64 FLRA No. 46

SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 220
(Union)

0-AR-4248
0-AR-4253

DECISION

December 1, 2009

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 exceptions to an award of Arbitrator Laurence M. Evans filed by both parties under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. Each party filed an opposition to the other's exceptions, and the Agency filed a motion to consolidate the cases. [1]

The grievance alleges that the Agency violated § 7116(a)(1) and (5) of the Statute and the parties' national agreement by unilaterally discontinuing the practice of permitting Teleservice Center (TSC) employees to work pre-shift and Saturday credit hours. The Arbitrator sustained the grievance in part and denied it in part.

For the following reasons, we dismiss the Union's exceptions as untimely, and we deny the Agency's exceptions.

II. Preliminary Issue

Under § 7122(b) of the Statute, the time limit for filing an exception to an arbitration award is 30 days "beginning on the date the award is served on the [filing] party[.]" The time limit may not be extended or waived by the Authority. 5 C.F.R. § 2429.23(d). *Accord U.S. Info. Agency*, 49 FLRA 869, 871-73 (1994).

The award is dated May 14, 2007. [2] The parties agree that the award was served by e-mail on May 13, and then by regular mail on May 14. [3] Agency Opp'n at 3; Union Opp'n at 2. On June 11, the Agency filed its exceptions and, on June 18, the Union filed its exceptions.

The Agency contends that the Union's exceptions are not timely because they were not filed within 30 days after the e-mail service on May 13, 2007. According to the Agency, as service was by e-mail, the parties are not entitled to five additional days for mailing. Agency Opp'n at 4. The Union argues that its exceptions are timely based on *U.S. Dep't of the Treasury, IRS, Washington, D.C.*, 60 FLRA 966, 967 n.2 (2005) (*IRS*), where the Authority held that e-mail is not an authorized method of service under 5 C.F.R. § 2429.27(b). Based on *IRS*, the Union argues that because its exceptions were filed within 35 days after the award was served by regular mail, the exceptions were timely filed. Union Opp'n at 4.

In *SSA Headquarters, Woodlawn, Md.*, 63 FLRA 302, 303-04 (2009), the Authority overruled *IRS* and held that § 2429.27(b) addresses only service by a "party" and not service by an arbitrator on parties. [4] The Authority held that, absent an agreement by the parties, determining the method of service of an award is the responsibility of the arbitrator. *Id.* at 303. The Authority also held that the date of service by e-mail is the date of transmission of the e-mail. *Id.* at 306.

In this case, there is no contention that the parties agreed on a method of service of the award. There also is no contention that the Union's exceptions were filed within 30 days of the date of transmission of the e-mail by which the award was served. As such, we dismiss the Union's exceptions as untimely.

1. Although the exceptions were inadvertently docketed with different numbers, there is no dispute that they concern the same award. As such, and as the Agency's motion is unopposed, we grant the motion to consolidate.

2. All dates in this section are in 2007.

3. The Arbitrator also issued a second version of the award, containing minor corrections to the first version of the award. There is no contention that the corrected award was served in a manner or on a date different from the first version of the award.

4. Under the Authority's regulations, an arbitrator is not a "party." 5 C.F.R. § 2421.11.

III. Background and Arbitrator's Award

Under the parties' previous agreement, Agency employees, including TSC employees, generally were entitled to work credit hours. [5] Award at 2. In addition, for many years, there was an Agency-wide practice of permitting employees to earn pre-shift credit hours whether or not those hours were within an employees' flexible arrival band. [6]

Before negotiations for a new agreement began, the Agency decided to discontinue the practice of permitting TSC employees and other employees to work pre-shift credit hours, and to discontinue Saturday credit hours for TSC employees who were telephone service representatives (TSRs). *Id*. at 7. The Agency based its decision on its interpretation of the Federal Employees Flexible and Compressed Work Schedules Act of 1982 (the Act) as prohibiting these practices. *Id*. at 4. The Agency informed the Union that it would permit the practices to continue while the national agreement was still in effect but would discontinue them when the agreement expired. *Id*. at 5. During subsequent negotiations, the parties agreed on provisions concerning the impact of the Agency's decision, but did not agree to any provisions for TSC employees. *Id*. at 6.

