64 FLRA No. 88

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY
ADJUDICATION AND REVIEW
(Agency)

and

ASSOCIATION OF
ADMINISTRATIVE LAW JUDGES
INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL ENGINEERS
(Union)

0-AR-4329

DECISION

February 25, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

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

The Union's grievance alleges that the Agency committed unfair labor practices (ULPs) and violated the parties' agreement when it informed its administrative law judges (ALJs) that they are not permitted to earn credit hours after 6:00 p.m. The Arbitrator sustained the grievance.

For the reasons that follow, we deny the exceptions in part, dismiss the exceptions in part, and remand in part.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency violated the parties' agreement and committed ULPs when it terminated a past practice that allowed ALJs to accrue credit hours after 6:00 p.m. on regular work days. [1] Exceptions, Ex. 3 at 4 (Step 2 Grievance). When the grievance was not resolved, it was submitted to arbitration.

The Agency filed a Motion for Decision on the Pleadings and Dismissal of the Union's Arbitration Request. Award at 1. The Arbitrator responded by asking the parties to submit briefs addressing several issues, including the Arbitrator's authority to order discovery. Exceptions, Ex. 15 at 1 (Arbitrator's E-Mails). As relevant here, the Union asked the Arbitrator to either order that the matter proceed to hearing after discovery, or, in the absence of ambiguity in the parties' agreement, find without a hearing that the agreement permits ALJs to earn credit hours after 6:00 p.m. on regular work days. Award at 3-4. The Arbitrator did not expressly frame the issues in her resulting award.

The Arbitrator rejected the Agency's assertion that the parties' agreement did not permit ALJs to accrue credit hours after 6:00 p.m. *Id.* at 6. The Arbitrator reviewed Article 14 of the parties' agreement, including Section 3(B), which states that ALJs "can start as early as 6:30 a.m. and leave as late as 6:00 p.m." [2] Award at 6. The Arbitrator noted the use of the word "can," and found no language limiting ALJs' hours to the period between 6:30 a.m. and 6:00 p.m. for the purpose of earning credit hours. *Id.*

The Arbitrator noted that Article 14, Section 5, entitled "Credit Hours," provides that ALJs can earn up to 2.5 credit hours per workday, and that an ALJ can earn up to 8 credit hours on a non-regular work day, excluding holidays. *Id.* The Arbitrator continued, "If there was intent to further limit the [ALJs'] accessibility to Credit Hours, this section of the [parties' agreement] would have been the logical site in which to do so. There is no language that specifically bars [an ALJ] from working beyond 6:00 pm or prior to 6:30 am." *Id.*

The Arbitrator also rejected the Agency's argument that the Union's requested relief would violate the Federal Employees Flexible and Compressed Work Schedules Act of 1982 (the Act). [3] *Id.* at 1-2, 7. In this regard, the Arbitrator restated her determination that the parties' agreement does not limit the earning of credit hours to the time frame set forth in Section 3(B), and held that the Act does not specifically restrict when credit hours may be earned. *Id.* at 7.

The Arbitrator sustained the Union's grievance and denied the Agency's motion to dismiss. *Id.* at 9. The

1. As defined in the parties' agreement, regular workdays are Monday through Friday. Award at 6.

2. This and other pertinent sections of Article 14 are set forth in the appendix to this decision.

3. The pertinent provisions of the Act are set forth *infra*.

Arbitrator addressed the parties' discovery dispute as follows:

> I uphold the parties' rights to request Discovery and to use the power of the Arbitrator to subpoena documents necessary to go forward with a fair Hearing.
>
> I order there be at least forty[-]five (45) days between the receipt of subpoenas and the date set for Hearing.

Id.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the award is contrary to the Act and related Office of Personnel Management (OPM) regulations and guidance because it permits employees to earn credit hours outside the designated hours of the Agency's flexible work schedule. Exceptions at 6. The Agency also argues that the Arbitrator's interpretation of the agreement permits ALJs to earn credit hours "at any time of the day or night," which the Agency asserts conflicts with the Act's requirement that federal employees may only earn credit hours within the confines of a previously established flexible schedule. *Id.* at 8.

