74 FLRA No. 45

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 105
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

0-AR-5980

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DECISION

August 5, 2025

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Before the Authority: Colleen Duffy Kiko, Chairman, and Anne Wagner, Member

I. Statement of the Case

Arbitrator Carol A. Vendrillo issued an award finding the Agency did not violate the parties' collective-bargaining agreement or 5 U.S.C. § 6101[1] when it scheduled certain employees for non-consecutive regular days off (split days off). The Union filed exceptions on essence, nonfact, and exceeded-authority grounds. Because the Union fails to demonstrate that the award is deficient, we deny the exceptions.

II. Background and Arbitrator's Award

The parties entered into a national collective-bargaining agreement in 2011 and revised that agreement in 2013 (the 2013 Agreement). Article 34, Section 5.B. of the 2013 Agreement pertinently states that, "[e]xcept when the [Agency] determines that it would be seriously handicapped in carrying out its functions or that costs would be substantially increased," the Agency "will provide that . . . [t]he basic forty . . . hour workweek is scheduled on five . . . days, Monday through Friday when possible, and the two . . . days outside the basic workweek are consecutive."[2]

In May 2015, the Agency solicited applications from employees to participate in a pilot program at a facility in Mexico (the facility). The solicitation stated that "[i]t is anticipated the facility will be open for approximately [six] hours per day," but "the assigned shift and days off will be dictated by operational needs."[3] Before the Agency implemented the pilot program, the Union met with the Agency and raised various questions and concerns, which the Agency later addressed in a memo to the Union.

As of July 28, 2015, sixteen employees had been assigned to the facility, but were scheduled to work there only part-time. In October 2015, the Agency sent employees a second solicitation that contained the same relevant terms as the first. In February 2016, employees began working at the facility more regularly. In October 2016, the Agency sent out a third solicitation that contained the same pertinent terms as the first two solicitations.

In 2017, the parties ratified a new national collective-bargaining agreement (the 2017 Agreement). Similar to Article 34, Section 5.B. of the 2013 Agreement, Article 34, Section 4.B. of the 2017 Agreement states, in relevant part, that, "[e]xcept when the [Agency] determines, pursuant to its authority to determine exceptions under 5 U.S.C. [§] 6101(a)(3), that it would be

[1] Title 5, § 6101 of the U.S. Code states, in pertinent part:

> (3) Except when the head of an Executive agency . . . determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide, with respect to each employee in his organization, that –
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> . . . .
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> (B) the basic [forty]-hour workweek is scheduled on [five] days, Monday through Friday when possible, and the [two] days outside the basic workweek are consecutive . . . .

5 U.S.C. § 6101(a)(3).

[2] Exceptions, Attach. 7 (2013 Agreement) at 160.

[3] Award at 3 (internal quotation marks omitted).

seriously handicapped in carrying out its functions or that costs would be substantially increased," the Agency "will provide that . . . [t]he basic forty . . . hour workweek is scheduled on five . . . consecutive days when possible, and the two . . . days outside the basic workweek are consecutive."[4] However, unlike the 2013 Agreement, the 2017 Agreement contains an additional provision – Article 34, Section 7.D. (the voluntary exception provision) – which states: "Voluntary or employee[-]requested scheduling exceptions. Scheduling exceptions are appropriate when, in accordance of the provisions of this [a]greement, the [Agency] requests a voluntary change to an employee's schedule and the employee agrees[,] and/or an employee requests a change which the [Agency] approves. . . ."[5]

In February 2018, the Agency discontinued the pilot program. On February 16, 2018, the Union filed a grievance alleging that the Agency violated Article 34 of the "National Collective Bargaining Agreement" and 5 U.S.C. § 6101 when the Agency scheduled split days off for unit employees working at the facility.[6] The Agency denied the grievance, and the Union invoked arbitration.

