69 FLRA No. 89

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1815
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY AVIATION CENTER OF EXCELLENCE
FORT RUCKER, ALABAMA
(Agency)

0-AR-5164

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DECISION

September 28, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

Within a six-month period, an employee (the grievant) had accumulated over nine weeks of work absences. The Agency issued the grievant a memorandum addressing her "excessive work absences"[1] and, among other things, instructing her to provide medical documentation to support future sick-leave requests. The Union filed a grievance alleging that the Agency violated and repudiated the parties' agreement by issuing the memorandum. Arbitrator Robert S. Adams denied the grievance.

The question before us is whether the award fails to draw its essence from the parties' collective-bargaining agreement. Because the Arbitrator's interpretation of the parties' agreement is not irrational, unfounded, implausible, or in manifest disregard of the agreement, the answer is no.

II. Background and Arbitrator's Award

The dispute arose when the Agency issued the grievant a memorandum, titled "Notice of Pending Termination of Employment," concerning the grievant's "excessive work absences."[2] According to the memorandum, within a six-month period, the grievant had "various duty statuses[,] including sick leave, annual leave, [and l]eave without [p]ay," and had accumulated "over [nine] weeks [of] work absences."[3] Among other things, the memorandum instructed the grievant to provide medical documentation so that the Agency could consider "approv[ing] any future request for continued sick leave"[4] and to determine her official duty status. The memorandum further instructed the grievant that "[w]ithout a timely reply . . . [the Agency] may . . . proceed with an administrative/adverse action, which may include any appropriate penalty up to and including . . . removal from [f]ederal [s]ervice."[5]

The Union filed a grievance alleging that the Agency breached the parties' agreement because the memorandum repudiated, as relevant here, Article 13, Section 13 of the agreement (Article 13-13), and in doing so, engaged in "bad-faith bargaining."[6] Article 13-13 states: "Except in cases of proven abuse, sick[-]leave usage shall not be a factor for promotion, discipline, evaluation[,] or other personnel action."[7]

The Agency denied the grievance, and the parties submitted the matter to arbitration. Absent a stipulated issue, the Arbitrator framed the following issue, as relevant here: "Was the [parties' agreement] violated/repudiated during the course of the [Agency] submitting a 'letter' to a covered employee concerning sick leave[?]"[8]

The Arbitrator concluded that the Agency did not violate or repudiate the parties' agreement when it issued the memorandum to the grievant. To begin, he found that the memorandum served "as a letter of counsel"[9] notifying the grievant that "her current practice of excessive sick leave"[10] was "not acceptable"[11] and then setting out "a different course of action to be followed."[12] Citing Article 13, Sections 4 and 5 of the parties' agreement (Articles 13-4 and 13-5) – the

[1] Exceptions Br., Attach. 7 at 1 (Mem.).

[2] *Id.*
[3] *Id.*
[4] *Id.* at 3.
[5] *Id.*
[6] Exceptions Br., Attach. 8 (Grievance) at 1.
[7] Exceptions Br., Attach. 9 (CBA) at 13.
[8] Award at 2.
[9] *Id.* at 8.
[10] *Id.* at 9.
[11] *Id.* at 8.
[12] *Id.*

pertinent wording of which concerns providing medical documentation to the Agency (see Section IV. below) – the Arbitrator noted that the parties' agreement allows the Agency "to seek a medical certificate when the [grievant's] sick leave progressed to an advanced level detrimental to proper staffing."[13] The Arbitrator also found that the memorandum raised discipline "as the next step if discipline was warranted."[14] The Arbitrator specified that this finding does not change the parties' agreement because, under that agreement, if sick leave is found to be abused, then discipline may be warranted.[15] Therefore, the Arbitrator denied the grievance.

The Union filed exceptions to the Arbitrator's award. The Agency did not file an opposition to the Union's exceptions.

