

72 FLRA No. 27

UNITED STATES
DEPARTMENT OF THE AIR FORCE
PETERSON AIR FORCE BASE, COLORADO
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1867
(Union)

0-AR-5597

DECISION

March 12, 2021

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

I. Statement of the Case

This case involves the provision of uniforms or a uniform allowance to civil service employees under 5 U.S.C. § 5901.¹ Arbitrator Robin A. Romeo found that the Agency violated Article 20 of the parties' agreement by failing to provide each civilian Air Force Reserve Technician (ART)² an initial uniform allowance. As described below, the Agency fails to demonstrate how the award is based on nonfacts or contrary to law. Accordingly, we uphold the award.

II. Background and Arbitrator's Award

The parties' current agreement was implemented on December 7, 2018.³ Article 20, Section K (Article 20) of the parties' agreement provides as relevant here: "[t]he Agency will provide an initial uniform allowance

of \$400 to all current and newly assigned ARTs."⁴ On December 14, 2018, the Agency notified all ARTs that funding for the initial uniform allowance was approved, but that "ARTs needed to fill out the necessary forms to obtain the [initial] uniform allowance."⁵ In April 2019, after receiving the necessary paperwork from the ARTs, the Agency did not provide the initial uniform allowance because it "found this provision of the CBA to be unnecessary as the ARTs already received a military uniform [for their separate reservist duties]."⁶ The Union subsequently filed a grievance. The Agency denied the grievance, and the Union invoked arbitration.

The issue, as framed by the Arbitrator, was "whether th[e] payment [of the initial uniform allowance] violates the law and whether the Agency may unilaterally decide a provision of the [parties' agreement] is illegal, even after it has been approved, where there is no subsequent change in the law."⁷

The Agency asserted that 5 U.S.C. § 7114(c) allowed it to revisit a previously approved provision at any time. Accordingly, the Agency argued that once the Agency Head found Article 20's uniform allowance illegal, the Agency had no duty to comply with that provision. However, the Arbitrator found that Article 20's uniform allowance did not violate the law because there was a "bona fide need for the [initial] uniform allowance."⁸ According to the Arbitrator, once the Agency began requiring civilian ARTs to wear a military uniform while performing civilian duties, the ARTs required additional clothing beyond the military uniform provided to them for their reserve duties. The Arbitrator also found that the Agency initially complied with Article 20, and only asserted that it was invalid when it later decided the payment was unnecessary. Based on these findings, the Arbitrator concluded that the Agency violated Article 20 of the parties' agreement by failing to provide the initial uniform allowance. As a remedy, the Arbitrator ordered the Agency to pay each ART 400 dollars plus interest.

The Agency filed exceptions on February 21, 2020 and the Union filed its opposition on March 19, 2020.

¹ 5 U.S.C. § 5901(a)(1)-(2) (The agency shall: "(1) furnish to each of these employees a uniform at a cost not to exceed \$400 a year[;] or (2) pay to each of these employees an allowance for a uniform not to exceed \$400 a year."). We also note that this case involves a one-time initial uniform allowance. Award at 8.

² As a condition of their employment with the Agency, ARTs are members of the United States Air Force Reserve. Award at 5.

³ Award at 5-6; Exceptions, Joint Ex. 1, Collective-Bargaining Agreement (CBA) at 64.

⁴ CBA at 33. We note that the Agency disapproved a previous version of the parties' agreement. However, it appears the parties resolved the underlying issues, because the Agency subsequently approved the version of the agreement before us in this proceeding. See Award at 5-6.

⁵ Award at 6.

⁶ *Id.* The Air Force Reserve Command provides uniforms to ARTs in their military capacity. Exceptions, Attach. 8, Hr'g Tr. at 78-79 (stipulated facts); see also Exceptions Br. at 4.

⁷ Award at 8.

⁸ *Id.*

III. Analysis and Conclusions

a. The award is not based on nonfacts.