In addition, the Agency contends that the Arbitrator's finding that the parties' agreement does not contain any language specifically barring ALJs from earning credit hours beyond the 6:30 a.m. to 6:00 p.m. time band fails to draw its essence from the agreement. *Id.* at 14. In this regard, the Agency argues that the Arbitrator ignored Article 14, Section 5(A)(11), which states that "starting and leaving times are determined by Section 3[,]" which, in turn, provides that ALJs "can start as early as 6:30 a.m. and leave as late as 6:00 p.m." *Id.* at 13-12.

Further, the Agency argues that the portion of the award authorizing discovery does not draw its essence from the parties' agreement. *Id.* at 14-16. The Agency asserts that the agreement does not contemplate discovery after a grievance is referred to arbitration, and does not authorize the Arbitrator to order discovery and issue subpoenas. *Id.* at 15.

B. Union's Opposition

The Union contends that the parties' agreement, as interpreted and applied by the Arbitrator, complies with the Act. Opp'n at 7. In this connection, the Union concedes that credit hours must be earned during a flexible work period, but asserts that this does not govern how the Arbitrator interpreted the parties' agreement to define the Agency's flexible schedule. *Id.* In addition, the Union asserts that the Arbitrator correctly deduced that the agreement's specific limiting of credit hour accrual on non-regular workdays in Article 14, Section 5(A)(2) indicates that the lack of a similar limitation for regular workdays in Section 5(A)(1) was intentional, thereby supporting the Arbitrator's interpretation and award. *Id.* at 12-13. Finally, the Union argues that any discovery dispute raised by the Agency's exceptions is interlocutory. *Id.* at 17.

IV. Preliminary Matter: The Agency's exceptions are not interlocutory.

The Authority ordered the Agency to show cause as to why its exceptions should not be dismissed as interlocutory. In this regard, the Authority questioned whether the award addressed only threshold issues, and noted the portion of the award in which the Arbitrator upheld the parties' rights to request discovery and subpoena documents. Order to Show Cause at 2.

In response to the Authority's order, the Agency argues that its exceptions are not interlocutory because the Arbitrator ruled on the merits of the grievance and made specific findings that completely resolved all of the issues submitted to arbitration. Response at 1. The Agency asserts that the portion of the award authorizing the parties to subpoena any documents needed for a fair hearing is immaterial. *Id.* at 6. In this connection, the Agency asserts that there would be "no point in scheduling a hearing before this arbitrator because she has already ruled in the Union's favor on all the issues submitted to her." *Id.* The Agency also argues that the Arbitrator's submission of a seemingly final bill for her services, and her request to publish her decision, indicate that the Arbitrator has entirely resolved all the merits of the grievance. *Id.* at 7. In the alternative, the Agency claims that extraordinary circumstances exist permitting interlocutory review. *Id.* at 8-10.

Section 2429.11 of the Authority's Regulations pertinently provides that "the Authority . . . ordinarily will not consider interlocutory appeals." 5 C.F.R. § 2429.11. Thus, the Authority ordinarily will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration. *See, e.g., U.S. Dep't of Transp., Fed. Aviation Admin., Wash., D.C.*, 60 FLRA 333, 334 (2004). An arbitration award that postpones the determination of an issue submitted does not constitute a final award subject to review. *See id.*

The award in this case resolved all of the issues submitted to arbitration. The Arbitrator addressed the merits of the grievance because she ruled on whether the parties' agreement and/or the Act restrict the hours during which ALJs may earn credit hours. Award at 6-7, 9. Notwithstanding the Arbitrator's ruling authorizing discovery for a possible future hearing, the Arbitrator resolved all issues submitted to arbitration when she held that neither the parties' agreement nor federal statute prohibited ALJs from earning credit hours after 6:00 p.m., and sustained the Union's grievance. Any ambiguous language in the award regarding whether the Arbitrator intended her decision to constitute a final award is irrelevant because the Authority has held that neither an arbitrator's intention, nor how the arbitrator labels his or her award, is determinative of whether an award is final. *See AFGE Local 12*, 61 FLRA 355, 357 (2005). Further, the Union has not sought to submit a response to the Agency's argument that its exceptions are not interlocutory or otherwise argued that discovery or further proceedings are necessary. As the Arbitrator's award is a complete and final disposition of the merits of the grievance, there is no discernible reason for the parties to proceed with discovery and a hearing. *See, e.g., U.S. Envtl. Prot. Agency, Region 2*, 59 FLRA 520, 524 (2003) (Member Pope dissenting on other grounds) (exceptions not interlocutory where award resolved only issue). Accordingly, we find that the Agency's exceptions are not interlocutory.

