

67 FLRA No. 123

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 407
(Union)

0-AR-4883

DECISION

June 24, 2014

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The Agency rearranged bargaining-unit employees' workweeks in order for the employees to staff a special event. In an award on the merits (merits award), Arbitrator Jerome H. Ross determined that the Agency's action violated the parties' agreement, which prohibits the Agency from rearranging the employees' schedules to avoid paying overtime. Because the Agency failed to show that the relevant regulation applies under the circumstances of this case, and because the award does not prohibit the Agency from rearranging the employees' schedules, we deny the Agency's exceptions that the award is contrary to law and based on a nonfact.

II. Background and Arbitrator's Award

The Agency planned a seventy-fifth anniversary celebration on a Saturday at the Shenandoah National Park (the event). Several weeks before the event, the Agency scheduled all of its employees to work that day, but gave each employee a day off earlier in the week so that the Saturday shift constituted part of the employees' scheduled tours of duty.

The Union filed a grievance alleging that the Agency violated the parties' agreement by changing employees' schedules to avoid paying overtime. The parties stipulated that the issue before the Arbitrator was:

"Whether the Agency violated Article 15, Section 2.A.2 of the [parties' agreement] . . . and if so, what shall be the remedy?"¹ That provision provides, in relevant part: "Employees will not be required to take time off during regular shift hours in their regular work week in order to compensate or offset overtime hours worked."²

The Arbitrator concluded that, in changing the employees' tours of duty, the Agency improperly considered the amount of overtime it would need to pay. The Arbitrator determined that the Agency's action violated the clear language of the parties' agreement. The Arbitrator "retain[ed] jurisdiction to resolve remedy issues,"³ but did not direct the parties to implement a remedy in the merits award.

The Agency filed exceptions to the merits award. But after the Authority's Office of Case Intake and Publication (CIP) issued an order directing the Agency to show cause why its exceptions should not be dismissed as interlocutory, the Agency requested to withdraw its exceptions and CIP granted its request. The parties then submitted briefs to the Arbitrator on the remedy.

In a remedial award (remedy award), the Arbitrator awarded the employees backpay, finding that they would have worked overtime but for the Agency's actions. The Arbitrator rejected the Agency's contention that its operations would have been "seriously handicapped" if it did not rearrange employees' tours of duty.⁴ The Arbitrator also determined that the Agency did not establish that its costs would have been "substantially increased" by paying the employees overtime for working the event.⁵

The Agency then filed these exceptions, and the Union filed an opposition.

III. Preliminary Issue: The Agency's exceptions are timely.

Under § 7122(b) of the Federal Service Labor-Management Relations Statute (the Statute)⁶ and § 2425.2(b) of the Authority's Regulations,⁷ parties have thirty days to file exceptions, beginning the day after service of an award. The thirty-day filing period is jurisdictional: the Authority cannot waive or extend it

¹ Merits Award at 4.

² *Id.* at 2.

³ *Id.* at 8.

⁴ Remedy Award at 3 (citations and internal quotation marks omitted).

⁵ *Id.* at 3-4 (citations and internal quotation marks omitted).

⁶ 5 U.S.C. § 7122(b).

⁷ 5 C.F.R. § 2425.2(b).

and must dismiss untimely filed exceptions.⁸ However, the thirty-day filing deadline applies only to final awards.⁹ Indeed, the Authority generally will not consider exceptions to an award that is interlocutory (i.e., not final).¹⁰

An arbitrator's award is final when all the issues submitted for arbitration are completely and unambiguously resolved.¹¹ An award is final "where an arbitrator has retained jurisdiction solely to assist the parties in the implementation of awarded remedies."¹² However, an award is not final when the arbitrator has not made a disposition as to a remedy.¹³

Here, although the Arbitrator "retain[ed] jurisdiction to resolve remedy issues,"¹⁴ he did not order a remedy as part of the merits award. Accordingly, the merits award did not become final until the Arbitrator issued the remedy award, and therefore, the time limit for filing exceptions did not begin until the issuance of the remedy award. Thus, the Agency's challenges to both the merits award and the remedy award – which were filed within thirty days of the issuance of the remedy award – are properly before us.