III. Preliminary Matter: We will not consider the Agency's supplemental submission.

The Agency filed a supplemental submission – alleging that the Authority should dismiss the Union's exceptions because of a procedural defect – without requesting leave to file it under § 2429.26 of the Authority's Regulations.[16] As the Agency failed to request leave to file this supplemental submission, we will not consider it.[17]

IV. Analysis and Conclusion: The award does not fail to draw its essence from the parties' agreement.

The Union argues that the award fails to draw its essence from the parties' agreement in several respects.[18] In reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the same deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[19] 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 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] 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."[21]

First, the Union challenges the Arbitrator's finding that the Agency did not violate the parties' agreement when it issued the memorandum addressing the grievant's sick-leave use.[22] The Union's argument regarding Article 13-13 is without merit.[23]

Consistent with Article 13-13's plain terms, the Arbitrator found that the parties' agreement permitted the Agency to impose discipline "as the next step *if*" it found that the grievant abused her sick-leave use.[24] This interpretation of the agreement comports with the Union's own assertion that under Article 13-13, sick-leave use may be "held against an employee . . . in cases of proven abuse."[25] And, as the Arbitrator also found, the text of the memorandum did not impose discipline, but served "as a letter of counsel" regarding excessive leave.[26] Therefore, nothing in the award's interpretation of Article 13-13 is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. Accordingly, the Union's first essence exception does not demonstrate that the award fails to draw its essence from Article 13-13.

Second, the Union argues that the Arbitrator erred by finding that Articles 13-4 and 13-5 allow the Agency to seek a medical certificate for sick-leave use.[27] Article 13-4 provides, in relevant part: "Employees normally shall not be required to furnish a valid medical certificate to support sick leave of three . . . workdays or less."[28] Article 13-5 states, in relevant part: "Cases requiring a doctor's certificate for each absence shall be reviewed by appropriate management official for the purpose of determining whether such requirement can be eliminated."[29] The Union contends that because Article 13-4's conditions for requiring a medical certificate had not been met, the Agency had no basis for requiring the grievant to provide medical documentation under the provisions of Article 13-5.[30]

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[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] 5 C.F.R. § 2429.26.
[17] *U.S. Dep't of State, Bureau of Consular Affairs, Passport Servs.*, 68 FLRA 657, 659 (2015).
[18] Exceptions Form at 9-10; *see* Exceptions Br. at 1-2.
[19] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[20] *U.S. DOD, Def. Contract Audit Agency, Cent. Region, Irving, Tex.*, 60 FLRA 28, 30 (2004) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*DOL*)).
[21] *Id.* (quoting *DOL*, 34 FLRA at 576).
[22] Exceptions Form at 10; *see* Exceptions Br. at 1.
[23] CBA at 13.
[24] Award at 8 (emphasis added).
[25] Exceptions Form at 10.
[26] Award at 8.
[27] Exceptions Br. at 2.
[28] CBA at 12.
[29] *Id.* at 13.
[30] *Id.*

Read together, by their plain terms, Articles 13-4 and 13-5 only prohibit the Agency (in normal circumstances) from requiring an employee to provide a medical certificate for three days or less of sick-leave use. These provisions are silent regarding the Agency's options where *more than* three days of sick-leave use are involved. Here, it is undisputed that the grievant used more than three days of sick leave within a six-month period.[31] Therefore, consistent with the plain terms of Articles 13-4 and 13-5, the Arbitrator's finding that the parties' agreement allowed the Agency to seek a medical certificate for the grievant's sick-leave use[32] does not fail to draw its essence from the parties' agreement. Accordingly, this Union essence exception also does not demonstrate that the award is deficient.

