

71 FLRA No. 128

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 5
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE FINANCE AND ACCOUNTING
(Agency)

0-AR-5488

DECISION

April 6, 2020

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

I. Statement of the Case

Arbitrator Angela D. McKee found that the Agency had just cause to suspend the grievant for two days because the parties' collective-bargaining agreement did not give the grievant an absolute right to use annual leave after she had exhausted her sick leave. The Union argues that the award fails to draw its essence from the parties' agreement. Because the Arbitrator's interpretation is consistent with the plain wording of the agreement, we deny the exceptions.

II. Background and Arbitrator's Award

The grievant had a long history of exhausting sick leave and then requesting annual leave or leave without pay (LWOP) for chronic and intermittent medical conditions. As a result, the Agency placed her on a series of Letter of Instructions (LOIs) and the LOIs advised the grievant that she must provide medical documentation to support any leave requests before management would approve any leave. On October 4, 2017 (October LOI), the Agency advised the grievant that her attendance was not improving and, therefore, once she exhausted her sick leave, her leave requests would not be approved as annual leave. The Agency also warned the grievant that any future absences beyond her accrued sick leave would be

charged as "[a]bsent [w]ithout [a]pproved [l]eave" (AWOL),¹ and could lead to discipline.

After that letter, the grievant's absenteeism did not improve. During the next six months, she requested sick leave for unscheduled absences on eleven different occasions but did not have available sick leave. The Agency charged her with AWOL for each absence and suspended her for two days. The grievant filed a grievance alleging that the Agency did not have just cause for the suspension. The parties were unable to resolve the grievance and invoked arbitration.

At arbitration, the parties stipulated that the issue was whether the Agency had "just cause to issue the [g]rievant a [two]-day suspension for the charge of AWOL in violation of the October [LOI.]"²

Article XVI, Section 8 of the parties' agreement (Section 8) provides that "[a]n employee may request annual leave in lieu of sick leave"³ and that "[a]n employee may request [leave without pay (LWOP)] in lieu of sick leave."⁴ Before the Arbitrator, the Union argued that these provisions guarantee her the right to substitute annual leave for sick leave. According to the grievant, she should not have been charged AWOL for the absences in question because she had accrued sufficient annual leave to cover them.

The Arbitrator rejected the Union's arguments, finding that Section 8 does not give employees an absolute right to use annual leave in lieu of sick leave because the word "request" is not interchangeable with the word "use."⁵ According to the Arbitrator, "request" implies that permission must be granted to use annual leave and "use" implies that the substitution is automatic.⁶ The Arbitrator also found that, when read together with Article XVI, Sections 2 and 3⁷ and Article XV,

¹ Award at 3.

² *Id.* at 5.

³ *Id.* at 6.

⁴ *Id.*

⁵ *Id.* at 9.

⁶ *Id.* On this point, the Arbitrator explained that "the term 'may request,' in the context of the entire provision, cannot reasonably be interpreted as an absolute right," because such an interpretation would also mandate that the Agency record leave as LWOP whenever an employee exhausts sick leave. She concluded that interpreting Section 8 as argued by the Union would allow employees "to avoid discipline for absenteeism in perpetuity." *Id.* & n.1.

⁷ *Id.* at 10. Article XVI, Section 2 provides that unscheduled sick leave "will be reported by the employee contacting the immediate supervisor," and Section 3 provides that "[s]ick leave requires the approval of the immediate supervisor." *Id.* at 5-6.

Section 3,⁸ these provisions indicated that supervisors retain the discretion to approve or deny a request for sick leave and there is “no guarantee” that employees will be permitted to use annual leave to cover unscheduled absences.⁹

The Agency argued that the October LOI was properly issued as discipline under the parties’ agreement, whereas the Union argued that restricting the use of annual leave was not an “alternative form of discipline” recognized by Article XXXVI, Section 2.¹⁰ But, the Arbitrator found that the October LOI’s “blanket denial” of annual leave was not an “alternative form of discipline, but rather “advance notice”¹¹ of how the supervisor would treat future requests consistent with his contractually authorized discretion.¹²

The Arbitrator concluded that the Agency’s refusal to approve annual leave in lieu of sick leave was a proper exercise of the Agency’s discretion. Accordingly, she denied the grievance, finding that the Agency had just cause to suspend the grievant for the multiple instances of AWOL.

