

72 FLRA No. 37

UNITED STATES
DEPARTMENT OF HEALTH
AND HUMAN SERVICES
FOOD & DRUG ADMINISTRATION
SAN ANTONIO, TEXAS
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 254
(Union)

0-AR-5608

DECISION

April 20, 2021

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

Decision by Member Abbott for the Authority

I. Statement of the Case

This case involves a dispute over which type of telework agreement is appropriate for the grievant, not whether the grievant is eligible for telework.¹ Arbitrator Sara Adler found that the Agency “violated law and [Article 26 of the parties’ agreement] when it refused to provide [the g]rievant a recurrent telework agreement.”² As described below, the Agency fails to demonstrate how the award is based on nonfacts or fails to draw its essence from the parties’ agreement. Accordingly, we uphold the award.

II. Background and Arbitrator’s Award

The grievant spends a quarter to half of his time in the field. Pursuant to the parties’ agreement, the

grievant submitted a request for a recurring telework agreement to his supervisor in August 2017.³ The supervisor denied the request in September. The Union subsequently filed this grievance. The Agency denied the grievance, and the Union invoked arbitration.

The issue, as framed by the Arbitrator, was “[d]id the Agency violate [the] law or the parties’ [agreement] when it denied [the g]rievant’s request for a recurring telework agreement in September, 2017.”⁴

As relevant here, Article 26 of the parties’ agreement provides for two types of telework agreements, episodic and recurring. Recurring telework “may be used when there is recurring opportunity to perform work at an alternate site,” and episodic telework may be used “for individual days or hours within a pay period, or for a special assignment or project on a short[-]term basis.”⁵

The Arbitrator found that the grievant has been teleworking since 2011, his work has been satisfactory since 2011, and his situation meets all of the requirements for telework. The Arbitrator further found that “[a]lthough a position with significant fieldwork doesn’t perfectly fit the definitions [of recurring or episodic telework], it is a closer fit to the definition of recurr[ing] telework.”⁶ Based on this, the Arbitrator found that the Agency “violated [the] law and [Article 26] when it refused to provide [the g]rievant a recurr[ing] telework agreement.”⁷ As a remedy, the Arbitrator ordered the Agency to enter into a recurring telework agreement with the grievant.

The Agency filed exceptions on March 23, 2020, and the Union filed its opposition on April 22, 2020.

III. Analysis and Conclusions

A. The award is not based on nonfacts.

The Agency argues that the award is based on a nonfact.⁸ Specifically, the Agency argues the Arbitrator’s finding that the grievant was previously on a recurring telework agreement is directly contradicted by the evidence, and is the reason the Arbitrator sustained the grievance.⁹

To establish that an award is based on a nonfact, the excepting party must establish that a central fact

¹ Award at 2-3 (stating that the grievant has routinely teleworked since 2011); Exceptions Br. at 2 (“Grievant currently has an episodic telework agreement with the Agency.”); *see also* Exceptions, Jt. Ex. 4, 2017 Telework Agreement (Telework Agreement).

² Award at 6. While the award does not specify which law the Agency violated, the grievance alleges a violation of the Telework Enhancement Act of 2012. *See* Exceptions, Jt. Ex. 2, Grievance at 1.

³ All dates occurred in 2017 unless otherwise noted.

⁴ Award at 2.

⁵ Exceptions, Jt. Ex. 1, Consolidated Collective Bargaining Agreement (CBA) at 93.

⁶ Award at 4.

⁷ *Id.* at 6.

⁸ Exceptions Br. at 4.

⁹ *Id.* at 5-6.

underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.¹⁰ The record clearly shows that the grievant was on an *episodic* telework agreement starting in 2015.¹¹ Therefore, the Agency is correct that the award contains an erroneous fact.

