65 FLRA No. 45

INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS
LOCAL 77
PROFESSIONAL AND SCIENTISTS
ORGANIZATION
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
FLEET READINESS CENTER SOUTHWEST
(Agency)

0-AR-4613

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DECISION

October 29, 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 Kenneth A. Perea 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.[1]

The Arbitrator found that the Agency did not violate the parties' agreement when it required employees to use annual leave or leave without pay during a holiday shutdown. For the following reasons, we dismiss the Union's exceptions in part and deny them in part.

II. Background and Arbitrator's Award

The Agency proposed a temporary shutdown of its entire facility during the winter holidays, allegedly to reduce costs and production inefficiencies. Award at 2-3. The Agency assembled a team of various representatives to deliberate and make a recommendation regarding the proposal, but did not include the Union's president. *Id.* Shortly thereafter, the Agency ordered the shutdown, requiring employees to take annual leave or leave without pay during this period. *Id.* at 3-4.

The Union filed a grievance alleging that the Agency violated the parties' agreement by: (1) failing to demonstrate the necessity of the shutdown for productivity- improvement reasons; (2) denying the Union an opportunity to negotiate implementation of the shutdown; and (3) treating bargaining-unit members inequitably and unfairly by directing the shutdown. *Id.* at 4. The grievance was unresolved and submitted to arbitration. *Id.* at 5.

In his award, the Arbitrator framed the issues as:

> (1) Whether [the] Agency's action ordering [the facility] to cease operations and therefore require all members of the bargaining unit represented by the Union to utilize annual leave or take leave-without-pay . . . [was] in violation of Article 19 of the Agreement; and (2) If the answer to Issue No. 1 above is in the affirmative, what shall be the appropriate remedy?

Id. at 2.

As an initial matter, the Arbitrator found that the Union's parent organization participated in pre-shutdown discussions regarding the proposed shutdown. *Id.* at 3. In addition, he determined that Article 19, Section 5 of the parties' agreement provides that the Agency retains the right to shut down "the facility" for the "expressed and limited reasons[]" in that provision, including "productivity improvement," but does not permit the Agency to shut down only a *portion* of the facility.[2] *Id.* at 11.

1. In addition, the parties filed several supplemental submissions, which are discussed further below.

2. Article 19, Section 5 of the parties' agreement provides, in pertinent part:

> The [Agency] retains the right to order the facility to shut down for reasons such as emergencies, fiscal crises or productivity improvement, and to require employees to use annual leave during these shutdown periods . . . . Employees with inadequate annual leave to cover a shutdown period may elect to take leave-without-pay or to be detailed to a work assignment defined by the [Agency], if possible. The [Union] will be given the opportunity to negotiate the implementation of the shutdown.

Award at 6.

Therefore, he found that determining whether the shutdown was justified "must be examined on a facility-wide basis[.]" *Id.* at 11-12. Crediting testimony indicating that "61% percent of the Agency's workforce was absent during the . . . holidays before the Agency commenced implementing holiday shutdowns in 2005[,]" the Arbitrator found that "[i]t cannot be doubted that when such a large percentage of the workforce is absent from the facility during [the winter holidays], production is reduced significantly." *Id.* at 11. The Arbitrator acknowledged that individual bargaining-unit employees may not be less productive during that time, but determined that "total producti[vity] of the facility would be impacted were it to remain open during [the] holiday period." *Id.* Consequently, he found that "the facility shutdown . . . was necessary in the interest of 'productivity improvement'" because "[p]roductivity measured on an annual basis is . . . improved when the facility remains closed during the less productive holiday period[.]" *Id.* at 11-12. Thus, he found that the Agency did not violate the agreement by conducting the shutdown, and he denied the grievance. *Id.* at 12.