At the arbitration hearing, the parties stipulated to the issues as: "Did [the] Agency violate the parties' national collective[-]bargaining agreement and/or 5 U.S.C. [§ 6101(a)(3)[7]] by failing to schedule employees assigned to the . . . [f]acility for two consecutive days off outside the basic work week. And if so, what shall be the remedy?"[8] In her award, the Arbitrator reworded the stipulated issues, stating them as: "Did the Agency violate Article 34 of the parties' collective[-]bargaining agreement and 5 [U.S.C. §] 6101(a)(3) by failing to schedule employees assigned to the . . . facility consecutive regular days off? If so, what is the appropriate remedy?"[9]

The Arbitrator found that "[b]oth the parties' collective[-]bargaining agreement and the U[.] S[.] Code grant Agency employees two consecutive days off outside their basic workweek."[10] The Arbitrator also found that, "[d]espite those guarantees, employees who were assigned to the . . . facility between 2016 and 2018 were denied two consecutive [regular days off] during their assignments."[11]

However, the Arbitrator then stated that "[t]he question is whether under Article 34, Section 7, employees who worked in the pilot program executed 'voluntary scheduling exceptions' and thereby relinquished that entitlement."[12] The Arbitrator noted that all of the Agency's solicitations for the pilot program informed employees their assigned shifts and days off would be dictated by operational needs, and did not carve out an exception that would preserve employees' consecutive regular days off. The Arbitrator then determined that, by applying for and accepting assignments to the pilot program, the employees "ceded their entitlement to two consecutive regular days off."[13]

In addition, the Arbitrator found the employees' understanding that the Agency could schedule them for split days off was "supported by" the fact that, when the Union raised concerns about the pilot program to the Agency in June 2015, it did not mention split days off.[14] Additionally, the Arbitrator stated that, "[o]nce [the pilot program] was up and running, complaints about the split [days off] were not voiced to management by employees who suffered that consequence."[15] The Arbitrator also noted that, "[e]ven if some employees were unaware of the consecutive two-day [regular-day-off] entitlement, it was not until February 2018 – as the pilot program was sunsetting – that the Union filed th[e] grievance."[16] The Arbitrator determined that, "[t]aken together, these factors signal acquiescence during the . . . pilot program to employee schedules that did not include two consecutive days off."[17]

The Arbitrator concluded that the Agency did not violate "the parties' collective[-]bargaining agreement" or 5 U.S.C. § 6101 by failing to provide consecutive regular days off to employees who worked on the pilot program.[18] Therefore, she denied the grievance.

On August 12, 2024, the Union filed exceptions to the award. The Agency did not file an opposition to the exceptions.

III. Analysis and Conclusions

A. The award draws its essence from the parties' agreements.

The Union argues the award fails to draw its essence from the 2013 and 2017 Agreements.[19] The

[4] Exceptions, Attach. 8 (2017 Agreement) at 173.
[5] *Id.* at 175.
[6] Exceptions, Jt. Ex. 3 (Step 1 Grievance) at 1.
[7] The hearing transcript says "1601(a)(3)." Exceptions, Attach. 6 (Tr.) at 5. However, the Union contends, and there is no dispute, that this was a "typo." Exceptions Br. at 4 n.2.
[8] Tr. at 5.
[9] Award at 2. Although the Union notes the Arbitrator changed the wording of the stipulated issues, *see* Exceptions Br. at 4, the Union does not except to the award on that basis.
[10] Award at 6.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 7.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Exceptions Br. at 9-14.

