

71 FLRA No. 203

BREMERTON METAL TRADES COUNCIL
INTERNATIONAL BROTHERHOOD
OF BOILERMAKERS
LOCAL 290
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
PUGET SOUND
NAVAL SHIPYARD AND
INTERMEDIATE MAINTENANCE FACILITY
BREMERTON, WASHINGTON
(Agency)

0-AR-5530

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DECISION

October 29, 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 Lawrence E. Little found that the Agency did not violate the parties’ collective-bargaining agreement and applicable law by refusing to provide the grievant a copy of an investigative report arising from his allegation of a hostile work environment. The Union filed exceptions on nonfact, contrary-to-law, and essence grounds. Because the Union does not demonstrate that the award is deficient on any of these grounds, we deny the exceptions.

II. Background and Arbitrator’s Award

In May 2018, the grievant alleged that Agency employees had harassed and hazed him, and that his transfer to a different department was retaliatory. The Agency completed an investigation of the grievant’s allegations in July 2018 and discussed the results with the grievant shortly thereafter.

In August 2018, the grievant submitted a Freedom of Information Act (FOIA) request for a “copy of the internal investigation” conducted by the Agency “into the matter of harassment by” Agency employees directed toward the grievant.¹ The Agency denied the FOIA request. The Agency’s denial stated, in relevant part, that while 126 pages of documents “were responsive to your request,” these documents “are being withheld in full because they are not appropriate for release pursuant to 5 U.S.C. § 552(b)(5) and (b)(6).”²

More specifically, the denial explained that 5 U.S.C. § 552(b)(5) “pertains to certain inter- and intra-agency communications protected by the deliberative process privilege.”³ It further explained that 5 U.S.C. § 552(b)(6) “exists to protect the privacy of third parties” and that it was “foreseeable that release of these documents would discourage candid discussions within the agency.”⁴ The denial contained instructions for appealing the denial of the FOIA request.

The Union subsequently requested a copy of all investigative material related to the grievant’s harassment complaint. The Agency denied the request because the Union had not established a particularized need for the requested information under 5 U.S.C. § 7114(b)(4). Citing a provision of the parties’ agreement, the grievant then submitted his own request for a copy of the investigative material, and the Agency denied his request.⁵

1 Award at 10.

2 *Id.*

3 *Id.*

4 *Id.*

5 The grievant’s request stated: “This is my [r]equest for [i]nformation (RFI) per [A]rticle 0304(a) of [t]he [a]greement.” Opp’n, Attach., Agency’s Post-Hr’g Br., Ex. 3 at 1.

In November 2018, the Union filed the instant grievance alleging that the Agency failed to provide the grievant access to information “specific to himself and retained by [the Agency] in a system of records”⁶ in violation of Article 0304 of the parties’ agreement (Article 0304)⁷ and the Privacy Act, specifically, 5 U.S.C. § 552a(d) (Section 552a(d)).⁸

The Agency denied the grievance, and the Union invoked arbitration. The Arbitrator framed the issue, in relevant part, as whether the Agency violated the parties’ agreement or law by not providing the grievant with a copy of the investigative file.

The Union contended that the grievant was “entitled to obtain a copy of the record that the [Agency] has admitted that it has.”⁹ It also argued the Agency improperly concluded that the Union had not established a particularized need for the information under § 7114(b)(4) because its request for the information was made “under Article 0304 and [Section 552a(d)] without referencing 5 U.S.C.[§] 7114 (b)(4).”¹⁰

The Agency asserted that it did not violate Article 0304 because the investigative file is not contained in the grievant’s Official Personnel Folder (OPF) or other records identifiable to the grievant. Further, the Agency argued that the FOIA exemptions it cited in its denial and the Privacy Act prohibit disclosure of the requested documents, and the grievance is not the proper way to appeal the denial of the FOIA request.

Addressing these arguments, the Arbitrator first noted that the grievant failed to file a FOIA appeal, despite receiving instructions for appealing the denial. Therefore, he found that the grievant failed to comply

with Article 0304 insofar as it “recognizes that applicable regulatory requirements will have to be followed to obtain access.”¹¹ The Arbitrator also found that the Agency properly relied upon the Privacy Act and FOIA exemptions in denying the request.

The Arbitrator also credited the Agency’s representation that the investigative file was not contained in the grievant’s OPF or other files identifiable to the grievant. Therefore, he found that the Agency did not violate Article 0304 by denying the grievant’s request for the investigative file.¹² Consequently, he denied the grievance.

The Union filed exceptions to the award on August 14, 2019, and the Agency filed an opposition to the Union’s exceptions on September 13, 2019.

III. Analysis and Conclusions

A. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.¹³ However, an arbitrator’s interpretation of a collective-bargaining agreement does not constitute a matter that can be challenged as a nonfact.¹⁴

The Union argues that the award is based on a nonfact because the grievant is entitled to the investigative file under Article 0304 without a FOIA request.¹⁵ In making this argument, however, the Union does not identify any central fact found by the Arbitrator that is clearly erroneous.¹⁶ Therefore, the Union’s argument does not provide a basis for finding that the award is based on a nonfact and we deny this exception.

