

73 FLRA No. 111

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2382
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS BENEFIT ADMINISTRATION
PHOENIX REGIONAL OFFICE
PHOENIX, ARIZONA
(Agency)

0-AR-5869

DECISION

June 15, 2023

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

I. Statement of the Case

Arbitrator Stephen L. Hayford found the Agency did not violate the parties' collective-bargaining agreement (the CBA) or past practice in denying a Union official (the grievant) 100% official time. The Union excepted, arguing the award is contrary to law and fails to draw its essence from the CBA. For the reasons discussed below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The grievant is the Union's Executive Vice-President, Treasurer, and Secretary. The Agency denied the grievant's 100%-official-time request, stating that "[g]iven [the] current staffing and workload, [it was] currently only able to grant official time for representation duties, not 100% of [the grievant's] duty time."¹ The Agency further provided that if the grievant had "official[-]time needs for representation, [it would] be

happy to consider those requests . . . on a case-by-case basis."² The Union grieved the denial of 100% official time, and the matter proceeded to arbitration.

The Arbitrator framed the issue as: "Did the Agency's refusal to grant [the grievant] 100% . . . official time violate any relevant provision of the [CBA] or abridge an established, binding past practice regarding the contractual entitlement of [Union] representatives to official time?"³ In framing the issue, the Arbitrator emphasized that "this dispute does not concern . . . Article 48, Section 10[s] . . . allot[ment of] 4.25 hours per year for each bargaining[-]unit position represented by [the Union]."⁴

The Arbitrator found that § 7131(d) of the Federal Service Labor-Management Relations Statute (the Statute)⁵ provides that "the amount of official time to which the [g]rievant is entitled is to be jointly determined by [the Agency] and [the Union], based on their mutual assessment of what amount of official time is reasonable, necessary[,] and in the public interest."⁶ The Arbitrator further found, as relevant to the issue at arbitration, the parties' CBA only provided that "[o]fficial time shall be granted for activities as specified in law and in the amount specified by this Agreement or otherwise negotiated."⁷ After reviewing the evidence and the CBA, the Arbitrator determined there was no CBA provision that entitled the grievant to 100% official time. The Arbitrator also determined that the Union failed to demonstrate there was a binding past practice that entitled the grievant to 100% official time. As such, the Arbitrator denied the grievance.

After resolving the grievance, the Arbitrator noted:

In light of the determination that . . . [the grievant] is not statutorily or contractually entitled to 100% official time[,] full resolution of the [i]ssue before the Arbitrator does require him to strike a balance between the Union's discretion to delegate official time to its officers and the Agency's management rights as contemplated by the relevant [Authority] case law. However, neither of those prerogatives is absolute[,] and in certain disputes concerning the amount, delegation, or scheduling of

¹ Award at 2.

² *Id.*

³ *Id.* at 6.

⁴ *Id.* at 11 n.2; *see also* Exceptions, Ex. 4, Collective-Bargaining Agreement (CBA) at 248 ("Every local union will receive an allotment of hours equal to 4.25 hours per year for each bargaining[-]unit position represented by that local union.").

⁵ 5 U.S.C. § 7131(d) (stating that, except as to activities described in preceding subsections, official time for representational activities "shall be granted . . . in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest").

⁶ Award at 11-12.

⁷ *Id.* at 12.

official time under § 7131(d) and [the CBA,] that balance will be outcome determinative.⁸

The Union filed exceptions to the award on February 24, 2023, and the Agency filed an opposition to the Union's exceptions on March 27, 2023.

III. Analysis and Conclusions

A. The award is not contrary to law.

The Union argues the award is contrary to § 7131(d) of the Statute.⁹ Specifically, the Union takes issue with the Arbitrator's statement, block-quoted above, regarding balancing the Union's discretion to delegate official time to its officers against management rights.¹⁰ According to the Union, in resolving this exception, the Authority should return to the "carve[-]out doctrine" that applied before the Authority's decision in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Miami, Florida*.¹¹

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.¹² In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.¹³ In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.¹⁴

The issue at arbitration was whether the Agency violated the CBA or a past practice by denying the grievant's request for 100% official time.¹⁵ The Arbitrator concluded that there was no contractual provision or past practice that entitled the grievant to 100% official time.¹⁶ That conclusion resolved the issue at arbitration. Only then did the Arbitrator make the statement to which the Union excepts as contrary to law. After arbitrators have resolved all of the framed issues before them, any additional statements they make concerning other issues are dicta that do not provide a basis for finding an award deficient.¹⁷ Therefore, the Arbitrator's challenged

statement is dicta that does not provide a basis for finding the award deficient. Accordingly, we deny the exception.

