73 FLRA No. 98

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
METROPOLITAN CORRECTIONAL CENTER
SAN DIEGO, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3619
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5856

DECISION

April 24, 2023

Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator Joseph W. Gardner issued an award directing the Agency to pay "a partial clothing allowance of $350," and provide "two pairs of steel[-]toe shoes and/or boots," to bargaining-unit-employees (BUEs).[1] The Agency excepted on essence, contrary-to-law, and exceeded-authority grounds. As discussed below, we are unable to determine whether the award is deficient, so we remand it for further action consistent with this decision.

II. Background and Arbitrator's Award

For some time, the Agency has been "augmenting" non-custody employees to work custody posts when correctional officers, who work those posts, are unavailable. Although the non-custody employees perform full-time clerical duties, they can be called upon to guard inmates. Correctional officers wear uniforms and steel-toe boots, and they receive a uniform allowance; non-custody employees do not wear uniforms or steel-toe boots in their regular positions, and they do not receive a uniform allowance.

The Union filed a grievance alleging the Agency violated Article 28, Sections F and H of the parties' agreement and "Program Statement 3300.03"[2] (Program Statement) by failing to provide augmented employees with a partial uniform allowance.[3] The grievance proceeded to arbitration.

The parties did not agree on the issue to be submitted to arbitration. The Union's proposed issue statement was: "[Did] the Agency violate[] Program Statement 3300.03, Section 19 [of the parties' agreement], and/or Article 28 of the [parties' agreement] by not granting uniform allowances to non-custody staff who have been augmented to work custody posts?"[4] As relevant here, the Agency's proposed issue statement was whether the Agency violated Article 28, Sections F and H of the parties' agreement, and/or the Program Statement, "by not providing a uniform allowance for positions that are not identified in [the] policy as eligible to receive an allowance."[5]

The Arbitrator – without framing any issues – granted the grievance. The entirety of the Arbitrator's analysis is as follows:

> After reviewing the evidence, this arbitrator finds that in its inception "augmentation" was the exception rather than the rule. Augmentation was used, but rarely reported or published. Over the past two or three years, augmentation has been used at least weekly, and its use has been frequently used and reported. According to the testimony at the arbitration hearing, clerical employees have been used more than weekly to assist correction officers to suppress misbehavior by the inmates. At the arbitration hearing, a [U]nion witness who testified was dressed in clothes that she would typically wear to work. The clothes and shoes she wore were appropriate for office apparel in the private sector. However, her clothing and her shoes would be dangerous apparel helping correction[al] officers suppress inmates. The grievance is granted.[6]

[1] Award at 5.

[2] We note that according to the Agency "Program Statement 3000.02" and "Program Statement 3300.03" are the same guidance. Exceptions Br. at 20. As such, all references within this decision are to the same Program Statement.

[3] Exceptions, Attach. D (Grievance) at 2.

[4] Exceptions, Attach. F (Transcript) at 15; Opp'n, Attach. 1 (Union Post-Hr'g Br.) at 2.

[5] Exceptions Br. at 20; Exceptions, Attach. A (Agency Closing Br.) at 4.

[6] Award at 4-5.

As remedies, the Arbitrator directed the Agency to: (1) pay an annual partial clothing allowance of $350 to all BUEs who do not currently receive full or partial clothing allowances and who have been, or may be, augmented; and (2) provide all BUEs with two pairs of steel-toe shoes and/or boots starting on January 1, 2023, and one pair every nine months thereafter.

The Agency filed exceptions to the award on January 17, 2023, and the Union filed an opposition to the Agency's exceptions on February 15, 2023.

III. Analysis and Conclusions: We remand the award for further findings.

The Agency argues the award fails to draw its essence from the parties' agreement because only employees who are required to wear a uniform are entitled to a uniform allowance under Article 28 of the parties' agreement and the Program Statement.[7]

The Authority will find 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 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.[8]

In sustaining the grievance, the Arbitrator did not discuss the language of – let alone provide any interpretation of – the parties' agreement or the Program Statement. Nor did the Arbitrator explain what violation(s) occurred. For example, both parties' proposed issue statements asked the Arbitrator to address augmented BUEs' entitlement to uniform allowances under Article 28, which authorizes a uniform allowance only for "each employee who is required by policy to wear a uniform in the performance of their official duties,"[9] but the Arbitrator failed to provide any interpretation of this critical contract language. Similarly, both parties asked the Arbitrator to resolve their dispute using the Program Statement, which reiterates that the uniform allowance is for employees *required* to wear a uniform, and reserves to the Agency the right to determine whether an employee is required to wear a uniform.[10] However, the award is devoid of any references to the Program Statement. As a result, we are unable to determine, on this record, whether the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement.[11]

Relatedly, the Agency argues the award is contrary to law because the Arbitrator ignored Authority precedent regarding Article 28 of the parties' agreement and the Program Statement.[12] However, in the decisions the Agency cites, the Authority was reviewing essence exceptions to arbitrators' interpretations of Article 28 and the Program Statement.[13] Here, as stated above, the Arbitrator provided no contractual interpretation that the Authority can review. As such, we are unable to assess whether the award is deficient.[14]