B. The award is not contrary to law.

The Union contends that the Arbitrator’s award is contrary to law because it “seemingly . . . require[s] that an employee file a [FOIA request] to obtain information the employee is entitled to per [Section 552a(d)].”¹⁷ When resolving a contrary to

⁶ Award at 11.

⁷ Article 0304 concerns access to personnel records and states, in pertinent part: “Upon request, Employees will be permitted to review their Official Personnel Folder (OPF), and any other records identifiable to the Employee which are contained in a system of records maintained by the Employer (including e-mails). An Employee’s representative when authorized by the Employee in writing will be permitted to review the Employee’s records. The [Union] recognizes that applicable regulatory requirements will have to be followed to obtain access.” Award at 4-5 (quoting Art. 0304).

⁸ Section 552a(d) states, in part, that: “Each agency that maintains a system of records shall . . . upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system.” 5 U.S.C. § 552a(d)(1). The Privacy Act defines “system of records” as “a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.” *Id.* at § 522a(a)(5).

⁹ Award at 11.

¹⁰ *Id.*

¹¹ *Id.* at 15 (quoting Art. 0304).

¹² *Id.* at 16.

¹³ *U.S. Dep’t of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993).

¹⁴ *U.S. DHS, U.S. ICE*, 65 FLRA 792, 795 (2011) (citing *AFGE, Nat’l Council of EPA Locals, Council 238*, 59 FLRA 902, 904 (2004) (internal citation omitted)).

¹⁵ Exceptions at 6.

¹⁶ *AFGE, Local 2846*, 71 FLRA 535, 537 (2020) (citing *NLRB Prof’l Ass’n*, 68 FLRA 552, 555 (2015)).

¹⁷ Exceptions at 4.

law exception, the Authority reviews any question of law raised by the exception and the award *de novo*.¹⁸ Applying a *de novo* standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.¹⁹ In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.²⁰

Contrary to the Union's assertion, the Arbitrator did not find that the grievant was *required* to file a FOIA request to obtain information pursuant to Section 552a(d). Instead, he found that, based on the language in Article 0304, the Agency properly relied on the exemptions from disclosure under FOIA and the Privacy Act in denying the Union's request.²¹ He also found that Article 0304 did not entitle the grievant to the requested information because it was not contained in the grievant's OPF or other records identifiable to the grievant.²² Because the Union's argument is based on a finding that the Arbitrator did not make, it provides no basis for concluding that the award is contrary to law.²³

Consequently, we deny the Union's contrary-to-law exception.

- C. The Union does not demonstrate that the award fails to draw its essence from the parties' agreement.

The Union argues that the award fails to draw its essence from the parties' agreement because "[t]he [agreement] entitles the employee to the information,"²⁴ "[a] union may expand its right to information through collective bargaining," and the subject of the investigation did not implicate any of the Agency's cited exceptions.²⁵ 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.²⁶

As noted previously, Article 0304 requires disclosure of records contained in an employee's OPF or other files identifiable to the employee, and that disclosure under that provision is subject to other regulatory requirements.²⁷ The Arbitrator found that because the requested records were not contained in the grievant's OPF or other files identifiable to him, the Agency did not violate Article 0304 in denying the request.²⁸ And he found that, consistent with Article 0304, the Agency properly relied on FOIA and the Privacy Act in denying the Union's request.²⁹ The Union's conclusory statements that the grievant is entitled to the information under the parties' agreement do not demonstrate that the award is irrational, implausible, or in manifest disregard of the agreement. Moreover, a party's disagreement with an arbitrator's interpretation of the agreement does not provide a basis for finding that an award fails to draw its essence from the parties' agreement.³⁰

Therefore, we deny the Union's essence exception.³¹

IV. Decision

We deny the Union's exceptions.

¹⁸ *U.S. Dep't of State, Bureau of Consular Affairs, Passport Servs. Directorate*, 70 FLRA 918, 919 (2018).

¹⁹ *Id.*

²⁰ *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (internal citation omitted).

²¹ Award at 15. The Union did not challenge the Arbitrator's findings on this issue as nonfacts or his conclusion that the cited exemptions applied as contrary to law. Exceptions at 4 (asserting generally that an employee "is entitled" to obtain information under Section 552a(d)).

²² Award at 16.

²³ *AFGE, Local 933*, 70 FLRA 508, 510 (2018).

²⁴ Exceptions at 7.

²⁵ *Id.* at 8 (citing *Dep't of the Navy, Portsmouth Naval Shipyard*, 4 FLRA 619 (1980)).

²⁶ *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)).

²⁷ Award at 4-5.

²⁸ *Id.* at 16.

²⁹ *Id.* at 15-16.

³⁰ *EEOC*, 48 FLRA 822, 831 (1993).

³¹ As part of its essence exception, the Union also claims that the Agency misrepresented the availability of the requested information. Exceptions at 9. This unsupported allegation does not demonstrate that the Arbitrator's award is not a plausible interpretation of the parties' agreement.