IV. Analysis and Conclusions

A. The award is not contrary to law.

1. The Agency fails to support its management-rights claim.

The Agency argues in its exceptions that the Arbitrator's remedy precludes the Agency "from properly exercising its rights under 5 U.S.C. § 7106(a) to determine the personnel required, and the time when work was to be performed in the accomplishment of the Agency mission."¹⁵

Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject

to . . . denial if: [t]he excepting party fails to . . . support" it.¹⁶ That is, the Authority will deny an exception if a party fails to support it.¹⁷ Here, the Agency does not explain how the award conflicts with management rights, other than its brief statement regarding management rights set forth above. Thus, because the Agency has failed to support its assertion that the award is contrary to management rights, we deny this exception under § 2425.6(e) of the Authority's Regulations.¹⁸

2. The award is not contrary to 5 U.S.C. § 6101 and 5 C.F.R. § 610.121.

The Agency argues that the award is contrary to law. 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.¹⁹ 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.²⁰ In making that assessment, the Authority defers to the arbitrator's underlying factual findings.²¹

The Agency argues that, pursuant to 5 U.S.C. § 6101 and 5 C.F.R. § 610.121(a), an agency may "change employees' work schedules without limitation 'when the head of an agency determines that the agency would be seriously handicapped in carrying out its functions OR that costs would be substantially increased.'"²² According to the Agency, the Arbitrator's interpretation of Article 15, Section 2 of the parties' agreement is contrary to § 6101 and § 610.121(a) and, therefore, unenforceable.²³

Title 5, § 610.121(b)(1) of the Code of Federal Regulations requires that agencies: (1) schedule employees' work so as to accomplish the agency's mission, and (2) schedule administrative workweeks to correspond with actual work requirements.²⁴ The Authority has held that 5 C.F.R. § 610.121(b) is qualified by 5 C.F.R. § 610.121(a).²⁵ Section 610.121(a) explicitly

⁸ *U.S. Dep't of Commerce, Patent & Trademark Office, Arlington, Va.*, 60 FLRA 869, 877 (2005).

⁹ See 5 U.S.C. § 7122(b).

¹⁰ *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 1, 2 (2012); 5 C.F.R. § 2429.11.

¹¹ E.g., *U.S. Dep't of the Treasury, IRS, Nat'l Distrib. Ctr., Bloomington, Ill.*, 64 FLRA 586, 589 (2010) (IRS).

¹² *AFGE, Nat'l Council of EEOC Locals No. 216*, 65 FLRA 252, 253-54 (2010) (citing *U.S. Dep't of the Treasury, IRS*, 63 FLRA 157, 158 (2009); *U.S. Dep't of the Air Force, Kirtland Air Force Base, Air Force Materiel Command, Albuquerque, N.M.*, 62 FLRA 121, 123 (2007)).

¹³ E.g., *IRS*, 64 FLRA at 589.

¹⁴ Merits Award at 8.

¹⁵ Exceptions at 7.

¹⁶ 5 C.F.R. § 2425.6(e)(1).

¹⁷ *AFGE, Local 1938*, 66 FLRA 741, 743 (2012) (citation omitted); 5 C.F.R. § 2425.6(e).

¹⁸ See *AFGE, Local 1938*, 66 FLRA at 743.

¹⁹ *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)).

²⁰ *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).

²¹ *Id.*

²² Exceptions at 7 (quoting 5 U.S.C. § 6101(a)(3)(A)).

²³ *Id.*

²⁴ *U.S. Dep't of the Navy, Phila. Naval Shipyard*, 39 FLRA 590, 604 (1991) (Navy).

²⁵ *Id.; NAGE, Local R7-23*, 23 FLRA 753, 755-56 (1986).

permits an agency to change employees' work schedules "when the head of an agency determines that the agency would be seriously handicapped in carrying out its functions or that costs would be substantially increased."²⁶

For § 610.121(a) to apply, an agency head must make a determination that "an exception from the normal scheduling was justified, in view of agency functions and the costs involved."²⁷ An agency head must justify her determination that the agency would be "seriously handicapped" or that "costs would be substantially increased" with a "discussion of the nature of work performed" by the employees and "the inherent administrative difficulties in scheduling their hours of duty."²⁸ Although not requiring "exhaustive findings," such determination must be "reasoned."²⁹ A serious handicap is one that "would jeopardize an agency's entire mission and demand priority attention throughout the organization."³⁰

The Agency argues that the remedy award is inconsistent with the above framework because the Arbitrator interpreted Article 15, Section 2 in a manner that prohibits the Agency from exercising its rights under 5 C.F.R. § 610.121. Contrary to the Agency's claim, the Arbitrator actually determined that the Agency had not met its burden to demonstrate that § 610.121(a) authorized its actions.

