70 FLRA No. 49

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 220
(Union)

0-AR-5249

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DECISION

May 30, 2017

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

I. Statement of the Case

Arbitrator David P. Clark sustained a grievance and found that the Agency violated the parties' collective-bargaining agreement (agreement) when it delegated the grievance-reviewing authority of a step 3 official to a deciding official on the same level of authority as a step 2 official.[1] As a remedy, the Arbitrator ordered the Agency to cease this practice.

The Agency challenges the award on two grounds. The first question is whether the award is contrary to law because it allegedly excessively interferes with management's right to assign work under § 7106(a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute).[2] Because Article 24, Section 9 of the agreement constitutes a procedure under § 7106(b)(2), the Arbitrator's enforcement of that provision is not contrary to the right to assign work, and the answer is no.

Second, the Agency argues that the award fails to draw its essence from the agreement. The Agency argues that the chart identifying the deciding official at each grievance step is not evidence that the Union has bargained for the right to deal with progressively higher officials at each step. The Agency also relies on the removal of a prior restrictive clause from the parties' previous agreement as evidence that the parties intended to "increase management's ability to delegate . . . not decrease it."[3] Finally, the Agency argues that the award effectively prohibits the step 3 official from ever using a designee because any delegation would be considered delegating down the line of function. Because the Arbitrator found that the Union had bargained for the right to deal with progressively higher officials at each step of the grievance procedure, and the award does not restrict the delegation to any particular position, the Agency's reargument of its interpretation of the agreement does not establish that the award is irrational, unfounded, implausible, or in manifest disregard of the agreement. Therefore, the Agency's essence exception does not establish that the award is deficient.

II. Background and Arbitrator's Award

Article 24 of the agreement provides a three-step negotiated grievance procedure (grievance procedure) and the grievance-step chart (chart) identifies the deciding officials by position title for each step. Section 9 of Article 24 also provides that deciding officials at the third and final step may use designees to complete their responsibilities, but that the Agency "shall not delegate down in the line function in using designees in the grievance procedure."[4]

The Union filed a grievance alleging that the Agency violated the agreement by "delegating down" the responsibilities of the step 3 deciding official to managers at the level of a step 2 deciding official.[5] The parties could not resolve the grievance, and submitted it to arbitration. As the parties did not stipulate to the issue, the Arbitrator framed the issue as "[w]hether the Agency violate[d] Article 24, Section 9 of the . . . [a]greement when[ever] a [s]tep 3 [o]fficial delegate[d] [the] responsibility for deciding a [s]tep 3 grievance [to] an [o]fficial at the same level of authority as the [s]tep 2 deciding [o]fficial[.] If so, what shall be the remedy?"[6]

The Arbitrator found that a plain reading of the agreement provides the following chronological grievance procedure: a step 1 grievance will be reviewed by the grievant's immediate supervisor; a step 2 grievance will be reviewed by a second-line supervisor; and a step 3 grievance will be reviewed by an even higher level supervisor. The Arbitrator concluded that the grievance procedure "demonstrate[d] that the Union had bargained for the right to deal with progressively higher officials at each step of the grievance procedure."[7]

[1] Award at 16.
[2] 5 U.S.C. § 7106(a)(2)(B).
[3] Exceptions Br. at 14.
[4] Award at 7 (quoting agreement Art. 24, § 9).
[5] *Id.* at 1 (quoting the grievance).
[6] *Id.* at 2.
[7] *Id.* at 15.

With regard to delegating designees, the Arbitrator found that the agreement "contains no exceptions to the obvious plan that the [s]tep 3 [o]fficial is at a higher level of authority than the [s]tep 2 [o]fficial . . . [and i]t follows that a deviation from this plan . . . [is] a violation[] of the [a]greement."[8] In reaching this conclusion, the Arbitrator rejected the Agency's interpretation that the agreement only prohibits a step 3 deciding official from delegating down to the same official who decided the step 2 grievance, and found this interpretation redundant to the established three-step grievance procedure. Thus, the Arbitrator concluded that the agreement provides that the Agency may not delegate the authority of a step 3 deciding official to an official at the same level of authority as a step 2 deciding official.[9]

The Arbitrator also rejected the Agency's other arguments and concluded that his interpretation does not interfere with the Agency's right to assign work. Although the award restricts the Agency from delegating the grievance-deciding authority of a step 3 deciding official to a deciding official on the same managerial level as a step 2 deciding official, the Arbitrator found that his interpretation does not restrict these delegations to any particular position. Instead, the Arbitrator listed several management positions that the Agency may designate at the step 3 level without violating the agreement.[10] In finding the Agency's arguments unpersuasive, the Arbitrator sustained the grievance, and directed the Agency to cease its downward-delegation practice.

