71 FLRA No. 204

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
HEALTH RESOURCES CENTER
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1822
(Union)

0-AR-5607

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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
(Member DuBester concurring)

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, Arbitrator Richard A. Beens found that the Agency's Absence and Leave Policy (the policy) did not address how a bargaining-unit employee (BUE) should properly verify her medical appointments, for purposes of leave, when that employee exclusively teleworks and is a disabled veteran.[1] As a result, the Arbitrator found that the Agency violated the policy by requiring a BUE—who is a disabled veteran and teleworks—to verify her medical appointment by a method not required by the policy. As a result, the Arbitrator ordered the Agency to negotiate an addendum to the policy to address how a disabled, teleworking veteran should verify his or her medical appointments. For the reasons discussed below, we find that the Agency fails to establish that the award does not draw its essence from the parties' agreement. Consequently, we deny the Agency's exception.

II. Background and Arbitrator's Award

Due to privacy concerns, the Agency and the Union previously reached an agreement to amend the policy to state that:

> in order for disabled Veteran employees to be entitled to leave under Executive Order 5396, the disabled Veteran employee must verbally confirm their status as a disabled Veteran to his/her supervisor and provide verbal notice indication the intention to take sick leave, annual leave in lieu of sick leave, or leave without pay under Executive Order 5396. . . . The disabled Veteran employee will provide proof of the medical appointment to his/her supervisor upon return to work. This proof will only need to show that the disabled Veteran employee was seen, not the nature of said medical appointment. The supervisor will review the documentation and return it to the employee.[2]

The amended policy allows BUEs who are disabled veterans to verify their medical appointments by physically showing their supervisors proof of the medical visit without exchanging any documents.

Thereafter, an employee, who is a disabled veteran and a teleworker (the employee), requested leave pursuant to the policy. After the employee returned from seeing her doctor, the Agency informed her that the policy required her to provide proof of her medical appointment. The Agency stated that she could verify her medical appointment by doing one of the following: presenting the documents through Skype, mailing the documents to the Agency's main facility, driving 200 miles (round-trip) to the Agency's main facility to physically present the documents, or sending a picture of the documents to her supervisor by email.[3] Furthermore, the Agency informed the employee that it

[1] As relevant here, Executive Order 5396 states the following:

> With respect to medical treatment of disabled veterans who are employed in the executive civil service of the United States, it is hereby ordered that, upon the presentation of an official statement from duly constituted medical authority that medical treatment is required, such annual or sick leave as may be permitted by law and such leave without pay as may be necessary shall be granted by the proper supervisory officer to a disabled veteran in order that the veteran may receive such treatment, all without penalty in his efficiency rating.

Exec. Order No. 5396 (July 17, 1930).

[2] Award at 5.

[3] If the employee chose to send the documents by email, then the Agency informed her that it would delete the documents after verification.

would not reimburse the employee's mileage for driving the 200 miles to and from the Agency's main facility.

The Union filed a grievance alleging that the four alternatives were not encompassed by the policy. Specifically, the Union claimed that the Agency's actions violated teleworking BUEs' privacy and that the Agency unilaterally implemented a change to the policy without engaging in required bargaining. The parties could not settle the grievance and it proceeded to arbitration.

The Arbitrator determined that the policy plainly concerned a condition of employment and that the Agency was, therefore, required to bargain with the Union over any changes to the policy. Based on the plain language of the policy, the Arbitrator also found that the Agency and the Union did not anticipate the privacy complications that would arise from requiring a teleworking employee to provide proof of his or her medical visits. Specifically, the Arbitrator noted that the Agency must comply with the Health Insurance Portability and Accountability Act of 1996[4] and other privacy laws when verifying a BUE's medical appointment. While the Arbitrator noted that he could not verify the Union's privacy concerns related to electronically submitting medical information, he held that the Agency and the Union addressed any privacy concerns in the policy by only requiring BUEs to physically show proof of their medical appointments to their supervisors. Therefore, he found that the Agency violated the parties' agreement by unilaterally changing the terms of the negotiated policy.[5] As a remedy, he ordered the Agency to bargain with the Union on how teleworking BUEs should verify their medical appointments under the policy.

The Agency filed exceptions to the award on March 18, 2020. The Union filed an opposition to the Agency's exceptions on April 17, 2020.

III. Analysis and Conclusions: The Agency fails to demonstrate that the award does not draw its essence from the parties' agreement.

In its sole exception, the Agency argues that the award does not draw its essence from the parties' agreement because it "requires the Agency to negotiate matters already covered" under the telework provision of the parties' agreement.[6] Specifically, the Agency claims that teleworking BUEs can comply with the policy because they are provided with privacy training and secured computers in compliance with the telework provision.[7] However, this argument does not address the Arbitrator's interpretation of the policy—that BUEs are only required to comply with the policy by physically showing proof of their medical appointments.[8] The Agency also does not raise any specific language from the telework provision in the parties' agreement to demonstrate that the Arbitrator's interpretation of the policy "constitutes a manifest disregard" of the agreement.[9] Moreover, the Agency does not except to the Arbitrator's finding that the Agency changed a condition of employment without engaging in the necessary bargaining.[10] Therefore, because the Arbitrator has wide discretion in fashioning a remedy,[11] its exception fails to establish any deficiencies in the award and merely reargues its case.[12] We deny the Agency's exception.

[4] Pub. L. No. 104-191, 110 Stat. 1936 (1996).

[5] Award at 13 (citing mid-term bargaining obligation in Article 47 of the parties' agreement).

[6] Exceptions Br. at 4-5. The Authority will find 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. *SSA*, 71 FLRA 580, 581 n.9 (2020) (Member DuBester concurring).

[7] Exceptions Br. at 4-5. While the Union claims that the Agency's exception should be dismissed because it was not raised in accordance with the parties' agreement, Opp'n Br. at 15 ("The Agency had full opportunity to raise the essence issue before the Step 3 Grievance as required in Collective Bargaining Agreement Article 43 to meet a threshold argument."), a review of the record demonstrates that the Agency raised this argument in its post-hearing brief, Exceptions, Agency Ex. C at 9, and that the Union never raised its dismissal argument before the Arbitrator. Opp'n, Union Ex. B, Union Post Hr'g Br. Therefore, we will consider the Agency's exception.

[8] Award at 10-12.

[9] Exceptions Br. at 4; *see Indep. Union of Pension Emps. for Democracy & Justice*, 71 FLRA 822, 824 (2020) ("As to the [u]nion's third argument, the [u]nion fails to cite any wording in the parties' agreement defining 'actively pursue' or otherwise supporting its contention that this term is intended to include the payment of invoices.").

[10] Exceptions Br. at 4-5.

[11] *SSA*, 71 FLRA 495, 496 (2019) (Member DuBester dissenting in part) ("The [a]gency's essence exception to the portion of the award that requires a collegial conversation also lacks merit. The Authority has held that an arbitrator has wide discretion to fashion a remedy.").

[12] *AFGE, Local 1148*, 70 FLRA 712, 714 (2018) (Member DuBester concurring) ("The [u]nion's argument that the lead role is a separate position warranting its own description merely reargues its case at hearing.").

IV. Decision

We deny the Agency's exception.

Member DuBester, concurring:

I agree with the Decision to deny the Agency's exception.