67 FLRA No. 43

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2823
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
CLEVELAND REGIONAL OFFICE
CLEVELAND, OHIO
(Agency)

0-AR-4920

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DECISION

January 10, 2014

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

I. Statement of the Case

Arbitrator Melvin E. Feinberg found that the Union failed to establish that the Agency violated a provision of the parties' collective-bargaining agreement concerning breaks for employees using video-display terminals. We must resolve two questions.

The first question is whether the Union has demonstrated that the award fails to draw its essence from the parties' agreement. Because the Union's essence claim is based on a misstatement of the award, the answer is no.

The second question is whether the Union has demonstrated that the award is deficient based on private-sector grounds not listed in the Authority's Regulations. Because the Union does not identify or support the private-sector grounds on which it relies, as required by § 2425.6(c) of the Regulations, the answer is no.

II. Background and Arbitrator's Award

The Agency employs public-contact representatives (representatives) to perform work that frequently requires them to use phones and video-display terminals in conjunction with one another in order to assist customers over the phone. The Union filed a grievance alleging that the Agency violated Article 29, Section 20(F) of their agreement (§ 20(F)), which states, in pertinent part: "Where an employee uses a [video-display terminal] . . . for at least one hour, the employee shall receive a [ten-]minute break for every hour of utilization. Such breaks will be in addition to regularly scheduled rest periods."[1]

When the grievance was unresolved, the parties proceeded to arbitration on the stipulated issue of whether the Agency violated § 20(F). The Arbitrator noted witness testimony that the Agency tracked the amount of time that each representative spent logged off the phone system (release time), and that a representative's accumulation of release time had the potential to adversely affect performance ratings, bonuses, and promotions. He also noted testimony that the Agency permitted (but did not require) representatives to take two fifteen-minute breaks and one thirty-minute lunch break each workday, and that any non-lunch breaks would be counted as release time if representatives chose to take them. In that regard, one witness (the witness) stated that representatives needed supervisory approval to exclude any of their time logged off the phone system from their release-time balances (excluded time). The witness also testified that when he personally requested a § 20(F) video-terminal break, his supervisor granted approval for the break, but denied his request to treat it as excluded time.

After finding "no evidence that any bargaining[-]unit employee requested and was denied" a video-terminal break,[2] the Arbitrator concluded that the Union had failed to establish that the Agency violated § 20(F). In addition, he noted the Union's claims that the Agency's "strictly applied performance[-]rating system" and "its refusal to grant . . . employees 'exclusion time'" for video-terminal breaks might discourage such breaks.[3] But the Arbitrator determined that those matters were "beyond the scope of the issue presented in this case."[4] He denied the grievance accordingly.

The Union has filed exceptions to the award, and the Agency has filed an opposition to the exceptions.

III. Analysis and Conclusions

A. The award draws its essence from the agreement.

The Union argues that the award fails to draw its essence from the agreement because the Arbitrator made inconsistent findings. Specifically, the Union claims that

[1] Award at 5 (quoting § 20(F)).
[2] *Id.* at 33-34.
[3] *Id.* at 34.
[4] *Id.*

the Arbitrator found no evidence that the Agency denied any bargaining-unit employee a requested video-terminal break, despite also finding that the witness "was in fact denied a break."[5]

The Authority will find an arbitration award deficient as failing to draw its essence from the collective-bargaining agreement when the excepting 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.[6] Essence exceptions that rely on misstatements of an award do not establish that the award is deficient.[7]

The Union misstates the award in arguing that the Arbitrator made inconsistent findings. The Arbitrator did not find that the witness's supervisor denied the witness's break request; instead, the Arbitrator noted witness testimony that the supervisor *granted* the break request, but denied the witness permission to treat it as excluded time. As such, the Union's essence argument is based on a misstatement of the award and, thus, does not establish that the award fails to draw its essence from the agreement.[8]

In support of its essence exception, the Union contends that the Arbitrator accepted into evidence a Union exhibit demonstrating that "a denial of excluded time" for a video-terminal break "will negatively affect an employee's performance."[9] And the Union contends that the Arbitrator acknowledged that "a denial of [excluded] time would negatively affect the employee."[10] But the Union does not explain how these contentions establish that the award fails to draw its essence from the agreement. To the extent that the Union is challenging the Arbitrator's finding that any effects on employee performance from exclusion-time denials for § 20(F) breaks went beyond the stipulated issue, we note that the Authority reviews whether an arbitrator failed to resolve an issue submitted to arbitration under the exceeded-authority framework.[11] But the Union does not argue that the Arbitrator exceeded his authority.[12] Therefore, the Union provides no basis for finding this aspect of the award deficient.

B. The Union fails to establish that the award is deficient based on private-sector grounds not listed in the Authority's Regulations.

The Union argues that the award is deficient on private-sector grounds not listed in the Regulations. For support, the Union reiterates the substance of its essence claim.

A party claiming that an arbitration award is deficient based on private-sector grounds not listed in the Regulations "must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions."[13] The Union fails to identify the private-sector grounds on which it relies and does not provide any supporting legal authority. Therefore, we deny this exception.

IV. Decision

We deny the Union's exceptions.

[5] Exceptions at 8-9.
[6] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[7] *NAGE, Local R4-45*, 55 FLRA 789, 794 (1999).
[8] *See id.*
[9] Exceptions at 9.
[10] *Id.*
[11] *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996); *see also U.S. Info. Agency, Voice of Am.*, 55 FLRA 197, 198 (1999) (Authority accords substantial deference to arbitrator's interpretation of a stipulated issue).
[12] Exceptions at 9 ("Are you alleging that the [A]rbitrator exceeded his or her authority? [ ] Yes [X] No").
[13] 5 C.F.R. § 2425.6(c).