

72 FLRA No. 105

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
(Agency)

0-AR-5555

DECISION

December 10, 2021

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

I. Statement of the Case

After Congress passed the Administrative Leave Act of 2016 (the Act),¹ and the Office of Personnel Management (OPM) issued implementing regulations,² the Agency informed the Union that employees unable to telework because of child-care closures caused by severe weather conditions would no longer be eligible for administrative leave. The Union filed a grievance contending that the Agency violated the parties' agreement and the Federal Service Labor-Management Relations Statute (the Statute)³ by repudiating a provision of the agreement that provided for administrative leave in such circumstances. Arbitrator Mark A. Rosen issued an award denying the grievance. He found that the Act and OPM's regulations superseded the provision of the parties' agreement that authorized administrative leave for child-care closures.

The Union filed exceptions, arguing that the award is contrary to the Act, OPM's commentary on implementation, and the Statute, and that it fails to draw its essence from the parties' agreement. Because the Act conflicts with, and supersedes, the parties' agreement, we deny the Union's exceptions.

II. Background and Arbitrator's Award

Article 54, Section 6(D) of the parties' agreement (Article 54) provides that "[w]hen severe weather or other circumstances prevent work from [an approved telework site] (e.g., electricity, employee must evacuate, infrastructure/connectivity and child/elder care issues) . . . and the office is closed to employees, a telework-ready employee may be granted administrative leave."⁴ Before 2018, the Agency—applying Article 54—regularly granted administrative leave to telework-approved employees when severe weather closed both the Agency office and the employees' child-care facilities.

In December 2016, Congress passed the Act, which divided administrative leave into four distinct categories of paid leave: (1) administrative leave, (2) investigative leave, (3) notice leave, and (4) weather-and-safety leave. Regarding weather-and-safety leave, § 6329c of the Act provides that an agency may approve such leave "only if the employee . . . is prevented from safely traveling to or performing work at an approved location."⁵ In April 2018, OPM issued 5 C.F.R. § 630.1603 (§ 630), a regulation implementing the weather-and-safety-leave provision of the Act.⁶ In relevant part, § 630 states that "an agency may grant weather[-]and[-]safety leave to employees only if they are prevented from safely traveling to or safely performing work at a location approved by the agency."⁷

A month later, on May 29, 2018, the Agency informed the Union that under the new OPM regulation, employees would "generally not be granted weather[-]and[-]safety leave (previously administrative leave)" when they are able to safely work from their approved telework location (the new policy).⁸ The Agency also noted that the new policy would apply regardless of requirements in the parties' agreement.⁹ Subsequently, several employees requested administrative leave under Article 54 when their children's care facilities closed due to severe weather. In denying these requests, Agency officials explained to

¹ 5 U.S.C. § 6329c.

² 5 C.F.R. § 630.1603.

³ 5 U.S.C. § 7116(a)(7).

⁴ Exceptions, Attach. 7, Collective-Bargaining Agreement (CBA) at 162.

⁵ 5 U.S.C. § 6329c(b).

⁶ 5 C.F.R. § 630.1603.

⁷ *Id.*

⁸ Award at 4 (quoting Exceptions, Joint Ex. 4, Agency's Notice of Weather and Safety Leave (Notice) at 1 (May 29, 2018)).

⁹ *Id.*

employees that the new OPM regulation prohibited weather-and-safety leave for child care.¹⁰

The Union filed a grievance alleging that the Act did not prohibit the Agency from granting administrative leave for child care. Because Article 54 was already in effect when the Agency implemented § 630, the Union also alleged that the Agency's implementation of § 630 violated Article 2, Section 2 of the parties' agreement,¹¹ § 7116(a)(7) of the Statute, and OPM's supplemental commentary instructing agencies on how to implement § 630.¹² The grievance proceeded to arbitration, and the Arbitrator framed the issues as "[w]hether [the Agency] violated applicable provisions of the [parties' agreement], statutory law and accompanying regulations in implementing . . . [§] 630 . . . [and] if so, what is the appropriate remedy?"¹³

The Arbitrator observed that "weather[-]and[-]safety leave is a new type of leave previously granted as administrative leave."¹⁴ Reasoning that Article 54 concerned administrative leave for weather and safety reasons, the Arbitrator found that Article 54 addresses the same circumstances as § 6329c of the Act. As Article 54 permits weather-and-safety leave in scenarios that the Act and OPM regulations do not—such as when severe weather causes child-care-facility closures—the Arbitrator concluded that § 6329c of the Act and § 630 of OPM's regulations conflicted with, and superseded, Article 54. Consequently, he denied the Union's grievance.

The Union filed exceptions on October 21, 2019, and the Agency filed an opposition to the Union's exceptions on December 16, 2019.

¹⁰ *Id.* (one employee's supervisor explained that "management had interpreted OPM's new rule as not making administrative leave available to telework employees . . . who were unable to work because of childcare duties"); *id.* at 5-6 (another employee was told that "if you have a telework agreement but can't work because of children[, then] you need to take [annual] leave for any portion of the day you are unable to work" because "[a]dministrative leave [is] no longer an option").

¹¹ CBA at 3 ("Any rule or regulation published after the effective date of this [a]greement . . . will not be enforced for bargaining[-]unit employees . . . if it conflicts with the specific terms of the [a]greement.").

¹² Weather and Safety Leave, 83 Fed. Reg. 15,291 (Apr. 10, 2018) ("For an agency collective[-]bargaining agreement in effect before publication of these regulations, any provision in the regulations (other than those restating statutory requirements) that are in conflict with the agreement may not be enforced until the expiration of the current term of the agreement.").

¹³ Award at 3.

¹⁴ *Id.* at 24 (internal quotations omitted).

