

67 FLRA No. 95

UNITED STATES
DEPARTMENT OF COMMERCE
NATIONAL OCEANIC
AND ATMOSPHERIC ADMINISTRATION
NATIONAL WEATHER SERVICE
(Agency)

and

NATIONAL WEATHER
SERVICE EMPLOYEES ORGANIZATION
(Union)

0-AR-4970

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DECISION

April 16, 2014

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

I. Statement of the Case

The Union filed a grievance alleging, as relevant here, that the Agency violated the parties' collective-bargaining agreement by denying the grievant "court leave,"¹ which is paid leave granted "during a period of absence with respect to which [an employee] is summoned . . . to serve . . . as a juror."² Arbitrator Joshua M. Javits sustained the grievance and directed the Agency to make the grievant whole. The Agency has filed exceptions to the award that present two substantive questions.

The first question is whether, due to the Arbitrator's evaluation of evidence or his interpretation of the parties' agreement, the award is based on a nonfact. Because parties may not successfully challenge an arbitrator's evaluation of evidence or his contractual interpretations as nonfacts – and the Agency's nonfact exception attempts to do so – the answer to the first question is no. The second question is whether the award is contrary to the statutory provision authorizing court leave – 5 U.S.C. § 6322 – or Comptroller General decisions interpreting that provision. Given the Agency's acknowledgement that § 6322 permits granting court

leave to the grievant for the dates in question, the answer to the second question is also no.

II. Background and Arbitrator's Award

Although he is a "rotating[-]shift worker"³ whose duty shifts and days off normally change from week to week, the grievant "typically . . . work[s] weekend shifts" and has two days off during the week.⁴ In response to a court summons, the grievant reported for jury service beginning on Monday, June 25, and his service continued through Wednesday, July 11.⁵ During that period, the grievant had to report for jury service on four of his regularly scheduled days off.

The grievant requested that the Agency grant him court leave for Wednesday, July 4, and for two of his regularly scheduled weekend workdays. When the Agency denied the grievant's court-leave requests, the Union grieved the denials as violating the parties' collective-bargaining agreement. The unresolved grievance went to arbitration on the stipulated issues⁶ of whether the grievant "[w]as . . . improperly denied court leave [And, i]f so, what should the remedy be?"⁷

The Arbitrator determined that Article 19, Section 11 of the parties' agreement (Section 11) was "the relevant [contractual] provision for addressing the . . . grievance."⁸ More specifically, the Arbitrator examined the second sentence of Section 11: "An employee eligible for court leave shall be granted court leave to serve on a jury for the entire period of service, *extending from the date on which he/she is required to report to the time of discharge by the court.*"⁹ The Arbitrator found that the "clear, . . . unambiguous" wording of the second sentence¹⁰ required that "court leave' remain[] in effect for the whole period that an employee is on jury[-]service duty; from the first day . . . until the last day," without exception.¹¹ Relying on that interpretation, the Arbitrator rejected the Agency's contention that it had discretion to deny court leave on any day between June 25 and July 11 when the court did not actually require the grievant to report for jury service – including July 4.

³ Award at 3-4 (quoting CBA Art. 20, § 2(A)).

⁴ *Id.* at 4.

⁵ All dates are in 2012.

⁶ *See* Exceptions at 9 (acknowledging that parties stipulated to issues); *id.*, Attach., Hearing Tr. at 11-12 (Arbitrator's statement of stipulated issues).

⁷ Award at 2.

⁸ *Id.* at 27-28.

⁹ *Id.* at 28 (quoting Section 11) (emphasis added by Arbitrator).

¹⁰ *Id.* at 36.

¹¹ *Id.* at 30; *accord id.* at 35-36.

¹ Award at 2, 27 (quoting CBA, Art. 19, § 11).

² 5 U.S.C. § 6322(a)(1).

As relevant to the grievant's court-leave requests for weekend days when he would otherwise be scheduled to work, the Arbitrator examined Section 11's sixth sentence, which states that employees "whose regular tour of duty includes Saturday, Sunday[,] or both, and who serve on a jury during the week *may* be granted court leave . . . for the weekend days [that] are part of their regular tour of duty."¹² The Arbitrator found that the use of the word "may" did not permit the Agency to deny the grievant court leave for weekend days. To the contrary, the Arbitrator noted that the parties' prior agreement used the word "may" in the same context, and the parties' "customary practice"¹³ in applying that wording gave "no indication that the word 'may' . . . provided Agency management . . . discretion to determine if court leave should be granted."¹⁴ Consequently, the Arbitrator rejected the Agency's assertion that, even though the grievant's jury service during the week satisfied the "conditions necessary for court leave" under Section 11's sixth sentence,¹⁵ the Agency nevertheless retained discretion to deny the grievant court leave for weekend days.

