70 FLRA No. 28

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1441
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
ST. PAUL DISTRICT
ST. PAUL, MINNESOTA
(Agency)

0-AR-5227

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DECISION

January 11, 2017

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Before the Authority: Ernest DuBester, Chairman, and Patrick Pizzella, Member

I. Statement of the Case

Arbitrator Robert Brookins issued an award finding that employees working a rotating shift who were assigned to work a day shift (the grievants) were not "temporarily assigned to a day shift."[1] Based on that finding, the Arbitrator concluded that the grievants did not qualify for a night-shift differential under 5 C.F.R. § 532.505(d)(1). The Union filed exceptions to the award.

First, the Union alleges that the award is contrary to law because 5 C.F.R. § 610.121(b)(1) does not disqualify employees from receiving a night-shift differential under § 532.505(d)(1). Because this exception misinterprets the award, we deny it.

Second, the Union argues that the award is contrary to law because it adds a "non-existent requirement that employees be 'permanently' assigned to night shifts"[2] to qualify for a night-shift differential under § 532.505(d)(1). Because the grievants are not "regularly assigned to a night shift" [3] – a requirement under § 532.505(d)(1) – this exception does not demonstrate that the award is contrary to law, and we deny it.

Third, the Union contends that the award is contrary to the Federal Employees Flexible and Compressed Work Schedules Act of 1982 (CWSA)[4] because the Arbitrator found that the schedule changes were not temporary. As with the previous contrary-to-law exception, because the grievants do not qualify for a night-shift differential under § 532.505(d)(1), this exception does not demonstrate that the award is contrary to law, and we deny it.

Finally, the Union raises several exceptions alleging that the award fails to draw its essence from the parties' collective-bargaining agreement. Because these exceptions, even if correct, would not change the result of the award, we deny them.

II. Background and Arbitrator's Award

The grievants are employees who worked rotating schedules – either compressed work schedules with some combination of twelve-, ten-, and eight-hour shifts; or work schedules with one of three, eight-hour shifts. Under the parties' agreement, the Agency issues a master schedule every November. Throughout the year, the Agency modifies this master schedule to account for leaves of absence and to adjust employees' schedules.

The Agency assigned the grievants, who had previously worked a night shift, to a day shift. The grievants requested a night-shift differential for time spent working the day shift after being reassigned; the Agency denied this request. The Union filed a grievance seeking night-shift-differential pay for the grievants. The parties were unable to resolve the grievance, and they submitted it to arbitration.

At arbitration the Arbitrator considered whether the Agency violated the parties' agreement, regulations, and statutes when it denied the Union's grievance.

The Union argued that the grievants qualified for a night-shift differential under § 532.505(d)(1). Under this regulation, employees who are "regularly assigned to a night shift who [are] temporarily assigned to a day shift" qualify to receive a night-shift differential.[5] According to the Union, the grievants were regularly assigned to a night shift under the master schedule, and any deviation from the master schedule is necessarily a temporary change, under both the law and the parties' agreement. Consequently, the Union

[1] 5 C.F.R. § 505(d)(1).
[2] Exceptions Br. at 12.
[3] 5 C.F.R § 532.505(d)(1).
[4] 5 U.S.C. §§ 6120-6133.
[5] 5 C.F.R. § 532.505(d)(1).

concluded, the Agency must provide a night-shift differential to the grievants.

The Agency argued that it properly reassigned the grievants under 5 C.F.R. § 610.121(b)(2). This regulation states, in pertinent part, that the head of an agency can reschedule an employee in advance of the administrative workweek. The Agency also argued that, because the reassignment occurred prior to the start of the administrative workweek, the new assignments were the grievants' new regular assignment. The Agency alleged that, because the day shift became the grievants' regular assignment, the grievants were no longer regularly assigned to a night shift and did not qualify for a night-shift differential under § 532.505(d)(1). Furthermore, the Agency argued that the grievants were not "regularly assigned to a night shift" within the meaning of § 532.505(d)(1) because the grievants were not solely assigned to a night shift.