However, this was not the “but for” reason the Arbitrator sustained the grievance. Instead, the Arbitrator relied on the definitions of episodic and recurring telework provided by Article 26 of the parties’ agreement, and applied them to the grievant’s work situation to find that the Agency incorrectly denied the grievant’s recurring telework request.¹² As such, the Agency fails to demonstrate that the Arbitrator would have reached a different conclusion but for the erroneous factual finding.¹³ Accordingly, we deny this exception.

B. The award does not fail to draw its essence from the parties’ agreement.

The Agency argues the award fails to draw its essence from the parties’ agreement because it “does not represent a plausible interpretation of the [agreement] and manifestly disregards key portions of [Article 26].”¹⁴

As relevant here, the Authority has held that mere disagreement with an arbitrator’s interpretation is not grounds for finding the award fails to draw its essence from the parties’ agreement.¹⁵ Furthermore, the Authority has held that a different interpretation of the parties’ agreement does not automatically render the arbitrator’s interpretation implausible.¹⁶

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 Telework Agreement at 1 (noting that the telework agreement was “episodic”); Exceptions, Union Ex. 1, 2015 Telework Agreement at 1 (requesting to telework from the alternative duty station “on an episodic basis”).

¹² Award at 4 (“The parties’ [a]greement defines recurring telework to cover the situation when there is a regular and recurring opportunity and defines episodic telework to cover when individual days or hours allow it.”); *id.* (“Although a position with significant fieldwork doesn’t perfectly fit the definitions, it is a closer fit to the definition of recurrent telework.”); *id.* at 4-5 (dismissing the Agency’s argument as “a hyper-technical interpretation of Article 26 . . . [which] [t]aken to its logical extreme . . . would require generating a separate telework agreement for each field inspection” (emphasis added)).

Here, the Arbitrator relied on the definitions for “episodic” and “recurring” telework provided by Article 26, Section 3 of the parties’ agreement in determining which type of telework agreement was appropriate for the grievant.¹⁷ While the Agency disagrees with the Arbitrator’s interpretation, it fails to identify any language that demonstrates the Arbitrator ignored, irrationally interpreted, or implausibly read the parties’ agreement in concluding that the Agency incorrectly denied the grievant’s telework request.¹⁸ Accordingly, we deny the exception.

IV. Order

We deny the Agency’s nonfact and essence exceptions. Accordingly, we uphold the award.

¹³ *See U.S. Dep’t of Educ., Off. of Fed. Student Aid*, 71 FLRA 1105, 1108 n.38 (2020) (then-Chairman Kiko dissenting) (denying a nonfact exception because the alleged nonfact was not the “but for” reason why the arbitrator sustained the grievance (citing *U.S. DHS, U.S. CBP*, 71 FLRA 243, 245 (2019) (Member Abbott concurring))). *But see U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 71 FLRA 892, 893 (2020) (then-Member DuBester concurring in part) (granting a nonfact exception because the agency established that a central fact – the date of the grievable occurrence – was clearly erroneous and but for the erroneous finding the arbitrator would have reached a different conclusion – that the grievance was untimely).

¹⁴ Exceptions Br. at 7-10.

¹⁵ *See Bremerton Metal Trades Council, Int’l Bhd. of Boilermakers, Loc. 290*, 71 FLRA 1033, 1035 (2020).

¹⁶ *U.S. Dep’t of VA, Veterans Benefits Admin.*, 72 FLRA 57, 59 & n.22 (2021) (Member Abbott concurring; Chairman DuBester dissenting on other grounds) (citing *U.S. Dep’t of HHS, Substance Abuse & Mental Health Servs. Admin.*, 65 FLRA 568, 571 (2011)).

¹⁷ Award at 4.

¹⁸ *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Tallahassee, Fla.*, 71 FLRA 622, 624 (2020) (then-Member DuBester concurring) (denying the agency’s essence exception because it did not “establish that the award fails to draw its essence from the agreement”).

Chairman DuBester, concurring:

I agree with the Order denying the Agency's nonfact and essence exceptions and upholding the Award.