68 FLRA No. 13

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 17
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL AIR STATION-JOINT RESERVE BASE
NEW ORLEANS, LOUISIANA
(Agency)

0-AR-5022

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DECISION

November 21, 2014

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

I. Statement of the Case

Arbitrator T. Zane Reeves issued an award denying the Union's grievances seeking the restoration of annual leave for any employee required to work on Mardi Gras.

The Union argues that the Arbitrator's award is deficient on multiple grounds. First, the Union alleges that the award is based on a nonfact in two instances: (1) the Arbitrator "erroneously framed the issue, based on a nonfact";[1] and (2) the Arbitrator incorrectly based his determination that the Union did not meet its burden of proof on a nonfact. Because these allegations fail to demonstrate that the award is deficient, we deny these exceptions.

Second, the Union raises two contrary-to-law exceptions: (1) the award misinterprets the Agency's management rights; and (2) the Arbitrator's ruling concerning the availability of administrative leave was contrary to a government-wide regulation.[2] Because these contrary-to-law exceptions are based on dicta, we deny these exceptions.

Finally, the Union alleges that the Arbitrator exceeded his authority by reviewing issues not properly before him. As this exception is also based on dicta, we deny this exception.

II. Background

The grievances concern employees of the Naval Air Station-Joint Reserve Base (NAS/JRB) in New Orleans, Louisiana. In the events leading up to the grievances, the Agency cancelled its practice of granting administrative leave on Mardi Gras. The Union alleged that the grant of administrative leave on Mardi Gras existed as a past practice and, thus, that the Agency was required to bargain before it made any changes to that practice; the Agency maintained that the matter was outside its duty to bargain. The matter eventually went to the Federal Service Impasses Panel (FSIP) for resolution.[3]

FSIP asserted jurisdiction over the matter due to "uncontroverted evidence during the initial investigation that at least some bargaining[-]unit employees had been told by their supervisors that the activities[] where they worked would be closed on Mardi Gras . . . and that they would be required to take annual leave."[4] Additionally, due to the uncontroverted evidence, FSIP took the "unusual step" in its procedural-determination letter to order the Agency "to grant administrative leave to all bargaining[-]unit employees, if any, who were required to take annual leave by their supervisors because they were informed that the activities where they work [would] be closed" on Mardi Gras.[5]

After asserting jurisdiction in its procedural-determination letter, FSIP issued a decision based on written submissions; in that decision, FSIP ordered the following: "[NAS/JRB] shall restore the annual leave of any bargaining[-]unit employees who were required to take annual leave by their supervisors because they were informed that the activities where they work would be closed on [Mardi Gras]."[6]

Sometime later, the Union filed grievances alleging that the Agency "had failed and refused to restore the annual leave of appropriated[-]fund and non-appropriated[-]fund employees for Mardi Gras" in compliance with the FSIP order.[7] The matter was unresolved, and the parties submitted it to arbitration. Because the parties were unable to reach agreement on

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[1] Exceptions at 5.
[2] *Id.* (quoting 5 C.F.R. § 610.302).

[3] *Dep't of the Navy, Naval Air Station Joint Reserve Base New Orleans, Belle Chasse, La.*, 13 FSIP 46 slip op. at 3, 2013 FSIP LEXIS *5 (2013) (FSIP decision).
[4] *Id.* at 10-11.
[5] *Id*. at 1 n.1.
[6] *Id.* at 13.
[7] Award at 5.

the issue, the Arbitrator framed the issue as "[w]hether the Agency closed the NAS/JRB on [Mardi Gras] and thereby forced bargaining[-]unit employees to take annual leave because of said closures."[8]

Before the Arbitrator, the Union argued that, "[b]y breaching a past practice extending over thirty . . . years, the [A]gency unilaterally changed a term and condition of employment."[9] Although the Arbitrator discussed the Union's past-practice argument, he recognized that the Union failed to raise "past practice as an issue during the grievance . . . process"[10] and that "the only issue before the Arbitrator is whether the Agency closed the NAS/JRB and thereby forced bargaining[-]unit employees to take annual leave because of said closures."[11] The Arbitrator decided that "the Union did not meet its burden of proof to demonstrate that the Agency closed the NAS/JRB on [Mardi Gras]" and that "the grievance[s] lack[ed] demonstrable merit."[12] Accordingly, he denied the grievances.