First, the Arbitrator found that any change from the master schedule to a day shift "did not automatically create a temporary tour of duty under [§] 532.505(d)(1)."[6] In doing so, the Arbitrator rejected both the Union's argument that any change from the master schedule was temporary and the Agency's argument that any change pursuant to § 610.121(b)(2) could not be temporary. Instead, the Arbitrator found that "scheduling under [§] 610.121(b)(1) [or (2)[7]] manifests no intent whatsoever to address temporary tours of duty under [§] 532.505(d)(1)"[8] and "one must affirmatively apply the standards under [§] 532.505(d)(1) to the facts and circumstances surrounding each [master-schedule] modification made under § 610.121(b)(2) to determine whether the [master-schedule] change qualifies as a temporary tour of duty under [§] 532.505(d)(1)."[9]

Next, the Arbitrator considered whether the grievants were "regularly assigned to a night shift."[10] The Arbitrator rejected the Agency's argument that the grievants had to be solely assigned to a night shift in order to be regularly assigned to a night shift; the Arbitrator also rejected the Union's argument that the grievants were regularly assigned to a night shift, stating that it was "not overwhelmingly persuasive."[11] The Arbitrator did not explicitly find whether the grievants were "regularly assigned to a night shift."[12]

Finally, the Arbitrator analyzed whether the grievants were "temporarily assigned to a day shift."[13] According to the Arbitrator,

> [a]pplying [the term] "temporarily assigned" to rotating-shift employees effectively eviscerates "temporarily assigned" of sensible [or] rational meaning under [§] 532.505(d)(1). Under [§] 532.505(d)(1), "temporary assignment" has meaning only when applied to employees who are permanently assigned to given shifts. As rotating-shift employees, the [g]rievants are never permanently assigned to any given shift.[14]

Consequently, the Arbitrator found that the grievants were not "temporarily assigned to a day shift" and therefore did not qualify for a night-shift differential under § 532.505(d)(1).[15] The Arbitrator denied the Union's grievance.

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

III. Analysis and Conclusions

A. The award is not contrary to law.

The Union raises several exceptions arguing that the award is contrary to law.[16] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[17] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions – not his or her underlying reasoning – are consistent with the applicable standard of law.[18] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that those findings are nonfacts.[19]

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[6] Award at 11 (emphasis omitted).
[7] *Id.* at 14.
[8] *Id.* at 13.
[9] *Id.* at 18-19 (emphasis omitted).
[10] 5 C.F.R. § 532.505(d)(1).
[11] Award at 22.
[12] 5 C.F.R. § 532.505(d)(1).
[13] *Id.*
[14] Award at 25 (emphasis omitted).
[15] 5 C.F.R. § 532.505(d)(1).
[16] Exceptions Br. at 7, 12.
[17] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995).
[18] *E.g., GSA*, 70 FLRA 14, 15 (2016).
[19] *E.g., AFGE, Nat'l Council 118*, 70 FLRA 63, 67 (2016).

First, the Union argues that the award is contrary to law because "the Arbitrator wrongly interprets changes made pursuant to [§] 610.121[(b)(2)[20]] as . . . disqualifying employees from [a] night differential to which they are entitled under [§] 532.505(d)(1)."[21] However, the Union mischaracterizes the award.

Contrary to the Union's allegation, the Arbitrator rejected the contention "that modifications [under § 610.121(b)(2)] . . . could never constitute temporary tours of duty" under § 532.505(d)(1).[22] Instead, the Arbitrator found that "one must affirmatively apply the standards under [§] 532.505(d)(1) to the facts and circumstances surrounding each [schedule] modification made under [§] 610.121(b)(2) to determine whether the [schedule] change qualifies as a temporary tour of duty under [§] 532.505(d)(1)."[23] As such, the Arbitrator found that a change pursuant § 610.121(b)(2) could constitute a temporary change. Therefore, the Union misinterprets the award. A misinterpretation of an arbitrator's award cannot form the basis for finding that award deficient.[24] Because this exception misinterprets the award, we deny it.

