73 FLRA No. 147

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2344
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
HERSHEL "WOODY" WILLIAMS
VA MEDICAL CENTER
(Agency)

0-AR-5900

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DECISION

December 14, 2023

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

I. Statement of the Case

Arbitrator James E. Rimmel issued an award finding the Agency did not violate the parties' collective-bargaining agreement by allowing a supervisor to work overtime instead of offering the overtime to bargaining-unit employees (employees). The Union filed exceptions to the award on essence, contrary-to-law, and bias grounds. For the reasons explained below, we partially dismiss the Union's contrary-to-law and bias exceptions, and deny the remaining exceptions.

II. Background and Arbitrator's Award

Over a twelve-month period during which two of the Agency's four supervisor positions were vacant, the Agency approved overtime for a maintenance-mechanic supervisor. The Union filed a grievance alleging the Agency violated Article 21 of the parties' agreement by failing to distribute overtime in a "fair and equitable" manner when it allowed the supervisor to work overtime instead of offering the hours to employees.[1] The Agency denied the grievance, and the parties proceeded to arbitration.

The parties did not stipulate an issue. The Arbitrator framed the issue as whether the Agency violated Article 21, Section 4 of the parties' agreement (Section 4) by scheduling the supervisor to work overtime between March 3, 2021 and March 12, 2022.

As relevant here, Section 4(A) states, "Overtime shall be distributed in a fair and equitable manner."[2] Section 4(D) states, "[N]on-bargaining[-]unit employees shall not be scheduled on overtime to perform the duties of bargaining[-unit] employees for the sole purpose of eliminating the need to schedule bargaining[-]unit employees for overtime."[3]

The Arbitrator determined that, during the relevant time period, the Agency approved employees' voluntary overtime, and "there [was] no claim of record" those assignments were other than "fair and equitable" as Section 4(A) requires.[4] Therefore, the Arbitrator considered whether the parties' agreement required the Agency to offer employees the particular hours the supervisor worked.

The Arbitrator found the agreement "provides no explicit language prohibiting" supervisors from performing work that employees could perform.[5] He further determined Section 4(D) "make[s] clear that the parties have agreed non-bargaining personnel may perform bargaining[-unit] work"[6] so long as the Agency does not schedule supervisors for overtime work "for the sole purpose of eliminating the need to schedule . . . employees [for] overtime."[7]

Applying this principle, the Arbitrator found the record "totally devoid" of any evidence demonstrating the Agency scheduled the supervisor to work overtime for the sole purpose of preventing employees from working overtime.[8] He determined the Agency "clearly needed" the supervisor for overtime to "primarily perform needed supervisory work" to "cover not only his regularly assigned areas, but also other shops given that two of the four" supervisor positions were vacant.[9] He further found that any duties the supervisor performed that employees also could have performed were "residual to his supervisory duties."[10] Thus, the Arbitrator concluded the overtime hours the supervisor worked "were not intended for . . . employees," and were "outside of the distribution

[1] Award at 2.
[2] *Id.* at 10.
[3] *Id.*
[4] *Id.* at 16.
[5] *Id.* at 13.
[6] *Id.* at 17 (citing Section 4(D)).
[7] *Id.* (quoting Section 4(D)); *see also id.* at 18 (finding that this is the "only limitation on Agency [m]anagement performing bargaining[-]unit work provided under the provisions of [Section 4(D)]").
[8] *Id.* at 17.
[9] *Id.* at 14.
[10] *Id.*

mandate set forth" under Section 4(A).[11] Consequently, the Arbitrator found the Agency did not violate the agreement.

On June 22, 2023, the Union filed exceptions to the award. The Agency did not file an opposition to the Union's exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Union's arguments.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[12] The Union argues the Arbitrator's determination that the Agency did not violate the contract by assigning the supervisor overtime is contrary to an "OPM regulation" concerning Fair Labor Standards Act (FLSA)-exempt employees receiving overtime pay, and cites 5 U.S.C. § 5541(2) for support.[13] The Union also argues the award is contrary to a U.S. Department of Labor Fact Sheet concerning FLSA-exempt employees' overtime eligibility.[14]

The Union admits it did not raise these arguments to the Arbitrator, claiming it "felt there was no need to raise an argument to the [A]rbitrator on the decision he made."[15] However, the supervisor's performance of overtime work was squarely before the Arbitrator.[16] Therefore, the Union should have known to raise its arguments concerning the FLSA, and any other applicable law or guidance relevant to the overtime at issue, to the Arbitrator.