The Agency argues that the award is based on “nonfacts, unfounded assumptions, and a misunderstanding of the role and process of [a]gency [h]ead [r]eview.”⁹ 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.¹⁰ However, consistent with this standard, the Authority has held that disagreement with an arbitrator’s evaluation of the evidence, including the weight to be accorded such evidence, does not provide a basis for finding the award is based on a nonfact.¹¹ Here, the Agency merely disputes the Arbitrator’s evaluation of the evidence,¹² and therefore, does not demonstrate that the award is based on a nonfact.¹³ Accordingly, we deny these exceptions.¹⁴

⁹ Exceptions Br. at 11.

¹⁰ *U.S. DHS, Citizenship & Immigr. Servs., Dist. 18*, 71 FLRA 167, 167 (2019) (then-Member DuBester dissenting on other grounds) (citing *U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010)).

¹¹ *AFGE, Loc. 12*, 70 FLRA 582, 583 (2018) (citing *U.S. Dep’t of the Air Force, Whiteman Air Force Base, Mo.*, 68 FLRA 969, 971 (2015)).

¹² Exceptions Br. at 11 (arguing that there is no evidence to support the Arbitrator’s finding that the Air Force Reserve uniform can only be used when the ART is on duty as an Air Force Reservist); *id.* at 11-13 (arguing that the Arbitrator incorrectly relied on Union testimony); *id.* at 13 (arguing that the Arbitrator’s factual findings “were not testified to with any specificity . . . and were rebutted by the testimony and evidence on the record”); *id.* at 14 (arguing the Arbitrator erred by relying on the Union witness’s testimony instead of the Agency witness’s testimony).

¹³ *AFGE, Loc. 2846*, 71 FLRA 535, 536-37 (2020) (denying nonfact exception because it constituted a disagreement with the arbitrator’s evaluation of the evidence); *Fraternal Ord. of Police, Lodge No. 168*, 70 FLRA 788, 790 (2018) (denying nonfact exception challenging arbitrator’s evaluation of the evidence); *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 70 FLRA 186, 187 (2017) (same).

¹⁴ The Agency also argues that the award is based on a nonfact because the Arbitrator misunderstood “the role and process of [a]gency [h]ead [r]eview.” Exceptions Br. at 13-14 (asserting that the Arbitrator “frequently used language in her decision making it sound as though the Agency . . . had the power or discretion to ignore [a]gency [h]ead [r]eview”). However, the Agency fails to identify any factual finding, let alone explain how the fact is a central fact, but for which the Arbitrator would have reached a different decision. Accordingly, we deny this exception. See *U.S. Dep’t of Educ., Off. of Fed. Student Aid*, 71 FLRA 1105, 1108 n.38 (2020) (then-Chairman Kiko dissenting on other grounds) (denying a nonfact exception because the contested fact was not a central fact, but for which the arbitrator would have reached a different conclusion).

b. The award is not contrary to law.

The Agency argues the award is contrary to 5 U.S.C. § 5901 because it requires the Agency to provide ARTs with a uniform allowance when it already provided them with uniforms.¹⁵ As relevant here, 5 U.S.C. § 5901 provides that the Agency shall: “(1) furnish to each of these employees a uniform at a cost not to exceed \$400 a year; *or* (2) pay to each of these employees an allowance for a uniform not to exceed \$400 a year.”¹⁶

The Authority reviews questions of law de novo.¹⁷ In conducting that assessment, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party established that they are nonfacts.¹⁸ As the Arbitrator noted, the “ARTs have two separate employments”;¹⁹ as military reservists, and as civilian employees. Article 20 concerns only the ARTs’ civilian employment and requires only the payment of a uniform allowance.²⁰ The Agency fails to explain or support its argument that Article 20 is rendered unlawful by § 5901.²¹ The Arbitrator found that the Air Force Reserve Command’s provision of a uniform to the individuals for their separate military reservist duties did not nullify, or render unlawful, the Agency’s obligation

¹⁵ See Exceptions Br. at 6-7; Exceptions Form at 4 (citing 5 U.S.C. § 5901). The Agency also argues that the award is contrary to the Federal Service Labor-Management Relations Statute because the provision at issue was denied on agency head review, and therefore, the Agency could not have violated the parties’ agreement. Exceptions Br. at 6-7. Contrary to the Agency’s assertion, the record provides that the agreement was executed on November, 28, 2018, and approved on agency head review on December 7, 2018. CBA at 64; Exceptions, Joint Ex. 4 at 1 (“The renegotiated agreement was reviewed pursuant to 5 U.S.C. § 7114(c) and is approved.”). Accordingly, we deny this exception.

