

**63 FLRA No. 141**

UNITED STATES DEPARTMENT  
OF HEALTH AND HUMAN SERVICES  
CENTERS FOR MEDICARE  
AND MEDICAID SERVICES  
BALTIMORE, MARYLAND  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 1923  
(Union)

0-AR-4273

—————  
DECISION

June 24, 2009

Before the Authority: Carol Waller Pope, Chairman and  
Thomas M. Beck, Member

**I. Statement of the Case**

This matter is before the Authority on exceptions to the award of Arbitrator Roger P. Kaplan filed by the Agency under § 7122 of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition.

The Arbitrator concluded that the Agency failed to establish that the Union's use of the lower lobby of the building to hold a Union fair violated Article 11, § 4.D. of the Master Labor Agreement (MLA) and denied the grievance. For the following reasons, we deny the exceptions.

**II. Background and Arbitrator's Award**

The Agency filed a grievance claiming that the Union violated Article 11, § 4.D. of the MLA<sup>1</sup> when it used the lower lobby of the building to hold a Union fair. The Agency claimed that the Union's fair constituted a non-representational activity in violation of the MLA against using "Agency space for internal Union business." Award at 8. The parties stipulated that the entire building, including the lower lobby, is owned and operated by the General Services Administration (GSA), that the GSA determines whether to issue permits for use of the lower lobby, and that the GSA appli-

cation refers to the "lobbies" as one of several spaces that are classified as "public space." *Id.* at 3-4. The GSA approved the Union's application to hold a fair on July 11, 2006, in the lower lobby to "share information about the [Union] and its benefits." *Id.* at 8. The grievance was not resolved and was submitted to arbitration. The parties stipulated to the following issues: "(1) If the Union's use of the lower lobby of the Central Office Single Site Building in Baltimore Maryland for a Union [f]air on July 11, 2006, violated Article 11, [§] 4.D. of the [MLA]? and (2) If so, what is the appropriate remedy?" Award at 2.

The Arbitrator concluded that the Agency failed to prove by a preponderance of the evidence that the term "any other Agency space" as set forth in Article 11, § 4.D. encompassed the Union's use of the lower lobby to hold a Union fair. Award at 9. In reaching this conclusion, the Arbitrator found that the interpretation of the words "any other Agency space" in Article 11, § 4.D. was central to the dispute and that the parties were in "sharp conflict" as to their meaning. *Id.* The Arbitrator rejected the Agency's argument that the reference to a "blanket prohibition" by the Union in a motion to the Federal Service Impasses Panel (the Panel)<sup>2</sup> indicated that the Union understood the words "other Agency space" to include the lower lobby. Rather, the Arbitrator found the Union was "merely responding to the Panel's decision, not recapitulating the negotiations." Award at 7-10. The Arbitrator also found unpersuasive

1. Article 11, § 4.D. provides that:

Section 4. Agency-Provided Office Space, Computers and Furnishings

D. The Union may use Agency conference rooms for representational discussions between employees and Union officials provided the conference space is available and provided the Agency determines the conference room is not needed for Agency work at the time requested. The Union will adhere to the conference room reservation process in place where the conference space is located. Conference rooms or any other Agency space may not be used for any non-representational activities (e.g., internal Union business activities). Attach. D, Joint Ex. at 51.

2. Article 11, § 4.D., among other articles of the MLA, was submitted to the Panel to consider a negotiation impasse. *See Dep't of Health & Human Servs. Centers For Medicare and Medicaid Servs. Baltimore, Md.*, 02 FSIP 167, at 18-19 (2004). With regard to Article 11, § 4.D., the Panel adopted the Agency's language. In a motion for reconsideration of the Panel's decision, the Union argued that it was "the only employee organization with a blanket prohibition on access to employees at the 50 acre [Agency] campus[.]" Award at 7. The Panel denied the motion.

the Agency's suggestion that the contrast between the prior and current contract language demonstrated that "any other Agency space" applied to the lower lobby. The Arbitrator concluded that the core of the Agency's concern in choosing the current language was that no Union solicitations take place while employees were "on duty." Award at 10. The Arbitrator concluded that to the extent that employees were properly in the lobby and not on duty, Union solicitation "was not offensive to the contractual and/or statutory regime." *Id.*

The Arbitrator, therefore, concluded that the Union's use of the lower lobby for a Union fair did not violate Article 11, § 4.D. of the MLA and denied the grievance.

