64 FLRA No. 145

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 801
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
WASECA, MINNESOTA
(Agency)

0-AR-4597

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DECISION

May 24, 2010

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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 Joseph L. Daly filed by the Union under § 7122 of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator found that the Agency did not violate the parties' agreement or improperly terminate a past practice when it gave certain employees priority for overtime assignments. For the reasons discussed below, we deny the exceptions.

II. Background and Arbitrator's Award

The Union filed a grievance with regard to the Agency's assignment of overtime shifts at a particular factory (UNICOR), claiming that the Agency violated the parties' agreement and improperly changed a past practice when it failed to assign employees without factory-specific training (non-UNICOR employees) to work overtime shifts, and instead assigned such shifts only to employees with factory-specific training (UNICOR employees). Award at 17-18. When the grievance was unresolved, it was submitted to arbitration.

At arbitration, the Arbitrator set forth the issue, in pertinent part, as follows: "Did the [A]gency violate . . . the [parties' agreement,] [A]rticles 3[(c)], 4(a) [and] (b) and 18, [S]ection P by selecting UNICOR [b]argaining [u]nit employees to work UNICOR overtime rather than a non-UNICOR bargaining unit employee?"[1] *Id.* at 14-15.

The Arbitrator found that the Agency had assigned both UNICOR and non-UNICOR employees to overtime shifts in the past. *Id.* at 22. However, he also found that Article 18, Section P of the parties' agreement states that "qualified

1. The record does not indicate whether the parties stipulated to the issue statement. We note that the Arbitrator also framed an issue of whether the Agency violated 5 U.S.C. § 5542 and § 7106(a)(5) and (8) of the Statute. Award at 15. As no exceptions were filed with regard to § 5542 or § 7106, we do not consider that issue further.

Article 3 states, in pertinent part:

> Section c. The Union and Agency representatives . . . will meet and negotiate on any and all policies, practices, and procedures which impact conditions of employment, where required by 5 [U.S.C. §§] 7106, 7114, and 7117, and other applicable government-wide laws and regulations, prior to implementation of any policies, practices, and/or procedures.

Id. at 16.

Article 4 states, in pertinent part:

> Section a. In prescribing regulations relating to . . . conditions of employment, the [Agency] and the Union shall have due regard for the obligation imposed by 5 [U.S.C. §§] 7106, 7114, and 7117. The [Agency] further recognizes its responsibility for informing the Union of changes in working conditions at the local level.
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> Section b. On matters which are not covered in supplemental agreements at the local level, all written benefits, or practices and understandings between the parties implementing this [a]greement, which are negotiable, shall not be changed unless agreed to in writing by the parties.

Id.

employees in the bargaining unit will receive first consideration for these overtime assignments[.]" *Id.* at 17, 22.

The Arbitrator determined that UNICOR employees are "qualified employees" because UNICOR employees have factory-specific training and non-UNICOR employees do not have such training. *See id.* at 22-23. As UNICOR employees are "qualified employees," the Arbitrator reasoned, the Agency was permitted under Article 18, Section P to give UNICOR employees first consideration for overtime assignments. *See id.* Therefore, the Arbitrator concluded that the Agency did not violate the parties' agreement. *Id.* at 23.

With regard to the Union's claim that the Agency improperly ended a past practice, the Arbitrator found that no past practice had been established, stating: "The fact that the previous Superintendent of Industries allowed non-qualified people to work overtime in UNICOR does not set a past practice." *Id.* at 23.

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the Arbitrator's finding is contrary to law. Exceptions at 1-2. In this connection, the Union asserts that a past practice existed under the standard set forth by the Authority in *United States Dep't of Justice, Executive Office for Immigration Review*, 55 FLRA 454, 456 (1999). Exceptions at 6-7. Specifically, the Union claims that the Agency's practice of assigning both UNICOR and non-UNICOR employees to overtime shifts was consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. *Id.* at 7. According to the Union, as the Arbitrator acknowledged that the Agency had allowed non-UNICOR employees to work overtime at the factory, this "would certainly establish a past practice." *Id.* at 1.

