

73 FLRA No. 164

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
VICTORVILLE, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3969
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5894

—
DECISION

March 22, 2024
—

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

I. Statement of the Case

Arbitrator Gerald R. Burke issued an award finding the Agency erroneously denied nineteen overtime opportunities to a correctional officer (the grievant). The Agency filed exceptions to the award on nonfact and exceeded-authority grounds. Because the Agency does not demonstrate that the award is deficient, we deny the exceptions.

II. Background and Arbitrator's Award

The grievant has a medical condition that would put his health at increased risk if he were exposed to COVID-19. Accordingly, the Agency assigned the grievant to a patrol assignment as a temporary job modification. In that assignment, the grievant retained his eligibility to work overtime hours and worked posts patrolling the perimeter of each institution (perimeter patrol) and patrolling the entire complex between the institutions (complex patrol).¹ Beginning in January 2022,

the Union alerted management to its concern that the Agency was improperly depriving the grievant of opportunities to work overtime in his modified assignment.² When attempts at informal resolution failed, the Union filed a grievance on February 16, 2022, alleging that the Agency “regularly” skipped the grievant when offering overtime assignments.³ In its grievance, the Union alleged various specific “[d]ate(s) of violation(s)” in January and February 2022, and “[c]ontinuous and ongoing” violations.⁴ In an April 2022 memorandum to the Agency invoking arbitration, the Union reiterated that it was alleging violations of law, Agency policy, and the parties’ agreement, occurring on the previously identified dates in January and February 2022 and “[c]ontinuous and ongoing.”⁵

In February 2023, the grievance advanced to arbitration, where the parties did not stipulate an issue. The Arbitrator framed the issues as: “Did the Agency fail to offer overtime as alleged in [the grievance]? If so, what is the appropriate remedy?”⁶

At arbitration, the Union alleged that the Agency erroneously deprived the grievant of multiple overtime opportunities,⁷ many of which took place after the Union filed the initial grievance (post-filing violations). The Agency argued the Union could not allege post-filing violations and that the scope of the grievance was limited to the specific dates expressly referenced on the grievance form. For support, the Agency cited Article 32 of the parties’ agreement (Article 32), which provides, in relevant part, that “the issues, the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement.”⁸ The Arbitrator rejected the Agency’s argument, finding the grievance “specified that the Union was raising not only the specific dates in the grievance but also the ‘ongoing’ violations.”⁹ On this basis, the Arbitrator considered both the dates referenced in the grievance and the alleged post-filing violations.

The Arbitrator considered various Union exhibits, including overtime logs and the grievant’s cell-phone records, in order to determine whether the Agency offered the grievant overtime assignments for which he was qualified. In summarizing the grievance’s allegations, the Arbitrator noted the Union’s accusation that managers had justified skipping the grievant for overtime assignments by erroneously claiming the

¹ See Award at 2-3 (referencing Union Ex. 2); see also Opp’n, Union Ex. 2 (listing grievant’s daily assignments as “PRM patrol #1”, “PRM patrol #2”, and “complex patrol”).

² Opp’n, Joint Ex. 2 (Complete Grievance) at 1.

³ *Id.* at 4; Exceptions, Attach. D, Grievance (Grievance Form) at 1; see Award at 5.

⁴ Grievance Form at 1.

⁵ Complete Grievance at 5-6; see also Award at 6 (discussing memorandum).

⁶ Award at 1.

⁷ *Id.* at 2.

⁸ Exceptions, Attach. C, Parties’ Collective-Bargaining Agreement (CBA) at 75.

⁹ Award at 5.

grievant was “not qualified to work perimeter patrols.”¹⁰ Specifically, the grievance alleged that managers were “fraudulently documenting that [the grievant] is not qualified to work perimeter patrols even though this is his daily post.”¹¹

Based on discrepancies between the dates on which the Agency alleged it offered overtime to the grievant and the grievant’s cell-phone records, the Arbitrator concluded the Agency had not offered overtime on all of the dates it claimed. The Arbitrator also found that on two instances, the Agency erroneously failed to offer the grievant overtime based on nonexistent shift conflicts.