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

III. Preliminary Matters: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar certain of the Union's exceptions.

A. A contrary-to-law argument is barred as not raised below.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[13]

The Union argues that the Arbitrator "erred as a matter of law in failing to determine" that the past practice of granting administrative leave for Mardi Gras "had been incorporated into the parties' collective[-]bargaining agreement," dated May 2012.[14] In support, the Union contends that a past practice establishing a condition of employment becomes incorporated into the parties' agreement as a matter of law.[15] While the Union argued below that the past practice should continue, there is no indication in the record that the Union argued that, as a matter of law, this past practice was incorporated into the agreement. Although an argument could have been presented to the Arbitrator that the past practice legally became part of the parties' agreement, the Union brought no such argument to the attention of the Arbitrator. Because the Union did not make this argument before the Arbitrator, but could have done so, it may not do so now.[16] We therefore dismiss this exception as barred by §§ 2425.4(c) and 2429.5.

The Agency contends that § 2429.5 bars another contrary-to-law exception. In his award, the Arbitrator ruled that granting administrative leave would impermissibly "establish an additional [federal] holiday for employees" in violation of 5 U.S.C § 6103.[17] In its exceptions, the Union argues that the Arbitrator erred as a matter of law because a government-wide regulation grants agencies discretion to grant administrative leave.[18] The Agency argues that because the Union failed to raise this argument below, it cannot do so now. However, the Arbitrator addressed 5 U.S.C. § 6103 and the establishment of a federal holiday *sua sponte* in his award. Having no reason to raise this contrary-to-law argument below, the Union may do so now, and § 2429.5 does not bar this exception.[19]

B. An exception fails to raise a recognized ground for review.

The Authority's Regulations enumerate the grounds upon which the Authority will review awards.[20] In addition, the Regulations provide that if exceptions argue that an arbitration award is deficient based on private-sector grounds not currently recognized by the Authority, then the excepting party "must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions."[21] Furthermore, § 2425.6(e)(1) of the Regulations provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support" the grounds listed in § 2425.6(a)-(c), or "otherwise fails to demonstrate a legally recognized basis for setting aside the award."[22] Thus, an exception that does not raise a recognized ground is subject to dismissal.[23]

The Union argues that the Arbitrator erred when he found "that granting [administrative] leave for Mardi

[8] *Id.* at 2.
[9] Exceptions, Attach. B at 8.
[10] Award at 8.
[11] *Id.* at 6.
[12] *Id.* at 10.
[13] 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012).
[14] Exceptions at 8.
[15] *Id.* (quoting *AFGE, Local 2128*, 58 FLRA 519, 523 (2003)).
[16] *AFGE, Local 1164*, 66 FLRA 74, 77 (2011).
[17] Award at 9.
[18] Exceptions at 9 (citing 5 C.F.R § 610.302).
[19] *U.S. DOL*, 60 FLRA 737, 738 (2005).
[20] 5 C.F.R. § 2425.6(a)-(b).
[21] *Id.* § 2425.6(c).
[22] *Id.* § 2425.6(e)(1).
[23] *AFGE, Local 738*, 65 FLRA 931, 932 (2011) (*Local 738*); *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011) (Member Beck dissenting in part).

Gras . . . is contrary to the [n]egotiated [a]greement."[24] Specifically, the Union argues that the Arbitrator "fail[ed] to acknowledge the limits on management's rights agreed to in" the parties' agreement.[25] This argument does not raise a ground for review currently recognized by the Authority, and the Union does not cite any legal authority that supports a conclusion that the argument raises a private-sector ground not currently recognized by the Authority.[26] As such, we dismiss this exception.[27]

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union argues that the Arbitrator erroneously based the award on two nonfacts. 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.[28] However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.[29] The Authority has long held that disagreement with an arbitrator's evaluation of evidence and testimony, including the determination of the weight to be given to such evidence, provides no basis for finding the award deficient as a nonfact.[30]

