66 FLRA No. 79

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
LOUISVILLE DISTRICT
LOUISVILLE, KENTUCKY
(Agency)

and

INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS
LOCAL 852
(Union)

0-AR-4575

_____

DECISION

January 10, 2012

_____

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 Tobie Braverman 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 did not file an opposition to the Agency's exceptions.

The Arbitrator sustained a grievance alleging that the Agency violated overtime provisions of the parties' collective bargaining agreement (CBA) when it failed to assign the grievant to perform work that would ordinarily lead to overtime pay. For the reasons set forth below, we dismiss in part, and deny in part, the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency is responsible for flood control and the repair and maintenance of locks and dams within the Louisville District. Award at 2. The grievant is the "Master" of the derrick boat called the "Shreve," which houses a heavy lift crane. *Id.* at 2-3. As Master of the Shreve, the grievant is responsible for the operation and maintenance of the boat. *Id.* at 3. Accordingly, the grievant travels with and operates the Shreve's crane whenever it is utilized. When the Shreve is not in use, the grievant usually travels with the rest of the fleet to various lock and dam repair projects where he operates the cranes, since he is one of only three employees qualified to operate all of the Agency's cranes. *Id.*

As relevant here, the grievant filed a grievance alleging that the Agency violated the overtime provisions in Article 26-2 of the parties' CBA when it failed to assign him to a project at the Cannelton Lock and Dam (Cannelton) where the Shreve was not in use. *Id.* at 5. The grievant claimed that he could have received overtime pay had the Agency assigned him to work at Cannelton, and that the Agency's refusal to assign him to that project was in retaliation for his disagreement with the Agency on unrelated issues. *Id.* at 4-5. The grievance was unresolved and submitted to arbitration, where the parties stipulated to the following issue: "Did the [Agency] violate Article 26 of the [CBA] by not assigning the [g]rievant to work at [Cannelton], and if so, what is the appropriate remedy?"[1] *Id.* at 2.

The Arbitrator determined that the decision of a different arbitrator involving the same parties and similar circumstances controlled the outcome of this case. *Id.* at 6-8. Relying on the arbitrator's decision in the earlier case, the Arbitrator found that Article 4 of the CBA and § 7106(a)(2)(B) of the Statute do not provide the Agency with unfettered discretion to exercise its management rights.[2] *Id.* at 7. The Arbitrator found that adopting the Agency's position – that Article 4-1 and § 7106(a)(2)(B) of the Statute give it the absolute right to determine the personnel and employees who will be assigned to projects – would render Article 26-2 of the CBA meaningless. According to the Arbitrator, when the language of Article 26-2 is given its full meaning, the grievant, who normally operates cranes at major repair projects, is

[1] Article 26, "OVERTIME," provides, in pertinent part:

> 26-1. POLICY
>
> All work officially ordered, approved, and performed outside of regular work hours shall be compensated either by paid overtime or compensatory time, in keeping with existing regulations and statutory provisions.
>
> 26-2. ASSIGNMENT
>
> Overtime assignments shall be made as the needs of the work require and where possible shall be distributed equitably to all employees of the organizational element involved. Except for emergencies, unit employees who normally perform the work will be given first opportunity to receive overtime work, where possible. The Employer agrees to maintain official records of overtime worked and to make such information available to the Union upon request. The Employer shall give as much advance notice as circumstances permit when assigning unit employees to work overtime.

Exceptions, Attach. C at 18-19.

[2] Article 4 is set forth in the appendix.

entitled to the first available opportunity to work overtime over those who do not normally, or who are not fully qualified to, do such work. *Id.* In addition, the Arbitrator found that Article 26-2 requires the Agency to "equalize" overtime, which it failed to do since the grievant did not have the opportunity to earn overtime when the Agency required him to remain at the Louisville Repair Station to perform maintenance on the Shreve while work was being done at Cannelton. *Id.* at 5.

