

72 FLRA No. 59

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1953
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
BARKSDALE AIR FORCE BASE, LOUISIANA
(Agency)

0-AR-5649

DECISION

May 25, 2021

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

I. Statement of the Case

Arbitrator Bruce J. Ponder found that the Agency did not violate 10 U.S.C. §§ 771-772 by requiring dual-status Air Reserve Technicians (technicians) to wear military uniforms while performing civilian duties. The Union filed exceptions on contrary-to-law grounds. Because the award is not contrary to law, we deny the Union’s exceptions.

II. Background and Arbitrator’s Award

As relevant here, the Agency issued an order requiring the technicians at Barksdale Air Force Base to wear their military uniforms while working in civilian status. After more than a decade of bargaining appropriate arrangements for employees adversely affected by the order, the Agency notified the Union that it intended to implement the uniform requirement. On March 28, 2019, the Agency notified the technicians that it would implement the order on April 18, 2019.

Shortly thereafter, the Union filed a grievance, and the parties advanced the grievance to arbitration. In relevant part, the Arbitrator framed the issue as: “Did the [A]gency violate 10 U.S.C. § 771 when it implemented its order on March 28, 2019, requiring Air Reserve

Technicians to wear Air Force Military uniforms while performing their job duties in civilian status?”¹

Section 771 provides that:

Except as otherwise provided by law, no person except a member of the Army, Navy, Air Force, or Marine Corps, as the case may be, may wear — (1) the uniform, or a distinctive part of the uniform, of the Army, Navy, Air Force, or Marine Corps; or (2) a uniform any part of which is similar to a distinctive part of the uniform of the Army, Navy, Air Force, or Marine Corps.²

The Union argued that the Agency violated § 771 by ordering technicians in civilian status to wear military uniforms. The Arbitrator interpreted § 771 in conjunction with 10 U.S.C. § 772, which he found “expressly provides exceptions to [§] 771.”³ The Arbitrator noted that one of those exceptions was “for members of ‘any other organization designated by the Secretary of a military department.’”⁴ He found that under § 772, the order requiring dual-status technicians “to wear uniforms while on civil service status . . . was solely within the sound discretion of the [Agency].”⁵ Therefore, he concluded that the Union’s “assertion that the [A]gency violated [§] 771 of Title 10 is without merit.”⁶

On June 29, 2020, the Union filed exceptions to the award, and on July 10, 2020, the Agency filed an opposition to the Union’s exceptions.

III. Analysis and Conclusions: The award is not contrary to law.

The Union argues that the award is contrary to 10 U.S.C. § 771.⁷ The Authority reviews questions of law raised by the exceptions de novo.⁸ In applying a

¹ Award at 6.
² 10 U.S.C. § 771.
³ Award at 24.
⁴ *Id.* (quoting 10 U.S.C. § 772(j)(2)).
⁵ *Id.* at 24.
⁶ *Id.* at 25.
⁷ The Union also argues that the award is contrary to 18 U.S.C. §§ 702 and 704. However, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator. 5 C.F.R. §§ 2425.4(c), 2429.5. Accordingly, we dismiss this exception under §§ 2425.4(c) and 2429.5. *See U.S. DHS, U.S. CBP*, 66 FLRA 335, 337-38 (2011) (declining to consider arguments a party could have, but did not, present to the arbitrator).
⁸ *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)).

standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law, based on the underlying factual findings.⁹ In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are based on nonfacts.¹⁰

The Union contends that the award conflicts with 10 U.S.C. §§ 771 and 772 because the Arbitrator found that "civilian supervisors can force civilian employees to wear a military uniform."¹¹ The Union's exceptions, however, merely recite the text of §§ 771 and 772, and do not explain how the award conflicts with those statutory provisions.

Instead, to support its argument, the Union – citing two Authority decisions – asserts that other arbitrators "have sided with the union on the wearing of a military uniform by [Air Reserve Technician] personnel."¹² However, the precedent cited by the Union does not support its assertion.¹³ And the Authority has specifically concluded that an arbitrator's determination that § 772 precludes the Agency from requiring technicians to wear military uniforms while performing civilian duties is contrary to the plain wording of that provision.¹⁴

Accordingly, the Union's argument provides no basis for finding that the award is contrary to law, and we deny the exception.

IV. Decision

We deny the Union's exception.

⁹ *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998).

¹⁰ *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012)).

¹¹ Exceptions at 8.

¹² *Id.* (citing *U.S. Dep't of the Air Force, 442nd Fighter Wing, Whiteman Air Force Base, Mo.*, 66 FLRA 357 (2011) (*Whiteman*); *AFGE, Loc. 1501*, 64 FLRA 802 (2010) (*Local 1501*)).

¹³ *Whiteman*, 66 FLRA at 362-65 (award finding Air Force regulations in existence in 1999 had been incorporated into the parties' agreement and uniform issue was "covered by" that agreement not deficient); *Local 1501*, 64 FLRA at 804 (concluding that uniform requirement was a permissive subject of bargaining).

¹⁴ *U.S. Dep't of the Air Force, 4th Fighter Wing, Seymour Johnson Air Force Base, N.C.*, 70 FLRA 279, 280-81 (2017) (Acting Chairman Pizzella concurring, then-Member DuBester concurring) (concluding that § 772 authorizes the Secretary of the Air Force to direct technicians serving in the Air Force Reserve to wear their military uniforms when working in civilian status).