¹⁶ 5 U.S.C. § 5901(a)(1)-(2) (emphasis added). We note that the Office of Personnel Management (OPM) has increased this limit to eight-hundred dollars. See 5 C.F.R. § 591.103; see also 5 U.S.C. § 5902 (“[OPM] may, from time to time, by regulation adjust the maximum amount for the cost of uniforms and the maximum allowance for uniforms under [§] 5901.”).

¹⁷ *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In conducting a de novo review, the Authority determines whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998).

¹⁸ *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (Member Pizzella concurring).

¹⁹ Award at 8.

²⁰ *Id.* at 4 (“The Agency will provide an initial uniform allowance of \$400 to all current and newly assigned ARTs” (quoting Article 20)).

²¹ See Exceptions Br. at 6-7 (failing to cite or discuss 5 U.S.C. § 5901); Exceptions Form at 4 (citing 5 U.S.C. § 5901 without providing any supporting argument).

to provide them a uniform allowance under Article 20 for their civilian employment.²² And the Arbitrator found that the ARTs needed the uniform allowance for their civilian employment because the uniforms they received for two days a month of reservist duty would not be sufficient to meet the twenty-day-a-month demands of ARTs' civilian employment.²³ As discussed above, the Agency does not successfully challenge this finding as a nonfact.²⁴ Because the Agency did not provide a uniform to the individuals for their employment as civilian ARTs, the award—requiring the Agency to provide a four-hundred-dollar initial uniform allowance—is not contrary to law.²⁵ This conclusion is further supported by the fact that the Agency acknowledges that it secured the funds for the initial uniform allowance.²⁶ Accordingly, we deny this exception.²⁷

IV. Order

We deny the Agency's contrary to law and nonfact exceptions. Accordingly, we uphold the award.

²² See Award at 8.

²³ *Id.*

²⁴ Although the Agency argues that the uniforms for reservists and ARTs are the same, Exceptions Br. at 11, this does not defeat the Arbitrator's finding that ARTs require clothing beyond the military uniform provided to them for their separate, non-civilian-employment related, reservist duties. Award at 8.

²⁵ See *U.S. DHS, U.S. CBP, El Paso, Tex.*, 72 FLRA 7, 11 (2021) (then-Member DuBester dissenting in part) (denying a contrary to law exception because, based on the arbitrator's undisturbed factual findings, the award was consistent with law).

²⁶ Exceptions, Joint Ex. 2 at 5 ("In accordance with the provisions of Article 20 . . . you are hereby notified that funding is approved and available for [the uniform allowance]."); *id.* ("Each [ART] must fill out and submit a Standard Form 1034 . . . in order to obtain the uniform allowance").

²⁷ The Agency also argues that the award "violates the law (the bona fide needs rule and necessary expense rule)." Exceptions Br. at 10. However, the Agency fails to provide any citation to these "rules" and also fails to explain how the award violates these rules when the Arbitrator found that there was a bona fide need. *Id.*; see also Award at 8 ("There is a bona fide need for additional clothing. Further, there is no evidence that when [r]eservists are given military uniforms they were meant for both their [reservist] and ART duty."). Accordingly, we deny this exception for failure to support. *AFGE, Loc. 2328*, 70 FLRA 797, 798 (2018) (citing *U.S. Dep't of VA, Gulf Coast Veterans Health Care Sys.*, 69 FLRA 608, 610 (2016)) (denying an exception when the party failed to provide support); 5 C.F.R. § 2425.6(e)(1) (An exception "may be subject to dismissal or denial if . . . [t]he party fails to . . . support a ground."). Similarly, we deny as unsupported the Agency's argument that the award is contrary to an Agency regulation. Exceptions Form at 5 (arguing, without explanation, that the award is contrary to "DODI 1400.25 AFI 36-701").