III. Analysis and Conclusion: The Act authorized the Agency's implementation of the new policy.

The Union argues that the award is contrary to law because the Arbitrator failed to identify any wording in § 6329c that prohibits the Agency from granting leave when child-care facilities are closed due to severe weather.¹⁵ Additionally, the Union contends that the award is contrary to OPM's supplemental commentary, which states that "any provision in the regulations (other than those restating statutory requirements) that are in conflict with [a preexisting] agreement may not be enforced until the expiration of the current term of the agreement."¹⁶

By its plain terms, § 6329c permits weather-and-safety leave "only" when an employee is prevented from safely performing work at an approved location.¹⁷ Article 54 of the parties' agreement conflicts with § 6329c because Article 54 permits weather-and-safety leave when telework-ready employees' child-care facilities are closed—even if those employees could safely work from an approved location.¹⁸ Moreover, nothing in the wording of § 6329c requires—or even permits—the Agency to grant weather-and-safety leave for child care.¹⁹

Regarding OPM's supplemental commentary, its guidance on implementation of regulations that conflict with preexisting agreements makes an exception for regulations that "restat[e] statutory requirements"²⁰ Section 630 of OPM's regulations effectively restates the Act's requirements by limiting weather-and-safety leave

¹⁵ Exceptions Br. at 12 (citing Award at 25); *see also id.* (noting that the "[t]he [Act] does not expressly contain a provision that bars employees from receiving administrative leave in instances when there is an office closure and a telework-ready employee has a childcare issue at home"). When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception *de novo*. *AFGE, Loc. 12*, 70 FLRA 348, 349-50 (2017) (then-Member DuBester concurring) (citing *Fraternal Ord. of Police, Lodge No. 158*, 66 FLRA 420, 423 (2011)). In applying the *de novo* standard of review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.* at 350. In making this assessment, the Authority defers to the arbitrator's underlying factual findings. *Id.*

¹⁶ Exceptions Br. at 25 (quoting Weather and Safety Leave, 83 Fed. Reg. at 15,291).

¹⁷ 5 U.S.C. § 6329c(b).

¹⁸ Award at 25 (finding that Article 54 "can no longer authorize administrative leave for weather and safety situations, making its current language in that regard without any lawful authority").

¹⁹ 5 U.S.C. § 6329c.

²⁰ Weather and Safety Leave, 83 Fed. Reg. at 15,291.

to circumstances where employees cannot safely work.²¹ Thus, just as the wording of § 6329c allows the Agency to grant weather-and-safety leave *only* when employees are prevented from safely working at an approved location, so, too, does § 630. Consequently, the Union fails to establish that the award is contrary to either § 6329c of the Act or OPM's commentary on implementing § 630, and we deny these exceptions.²²

The Union also contends that the award is contrary to the Statute and fails to draw its essence from the parties' agreement because the Agency cited the regulation—rather than the Act—in implementing the new policy.²³ However, where a provision of a collective-bargaining agreement is contrary to law, an agency's failure to comply with that provision does not constitute a repudiation.²⁴ Here, as discussed above, the Agency appropriately implemented the new policy consistent with the Act, and the OPM regulation effectively mirrors the Act. Thus, although the Agency cited the regulation in implementing the new policy, Article 54 was unenforceable because it conflicted with, and was superseded by, the Act. Consequently, the Union's remaining contrary-to-law and essence exceptions have no merit, and we deny them.²⁵

IV. Decision

We deny the Union's exceptions.

²¹ Compare 5 U.S.C. § 6329c ("An agency may approve the provision of leave under this section . . . only if the employee or group of employees is prevented from safely traveling to or performing work at an approved location."), with 5 C.F.R. § 630.1603 ("[A]n agency may grant weather[-]and[-]safety leave to employees only if they are prevented from safely traveling to or safely performing work at a location approved by the agency.").

²² See *Pro Airways Sys. Specialists, Dist. No. 1, MEBA/NMU (AFL-CIO)*, 48 FLRA 764, 769 (1993) (award not deficient as contrary to law or regulation where excepting party failed to establish that the award was contrary to the law or regulation upon which the excepting party relied).

²³ Exceptions Br. at 16, 30.

²⁴ *Off. of the Adjutant Gen., Mo. Nat'l Guard, Jefferson City, Mo.*, 58 FLRA 418, 421 (2003).

²⁵ See *GSA, Wash., D.C.*, 50 FLRA 136, 139 (1995) (finding that a provision that conflicted with a federal statute was unenforceable and failure to abide by it did not constitute a repudiation).

Chairman DuBester, concurring:

I agree with the Decision to deny the Union's exceptions. When it implemented the change at issue here, the Agency expressly relied on the Administrative Leave Act of 2016 (the Act).¹ And the Arbitrator similarly found that the Act justified the Agency's actions.² Because that finding is consistent with the Act, and provides a sufficient basis for the Arbitrator's denial of the grievance, I would find it unnecessary to decide whether the Agency or the Arbitrator could also properly rely on 5 C.F.R. § 630.1603. Accordingly, I concur.

¹ 5 U.S.C. § 6329c. See Award at 4 (finding that the Agency's May 29, 2018 notice to the Union stated, "[g]iven that this notice and the corresponding changes are pursuant to the statutory requirements found in 5 [U.S.C. §] 6329, we consider this matter outside the duty to bargain"); *id.* (finding that, on June 25, 2018, the Agency notified the Union that it was "fully implementing the *statutory* and regulatory requirements pertaining to weather and safety leave[*']*") (emphasis added).

² See Award at 23-25 (explaining why the Act superseded the parties' collective-bargaining agreement and no longer permitted the Agency's former practice of granting administrative leave).