70 FLRA No. 66

INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS
ASSOCIATION ADMINISTRATIVE LAW JUDGES
(Union)

and

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY AND APPEALS REVIEW
(Agency)

0-AR-5264

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DECISION

August 16, 2017

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

I. Statement of the Case

Arbitrator Jerome H. Ross denied the Union's grievance challenging a telework memorandum issued by the Agency, finding that the grievance was not arbitrable based on the same final sentence in two telework-related sections of the parties' collective-bargaining agreement (agreement). Specifically, the Arbitrator found that both telework provisions required telework to have been restricted before the Union could challenge the Agency's action. The Union filed exceptions to the award.

First, we must decide whether the award fails to draw its essence from the parties' agreement. Because the Union challenges the Arbitrator's plain-language interpretation and fails to demonstrate that the Arbitrator's interpretation is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, the answer to this question is no.

Second, we must decide whether the award is contrary to the Telework Enhancement Act.[1] Because the Arbitrator did not make any findings or reach any conclusions as to the Telework Enhancement Act, or on any other merits issue, the answer to this question is no.

[1] 5 U.S.C. § 6503(a)(3)(B).

II. Background and Arbitrator's Award

The two telework-related sections at issue are Article 15, Sections 7.L.3. and 7.L.4. of the parties' agreement. Section 7.L.3. requires administrative law judges (ALJs) to schedule a "reasonably attainable" number of cases for hearing or risk having their ability to telework restricted.[2] Section 7.L.4. requires ALJs to act on cases under their control in a timely manner by not allowing the cases to become "seriously delinquent" or they likewise risk having their ability to telework restricted.[3] Both sections contain the same final sentence, which states that "any dispute as to whether the [e]mployer has properly restricted the ability to telework under this paragraph is to be resolved pursuant to the negotiated grievance procedure."[4]

At some point, the Agency issued a telework memorandum (Telework Memo) to provide guidance regarding Article 15, Sections 7.L.3. and 7.L.4. The Telework Memo defined numerically what a reasonably attainable number of cases for hearing and seriously delinquent cases were for purposes of potentially restricting telework for ALJs.

The Union grieved the terms of the Telework Memo under these two sections, arguing that the numbers of cases were not reasonable because many ALJs would be excluded from teleworking. The Agency denied the grievance, and the parties proceeded to arbitration.

At arbitration, the parties stipulated to three issues. The first issue, which the Arbitrator decided, was "[w]hether the Union's . . . grievance fails to raise an arbitral issue because [the Telework Memo] to all ALJs constitutes the Agency's exercise of the Agency's retained right under 5 [U.S.C. §] 7106(a) and Articles 3 and 15 of the parties' [agreement] to set the parameters or guidelines for completion of the Agency['s] work."[5]

The Arbitrator denied the grievance, finding the grievance non-arbitrable. The Arbitrator interpreted the final sentence of Article 15, Sections 7.L.3. and 7.L.4. using plain language, finding that the clause "pursuant to the negotiated grievance and arbitration procedures" requires telework to have been restricted before the Union could challenge the Agency's actions.[6]

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

[2] Award at 2.
[3] *Id.*
[4] *Id.* at 2-3.
[5] *Id.* at 6.
[6] *Id.* at 12.

III. Analysis and Conclusions

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

The Union raises three essence exceptions that challenge the Arbitrator's interpretation of the parties' agreement.[7]

When 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.[8] Under this standard, the appealing party must establish 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.[9]

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."[10]

In its first essence exception, the Union argues: (1) that the Arbitrator erred in determining that the Agency had retained a management right in determining the meaning of the terms "reasonably attainable" and "seriously delinquent,"[11] and (2) that the Agency's definitions are inconsistent with the agreement's purpose and bargaining history.[12]

In its second essence exception, the Union presents several arguments. The Union argues that: (1) the phrase "any dispute" in sections 7.L.3. and 7.L.4. allows both individual and group grievances,[13] (2) the Arbitrator looked outside the agreement and substituted his own interpretation, (3) the Arbitrator improperly used gap-filling and went outside the parties' agreement for his interpretation, and (4) the Arbitrator's findings regarding the Telework Memo are irrational.[14]