Subsequently, the Union filed a grievance, which was submitted to arbitration. As the parties did not stipulate the issues, the Arbitrator framed them as follows:

> 1. Whether the Agency's past practice of permitting TSC employees to work pre-shift credit hours was illegal under 5 U.S.C. § 6121(4).
>
> 2. Whether the Agency's past practice of permitting TSC employees to work credit hours before and/or after their flexible schedules' flexible band began or ended was illegal under 5 U.S.C. § 6121(4).
>
> 3. Whether, if the above practices were illegal, the Agency satisfied its contractual and statutory duty to bargain with the Union over the impact and implementation of its decision to discontinue the stated practices.
>
> 4. Whether, if the above practices were legal, the Agency satisfied its contractual and statutory duty to bargain with the Union over the substance of its decision to discontinue the stated practices.
>
> 5. Whether the Agency violated the national agreement and 5 U.S.C. § 7116(a)(1) and (5) of the Statute when it prohibited TSRs from working credit hours on Saturdays.
>
> 6. To the extent that the Agency violated the national agreement and/or 5 U.S.C. § 7116(a)(1) and (5), what the appropriate remedy would be.

Id. at 15-16. As discussed in more detail below, the Arbitrator sustained the Union's grievance in part and denied it in part. *Id*. at 16.

As for pre-shift credit hours, the Arbitrator rejected the Agency's claim that the definition of credit hours in § 6121(4) as hours "in excess of an employee's basic work requirement" covers only hours "after" the employee's shift ends. *Id*. He also found that there was a binding and enforceable past practice of TSC employees working pre-shift credit hours. *Id*. at 17. Accordingly, the Arbitrator found that the practice of permitting pre-shift credit hours was legal and could not be discontinued without substantive bargaining. Id. at 19.

However, the Arbitrator determined §§ 6121(4) and 6122 prohibit employees from working credit hours before and after their flexible bands set forth in Article 10, Appendix B, Section 5.D. of the parties' agreement. [7] *Id*. at 17-19. The Arbitrator noted, in this regard, that the Act defines credit hours as being within "a flexible schedule established under section 6122." *Id*. at 17. Accordingly, the Arbitrator found that employees may work credit hours only within their flexible bands and that the Agency could lawfully discontinue — subject to

5. Under 5 U.S.C. § 6121(4), "credit hours" are defined as "any hours, within a flexible schedule . . . which are in excess of an employee's basic work requirement and which the employee elects to work so as to vary the length of a workweek or workday." The definition of "credit hours" in the parties' agreement is substantively the same. *See* Award at 3.

6. For example, an employee scheduled to begin an eight-hour day at 9 a.m. may have a one-hour flexible arrival band beginning at 8 a.m. If that employee worked within that band, then he or she would earn one credit hour between 8 a.m. and 9 a.m. Under the alleged past practice, that employee was able to start work earlier than 8 a.m. and earn additional credit hours. Award at 4.

7. Article 10, Appendix B, Section 5.D. provides, in pertinent part:

> FLEXIBLE BANDS will be as follows except in the first and last shifts in the Mega Centers.
>
> 1. Morning Flexible Band: Begins forty five (45) minutes before the normal start time and ends forty five (45) minutes after the normal start time. Afternoon Flexible Band: Begins forty five (45) minutes before the normal quitting time and ends forty five (45) minutes after the normal quitting time. . . .

Union's Exceptions, Attachment 6.

impact and implementation bargaining — the practice of allowing credit hours not within those bands. *Id.* at 19.

According to the Arbitrator, the Agency fulfilled its obligation to bargain over the impact and implementation of its decision to terminate the practice of permitting employees to earn credit hours outside their flexible bands. *Id.* at 20. However, the Arbitrator concluded that the Agency did not fulfill its obligation, under § 7116(a)(1) and (5) of the Statute and Article 1, Section 2 of the parties' agreement, [8] to bargain over the substance of its decision to discontinue the practice of working credit hours within flexible bands. *Id.* at 19-20. In this regard, the Arbitrator noted that the Agency's "position throughout . . . negotiations was that the practice . . .was illegal." *Id.* at 19. As a result, according to the Arbitrator, the "parties never engaged in" or "came close to" substantive bargaining. *Id.*

As for Saturday credit hours, the Arbitrator found that a memorandum of understanding (MOU) prohibits TSRs from earning Saturday credit hours and that the Union failed to establish that the Agency acquiesced in a contrary practice. *Id.* at 21-22. Therefore, the Arbitrator concluded that the Agency did not violate the parties' agreement or the Statute when it prohibited TSRs from working Saturday credit hours.