Second, the Union argues that the award is contrary to law because it adds "a non-existent requirement that employees be 'permanently' assigned to night shifts in order to qualify as temporarily assigned to a day shift when there is a schedule change."[25] Under § 532.505(d)(1), "[a]n employee regularly assigned to a night shift who is temporarily assigned to a day shift . . . shall continue to receive the regular night[-]shift differential."[26] Thus, there are two relevant requirements for qualifying for a night-shift differential under 532.505(d)(1): that the employee is (1) "regularly assigned to a night shift," and (2) "temporarily assigned to a day shift."[27] Although the Arbitrator denied the Union's grievance because he found that the grievants were not temporarily assigned to a day shift – the second requirement and the basis for this exception – we must determine whether the Arbitrator's legal conclusion – that the grievants did not qualify for a night-shift differential under § 532.505(d) – is contrary to law.[28]

As such, we turn to the first requirement under § 532.505(d)(1) – that the employee is "regularly assigned to a night shift." Although the Arbitrator considered the parties' arguments concerning whether the grievants were regularly assigned to a night shift, the Arbitrator never made an explicit finding on this issue.[29] The Union contends that the grievants are "regularly assigned to a night shift via their [master schedule] as established" by the parties' agreement.[30]

Section 532.505(d)(1) does not define the term "regularly assigned to a night shift," but § 532.505(e), a neighboring subsection, does delineate four types of employees: (1) those "regularly assigned to a night shift";[31] (2) those "regularly assigned to a day shift";[32] (3) those "assigned to a regularly rotating schedule involving work on both day and night shifts";[33] and (4) those "not regularly assigned to a day shift or a night shift but whose shift is changed at irregular intervals."[34] For each delineated group, § 532.505(e) prescribes a different treatment for paying a night-shift differential for leave. Where a regulation uses different terms, there is a presumption that the terms are not identical.[35] Given the distinct terms used in § 532.505 and the different treatment of those terms, there is a presumption that an employee "assigned to a regularly rotating schedule" is not an employee "regularly assigned to a night shift." The Arbitrator found that the grievants were on a rotating schedule.[36] Consequently, the grievants are not "employee[s] regularly assigned to a night shift" and fail one of the requirements under § 532.505(d)(1). Therefore, the employees do not qualify for a night differential under § 532.505(d)(1), regardless of whether they were "temporarily assigned to a day shift."[37]

Because the grievants do not qualify for a night-shift differential under § 532.505(d) as discussed above, the Union's argument does not demonstrate that the Arbitrator's conclusion is contrary to law, and we deny this exception.

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[20] The Union's Exceptions states that the changes were made pursuant to "§ 610.121(d)(1)." However, § 610.121 does not have a subsection d, and § 610.121(b)(1) does not pertain to the modifications at issue here. Consequently, we assume that the Union intended this exception to pertain to § 610.121(b)(2).
[21] Exceptions Br. at 7.
[22] Award at 18.
[23] *Id.* at 18-19 (emphasis omitted).
[24] *AFGE, Local 1415*, 69 FLRA 386, 390 (2016); *U.S. DHS, U.S. CBP*, 66 FLRA 838, 844 (2012).
[25] Exceptions Br. at 12 (quoting Award at 25).
[26] 5 C.F.R. § 532.505(d)(1).
[27] *Id.*
[28] *GSA*, 70 FLRA at 15.
[29] Award at 22 (rejecting Agency's argument that grievants must be "solely" assigned to a night shift in order to be regularly assigned to a night shift but finding the Union's arguments "not overwhelmingly persuasive"); *see also* Exceptions Br. at 13 n.24 ("The Arbitrator does not explicitly hold that the [g]rievants were 'regularly assigned.'").
[30] Exceptions Br. at 6.
[31] 5 C.F.R. § 532.505(e)(1).
[32] *Id.* § 532.505(e)(2).
[33] *Id.* § 532.505(e)(3).
[34] *Id.* § 532.505(e)(4).
[35] *Cf. U.S. SEC, Wash. D.C.*, 61 FLRA 251, 255 (2005) (citing *Recording Indus. Ass'n of Am. v. Verizon Internet Serv.*, 351 F.3d 1229, 1235 (D.C. Cir. 2003)).
[36] Award at 4, 22, 24, 25, 26.
[37] 5 C.F.R. § 532.505(d)(1).