Upon concluding the grievant was “not offered and should have been offered overtime assignments,”¹² the Arbitrator sustained the grievance, and awarded backpay for nineteen overtime assignments between the dates of January 15, 2022 and February 18, 2023.

On June 7, 2023, the Agency filed exceptions to the award. On July 6, 2023, the Union filed an opposition to the Agency’s exceptions.

III. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency argues the award is based on a nonfact because the Arbitrator misstated the Agency’s arguments.¹³ 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.¹⁴ Arguments based on a misunderstanding of an award do not provide a basis for finding an award deficient on nonfact grounds.¹⁵

The Agency contends the Arbitrator awarded the grievant overtime for January 15, 2022, based on his

rejection of a purported Agency argument that the grievant “was not qualified to work perimeter patrols.”¹⁶ According to the Agency, its actual argument was that the grievant was permitted to work perimeter-patrol assignments, but no such assignments were available on that date.¹⁷

The Arbitrator accurately recounted the Agency’s position that it had “placed [the grievant] in perimeter[-]patrol” assignments as a job modification and he was “not deprived of perimeter[-]patrol overtime assignments.”¹⁸ The Arbitrator made the challenged statement when discussing the grievance’s allegations.¹⁹ Specifically, the Arbitrator was referencing the grievance’s accusation that managers had falsified overtime logs by stating the grievant was “not qualified to work perimeter patrols.”²⁰ Thus, when the Arbitrator made the challenged statement, he was summarizing a grievance allegation, not misrepresenting an Agency argument. Because the Agency’s nonfact argument is based on a misunderstanding of the award, it does not establish that the award is deficient.²¹

We deny the Agency’s nonfact exception.

B. The Agency does not demonstrate that the Arbitrator exceeded his authority.

The Agency argues the Arbitrator exceeded his authority.²² Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.²³ Where the parties do not stipulate the issue for resolution, arbitrators may formulate the issue on the basis of the subject matter before them, and the Authority accords substantial deference to

¹⁰ *Id.* at 6 (stating that “[t]he agency argued that the applicant was not qualified to work perimeter patrols but the record clearly shows that he was qualified and the agency acknowledged this” in a paragraph summarizing grievance’s allegations).

¹¹ Complete Grievance at 4.

¹² Award at 7.

¹³ Exceptions Br. at 12-15.

¹⁴ *AFGE, Loc. 3601*, 73 FLRA 515, 517 (2023) (citing *U.S. DHS, U.S. CBP*, 71 FLRA 243, 245 (2019) (Member Abbott concurring on other grounds)).

¹⁵ *Bremerton Metal Trades Council*, 73 FLRA 212, 213 (2022) (*Bremerton*) (citation omitted).

¹⁶ Exceptions Br. at 13 (quoting Award at 6) (emphasis omitted).

¹⁷ *Id.* at 13-14.

¹⁸ Award at 2 (describing Agency’s position); see also *id.* at 5 (finding Agency placed grievant in perimeter-patrol assignments).

¹⁹ *Id.* at 6 (discussing grievance); see Complete Grievance at 1.

²⁰ Complete Grievance at 1.

²¹ *Bremerton*, 73 FLRA at 213; *AFGE, Loc. 3601*, 73 FLRA 515, 518 (2023) (denying nonfact exception based on a misunderstanding of the award (citing *AFGE, Council of Prison Locs. #33, Loc. 0922*, 69 FLRA 351, 353 (2016))); see also *AFGE, Loc. 1395*, 64 FLRA 622, 626 (2010) (denying nonfact exception based on argument the arbitrator had misstated the excepting party’s position where arbitrator correctly stated position (citing *NFFE, Loc. 1636*, 45 FLRA 1045, 1047-48 (1992))).

²² Exceptions Br. at 5-12.