V. Analysis and Conclusions

A. The award is not contrary to law, rule and/or regulation.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an exception and the award *de novo*. *See 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)). In applying a *de novo* standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Authority has repeatedly held that, under the Act, matters pertaining to alternative work schedules are fully negotiable and enforceable, subject only to the Act itself or other laws superseding it. *See, e.g., U.S. Dep't of the Treasury, Internal Revenue Serv., Austin, Tex.*, 60 FLRA 606, 608 (2005).

The Act authorizes agencies to establish flexible work schedule programs which include:

> (1) designated hours and days during which an employee on such a schedule must be present for work; and
>
> (2) designated hours during which an employee on such a schedule may elect the time of such employee's arrival at and departure from work, solely for such purpose or, if and to the extent permitted, for the purpose of accumulating credit hours to reduce the length of the workweek or another workday.

5. U.S.C. § 6122(a). *Accord id.* § 6121(4) (defining "credit hours" as "any hours, within a flexible schedule established under section 6122 of this title, which are in excess of an employee's basic work requirement and which the employee elects to work so as to vary the length of a workweek or a workday"); 5 C.F.R. § 610.403 (meaning of "credit hours" in implementing regulations is provided in 5 U.S.C. § 6121). Flexible schedules that are established by a collective bargaining agreement are governed by the Act and the terms of that agreement. 5 U.S.C. § 6130(a)(1). [4]

The issue here is whether the Act prohibits a flexible schedule under which employees may earn credit hours at any time of day or night on regular workdays. The Arbitrator found that the only limitations on credit hour earning on regular workdays memorialized in the parties' agreement are that: (1) credit hours are earned for work performed in excess of an ALJ's basic work requirement, and (2) an ALJ can earn only up to 2.5 credit hours per regular workday. Award at 6. Nothing in the Act requires the parties to specify a narrower time band during which credit hours may be earned. That the parties' agreement, as interpreted by the Arbitrator, designates *any* time outside an employee's basic work requirement as an opportunity to earn credit hours on weekdays, subject to the 2.5 credit hour maximum, is not contrary to the Act, regulations, or OPM advisory guidance cited by the Agency. Therefore, we conclude that the Act does not preclude employees from earning credit hours as provided in the Arbitrator's award. Accordingly, we deny the exception.

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4. 5 U.S.C. § 6130(a)(1) provides:

> In the case of employees in a unit represented by an exclusive representative, any flexible or compressed work schedule, and the establishment and termination of any such schedule, shall be subject to the provisions of this subchapter and the terms of a collective bargaining agreement between the agency and the exclusive representative.

B. We dismiss the Agency's essence exceptions in part, and remand in part.

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 U.S. 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.

1. We remand the matter of whether ALJs are prohibited from earning credit hours after 6:00 p.m. under the parties' agreement.

The Agency claims that the award fails to draw its essence from the parties' agreement because the Arbitrator erroneously ignored Article 14, Section 5(A)(11) when she found that nothing in the parties' agreement explicitly limits the time within which ALJs may earn credit hours on regular workdays.

Article 14, Section 5 of the agreement is specifically entitled "Credit Hours." Paragraph 11 of that section provides that "[s]tarting and leaving times are determined by Section 3 above." In turn, Article 14, Section 3(B) provides that ALJs "can start as early as 6:30 a.m. and leave as late as 6:00 p.m." The Arbitrator examined Article 14, Section 3(B) and found that the permissive wording in the sentence "Judges *can* start as early as 6:30 am and leave as late as 6:00 pm" does not prohibit ALJs from earning credit hours after 6:00 p.m. Award at 6 (emphasis added). The Arbitrator also quoted the first two paragraphs of Section 5(A) in her award and stated that they provide the agreement's only limitations on the availability of credit hours. *Id.* However, the Arbitrator neither referred to nor discussed Section 5(A)(11), which specifically covers when credit hours can be earned.

