

70 FLRA No. 169

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
DENVER REGIONAL OFFICE
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1557
(Union)

0-AR-5349

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DECISION

September 26, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester concurring)

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, we address whether the Arbitrator's interpretation that a pre-approval provision in a negotiated memorandum of understanding (MOU) applies to Union officials serving 100% official time.¹

The Union and Agency negotiated a MOU, which requires Union officials to obtain Agency approval prior to using official time. The grievant, a local Union president who serves on 100% official time, failed to follow this provision, and the Agency reprimanded her for violating the MOU.

Arbitrator Hazel E. Hanley found that the MOU's approval provision was not intended to apply to Union officials who serve on 100% official time and ordered the Agency to remove the reprimand from the grievant's records.

¹ Member Abbott notes that the issue in this grievance concerning official time release procedures may soon be moot with the implementation of Executive Order 13,836, *Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining*. 83 Fed. Reg. 25,329 (May 25, 2018).

The main question before us is whether the award fails to draw its essence from the parties' master agreement or the MOU. The Agency argues that the MOU complies with the parties' agreement and there is no language in the MOU which excludes the grievant or Union officials who serve on 100% official time from the pre-approval requirement. Because the Agency fails to demonstrate that the Arbitrator's interpretation of the agreements is not plausible, we deny Agency's exception.

II. Background and Arbitrator's Award

Since September 2014, the grievant has worked on 100% official time, which includes 50% as the local Union president and 50% as secretary for the Union's national midterm bargaining committee.

In June of 2015, the parties signed a MOU that requires Union officials to obtain Agency approval before the use of official time through the Agency's SharePoint system.² The Agency reprimanded the grievant for failing to obtain Agency pre-approval on eleven occasions. The parties submitted the matter to arbitration.

The Union argued that the grievance was not issued for just and sufficient cause because the pre-approval provision does not apply to Union officials who serve on 100% official time, like the grievant. The Agency argued that the MOU contained no language that excluded Union officials on 100% official time from the approval requirement.

The MOU states, in pertinent part, that:

Prior to engaging in official union activities, Union [r]epresentatives will obtain prior approval. Generally, approval will be obtained through the SharePoint system . . . When circumstances do not permit prior approval after diligent efforts . . . the [U]nion representative will be responsible for entering the official time activity into SharePoint, as soon as possible.³

On January 5, 2018, the Arbitrator issued an award which found that the MOU conflicted with the parties' agreement, and did not apply to the grievant. According to the Arbitrator, the MOU conflicted with Article 17 of the parties' agreement which concerns the

² SharePoint is the Agency's online time-keeping system where supervisors can track and approve official time used by Union officials. Award at 7.

³ Opp'n, Attach. B, Official Time Release Procedures June 8, 2015 MOU.

Union's right to discuss any denial of official time and Article 24 which concerns the SharePoint system's ability to maintain official records. Moreover, the Arbitrator found credible evidence that the parties never intended for the MOU to apply to the grievant or Union officials who serve on 100% official time.⁴ Therefore, the Arbitrator found that the reprimand was not warranted and ordered the Agency to remove the reprimand from the grievant's records.⁵

On February 5, 2018, the Agency filed exceptions to the award and on March 6, 2018, the Union filed an opposition.

III. Analysis and Conclusion: The award draws its essence from the agreement.

The Agency alleges that the award fails to draw its essence from the parties' agreement because the MOU complies with the parties' agreement and applies to the grievant.⁶ An arbitration award fails to draw its essence from a collective-bargaining agreement when the award, as relevant here, does not represent a plausible interpretation of the agreement.⁷

The Agency's arguments fail to demonstrate that the award does not draw its essence from the parties' agreement; the Arbitrator's other findings support her conclusion.⁸ While the Agency argues that the MOU is valid because it was sufficiently bargained with the Union,⁹ the Arbitrator found that the MOU conflicts with Articles 17 and 24 of the parties' agreement.¹⁰ Because the Agency does not challenge the Arbitrator's

conclusions as to the MOU's conflict with Articles 17 and 24, we find that the Agency fails to establish that the Arbitrator's interpretation of the parties' agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement.¹¹

The Agency also argues that the MOU's pre-approval provision was applicable to the grievant because it did not include any language that excludes the grievant or Union officials who serve on 100% official time.¹² Contrary to the Agency's arguments here, the Arbitrator found that the parties understood that the MOU would not apply to Union officials who serve on 100% official-time status.¹³ Thus, the Arbitrator concluded that the MOU did not apply to the grievant because she was already on 100% official time.¹⁴ The parties essentially called on the Arbitrator to interpret whether the MOU applied to the grievant when they did not specifically address Union officials who serve on 100% official time like the grievant. Our review is deferential because it is the arbitrator's interpretation of the agreement for which the parties have bargained, and the Agency fails to demonstrate that the arbitrator's interpretation is not a plausible interpretation of the agreement.¹⁵ Consequently, we deny the Agency's essence exception.¹⁶

IV. Decision

We deny the Agency's exceptions.

⁴ Award at 23.

⁵ *Id.* at 23-26.

⁶ Exceptions Br. at 2-10.

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. 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." *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (citing *AFGE, Council 220*, 54 FLRA 156, 159 (1998)). 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 does not represent a plausible interpretation of the agreement. *Id.* (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

⁸ Chairman Kiko notes that she finds merit to the Agency's arguments challenging the Arbitrator's conclusion that the MOU was "invalid and unenforceable." Award at 23. However, the Agency's arguments fail to adequately challenge the remainder of the Arbitrator's rationale for finding that the Agency lacked just cause for the discipline.

⁹ Exceptions Br. 5-7.

¹⁰ Award at 23.

¹¹ *SSA, Balt., Md.*, 66 FLRA 569, 571-72 (2012) (citing *U.S. Dep't of HHS, Nat'l Inst. of Health*, 64 FLRA 266, 268 (2009) (denying an essence exception where the agency did not show that the arbitrator's interpretation was irrational, unfounded, implausible, or in manifest disregard of the parties' agreement)).

¹² Exceptions Br. at 7.

¹³ Award at 23.

¹⁴ *Id.*

¹⁵ *U.S. Dep't of Transp., FAA*, 68 FLRA 905, 908 (2015) (citing *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987)).

¹⁶ The Agency also argues that the award is contrary to Authority precedent invalidating arbitrator awards that added terms to negotiated agreements. Exceptions Br. at 5 (citing *U.S. Dep't of the Treasury, IRS*, 64 FLRA 720 (2010)). As this argument merely repeats its essence argument, we also deny this exception. *AFGE, Local 648, Nat'l Council of Field Labor Locals*, 65 FLRA 704, 711-12 (2011) (citing *U.S. Dep't of Transp., FAA*, 65 FLRA 320, 323 (2010)).

Member DuBester, concurring:

I agree with the decision to deny the Agency's exceptions.