Therefore, the Arbitrator determined, the Agency violated Article 26-2 by failing to assign the grievant to work at Cannelton since there was no pressing maintenance scheduled to be performed on the Shreve at that time. *Id.* at 8. Consequently, the Arbitrator ordered the Agency to compensate the grievant for all lost wages for the hours which he should have been assigned at Cannelton. *Id.* at 9.

III. Agency's Exceptions

The Agency claims that the award is contrary to law on several bases. The Agency argues that the award is contrary to management's right to determine its organization under § 7106(a)(1), and its right to determine "the numbers, types, and grades of employees or positions assigned to any . . . work project or tour of duty" under § 7106(b)(1) of the Statute. Exceptions at 5-7. According to the Agency, Article 4-1 of the CBA leaves determinations of numbers, types, and grades of employees up to the discretion of the Agency.

The Agency also argues that the award violates management's right to assign work under § 7106(a)(2)(B). In this regard, the Agency contends that management's right to assign work includes the rights to assign overtime and to determine the particular duties to be assigned to an employee, when work assignments will occur, to whom or what positions duties will be assigned. *Id.* at 6. According to the Agency, as the award requires the Agency to use the grievant in its work crews, *id.* at 7, it violates management's right to assign work.

Finally, the Agency claims that the award fails to draw its essence from the CBA. The Agency objects to the Arbitrator's finding that applying Article 4-1 to this case in an absolute manner, as the Agency had argued, would render Article 26-2 meaningless. *Id.* at 8. Proposing a different interpretation, the Agency contends that "one conceivable way" to "reconcile" the two provisions would be to interpret them to mean that once the Agency had assigned employees to a crew, overtime would be distributed equitably within that crew. *Id.* at 8.

IV. Preliminary Issue: 5 C.F.R. § 2429.5 bars the Agency's exceptions that the award is contrary to management's right to determine its organization and its right to determine the numbers, types, and grades of employees or positions assigned to a work project or tour of duty under § 7106 of the Statute.

The Agency claims in its exceptions that the award is contrary to law as affecting management's right to determine its organization and its right to determine the numbers, types, and grades of employees or positions assigned to a work project or tour of duty, under § 7106 of the Statute.

Exceptions are barred by 5 C.F.R. § 2429.5 of the Authority's Regulations when they pertain to issues that could have been, but were not, presented to an arbitrator.[3] *See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 66 FLRA 335, 337-38 (2011) (*Customs*) (dismissing management-rights exception under § 2429.5 where agency did not raise it before the arbitrator along with its other management-rights claims).

The case law interpreting 5 C.F.R. § 2429.5 makes clear that the Authority will not consider contentions that could have been, but were not, presented to the Arbitrator. *See id.* (citations omitted); *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 64 FLRA 841, 843 (2010). The record demonstrates that the Agency understood that the issue presented at arbitration implicated management rights because the Agency argued before the Arbitrator that the Union's proposed interpretation of Article 26-2 of the CBA affected its rights to assign work and determine the personnel by which Agency operations shall be conducted. Award at 5-6. Nothing in the record indicates that the Agency raised either of these management-rights arguments before the Arbitrator, even though it could have done so. The Agency could have, and should have, presented to the Arbitrator all of its management-rights challenges to the Union's proposed interpretation of Article 26-2 of the CBA, including all challenges to its enforceability under § 7106 of the Statute.

As there is no evidence in the record that the Agency raised the arguments discussed above before the Arbitrator, we conclude that the Agency's exceptions on these bases are not properly before the Authority. Therefore, we dismiss the Agency's exceptions

[3] The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including § 2429.5, were revised effective October 1, 2010. 75 Fed. Reg. 42,283 (2010). As the exceptions in this case were filed prior to October 1, 2010, we apply the prior version of the Regulations here. *See* 5 C.F.R. § 2425.1. However, we note that, like the prior version of § 2429.5, the revised version of § 2429.5 provides that the Authority will not consider any issue that could have been, but was not, presented to the arbitrator.

contending that the award is contrary to management's right to determine its organization and its right to determine the numbers, types, and grades of employees or positions assigned to a work project or tour of duty under § 7106 of the Statute.

