68 FLRA No. 27

BREMERTON METAL TRADES COUNCIL
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
PUGET SOUND NAVAL SHIPYARD
AND INTERMEDIATE MAINTENANCE FACILITY
BREMERTON, WASHINGTON
(Agency)

0-AR-4963

_____

DECISION

December 30, 2014

_____

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The grievant volunteered for weekend overtime. However, the grievant was on sick leave on the Thursday when her supervisor assigned the weekend overtime. Unsure whether the grievant was still able to work the weekend overtime, the supervisor gave the overtime to another employee, and the Union filed a grievance. Arbitrator Timothy D.W. Williams found that the Agency did not violate the parties' agreement, as amended by a memorandum of understanding (the MOU), when it did not select the grievant for the weekend overtime. There are two questions before the Authority.

The first question is whether the award fails to draw its essence from the parties' agreement because the Arbitrator found that the grievant was obligated under the agreement to notify her supervisor that she was still able to work the weekend overtime, and because the Arbitrator found that the Union had the burden of proof at arbitration to establish that the grievant provided adequate notification. Because the parties' agreement is silent on the notification issue, and does not address burdens of proof at arbitration, the Union fails to demonstrate that the Arbitrator's interpretation of the agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement, and the answer is no.

The second question is whether the award is based on a nonfact. Because the Union's nonfact exception challenges the Arbitrator's contractual interpretation rather than a factual finding, the answer is no.

II. Background and Arbitrator's Award

The grievant, who works a Monday-to-Friday workweek, volunteered for weekend overtime. One Thursday, she called in sick, but returned to work on Friday. The Agency assigns weekend overtime in the grievant's unit on Thursday afternoons. Although the grievant would ordinarily have been selected for the weekend overtime for which she volunteered, her supervisor assigned the weekend overtime to another employee. Her supervisor explained that because the grievant was out sick on Thursday, he did "not know [whether she would] be available to work the overtime" that weekend.[1]

The Union filed a grievance challenging the Agency's failure to select the grievant for the overtime. The Union based its grievance on a provision of the parties' agreement, and a related MOU, both dealing with overtime assignments. The contract provision that the Union relied on, Article 8, provides that "[a]n [e]mployee's approved absences during the basic work week shall not be considered in determining which [e]mployee will be selected for an overtime assignment."[2] The related MOU requires employees to "note their overtime preferences by Thursday morning," and states that, on Thursday afternoon, management "will assign weekend overtime using volunteers first."[3]

The parties were unable to resolve the grievance and submitted it to arbitration. The parties stipulated to the following issue: "Did the Agency violate Article 8 of the [parties' agreement], as amended by [the MOU,] when it did not select [the grievant] for overtime?"[4]

The Arbitrator denied the grievance. The Arbitrator determined that the parties' agreement does not address how the Agency "was to proceed with the Thursday afternoon selection process, required by the MOU, for weekend[-]overtime work when an otherwise eligible employee had called in sick on that day."[5] Considering Article 8, and "mindful of the language found in the MOU,"[6] the Arbitrator concluded that "[i]f an employee is absent for illness reasons on a Thursday when selection for overtime work is made, it is the

[1] Award at 5.
[2] *Id.* at 8.
[3] *Id.* at 4 (internal quotation marks omitted).
[4] *Id.* at 6.
[5] *Id.* at 15.
[6] *Id.* at 18.

employee's obligation to notify management that [he or she] will be able to work on the weekend."[7] The Arbitrator further found that "[i]n the absence of that notice, [the Agency] is free to make an alternative selection."[8]

The Arbitrator also resolved the Union's claim that the grievant did indeed notify her supervisor that she was able to work on the weekend. Noting conflicting testimony on that point, the Arbitrator found that "there was insufficient evidence to establish that the [g]rievant had properly informed [her supervisor] that she would be able to return from her illness for the weekend work."[9] The Arbitrator concluded: "Since the Union has the burden of proof, . . . the evidentiary deficiency [is] sufficient to deny the grievance."[10]

The Union filed exceptions, and the Agency filed an opposition to the Union's exceptions.

III. Analysis and Conclusions

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

The Union contends that the award fails to draw its essence from the parties' agreement. When reviewing an arbitrator's award, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[11] 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."[12] 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.[13]

Additionally, when an arbitrator interprets an agreement as imposing a particular requirement, and the parties' agreement is silent with respect to that requirement, that does not, by itself, demonstrate that the award fails to draw its essence from the parties' agreement.[14] Applying these standards to this case, we find that the Union does not establish that the award fails to draw its essence from the parties' agreement.

