71 FLRA No. 170

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
COLEMAN, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 506
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5564

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DECISION

July 27, 2020

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

I. Statement of the Case

Because an Agency memorandum issued *after* the Union filed its grievance cannot have provided the basis of the Union's grievance, we set aside the award as based on a nonfact and we find the award fails to draw its essence from the parties' agreement.

The Union filed a grievance on February 14, 2017, alleging, as relevant here, that the Agency violated the parties' agreement by unilaterally terminating a compressed work schedule on February 12, 2017. Arbitrator Norman J. Stocker issued an award finding that the Agency terminated the compressed work schedule on March 10, 2017 – twenty-four days *after* the Union filed the grievance.

The main questions before us are (1) whether the award is based on a nonfact and (2) whether the award fails to draw its essence from the parties' agreement. Because the Agency's actions in March 2017 could not have formed the basis for the Union's February 2017 grievance, a central fact underlying the award is clearly erroneous. More importantly, even if we deferred to the Arbitrator's factual finding, the Arbitrator's conclusion that a March 2017 occurrence could provide the basis for a February 2017 grievance is so unfounded in reason and fact that it fails to draw its essence from the parties' agreement. Therefore, we grant the Agency's nonfact and essence exceptions and set aside the award.

II. Background and Arbitrator's Award

In 2003, the parties agreed to a compressed work schedule for the nurses working at the Agency's "Penitentiary 1" prison[1] for a combination of six twelve-hour shifts and one eight-hour shift during a two week pay period.[2] After a verbal agreement between the parties, the compressed work schedule was changed to four ten-hour shifts per week. On July 24, 2016, the Agency verbally discontinued the nurses' compressed work schedule.[3]

Almost seven months later, on February 14, 2017, the Union filed a grievance alleging, as relevant here, that the Agency violated the parties' agreement by unilaterally terminating the nurses' compressed work schedule. The Union stated that the grievable occurrence happened on February 12, 2017. The following month, on March 10, 2017, the Agency sent a memorandum to the Union stating that it had discontinued the compressed work schedule on July 24, 2016, not February 12, 2017. The parties could not resolve the dispute, and it proceeded to arbitration.

Before the Arbitrator, as relevant here, the Agency argued that the grievance was untimely under Article 31, Section d which states that "[g]rievances must be filed within forty . . . calendar days of the date of the alleged grievable occurrence."[4] Specifically, the Agency alleged that the Union filed the grievance more than forty days after the Agency verbally discontinued the nurses' compressed work schedule on July 24, 2016. The Arbitrator did not analyze the Agency's procedural-arbitrability argument in his award. Instead, he stated in his factual findings that the Agency terminated the Union's compressed work schedule on March 10, 2017 – when the Agency sent the memorandum stating that it had discontinued the compressed work schedule on July 24, 2016.[5] On the merits, the Arbitrator found that the Agency violated the Federal Employees Flexible and Compressed Work Schedules Act. As a remedy, he directed the parties to the negotiation table and for the Agency to provide backpay from March 10, 2017.

[1] Award at 7.
[2] Exceptions, Attach. E., Hr'g Tr. (Tr.) at 55.
[3] *Id.* at 55-56.
[4] Exceptions, Attach. D, Master Agreement (MA) at 71.
[5] Award at 6; *id.* at 14 (identifying March 10, 2017, as the date "when [the] Associate[] Warden . . . terminated the mutually agreed upon 10-hour compressed work schedule").

On November 15, 2019, the Agency filed exceptions to the Arbitrator's award. The Union did not file an opposition.

III. Analysis and Conclusions

A. The award is based on a nonfact.

The Agency argues that the Arbitrator based his award on the erroneous fact that the date of the alleged grievable occurrence was March 10, 2017.[6] Specifically, the Agency asserts that the Arbitrator – as evident from both his recitation of facts and the time period of the backpay remedy – based his award on finding that the Agency terminated the schedule on March 10, 2017.[7] To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[8]

The Agency asserts, and nowhere in the record does the Union dispute, that the Agency discontinued the nurses' compressed work schedule on July 24, 2016.[9] The Arbitrator found, without any explanation, that the Agency terminated the compressed work schedule on March 10, 2017 – twenty-four days after the Union filed its February 14 grievance.[10] However, the Agency's actions in March 2017 could not have formed the basis for the Union's February 2017 grievance.[11] And because the Union filed its grievance on February 14, 2017, more than forty days after July 24, 2016, the grievance was not timely filed under Article 31, Section d.[12] Accordingly, but for the Arbitrator's erroneous conclusion that the date of the grievable occurrence was March 10, 2017, he would not have found the grievance timely and directed backpay from March 10, 2017.[13] Consequently, we find that the award is based on a nonfact.

