73 FLRA No. 160

NATIONAL TREASURY EMPLOYEES UNION
(Union)

and

FEDERAL DEPOSIT INSURANCE CORPORATION
(Agency)

0-AR-5904

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DECISION

February 29, 2024

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

I. Statement of the Case

The parties modified their collective-bargaining agreement to expand telework availability through a program called the home-based option. Eight months later, the Agency sent a memorandum to all teleworking employees directing them to return to their official duty station at least once per pay period (the memo). The Union grieved, arguing the memo violated the new telework provision of the parties' agreement (Article 20). Arbitrator Roger P. Kaplan issued an award finding (1) the Union failed to demonstrate the Agency violated Article 20, and (2) the Union's interpretation of Article 20 conflicted with management rights under § 7106 of the Federal Service Labor-Management Relations Statute (the Statute).[1]

The Union filed exceptions alleging the award is based on several nonfacts and conflicts with Authority precedent concerning unfair labor practices (ULPs) and management rights. Because the nonfact exceptions do not establish the Arbitrator relied on any clearly erroneous facts but for which he would have reached a different result, we deny them. Further, the Union does not establish the Agency committed a ULP. Regarding the management-rights exception, the Arbitrator's management-rights analysis was one of two separate and independent grounds upon which he relied to deny the Union's grievance. Since the Union does not establish the Arbitrator's other rationale for denying the grievance is deficient, we do not consider the Union's management-rights exception.

II. Background and Arbitrator's Award

During the COVID-19 pandemic, the Agency assigned all employees to mandatory telework. Also during this time, the parties agreed to reopen negotiations on several provisions of their collective-bargaining agreement, including Article 20—the telework provision. As part of the renegotiation, the parties modified Article 20 by expanding a telework program called "the [h]ome[-b]ased option."[2]

Article 20 states that the Agency will identify positions "for which the work can be performed effectively from a remote location without the need for the employee to regularly report to the assigned office,"[3] and that those positions will be eligible for the home-based option. Although their official-duty stations would remain unchanged, home-based employees "will ordinarily perform their work responsibilities at their primary place of residence."[4] However, Article 20 also provides that a "manager/supervisor has the right to direct [home-based] employees to report" to the office "when necessary to meet mission, staffing and workload requirements."[5]

In August 2022, the Agency sent the memo to all employees, announcing the Agency was requiring all employees to report to their official duty station at least once per pay period. The Union filed a grievance claiming that, by issuing the memo, the Agency violated Article 20 and repudiated the parties' agreement in violation of § 7116 of the Statute.[6] The grievance went to arbitration, where the Arbitrator framed the issues as whether the Agency violated Article 20, or repudiated the parties' agreement, when it issued the memo.

At arbitration, the parties disputed how frequently—and under what circumstances—Article 20 permitted the Agency to require a home-based employee to report to the office. In evaluating the parties' competing interpretations, the Arbitrator found Article 20 "ambiguous."[7] The Arbitrator asserted that, as the grieving party, the Union had the "burden to prove its interpretation was the correct interpretation by [a] preponderance of the evidence."[8]

The Arbitrator observed that the Union interpreted Article 20 as prohibiting the Agency from

[1] 5 U.S.C. § 7106.
[2] Award at 4 (quoting Art. 20).
[3] *Id.* at 4 (quoting Art. 20, § 8(a)).
[4] *Id.* at 5 (quoting Art. 20, § 11(c)).
[5] *Id.* (quoting Art. 20, § 11(d)).
[6] 5 U.S.C. § 7116(a)(1), (5).
[7] Award at 37; *see also id.* at 31 (noting that, while the parties "eventually agreed on the language [of Article 20, they did] no[t] agree[] on what the language meant").
[8] *Id.* at 37.

"requiring employees to report to the office on a preset schedule, [such as] once a pay period[or] once a month."[9] He also noted that, while "[t]he Union did not offer a maximum number of times" management could direct employees to report, "the testimony of the Union witnesses indicated that four . . . times a year might" comply with Article 20.[10] Thus, he concluded the Union's interpretation of Article 20 "limit[s] when employees could be directed to come into the office to approximately four . . . times a year."[11]