III. Positions of the Parties

A. Union's Exceptions

The Union claims that the Arbitrator should have found that the Agency committed an unfair labor practice (ULP) and violated Article 19, Section 5 of the agreement "[b]ased on the Agency's failure to bargain in good faith with the Union regarding the implementation of the 'shutdown[.]'" Exceptions at 4. The Union further claims that the Arbitrator's finding that the Agency could shut down the facility only for the "expressed and limited reasons" in the agreement would violate management's rights under § 7016(a) of the Statute to direct its mission and budget. *Id.* at 5.

In addition, the Union contends that the award is based on a nonfact because the Arbitrator erroneously found that the Union's parent organization participated in negotiations regarding the shutdown. *Id.* at 2-4. In this connection, the Union claims that the participating union was not its parent organization, and that the Arbitrator based his finding on "blatant and intentional misrepresentation[s]" made by the Agency in its post-hearing brief. *Id.* at 3-4.

The Union further maintains that the award is contrary to the Authority's decision in *United States Department of the Navy, Mare Island Naval Shipyard, Vallejo, California*, 49 FLRA 802, 810 (1994) (*Mare Island*). According to the Union, *Mare Island* established the principle that "a negotiated provision allowing an [a]gency to compel employees to use leave, or take leave without pay, cannot be abused and used wantonly." Exceptions at 3.

Next, the Union asserts that the award fails to draw its essence from the parties' agreement in several respects. The Union maintains that, in interpreting Article 19, Section 5, the Arbitrator erred by construing the term "the facility" as "the entire facility[.]" *Id.* at 6-7, 9. In this connection, the Union claims that this interpretation is inconsistent with testimony indicating that the parties intended the provision to protect only bargaining-unit members, rather than the entire facility, from arbitrary shutdowns. *Id.* at 5-6, 9. With respect the Arbitrator's findings under Article 19, Section 5 regarding "productivity improvement[,]" the Union argues that the Arbitrator erred by: (1) defining productivity only in terms of employee attendance; and (2) relying on testimony regarding decreased employee attendance during the winter holidays because that testimony concerned the attendance rate from a previous year, rather than the year at issue. *Id.* at 8, 10. In addition, according to the Union, there is "no evidence in the record that productivity is to be measured on an annual basis[,]" or "that total annual productivity of the facility would increase by shutting the facility down for a certain amount of time." *Id.* at 11. The Union asserts that because the agreement does not define "productivity" and "productivity improvement," those terms must be interpreted by considering their "common definition" or the parties' intent. *Id.* at 7, 10. In this regard, the Union cites testimony indicating that the parties intended the "productivity improvement" provision to apply only to "out of the ordinary and drastic" situations such as major overhauls. *Id.* at 5-8. Finally, the Union asserts that the award is "at odds" with Article 19, Section 2 of the agreement because it affords the Agency "unfettered control over Union members' leave."[3] *Id.* at 8-9, 11.

B. Agency's Opposition

The Agency asserts that the Union's exceptions should be dismissed because the Union failed to:

3. Article 19, Section 2 of the parties' agreement provides, in relevant part: "The primary purpose of annual leave is to provide an annual vacation period. The Employer will make an effort to approve an annual leave schedule that is consistent with the desires of employees and the dictates of workload and productivity." Exceptions, Attach. at 1.

(1) timely file its exceptions with the Authority; (2) serve the Agency until after the expiration of the filing period for exceptions; and (3) provide a certificate of service. Opp'n at 8-9. With respect to the Union's nonfact exception, the Agency contends that the Union has failed to demonstrate that a central fact underlying the award is clearly erroneous, but for which the Arbitrator would have reached a different result. *Id.* at 9. The Agency further argues that the Union has not shown that the award fails to draw its essence from the parties' agreement. *Id.* at 10-14.