First, the Union argues that the Arbitrator "erroneously framed the issue, based on a nonfact, as whether the Navy base, NAS/JRB, was closed by the [A]gency on [Mardi Gras]," rather than whether "particular agency work facilities were closed on Mardi Gras, which required employees to take annual leave."[31] Specifically, the Union alleges that the Arbitrator made a "significant factual error" in his interpretation of the FSIP order and the grievance.[32] However, the Arbitrator's interpretation of the FSIP order is not a "fact" that can be challenged on nonfact grounds. Additionally, in challenging the Arbitrator's interpretation of the grievance, the Union contests the Arbitrator's interpretation of the scope of the issue – i.e., whether the issue involves work facilities on the base or the base as a whole.[33] However, an arbitrator's interpretation of the scope of a grievance does not constitute a matter that can be challenged as a nonfact.[34] As such, we find that this exception fails to establish that the award is based on a nonfact.

Second, the Union argues that the Arbitrator's finding that "the Union did not meet its burden of proof to demonstrate that the Agency closed the NAS/JRB on [Mardi Gras]" is based on nonfact as it is contrary to the Union's evidence.[35] The Union points to uncontested testimony that stated that various facilities were not operational on Mardi Gras. However, even if credited, this testimony does not contradict the Arbitrator's finding that the Agency did not close NAS/JRB as a whole and "force[] bargaining[-]unit employees to take annual leave because of said closure[]."[36] Therefore, we find that the Union has failed to demonstrate that this finding is based on a nonfact.

As the nonfact exceptions fail to demonstrate that the award is deficient, we deny these exceptions.

B. The remaining exceptions challenge dicta.

The Union also claims that the award is contrary to law and that the Arbitrator exceeded his authority. As to the contrary-to-law exceptions, the Union alleges that the Arbitrator erred as a matter of law in two respects: (1) "in stating that granting leave for Mardi Gras . . . conflicts with management rights";[37] and (2) "concerning the availability of administrative leave."[38] As to the Arbitrator exceeding his authority, the Union contends

[24] Exceptions at 8.
[25] *Id.*
[26] *AFGE, Local 1858*, 67 FLRA 327, 328 (2014) (Member Pizzella concurring).
[27] Member Pizzella would find that the Union has stated an argument that sufficiently "explain[s] how the award is deficient" to avoid dismissal. *AFGE, Local 1897*, 67 FLRA 239, 243 (2014) (Concurring Opinion of Member Pizzella) (citations and internal quotation marks omitted). He would rule that the Union has set forth an arguable essence exception that cannot be merely dismissed. As Member Pizzella has previously noted, the Authority's Regulations do not require a party "to invoke any particular magical incantations" to perfect an exception. *Id.* (citation and internal quotation marks omitted); *see also NTEU v. FLRA*, 754 F.3d 1031, 1040 (D.C. Cir. 2014) ("A party is not required to invoke 'magic words' in order to adequately raise an argument before the Authority. Instead, an argument is preserved if the party has 'fairly brought' the argument 'to the Authority's attention.'") (citations omitted). However, looking to the merits of the exception, he would deny it as based on dicta as explained in section IV.B. below.
[28] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).
[29] *Id.*
[30] *NFFE, Local 1968*, 67 FLRA 384, 385-86 (2014).
[31] Exceptions at 5.
[32] *Id.*
[33] *AFGE, Council Local 2128*, 59 FLRA 406, 408 (2003); *U.S. DOD, Def. Contract Mgmt. Agency*, 59 FLRA 396, 403 (2003) (then-Member Pope dissenting in part).
[34] *Id.*
[35] Exceptions at 9 (quoting Award at 10).
[36] Award at 10.
[37] Exceptions at 8.
[38] *Id.* at 9 (stating that 5 C.F.R. § 610.302 allows that "agencies may grant administrative leave 'to the extent warranted by good administration for short periods of time not generally exceeding [three] consecutive work days'").

that "the Arbitrator exceeded his authority when he reviewed proposals . . . which were before the FSIP, not the Arbitrator."[39]

These exceptions all allege errors in the Arbitrator's analysis and evaluation of the Union's argument "concern[ing] whether a long-standing 'past practice' [of granting administrative leave for Mardi Gras] could be unilaterally terminated by the Agency" or if the parties had to negotiate over the issue.[40] However, as part of his discussion of this issue, the Arbitrator determined that the "issue before [him was] narrowly and precisely defined by the controlling order by FSIP"[41] and that the "negotiation of administrative leave for bargaining[-]unit employees on Mardi Gras" was not an "element[] of the captioned matter and must be excluded from arbitral consideration."[42] Where, as here, an arbitrator finds a matter not arbitrable, any comments he or she makes concerning the merits of that matter are dicta, and cannot form the basis for finding an award deficient.[43] Because these remaining exceptions challenge dicta, we deny them.