Finally, the Agency's exceeded-authority exception alleges the Arbitrator considered an issue not submitted to arbitration – specifically, the issue of providing steel-toe shoes and/or boots to BUEs.[15] Arbitrators exceed their authority when they resolve an issue not submitted to arbitration.[16] When parties have not stipulated, and an arbitrator has not expressly framed, any issues, the Authority will assess whether the issues are nevertheless apparent from the award.[17] Where an arbitrator does not frame any issues, but the award is directly responsive to the parties' *submitted issues*, the Authority denies exceeded-authority exceptions contending the arbitrators resolved an issue not submitted to arbitration.[18]

Here, the parties did not stipulate to the issues to be submitted for arbitration, the Arbitrator did not frame any issues, and no issues are apparent from the award. The parties' submitted issues involved a uniform allowance for

---

[7] Exceptions Br. at 12-18.

[8] *Fed. Educ. Ass'n, Stateside Region*, 73 FLRA 32, 33 (2022).

[9] Exceptions, Attach. B (Master Agreement) at 66.

[10] Exceptions, Attach. C at 71-75.

[11] *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 72 FLRA 146, 148 (2021) (*DHS*) (Chairman DuBester dissenting in part on other grounds) (where the arbitrator failed to explain or support conclusions, the Authority was unable to determine whether the award drew its essence from the agreement).

[12] Exceptions Br. at 8-12 (citing *AFGE, Council of Prison Locs. 33*, 59 FLRA 381, 383 (2003) (*Locs. 33*); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex., Yazoo City, Miss.*, 73 FLRA 114, 117 (2022) (*BOP Yazoo City*)).

[13] *BOP Yazoo City*, 73 FLRA at 117 (arbitrator's determination that augmented non-custody employees were entitled to a uniform allowance failed to draw its essence from wording in Article 28 and the Program Statement authorizing a uniform allowance only for employees required by the agency to wear a uniform); *Locs. 33*, 59 FLRA at 383 (where agency did not require temporarily reassigned non-custody employees to wear a uniform, arbitrator's determination that they were not entitled to a uniform allowance drew its essence from Article 28).

[14] *DHS*, 72 FLRA at 148.

[15] Exceptions Br. at 18-21.

[16] *NTEU, Chapter 66*, 72 FLRA 70, 71 (2021) (Chairman DuBester concurring; Member Abbott dissenting on other grounds).

[17] *Off. & Prof'l Emps. Int'l Union, Loc. 2001*, 65 FLRA 456, 458 (2011).

[18] *U.S. DOJ, Fed. BOP, Med. Facility for Fed. Prisons*, 51 FLRA 1126, 1139 (1996).

augmented non-custody BUEs and did not specifically mention steel-toe shoes or boots.[19] Although the Arbitrator stated "[t]he grievance [also] requested . . . allowances for . . . steel[-]toe boots,"[20] the grievance did not discuss steel-toe boots (or shoes), the only provisions of Article 28 the grievance cited concern uniform allowances,[21] and a *different* provision of Article 28 discusses steel-toe boots.[22] Further, while the Union asserts that there was witness testimony about steel-toe shoes and/or boots,[23] the Arbitrator did not expressly rely upon that testimony to find the issue of steel-toe shoes and/or boots was presented. For these reasons, it is unclear from the award whether the issue of steel-toe shoes or boots was before the Arbitrator.

Where an arbitrator's findings are insufficient for the Authority to determine whether the award is deficient on the grounds raised by a party's exceptions, the Authority will remand the award.[24] Accordingly, we remand the award to the parties for resubmission to arbitration, absent settlement, for further findings. Consistent with this decision, the resulting award should frame the issues to be decided at arbitration based on the subject matter submitted to arbitration; explain the contractual bases for any conclusions; explain any interpretations of the parties' agreement – particularly Article 28 and the Program Statement; and provide adequate factual findings.

IV. Decision

We remand this case for action consistent with this decision.[25]

[19] Exceptions Br. at 20; Agency Closing Br. at 4; Transcript at 15; Union Post-Hr'g Br. at 2.
[20] Award at 3.
[21] Grievance at 2 (Article 28, Section F states that "employees who transfer or are assigned from a non[-]uniformed position . . . will receive an allowance . . . ."; Article 28, Section H states that "[u]niforms for all staff will be in accordance with policy, and only those staff occupying positions outlined in policy will be eligible for a uniform allowance.").
[22] Master Agreement at 66-67.
[23] Opp'n Br. at 14.
[24] *DHS*, 72 FLRA at 148 (where the arbitrator failed to explain or support conclusions, remanding because the Authority was unable to determine whether the award was deficient on multiple grounds raised by exceptions); *U.S. Dep't of HHS*, 72 FLRA 522, 524 (2021) (Chairman DuBester concurring).
[25] Nothing in this decision precludes the parties from mutually agreeing to select a different arbitrator on remand. *E.g.*, *NAGE, Loc. R3-74, SEIU*, 73 FLRA 57, 58 n.15 (2022); *U.S. Dep't of VA*, 72 FLRA 212, 214 n.25 (2021) (Chairman DuBester concurring in part).