

67 FLRA No. 47

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 215
(Union)

and

UNITED STATES
DEPARTMENT OF HEALTH
AND HUMAN SERVICES
SEATTLE, WASHINGTON
(Agency)

0-AR-4939

DECISION

January 14, 2014

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

Arbitrator Joe H. Henderson denied a grievance alleging that the Agency violated the parties' collective-bargaining agreement and Agency regulations by not providing the grievant with certain per diem payments, and the Union contends that the Arbitrator's award is deficient in two respects. First, the Union argues that the award is contrary to law or government-wide regulation. Because the Union does not specify a law or government-wide regulation with which the award conflicts, we deny this exception. Second, the Union asserts that the award is contrary to the Agency's travel manual. But as the Union does not demonstrate that the travel manual's plain wording entitles the grievant to additional per diem payments, and also does not show that the award is otherwise inconsistent with the manual, we deny this exception as well.

II. Background and Arbitrator's Award

At the Agency's expense, the grievant flew from Seattle to Orlando in order to attend a conference. Although the conference ended before noon on a Friday, the Agency permitted the grievant to remain in Orlando for the weekend and – using annual leave – the following Monday and Tuesday. On Wednesday, the grievant

returned to Seattle, again at the Agency's expense. For the days just mentioned, the Agency made the following per diem travel payments to the grievant:

Day	Per Diem
Friday <i>End of Conference</i>	None
Saturday	None
Sunday	None
Monday	None
Tuesday	None
Wednesday <i>Return Flight</i>	Partial

The Union filed a grievance contending that the Agency improperly denied the grievant full per diem for Friday. As relevant here, when the grievance was unresolved, the parties proceeded to arbitration on the stipulated issue of whether the grievant was "entitled to payment for one full travel per diem for Friday."¹

The Arbitrator noted that the parties' agreement states that "[e]mployees will incur any additional costs resulting from travel deviations for personal reasons."² Applying that principle, the Arbitrator found that the grievant's choice to remain in Orlando after the conference did not entitle him to per diem both for Friday (when he could have returned to Seattle) and for the following Wednesday (when he actually returned). Rather, the Arbitrator found the grievant entitled to a single return-travel-day per diem, which the grievant received for Wednesday. Moreover, the Arbitrator determined that the Agency's travel manual did not entitle the grievant to any additional per diem payments.

The Arbitrator acknowledged the Union's assertion that Saturday was the earliest that the grievant could have returned to Seattle and that, consequently, the grievant should have received full per diem for Friday, in addition to the partial per diem that he received for his return travel on Wednesday. But the Arbitrator rejected that contention due to "[in]sufficient proof . . . that [the grievant] would not have been able to return to Seattle until Saturday."³ Accordingly, the Arbitrator denied the grievance.

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

¹ Award at 2.

² *Id.* at 16 (quoting CBA, Art. 42, § 1(B)) (alteration in original) (internal quotation marks omitted).

³ *Id.* at 15.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Union's exceeded-authority argument.

The Union contends that the Agency did not dispute the grievant's inability to return from the conference on Friday until its post-hearing brief. According to the Union, because the parties' agreement prohibits unilaterally raising an issue "for the first time" at arbitration, the Arbitrator could not rely on newly raised arguments in the Agency's brief without exceeding his authority.⁴ Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.⁵ The Union could have argued before the Arbitrator that he lacked authority to consider parts of the Agency's post-hearing brief, but the Union "elected not to submit a reply" to that brief.⁶ Consequently, we find that §§ 2425.4(c) and 2429.5 of the Regulations bar consideration of the Union's argument here.⁷

IV. Analysis and Conclusions: The award is not contrary to law, rule, or regulation.

When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law de novo.⁸ 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.⁹ In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.¹⁰

The Union claims that the award is "contrary to law or government-wide regulation"¹¹ but does not identify a law or government-wide regulation with which the award conflicts. Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground" listed in § 2425.6(a)-(c).¹² Consistent with these regulations,

when a party fails to provide any argument to support its exception, the Authority will deny the exception.¹³ Although the Union's claim refers to a decision of the Comptroller General concerning the Federal Travel Regulation (FTR),¹⁴ the Union clarifies that it relies on that decision merely to "provide[] . . . guidance" for interpreting the Agency's travel manual.¹⁵ In this regard, the Union does not allege that the award is contrary to the FTR itself, and, further, the rules involved in the cited Comptroller General decision no longer appear in the FTR.¹⁶ Because the Union does not provide any argument to support finding the award contrary to law or government-wide regulation, we deny this exception under § 2425.6(e)(1).

In addition, the Union argues that the award is contrary to Rule 5.2.1.5 of the Agency's travel manual. The Authority has held that collective-bargaining "agreements, and not agency rules and regulations, govern the disposition of matters to which they both apply when there is a conflict."¹⁷ Thus, a dispute concerning an agency rule or regulation that conflicts with an applicable provision of the parties' agreement becomes a matter of contract interpretation, in which the Authority examines whether an award draws its essence from the agreement.¹⁸ However, the Authority has also held that if requirements imposed by a collective-bargaining agreement do not conflict with requirements imposed by an agency rule or regulation, then both an agreement and an agency rule or regulation may affect the disposition of a matter.¹⁹ According to the Union, the parties' agreement and Rule 5.2.1.5 do not conflict when applied to the grievant's circumstances.²⁰ As the Agency does not dispute the Union's assertion that no conflict exists between the agreement and

⁴ Exceptions Br. at 10 n.10 (citing CBA, Art. 45, § 7(1)).