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

III. Analysis and Conclusions

A. The award is not contrary to law.

The Agency alleges that the award is contrary to law because it violates the Agency's management rights under § 7106(a)(2)(B) of the Statute.[11] 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.[12] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[13] In making that assessment, the Authority defers to the arbitrator's underlying factual findings,[14] unless a party demonstrates that the findings are deficient as nonfacts.[15]

Authority precedent requires that when reviewing exceptions alleging that an award is inconsistent with a management right, the Authority first assesses whether the award affects the exercise of the asserted management's right.[16] If so, then the Authority examines whether the award applies an enforceable contract provision negotiated under § 7106(b) of the Statute.[17]

The Agency argues that the award affects its right to assign work.[18] The right to assign work under § 7106(a)(2)(B) of the Statute includes the right to determine the particular duties to be assigned, the right to decide when work assignments will occur, and the right to decide to whom or what positions the duties will be assigned.[19] Where a case includes an issue concerning whether there is an impermissible effect on management's right under § 7106(a), the Authority may consider whether the contract provision falls within an exception to management's right negotiated under § 7106(b) of the Statute.[20]

As interpreted and applied by the Arbitrator, Article 24, Section 9 of the agreement does not preclude management from delegating the authority of a step 3 deciding official to any particular position. Instead, the award only precludes management from delegating down the responsibilities of the step 3 deciding official to managers at the level of a step 2 official because the Arbitrator found that a plain reading of the three-step grievance procedure demonstrated that the parties have bargained for the right to deal with progressively higher officials. Even assuming such a bargained-for limitation does affect the Agency's right to assign work, as explained in *AFGE, Council 220*, the Authority has held

[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] Exceptions Form at 4.
[12] *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)).
[13] *AFGE, Local 3506*, 65 FLRA 121, 123 (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[14] *U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010) (citation omitted).
[15] *NAGE, Local R4-17*, 67 FLRA 4, 6 (2012) (citing *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008)).
[16] *U.S. Dep't of Transp., FAA*, 68 FLRA 402, 404 (2015) (citing *U.S. EPA*, 65 FLRA 113, 115 (2010)).
[17] *Id.*
[18] Exceptions Form at 4.
[19] 5 U.S.C. § 7106(a)(2)(B); *SSA*, 65 FLRA 638, 640 (2011) (*SSA*) (citing *U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 55 FLRA 553, 558 (1999)).
[20] *NTEU, Chapter 299*, 68 FLRA 835, 837 (2015) (*Chapter 299*) (citations omitted).

that "so long as contract provisions do not specify the particular persons or positions who will perform a task, those provisions may constitute enforceable procedures under § 7106(b)(2)."[21] Thus, consistent with *AFGE, Council 220* and the precedents discussed therein, we find that Article 24, Section 9 of the agreement, as interpreted and applied by the Arbitrator, constitutes a procedure under § 7106(b)(2) and that, as a result, the award is not contrary to the right to assign work.[22]

For the foregoing reasons, we deny the Agency's contrary-to-law exception.

B. The award draws its essence from Article 24, Section 9 of the agreement.

The Agency argues that the award fails to draw its essence from the agreement.[23] 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.[24] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' 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 parties' 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.[25] In addition, the Authority defers to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained."[26]

First, the Agency disputes the significance that the Arbitrator assigned to the chart.[27] Specifically, the Agency argues that the grievance procedure operates "independently" from the chart by identifying the deciding official by position for each step and is not evidence that the Union has bargained for the right to deal with progressively higher officials at each step.[28] However, the Arbitrator rejected that argument and found that a plain reading of the agreement demonstrated that the Union has bargained for the right to deal with progressively higher officials at each step of the