The Union also claims that the Arbitrator "failed to address" the issue of "whether the parties had an enforceable verbal agreement[]" under which the Agency would assign UNICOR and non-UNICOR employees to work overtime shifts.[2] *Id.*

B. Agency's Opposition

The Agency contends that the Union's contrary-to-law claim provides no basis for finding the award deficient because the Arbitrator's finding of no past practice was based on the Arbitrator's interpretation of the parties' agreement, not of the law. Opp'n at 8-9. In the alternative, the Agency claims that the award is not contrary to law because the alleged practice was not consistently exercised over a significant period of time. *Id.* at 7-8.

With regard to the Union's assertion that the Arbitrator failed to address an alleged "verbal agreement" between the parties on overtime procedures, the Agency contends that this alleged failure does not render the award deficient. *Id.* at 5.

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

Although the Union argues that the Arbitrator's finding of no past practice is contrary to law, "[i]n arbitration cases, the Authority addresses issues as to whether a past practice exists under the nonfact framework."[3] *NTEU, Chapter 66*, 63 FLRA 512, 514 n.3 (2009). To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *Id.* at 513-14. 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. *See*,

2. Although the Union claims in its exceptions that the Agency violated 5 U.S.C. § 7117(d), *see* Exceptions at 8, 12, the Union does not claim that the award is contrary to § 7117(d). *See id.* at 1-2. In this connection, we note that § 7117(d) pertains to a Union's consultation rights, which are not at issue in this case. In addition, the Union argues that if the Arbitrator erred in denying the grievance, then employees should receive backpay for lost overtime wages from October 10, 2006 to March 6, 2007, and that the Arbitrator erroneously found that the grievance period ended on October 20, 2006. *Id.* at 13-14. Given our resolution of the exceptions below, it is unnecessary to address this argument.

3. The Authority applies the essence standard when determining whether an arbitrator properly interpreted a past practice. *See NTEU, Chapter 66*, 63 FLRA at 514 n.3.

e.g., *U.S. Dep't of the Treasury, IRS, Nat'l Distrib. Ctr., Bloomington, Ill.*, 64 FLRA 586, 591 (2010) (*IRS*).

Before the Arbitrator, the Agency and the Union disputed whether there was a binding past practice that required the Agency to assign both UNICOR and non-UNICOR employees to overtime assignments at the factory. Award at 22. As the parties disputed the existence of a binding past practice before the Arbitrator, the Union does not demonstrate that the award is based on a nonfact. *See IRS*, 64 FLRA at 591. Therefore, we deny the exception.

B. The Arbitrator did not exceed his authority.

We construe the Union's claim that the Arbitrator failed to consider the effect of an alleged "verbal agreement" between the parties, Exceptions at 1-2, as contending that the Arbitrator exceeded his authority. *See AFGE, Local 1547*, 59 FLRA 149, 150 (2003) (Authority construed argument that arbitrator failed to consider certain issues as exceeded-authority exception). As relevant here, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration.[4] *See, e.g.*, *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

The issue before the Arbitrator was whether the Agency violated "the [parties' agreement,] [A]rticles 3[(c)], 4(a) [and] (b) and 18, [S]ection P by selecting UNICOR [b]argaining [u]nit employees to work UNICOR overtime rather than a non-UNICOR bargaining unit employee?" Award at 14-15. As the Arbitrator found that the Agency did not violate the parties' agreement in this regard, *id.* at 23, he resolved the issue before him. *See U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Portland Dist.*, 64 FLRA 271, 273 (2009) (award responsive to issue framed by arbitrator). The issue stated by the Arbitrator does not include a question of whether the Agency violated an alleged "verbal agreement" between the parties. As such, the Union does not demonstrate that the Arbitrator failed to resolve an issue submitted to arbitration. Accordingly, we find that the Arbitrator did not exceed his authority.

V. Decision

The Union's exceptions are denied.

4. An arbitrator also exceeds his or her authority by: (1) resolving an issue not submitted to arbitration; (2) disregarding specific limitations on his or her authority; or (3) awarding relief to those not encompassed within the grievance. *AFGE, Local 1617*, 51 FLRA at 1647.