72 FLRA No. 57

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Union)

and

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

0-AR-5683

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DECISION

May 24, 2021

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

I. Statement of the Case

In this case, we uphold an award finding that the parties' collective-bargaining agreement conflicts with, and supersedes, an Agency policy concerning how the Agency handles sick-leave requests when the requesting employee has an insufficient sick-leave balance.

The grievant missed a shift due to illness, and he requested sick leave to cover the absence. A week later, the Agency discovered that the grievant did not have enough sick leave, so the Agency converted the grievant's sick-leave request to a leave-without-pay (LWOP) request and granted it. The Union filed a grievance arguing that the Agency violated the parties' agreement and Agency policy by not automatically converting the requested sick leave to annual leave. Arbitrator Alan A. Symonette issued an award denying the grievance. He concluded that the parties' agreement did not require the Agency to grant annual leave in lieu of the requested sick leave and that the Agency could deny annual leave based on staffing considerations.

The Union filed exceptions to the award, arguing that (1) the award conflicts with an annual-leave provision in the parties' agreement, and (2) the Arbitrator effectively rewrote a provision of the parties' agreement that requires the Agency to approve sick-leave requests under certain circumstances. Because the Union did not raise the first argument before the Arbitrator, but could have, we dismiss that exception as barred by the Authority's Regulations.[1] And because the Union's second argument accuses the Arbitrator of modifying a provision that he actually found inapplicable, we deny that exception.

II. Background and Arbitrator's Award

The grievant, an air-traffic controller, requested sick leave for an upcoming shift due to an illness. The controller in charge for the shift approved his absence. Six days later, when the supervisor checked the grievant's sick-leave balance, he discovered that the grievant did not have sufficient sick leave to cover the missed shift. As a result, the supervisor charged his absence as LWOP.

The Union filed a grievance arguing that the Agency violated Article 25 of the parties' agreement and Chapter 8.1 of the Agency's Human Resources Policy Manual (HRPM 8.1). Article 25, Section 2 (Article 25) states, as relevant here, that "[s]ick leave must be granted" when an employee "is incapacitated and cannot perform the essential duties of his/her position because of physical or mental illness."[2] And HRPM 8.1 provides that "[i]f there is insufficient sick leave to cover leave already used, . . . [then] excess sick leave used will be automatically converted to . . . earned annual leave."[3]

The Arbitrator found that Article 25 must be "considered in the context in which it is used internally in the [a]greement."[4] Because Article 25 followed a provision in the agreement that specified the rate of sick-leave accrual, the Arbitrator determined that entitlement to sick leave under Article 25 applied only to employees that have a sufficient sick-leave balance.[5] According to the Arbitrator, when an employee does not have sufficient accrued sick leave, then that employee's sick-leave request becomes "a request for payment pursuant to another type of leave accrual."[6] However, the Arbitrator held that it was impossible to "automatically" convert sick leave to annual leave, as the HRPM 8.1 required, because spot-annual leave is subject to the procedures in Article 24, Section 14 (Article 24) of the parties' agreement.[7] Under that article, the Agency

[1] 5 C.F.R. §§ 2425.4(c), 2429.5.
[2] Award at 4 (quoting Art. 25, § 2).
[3] *Id.* at 5.
[4] *Id.* at 14.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 15. The parties' agreement defines spot-annual leave as "leave requested for any period during a posted watch schedule." *Id.* at 4 (quoting Art. 24, § 14). The Arbitrator found that, as the schedule had already been determined and posted when the grievant requested sick leave, any annual leave would be governed by the spot-annual leave procedures of Article 24, Section 14. *Id.* at 15.

approves or disapproves spot-annual-leave requests subject to: (1) the staffing and workload requirements of the shift; and (2) whether other employees had already requested leave for that shift. As HRPM 8.1 instructed the Agency to approve annual leave without considering Article 24, the Arbitrator found that the parties' agreement conflicted with, and superseded, the policy.[8]

Applying this interpretation of the parties' agreement and Agency policy, the Arbitrator determined that Article 25 did not apply to the grievant's sick-leave request because he did not have sufficient sick leave to cover his absence. The Arbitrator then found that the Agency appropriately determined that spot-annual leave was not available to the grievant based on the workload and staffing requirements of the shift and the number of employees that had already requested leave. According to the Arbitrator, the Agency properly determined that the grievant was not eligible for either sick leave or annual leave, and that LWOP was the only type of leave available to the grievant. Consequently, the Arbitrator concluded that the Agency did not violate the parties' agreement and denied the Union's grievance.

On December 7, 2020, the Union filed exceptions to the award, and on January 5, 2021, the Agency filed an opposition to the Union's exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Union's exceptions.