Third, the Union disagrees "with the consolidation of the grievances" because they were individually filed.[33] The Arbitrator reviewed only one grievance.[34] But even assuming that the Arbitrator consolidated the Union's grievances, the Union identifies no language in the parties' agreement that addresses consolidation of grievances. Because the Union does not identify a provision of the parties' agreement with which the award conflicts, this essence claim also lacks merit.[35]

Fourth, the Union argues – without elaboration – that the award fails to draw its essence from the parties' agreement because the Arbitrator should have applied the "covered[-]by" doctrine.[36] Under § 2425.6(e)(1) of the Authority's Regulations, an exception "may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground" listed in § 2425.6(a)-(c), "or otherwise fails to demonstrate a legally recognized basis for setting aside the award."[37] The "covered-by" doctrine does not provide a basis for finding an award deficient under the essence standard set forth above.[38] Rather, the "covered-by" doctrine may support setting aside an arbitrator's finding of a statutory failure to bargain, under § 7116(a)(1) and (5) of the Statute, on contrary-to-law grounds.[39] Accordingly, the Union's reliance on the covered-by doctrine provides no basis for finding the award deficient on essence grounds.

For these reasons, we find that the Union has failed to establish that the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, and we deny the Union's essence exceptions.

Finally, in response to our concurring colleague, we note the following. As we have made clear before,[40] in adjudicating the thousands of cases that come before us, it is our responsibility to apply the law to the issues and facts properly before us. Further, as adjudicators, we will not be guided by purely policy-based considerations. We continue to adhere to these principles, and reject our colleague's injudicious attempt to do otherwise.[41]

V. Decision

We deny the Union's exceptions.

[31] Mem. at 1.
[32] Award at 8.
[33] Exceptions Br. at 2.
[34] Award at 7.
[35] *See NTEU, Chapter 32*, 67 FLRA 354, 355 (2014) (denying essence exception that failed to identify provision of parties' agreement imposing an alleged requirement).
[36] Exceptions Br. at 2.
[37] 5 C.F.R. § 2425.6(e)(1).
[38] *U.S. Dep't of the Treasury, IRS*, 68 FLRA 329, 333 (2015).
[39] *Id.* (citing *U.S. Dep't of the Navy, Marine Corps, Combat Dev. Command, Marine Corps Base, Quantico, Va.*, 67 FLRA 542, 546 (2014) (Member Pizzella dissenting)).
[40] *U.S. DHS, CBP*, 67 FLRA 107, 111 (2013) (Concurring Opinion of Chairman Pope & Member DuBester) (Member Pizzella concurring).
[41] Member DuBester further notes that our colleague's gratuitous appraisal of the actions of Agency managers, Union representatives, and the grievant in this case – as well as his critique of the virtues of public service and the federal government in general – are irrelevant to this case's disposition. Moreover, because our colleague's comments purport to address background facts and circumstances of which neither the majority nor our colleague have any knowledge – as those background facts and circumstances are not in the case's record – his comments are unfounded.

Member Pizzella, concurring:

According to movie director and actor Woody Allen, "eighty percent of success is showing up."[1]

Obviously, the federal workplace is not an elective-come-and-go-whenever-you-feel-like-it hangout. I also doubt that few federal employees (whether employee, manager, or union representative) would disagree, that nine weeks of leave – combining sick leave, annual leave, and leave without pay – taken over a six month period will have a negative impact on the workplace. After all, when a coworker is unavailable for work on a regular and reoccurring basis (one might say unreliable), those absences soon will have an impact on everyone in the workplace – someone has to do the work.

Jessica Degginger is a pharmacy technician at the Lyster Army Health Clinic at Fort Rucker, Alabama. During a six-month period (December 2014 through April 2015),[2] she was not at work for nine weeks (mathematically that means she was not in the office 37.5% of the time).[3] Mysteriously, most of Degginger's absences occurred "in conjunction with [] weekend[s] or other approved days off."[4]

Because her absences proved to be "detrimental to proper staffing,"[5] Degginger's supervisor issued her a notice which cautioned that "her current practice of excessive sick leave"[6] was "not acceptable."[7] And though Arbitrator Robert S. Adams editorialized that the circumstances of these absences could have supported a "designated time suspension," the supervisor opted to excuse the excessive absences which had already occurred and instead focus Degginger on the procedures she needed to follow in order to avoid discipline in the future.[8]

But Degginger and Jule Garrison, the president of American Federation of Government Employees, Local 1815, apparently believed that there was nothing wrong with Degginger's irregular attendance because Garrison first filed an unfair labor practice and then a grievance on Degginger's behalf. The matter proceeded to arbitration, but the Arbitrator denied (correctly in my view) the grievance.

