

72 FLRA No. 122

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS DISTRICT
ST. PAUL, MINNESOTA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1441
(Union)

0-AR-5700

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DECISION

January 24, 2022

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

I. Statement of the Case

Arbitrator Michael A. Wojick issued an award finding that the Agency violated the parties' collective-bargaining agreement and a memorandum of understanding (MOU) when a supervisor covered bargaining-unit shift vacancies instead of offering overtime work to bargaining-unit employees (employees). The Agency filed exceptions to the award on essence, contrary-to-law, nonfact, and exceeds-authority grounds. Because the award fails to draw its essence from the parties' agreement or the MOU, we grant the essence exception and set aside the award.

II. Background and Arbitrator's Award

The Agency operates locks and dams. In an effort to create leadership opportunities for the staff, the Agency established a "[w]orking [s]upervisor"¹ position at each facility. This new staffing model required the Agency to eliminate a bargaining-unit position. The parties engaged in impact and implementation bargaining that resulted in the MOU. The MOU addressed the employees' schedule changes due to the addition of the working supervisor position.

Two years later, the Agency transitioned its navigation season on short notice, causing staffing shortages for three days at one facility. When the working supervisor at that facility covered the shift vacancies, the Union filed a grievance alleging that this action denied employees opportunities to work overtime. The parties could not resolve the matter and it went to arbitration.

At arbitration, the Union argued that the Agency violated the parties' agreement and the MOU when the working supervisor flexed his schedule to cover the shift vacancies. The Arbitrator found there was no dispute that the Agency had the "sole authority" to establish the working supervisor position and that the working supervisor had the right to flex his schedule because it was not subject to the provisions in the parties' agreement.² But the Arbitrator also concluded that to determine whether a violation had occurred, he had to evaluate the reasons for the working supervisor's decision and the "resulting effect" of that decision on the employees.³

Relying on Agency notes from the MOU bargaining sessions, the Arbitrator found that the Agency represented it was not its "intent to have [w]orking [s]upervisors flex their schedules to avoid paying overtime to [employees]," and that the working supervisor position "would not be utilized as a replacement" for the eliminated bargaining-unit position.⁴ He further found that the Agency indicated that when a working supervisor flexed his schedule "it would generally be done to perform supervisory duties."⁵

Based on these findings, the Arbitrator determined there would have been no issue if the working supervisor had flexed his schedule to perform supervisory duties, address an immediate and unplanned circumstance, or to cover a vacancy due to the unavailability of employees. However, he found that

¹ Award at 3.

² *Id.* at 6.

³ *Id.* at 10.

⁴ *Id.* at 8.

⁵ *Id.*

none of those circumstances existed. Therefore, based on the bargaining notes and other evidence indicating that there was no unforeseen, immediate need for the working supervisor to cover the shift, the Arbitrator concluded that the Agency's actions "not only violated the [parties' agreement], but were contrary to the statements made to the Union during [bargaining]."⁶

The Agency filed exceptions to the award on January 29, 2021, and the Union filed an opposition on March 14, 2021.⁷

III. Analysis and Conclusion: The award fails to draw its essence from the parties' agreements.

The Agency asserts that the award fails to draw its essence from the parties' agreements because it is based only on discussions and statements made during bargaining, and not on any provision in the parties' agreement or MOU.⁸ The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the appealing party establishes 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 collective-bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.⁹

Here, despite finding that the Agency violated the parties' agreements, the Arbitrator did not specify any provision in the agreement or the MOU that the Agency violated. Indeed, he agreed with the Agency that "the [w]orking [s]upervisor has every right to flex his schedule and the issue of a [w]orking [s]upervisor flexing his schedule is not subject to the provisions" of the parties' agreement.¹⁰

However, the Arbitrator identified provisions in the agreement he found relevant to the Agency's action, in particular, Article 9, Section 5 (Section 5).¹¹ Section 5 states that while the Agency *may* call employees back for overtime work to cover shift vacancies, "[t]his provision does not require the mandatory presence of a replacement employee."¹² Section 5 further states that supervisors "will consider the need for a replacement employee when

safety factors or workload requirements are involved,"¹³ but also provides that "[t]his does not preclude the supervisor or other qualified staff from working the schedule."¹⁴ Lastly, Section 5 provides that "[t]he administration of overtime work is solely a function of management."¹⁵ And the MOU states simply that the Agency will distribute overtime in accordance with the parties' agreement.¹⁶

The Arbitrator determined that the Agency violated the parties' agreement when the working supervisor flexed his schedule because the "effect of the decision on the bargaining unit" is subject to the parties' agreement.¹⁷ However, Section 5 "does not preclude" the working supervisor from covering a vacant shift.¹⁸ Nor does it require the Agency to demonstrate any of the circumstances enumerated by the Arbitrator before a working supervisor may cover a shift. Consequently, the Arbitrator's determination that the Agency violated the parties' agreements is not consistent with Section 5.

Moreover, the Arbitrator made no finding that the MOU or any provision in the parties' agreement was ambiguous. And because Section 5 clearly authorizes the Agency to assign overtime in the manner challenged by the grievance, there was no basis for the Arbitrator to rely on the parties' bargaining notes.¹⁹

Accordingly, we grant the Agency's essence exception and set aside the award.²⁰

IV. Decision

We grant the Agency's essence exception and set aside the award.

⁶ *Id.* at 11.

⁷ On February 19, 2021, the Union requested a two-week extension of time to file its opposition. On February 22, 2021, the Authority's Office of Case Intake and Publication granted an extension of time until March 15, 2021 to file an opposition. Accordingly, the opposition is timely.

⁸ Exceptions at 9-10; *see also id.* at 3-4.

⁹ *NAGE*, 71 FLRA 775, 776 (2020).

¹⁰ Award at 10.

¹¹ *Id.* at 2-3.

¹² *Id.* at 3.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Opp'n, Attach. 4, Post-Hr'g. Joint Ex., Joint Ex. 7. at 2.

¹⁷ Award at 11.

¹⁸ *Id.* at 3.

¹⁹ *U.S. DHS, U.S.CBP*, 71 FLRA 744, 745 (2020) (Member Abbott concurring; then-Member DuBester dissenting) (finding that award failed to draw its essence from collective-bargaining agreement where award conflicted with the agreement's plain wording and arbitrator erroneously relied upon extraneous evidence rather than the agreement's unambiguous terms).

²⁰ Because we set aside the award on essence grounds, it is unnecessary to address the Agency's remaining exceptions. *E.g., AFGE, Loc. 2145*, 69 FLRA 7, 9 (2015).