### III. Positions of the Parties

#### A. Agency's Exceptions

The Agency first argues that the Arbitrator's award is deficient because it fails to draw its essence from the collective bargaining agreement. According to the Agency, by finding that the words "any other Agency space" could mean a number of areas within the Agency space rented from GSA, the Arbitrator effectively rewrote Article 11, § 4.D. rendering it "utterly meaningless." Exceptions at 9-10. In other words, the Agency argues that if the agreement required specific designation of those locations where representational conduct is prohibited, then there would be no need for the term "any other Agency space." *Id.* at 10. The Agency also argues that the Arbitrator's conclusion that the Union's solicitation was not "offensive to the contractual and/or statutory regime" fails to draw its essence from the agreement. *Id.* (quoting Award at 10). The Agency asserts that the language of Article 11, § 4.D. sought to prevent the Union from "engaging in solicitation of on-duty employees" in "any other Agency space" including the lower lobby. *Id.* at 11.

The Agency also asserts that the award is based on a nonfact. The Agency claims that the Arbitrator erred when he rejected the Agency's argument that the reference to a "blanket prohibition" by the Union, in its motion for reconsideration filed with the Panel, indicated that the Union understood the term "any other Agency space" to include the lower lobby. Exceptions at 11-12. The Agency argues that the Arbitrator's factual conclusion that the Union was merely responding to the Panel's decision, not recapitulating the negotiations, was "clearly erroneous." *Id.* at 12.

#### B. Union's Opposition

The Union contends that the Arbitrator properly determined that the lower lobby is not covered by Article 11, § 4.D. of the MLA and that the Union has the right to solicit for membership during non-duty status time in non-work spaces. Opposition at 6-7. Further, the Union contends that the Arbitrator did not base his decision on a nonfact when he declined to assign probative weight to a statement in the Union's reconsideration motion to FSIP regarding "a blanket prohibition." *Id.* at 9. The Union notes that the statement was made months after Article 11 was negotiated and by a Union attorney who was not involved in the negotiations. *Id.* at 9 & n.4.

### IV. Discussion

A. The award does not fail to draw its essence from the collective bargaining agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing 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. *See United States Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

The Agency argues that the Arbitrator's award fails to draw its essence from the collective bargaining agreement because the Arbitrator's interpretation of the words "any other Agency space" rendered Article 11, § 4.D. meaningless. The Agency also argues that the Arbitrator's conclusion that the Union's solicitation was not "offensive to the contractual and/or statutory regime" fails to draw its essence from the agreement. Exceptions at 10.

Here, the Arbitrator concluded that the Agency failed to establish that the Union's use of the lower lobby of the building to hold a Union fair violated Article 11, § 4.D. of the MLA. The Arbitrator's conclusion

was based on his interpretation of the words “any other Agency space” in Article 11, § 4.D. As set forth above, the Authority defers to the Arbitrator’s interpretation of the agreement “because it is the [A]rbitrator’s construction of the agreement for which the parties have bargained.” *OSHA*, 34 FLRA at 576. In this regard, the Agency has not demonstrated that the Arbitrator’s interpretation of Article 11, § 4.D. is irrational, implausible, or otherwise deficient. Consequently, the award does not fail to draw its essence from the MLA. *See OSHA*, 34 FLRA at 575.

In addition, the Agency has not shown that the Arbitrator’s conclusion that the Union’s solicitation was not “offensive to the contractual and/or statutory regime” fails to draw its essence from the agreement. The Arbitrator’s conclusion, in this regard, is consistent with his interpretation of the language of Article 11, § 4.D. In this connection, the Arbitrator noted that the Agency’s concern in choosing the current language was that no Union solicitation would take place while employees were on duty. Therefore, the Arbitrator concluded that as long as the employees were not on duty while in the lobby, Union solicitation was not offensive to the contractual or statutory regime. As such, the Agency has not shown that the Arbitrator’s conclusion does not represent a plausible interpretation of the agreement. *See id.*

Accordingly, we deny the Agency’s essence exception.

**B. The award is not based on a nonfact.**

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. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). Moreover, the Authority will not find an award deficient on the basis of an arbitrator’s determination on any factual matter that the parties disputed at arbitration. *See United States Dep’t of Health and Human Servs., Denver, Co.*, 56 FLRA 133, 135 (2000) (*Health and Human Servs.*).

The Agency claims that the Arbitrator erred when he rejected the Agency’s argument regarding the Union’s interpretation of the language of Article 11, § 4.D. in its motion to the Panel. As the issue of how the Union had interpreted the language of Article 11, § 4.D. in its motion to the Panel was disputed before the Arbitrator, the Agency’s exception does not provide a basis for finding the award deficient. As noted above, the Authority will not find an award deficient on the basis

of an arbitrator’s determination on any factual matter that the parties disputed at arbitration. *See Health and Human Servs.*, 56 FLRA at 135.

Accordingly, we deny the Agency’s nonfact exception.

**V. Decision**

The Agency’s exceptions are denied.