73 FLRA No. 151

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 916
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
TINKER AIR FORCE BASE, OKLAHOMA
(Agency)

0-AR-5901

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DECISION

January 18, 2024

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

I. Statement of the Case

Arbitrator Richard R. Rice issued an award finding the Agency did not violate the parties' master collective-bargaining agreement (master agreement) and a local supplement agreement (local agreement) by denying the grievant overtime. The Union filed exceptions to the award on contrary-to-Agency-regulation and essence grounds. For the reasons explained below, we deny the exceptions.

II. Background and Arbitrator's Award

The grievant signed up for a Saturday overtime shift. On the preceding Friday, she took leave for a medical appointment. The Agency denied the overtime based on an alleged past practice of denying weekend overtime to employees who missed work on the day "immediately preceding" the overtime shift.[1]

The Union filed a grievance alleging the Agency violated Article 8, Section A(1) (Article 8) of the local agreement, when it "punished [the grievant] by not allowing her to work [overtime] for circumstances beyond her control," and caused the grievant to lose money.[2] As relevant here, Article 8 states: "Overtime will not be assigned as a reward or penalty."[3]

The parties did not stipulate an issue. The Arbitrator framed the issue as whether the Agency "'punish[ed]' the [g]rievant when it denied her overtime on a Saturday after she was absent from work on the preceding Friday."[4] The Arbitrator also framed two sub-issues: (1) "was the denial of the overtime a 'punishment' for missed work;" and (2) "[was] there an established past practice governing this [overtime] issue."[5]

On the first point, the Arbitrator found the Union presented "no evidence" to support its allegation that the Agency "punish[ed]" the grievant when it denied her overtime.[6]

On the second point, the Arbitrator determined the Agency demonstrated the denial was based on a "past practice of denying overtime during a weekend if the employee misses work immediately preceding the needed shift."[7] The Arbitrator found the Agency supported its past-practice assertion by submitting a copy of a prior arbitration award (the Sims award) with facts "nearly identical to the case at hand."[8] The Arbitrator determined that the Sims award – and the witness testimony described therein – demonstrated the Agency had "a long standing, unspoken rule" of denying weekend overtime if the requesting employee is absent for any reason on the preceding Friday.[9] Therefore, the Arbitrator found "the issue [of past practice] has been previously resolved in an identical arbitration."[10] Consequently, the Arbitrator found the Agency did not violate Article 8, and he denied the grievance.

On June 28, 2023, the Union filed exceptions to the award.[11] On July 31, the Agency filed an opposition to the Union's exceptions.

III. Preliminary Matter: The Agency's opposition is timely.

Under the Authority's Regulations, the time limit for filing an opposition to exceptions is thirty days after the date of service of the exceptions.[12] As relevant here, the date of service is the date the exceptions are transmitted

[1] Award at 2.
[2] Exceptions, Attach. (Appeal Support) at 1.
[3] *Id.* at 4.
[4] Award at 2.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* (citing Appeal Support at 11-17 (Sims Award)).
[9] *Id.*
[10] *Id.* at 3.
[11] All dates hereafter refer to 2023.
[12] 5 C.F.R. § 2425.3(b).

by email.[13] The Union filed its exceptions on June 28 using the Authority's eFiling system and asserted that it served the Agency with a copy of the exceptions by email.[14] Based on this assertion, the Agency's opposition would have been due no later than July 28. Because the Agency filed its opposition on July 31, the Authority issued an order directing the Agency to show cause why its opposition should not be dismissed as untimely.[15]

In a response to the order, the Agency asserted it was unaware the Union had filed exceptions until it received a notice from the Authority on July 6.[16] The Agency also stated that the Union did not serve the Agency with the exceptions via email until July 12.[17] To support this claim, the Agency provided a copy of an email exchange with the Union indicating the Union had mistakenly failed to serve the Agency on June 28 and, instead, served the Agency on July 12.[18] Based on the July 12 service date, the Agency's opposition was due August 11. Accordingly, we find the Agency timely filed its opposition on July 31.