To remedy the Agency's violation with regard to credit hours earned within flexible bands, the Arbitrator ordered status quo ante relief. *Id.* at 22-23. He also ordered that affected employees be made whole. *Id.* at 23. In this regard, the Arbitrator made a specific finding that the Agency's violation directly resulted in the loss of credit hours for certain TSC employees, who "but for" the Agency's action would have worked pre-shift credit hours. *Id.* n.22.

IV. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is deficient because it is contrary to law and fails to draw its essence from the national agreement.

The Agency asserts that, despite its position that pre-shift credit hours (whether or not within flexible bands) are not permitted under § 6121(4) [9], it engaged in "substantive negotiations" over its decision to prohibit such credit hours. Agency's Exceptions at 10. The Agency asserts that because the parties agreed to provisions covering all but "a very small portion of" the bargaining unit, the Agency fulfilled its bargaining obligations. *Id.* at 15-16. In this regard, the Agency argues that the award is contrary to § 7114(a)(1) [10] of the Statute in that, when the Agency and the Union bargained over pre-shift credit hours, they bargained as to all unit employees. *Id.* The Agency also asserts that the Arbitrator erred when he found that the Agency has a contractual duty to bargain that is separate from its statutory duty. *Id.* at 16.

According to the Agency, the award also is deficient because it is contrary to the Back Pay Act, 5 U.S.C. § 5596. *Id.* at 20-22. In this regard, the Agency claims that, as it did not violate the Statute or the parties' agreement, it did not commit an "unjustified or unwarranted personnel action." *Id.* at 20. In the alternative, the Agency contends that the Arbitrator erred in finding that "but for" the Agency's discontinuation of pre-shift credit hours, TSC employees would not have lost credit hours. *Id.* at 21. According to the Agency, although the Arbitrator "use[d] the magic 'but for' language, he fail[ed] to provide any real findings." *Id.* Further, the Agency contends that, to the extent the remedy results in employees accumulating more than 24 credit hours for carryover from one pay period to another, the award violates 5 U.S.C. § 6126. *Id.* at 22.

The Agency also asserts that the award fails to draw its essence from the parties' agreement. *Id.* at 23-24. The Agency claims, in this regard, that "[t]he Arbitrator's finding that the Agency did not bargain over a small part of the unit does not meet the essence test" because the parties "came to the table" to bargain "for the whole bargaining unit." *Id.* The Agency argues, in this regard, that the award is contrary to the Recognition and Coverage article [11] of the agreement, which recognizes that when the Union negotiates, it does so for all unit employees. *Id.* at 23-24.

B. Union's Opposition

The Union contends that the Arbitrator's finding that the Agency failed to bargain over the substance of

8. Article 1, Section 2 incorporates § 7116(a). *See* Agency Exceptions at 16.

9. The Agency no longer disputes that § 6121(4) permits pre-shift credit hours. Exceptions at 8 n.5.

10. Section 7114(a)(1) provides, in pertinent part, that "A labor organization . . . accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, *all employees in the unit*." (Emphasis added).

11. This article was not made part of the record.

its discontinuation of pre-shift credit hours within flexible bands is not contrary to the Statute. Union Opp'n at 8. The Union also contends that, as the Arbitrator concluded that the Agency violated the Statute, it is irrelevant whether he erred in finding that the Agency also violated a separate contractual duty to bargain. *Id*. at 10.