The Union claims that the award fails to draw its essence from the parties' agreement for two reasons. First, relying on Article 8 of the parties' agreement, the Union claims that the Arbitrator erred when he found that employees who are on approved sick leave on Thursdays are obligated to notify the Agency that they are still able to work the weekend overtime for which they have volunteered.[15] The Union also relies on Article 14 of the parties' agreement, listing the information that an employee must provide when an employee requests sick leave.[16]

The Union's claim does not demonstrate that the award fails to draw its essence from the parties' agreement. The Union does not dispute the Arbitrator's finding that Article 8 does not address how the Agency "was to proceed with the Thursday afternoon selection process, required by the MOU, for weekend[-]overtime work when an otherwise eligible employee had called in sick on that day."[17] Moreover, the Union does not claim that Article 14, listing the information an employee must provide when requesting sick leave, addresses overtime-request and selection matters.

The Arbitrator interpreted the parties' agreement as imposing "the additional obligation for [an] employee"[18] who is on sick leave on Thursday "to notify management that [he or she] will be able to work on the weekend."[19] As indicated, that the agreement is silent on this matter does not demonstrate that the award fails to draw its essence from the agreement.[20] Further, the Union does not provide any other basis for finding the award irrational, unfounded, implausible, or in manifest disregard of the parties' agreement in this regard. Accordingly, we deny this essence exception.

Second, the Union claims that the Arbitrator erred when he found that "the Union has the burden of proof"[21] to "establish that the [g]rievant had properly informed"[22] her supervisor that she was still able to work

[7] *Id.* at 19-20.
[8] *Id.* at 20.
[9] *Id.*
[10] *Id.*
[11] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998) (*Council 220*).
[12] *Council 220*, 54 FLRA at 159.
[13] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[14] *E.g.*, *U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 413, 414 (2003) (*Johnson Med. Ctr.*).
[15] Exceptions at 2, 4.
[16] *Id.* at 2-3; Exceptions, Attach., U19 at 62-66.
[17] Award at 15.
[18] *Id.* at 19.
[19] *Id.* at 15, 19-20.
[20] *Johnson Med. Ctr.*, 58 FLRA at 414.
[21] Award at 19.
[22] *Id.* at 20.

the weekend overtime for which she applied.[23] The Arbitrator denied the grievance, in part, because the Union did not show, "by a preponderance of [the] evidence,"[24] that "the [g]rievant had properly informed [her supervisor] that she would be able to return from her illness for the weekend work."[25]

The Union's claim does not demonstrate that the award fails to draw its essence from the parties' agreement. "In the absence of any established burden of proof, [an] [a]rbitrator [is] free to determine which party [is] required to bear the burden of proof" regarding a specific issue.[26] As the Union does not identify any contract provision requiring the Agency to bear the burden of proving that an employee like the grievant did not properly inform her supervisor that she still was able to work on the weekend following a Thursday sick-leave absence, the Union fails to demonstrate that the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement in this regard. Accordingly, we deny this essence exception.

Because the Union does not establish that the award fails to draw its essence from the parties' agreement, we deny the Union's essence exceptions.

B. The award is not based on a nonfact.

The Union contends that the award is based on a nonfact.[27] As relevant here, 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, an arbitrator's interpretation of the parties' agreement is not a "fact" that can be challenged as a nonfact.[29]

The Union challenges as a nonfact the Arbitrator's conclusion that "[i]f an employee is absent for illness reasons on a Thursday when selection for overtime work is made, it is the employee's obligation to notify management that [he or she] will be able to work on the weekend."[30] But the Arbitrator's conclusion that the Union disputes represents the Arbitrator's interpretation of the parties' agreement. As such, it may not be challenged as a nonfact.[31] Accordingly, we deny the Union's nonfact exception.

IV. Decision

We deny the Union's exceptions.

[23] *Id.* at 19-20; Exceptions at 2-3.
[24] Award at 19.
[25] *Id.* at 20.
[26] *NFFE, Local 1437*, 55 FLRA 1166, 1171 (1999) (citing *AFGE, Local 2250*, 52 FLRA 320, 324 (1996)).
[27] Exceptions at 2.
[28] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).
[29] *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014) (*Nat'l Weather Serv.*); *AFGE, Local 1802*, 50 FLRA 396, 398 (1995).
[30] Exceptions at 2 (quoting Award at 19-20).
[31] *E.g., Nat'l Weather Serv.*, 67 FLRA at 358.