The Union also argues the Arbitrator was biased because he did not open an envelope containing the Union's evidence, or review that evidence, until the day of the hearing.[17] In this regard, the Union asserts that the Arbitrator opened the envelope on the day of the hearing in front of the parties.[18] Consequently, the Union could have raised its argument to the Arbitrator, but there is no evidence it did so.

As the Union could have raised these arguments before the Arbitrator but did not, it cannot do so now.[19] Therefore, we dismiss these arguments.[20]

IV. Analysis and Conclusions

A. The Union does not demonstrate the award fails to draw its essence from the parties' agreement.

The Union argues the Arbitrator disregarded Section 4(D) by finding the Agency did not violate that provision.[21] The Authority will find that an award fails 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.[22]

Section 4(D) states, "[N]on-bargaining[-]unit employees shall not be scheduled on overtime to perform the duties of bargaining employees for the sole purpose of eliminating the need to schedule bargaining[-]unit employees for overtime."[23] The Arbitrator found that Section 4(D) only prohibits the Agency from assigning supervisors overtime work "for the *sole purpose*" of taking overtime work away from employees,[24] and that there was no evidence the Agency did so. The Arbitrator further determined the Agency did not violate Section 4(D) because the Agency scheduled the supervisor for overtime

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[11] *Id.* at 17.
[12] 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DHS, Citizenship & Immigr. Servs.*, 73 FLRA 82, 83-84 (2022) (citing 5 C.F.R. §§ 2425.4(c), 2429.5; *AFGE, Loc. 3627*, 70 FLRA 627, 627 (2018)).
[13] Exceptions at 4 (citing U.S. Off. of Personnel Mgmt., *Fact Sheet: Compensatory Time Off*, https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/compensatory-time-off/).
[14] *Id.* (citing U.S. Dep't of Lab., *Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)*, https://www.dol.gov/agencies/whd/fact-sheets/17a-overtime).
[15] *Id.* at 4-5.
[16] Award at 11.
[17] Exceptions at 5.
[18] *Id.*
[19] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mendota, Cal.*, 73 FLRA 474, 475-76 (2023) (citing *USDA, Farm Serv. Agency, Kan. City, Mo.*, 65 FLRA 483, 484 n.4 (2011) (*USDA*)).
[20] *Id.* at 476 (citing *AFGE, Loc. 2338*, 73 FLRA 229, 230 (2022); *U.S. Dep't of VA, James A. Haley VAMC, Tampa, Fla.*, 73 FLRA 47, 48 (2022); *AFGE, Loc. 2338*, 71 FLRA 1039, 1040 (2020); *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 357 (2014); *USDA*, 65 FLRA at 484 n.4; *U.S. DOJ, Fed. BOP, USP Admin. Maximum (ADX), Florence, Colo.*, 64 FLRA 1168, 1170 (2010), *recons. denied*, 65 FLRA 76 (2010); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 64 FLRA 810, 811-12 (2010), *recons. denied*, 65 FLRA 256 (2010)).
[21] Exceptions at 5-6.
[22] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 73 FLRA 620, 622 (2023) (citing *NTEU, Chapter 149*, 73 FLRA 413, 416 (2023)).
[23] Award at 10.
[24] *Id.* at 17 (emphasis added).

to "primarily perform needed supervisory work" that was "needed to cover not only his regularly assigned areas, but also other shops given that two of the four" supervisor positions were vacant.[25] The Union's argument does not demonstrate how the award is irrational, implausible, unfounded, or in manifest disregard of Section 4(D).[26]

We deny the Union's essence exception.