In conclusion, the Arbitrator found that the "Agency was compelled, under [Section 11], to provide the [g]rievant with court leave" for the dates he requested.¹⁶ To remedy the Agency's contractual violation, the Arbitrator directed that the Agency make the grievant whole by granting him either court leave for use "at a later weekend date" or "backpay for the dates that he should have been awarded court leave."¹⁷

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

III. Preliminary Matters

- A. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar consideration of one of the Agency's arguments.

The Agency challenges the Arbitrator's remedy.¹⁸ 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.¹⁹ In particular, the Authority has declined to consider an agency's exception to an

arbitrator's chosen remedy where: (1) the union specifically requested the chosen remedy in its brief to the arbitrator; and (2) the agency did not avail itself of an opportunity to respond to the union's remedial request before the arbitrator issued an award.²⁰ Here, the Arbitrator granted the very relief that the Union requested in its brief,²¹ and there is no indication that the Agency opposed the Union's remedial request before the Arbitrator, despite having an opportunity to do so. Therefore, consistent with §§ 2425.4(c) and 2429.5, we do not consider the Agency's arguments regarding the remedy awarded.

- B. We deny the Agency's exceeded-authority exception under § 2425.6(e)(1) of the Authority's Regulations.

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).²² The Authority has denied an exception as unsupported under § 2425.6(e)(1) where a party asserted that an arbitrator exceeded his authority by issuing an award that was contrary to law, but the party did not provide any arguments pertinent to the standard for evaluating an exceeded-authority exception.²³ In that regard, to establish that an arbitrator exceeded his or her authority, a party must show that the arbitrator failed to resolve an issue submitted to arbitration, resolved an issue not submitted to arbitration, disregarded specific limitations on his or her authority, or awarded relief to individuals outside the scope of the grievance.²⁴

The Agency asserts that the Arbitrator exceeded his authority by issuing an award that conflicts with certain Comptroller General decisions. But that assertion does not address how the Arbitrator exceeded his authority under the standard set forth above.²⁵ Accordingly, we deny the Agency's exceeded-authority exception as unsupported under § 2425.6(e)(1) of the Authority's Regulations.

¹² *Id.* at 12 (quoting Section 11) (emphasis added by Arbitrator) (one emphasis omitted).

¹³ *Id.* at 34.

¹⁴ *Id.* at 39.

¹⁵ *Id.* at 38; *see id.* at 37-40.

¹⁶ *Id.* at 36.

¹⁷ *Id.* at 40.

¹⁸ *See* Exceptions at 21.

¹⁹ 5 C.F.R. §§ 2425.4(c), 2429.5.

²⁰ *E.g., USDA, Farm Serv. Agency, Kan. City, Mo.*, 65 FLRA 483, 484 n.4 (2011).

²¹ *Compare* Award at 40 (remedial award), *with* Exceptions, Attach., Union's Post-Hr'g Br. at 38 (relief requested).

²² 5 C.F.R. § 2425.6(e)(1).

²³ *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 & n.5 (2012) (*IRS*).

²⁴ *U.S. Dep't of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 307-08 (1995).

²⁵ *See IRS*, 67 FLRA at 104 n.5.

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency argues that the award is based on the nonfact “that there was no indication that the word ‘may’ in the parties’ predecessor collective[-]bargaining agreement provided Agency management with the sole discretion to determine if court leave should be granted.”²⁶ As relevant here, to establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.²⁷ However, the Authority will not find an award deficient on nonfact grounds based on a party’s disagreement with an arbitrator’s evaluation of evidence²⁸ or interpretation of a collective-bargaining agreement.²⁹ To the extent that the Agency is challenging the Arbitrator’s determination that none of the parties’ prior court-leave practices supported the Agency’s interpretation of the word “may” in Section 11, the Agency’s disagreement with the Arbitrator’s weighing of evidence cannot establish that the award is based on a nonfact.³⁰ And to the extent that the Agency is challenging the Arbitrator’s interpretation of Section 11 generally, or the word “may” specifically, these contractual-interpretation challenges also cannot establish that the award is based on a nonfact.³¹ (We note that the Agency does not assert that the Arbitrator’s interpretation of Section 11 fails to draw its essence from the parties’ agreement.) Thus, we deny the Agency’s nonfact exception.