The Authority has previously found that where there is an apparent inconsistency between the parties' agreement and the award at issue, but the relevant contract language has not been interpreted by the arbitrator, the award should be remanded for the arbitrator to address the contract provision in dispute. *See AFGE Council 220*, 54 FLRA at 159-60; *Social Sec. Admin., Balt., Md.*, 57 FLRA 690, 694 (2002). "A remand in such cases permits the arbitrator, who was the parties' choice to interpret and apply their agreement, to interpret in the first instance the provision that may be dispositive of the grievance." *AFGE Council 220*, 54 FLRA at 160.

There appears to be a conflict between the Arbitrator's interpretation of Section 5(A)(1)-(2) and the plain terms of Section 5(A)(11). At the very least, any interpretation of Section 5 must take into account the "starting and leaving times" language in paragraph 11. The Arbitrator did not take paragraph 11 into account. Absent findings by the Arbitrator on this matter, we are unable to determine whether the award is deficient. Accordingly, we remand this matter to the parties for resubmission to the Arbitrator, absent settlement, to consider Article 14, Section 5(A)(11), in her interpretation of the award.

2. The matter of whether the award of discovery fails to draw its essence from the parties' agreement is moot.

The Agency argues that the portion of the award authorizing discovery does not represent a plausible interpretation of the agreement and should be set aside. Exceptions at 14. However, in the Agency's response to the Authority's order to show cause, the Agency argues repeatedly that the Arbitrator's award is a final determination. *See, e.g.*, Response at 6 ("Th[ere] is no point in scheduling a hearing before this arbitrator because she has already ruled in the Union's favor on all the issues submitted to her.") It does not appear that the Union is seeking discovery, and the Union questions whether a discovery dispute even exists. Opp'n at 17. Therefore both parties have essentially conceded that any discovery dispute is moot. The Authority will dismiss an exception to an element of an arbitrator's award that the Authority has found to be moot. *See, e.g., U.S. Dep't of Transp., Fed. Aviation Admin., Chi., Ill.*, 41 FLRA 1441, 1451 n.5 (1991) (dismissing as moot exception that arbitrator failed to rule on attorney fee request because Authority's modification of the award made this remedy unavailable). As we have found that further discovery and a hearing would be unnecessary given that the Arbi-

trator has already issued a decision addressing all of the issues submitted to her, we dismiss the exception. [5]

VI. Decision

The matter of whether ALJs are prohibited from earning credit hours after 6:00 p.m. under the parties' agreement is remanded to the parties for resubmission to the Arbitrator, absent settlement. The remaining exceptions are dismissed and/or denied.

APPENDIX

Article 14, Hours of Work, Fixed Tours, Flextime, Flexible Work Arrangements, and Credit Hours, of the parties' agreement provides in pertinent part:

> Section 3 – Flextime
>
> All Judges shall be permitted to work a flexible work schedule that permits him or her to vary his or her daily starting and leaving times. This schedule shall be in accordance with the following rules:
>
> A. All Judges must be on duty status during established core hours, except for lunch periods and core time deviations. Such core hours shall be from 9:30 a.m. to 3:00 p.m. Monday through Friday. The basic work requirement can only be completed Monday through Friday.
>
> B. Judges can start as early as 6:30 a.m. and leave as late as 6:00 p.m.
>
> Section 5 – Credit Hours
>
> . . . Credit hours are available to give credit for work performed by a Judge in excess of his or her basic work requirement.
>
> A. Procedures
>
> 1. A Judge can earn up to 2½ credit hours per weekday, Monday through Friday.
>
> 2. A Judge can earn up to 8 credit hours on a non-regular work day, excluding holidays (5 U.S.C. § 6103), as follows:
>
> a. A Judge can earn no more than a total of eight credit hours on non-regular work days in any calendar week[.]
>
> . . . .
>
> c. Credit hours may be earned between the hours of 6:30 a.m. and 6:00 p.m. on a non-regular work day, excluding holidays . . . .
>
> 11. Starting and leaving times are determined by Section 3 above.

Exceptions, Ex. 10 at 60-61, 64-65 (Collective Bargaining Agreement Excerpts).

5. Our dismissal of this exception is unaffected by our remanding of the award to the Arbitrator to clarify her interpretation and application of certain provisions of the parties' agreement, as there is no basis for finding that this would require discovery.