[21] 65 FLRA 726, 728 (2011) (citing *SSA*, 65 FLRA at 640).
[22] *Id.*

[23] Exceptions Form at 10 (citing *U.S. Dep't of HHS, Ctrs. For Medicare & Medicaid Servs.*, 67 FLRA 665, 667 (2014) (finding no merit in the essence exception because it failed to demonstrate that the arbitrator substituted his judgement for that of management); *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993) (finding award deficient because the arbitrator's interpretation of the parties' agreement was incompatible with its plain wording); Restatement (Second) of Contracts § 203 (1981) (providing that negotiated agreements are assumed to have no superfluous terms); *Interstate Brands Corp. v. Bakery Drivers & Baking Goods Vending Machines*, 167 F. 3d 764 (2nd Cir. 1999) (dismissing a private employer's suit because the parties' agreement required them to arbitrate the matter); *Fishman v. LaSalle Nat'l Bank*, 247 F. 3d 300 (1st Cir. 2001) (affirming the district court ruling that the holder's reading of a note's terms, as opposed to the borrower's reading, was the better interpretation)).
[24] 5 U.S.C. § 7122(a)(2); *see Chapter 299*, 68 FLRA at 838.
[25] *Chapter 299*, 68 FLRA at 838 (citations omitted).
[26] *SSA*, 65 FLRA at 641 (citing *U.S. DOL*, 34 FLRA 573, 575 (1990)).
[27] Exceptions Br. at 12 (referring to "big black lines").
[28] *Id.*

grievance procedure.[29] Here, the Agency's attempt to relitigate its interpretation of the agreement and the evidentiary weight that should be accorded to its witnesses fails to demonstrate that the Arbitrator's interpretation is unfounded in reason, and so, is unpersuasive. Because a disagreement with the weight an arbitrator gives evidence does not provide a basis for finding that an award fails to draw its essence from the parties' agreement,[30] and the Agency fails to demonstrate that the award is deficient, we find the Agency's first argument without merit.

Second, the Agency reargues the bargaining history of the agreement and highlights the removal of a prior restrictive clause regarding delegations from the parties' previous agreement as evidence that, in the current agreement, the parties intended to "increase management's ability to delegate . . . not decrease it."[31] The Arbitrator considered the plain language of the agreement before him and found no exception from the chronological grievance procedure wherein a progressively higher official is afforded to the grievant at each step.[32] As before, the Agency's reargument of its preferred testimony and interpretation of the agreement, coupled with the invocation of "common sense"[33] and the canons of commercial contract interpretation, fails to persuade us that the Arbitrator's interpretation of the agreement before him failed to draw its essence from that agreement language. Therefore, the Agency has failed to demonstrate that the Arbitrator's interpretation of Article 24, Section 9 of the agreement is irrational, unfounded, or in manifest disregard of the agreement.[34]

Finally, the Agency argues that the award effectively prohibits the step 3 official from ever using a designee because any delegation under his or her authority would be considered delegating down the line of function.[35] However, the Agency's argument is based on its misreading of the award. The Arbitrator found that Article 9, Section 24 precludes management from delegating down the responsibilities of the step 3 deciding official to managers at the level of a step 2 official.[36] Accordingly, the award listed several management positions that the Agency may designate to decide the step 3 grievance without violating the agreement.[37] Therefore, we deny the Agency's exception because the Agency misreads the award, and its argument provides no basis for finding that the award fails to draw its essence from the agreement.[38]

IV. Decision

We deny the Agency's exceptions.

[29] Award at 15.
[30] *Chapter 299*, 68 FLRA 835, 838 (2015) (citing *AFGE, Council 215*, 68 FLRA 137, 141 (2011)) (denying essence exceptions where union was merely disagreeing with arbitrator's evaluation of evidence).
[31] Exceptions Br. at 14.
[32] Award at 15.
[33] Exceptions Br. at 16.
[34] *AFGE, Local 3571*, 67 FLRA 178, 180 (2014).
[35] Exceptions Br. at 15.
[36] Award at 15.
[37] *Id.*
[38] *U.S. Dep't of Treasury, IRS*, 69 FLRA 122, 125 (2015) (citing *Chapter 299*, 68 FLRA at 838).