply to the Agency. Further, in making this argument, the Union ignores that, in this same provision of the Agreement, it agreed that the hazards at issue "can never be completely eliminated." *Id.* at 5. Thus, the provision itself, when read as a whole, clearly contemplates the existence of some inherent hazards. Therefore, the Union has not demonstrated that the Arbitrator's interpretation of the Agreement is irrational, implausible, unfounded, or in manifest disregard of the Agreement. *See U.S. Dep't of Transp., FAA*, 63 FLRA 15, 18 (2008).

Accordingly, we deny the Union's exception.

C. The award of a hazard pay differential 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.*; *see also U.S. Dep't of the Navy, Naval Explosive Ordinance Disposal Tech. Div., Indian Head, Md.*, 56 FLRA 280, 286 (2000) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 594 (1993)). In addition, the Authority has long held that disagreement with an arbitrator's evaluation of evidence and testimony, including the determination of the weight to be accorded such evidence, provides no basis for finding the award deficient. *See U.S. Dep't of Veterans Affairs, Med. Ctr., Richmond, Va.*, 63 FLRA 553, 556 (2009); *AFGE, Local 3295*, 51 FLRA 27, 32 (1995).

The Hazardous Duty Act, codified at 5 U.S.C. § 5545, authorizes the payment of hazard pay differentials to employees who perform hazardous duties. *NTEU, Chapter 51*, 40 FLRA 614, 621 (1991). Before an Arbitrator may award hazardous duty pay, a union must establish that "(1) [t]he hazard or physical hardship [is] not . . . considered in the classification of the employee's position pursuant to 5 U.S.C. § 5545(d)[;] (2) [t]he hazard or physical hardship [is] . . . listed in Appendix A to 5 C.F.R. Part 500[; and] (3) [the grievant is] . . . performing a hazardous duty within the definition of 5 C.F.R. 550.902." *U.S. Dep't of the Army, Alaska*, 54 FLRA 1117, 1122 (1998).

The Union argues that the award is based on a nonfact because the Arbitrator found, as a matter of fact, that the disputed hazardous duties were taken into account in the classification of the grievants' position. Exceptions at 13-14. As the Union itself concedes, this issue was disputed before the Arbitrator. *Id.* at 13 (acknowledging that at arbitration "the Agency argued that the Lock and Security Specialist's exposure to explosive munitions was considered when the position was classified"); *see also* Award at 16 (finding that the parties were "in disagreement about whether or not the hazards faced by the grievants working in the Armory [were] properly considered when the positions occupied by the grievants were classified and wage rates established"). Consequently, the Union's contention does not provide a basis for establishing that the award is based on a nonfact. *See U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Dahlgren, Va.*, 44 FLRA 1118, 1122-23 (1992) (finding that the agency failed to establish that the award was based on a nonfact when it alleged that the arbitrator incorrectly determined that the performance of certain hazardous duties were not taken into account in the classification of the grievants' positions); *see also AFGE, Local 376*, 62 FLRA 138, 141 (2007) (Chairman Cabaniss concurring).

Accordingly, we deny the Union's exception.[4]

V. Decision

The Union's exceptions are dismissed in part and denied in part.

4. Based on this finding, we find it unnecessary to address the Union's contention that the award is contrary to law because it failed to award the grievants who were full-time Lock and Security Specialists a hazard pay differential.

APPENDIX

Article 6 -- Rights of the Employee

> Section a. Each employee shall have the right to form, join, or assist a labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right . . . .
>
> Section b. The parties agree that there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights provided for in this Agreement and any other applicable laws, rules, and regulations, including the right: . . . to be treated fairly and equitably in all aspects of personnel management . . . .

Article 27 – Health and Safety

> Section a. There are essentially two (2) distinct areas of concern regarding the safety and health of employees in the Federal Bureau of Prisons:
>
> 1. the first, which affects the safety and well-being of employees, involves the inherent hazards of a correctional environment; and
>
> 2. the second, which affects the safety and health of employees, involves the inherent hazards associated with the normal industrial operations found throughout the Federal Bureau of Prisons.
>
> With respect to the first, the Employer agrees to lower those inherent hazards to the lowest possible level, without relinquishing its rights under 5 USC 7106. The Union recognizes that by the very nature of the duties associated with supervising and controlling inmates, these hazards can never be completely eliminated.
>
> With respect to the second, the Employer agrees to furnish to employees places and conditions of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm, in accordance with all applicable federal laws, standards, codes, regulations, and executive orders.

Exceptions, Jt. Ex. 2 at 10, 63.