As noted above, Article 20 provides that a "manager/supervisor has the right" to direct home-based employees to report to the office "when necessary" under certain circumstances.[12] According to the Arbitrator, Union witnesses testified that the threshold for requiring a home-based employee to report to the office is similar to the circumstances under which the Agency could cancel "previously approved annual[-]leave requests."[13] The Arbitrator concluded that, under this Union interpretation of Article 20, the Agency could direct a home-based employee to report to an office only when *the employee's supervisor* determines that not reporting would cause "a *severe impact* on the [Agency's] workload, staffing[,] or mission requirements."[14] The Arbitrator determined the Union's interpretation "limit[s] what level of management can direct employees to come into the office" by requiring that supervisors—rather than upper-level Agency officials—individually apply the "severe[-]impact" standard to each employee directed to report.[15]

Conversely, the Arbitrator found the Agency's interpretation of Article 20 contains "no frequency limitation" on its ability to direct employees to report.[16] According to the Agency, a home-based employee could be directed to report once per pay period under Article 20 because they still "would regularly be working from home nine . . . out of ten . . . workdays."[17] Moreover, the Agency claimed "the decision [to direct employees to report] could be made at any level" of the Agency based on mission, staffing, or workload, and without applying the Union's severe-impact standard.[18] The Arbitrator determined the Agency's interpretation of Article 20 provided Agency officials with "broad . . . but not . . . unfettered discretion" to direct employees to report to the office.[19]

After evaluating both parties' evidence, the Arbitrator found the Union "failed to carry [its] burden" of demonstrating that it had the "correct interpretation by [a] preponderance of the evidence."[20] Therefore, the Arbitrator rejected the Union's interpretation of Article 20.

The Arbitrator also provided an "[a]lternative" rationale for rejecting the Union's interpretation.[21] Relying on the Authority's decision in *National Treasury Employees Union* (*NTEU*),[22] the Arbitrator stated that provisions dictating the frequency of telework affect management's rights to direct employees and assign work under § 7106 of the Statute.[23] The Arbitrator acknowledged that the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacated that Authority decision. However, he asserted that *NTEU* "sets out the Authority's thinking on management rights as they pertain to telework."[24] Finding the Union's interpretation of Article 20 similar to the provision the Authority found unlawful in *NTEU*, the Arbitrator concluded the Authority would likely find the Union's interpretation conflicts with management's rights.

Based on the above, the Arbitrator concluded that the Agency neither violated Article 20, nor repudiated the parties' agreement, and he denied the Union's grievance.

The Union filed exceptions on July 5, 2023, and the Agency filed an opposition on August 3, 2023.

III. Analysis and Conclusions

A. The Union does not establish the award is based on nonfacts.

The Union alleges the award is based on nonfacts because the Arbitrator mischaracterized the Union's

[9] *Id.* at 27.
[10] *Id.*
[11] *Id.* at 29.
[12] *Id.* at 5 (quoting Art. 20, § 11(d)).
[13] *Id.* at 32.
[14] *Id.* at 27 (emphasis added).
[15] *Id.* at 30; *see also id.* at 27 ("The Union interprets [Article 20] as prohibiting executives and other upper[-]level management officials from directing employees to report to the office.").
[16] *Id.* at 18.
[17] *Id.* at 25.
[18] *Id.* at 19-20.
[19] *Id.*
[20] *Id.* at 33, 37.
[21] *Id.* at 30; *see also* Exceptions Br. at 31 (referring to the award's two discussion sections as "the Arbitrator's [a]lternative [h]olding[s]").
[22] 71 FLRA 703, 707 (2020) (Member DuBester dissenting in part), *decision vacated & remanded in part sub nom. NTEU v. FLRA*, 1 F.4th 1120, 1128 (D.C. Cir. 2021) (*FLRA*).
[23] 5 U.S.C. § 7106(a)(2)(A)-(B).
[24] Award at 29. Although the D.C. Circuit remanded *NTEU* to the Authority for further proceedings, *FLRA*, 1 F.4th at 1128, the parties subsequently settled their negotiability dispute.

interpretation of Article 20 in four ways.[25] 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.[26] 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.[27]

First, the Union argues the Arbitrator relied on a nonfact because the Union never claimed the standard for directing home-based employees to report to the office was the same as the standard for cancelling approved annual leave.[28] The Union claims it consistently argued the Agency could direct employees into the office if the Agency satisfies the "standard for *approving or denying* annual leave" under Article 22, Section 2 (Section 2).[29] According to the Union, the Arbitrator found the Union's interpretation applied the "standard for *cancelling* approved leave" in Article 22, Section 8 (Section 8).[30]