IV. Preliminary Issues

A. We consider some, but not all, of the parties' supplemental submissions.

The Authority's Regulations do not provide for the filing of supplemental submissions. However, § 2429.26 of the Authority's Regulations provides that the Authority may, in its discretion, grant leave to file "other documents" as deemed appropriate. *See, e.g., Cong. Research Employees Ass'n, IFPTE, Local 75*, 59 FLRA 994, 999 (2004). The Authority generally will not consider submissions filed without requesting leave or permission. *See, e.g., Nat'l Ass'n of Indep. Labor, Local 6*, 63 FLRA 232, 232 n.1 (2009). However, the Authority may consider submissions filed without permission if those submissions address jurisdictional issues, such as the timeliness of exceptions. *See Bremerton Metal Trades Council*, 59 FLRA 583, 584 (2004) (*Bremerton Metal*) (timeliness of exceptions is jurisdictional); *AFGE, Council of Prison Locals, Local 171*, 52 FLRA 1484, 1489 n.7 (1997) (*Local 171*) (Authority considered jurisdictional arguments of supplemental submission filed without requesting permission).

On March 16, 2010, the Agency filed a supplemental submission including a declaration of Agency counsel in support of its opposition.[4] As this submission was filed within the time limit for filing the opposition, we consider this submission as part of the opposition.[5] *See Fed. Emps. Metal Trade Council*, 39 FLRA 3, 3 n.* (1991) (Authority considered addendum to opposition where it was filed within the time limit for filing the opposition).

On March 19, the Union filed a supplemental submission including: (1) a response to the Agency's claim in its opposition that the Union's exceptions were untimely; (2) a claim that the Union president personally delivered a copy of the Union's exceptions to an Agency representative on February 16 upon the Agency's request; and (3) an assertion that the Union had only two weeks to prepare its exceptions due to the shutdown, while the Agency had three months. *See* Union's Supplemental Submission (Mar. 19). Although the Union did not request leave to file the submission, the first issue addresses the timeliness of the exceptions, which, as stated above, is the type of issue that we consider even absent a party's request for permission to file a supplemental submission. *See Bremerton Metal*, 59 FLRA at 584; *Local 171*, 52 FLRA at 1489 n.7. Accordingly, we consider the March 19 submission to the extent that it addresses timeliness issues.[6] However, the Union's remaining assertions do not address that type of issue. As such, and as the Union did not request permission to file this submission, we do not consider these portions of the March 19 submission.

On April 30, the Authority's Office of Case Intake and Publication (CIP) issued an order directing the parties to cure procedural deficiencies in their respective filings. On May 14, the Union cured its deficiency, but also included documents in support of its exceptions that had not been filed with its original exceptions. As the time limit for filing exceptions had already expired, and the Union did not request leave to file these supplemental submissions, we do not consider them.

On May 27, the Agency filed a supplemental submission in response to the Union's May 14 submissions. However, the Agency did not request permission to file this submission, and the submission responds to arguments raised for the first time in submissions that we have not considered. Accordingly, we do not consider the May 27 submission. *See U.S. Dep't of the Army, Corps of Eng'rs, Portland Dist.*, 62 FLRA 97, 98 (2007) (*Corps of Eng'rs)* (submission was moot where it responded to arguments that were raised in a submission that was not considered by the Authority).

On June 17, CIP issued a Deficiency Order directing the Union to cure deficiencies in its filings. The Union timely cured the deficiencies. On July 1, the Agency requested leave to file a submission in response to the Deficiency Order. However, as the Order was not directed to the Agency, we do not

4. All dates in this section are from 2010.

5. The Agency's counsel's declaration is discussed *infra* Section IV.C.

6. The Union's argument regarding timeliness is considered *infra* Section IV.B.

consider the July 1 submission. *See U.S. Air Force, 82nd Training Wing, Sheppard Air Force Base, Wichita Falls, Tex.*, 61 FLRA 443, 443 n.1 (2006) (submission filed in response to order directed at opposing party was not considered by the Authority). Consequently, the Union's July 13 supplemental submission filed in response to the July 1 submission is rendered moot. *See Corps of Eng'rs*, 62 FLRA at 98. Further, as each of the parties' remaining supplemental submissions address arguments raised for the first time in supplemental submissions that are moot, we do not consider those submissions. *Id.*

