

67 FLRA No. 27

UNITED STATES
DEPARTMENT OF THE NAVY
U.S. MARINE CORPS
MARINE CORPS BASE, QUANTICO
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1786
(Union)

0-AR-4927

DECISION

December 18, 2013

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

I. Statement of the Case

Arbitrator Gail Smith found that the Agency violated the parties' collective-bargaining agreement by failing to pay certain employees holiday and Sunday premium pay. There are two substantive questions before us.

The first question is whether the Arbitrator exceeded her authority by determining what type of schedule the grievants worked. Because that issue necessarily arose from the issue and arguments that were before the Arbitrator, the answer is no.

The second question is whether the Agency has demonstrated that the award is contrary to law. Because the Agency's exception is premised on its claim that the Arbitrator erred in finding that certain employees worked a compressed work schedule – and the Agency has not shown that finding is deficient – the answer is no.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency failed to properly compensate five civilian police officers (the grievants) for work that they performed on holidays and Sundays. The parties' collective-bargaining agreement provides that "[e]mployees will be paid in accordance with law and regulations,"¹ and the parties' memorandum of understanding states that "[p]olice [o]fficers will receive . . . holiday pay, and/or Sunday pay as appropriate for any work that is performed during their scheduled shifts."² At arbitration, the parties were unable to agree on a stipulated issue, and the Arbitrator framed the issue as follows: "Were [the grievants] compensated in accordance with applicable federal statutes and regulations, as well as the [parties' collective-bargaining agreement], with respect to holiday leave and holiday grade pay, and with respect to Sunday premium pay?"³

The Arbitrator found that when the grievants worked ten hours on a holiday or Sunday, the Agency prohibited them from claiming more than eight hours of holiday or Sunday premium pay. In determining whether this violated law, regulations, or the parties' agreement, the Arbitrator considered evidence concerning whether the grievants worked a "maxi[-]flex" or "compressed work" schedule.⁴ The Agency asserted that federal regulations prohibited it from paying the grievants more than eight hours of holiday or Sunday premium pay because the grievants worked a maxi-flex schedule that permitted them to vary their hours and days of work as long as they worked eighty hours every two-week pay period.⁵ But the Union alleged that the grievants worked a compressed work schedule because the grievants worked the same four ten-hour days every week.⁶ The Agency acknowledged that the regulations prohibiting it from paying more than eight hours of Sunday or holiday premium pay do not apply to employees who work a compressed work schedule.⁷

Based on the evidence before her, including the Agency's time and pay records for the grievants, the Arbitrator rejected the Agency's contention that the grievants worked a maxi-flex schedule, and found instead that the grievants worked a compressed work schedule.⁸ In this regard, the Arbitrator found that "there was an acknowledged practice adopted by [m]anagement to regularly assign [the grievants to work] four ten[-]hour days on the same recurring days of the week, and . . . it

¹ Award at 5.

² *Id.* at 6.

³ *Id.*

⁴ *Id.* at 3.

⁵ *Id.* at 8-9.

⁶ *Id.* at 3, 7, 10.

⁷ *Id.* at 3-4 (citing 5 C.F.R. §§ 550.103, 550.131).

⁸ *Id.* at 14-15

became the parties' past practice."⁹ The Arbitrator found that this practice "established a condition of employment that was incorporated by conduct" into the parties' collective-bargaining agreement.¹⁰

As a result, the Arbitrator found that the Agency violated the parties' collective-bargaining agreement "by failing to pay Sunday premium pay and holiday pay for work performed on a Sunday or holiday . . . to [the] [g]rievants . . . in accordance with a compressed work schedule rather than a flexible work schedule."¹¹ As a remedy, the Arbitrator directed the Agency to make the grievants whole for any Sunday or holiday work for which they "were not compensated in accordance with a compressed work schedule,"¹² and directed the Agency to continue to pay its civilian police officers "in accordance with a compressed work schedule" as long as they consistently work four ten-hour days per week.¹³

