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

DECISION

October 1, 2020

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.”

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. 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 unrebuted testimony that the Warden advised the Union to “simply go forward with a grievance.”

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. 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. 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.1
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.

References

7 Exceptions at 7.
8 Id.
9 E.g., AFG, 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.

13 Exception 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
(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
(denying exceeded-authority exception based on the same