71 FLRA No. 194

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ASHLAND, KENTUCKY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1286
COUNCIL OF PRISON LOCALS
(Union)

0-AR-5579

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DECISION

October 1, 2020

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

I. Statement of the Case

Arbitrator Jay Nadelbach found that the Union's grievance was properly filed and upheld the grievance on the merits. The Agency challenges the Arbitrator's procedural-arbitrability determination on nonfact, essence, and exceeds-authority grounds. Because the Agency does not demonstrate that a central fact underlying the award is clearly erroneous, that the award is irrational, unfounded, implausible, or in manifest disregard of the agreement, or that the Arbitrator exceeded his authority, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

In December 2017, the Union filed a formal grievance with the Agency alleging that the Agency's failure to relieve certain employees for their contractual half hour duty-free lunch and properly compensate them for that time worked violated the parties' agreement and the Fair Labor Standards Act. The Agency rejected the grievance and raised both procedural and substantive objections. In January 2018, the Union invoked arbitration.

At arbitration, the Agency maintained that the grievance was procedurally defective. As relevant here, the Agency asserted that the grievance was not filed at the appropriate level, in violation of Article 31, Section f of the parties' collective-bargaining agreement (Article 31).

Article 31 states that a grievance must be "filed with the Chief Executive Officer of the institution/facility, if the grievance pertains to the action of an individual for which the Chief Executive Officer of the institution/facility has disciplinary authority over" but when a grievance is "against the Chief Executive Officer of an institution /facility, . . . the grievance will be filed with the appropriate Regional Director."[1]

The Arbitrator rejected all of the Agency's procedural claims. He determined that the Warden was the Chief Executive Officer for the facility and that "it was the Warden's decision . . . not to adjust the scheduling to allow for duty-free lunches" that was being grieved.[2] He found that the Warden, not the institution's captains or lieutenants, is responsible for providing employees a duty-free lunch period. The Arbitrator determined that the Union attempted to informally resolve the issue at the Warden's level, and when those efforts failed, the Union appropriately filed its grievance with the Regional Director. The Arbitrator credited the Union's unrebutted testimony that the Warden advised the Union to "simply go forward with a grievance."[3]

Based on these findings, the Arbitrator concluded that the record credibly demonstrated that the Union's grievance was not procedurally deficient. He then sustained the grievance on the merits and directed the Agency to make whole all of the affected employees.

On December 31, 2019, the Agency filed exceptions to the award, and on February 4, 2020, the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency argues that the award is based on a nonfact because the Arbitrator found that the Union's grievance was based on a decision made by the Warden and that the Union correctly filed its grievance with the Regional Director.[4] To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[5] The Authority has held that mere disagreement

[1] Award at 4-5.
[2] *Id.* at 20.
[3] *Id.*
[4] Exceptions at 5, 7-8.
[5] *NLRB Prof'l Ass'n*, 68 FLRA 552, 554 (2015) (*NLRB*).

with an arbitrator's evaluation of evidence, including the determination of the weight to be given such evidence, provides no basis for finding an award deficient.[6]

Specifically, the Agency asserts that the Arbitrator erroneously found that "there was no testimony offered by a Lieutenant or a Captain that they had the authority to correct or informally resolve this situation" even though it presented evidence that those officers could have resolved the lunch break issue.[7] The Agency acknowledges that the Arbitrator credited Union testimony on the issue, but argues that he should not have relied on it for his conclusions because the Union's testimony "makes no sense" and conflicted with the testimony of the Associate Warden.[8] The Agency's arguments are mere disagreement with the Arbitrator's evaluation of the evidence and, thus, provide no basis for finding the award deficient based on a nonfact.

Accordingly, we deny the Agency's nonfact exception.[9]

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

The Agency argues that the Arbitrator's award fails to draw its essence from Article 31,[10] which provides that a grievance must be filed with the Warden if it concerns the actions of an individual over whom the Warden has authority, but if the grievance concerns the Warden's actions, it must be filed with the appropriate Regional Director.[11] 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.[12]

In support of its essence exception, the Agency reiterates that the institution's lieutenants and captains are responsible for relieving officers for lunch. According to the Agency, because the Warden has disciplinary authority over those employees, the Arbitrator's finding that the grievance was properly filed with the Regional Director fails to draw its essence from Article 31.[13] However, the Arbitrator found that the Warden was ultimately responsible for the schedules, the failure to provide duty-free lunch periods, and the impossibility of an informal resolution of the issue at his level.[14] Because these findings support the Arbitrator's conclusion that the grievance challenged an action of the Warden, his conclusion that the grievance was appropriately filed with the Regional Director is consistent with Article 31.

Because the Agency has failed to establish that the Arbitrator interpreted Article 31 in a way that is irrational, unfounded, implausible, or in manifest disregard of the agreement,[15] we deny the Agency's essence exception.[16]

IV. Decision

We deny the Agency's exceptions.

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[6] *See, e.g., Int'l Bhd. of Elec. Workers, Local 2219*, 69 FLRA 431, 433 (2016) (*IBEW*) (citations omitted); *U.S. DHS, CBP*, 68 FLRA 157, 160 (2015) (citing *NLRB, Region 9, Cincinnati, Ohio*, 66 FLRA 456, 461 (2012)).

[7] Exceptions at 7.

[8] *Id.*

[9] *E.g., AFGE, Local 2846*, 71 FLRA 535, 536 (2020); *IBEW*, 69 FLRA at 433-34 (citation omitted); *NLRB*, 68 FLRA at 555.

[10] Exceptions at 9.

[11] *Id.*

[12] *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (citing 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

[13] Exceptions at 9.

[14] Award at 20.

[15] *U.S. Dep't of State, Passport Serv.*, 71 FLRA 327, 328 (2019) (Member DuBester concurring; Chairman Kiko dissenting); *U.S. Dep't of the Treasury, IRS*, 70 FLRA 539, 542 (2018) (Member DuBester concurring).

[16] The Agency also argues that the Arbitrator exceeded his authority because he disregarded Article 32, Section h in finding that the Union's grievance was correctly filed with the Regional Director. Exceptions at 11. The Agency refers to both "Article 31, Section h" and "Article 32, Section h," but it is clear from its argument that it is referring to Article 32, Section h. *Id.* at 11-12. This provision states that "The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of [the parties' agreement]." *See* Exceptions, Attach. 2, Master Agreement at 76. As relevant here, arbitrators exceed their authority when they disregard specific limitations on their authority. *U.S. DHS, U.S. CBP, Seattle, Wash.*, 70 FLRA 180, 183 (2017) (citing *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996)). The Agency's exceeds-authority exception is based on the same premise as its essence exception – that the Arbitrator disregarded the parties' agreement by determining that the Union's grievance was properly filed with the Regional Director. Exceptions at 9. Consistent with our denial of the Agency's essence exception we also deny its exceeded authority exception. *E.g., U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 103, 105 (2019) (denying exceeded-authority exception based on the same premise as previously rejected essence exception); *SSA, Office of Disability Adjudication & Review, Springfield, Mass.*, 68 FLRA 803, 806 (2015) (same).