B. The award fails to draw its essence from the parties' agreement.

The Agency also argues that the award fails to draw its essence from Article 31, Section d.[14] The Authority has found that an award fails to draw its essence from a parties' agreement where the award conflicts with the agreement's plain wording.[15] In addition, the Authority has emphasized that "when parties agree to a filing deadline – with no mention of any applicable exception – the parties intend to be bound by that deadline."[16]

Article 31, Section d states that "[g]rievances must be filed within forty . . . calendar days of the date of the alleged grievable occurrence."[17] As mentioned above, the Arbitrator found that the Agency terminated the compressed work schedule on March 10, 2017, without explaining how that date provided the basis of his decision.[18] Even if we deferred to the Arbitrator's

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[6] Exceptions Br. at 16 (arguing that the March 10 memo could not have formed the basis for the grievance because the Agency sent it to the Union "twenty-four . . . days *after* the Union filed its grievance" (emphasis added)).

[7] *Id.* at 15-16 (quoting Award at 6, 14).

[8] *U.S. DOL, Office of Workman's Comp. Programs*, 71 FLRA 726, 727 (2020) (*DOL*) (Member DuBester concurring).

[9] Exceptions Br. at 14-15 ("There is no dispute at all as to the date that the grievants became aware of the termination of their [compressed work] schedules[:] July 24, 2016."); *see* Award at 8 ("[T]he Agency may have been correct that the Union had to be aware that the agreed upon compressed work schedule had not been in effect [on July 24, 2016]."); Tr. at 41, 55-58 (witness testimony – not clearly disputed at the hearing – that the Agency terminated the compressed work schedule on July 24, 2016). We note that the Union did not file an opposition in this case, and the Union's post-hearing brief is not in the record.

[10] Award at 6-7, 14. We note that nothing in the record explains why the Union supplied February 12, 2017, as the "grievable occurrence" date on its grievance.

[11] Because the Arbitrator found that the Agency terminated the compressed work schedule in March 2017, he rejected the Union's allegation, in its grievance, that the Agency terminated the compressed work schedule on February 12, 2017. *Id.* at 8; *see* Exceptions, Attach. C, Joint Ex. 2, Grievance at 1.

[12] MA at 71 ("Grievances must be filed within forty . . . calendar days of the date of the alleged grievable occurrence.").

[13] Award at 14; MA at 71; *see DOL*, 71 FLRA at 727 (setting aside award as based on a nonfact because the arbitrator considered a charge different from that stipulated to by the parties); *U.S. DHS, Citizenship & Immigration Servs., Dist. 18*, 71 FLRA 167, 167-68 (2019) (Member DuBester dissenting) (finding that the award was based on the nonfact that the charge at issue was grievant's first offense when it was actually the grievant's second offense).

[14] Exceptions at 6-13. The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the excepting 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. *U.S. Small Business Admin.*, 70 FLRA 525, 527 (2018) (*SBA*) (Member DuBester concurring, in part, and dissenting, in part).

[15] *SBA*, 70 FLRA at 527.

[16] *U.S. Dep't of the Air Force, 673rd Air Base Wing, Joint Base, Elmendorf-Richardson, Alaska*, 71 FLRA 781, 782 (2020) (*Air Force*) (Member DuBester dissenting) (finding the award failed to draw its essence from the parties' agreement because the arbitrator ignored the agreement's procedural rules by concluding the union's step-three grievance was timely filed).

[17] MA at 71.

[18] Award at 6, 14.

finding that the grievable occurrence happened on that date, the Union filed the grievance twenty-four days *before* March 10.[19] Thus, the grievance was premature and not filed in accordance with Article 31, Section d.[20] In finding otherwise, the award is "so unfounded in reason and fact and so unconnected with the wording and purpose of the parties' agreement as to manifest an infidelity to the obligation of the arbitrator."[21] Accordingly, we find that the award fails to draw its essence from Article 31, Section d.[22]

IV. Decision

We set aside the award.

Member DuBester, concurring in part:

I agree with the decision to grant the Agency's nonfact exception and set aside the award on that basis. Therefore, I would find it unnecessary to address the Agency's essence exception.

[19] *Id.*

[20] MA at 71; *see U.S. DOD, Educ. Activity, Alexandria, Va.*, 71 FLRA 765, 766-67 (2020) (Member DuBester dissenting) (award failed to draw its essence from the parties' agreement because "the [a]rbitrator failed to enforce the plain language of the parties' agreed-to framework for filing a grievance within forty-five days after a triggering event").

[21] *SBA*, 70 FLRA at 527.

[22] *See Air Force*, 71 FLRA at 782 (award failed to draw its essence from the parties' agreement because the arbitrator ignored the agreement's procedural rules). Because we set aside the award, we do not address the Agency's remaining exceptions. *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 71 FLRA 815, 816 n.14 (2020) (Member DuBester dissenting).