IV. Analysis and Conclusions

A. The Union fails to demonstrate the award is contrary to an Agency regulation.

The Union argues the award is contrary to an Agency regulation.[19] To support its exception, the Union cites Article 8 and Articles 6 and 7 of the master agreement,[20] but does not cite any Agency regulations. Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground" listed in § 2425.6(a)-(c).[21] Consistent with § 2425.6(e)(1), because the Union failed to cite an Agency regulation with which the award purportedly conflicts, we deny this exception as unsupported.[22]

B. The Union does not demonstrate the award fails to draw its essence from the master agreement.

The Union argues the award fails to draw its essence from Article 7 of the master agreement (Article 7) because the Arbitrator impermissibly relied on the Sims award as precedent to deny the grievance.[23] Article 7 states: "[G]rievances on matters [such as overtime] will be arbitrated using the expedited procedure unless the parties mutually agree to [use] the regular arbitration procedure outlined in Section 7.01. . . . Awards rendered in this expedited procedure will have no precedential value."[24]

The Authority will find that an award fails to draw its essence from an 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.[25] 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.[26]

The Arbitrator found the Agency supported its past-practice assertion by submitting the Sims award, with facts "nearly identical to the case at hand."[27] As the Sims award was introduced as evidence in the hearing, the Union could have argued to the Arbitrator that he could not rely on it as precedential. The Union presented conflicting statements in its exceptions regarding whether it raised to the Arbitrator its argument that reliance on the Sims award violated Article 7.[28] Nevertheless, even assuming, without deciding, that the Union raised its

[13] *Id.* § 2429.27(b)(6). Although email service of arbitration exceptions is appropriate "only when the receiving party has agreed to be served by email," *id.*, there is no claim that the Agency did not agree to email service in this case.
[14] Exceptions at 8.
[15] Order to Show Cause (Order) at 1-2.
[16] Resp. to Order (Resp.) at 1.
[17] *Id.*
[18] Resp., Ex. 2 at 1.
[19] Exceptions at 4-5.
[20] *See id.*
[21] 5 C.F.R. § 2425.6(e)(1).
[22] *AFGE, Loc. 12*, 70 FLRA 582, 583 n.17 (2018) (denying as unsupported argument that award was contrary to an agency regulation where excepting party failed to identify any agency regulation).
[23] Exceptions at 4-5.
[24] Appeal Support at 7.
[25] *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)).
[26] 5 C.F.R. §§ 2425.4(c), 2429.5; *see 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)); *U.S. DHS, U.S. CBP*, 68 FLRA 253, 256 (2015) (finding the agency's argument contesting remedy barred because the union requested the remedy at the hearing and in its brief and the agency could have raised its argument to the arbitrator but did not do so).
[27] Award at 2 (citing Sims Award); *see* Opp'n at 5 (Agency asserting the "Union did not raise any issues regarding the Sims case" before the Arbitrator); *see also* Appeal Support at 11.
[28] To support its claim that the award is contrary to an Agency regulation, the Union asserted that it raised its Article 7 argument at the hearing. Exceptions at 5. However, in its essence exception, the Union stated that this argument was "not raised[;] this was derived from the decision." *Id.* at 6.

Article 7 argument to the Arbitrator,[29] the Union does not demonstrate, nor is it evident from the record, that the Sims award was issued as part of an *expedited* arbitration.[30] As such, the Union does not establish Article 7 applies to this dispute, and we deny this exception.[31]

V. Decision

We deny the Union's exceptions.

[29] *See, e.g.*, *Laborers Int'l Union of N. Am., Loc. 1776*, 73 FLRA 591, 593 n.30 (2023) (Member Kiko concurring on other grounds) (assuming, without deciding, that argument was before the Authority where it was unclear if argument raised at arbitration); *USDA, U.S. Forest Serv., Law Enf't & Investigations, Region 8*, 68 FLRA 90, 92 (2014) (same); *see also AFGE, Loc. 918*, 68 FLRA 113, 115 (2014) (assuming, without deciding, that excepting party raised essence argument before arbitrator where argument failed to show award was deficient).

[30] *See* Appeal Support at 11-17.

[31] *AFGE, Loc. 3917*, 72 FLRA 651, 654 (2022) (Chairman DuBester concurring) (denying essence exception where excepting party failed to show that contract provision applied to dispute).