

72 FLRA No. 137

INTERNATIONAL BROTHERHOOD
OF BOILERMAKERS
LOCAL 290
BREMERTON METAL TRADES COUNCIL
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
PUGET SOUND NAVAL SHIPYARD
INTERMEDIATE MAINTENANCE FACILITY
BREMERTON, WASHINGTON
(Agency)

0-AR-5729

DECISION

March 15, 2022

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

I Statement of the Case

Arbitrator Charles J. Crider found that the Agency did not violate the parties' collective-bargaining agreement and a memorandum of understanding (MOU) by not selecting the grievant for a weekend overtime assignment. The Union filed exceptions to the award on bias, essence, and nonfact grounds. Because the Union does not demonstrate that the award is deficient on any of these grounds, we deny the exceptions.

II Background and Arbitrator's Award

On Wednesday, August 7, 2019,¹ the grievant put her name on a sign-up sheet requesting to work overtime on the upcoming weekend (the overtime assignment). On Thursday, the grievant called in sick, stating that she "anticipated she would likely get a migraine headache from physical therapy" that she had attended on Wednesday.² The grievant returned to work on Friday and submitted a leave request to her supervisor for her Thursday absence. The Agency did not schedule the grievant for the overtime

assignment. On the following Monday, the supervisor approved the leave request.

The Union subsequently filed a grievance alleging that the Agency violated Article 8, Section 0807 of the parties' agreement (Section 0807) and the MOU because the Agency did not schedule the grievant for the overtime assignment. The parties were unable to resolve the grievance, and the Union invoked arbitration.

At arbitration, the Arbitrator framed the issue as whether the Agency violated the parties' agreement "by refusing to schedule" the grievant for the overtime assignment.³ In resolving this issue, the Arbitrator rejected the Union's argument that the grievant was eligible for the overtime assignment, despite her Thursday absence, because she signed the sign-up sheet on Wednesday and the Agency was prohibited by Section 0807 from considering this absence in denying her request.

Section 0807 states that "[a]n employee's approved absences . . . shall not be considered" in determining the employee's eligibility for overtime.⁴ The Arbitrator, however, concluded that Section 0807's "application is qualified . . . by the MOU."⁵ And he found that under the MOU, the parties excluded employees who are absent on Thursday from consideration for weekend overtime "if their absence is *unscheduled* regardless of whether it may be later approved."⁶

Applying these principles, the Arbitrator found that the grievant's absence was unscheduled, and not yet approved, when the Agency selected employees on Thursday for the overtime assignment. He also noted that when the Agency made selections for the overtime assignment, it did not know when the grievant would return to work. On these grounds, the Arbitrator concluded that the Agency was justified in not scheduling the grievant for the overtime assignment, and he denied the grievance.

³ *Id.* at 2.

⁴ *Id.* at 3.

⁵ *Id.* at 6.

⁶ *Id.* See also Exceptions, Attach. 2, Employer's Submission Grievance, Memorandum of Understanding Shop 06 Toolroom Overtime Process Bremerton Site at 86, Memorandum of Understanding, Shop 06 Toolroom Overtime Process, Bremerton Site (MOU) at 1 (stating that weekend overtime selections are made on Thursday afternoon). The Arbitrator agreed with the Agency's position that the MOU established a Thursday "cut off" rule to provide the Agency with predictability and to allow it to give employees sufficient notice of their overtime assignments. He noted that, under the MOU, when an employee is absent on Thursday, but had notified the Agency that they will be available to work on the weekend, the employee may be eligible to work overtime on the weekend.

¹ Unless otherwise noted, all dates hereafter occurred in 2019.

² Award at 3.

Additionally, in describing the grievant's reason for her unscheduled leave as "unusual and imaginative," the Arbitrator found that the Agency made a "goodwill effort to appease the grievant" by placing her name first on the overtime list for the next overtime opportunity.⁷ However, the Arbitrator noted that he did not rely on these considerations to resolve the issue before him.

On May 4, 2021, the Union filed exceptions to the award, and on June 1, 2021, the Agency filed an opposition to the Union's exceptions.