The Arbitrator first found that the Agency had not established that it needed to rearrange its employees' schedules to avoid being seriously handicapped. Rather, he determined that the Agency chose this action "to avoid paying overtime," and that there was "no demonstrated operational advantage in the rescheduling."³¹ Similarly, the Arbitrator found that the Agency had not shown that its costs would be substantially increased if it allowed the employees' schedules to remain unaltered. Although the Arbitrator acknowledged that "personnel costs . . . would be higher"³² because of additional overtime, he found that the Agency had not satisfied the "legal and regulatory test" regarding substantial increases.³³

In response to the Arbitrator's conclusions, the Agency contends that the Arbitrator's award "preclude[s] consideration by the Agency of whether a particular work schedule would result in substantially increased costs, in

the form of overtime, as well as whether it would seriously handicap the Agency in carrying out its mission as required by 5 C.F.R. § 610.121(a)."³⁴ However, the Arbitrator did not find that Article 15 precluded such considerations. Rather, as discussed above, the Arbitrator determined that the Agency had not met its burden to show that they applied. Consequently, the Agency's argument does not provide a basis for finding that the award is deficient.³⁵

Accordingly, we deny the Agency's exception that the award is contrary to 5 U.S.C. § 6101 and 5 C.F.R. § 610.121.

B. The award is not based on a nonfact.

The Agency also argues that the award is based on a nonfact.³⁶ 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.³⁷

The Agency contends that the Arbitrator "erroneously stated that there is no showing that the Agency had a bona fide operational need to rearrange employees['] schedules during the workweek leading up to [the event] so that it could avoid being operationally seriously handicapped on the day of the event."³⁸ According to the Agency, the matter was not in dispute and, therefore, not before the Arbitrator.³⁹ The Agency contends that testimony from Agency witnesses establishes that it needed employees to work on the Saturday in question.⁴⁰ However, the Arbitrator did not find that the Agency was prohibited from assigning employees to work that day. He merely held that, before the Agency changed employees' schedules to avoid assigning overtime, it needed to demonstrate that such a change was necessary to avoid a serious handicap or substantial increase in costs.⁴¹ Therefore, the Agency has not established that a central fact underlying the award – that it had an operational need to reschedule the employees on the day in dispute – is clearly erroneous, but for which the arbitrator would have reached a different result.⁴²

²⁶ 5 C.F.R. § 610.121(a).

²⁷ *Acuna v. United States*, 479 F.2d 1356, 1362 (Ct. Cl. 1973).

²⁸ *Id.*

²⁹ *Gahagan v. United States*, 19 Cl. Ct. 168, 179 (1989).

³⁰ *Id.*

³¹ Remedy Award at 3.

³² *Id.*

³³ *Id.* at 3-4.

³⁴ Exceptions at 6; *see also id.* at 7 (citations omitted).

³⁵ *See, e.g., Navy*, 39 FLRA at 604-05.

³⁶ Exceptions at 21.

³⁷ *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).

³⁸ Exceptions at 21 (citing Remedy Award at 3).

³⁹ *Id.* at 21-22.

⁴⁰ *See id.* at 22 (citations omitted).

⁴¹ *See Remedy Award at 3-4.*

⁴² *See, e.g., AFGE, Council 215*, 66 FLRA 137, 142 (2011) (citation omitted).

The Agency also argues that the Arbitrator erroneously found that “the [A]gency was obligated to show how its operations or functions would be seriously handicapped by working the affected employees on Saturday at the applicable overtime rate.”⁴³ However, this is legal conclusion, rather than a factual finding, and a party’s challenge to an arbitrator’s legal conclusions does not provide a basis for establishing that an award is based on a nonfact.⁴⁴

Accordingly, we deny the Agency’s nonfact exceptions.

C. The Arbitrator did not exceed his authority by resolving an issue that was not before him.

The Agency also asserts that the Arbitrator exceeded his authority by deciding a matter “not in dispute and therefore not before the Arbitrator for decision.”⁴⁵ Specifically, it claims that the issue of whether the Agency had shown a “bona fide operational need to rearrange employees[] schedules . . . so that it could avoid being operationally seriously handicapped” was not before the Arbitrator.⁴⁶ An arbitrator exceeds his authority if he resolves an issue not submitted to arbitration.⁴⁷

Contrary to the Agency’s claim, the above issue was properly before the Arbitrator. In this regard, the Arbitrator had to resolve this issue as part of his remedy award in order to determine whether the Union could even receive a remedy for the Agency’s violation of the parties’ agreement. An arbitrator does not exceed his authority when he resolves an issue that is necessary to the resolution of an issue before him.⁴⁸ Thus, because the above issue was necessary to the Arbitrator’s resolution of his remedy award, we find that the Arbitrator did not exceed his authority by resolving it. We therefore deny the Agency’s exceeds-authority exception.

V. Decision

We deny the Agency’s exceptions.

⁴³ Exceptions at 22.

⁴⁴ *E.g.*, Navy, 39 FLRA at 605 (citation omitted).

⁴⁵ Exceptions at 26.

⁴⁶ *Id.*

⁴⁷ *E.g.*, AFGE, Local 3627, 64 FLRA 547, 549-50 (2010) (citation omitted).

⁴⁸ See, e.g., AFGE, Local 1770, 67 FLRA 93, 94 (2012).