B. The Union's exceptions were timely filed.

Section 7122(b) of the Statute provides, in pertinent part, that exceptions to an arbitrator's award must be filed "during the 30-day period beginning on the date the award is served on the party[.]" 5 U.S.C. § 7122(b). Under the Authority's Regulations that were in effect when the Union filed its exceptions, the first day of the thirty-day period is the date of service of the award. *See* 5 C.F.R. § 2425.1(b).[7] The Authority presumes, absent evidence to the contrary, that an award was served by mail on the date of the award. *See, e.g.*, *Int'l Org. of Masters, Mates & Pilots*, 49 FLRA 1370, 1370-71 (1994) (*Masters, Mates & Pilots)*. If the last day of the thirty-day period falls on a weekend or federal holiday, then the due date for the exceptions is the next day that is not a weekend or federal holiday. 5 C.F.R. § 2429.21(a). In addition, if the award was served on the excepting party by mail, then the time period is extended an additional five days. 5 C.F.R. § 2429.22.

There is no evidence of the service date of the award other than the date of the award, which is December 11, 2009. Thus, the award is considered to have been served on December 11. *Masters, Mates & Pilots*, 49 FLRA at 1370. Counting thirty days beginning on December 11, the due date for filing exceptions was January 9, 2010. As January 9 was a Saturday, the due date for filing then became Monday, January 11. As the Authority presumes, absent evidence to the contrary, that an award was served by mail on the date of the award, the time period is extended for five days, until Saturday, January 16. *See id*. As January 16 was a Saturday, the due date for filing then became Monday, January 18, and as January 18 was a federal holiday, the due date was further extended until Tuesday, January 19. *See* 5 C.F.R. § 2429.21(a). The record shows, consistent with the Union's argument in its March 19 supplemental submission, that the Union's exceptions were postmarked on January 13. Accordingly, we find that the exceptions were timely filed.

C. The Union's exceptions are not procedurally deficient under § 2429.27(a) and (c) of the Authority's Regulations.

The Authority's Regulations provide that a party filing a document with the Authority must serve a copy on all counsel of record or other designated representatives of other parties, and must submit a statement of service to that effect. *See* 5 C.F.R. § 2429.27(a) and (c). Here, the Agency argues that the Union's exceptions should be dismissed because the Union did not serve the Agency with its exceptions until after the expiration of the filing period for exceptions and did not provide a certificate of service. Opp'n at 7-8. For support, the Agency cites the declaration of Agency counsel, in which he states that he received a copy of the Union's exceptions on February 16, 2010 without a certificate of service. *See id*; Agency Supplemental Submission (Mar. 16, 2010). However, the Union submitted a certificate of service showing service on the Agency on that date. *See* Union Cure of Deficiencies (July 1, 2010) at 2. Further, when timely filed exceptions have been served on the opposing party after the expiration of the filing period for exceptions, the Authority views such service to be procedurally sufficient unless the opposing party establishes that it was prejudiced by such service. *U.S. Dep't of Transp., FAA, Wash., D.C.*, 63 FLRA 492, 493 (2009) (citing *Office of Personnel Mgmt.*, 61 FLRA 358, 361 (2005) (then-Member Pope dissenting in part on unrelated grounds)). As the Agency does not claim that it was prejudiced by the Union's service, we deny the Agency's motion to dismiss the Union's exceptions.

D. Section § 2429.5 of the Authority's Regulations bars the Union's claims relating to Article 19, Section 2 of the parties' agreement and §§ 7106(a)(1) and 7116 of the Statute.

Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, presented in the proceedings before the arbitrator. *See, e.g., U.S. Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 59 FLRA 542, 544 (2003). There is no evidence that the Union argued below that:

7. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the exceptions in this case were filed before that date, we apply the prior Regulations.

(1) the Agency violated Article 19, Section 2 by directing the shutdown; (2) Article 19, Section 5's limits on the Agency's ability to direct a shutdown would violate management's rights under § 7106(a)(1) to direct its mission and budget; or (3) the Agency committed a ULP under § 7116 of the Statute. As the Union could have raised these issues before the Arbitrator, but did not, we dismiss these exceptions.