B. The award draws its essence from the CBA.

The Union argues the award fails to draw its essence from the CBA.¹⁸ Specifically, the Union contends the award allows the Agency – without contractual support, and contrary to the plain language of Article 48, Section 10 (Section 10) – to cap official-time entitlements.¹⁹

The Authority will find an arbitration award deficient as failing to draw its essence from a CBA when the appealing party establishes that the award: (1) cannot in any rational way be derived from the CBA; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the CBA as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the CBA; or (4) evidences a manifest disregard of the CBA.²⁰

The Arbitrator found the CBA does not contain a provision entitling the grievant to 100% official time.²¹ In this regard, the Arbitrator determined that Article 48, Section 1 of the CBA "confirms the [p]arties' mutual understanding that the granting of official time for appropriate representational duties is a matter to be determined by negotiation."²² The Arbitrator further determined that because the parties had not negotiated 100% official time for the grievant, the Agency did not err in denying the grievant's request for 100% official time.²³

The Union does not identify any CBA language that contradicts the Arbitrator's findings. To the extent the Union argues Section 10 requires granting 100% official time, the Arbitrator expressly rejected this argument, emphasizing the "dispute [did] not concern . . . Section 10[']s . . . allot[ment of] 4.25 hours per year for each bargaining[-]unit position represented by [the Union]."²⁴ The Union's contrary assertion that Section 10 requires a different result does not demonstrate that the award is implausible, unfounded, irrational, or a

⁸ *Id.* at 13 n.5.

⁹ Exceptions Br. at 8-11.

¹⁰ *Id.*

¹¹ *Id.* at 11 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mia., Fla.*, 71 FLRA 1247 (2020) (Member DuBester dissenting)).

¹² *AFGE, Council 222*, 73 FLRA 54, 55 (2022).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Award at 6.

¹⁶ *Id.* at 12-13.

¹⁷ *AFGE, Loc. 1822*, 72 FLRA 595, 598 n.34 (2021) (Chairman DuBester concurring).

¹⁸ Exceptions Br. at 12.

¹⁹ *Id.* at 12-16.

²⁰ *Fed. Educ. Ass'n, Stateside Reg.*, 73 FLRA 32, 33 (2022).

²¹ Award at 12.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 11 n.2; see also CBA at 248 ("Every local union will receive an allotment of hours equal to 4.25 hours per year for each bargaining[-]unit position represented by that local union.").

manifest disregard of the CBA.²⁵ Accordingly, the Union does not demonstrate that the award fails to draw its essence from the CBA, and we deny the essence exception.

IV. Decision

We deny the Union's exceptions.

²⁵ *Bremerton Metal Trades Council*, 73 FLRA 212, 214 (2022) (denying essence exception where arbitrator's interpretation was consistent with the parties' agreement and rejecting excepting party's attempt to relitigate its preferred interpretation); *AFGE*,

Loc. 2338, 71 FLRA 1039, 1041 (2020) (citing *NAIL, Loc. 10*, 71 FLRA 513, 515 (2020)) (denying essence exception where union failed to establish arbitrator was required to apply cited contract provision).

Chairman Grundmann, concurring:

As the decision notes, the Union argues that the Authority should return to the carve-out doctrine that the Authority applied before the decision in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Miami, Florida (FCI Miami)*.^{*} Because the Union's contrary-to-law exception only challenges dicta, it is not necessary for the Authority to resolve the Union's argument regarding *FCI Miami*. However, I note that I was not a Member when the Authority issued *FCI Miami* and, thus, did not participate in that case. I am open to revisiting *FCI Miami* in a future, appropriate case.

Therefore, I concur.

^{*} 71 FLRA 1247 (2020) (Member DuBester dissenting).