Finally, in its third essence exception, the Union argues that the Arbitrator's interpretation cannot in any rational way be derived from the parties' agreement because the Arbitrator reached outside the intent and the plain language of the parties' agreement, resulting in an "incorrect" conclusion that would require the Union to litigate potentially hundreds of individual grievances.[15]

The Union's essence arguments all challenge the Arbitrator's determination as to the plain meaning of 7.L.3. and 7.L.4. The Arbitrator found that the final sentences of these provisions each unambiguously provide that an ALJ may only invoke the parties' negotiated grievance procedure "after his or her telework is restricted."[16] The Arbitrator interpreted the parties' agreement and found that the language of the agreement plainly requires an actual triggering event – namely that a bargaining-unit employee's telework was restricted based upon the number of hearings scheduled or the number of delinquent cases – before a grievant may file a grievance alleging that their telework was limited or denied improperly.[17] The Union's essence exceptions all fail to establish that this interpretation of these provisions is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement.[18] Therefore, we deny these exceptions.

B. The award is not contrary to law.

The Union argues that the award is contrary to law.[19] 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.[20] 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.[21] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that those findings are nonfacts.[22]

The Union argues that the award is contrary to the Telework Enhancement Act.[23] Despite the Union's

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[7] Exceptions Br. at 7-16.
[8] *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[9] *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*)).
[10] *Id.* (quoting *DOL*, 34 FLRA at 576).
[11] Exceptions Br. at 7-9.
[12] *Id.* at 7-10.
[13] *Id.* at 12-13.
[14] *Id.* at 11-15.
[15] *Id.* at 15-16.
[16] Award at 12.
[17] *Id.* at 12-13.
[18] *U.S. Dep't of the Treasury, IRS*, 68 FLRA 329, 332 (2015) (denying an essence exception challenging the arbitrator's plain-language interpretation of the parties' agreement); *U.S. DOJ, Fed. BOP*, 68 FLRA 311, 313 (2015) (then-Member Pizzella dissenting) (denying an essence exception arguing that the arbitrator misinterpreted the parties' agreement); *SSA*, 65 FLRA 339, 343 (2010) (denying an essence exception challenging the arbitrator's plain-language interpretation of the parties' agreement).
[19] Exceptions Form at 4-5; Exceptions Br. at 16-17 (citing Attach. 15, Tr. Vol. IV, 218; Attach. 16, Tr. Vol. IV, 272-273).
[20] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995).
[21] *E.g., GSA*, 70 FLRA 14, 15 (2016).
[22] *E.g., AFGE, Nat'l Council 118*, 70 FLRA 63, 67 (2016).
[23] Exceptions Br. at 16-17.

concession that the Arbitrator made no findings and reached no conclusions on merits issues, the Union claims that the award is contrary to law because implementing the Telework Memo would result in teleworking ALJs and non-teleworking ALJs being treated differently, contrary to the Act.[24]

The Arbitrator noted that the parties stipulated to three issues.[25] The first issue was a threshold matter that required the Arbitrator to determine whether the grievance was arbitrable.[26] The Arbitrator only resolved that threshold matter, finding the grievance non-arbitrable. As a result, the Arbitrator did not resolve any merits issues concerning the propriety of actions that the Agency might take under the Telework Memo. Therefore, because the Union's contrary-to-law exception challenges merits findings that the Arbitrator did not make, the exception provides no basis for finding that the award is contrary to law.[27] And, we deny this exception.

IV. Decision

We deny the Union's exceptions.

[24] *Id.*
[25] Award at 6-7.
[26] *Id.* at 6.
[27] *See AFGE, Council of Prisons Locals, Council 33*, 70 FLRA 191, 193 (2017) (denying a contrary-to-law exception where the arbitrator was not tasked with resolving a dispute).