III. Analysis and Conclusions

A. The Union fails to establish that the Arbitrator was biased.

The Union argues that the Arbitrator was biased because he commented on the validity of the grievant's absence.⁸ To establish that an arbitrator was biased, a party must demonstrate that the award was procured improperly, the arbitrator was partial or corrupt, or that the arbitrator engaged in misconduct that prejudiced a party's rights.⁹

As noted, the Arbitrator commented that the grievant's unscheduled leave based on an anticipated migraine was "unusual and imaginative."¹⁰ Although these comments were critical of the grievant, the Authority has found that similar comments, standing alone, do not establish that an arbitrator was biased.¹¹ Moreover, the Arbitrator did not rely on the grievant's reason for requesting leave to resolve the grievance. Therefore, these comments, as mere dicta, do not demonstrate that the award is deficient for the reasons asserted by the Union.¹² Accordingly, we deny this exception.

B. The award draws its essence from the parties' agreement.

The Union contends that the award fails to draw its essence from Section 0807 because the grievant's

⁸ Exceptions at 4-5.

⁹ *U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso Sector, El Paso, Tex.*, 72 FLRA 253, 258 (2021) (Member Abbott dissenting in part on other grounds) (citing *AFGE, Loc. 3438*, 65 FLRA 2, 3 (2010)).

¹⁰ Award at 7-8.

¹¹ See *AFGE, Loc. 4044, Council of Prisons Loc. 33*, 57 FLRA 98, 100 (2001) (denying a bias exception even though the arbitrator made certain "comments [that] were clearly intemperate"); *AFGE, Loc. 4042*, 51 FLRA 1709, 1714-15 (1996) (denying bias exception where arbitrator's award contained language "sharply critical" of a party). Member Abbott notes that the citation referenced is not the most current. Member Abbott would cite *U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso Sector, El Paso Texas*, 72 FLRA 253, 258 (2021) (Member Abbott dissenting in part) for this proposition.

¹² *Indep. Union of Emps. for Democracy & Just.*, 72 FLRA 328, 329 n.18 (2021) (statements that are not essential to the arbitrator's decision are dicta and do not provide a basis for finding an award deficient). Member Abbott notes that the citation referenced is not the most relevant for a general proposition about dicta. Member Abbott would cite *SSA, Office of Hearings Operations*, 71 FLRA 687, 689 (2020) (*SSA*) (then-Member DuBester dissenting) (citing *AFGE, Council of Prison Locs. 33, Loc. 3690*, 69 FLRA 127, 131 (2015)) for this proposition.

⁷ Award at 7-8.

Thursday absence was approved.¹³ When reviewing an arbitrator's interpretation of an agreement, the Authority will find that an arbitration award is deficient as failing to draw its essence from the 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 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.¹⁴

In support of its essence exception, the Union argues that Section 0807 precluded the Agency from considering the grievant's approved absence in determining her eligibility for the overtime assignment.¹⁵ However, the Arbitrator found that the grievant's leave was not approved until the Monday after the overtime assignment.¹⁶ And he determined that the Agency did not violate this provision because the grievant's leave was unscheduled and not approved on Thursday, the day when the Agency selected employees for the overtime assignment.¹⁷ This conclusion is not inconsistent with the wording of Section 0807, which only prohibits *approved* leave from being considered by the Agency when assigning overtime. Because the Union has not established that the Arbitrator's interpretation is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, we deny this exception.¹⁸

C. The award is not based on a nonfact.

The Union asserts that the Arbitrator's determination that the Agency did not violate the parties' agreement is based on several nonfacts.¹⁹ To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have

reached a different result.²⁰ But, disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, does not provide a basis for finding that an award is based on a nonfact.²¹

First, the Union maintains that the Arbitrator erroneously determined that the grievant did not sign up for overtime by Thursday.²² However, as discussed above, the Arbitrator's conclusion that the Agency was justified in not selecting the grievant for overtime was based on the grievant's unapproved absence on Thursday, not the dates he signed up for the overtime opportunity.²³ Therefore, the Arbitrator's finding regarding the date the grievant signed up is not a central fact underlying the award.²⁴

Next, the Union argues that the Arbitrator incorrectly determined that the Agency "made the goodwill effort to appease the grievant" by placing her first on the sign-up sheet for the next overtime opportunity.²⁵ But the Arbitrator's statements regarding the Agency's actions concerning a different overtime opportunity were not the basis for his resolution of the grievance.²⁶ As such, they do not provide a basis for finding the award deficient.²⁷

The Union also contends that the Arbitrator erred by "project[ing] his own determination" regarding the Agency's responsibility to "normally carry the employee in an approved leave status" because the Agency did not question the "validity" of the grievant's requested leave.²⁸ To the extent this argument challenges the Arbitrator's finding that the grievant's leave was unapproved on Thursday, the parties disputed at arbitration when the grievant's leave was approved.²⁹

¹³ Exceptions at 13-14.

