

64 FLRA No. 32

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL R4-45
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE COMMISSARY AGENCY
OCEANA, VIRGINIA
(Agency)
0-AR-4302

—
DECISION

November 2, 2009

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Before the Authority: Carol Waller Pope, Chairman
and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator Lewis R. Amis, filed by the Union under § 7122 (a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the exception.

The grievant had a documented medical condition that qualified her for light duty work. The Arbitrator found that the Agency did not violate the parties' collective bargaining agreement (CBA) by placing the grievant on unpaid leave when no light duty work was available. For the reasons discussed below, we deny the Union's exception.

II. Background and Arbitrator's Award

The grievance alleged that the Agency violated the CBA by failing to give the grievant an available light duty work assignment and placing her on unpaid leave. When the grievance was not resolved, it was submitted to arbitration. The arbitration hearing was not recorded.

The grievant is employed by the Agency as a cashier. The grievant provided the Agency with periodic medical assessments of her medical condition. Award at 2. The assessments indicated that the grievant should limit the time she worked in a standing position. *Id.*

Pursuant to Article 25, Section 9 of the CBA¹, the Agency had assigned the grievant light-duty work when it was available.

On the day the dispute arose, the grievant was ordered to operate the cash register. This assignment required prolonged standing. *Id.* When the grievant experienced leg pain and attempted to alleviate it by sitting down on the job, the supervisor on duty removed her from the register. *Id.* at 2-3. At that point, the grievant requested light duty work. However, no light duty work was available. *Id.* at 6. Therefore, the supervisor placed the grievant on unpaid leave for medical reasons, through the next 37.25 hours of her regular work schedule, until light duty work was again available. *Id.* at 3.²

The Arbitrator ruled that under Article 25, Section 9, if light duty work was available, the supervisor could not reasonably deny the grievant's light duty work request. *Id.* at 6. The Arbitrator credited the supervisor's testimony that no light duty work was available. Further, the Arbitrator determined that the Union offered only a "bare assertion" to the contrary. *Id.* at 4. Therefore, the Arbitrator found that the supervisor denied the grievant's light duty work request consistent with the CBA.

III. Positions of the Parties**A. Union's Exception**

The Union contends that the Award is based on a nonfact. Exception at 1. It maintains that the grievant's supervisor testified at the hearing that light duty work was available during the period that the grievant was forced to take unpaid leave. The Union alleges that the Arbitrator misconstrued this testimony when he found that no light duty work was available. *Id.* at 4.

In support, the Union submits the affidavits of the grievant and the local Union president. Both were present at the hearing, and both state in their affidavits that they heard the supervisor testify that light duty work was available. Exception at Exhibits D, E. The Union asserts that the grievant satisfied all other conditions for light duty under Article 25, Section 9. There-

1. The relevant portion of Section 9 provides that:

Section 9: Employees unable to perform their assigned tasks due to injury or illness . . . may request light duty . . . a. The Employer agrees to consider assigning the injured employee to light duty, when . . . such work is available.

2. The supervisor placed the grievant on unpaid leave because the grievant did not have any annual or sick leave. *Id.* at 3.

fore, the Union argues that but for the Arbitrator misconstruing the supervisor's testimony, the Arbitrator would have reached a different result.

B. Agency's Opposition

The Agency contends that the award is not deficient. It argues that the award accurately reflects the supervisor's testimony that no light duty work was available. In support, the Agency submits the affidavit of the supervisor stating that she testified at the arbitration hearing that no light duty work was available. Opposition to Exception, Tab 1. The Agency characterizes the grievant's and the Union president's affidavits as hearsay that should not be accorded more weight than the "unbiased opinion" of the Arbitrator and direct testimony of the supervisor. In addition, the Agency argues that the Union presented no evidence beyond a "bare assertion" that light duty work was available. *Id.* at 3-4.

IV. Analysis and Conclusion

The Union's exception does not establish that the Arbitrator's award is based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). Although the finding that no light duty work was available appears to be such a central fact, the Union fails to establish that it is clearly erroneous. The Union bases its claim on the affidavits of the grievant and the local Union president, both present at the hearing, stating that they heard the supervisor say that light duty work was available. However, these affidavits do not demonstrate that the Arbitrator's contrary finding was clearly erroneous. At most, the affidavits submitted by the Union establish that the availability of light duty work is merely a disputed fact.

Moreover, the Union's nonfact claim is rejected because the issue of light duty work availability was disputed at the arbitration hearing. The Authority will not find that an award relies on a nonfact based simply on the Arbitrator's allegedly erroneous determination of any factual matter that the parties disputed at arbitration. *Id.* In other words, an exception is not a vehicle for relitigating a matter disputed before the Arbitrator. In the instant matter, it is clear that the parties disputed the availability of light duty work during the arbitration hearing. Therefore, the Union's argument does not provide any basis for finding the award deficient.

Finally, the Union's nonfact exception disputes the Arbitrator's evaluation of the supervisor's testimony regarding light duty work availability. The Authority has long held that disagreement with an arbitrator's evaluation of evidence and the weight to be accorded such evidence does not provide any basis for finding an award deficient. *AFGE, Local 3295*, 51 FLRA 27, 32 (1995). Here, the Union simply disagrees with the Arbitrator's evaluation of the supervisor's testimony to find that no light duty work was available.

V. Decision

Accordingly, the exception provides no basis for finding the award deficient based on nonfact, and we deny this exception.