The Union argues that the award fails to draw its essence from the parties' agreement because the Arbitrator's interpretation of Article 24 "creates a contractual violation."[9] According to the Union, Article 24 requires the Agency to approve or deny spot-annual leave "within two . . . hours of when the request was made, or prior to the end of the shift, whichever is less."[10] By finding that the Agency appropriately denied the grievant's spot-annual leave one week after the grievant submitted his original request, the Union contends that the Arbitrator's award permitted the Agency to violate the two-hour requirement in Article 24.[11]

The Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[12] While the parties presented arguments to the Arbitrator on whether Article 24 applied, the Union concedes[13]—and the record establishes[14]—that the Union never asserted that the application of Article 24 to the grievant's leave request would result in the Agency violating the article. Because the Union could have raised this argument to the Arbitrator, but did not do so, we dismiss[15] this exception as barred by §§ 2425.4(c) and 2429.5 of the Authority's Regulations.[16]

IV. Analysis and Conclusion: The award does not fail to draw its essence from the parties' agreement.

The Union argues that the award fails to draw its essence from the parties' agreement because the award "rewrites" Article 25's statement that "[s]ick leave must be granted" to mean "[a]n employee must be released from duty."[17] The Union argues that the Arbitrator's modification of the term "sick leave" manifests a disregard for the parties' agreement because the term "sick leave" is synonymous with paid leave throughout the agreement—not LWOP.[18]

Contrary to the Union's argument, the Arbitrator did not modify Article 25. Instead, he determined that

[8] *Id.* at 6 (referencing Article 102, which states, in relevant part, that "any provision of this [a]greement shall be determined a valid exception to and shall supersede any existing or future Agency . . . policies . . . that conflict with the [a]greement").
[9] Exceptions Br. at 10.
[10] *Id.* at 11 (quoting Art. 24, § 14).
[11] *Id.* at 11-12.
[12] 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Loc. 3448*, 67 FLRA 73, 73-74 (2012).
[13] Exceptions Form at 6.
[14] *See* Exceptions, Attach. 5, Union's Post-Hr'g Br. (Union's Post-Hr'g Br.) at 5-7 (arguing that "Article 24 has no bearing on the matter at hand"); Exceptions, Attach. 7, Union's Rebuttal Br. at 5-7 (arguing that the Agency violated the parties' agreement by applying Article 24 because Article 24 and Article 25 are two unconnected provisions).
[15] Member Abbott disagrees with the decision to dismiss the Union's argument under Article 24. Member Abbott does not agree that the Union did not sufficiently address its Article 24 arguments before the Arbitrator. Therefore, he would not dismiss this argument, but would address and deny it on the merits.
[16] *U.S. DHS, CBP*, 68 FLRA 824, 825 (2015).
[17] Exceptions Br. at 9 (emphasis omitted). For an award to be found deficient as failing to draw its essence from the parties' agreement, the excepting party must establish 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 parties' agreement as to manifest infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard for the agreement. *AFGE, Loc. 1594*, 71 FLRA 878, 879 (2020); *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017); *U.S. DOD, Def. Cont. Audit Agency, Cent. Region, Irving, Tex.*, 60 FLRA 28, 30 (2004).
[18] Exceptions Br. at 9. The Union asserts in the exceptions form that it failed to make its Article 25 argument before the Arbitrator. Exceptions Form at 5. However, the record establishes that the Union *did* present arguments to the Arbitrator on whether Article 25 required the Agency to grant the grievant's sick-leave request. Union's Post-Hr'g Br. at 5-7. Therefore, we find that §§ 2425.4(c) and 2429.5 do not bar this exception.

Article 25 did not apply to the grievant because he did not have sufficient leave to cover the request.[19] Noting that Article 25 followed a provision in the agreement that specified the rate of sick-leave accrual, the Arbitrator reasoned that sick leave must be granted only when an employee "has sufficient [sick] leave."[20] As the grievant had insufficient sick leave, the Arbitrator concluded that his "request had to be for another type of leave"—specifically, spot-annual leave or LWOP.[21]

Because the Arbitrator's conclusion that Article 25 did not apply was based on a plausible interpretation of that provision, the Union's argument that he modified Article 25 does not establish that the award fails to draw its essence from that article.[22] Moreover, the Union has not identified any provision in the parties' agreement that would have required the Arbitrator to apply Article 25, even though the grievant did not have sufficient sick leave.[23] Consequently, we deny the Union's essence exception.[24]

V. Decision

We dismiss, in part, and deny, in part, the Union's exceptions.

[19] Award at 13.
[20] *Id.*
[21] *Id.* at 13, 16.
[22] *See U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 103, 105 (2019) (denying an essence exception where the award was supported by a plain wording of the parties' agreement); *SSA*, 69 FLRA 208, 210 (2016) (denying an essence exception where the agency's exception did not establish that the award disregarded or modified the parties' agreement).
[23] *See* Exceptions Br. at 8-9.
[24] *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Tallahassee, Fla.*, 71 FLRA 622, 624 (2020) (then-Member DuBester concurring); *U.S. Dep't of the Treasury, IRS*, 70 FLRA 539, 542 (2018) (then-Member DuBester concurring); *Bremerton Metal Trades Council*, 68 FLRA 154, 156 (2014).