¹⁴ *AFGE, Loc. 3342*, 72 FLRA 91, 92 (2021) (*Local 3342*) (citing *U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 103, 104 & n.13 (2019); *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017)).

¹⁵ Exceptions at 13.

¹⁶ Award at 7.

¹⁷ *Id.* at 6, 9; see *Local 3342*, 72 FLRA at 92 (citing *AFGE, Loc. 3354*, 64 FLRA 330, 333 (2009)

("disagreement with an arbitrator's factual finding does not provide a basis for concluding that an award fails to draw its essence from an agreement").

¹⁸ See *U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Tex.*, 72 FLRA 293, 295 (2021) (*CBP*) (Member Kiko concurring; Member Abbott concurring) (citing *AFGE, Loc. 2382*, 66 FLRA 664, 666-67 (2012)).

¹⁹ Exceptions at 6-12.

²⁰ *U.S. Dep't of VA, Nashville Reg'l Off., VA Benefits Admin.*, 72 FLRA 371, 374 (2021) (*VA Nashville*) (Member Abbott concurring) (citing *AFGE, Loc. 1594*, 71 FLRA 878, 880 (2020)); *CBP, 72 FLRA at 294* (citing *AFGE, Loc. 2302*, 70 FLRA 202, 204 (2017)).

²¹ *VA Nashville*, 72 FLRA at 374-75 (citing *U.S. Small Bus. Admin., Birmingham, Ala.*, 72 FLRA 106, 106 (2021)).

²² Exceptions at 6.

²³ Award at 6-7.

²⁴ *CBP, 72 FLRA at 294* (citing *United Power Trades Org.*, 67 FLRA 160, 163 (2013)).

²⁵ See Exceptions at 7-8.

²⁶ Award at 6-7.

²⁷ *Int'l Bhd. of Elec. Workers, Loc. 2219*, 69 FLRA 431, 434 (2016) (citing *AFGE, Loc. 2152*, 69 FLRA 149, 151 (2015)).

Member Abbott notes that the citation referenced is not the most current. Member Abbott would cite *SSA*, 71 FLRA at 689.

²⁸ Exceptions at 9.

²⁹ See *id.* at 10 (quoting Exceptions, Attach. 3, 2021-01-15 Montoy, R. Union Brief at 8) (alleging the grievant's supervisor knew and approved her absence before Thursday); see also Exceptions, Attach. 2, Employer's Submission Grievance, Request for Leave or Approved Absence (Agency Br.) at 6-7 (stating that leave is not approved until signed by supervisor).

Moreover, the record includes evidence that the grievant's supervisor did not approve the requested leave until Monday.³⁰ As such, the Union's argument – which merely challenges the Arbitrator's evaluation of the evidence, and fails to demonstrate that the Arbitrator's finding is clearly erroneous – does not demonstrate that the award is based on a nonfact.³¹

Finally, the Union argues that the Arbitrator incorrectly determined that the parties had an established past practice of not selecting for overtime assignment any employee who was absent on Thursday on unscheduled and unapproved leave.³² On this point, the Union reiterates its arguments that the grievant's absence was approved and that Section 0807 prohibits the Agency from considering an approved absence when assigning overtime. However, the Arbitrator did not base his conclusions upon any finding that the parties had a past practice in this regard. Moreover, we have already rejected the Union's arguments that the Agency was prohibited from considering the grievant's absence in denying her overtime request.

Accordingly, we deny the Union's nonfact exception.³³

IV. Decision

We deny the Union's exceptions.

³⁰ See Agency Br. at 84.

³¹ *E.g.*, *CBP*, 72 FLRA at 294.

³² Exceptions at 11-12.

³³ *U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1168 n.18 (2020) (then-Member DuBester concurring) (denying nonfact exception because it was based on the same argument upon which rejected essence exception was premised); *AFGE, Loc. 466*, 70 FLRA 973, 974 (2018) (same).