However, the Arbitrator relied on *Union witness testimony* that the threshold for requiring a home-based employee to report to the office is similar to the circumstances under which the Agency could cancel previously approved annual-leave requests.[31] To the extent the Union challenges the Arbitrator's decision to give weight to this testimony, that does not demonstrate the award is based on a nonfact.[32] In any event, the standards for denying annual leave under Section 2 and for cancelling approved annual leave under Section 8 are identical: both require the Agency to demonstrate the leave would result in a "severe impact" on the Agency's "workload, staffing, or mission requirements."[33] Thus, even if the Arbitrator erroneously found the Union relied on the Section 8 standard, the Union does not establish the Arbitrator would have reached a different result but for this alleged nonfact. For these reasons, we deny this exception.[34]

Second, the Union argues the Arbitrator erred in concluding the Union's interpretation of Article 20 "limit[s] what level of management can direct employees to come into the office."[35] According to the Union, any level of management may direct an employee to return to the office as long as the Agency official first conducts an "individualized assessment" of the "justification" for directing an employee to report based on workload, staffing, and mission requirements.[36]

At the same time, the Union *also* argues that upper-level Agency officials do not have sufficient knowledge to conduct this "individualized assessment."[37] The Union states that Article 20 "logically[] would require a supervisor's assessment" before the Agency could direct an employee to report to the office because direct supervisors have the best understanding of an employee's "work situation."[38] At arbitration, the Union claimed it would be "farcical" to interpret Article 20 as permitting upper-level officials to conduct this assessment.[39] Because the Union interprets Article 20 as "requir[ing] a supervisor's assessment,"[40] the Union does not demonstrate the Arbitrator erred in making the challenged finding. Consequently, we deny this exception.[41]

Third, the Union argues the Arbitrator erred in finding the Union's Article 20 interpretation "limit[s] when employees could be directed to come into the office to approximately four . . . times a year."[42] According to the Union, it does not interpret Article 20 as providing "an

[25] Exceptions Br. at 18.
[26] *NTEU, Chapter 46*, 73 FLRA 654, 655-56 (2023) (*Chapter 46*) (citing *AFGE, Loc. 4156*, 73 FLRA 588, 590 (2023)).
[27] *Id.* at 656 (citing *AFGE, Loc. 12*, 70 FLRA 582, 583 (2018)).
[28] Exceptions Br. at 22-23.
[29] *Id.* at 23.
[30] *Id.*
[31] Award at 32.
[32] *Chapter 46*, 73 FLRA at 656.
[33] *Compare* Opp'n, Attach. 2, Collective-Bargaining Agreement at 79 ("Any annual leave request will be approved unless the [Agency] can show that to approve the leave would severely impact the [Agency's] workload, staffing[,] or mission requirements."), *with id.* at 81 ("Annual leave, once approved, will not be rescinded unless the rescission is necessitated by a severe impact on the [Agency's] workload, staffing, or mission requirements.").
[34] *See AFGE, Loc. 1395*, 64 FLRA 622, 626 (2010) (denying nonfact exception where, even assuming arbitrator relied in part on an expired memorandum of understanding, the excepting party did not demonstrate arbitrator would have reached a different result but for this alleged error); *Bremerton Metal Trades Council, IAMAW*, 63 FLRA 336, 338-39 (2009) (denying nonfact exception alleging arbitrator misunderstood aspects of grievance where excepting party did not demonstrate how the alleged misunderstanding caused the arbitrator to reach a different result).
[35] Exceptions Br. at 21 (quoting Award at 30).
[36] *Id.* at 19, 21.
[37] *Id.*
[38] *Id.*
[39] Exceptions, Ex. H., Union's Post-Hr'g Br. (Union's Post-Hr'g Br.) at 24.
[40] Exceptions Br. at 21; *see also* Award at 17 (noting Union testimony that how the home-based option operated in different offices "was up to the supervisors").
[41] *See AFGE, Loc. 3369*, 72 FLRA 158, 159 (2021) (*Loc. 3369*) (denying nonfact exception where excepting party did not demonstrate arbitrator's factual findings were clearly erroneous); *AFGE, Loc. 2076*, 71 FLRA 1023, 1025 (2020) (*Loc. 2076*) (Member DuBester concurring) ("[I]n the absence of evidence demonstrating that the [a]rbitrator's conclusions are clearly erroneous," excepting party did not show award based on nonfact).
[42] Exceptions Br. at 18 (quoting Award at 29).

annual cap."[43] Instead, the Union claims Article 20 permits the Agency to direct employees to report whenever there is an individualized need for them to report.[44]