Authority will find that an award fails to draw its essence from a 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 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.[20] Mere disagreement with the arbitrator's interpretation and application of a collective-bargaining agreement does not establish the award fails to draw its essence from the agreement.[21]

First, the Union argues that, in finding the Agency did not commit a contractual violation, the Arbitrator focused on the voluntary exception provision in the 2017 Agreement – but did not discuss the *2013* Agreement, which does *not* contain that provision.[22] The Union asserts that the split days off occurred between 2016 and 2018 and, thus, "straddle" the 2013 Agreement and the 2017 Agreement.[23] According to the Union, by applying the voluntary exception provision to the portions of the grievance that the 2013 Agreement governs, the Arbitrator "effectively add[ed] language to," and improperly modified, the 2013 Agreement.[24]

We note that neither the Union's 2018 grievance nor the stipulated issues mention multiple agreements or establish that the Arbitrator was *required* to resolve the grievance by relying, in part, upon the 2013 Agreement.[25] However, even assuming that the Arbitrator was required to apply the 2013 Agreement, the Union does not cite any wording from the 2013 Agreement indicating employees may not "cede[] their entitlement to two consecutive regular days off," as the Arbitrator found the employees did in this case.[26] Therefore, even if the Arbitrator erred by applying the voluntary exception provision to events that preceded the 2017 Agreement, the Union's arguments provide no basis for finding that the award was irrational, unfounded, implausible, or in manifest disregard of the 2013 Agreement.[27] Accordingly, the Union's arguments do not demonstrate that the award fails to draw its essence from the 2013 Agreement, and we deny this exception.

Second, even for the portions of the grievance that the Union alleges are governed by the 2017 Agreement, the Union asserts that the award fails to draw its essence from the voluntary exception provision of that agreement.[28] As noted previously, that provision states: "Voluntary or employee[-]requested scheduling exceptions. Scheduling exceptions are appropriate when, in accordance of the provisions of this [a]greement, the [Agency] requests a voluntary change to an employee's schedule and the employee agrees[,] and/or an employee requests a change which the [Agency] approves. . . ."[29] The Union contends that the Arbitrator did not find that either of these situations occurred but, instead, found the employees and the Union "signaled 'acquiescence'" to the split days off by failing to "complain (or complain quickly enough)" about them.[30] According to the Union, the voluntary exception provision does not provide an exception to scheduling requirements where employees merely "'acquiesce' to (rather than explicitly and affirmatively volunteer for or agree to)" split days off.[31]

Interpreting and applying the voluntary exception provision, the Arbitrator found that: (1) the Agency's solicitations for the pilot program informed employees that their shifts would be dictated by operational needs, and did not preserve employees' right to consecutive regular days off; and (2) the employees who applied for and accepted assignments to the pilot program "ceded their entitlement"

[20] *AFGE, Loc. 310*, 74 FLRA 22, 23 (2024) (*Local 310*).
[21] *Id.*
[22] Exceptions Br. at 10.
[23] *Id.*
[24] *Id.* at 11.
[25] *See* Step 1 Grievance at 1 (alleging, as relevant here, that the Agency violated Article 34 of "the National Collective Bargaining Agreement (NCBA)"); Tr. at 5 (reciting stipulated issue as asking, in relevant part, whether the Agency violated "the parties' national collective[-]bargaining agreement"); Award at 2 (restating stipulated issue as asking, in relevant part, whether the Agency violated "Article 34 of the parties' collective[-]bargaining agreement").
[26] Award at 7; *see* Exceptions Br. at 9-11.
[27] *NLRB Union*, 74 FLRA 230, 234 (2025) (denying essence exception where excepting party failed to identify any contractual wording requiring the arbitrator to reach a different conclusion); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Elkton, Ohio*, 74 FLRA 29, 31 (2024) (same); *NTEU, Chapter 66*, 72 FLRA 70, 71 (2021) (Chairman DuBester concurring; Member Abbott dissenting) (denying essence exception challenging arbitrator's reliance on an "arrangement" between the parties rather than the terms of the collective-bargaining agreement); *AFGE, Loc. 2612*, 55 FLRA 483, 486 (1999) (denying essence exception challenging arbitrator's finding that the grievant and his representative waived the grievant's rights under the collective-bargaining agreement). *Cf. AFGE, Loc. 1547*, 65 FLRA 928, 929 (2011) (denying essence exception to award that found specific provisions of collective-bargaining agreement did not apply to certain employees, based on statements the employees signed).
[28] Exceptions Br. at 11-14.
[29] 2017 Agreement at 175.
[30] Exceptions Br. at 12.
[31] *Id.* at 13.