The Union also contends that the award is not contrary to either the Back Pay Act or 5 U.S.C. § 6126. *Id*. at 10-14. In this regard, the Union argues that the Agency's disagreement with the Arbitrator's factual finding that "but for" the Agency's actions, TSC employees would not have lost credit hours, provides no basis for finding the award deficient. *Id*. at 12-13. Regarding § 6126, the Union cites an Authority decision in support of the proposition that an arbitrator's award of credit hours that might exceed the 24-hour cap does not violate § 6126 because that provision does not limit arbitral remedies. *Id*. at 13 (citing *U.S. Dep't of Housing and Urban Development, Grand Rapids, MI*, 55 FLRA 219 (1999) (*Grand Rapids*)). Finally, the Union argues that the award draws its essence from the parties' agreement. *Id*. at 14-15.

V. Analysis and Conclusions

A. The award is not contrary to law.

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*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. *See U.S. Dep't of Def., Dep'ts of the Army and the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

It is clear from the record, and the Arbitrator found specifically, that the Agency's position throughout negotiations was that the practice of permitting employees to earn pre-shift credit hours was illegal and that it would bargain only over the impact and implementation of the termination of the practice. *See* Award at 19; Agency's Exceptions at 11-14. In fact, the Arbitrator found that the parties "never came close to substance bargaining." Award at 19-20. The Agency does not contend that the Arbitrator's factual finding is a nonfact, and its assertion that it engaged in substantive bargaining over this matter is unsupported. Therefore, the assertion provides no basis for finding the award deficient, and we deny the exception alleging that the award is contrary to the Statute.

With regard to the Agency's exception regarding the Back Pay Act, the Authority has long held that, under the Back Pay Act, an award of backpay is authorized only when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action has resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. [12] *See, e.g., U.S. Dep't of Health and Human Servs.*, 54 FLRA 1210, 1218-19 (1998).

As discussed above, we have rejected the Agency's exception alleging that the award is contrary to the Statute. As the Agency violated the Statute, it committed an unjustified or unwarranted personnel action. *See Dep't of the Interior, Bureau of Reclamation, Washington, D.C.*, 33 FLRA 671, 680-81 (1988) (a violation of § 7116(a)(5) of the Statute constitutes an unjustified or unwarranted personnel action). Moreover, the Agency does not specifically dispute the Arbitrator's finding that "but for" the violation, unit employees lost credit hours. Award at 23. Instead, as noted above, the Agency asserts that the Arbitrator "fail[ed] to provide any real findings." Agency Exceptions at 21. As the Agency does not claim that the Arbitrator's finding is a nonfact, its claim is insufficient to find the award deficient. For these reasons, we deny the Agency's Back Pay Act exception.

As for the Agency's argument that the award is contrary to 5 U.S.C. § 6126 because it permits employees to exceed the statutory 24-hour ceiling on credit hours, the Authority held, in *Grand Rapids, supra*, that § 6126 does not limit arbitral remedies. 55 FLRA at 220. Moreover, the Arbitrator ordered that the remedy be "consistent with applicable law and regulation." Award at 23. Therefore, § 6126(a) will apply to restrict an employee's use of the credit hours in any pay period to 24 hours to ensure that credit hours are not used as a basis for long term leave. *See* 55 FLRA at 220. Accordingly, we deny this exception.

For the foregoing reasons, we deny the Agency's contrary-to-law exceptions.

12. The Agency does not dispute that credit hours are a form of "pay, allowances, or differentials" for purposes of the Back Pay Act. *See* Agency Exceptions at 20-22.

B. The award draws its essence from the collective bargaining agreement.

The Authority will find that an award is deficient as failing to draw its essence from the 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 collective bargaining 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. *See U.S. Dep't of Labor* (*OSHA*), 34 FLRA 573, 575 (1990).

The Arbitrator's finding that the Agency improperly failed to bargain over the substance of its discontinuation of pre-shift credit hours within flexible bands represents a plausible interpretation of Article 1, Section 2 of the parties' agreement, which incorporates the obligation under the Statute. The Agency's contention that the award evidences a misinterpretation or disregard of the Recognition and Coverage article is based on a misinterpretation of the award. *See* Agency's Exceptions at 23-24. The Arbitrator did not find that the Agency met its substantive bargaining obligations with respect to all employees except TSC employees. Instead, the Arbitrator found that the Agency did not meet this obligation to engage in substantive bargaining with respect to any unit employees. Award at 19-20.

Accordingly, the Authority denies this exception.

VI. Decision

The Union's exceptions are dismissed, and the Agency's exceptions are denied.