⁵ 5 C.F.R. §§ 2425.4(c), 2429.5.

⁶ Award at 2; *accord* Exceptions Br. at 4 ("[O]nly the Agency opted to file a [r]eply brief.").

⁷ See *USDA, Farm Serv. Agency, Kan. City, Mo.*, 65 FLRA 483, 484 n.4 (2011) (barring argument that party could have raised, but did not raise, in response to opponent's post-hearing brief).

⁸ *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)).

⁹ *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

¹⁰ *U.S. DHS, U.S. CBP*, 66 FLRA 567, 567-68 (2012) (*CBP*).

¹¹ Exceptions eFiling Form at 4.

¹² 5 C.F.R. § 2425.6(e)(1).

¹³ *E.g., AFGE, Local 405*, 66 FLRA 437, 437 n.1 (2012) (applying § 2425.6(e)(1)).

¹⁴ Exceptions Br. at 8-11 (citing *In re Michael Balen*, B-248868, 1992 WL 216809 (Comp. Gen. Sept. 2, 1992)).

¹⁵ *Id.* at 8.

¹⁶ *Cf. NAGE, Local R1-109*, 53 FLRA 403, 412-13 (1997) (citing *NFFE, Local 1167 v. FLRA*, 681 F.2d 886, 891 (D.C. Cir. 1982)) (where agency alleged proposal was nonnegotiable based on Comptroller General decisions "rely[ing] on a version of the [FTR] that ha[d] become outdated," Authority found that agency had not cited any "law or regulation . . . to support its allegation").

¹⁷ *U.S. Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 FLRA 186, 194-95 (1990) (*Fort Campbell*); *accord AFGE, Gen. Comm.*, 66 FLRA 367, 371 (2011) (rejecting argument that award was inconsistent with *Fort Campbell*).

¹⁸ *E.g., U.S. Dep't of Transp., FAA*, 64 FLRA 318, 320 (2009).

¹⁹ See *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 63 FLRA 191, 193-94 (2009) (finding that parties' agreement "does not take precedence over [agency's] program statement" absent a conflict).

²⁰ Exceptions Br. at 12-13.

Rule 5.2.1.5, and as there is no contention that the award fails to draw its essence from the agreement, we resolve de novo the Union's claim that the award is contrary to Rule 5.2.1.5.²¹

When evaluating an exception asserting that an award is contrary to a governing agency rule or regulation, the Authority determines whether the award is inconsistent with the plain wording of, or is otherwise impermissible under, the rule or regulation.²² Rule 5.2.1.5 provides that employees who interrupt their official travel are "entitle[d] . . . to . . . per diem and travel expenses not to exceed" those that they would have received for uninterrupted travel.²³ The Union has not established that the plain wording of Rule 5.2.1.5 entitles the grievant to per diem for both Friday (when the Arbitrator found that he could have returned to Seattle) and the following Wednesday (when he actually returned).²⁴ Thus, we find that the award is consistent with the plain wording of Rule 5.2.1.5. Although the Union also argues that the Arbitrator misapplied the rule by failing to "reconstruct[]" the grievant's travel as if uninterrupted,²⁵ the Arbitrator found that the grievant received the same per diem for his interrupted travel as he would have received for uninterrupted travel, and the Union does not allege that this finding is a nonfact.²⁶ Therefore, we find further that the award is not otherwise impermissible under Rule 5.2.1.5.

V. Decision

We dismiss the Union's exceeded-authority exception and deny its remaining exceptions.

Member Pizzella, concurring:

I join my colleagues in their decision to deny the Union's exceptions.

It is also worth noting, however, that the costs involved in processing this grievance through the grievance procedure, arbitration, and exceptions to the Authority substantially dwarf the cost of the claim for one day per diem that was at issue. Furthermore, the Union failed to make arguments it could have made to the Arbitrator and failed to provide support for its exceptions.¹

These circumstances, quite simply, do not promote "the effective conduct of public business"² or foster "work practices [that] facilitate and improve . . . the efficient accomplishment of the operations of the Government."³

Thank you.

²¹ See *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 626, 629-31 (2012) (de novo evaluation of argument that award was contrary to governing agency-wide regulation).

²² *E.g., SSA, Region IX*, 65 FLRA 860, 863 (2011).

²³ Exceptions Br. at 5 (citing Travel Manual Rule 5.2.1.5).

²⁴ See *CBP*, 66 FLRA at 567-68 (absent nonfact, Authority defers to underlying arbitral factual findings).

²⁵ Exceptions Br. at 11.

²⁶ See *CBP*, 66 FLRA at 567-68.

¹ Majority at 3.

² *U.S. DHS, CBP*, 67 FLRA 107, 112 (2013) (Concurring Opinion of Member Pizzella) (citing 5 U.S.C. § 7101(a)(1)(B)).

³ *Id.* (quoting 5 U.S.C. § 7101(a)(1) (internal quotation marks omitted)).