to consecutive regular days off.[32] The Union does not cite any contract wording that required the employees to more explicitly or affirmatively express their willingness to accept the possibility of split days off, or that otherwise demonstrates it was irrational, unfounded, implausible, or in manifest disregard of the 2017 Agreement for the Arbitrator to effectively find that the schedule changes were "voluntary" within the meaning of the voluntary exception provision.[33] Rather, the Union merely argues for its preferred interpretation and application of that provision, which does not demonstrate the award is deficient on essence grounds.[34] Thus, we deny this exception.

We deny the Union's essence exceptions.

B. The Union does not demonstrate the award is based on nonfacts.

The Union argues the award is based on three nonfacts, specifically, the Arbitrator's findings that: (1) the Union could have raised the issue of split days off in its conversations with the Agency before the pilot program commenced; (2) by failing to do so, the Union agreed to split days off on the employees' behalf; and (3) employees did not complain to management about the split days off.[35]

To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[36] As discussed above, the Arbitrator concluded that, given the information contained in the solicitations for the pilot program, employees who applied for and accepted assignments to that program "ceded their entitlement to two consecutive regular days off."[37] The Arbitrator *then* went on to state that the factors the Union challenges as nonfacts provided further "support[]" for that conclusion.[38] There is no basis for finding that these additional findings were central facts underlying the award, but for which the Arbitrator would have reached a different result. Consequently, the Union does not establish the award is based on a nonfact, and we deny the nonfact exception.[39]

C. The Arbitrator did not exceed her authority.

The Union claims the Arbitrator exceeded her authority when she noted that the Union did not file the grievance until "the pilot program was sunsetting."[40] According to the Union, the Arbitrator relied on this finding to deny the grievance, and thereby resolved a procedural-arbitrability issue that was not submitted to arbitration.[41]

As relevant here, arbitrators exceed their authority when they resolve an issue not submitted to arbitration.[42] The Authority has denied exceeded-authority exceptions where the excepting party's arguments misinterpret the arbitrator's award.[43]

Although the Arbitrator noted the timing of the Union's filing of the grievance, she did not find it untimely or otherwise resolve a procedural-arbitrability issue. Therefore, the Arbitrator did not resolve an issue that was not submitted to arbitration, and the Union's arguments misinterpret the award. Accordingly, we deny the exceeded-authority exception.[44]

IV. Decision

We deny the Union's exceptions.

[32] Award at 7.
[33] 2017 Agreement at 175.
[34] *Local 310*, 74 FLRA at 23.
[35] Exceptions Br. at 14-17.
[36] *AFGE, Loc. 2076, Nat'l Citizenship & Immigr. Serv. Council*, 73 FLRA 368, 369 (2022) (*Local 2076*).
[37] Award at 7.
[38] *Id.*
[39] *See, e.g.*, *Local 2076*, 73 FLRA at 369 (denying nonfact exception where excepting party failed to show that, but for the alleged errors, the arbitrator would have reached a different result).
[40] Exceptions Br. at 18 (quoting Award at 7).
[41] *Id.* at 19.
[42] *AFGE, Loc. 2338*, 74 FLRA 99, 102 (2024).
[43] *U.S. Dep't of the Army, Ky. Nat'l Guard*, 73 FLRA 869, 871 (2024) (then-Member Kiko concurring on other grounds).
[44] *See, e.g.*, *id.* (denying exceeded-authority exception that was based on misinterpretation of award); *AFGE, Loc. 1594*, 71 FLRA 878, 879 (2020) (denying exceeded-authority exception where arbitrator did not decide an issue that was not before her).