The Federal Service Labor-Management Relations Statute (Statute)[9] affords Degginger and the Union the prerogative to file a grievance. But I doubt that few federal labor-management-relations practitioners (whether union or management representative) would disagree with the proposition that not every workplace disagreement warrants a hearing and not every grievance "contributes to the effective conduct of [government] business"[10] or "meet[s] the . . . needs of the Government."[11]

Without a doubt, the vast majority of federal employees are reliable, work hard, and make judicious use of the generous leave benefits which Congress has allocated for the health and welfare of the federal workforce. Nonetheless, a small number of federal employees contribute to the public's skepticism of the federal workforce as a whole.

A top concern consistently voiced by federal managers, year after year, is how to control leave abuse and to do so legally and in compliance with an array of federal statutes and regulations. To address these concerns, federal agencies pay thousands of taxpayer dollars annually to dozens of law firms, human-resource consultants, and training firms to train managers on how to control leave abuse.[12]

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[1] http://www.brainyquote.com/quotes/quotes/w/woodyallen145883.html.

[2] Exceptions, Attach. 7, Notice of Pending Termination of Employment (Notice) at 1.

[3] Majority at 1.

[4] Notice at 1.

[5] Award at 8.

[6] *Id.* at 9.

[7] *Id.* at 8.

[8] *Id.*

[9] 5 U.S.C. §§ 7101-7135.

[10] *Id.* § 7101(a)(1)(B).

[11] *Id.* § 7101(b).

[12] *See* Katherine Barrett & Richard Greene, *Sick Leave Causes Headaches for Governments*, Smart Management (Sept. 2012), http://www.governing.com/columns/smart-mgmt/col-sick-leave-causing-headaches-for-governments.html; Ian Smith, *Sick Leave Abuse Hurts Job Health*, Fed Smith (July 10, 2012), http://www.fedsmith.com/2012/07/10/sick-leave-abuse-hurts-job-health/; Matthew B. Tully, *Summertime Abuse of Sick Leave Can Sink Federal Careers*, Federal Employee News Digest, http://www.tullylegal.com/articles/summertime-abuse-of-sick-leave-can-sink-federal-careers/; Debra Roth, *How to fight sick leave abuse – Ask the Lawyer*, Federal Times (Apr. 18, 2010), http://askthelawyer.federaltimes.com/2010/04/18/how-to-fight-sick-leave-abuse/ (Roth); Scott MacFarlane, *Dozens of Federal Workers Cheat on Time Sheets*, NBC4Washington (July 14, 2015),http://www.nbcwashington.com/investigations/Dozens-of-Federal-Workers-Cheat-on-Time-Sheets-314779291.html (MacFarlane); Lisa Rein, *Thousands of Federal Workers on Extended Paid Leave*, Wash. Post, (Oct. 20, 2014),https://www.washingtonpost.com/politics/thousands-of-federal-workers-on-extended-paid-leave/2014/10/20/c1c963bc-53e3-11e4-ba4b-f6333e2c0453_story.html (Rein).

There can be no doubt that Congress has taken note of this problem. According to one investigative report cited by the U.S. House Oversight and Government Reform subcommittee, sixty (60) federal workers at more than a dozen federal agencies "cost taxpayers more than $1 million [from 2012 to 2015]" by not reporting absences from work.[13] And those were just the ones who were "caught."[14] Make no mistake, though, not all federal supervisors manage their employees and resources in an effective manner. Many leave-abuse problems are exacerbated when a federal manager takes the "easiest" approach, simply approves every leave request, and permits questionable patterns to go on for too long.[15] For example, in this case, every day of leave that was "taken"[16] by Degginger during the six-month period was apparently approved or permitted by her supervisor.