B. The award is not contrary to 5 U.S.C. § 6322 or decisions of the Comptroller General interpreting that provision.

The Agency contends that the award is “contrary to . . . § 6322 because it requires the Agency to grant the grievant court leave on dates that he did not perform jury service and that did not . . . meet the very limited

exceptions” to § 6322’s requirements for granting leave.³² The Agency adds that the “exceptions” to which it refers are found in “various Comptroller General decisions . . . clarifying] the operation” of § 6322.³³ In its opposition to the Agency’s exceptions, the Union likewise relies on decisions of the Comptroller General to support its interpretation of § 6322.³⁴

When an exception involves an award’s consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo.³⁵ 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.³⁶

We note that decisions of the Comptroller General are not binding on the Authority.³⁷ In that regard, “[a]lthough a Comptroller General opinion serves as an expert opinion that should be prudently considered,” it is not one to which the Authority must defer.³⁸ Nevertheless, in cases where the parties and the arbitrator have examined Comptroller General precedent to address legal questions raised by a grievance, the Authority has assumed the applicability of that precedent when assessing contrary-to-law exceptions to the resulting arbitral award.³⁹ We follow this approach in assessing the Agency’s exception regarding the award’s consistency with § 6322.

In its discussion of the requirements for court leave under § 6322, the Agency expressly and repeatedly acknowledges that, according to the Comptroller General, the Agency may lawfully exercise its discretion to grant court leave: (1) on weekends to an employee (such as the grievant) whose regularly scheduled tour of duty includes weekend days and who performed jury service during the week;⁴⁰ and (2) on occasions “when [the employee is]

²⁶ Exceptions at 1-2; *accord id.* at 14-17 (providing further argument in support of nonfact exception).

²⁷ *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*Local 1984*) (citing *U.S. Dep’t of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).

²⁸ *E.g., IRS*, 67 FLRA at 103 (citing *AFGE, Local 3295*, 51 FLRA 27, 32 (1995)).

²⁹ *U.S. Dep’t of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 56 FLRA 498, 501 (2000) (*Warner Robins*); *NLRB*, 50 FLRA 88, 92 (1995).

³⁰ *See, e.g., IRS*, 67 FLRA at 103 (citing *U.S. DOD Educ. Activity, Arlington, Va.*, 56 FLRA 836, 842 (2000); *NAGE, Local R4-45*, 55 FLRA 695, 697, 700 (1999) (finding agency’s argument regarding an “absence of facts” did not demonstrate award was based on nonfact)).

³¹ *Warner Robins*, 56 FLRA at 501; *NLRB*, 50 FLRA at 92.

³² Exceptions at 17.

³³ *Id.* at 18.

³⁴ *See Opp’n* at 10-14.

³⁵ *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)).

³⁶ *U.S. DOD, Dep’t of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

³⁷ *See, e.g., U.S. Dep’t of the Treasury, IRS, Small Bus./Self Employed Operating Div.*, 65 FLRA 23, 26 n.5 (2010) (citing *AFGE, Local 1458*, 63 FLRA 469, 471 (2009) (*Local 1458*)).

³⁸ *Local 1458*, 63 FLRA at 471.

³⁹ *See U.S. Dep’t of the Navy, Naval Underseas Warfare Ctr., Newport, R.I.*, 54 FLRA 1495, 1499-1500 & n.2 (1998) (and cases cited therein).

⁴⁰ Exceptions at 9, 19-20 (citing *In re Jury Duty for Emps. Whose Workweek Includes Weekends*, 54 Comp. Gen. 147, B-180813, 1974 WL 8662 (Aug. 27, 1974)); *id.* at 9-10, 18 (citing *In re VA Hosp., Montrose, N.Y. – Rescheduling of*

excused from jury duty for one day” – such as July 4 – during the term of the employee’s jury service.⁴¹ Thus, the Agency effectively concedes that § 6322 permits granting the grievant court leave on the three dates in question. Still, the Agency asserts that the award is contrary to law because it “obviates the Agency’s discretion” to grant or deny court leave under § 6322.⁴² But the award does not “obviate” the Agency’s discretion; rather, it enforces the parties’ agreement regarding the manner in which the Agency exercises its discretion to grant or deny court leave.⁴³ As the Agency has not established that the Arbitrator’s enforcement of Section 11 of the parties’ agreement is contrary to § 6322 or Comptroller General decisions interpreting that provision, we deny the Agency’s contrary-to-law exception.

V. Decision

We deny the Agency’s exceptions.

Workweek for Jury Duty, B-180813, 1976 WL 9862 (Comp. Gen. Aug. 13, 1976)).

⁴¹ *Id.* at 19 (citing *Leaves of Absence – Jury Serv. – Return to Duty Requirements; Etc.*, 26 Comp. Gen. 413, B-62160, 1946 WL 614 (Dec. 13, 1946)); *accord id.* at 18, 19 (citing *In re Nora Ashe*, 60 Comp. Gen. 412, B-201590, 1981 WL 22500 (Apr. 22, 1981)).

⁴² *Id.* at 21.

⁴³ *See SSA, Balt., Md.*, 58 FLRA 630, 633 (2003) (“As agencies have discretion to grant administrative leave to their employees, management can negotiate the terms under which it will exercise that discretion[,] and such agreements are enforceable in arbitration.” (citing *Dep’t of VA Med. Ctr., Asheville, N.C.*, 51 FLRA 1572, 1578 (1996))).