The Union filed exceptions to the award on April 1, 2019, and the Agency filed an opposition to the Union’s exceptions on May 2, 2019.

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

The Union argues that the award fails to draw its essence from the parties’ agreement¹³ because there was not just cause to suspend the grievant.¹⁴

In its exception the Union essentially repeats the arguments that were rejected by the Arbitrator – that the grievant had a “right” to use annual leave in lieu of sick

⁸ *Id.* at 10 n.2. This provision requires employees to contact their immediate supervisor to report emergency leave, but explains that “[s]uch calls . . . do not guarantee leave approval.” *Id.*

⁹ *Id.*

¹⁰ *Id.* at 8

¹¹ *Id.* at 12.

¹² *Id.*

¹³ 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: (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. *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014).

¹⁴ Exceptions at 6.

leave.¹⁵ But the Arbitrator determined that Section 8, both by its plain wording and when read in context with Article XVI, Sections 2 and 3 and Article XV, Section 3, did not guarantee the grievant the right to use annual leave in lieu of sick leave.¹⁶ Rather, she determined that the parties’ agreement gave the Agency discretion to deny leave requests and charge the grievant with AWOL.¹⁷ The Union neither explains nor demonstrates how the Arbitrator’s interpretation conflicts with any contract language.

The Union also argues that the restriction on the grievant’s “right to utilize annual leave in lieu of sick leave” violates the parties’ agreement because it was a form of discipline not authorized by Article XXXVI, Section 2.¹⁸ On this point, however, the Arbitrator found that the October LOI was *not* a form of discipline, but rather was simply advance notice of how the grievant’s supervisor would treat future leave requests consistent with his contractual discretion.¹⁹

Accordingly, the Union does not establish that the award is irrational, unfounded, implausible, or in manifest disregard of the parties’ agreement.²⁰ Therefore, we deny the Union’s essence exceptions.²¹

V. Decision

We deny the Union’s exceptions.

¹⁵ *Id.* at 8-10.

¹⁶ Award at 12.

¹⁷ *Id.*

¹⁸ Exceptions at 10.

¹⁹ Award at 12.

²⁰ *See, e.g., Broad. Bd. of Governors, Office of Cuba Broad.*, 66 FLRA 1012, 1020 (2012).

²¹ The Union makes additional arguments that are similarly unavailing. Specifically, the Union argues that the award is contrary to Army Regulation 215-3, Sections 5-12(f) (an “employee whose absence for illness has been approved by management and whose accumulated [sick leave] has been exhausted may have the absence charged to [annual leave] or LWOP”) and 7-4 (the Agency may use an alternative discipline program if certain conditions are met), as well as Army Regulation 5-34 (an employee’s absence that was recorded as AWOL “may be changed to [annual leave, sick leave], or LWOP, as appropriate” if it is “later determined that the absence is excusable”). Exceptions at 8-9. Apart from reiterating its argument that the grievant’s supervisor lacked discretion to deny leave requests and charge the grievant with AWOL, the Union does not explain how the Arbitrator’s conclusion to the contrary conflicts with the plain wording of the regulations. Consequently, we reject the Union’s arguments on this point.

Member DuBester, concurring:

“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.”¹ This reflects a principle that has existed in Authority precedent for over forty years. However, the majority’s decision notably, and apparently purposely, omits reference to this foundational principle.

As I explained in my dissenting opinion in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Miami, Florida*,² the majority’s rationale for questioning application of this well-established standard to federal-sector arbitration awards is based upon a fundamental misunderstanding of both our Statute and the principles underlying the “federal policy of settling labor disputes by arbitration.”³ Moreover, the majority’s baseless assertions concerning the essence exception – if left unchecked – “threaten to undermine the carefully balanced framework that Congress purposely built into our Statute to address the unique aspects of federal-sector labor relations.”⁴

Accordingly, while I agree with the decision to deny the Union’s essence exception, I cannot join any decision which does not reaffirm the Authority’s commitment to these well-established principles.

¹ *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (further holding that “[t]he 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’”) (quoting *AFGE, Council 220*, 54 FLRA 156, 159 (1998)).

² 71 FLRA 660, 669-76 (2020) (Dissenting Opinion of Member DuBester).

³ *Id.* at 672 (quoting *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960)).

⁴ *Id.* at 669.