B. The Union has not demonstrated the award is contrary to law.

The Union argues the award is contrary to law because the Arbitrator determined the Agency did not violate Section 4(D).[27] When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.[28] Applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[29] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[30] Additionally, the Authority has rejected contrary-to-law exceptions that challenge an arbitrator's interpretation of a collective-bargaining agreement.[31]

The Union's argument is premised on the Arbitrator's interpretation of Section 4(D), and we have rejected the Union's essence exception challenging that interpretation.[32] The Union does not demonstrate the Arbitrator was required, as a matter of law, to interpret this provision differently. Consequently, the Union's argument provides no basis for finding the award contrary to law, and we deny this exception.[33]

C. The Union fails to establish the Arbitrator was biased.

The Union argues the Arbitrator was biased because he incorrectly stated that Section 4(D) "was the only provision cited dealing with non-bargaining personnel performing bargaining[-]unit work" and he did not "address the overtime issue at all."[34] The Union also claims the Arbitrator was biased because he "sided with the Agency" even after he "appeared to be annoyed" with the manner in which the Agency's witnesses answered questions.[35]

To establish bias, the excepting party must demonstrate that (1) the award was procured by improper means, (2) there was partiality or corruption on the arbitrator's part, or (3) the arbitrator engaged in misconduct that prejudiced the party's rights.[36] A party's assertion that an arbitrator's findings were adverse to that party, without more, does not demonstrate that an arbitrator was biased.[37] A party's disagreement with an arbitrator's evaluation of the evidence and conclusions also is insufficient to establish bias.[38]

Contrary to the Union's assertion, the Arbitrator addressed the overtime issue presented, analyzed Section 4(A) and Section 4(D), and concluded the Agency did not violate Section 4.[39] The Union's disagreement with the Arbitrator's evaluation of the evidence and conclusion concerning the overtime issue does not demonstrate the Arbitrator was biased.[40] Moreover, the Union does not allege the award was procured by improper means, there was partiality or corruption on the Arbitrator's part, or the Arbitrator engaged in misconduct that prejudiced the Union's rights.[41]

We deny this exception.

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[25] *Id.* (further finding the record "totally devoid" of any evidence the Agency violated Section 4(D)).
[26] *See NTEU, Chapter 46*, 73 FLRA 654, 657 (2023).
[27] Exceptions at 3-4.
[28] *NTEU, Chapter 14*, 73 FLRA 613, 614 (2023) (Chairman Grundmann concurring) (citing *NTEU, Chapter 338*, 73 FLRA 487, 488 (2023)).
[29] *Id.*
[30] *Id.*
[31] *See NLRB Pro. Ass'n*, 68 FLRA 552, 556 (2015) (*NLRB*) (citing *AFGE, Loc. 779*, 64 FLRA 672, 674 (2010); *Pro. Airways Sys. Specialists*, 56 FLRA 124, 125 (2000)).
[32] *See* section IV.A. above.
[33] *See AFGE, Loc. 2382*, 66 FLRA 664, 667 (2012) (denying contrary-to-law exception premised on previously denied essence exception); *see also Indep. Union of Pension Emps. for Democracy & Just.*, 72 FLRA 328, 329 (2021) (denying contrary-to-law exception where excepting party did not demonstrate that arbitrator's contractual interpretation was deficient as a matter of law).
[34] Exceptions at 5.
[35] *Id.*
[36] *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 498, 504 (2023) (*VA Pershing*) (citing *AFGE, Loc. 2052, Council of Prison Locs. 33*, 73 FLRA 59, 61 (2022) (*Local 2052*) (Chairman DuBester concurring); *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, 70 FLRA 924, 929 (2018) (*IRS Austin*) (Member DuBester concurring in part and dissenting in part on other grounds)).
[37] *VA Pershing*, 73 FLRA at 504 (citing *Local 2052*, 73 FLRA at 61; *IRS Austin*, 70 FLRA at 929).
[38] *AFGE, Loc. 3911, AFL-CIO*, 68 FLRA 564, 571 (2015) (*Local 3911*) (citing *U.S. Small Bus. Admin., Charlotte Dist. Off., Charlotte, N.C.*, 49 FLRA 1656, 1663 (1994) (*SBA Charlotte*)).
[39] *See* Award at 4-5, 9-19.
[40] *Local 3911*, 68 FLRA at 571 (citing *SBA Charlotte*, 49 FLRA at 1663).
[41] *VA Pershing*, 73 FLRA at 504.

V. Decision

We partially dismiss, and partially deny, the Union's exceptions.