²³ *USDA, Food Safety & Inspection Serv.*, 73 FLRA 683, 684 (2023) (*USDA*) (citing *NFFE, Loc. 1998*, 73 FLRA 143, 144 (2022); *U.S. Dep’t of VA, Montgomery Reg’l Off., Montgomery, Ala.*, 65 FLRA 487, 490 (2011)).

that formulation.²⁴ The Authority has held that arbitrators do not exceed their authority where the award is directly responsive to the formulated issues.²⁵ In formulating and resolving the issues before them, arbitrators may rely on the arguments that the parties raise in the proceeding.²⁶ Additionally, in assessing whether arbitrators have exceeded their authority, the Authority grants arbitrators broad discretion to fashion remedies that they consider appropriate.²⁷

The Agency contends the Arbitrator framed the issues before him to limit the dates of liability to the specific dates listed in the grievance,²⁸ and went beyond the framed issues when he addressed the alleged post-filing violations.²⁹ The Agency also contends that, by considering those allegations, the Arbitrator modified the grievance's terms³⁰ and "disregard[ed]" limitations on his authority imposed by Article 32.³¹ As noted above, Article 32 requires "mutual agreement" to modify the "issues, the alleged violations, and the remedy requested in the written grievance."³² The Agency argues it did not agree to modify the grievance to include the alleged post-filing violations.³³ The Agency also cites another provision in Article 32, which states that the Arbitrator "shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of . . . [the parties' a]greement."³⁴

Further, the Agency argues the Arbitrator exceeded his authority by finding post-filing violations because the Union did not cite a contract provision to support such claims.³⁵ The Agency asserts the parties' agreement is "void of any language" permitting the Arbitrator to find ongoing post-filing violations because

there was only a "single alleged grievable event" on January 15, 2022.³⁶

In relevant part, the Arbitrator framed the issue as whether the Agency failed to offer overtime "as alleged in [the grievance]."³⁷ As the Agency acknowledges, the grievance alleged the Agency denied the grievant overtime opportunities on specific dates *and* on a "[c]ontinuous and ongoing" basis.³⁸ The Agency attempts to diminish the importance of that grievance wording by asserting that "the continuous and ongoing language is boilerplate and is language that is typically included in all the Union's grievances."³⁹ However, the Agency does not explain why the Union's frequent use of these terms would mean that the grievance did *not* allege ongoing violations for purposes of Article 32.

As the written grievance contains an allegation of ongoing violations, the Arbitrator did not modify the issues presented in the grievance when he considered evidence of post-filing violations. Therefore, the Agency does not demonstrate the Arbitrator disregarded any limitations under Article 32, or resolved issues falling outside the scope of the framed issues.⁴⁰ Further, the Agency does not cite any limitation on the Arbitrator's authority to consider or find post-filing violations.⁴¹ For

²⁴ *Id.* at 684-85 (citing *U.S. Dep't of the Navy, Naval Med. Ctr. Camp Lejeune, Jacksonville, N.C.*, 73 FLRA 137, 141 (2022) (*Navy*)); see also *AFGE, Loc. 522*, 66 FLRA 560, 562 (2012) ("where there is no stipulation, that an arbitrator's formulation of an issue differs from the issues alleged in the grievance does not provide a basis for finding that the arbitrator exceeded his or her authority" (citing *AFGE, Loc. 1547*, 59 FLRA 149, 150-51 (2003))).

²⁵ *USDA*, 73 FLRA at 685 (citing *Navy*, 73 FLRA at 141).

²⁶ *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 68 FLRA 960, 966 (2015) (*BOP Guaynabo*) ("The law is clear . . . that, in formulating and resolving the issues before them, arbitrators may rely on the arguments that the parties raise in the proceeding" (citing *U.S. Dep't of HHS, SSA, Off. of Hearings & Appeals*, 48 FLRA 833, 838 (1993))).

²⁷ *USDA*, 73 FLRA at 685 (citing *Navy*, 73 FLRA at 141).

²⁸ Exceptions Br. at 6-7.

²⁹ *Id.* at 9-10.

³⁰ *Id.* at 6.

³¹ *Id.* at 7.

³² CBA at 75.

³³ Exceptions Br. at 7.

³⁴ *Id.* at 8 (quoting CBA at 77).

³⁵ *Id.* at 10-11.

³⁶ *Id.* at 11-12.

³⁷ Award at 1.

³⁸ Grievance Form at 1; Exceptions Br. at 7 n.2.

³⁹ Exceptions Br. at 7 n.2.