V. Decision

We dismiss, in part, and deny, in part, the Union's exceptions.

[39] *Id.* at 8.
[40] Award at 6.
[41] *Id.* at 8
[42] *Id.* at 9.
[43] *AFGE, Council of Prison Locals, Council 33*, 66 FLRA 602, 605 (2012); *AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009).

Member DuBester, concurring in the result:

I agree with the majority's decision to dismiss, in part, and deny, in part, the Union's exceptions. I write separately primarily because the majority's resolution of one issue in the case reflects a misunderstanding of important past-practice principles.

The majority errs in holding that the Union is barred from raising a past-practice claim regarding the award because the Union did not argue the matter before the Arbitrator. The Union claims that the Arbitrator "erred as a matter of law in failing to determine" that the past practice of granting administrative leave for Mardi Gras "had been incorporated into the parties' collective[-]bargaining agreement."[1] The Union's claim supports its broader assertion that the Arbitrator erred when he failed to restore the annual leave of employees who took annual leave for Mardi Gras, after the Agency unilaterally discontinued an established – and contractually binding – past practice of granting administrative leave for that holiday.

The majority refuses to consider the Union's claim because "there is no indication in the record that the Union argued [to the Arbitrator] that, as a matter of law, this past practice was incorporated into the agreement."[2] The majority's logic is faulty. The majority acknowledges that the Union argued to the Arbitrator that granting administrative leave for Mardi Gras was a past practice "extending over thirty . . . years," and that by terminating the past practice, "the [A]gency unilaterally changed a term and condition of employment."[3] What the majority fails to appreciate is that "[w]here a past practice establishes a condition of employment, that condition of employment is incorporated into the parties' collective[-]bargaining agreement" as a matter of law.[4] Consequently, the Union's argument to the Arbitrator – that granting administrative leave for Mardi Gras was a past practice that established a condition of employment – is the legal equivalent of arguing that granting administrative leave for Mardi Gras had been incorporated into the parties' collective-bargaining agreement "as a matter of law." Accordingly, in my view, the Union's argument to the Arbitrator preserved the claim that it now asks the Authority to consider.

That said, I would nevertheless deny the Union's contrary-to-law claim on its merits, for the reasons the majority sets forth in part IV.B. of the decision for denying certain of the Union's other contrary-to-law claims. Specifically, I would deny the Union's claim

[1] Exceptions at 8.
[2] Majority at 3.
[3] *Id.* (quoting Exceptions, Attach. B at 8).
[4] *AFGE, Local 2128*, 58 FLRA 519, 523 (2003).

because it alleges an error in the Arbitrator's analysis and evaluation of the Union's argument concerning the past practice of granting administrative leave for Mardi Gras. The Arbitrator found that matter not arbitrable.[5] And as the majority holds, where an arbitrator finds a matter not arbitrable, any comments that he or she makes concerning the merits of that matter are dicta, and cannot form the basis for finding an award deficient.

Finally, regarding the Arbitrator's comments concerning the merits of the Union's past-practice claim, I note his finding that such a past practice existed.[6] And I also note that, although the Arbitrator's reasons for finding "inescapable barriers"[7] to the negotiation or continuation of such a past practice – like a purported conflict of such a past practice with "exclusive"[7] management rights – are problematic, the Union nevertheless chose to seek in its grievance only the Agency's compliance with the Federal Service Impasses Panel's decision. Because of the limited nature of the grievance proceeding that the Union initiated, I agree that we are compelled to treat the Arbitrator's remarks addressing the Union's past-practice arguments as dicta, and to resolve the Union's contrary-to-law exceptions accordingly.

[5] Award at 9.
[6] *Id.* at 8.
[7] *Id.*
[7] *Id.* at 9.