The Arbitrator found applying the individualized-need standard in the manner the Union contemplated would result in a meaningful limitation on the number of occasions the Agency could call employees into the office.[45] Although the Arbitrator acknowledged that "the Union did not offer a maximum number" of such occasions, he credited a Union witness's testimony that three or four times per year "might be allowable" under the Union's interpretation of Article 20.[46] This finding is consistent with the Union argument to the Arbitrator that "[s]ome people participating in the [h]ome[-]based [o]ption might need to report to the office several times a year to perform their work effectively, while others might need only report one time that year."[47]

Based on the evidence presented to him – including the testimony of the Union's own witnesses – the Arbitrator estimated the effect of the Union's interpretation of Article 20 on the Agency's operations.[48] The Union's disagreement with the Arbitrator's evaluation of the evidence in reaching this estimation does not establish the Arbitrator made a clearly erroneous factual finding. Consequently, we deny this exception.[49]

Fourth, the Union contends its Article 20 interpretation does not, as the Arbitrator concluded, "eliminat[e] the option of [requiring employees to report to the office on] a set pattern."[50] According to the Union, this characterization of its position is erroneous because the Union concedes "[t]here could be circumstances where an employee might need to report to the office in multiple consecutive pay period[s] . . . for some limited time."[51] The Union stresses that such an arrangement would be permissible under its interpretation of Article 20 as long as the reporting was tied to specific circumstantial need and only "for a limited time."[52] However, the Union does not explain how such an "ad hoc"[53] arrangement constitutes a set pattern of reporting. Further, the Union argued at arbitration, and maintains here,[54] that any reporting requirement must be, "by definition, irregular" to comply with Article 20.[55] Accordingly, the Union does not establish the Arbitrator relied on a clearly erroneous fact, and we deny this exception.[56]

B. The Union does not establish the Agency repudiated the parties' agreement.

The Union argues the award is contrary to law because the Arbitrator should have found the Agency repudiated the parties' agreement when it sent the memo to employees.[57] 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.[58] 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.[59] In resolving contrary-to-law exceptions, the Authority defers to the arbitrator's interpretation of the parties' agreement unless the award fails to draw its essence from the agreement.[60]

The Union's grievance alleged that the Agency repudiated the parties' agreement in violation of § 7116(a)(1) and (5) of the Statute. In resolving a grievance that alleges a ULP under § 7116 of the Statute, an arbitrator functions as a substitute for an Authority administrative law judge.[61] In a grievance alleging a ULP by an agency, the union bears the burden of proving the

[43] *Id.* at 19.
[44] *Id.*
[45] *See* Award at 29-30.
[46] *See id.* at 13 (noting a Union witness testified she was required to report three or four times per year before the memo), 27 ("The Union did not offer a maximum number of times that would be allowable, but the testimony of the Union witnesses indicated that four . . . times a year might be allowable.").
[47] Union's Post-Hr'g Br. at 9.
[48] *See* Award at 29-30.
[49] *See Chapter 46*, 73 FLRA at 656 (denying nonfact exception arguing arbitrator erred in not finding evidence sufficient because the excepting party "merely disagree[d] with the [a]rbitrator's evaluation of the evidence"); *Loc. 3369*, 72 FLRA at 159 (denying nonfact exception which merely challenged arbitrator's evaluation of the evidence).
[50] Exceptions Br. at 20.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 26.
[54] *Id.* (arguing Article 20 "created an arrangement under which [home-based] employees were based at home as a default, subject to *irregular* requirements to report to other work sites based on individualized, ad hoc operational needs" (emphasis omitted)).
[55] Union's Post-Hr'g Br. at 9.
[56] *See Loc. 3369*, 72 FLRA at 159 (denying nonfact exception where excepting party did not demonstrate that the arbitrator's factual findings were clearly erroneous); *Loc. 2076*, 71 FLRA at 1025 (same).
[57] Exceptions Br. at 25.
[58] *U.S. Dep't of the Army, Ariz. Dep't of Emergency & Mil. Affs., Ariz. Army Nat'l Guard*, 73 FLRA 617, 618 (2023) (citing *AFGE, Council 222*, 73 FLRA 54, 55 (2022)).
[59] *Id.*
[60] *Consumer Fin. Prot. Bureau*, 73 FLRA 670, 679 (2023).
[61] *U.S. DHS, U.S. CBP*, 64 FLRA 916, 920 (2010).

elements of the alleged ULP by a preponderance of the evidence.[62]