⁴⁰ See *USDA*, 73 FLRA at 684-85 (arbitrator did not exceed authority in framing issues to include matter raised in grievance denial); see, e.g., *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Lexington, Ky.*, 68 FLRA 932, 942 (2015) (Member Pizzella concurring in part, dissenting in part on other grounds) (rejecting exceeded-authority exception where parties did not stipulate to issue and arbitrator determined grievance encompassed posts not specifically named in the grievance).

⁴¹ See *SSA, Off. of Hearings Operations*, 71 FLRA 589, 590 (2020) (Member DuBester dissenting in part on other grounds) (denying exceeded-authority exception where excepting party "d[id] not identify an express contractual limitation on the [a]rbitrator's authority"); *U.S. DHS, U.S. CBP*, 66 FLRA 838, 844 (2012) (Member DuBester dissenting in part on other grounds) (rejecting claim that "[a]rbitrator disregarded specific limitations on his authority" by considering claims beyond a specific date because excepting party neither "cited any such express limitations" nor "established that the [a]rbitrator disregarded such limitations").

these reasons, the Agency does not demonstrate the Arbitrator exceeded his authority in these respects.⁴²

The Agency also asserts the Arbitrator exceeded his authority by awarding backpay for overtime on January 19, 2022, even though any claims regarding that date were “withdrawn” by the Union.⁴³ To support this assertion, the Agency cites certain pages in the transcript and Union Exhibit 3.⁴⁴ The cited documents pertain to overtime availability for *perimeter-patrol* overtime assignments.⁴⁵ The record indicates the Union withdrew many of its claims regarding the *perimeter-patrol* overtime assignments listed in Union Exhibit 3.⁴⁶

However, in a separate exhibit, the Union presented evidence regarding *complex-patrol* overtime assignments. As relevant here, that evidence indicated that on January 19, 2022, a complex-patrol overtime assignment was available and the Agency skipped the grievant based on a “shift conflict.”⁴⁷ The Union provided evidence that the grievant was off work that day, so there was no shift conflict.⁴⁸ The grievant also testified he was not offered a complex-patrol overtime assignment that day and would have worked the shift if given the opportunity.⁴⁹ Therefore, the record demonstrates that, even after the Union withdrew its claim regarding any January 19, 2022 perimeter-patrol overtime shift listed in Union Exhibit 3, an overtime assignment on that date was still before the Arbitrator. The Agency provides no basis for finding the Arbitrator exceeded his authority by awarding overtime for that date.⁵⁰

We deny the Agency’s exceeded-authority exception.

IV. Decision

We deny the Agency’s exceptions.

⁴² *BOP Guaynabo*, 68 FLRA at 966-67 (where grievance alleged the agency “continue[d] to violate” prior awards remedying sexual harassment and framed issues included “how [the agency] ha[d] dealt with issues of sexual harassment,” arbitrator did not exceed authority by addressing agency’s “ten[-]year record . . . related to sexual harassment” based on arbitration testimony); see also *NTEU*, 73 FLRA 431, 434 (2023) (denying exceeded-authority exception where arbitrator’s resolution of an issue “flow[ed] from, and [was] directly responsive to” the framed issue (citing *NAIL, Loc. 10*, 71 FLRA 513, 515 (2020))). We note the Agency has not alleged that any claims in the grievance or addressed by the Arbitrator were untimely filed under the parties’ agreement, and does not challenge the award as failing to draw its essence from the parties’ agreement.

⁴³ Exceptions Br. at 10.

⁴⁴ *Id.*

⁴⁵ Exceptions, Attach. B, Tr. (Tr.) at 89-91.

⁴⁶ *Id.* at 91 (indicating the shifts at issue in Union Exhibit 3 are limited to those marked with an asterisk); see Exceptions, Attach. E, Union Ex. 3 at 1-4 (no perimeter-patrol overtime assignments marked with an asterisk are dated January 19, 2022).

⁴⁷ Opp’n at 3-5, 8; Opp’n, Union Ex. 5 at 2.

⁴⁸ Tr. at 60.

⁴⁹ *Id.*

⁵⁰ *USDA*, 73 FLRA at 685 (citing *Navy*, 73 FLRA at 141-42).