**71 FLRA No. 30**

SOCIAL SECURITY ADMININSTRATION
OFFICE OF HEARING OPERATIONS
(Agency)

and

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

0-AR-5407

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DECISION

May 28, 2019

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Before the Authority: Collen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members

## I. Statement of the Case

In this case, we hold that a party may not successfully challenge as nonfacts factual findings that an arbitrator did not actually make.

The Agency's "Temporary Telework for Medical Reasons" policy (telework policy),[1] allows administrative law judges (ALJs) to temporarily work from home for medical reasons. Following back surgery, the grievant requested to perform temporary telework under this policy. The Agency denied the grievant's request. The Union filed a grievance and Arbitrator Roger I. Abrams found that the Agency violated the telework policy. As a remedy, he directed the Agency to restore a portion of the grievant's sick leave.

The question before us is whether the award is based on nonfacts. Because the Agency's nonfact arguments dispute alleged findings that the Arbitrator did not actually make, and which therefore do not provide a basis for finding an arbitration award deficient on nonfact grounds, the answer is no.

## II. Background and Arbitrator's Award

Under the Agency's telework policy, an Agency "approving official . . . may authorize work at home . . . as temporary telework for medical reasons for employees, who because of medical reasons, certified by a health care provider, have difficulty commuting to the worksite but are able to perform the duties of their position at home."[2] The grievant, an ALJ, requested to work from home after his back surgery. He provided the Agency with a doctor's note dated March 23, 2017, stating that he should "stay out of work," but that he could "try to work from home if the work is available."[3]

On March 29, 2017, the Agency denied the request concluding that the doctor's note did not specifically state the extent to which the grievant would be unable to commute but still perform the essential functions of his job while at home. In response, the grievant filed a grievance. He then submitted another doctor's note on May 9, 2017, explicitly stating that he should not commute to work. The Agency denied the grievance because the final doctor's note did not definitively state that the grievant could perform a full range of his duties at home.

The parties could not resolve the grievance and invoked arbitration.

The Arbitrator determined that the Agency violated the telework policy when it denied the grievant's request to temporarily work from home following his back surgery. He found that the grievant provided the Agency with the requisite information under the policy – that he could not commute to work for medical reasons, but could perform his duties at home – through all of the submitted notes. The Arbitrator further found that the March 23 doctor's note was conditioned on whether work was available for the grievant to perform at home. And he concluded that when the grievant made his request, work was available to perform at home.

As a remedy, the Arbitrator awarded restoration of the sick leave that the grievant used rather than performing work at home.

On August 22, 2018, the Agency filed exceptions to award. The Union filed an opposition on September 26, 2018.

[1] Exceptions, Ex. 5, Temporary Telework for Medical Reasons Policy (presented as a joint exhibit by the parties at arbitration).

[2] *Id.* at 2.

[3] Award at 3.

## III. Analysis and Conclusion: The award is not based on nonfacts.

To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[4] The Authority rejects nonfact exceptions that challenge alleged findings that an arbitrator did not actually make.[5] Moreover, the Authority will not find an award deficient based on the arbitrator's determination of any factual matter that the parties disputed at arbitration.[6]

The Agency claims that the award is based on a nonfact because the Arbitrator erroneously found that work was available for the grievant to perform at home as of May 9.[7] According to the Agency, the grievant's supervisor reassigned the grievant's work to other employees, and these reassignments were complete as of May 9. In the alternative, the Agency claims that even if work was available as of May 9, the Agency had reassigned all of the grievant's work by "no later than May 17."[8] Based on its alternative nonfact argument, the Agency argues that the Authority should modify the remedy to restore sick leave for only the period between May 9 and May 17.[9]

The Agency misconstrues the Arbitrator's award. The Arbitrator made no finding on whether work was available to perform at home on May 9 or after May 17.[10] Rather, he found that work was available for the grievant to perform at home "[w]hen [the grievant] made his request"[11] – specifically, the request he made when he submitted the doctor's note dated March 23, which the Agency denied on March 29.[12] The Agency does not challenge this factual finding, and the Agency's subsequent reassignment of the grievant's work does not negate the availability of portable work at the time of the grievant's original telework request. Because the Agency's nonfact exceptions challenge alleged findings that the Arbitrator did not make, this argument provides no basis for finding the award deficient.[13]

Accordingly, we deny the Agency's nonfact exceptions, and, consequently, find it unnecessary to modify the Arbitrator's remedy.

## IV. Decision

We deny the Agency's exceptions.

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[4] *U.S. DOD, Def. Logistics Agency, Disposition Servs., Battle Creek, Mich.*, 70 FLRA 949, 950 (2018).
[5] *NLRB Prof'l Ass'n*, 68 FLRA 552, 554 (2015) (*NLRB*); *U.S. Dep't of the Army, White Sands Missile Range, N.M.*, 67 FLRA 619, 623 (2014) (*White Sands*).
[6] *U.S. EPA*, 68 FLRA 139, 141 (2014) (*EPA*).
[7] Exceptions at 5-7.
[8] *Id.* at 7-8.
[9] *Id.* at 8.
[10] We note the Agency repeatedly referred in its exceptions to a supposed concession by the Union that the grievant was not in compliance with the telework policy until the final note dated May 9. *See* Exceptions at 6-7. Again, the Arbitrator made no such finding; on the contrary, the Arbitrator found that the Agency violated the telework policy by insisting that one note contain all the required information instead of considering all the submitted notes "together." Award at 8.
[11] *Id.* at 9.
[12] *Id.* at 3, 9.
[13] *NLRB*, 68 FLRA at 554; *White Sands*, 67 FLRA at 623-24.