Situations like this contribute to the public's skepticism of the federal workplace and its ability to effectively deliver basic services. Renowned economist and former Federal Reserve Chairman Paul Volcker put it this way:

> It's a whole different attitude toward public service than it once was. I tell you, we can all sit around in our old age and moan about it, but I think the administrative processes and the management effectiveness of the federal government are terrible![17]

In the matters that come before the Authority for adjudication, Congress expects the Authority to "*provide* leadership in establishing policies and *guidance* relating to matters under this chapter."[18] As I stated at my confirmation hearing,[19] in my first opinion as a Member of the Authority,[20] and many times since,[21] I take this responsibility quite seriously.

My colleagues baldly assert pure obeisance to only law, issues, and facts when adjudicating cases[22] that come before the Authority.[23] While I understand that my colleagues may not share my perspective on providing the leadership and guidance which I believe our Statute requires, I do object to my colleagues' characterization of *my* observations concerning that responsibility as "injudicious"[24] and "gratuitous."[25] As I have noted before, the majority with increasing frequency routinely "assume[s] without deciding" any number of facts, findings, or remedies in order to achieve an outcome (or to avoid a decision) which is based on nothing more than those assumptions.[26]

Even in this case where we unanimously agree that the Union's grievance is without any merit whatsoever, it is a bridge too far for my colleagues to observe an obvious takeaway from this case − that every grievance does not promote the purposes of the Statute and that not every federal manager responds effectively to situations that indicate leave abuse.

Thank you.

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[13] MacFarlane.
[14] *Id*.
[15] Rein; *see also* Roth.
[16] Award at 5.
[17] http://www.azquotes.com/quote/1423819.
[18] 5 U.S.C. § 7105(a) (emphasis added).
[19] *U.S. DHS, CBP*, 67 FLRA 107, 113 (2013) (Concurring Opinion of Member Pizzella) (Chairman Pope & Member DuBester concurring).
[20] *Id*.
[21] *See e.g.*, *NTEU, Chapter 32*, 67 FLRA 174, 177 (2014) (Concurring Opinion of Member Pizzella) ("The filing of a frivolous grievance . . . unwisely consumes federal resources . . . and completely fails to take into account the resulting costs to . . . taxpayers, who fund the [a]gency's operations and pay for the significant costs of [u]nion official time to process a grievance.").

[22] Unless I was never informed of the additional cases, this quorum of the Authority has not had the opportunity "to adjudicate[e] thousands of cases." To date, only 369 cases have come before since the current quorum of the Authority (Chairman Pope, Member DuBester, and Member Pizzella) was constituted in October 2013. Even including the 619 cases that the preceding cohort of the Authority (Chairman Pope, Member DuBester, and Member Beck) had the opportunity to review, my colleagues have not adjudicated "thousands" of cases.
[23] Majority at 5.
[24] *Id.*
[25] *Id.* at n.41.
[26] *See e.g.*, *U.S. DHS, U.S. CBP*, 69 FLRA 419, 421 (2016) (Member Pizzella dissenting) (Majority "assume[s], without deciding, that the award affects management's rights to take disciplinary action and assign work"); *U.S. DHS, CBP*, 69 FLRA 412, 414 (2016) (Member Pizzella concurring) (Majority "assume[s], without deciding that the Agency's response is properly before us"); *U.S. Dep't of HUD*, 68 FLRA 631, 634 (2015) (Member Pizzella dissenting) (Majority "assume[s], without deciding, that [a] statement in [arbitrator's third award] constitutes a modification of the remedial award" in order to include a new category of employees).