V. Analysis and Conclusions

A. 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.*

The Union's nonfact exception alleges that the Arbitrator erroneously found that the Union's parent organization participated in negotiations regarding the holiday shutdown. Exceptions at 2-4. Specifically, the Union claims that the participating union cited by the Arbitrator is not the Union's parent organization. *Id.* at 3-4. Although the Union asserts that the Arbitrator based his finding on alleged misrepresentations made in the Agency's post-hearing brief, the Union does not demonstrate that the Arbitrator clearly erred in making this finding. Accordingly, we deny the exception.

B. The award is not contrary to Authority precedent.

The Union contends that the award is contrary to the Authority's decision in *Mare Island*, 49 FLRA at 810. Exceptions contending that an award is contrary to Authority precedent are reviewed as contrary-to-law exceptions. *See, e.g., U.S. Dep't of the Treasury, IRS, Nat'l Distrib. Ctr., Bloomington, Ill.*, 64 FLRA 586, 592 (2010). As such, the Authority reviews the award *de novo*. In applying a *de novo* standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.*

The Union's reliance on *Mare Island* is misplaced. In *Mare Island*, the arbitrator found that the agency violated the agreement at issue in that case by failing to provide sufficient justification for its required use of annual leave during a temporary shutdown. The Authority denied the agency's essence exceptions to the arbitrator's interpretation of the agreement. *Mare Island*, 49 FLRA at 810. However, contrary to the Union's claim, the Authority did not hold, as a matter of law, that "a negotiated provision allowing an [a]gency to compel employees to use leave, or take leave without pay, cannot be abused and used wantonly." Exceptions at 3. As such, *Mare Island* does not provide a basis for setting aside, as contrary to law, the award at issue here, which involves a different arbitrator's interpretation of a different agreement. Accordingly, we deny the exception.

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

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard 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. *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.

Article 19, Section 5 states, in pertinent part, that "[t]he [Agency] retains the right to order the facility to shut down for reasons such as . . . productivity improvement[.]" Award at 6. The Arbitrator found that "the facility" meant the *entire* facility, and that "the facility shutdown . . . was necessary in the interest of 'productivity improvement'" because "[p]roductivity measured on an annual basis is . . . improved when the facility remains closed during the less productive holiday period[.]" *Id.* at 11-12. The Union contends that these findings are inconsistent with testimony indicating that Article 19, Section 5 was intended to: (1) protect only bargaining-unit employees, rather than employees of the entire facility, from arbitrary shutdowns; and (2) apply only

to "out of the ordinary and drastic" situations such as major overhauls. Exceptions at 6-9. However, the Union's reliance on this testimony does not provide a basis for finding that the Arbitrator's interpretation of Article 19, Section 5 is unfounded, implausible, and irrational or in manifest disregard of the parties' agreement. Accordingly, we deny this exception.

The Union also argues that the Arbitrator should have found that the Agency violated Article 19, Section 5 by "fail[ing] to bargain in good faith with the Union regarding the implementation of the 'shutdown[.]'" *Id.* at 4. This argument is premised on the Union's nonfact argument, specifically, the Union's claim that the union that participated in shutdown negotiations was not the Union's parent organization. As we have denied the nonfact exception, we also deny this exception. *See AFGE, Local 3937*, 64 FLRA 1113, 1115 (2010) (denying essence exception premised on party's previously rejected nonfact argument).

VI. Decision

The Union's exceptions are dismissed in part and denied in part.[8]

8. We note that the Union also asserts that the Arbitrator conducted an "improper hearing." Exceptions at 11. To the extent that the Union argues that it was denied a fair hearing, we deny the claim as a bare assertion. *See SSA, Balt., Md.*, 57 FLRA 690, 694 n.9 (2002) (denying unsupported fair hearing claim as a bare assertion).