In determining whether a repudiation has occurred, the Authority first considers the nature and scope of the alleged breach of the agreement.[63] "[U]nless there is a breach of an agreement, there can be no repudiation in violation of the Statute."[64] The Arbitrator rejected the Union's interpretation of Article 20 and, consequently, found the Agency did not breach that article by sending the memo.[65] The Union does not argue the award fails to draw its essence from the parties' agreement. Therefore, in assessing whether the award is contrary to law, we defer to the Arbitrator's finding that the Agency did not breach the parties' agreement.[66] As there is no breach, there can be no repudiation.[67] Consequently, we deny this exception.[68]

C. The Union's management-rights exception does not demonstrate the award is deficient.

The Union argues the Arbitrator's management-rights analysis is contrary to law because the Arbitrator relied on *NTEU*.[69] The Authority has repeatedly held that when an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient before the Authority will set the award aside.[70]

The Arbitrator denied the Union's grievance on two "[a]lternative" grounds.[71] First, the Arbitrator found the Agency did not violate Article 20, because the Union did not carry its "burden to prove its interpretation was the correct interpretation by [a] preponderance of the evidence."[72] Second, relying on the Authority's reasoning in *NTEU*,[73] the Arbitrator found the Union's interpretation of Article 20 conflicted with management's rights under § 7106 of the Statute.[74]

As explained above, we find that none of the Union's exceptions demonstrate the Arbitrator's first rationale is deficient.[75] That rationale provides a sufficient basis for the Arbitrator's denial of the grievance. Thus, the award would stand regardless of whether the Arbitrator's second rationale for denying the grievance—including his reliance on *NTEU*—is deficient. Accordingly, it is unnecessary to consider the Union's management-rights exception, and we do not consider it.[76]

V. Decision

We deny the Union's exceptions.

[62] *Id.*
[63] *Dep't of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.*, 51 FLRA 858, 862 (1996).
[64] *Ass'n of Civilian Technicians, N.Y. State Council*, 61 FLRA 664, 666 n.4 (2005) (*ACT*); *see also NTEU*, 63 FLRA 70, 74 (2009) (*NTEU II*) (finding no repudiation where no breach of the agreement because a "necessary element of an unlawful repudiation is a clear and patent breach of an agreement").
[65] Award at 33 ("The [Union] had the burden of proof to establish that its interpretation was the correct interpretation . . . . I find that it failed to carry that burden."); *id.* at 37-38 (finding the Agency did not violate Article 20 or repudiate the parties' agreement).
[66] *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst.., Dublin, Cal.*, 71 FLRA 1172, 1176 n.46 (2020) (Member DuBester dissenting in part on other grounds) (applying arbitrator's interpretation of parties' agreement in resolving contrary-to-law exception because excepting party did not demonstrate award failed to draw its essence from agreement).
[67] *ACT*, 61 FLRA at 666 n.4.
[68] *See NTEU II*, 63 FLRA at 74 (rejecting repudiation argument where arbitrator found "there had been no breach" and excepting party did not demonstrate this finding failed to draw its essence from the parties' agreement).
[69] Exceptions Br. at 12.
[70] *Fraternal Ord. of Police, DC Lodge 1*, 73 FLRA 408, 412 (2023) (*Lodge*).
[71] Award at 30; *see also* Exceptions Br. at 31 (discussing "the Arbitrator's [a]lternative [h]olding[s]").
[72] Award at 37.
[73] *Id.* at 28 (citing *NTEU*, 71 FLRA at 707).
[74] *Id.* at 36.
[75] *See* section III.A. (denying exceptions arguing Arbitrator's characterization of Union's Article 20 interpretation was based on nonfacts); section III.B. (denying Union's repudiation argument because it did not successfully challenge the Arbitrator's finding that the Agency did not breach Article 20).
[76] *See Lodge*, 73 FLRA at 412 (declining to consider contrary-to-law exception where arbitrator based award on separate and independent grounds and excepting party challenged only one of those grounds); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst.., Englewood, Colo.*, 69 FLRA 474, 478-79 (2016) (declining to consider exception because the Authority was denying all exceptions challenging one of the arbitrator's separate and independent grounds for the award).

Chairman Grundmann, concurring:

I agree with the decision in all respects. I write separately simply to note that I was not a Member when the Authority issued *NTEU*[*] and, thus, I did not participate in that case. However, I agree that we need not resolve the Union's exception challenging the Arbitrator's reliance on *NTEU*. As such, I express no opinion on whether that case was rightly decided.

Therefore, I concur.

[*] 71 FLRA 703, 707 (2020) (Member DuBester dissenting in part), *decision vacated & remanded in part sub nom. NTEU v. FLRA*, 1 F.4th 1120, 1128 (D.C. Cir. 2021).