Finally, the Union argues that the award is contrary to the CWSA because it "holds that the [g]rievants' annual schedules are not fixed schedules"[38] and that "[b]y holding that schedule changes were not temporary, the Arbitrator violated the CWSA."[39] As with the Union's previous contrary-to-law exception, this exception challenges the Arbitrator's finding that the grievants were not temporarily assigned to a day shift.[40] Again, we must decide only whether the Arbitrator's conclusion that the grievants do not qualify for a night-shift differential under § 532.505(d)(1) is contrary to law – not whether his underlying reasoning is correct.[41] Consequently, this exception fails to demonstrate that the Arbitrator's conclusion is contrary to law for the same reasons as above, and we deny it.

B. The Union does not demonstrate that the award is deficient because it fails to draw its essence from the parties' agreement.

The Union argues that the award fails to draw its essence from the parties' agreement.[42] In reviewing an arbitrator's interpretation of an agreement, the Authority ordinarily applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[43] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the 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.[44] 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."[45]

The Union argues that the award fails to draw its essence from the agreement because "the [a]greement's plain language mandates an annual, fixed[] schedule to which [the Agency] can only make temporary changes."[46] First, the Union cites Article 9, Section 1, stating that "[w]ork schedules for [the grievants] will be drawn up annually" and that any change to the schedule must be made pursuant to § 610.121.[47] Second, the Union argues that Article 9, Section 8, "Procedures of Temporary Changes to Work Schedules," allows the Agency to "temporarily adjust [employees'] tours of duty."[48] Finally, the Union argues that Article 10, Section 1, requires the Agency to negotiate any schedule changes that were permanent.[49]

Each of these arguments pertain to the Union's overall argument that the grievants were "temporarily assigned to a day shift"[50] under § 532.505(d)(1),[51] and that the Arbitrator erred in finding otherwise. However – beyond the requirement that the grievants were "temporarily assigned to a night shift" and as noted above – the grievants do not qualify for a night-shift differential under § 532.505(d)(1) because they were not "employee[s] regularly assigned to a night shift."[52] Consequently, even were the Union's arguments concerning the temporary or permanent nature of the scheduling change under the parties' agreement correct, the grievants would nonetheless not qualify for a night-shift differential under § 532.505(d)(1). Because granting this exception would not change the result of the award, there is no need to address it further.[53] As such, the Union's essence exceptions do not demonstrate that the award is deficient, and we deny them.

IV. Decision

We deny the Union's exceptions.

[38] Exceptions Br. at 15.
[39] *Id.* at 16.
[40] *Id.* (arguing that the master schedule is a fixed schedule and "any changes to fixed schedules, whether rotating or not, must by definition be either temporary or negotiated").
[41] *GSA*, 70 FLRA at 15.
[42] Exceptions Br. at 17.
[43] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[44] *U.S. DOL* (*OSHA*), 34 FLRA 573, 575 (1990).
[45] *Id.* at 576.
[46] Exceptions Br. at 17.
[47] *Id.* at 18.
[48] *Id.* at 18-19.
[49] *Id.* at 19.
[50] *Id.* at 20 ("By holding that the Agency's changes to the [g]rievants' schedules were anything other than temporary changes, the [Award] ignored the plain language of the [a]greement.").
[51] 5 C.F.R. § 532.505(d)(1).
[52] *Id.*
[53] *See U.S Dep't of VA, Augusta, Ga.*, 59 FLRA 780, 784 (2004) (finding it unnecessary to address essence exception because it was "irrelevant to the outcome of th[e] decision"); *U.S. DOD, Mapping Agency, Hydrographic/Topographic Ctr., Wash., D.C.*, 47 FLRA 1187, 1204 n.5 (1993) (declining to address an exception where the exception was "irrelevant to the outcome of th[e] decision"); *cf. U.S. DHS, CBP*, 69 FLRA 579, 581 (2016) (finding it unnecessary to resolve request for official notice where it would not affect the outcome of the decision); *U.S. Dep't of the Treasury, IRS*, 62 FLRA 298, 305 (2007) (finding that an argument lacked merit because, even if accepted, it would not change the outcome of the case).