V. Analysis and Conclusions

A. The award is not contrary to management's right to assign work under § 7106(a)(2)(B) of the Statute.

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. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.,* 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Authority 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*). As relevant here, under the revised analysis, the Authority assesses whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115.[4] 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 under § 7106(b). *Id*. Absent a claim that an award enforces a contract provision that was not negotiated under § 7106(b), the Authority will not find an award contrary to management rights. *See, e.g., Customs*, 66 FLRA at 338 n.10.

In contrast to the Agency's management-rights arguments set forth above that are barred by § 2429.5, the Agency did argue to the Arbitrator that it exercised its right to assign work under § 7106 when it ordered the grievant to remain at the Louisville Repair Station and perform maintenance on the Shreve, rather than work on the project at Cannelton. Award at 5-6. Thus, the Authority's Regulations do not bar the Agency's claim that the award is contrary to that management right. *Cf. Customs*, 66 FLRA at 338.

Although it is undisputed that the award affects management's right to assign work, the Agency fails to argue in its exceptions that Article 26 was not negotiated under § 7106(b), for example, as either a procedure under § 7106(b)(2) or an appropriate arrangement under § 7106(b)(3). Absent such a claim, the Authority has no basis for finding that the award is contrary to a management right.[5] *See id.* at 338 n.10. Accordingly, we deny the exception.

B. The award does not fail to draw its essence from the CBA.

The Agency claims that the award fails to draw its essence from the CBA. The Agency proposes a different interpretation of Articles 4-1 and 26-2 than that adopted by the Arbitrator. Exceptions at 8.

In reviewing an arbitrator's interpretation of a CBA, 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) (*OSHA*). 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.

[4] 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; *SSA, Office of Disability Adjudication & Review*, 65 FLRA 477, 481 n.14 (2011); *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).

[5] Even if the Agency had argued in its exceptions that the award does not enforce a contract provision negotiated under § 7106(b), that argument would be barred because the Agency failed to raise it before the Arbitrator. *See Customs*, 66 FLRA at 338 & n.10; *see also U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Oakdale, La.*, 63 FLRA 178, 179-80 (2009).

The Agency's argument that the Arbitrator could have interpreted Articles 4-1 and 26 differently does not demonstrate that the award fails to draw its essence from the agreement. Merely providing the Authority with an interpretation of the parties' agreement different than the arbitrator's is not sufficient to support an essence exception. *See OSHA*, 34 FLRA at 575. Nothing in the language of Articles 4-1 and 26-2 precludes the Arbitrator's interpretation that Article 26-2 constitutes a limitation on the Agency's right to assign work under Article 4-1. *See* Award at 5, 7. Accordingly, the Agency does not demonstrate that the Arbitrator's interpretation of those provisions is irrational, unfounded, implausible, or in manifest disregard of the CBA. For this reason, we deny the exception.

VI. Decision

The Agency's exceptions are dismissed in part, and denied, in part.

APPENDIX

ARTICLE 4

RIGHTS OF THE EMPLOYER

4-1. The Union agrees to respect the dignity of the Employer in implementing its responsibilities with respect to applicable laws and regulations. In accordance with Title VII, Public Law 95-454, nothing in this Agreement shall affect the authority of any management official of the Employer:

a. To determine the mission, budget, organization, number of employees and internal security practices of the Employer.

b. In accordance with applicable laws:

(1) To hire, assign, direct, lay off and retain employees, or suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees.

(2) To assign work, to make determinations with respect to contracting out, to determine the personnel by which the Employer's operations shall be conducted.

(3) With respect to filling positions, to make selections for appointments from:

(a) Among properly ranked and certified candidates for promotion or,

(b) Any other appropriate source.

(1) To take whatever actions may be necessary to carry out the Employer's mission during emergencies.

[c.] To determine the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work.

. . . .

Exceptions, Attach. C at 3-4.