The Agency filed exceptions to the Arbitrator's award, and the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matter

The Union's opposition was due May 8, 2013, but the Union did not file it until July 15, 2013. Section 2429.23(b) of the Authority's Regulations states that the Authority, "as appropriate, may waive any expired time limit . . . in extraordinary circumstances."¹⁴ But if a party fails to establish extraordinary circumstances for an untimely filing, then the Authority will not consider the filing.¹⁵

The Union makes two arguments to justify its untimely filing. First, the Union argues that the Union's representative was out of the office from February 8, 2013, until June 10, 2013, and that the Agency could have alerted another Union official of the filing of its exceptions. However, the Union does not assert that it was not properly served, and the Authority has declined to find extraordinary circumstances where the untimely party was properly served at the address it provided.¹⁶ Second, the Union asserts that the Union representative did not understand that any opposition must be timely filed with the Authority in order to be considered. But the Authority has found that a party's misunderstanding of time limits is not an extraordinary circumstance that

excuses an untimely filing.¹⁷ Accordingly, the Union's arguments do not provide a basis for waiving the expired time limit, and we decline to consider the Union's untimely opposition.

IV. Analysis and Conclusions

A. The Arbitrator did not exceed her authority.

The Agency argues that the Arbitrator exceeded her authority by addressing the issue of whether the grievants worked a maxi-flex or compressed work schedule.¹⁸ Arbitrators exceed their authority when they resolve an issue not submitted to arbitration, but do not exceed their authority by addressing any issue that necessarily arises from issues before them.¹⁹

Here, the issue before the Arbitrator was whether the grievants were "compensated in accordance with applicable federal statutes and regulations, as well as the [parties' collective-bargaining agreement], with respect to holiday leave and holiday grade pay, and with respect to Sunday premium pay?"²⁰ And the parties debated the propriety of the Agency's actions by disputing before the Arbitrator whether the grievants were working a maxi-flex or compressed schedule.²¹ Accordingly, the issue of whether the grievants worked a maxi-flex or compressed work schedule necessarily arose from the issue before the Arbitrator, as well as the arguments presented to her, and the Agency does not demonstrate that the Arbitrator exceeded her authority by resolving this issue.²²

Further, the Agency claims that the Arbitrator "ignored" testimony showing that the grievants worked a maxi-flex schedule.²³ But, as the Agency did not file a nonfact exception to the Arbitrator's finding that the grievants worked a compressed work schedule, this argument does not provide a basis for finding the award deficient.

B. The award is not contrary to law.

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 de

⁹ *Id.* at 16.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 17.

¹⁴ 5 C.F.R. § 2429.23(b).

¹⁵ See, e.g., *AFGE, Local 2505*, 64 FLRA 689, 689 (2010) (*Local 2505*).

¹⁶ See, e.g., *AFGE, Local 1770*, 43 FLRA 303, 305 (1991).

¹⁷ *Local 2505*, 64 FLRA at 689.

¹⁸ Exceptions at 3-6.

¹⁹ *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div.*, 60 FLRA 530, 532 (2004) (*Navy*).

²⁰ Award at 6.

²¹ *Id.* at 3.

²² See *Navy*, 60 FLRA at 532.

²³ Exceptions at 5.

novo.²⁴ In conducting de novo review, the Authority defers to the arbitrator's underlying factual findings.²⁵

The Agency argues that the award "is contrary to law because the [A]gency was precluded from paying the [grievants] for more than [eight] hours of Sunday premium pay or holiday pay *because they were not on a compressed work schedule.*"²⁶ But the Arbitrator found that the grievants worked a compressed work schedule,²⁷ and the Agency's only challenge to that finding is its exceeded-authority exception – which we have denied. Accordingly, the Agency provides no basis for finding that the award is contrary to law, and we deny this exception.

V. Decision

We deny the Agency's exceptions.

²⁴ *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)).

²⁵ *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).

²⁶ Exceptions at 9 (emphasis added).

²⁷ Award at 14-16.