

65 FLRA No. 42

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Union)

0-AR-4075

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DECISION

October 29, 2010

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 Kathryn Durham filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator concluded that the Agency violated the parties' collective bargaining agreement by cancelling scheduled overtime assignments without proper notice. For the following reasons, we dismiss the Agency's exceptions pertaining to § 7106(a)(2)(A) and (D) and § 7101 of the Statute, and we deny the remaining exceptions.

II. Background and Arbitrator's Award

The parties submitted to arbitration several grievances alleging that the Agency had violated the parties' agreement by cancelling overtime assignments with less than seven days' notice. Award at 1. The Arbitrator found that Article 38, Section 8 (Section 8) of the agreement clearly specifies that the only situation in which the Agency can cancel overtime assignments with less than seven days' notice is when the overtime was assigned to an employee because of another employee's scheduled absence and the overtime was cancelled because that

other employee returned to work.¹ *Id.* at 13. The Arbitrator determined that none of the grievances involved this situation and that, consequently, the Agency violated Section 8, as alleged. *Id.*

The Arbitrator addressed the Agency's claim that this interpretation of Section 8 is unenforceable as contrary to management's right to assign work under § 7106(a)(2)(B) of the Statute. *Id.* at 14. The Arbitrator noted that Section 8 provides that management is "normally" precluded from cancelling overtime without seven days' notice except in the specified circumstances. *Id.* at 13. She agreed with the Agency that including the standard "normally" into a provision does not necessarily render it negotiable, and she rejected the Union's argument that the inclusion of the term "normally" makes Section 8 negotiable and enforceable. *Id.* at 9, 13. Instead, she found that Section 8 constitutes an arrangement in which "the Agency bears the cost of 'doing business,' so to speak" in a limited number of "abnormal situations[.]" *Id.* at 14. In addition, she determined that Section 8's benefits to employees outweigh any effect on management's right. *Id.* Consequently, she concluded Section 8 is enforceable as an appropriate arrangement negotiated under § 7106(b)(3). Award Summary; Award at 14.

Accordingly, the Arbitrator sustained the grievances. She concluded that the grievants were entitled to the overtime pay that they would have earned if management had not violated the agreement, and she directed that the grievants be made whole. Award Summary.

III. Positions of the Parties**A. Agency's Exceptions**

The Agency contends that the award is based on a nonfact because the Arbitrator "relies heavily" on an alleged, but unproven, past practice "of paying employees for overtime when scheduled overtime is cancelled with less than seven days notice." Exceptions at 28-29. The Agency further contends

1. Section 8 provides as follows:

Overtime shall not normally be cancelled without seven (7) days notice. However, if an employee cancels or returns from annual or sick leave, any overtime scheduled to cover that absence may be canceled, provided that such overtime had been scheduled as a direct result of the returning employee's absence.

Award at 1.

that the award fails to draw its essence from Section 8 of the agreement. In this connection, the Agency asserts that the Arbitrator interpreted and applied the term “normally” to “declare” that Section 8 is “negotiable[.]” *Id.* at 33.

The Agency also contends that the award is contrary to management’s rights to assign and direct employees under § 7106(a)(2)(A) of the Statute, and to take whatever actions are necessary to carry out the Agency mission during emergencies under § 7106(a)(2)(D). In addition, the Agency contends that the award is contrary to § 7101(a) of the Statute.

Finally, the Agency contends that the award is contrary to management’s right to assign work under § 7106(a)(2)(B) of the Statute because the award affects the exercise of that right, and Section 8 is not enforceable pursuant to § 7106(b)(2) or (3). *Id.* at 12-21. With regard to § 7106(b)(3), the Agency asserts that the Arbitrator’s interpretation of Section 8 requires the Agency to make “unacceptable choices” of either assigning an employee overtime work when there is no need for overtime work to be performed or paying the employee for the scheduled overtime. *Id.* at 20. The Agency argues that both options significantly burden management because they restrict management’s ability to respond to the numerous situations that necessitate the cancellation of overtime on short notice. *Id.* at 20-21. Accordingly, the Agency contends that Section 8, as interpreted by the Arbitrator, excessively interferes with management’s right to assign work and is not an enforceable appropriate arrangement under § 7106(b)(3).

B. Union’s Opposition

The Union contends that the award is not based on a nonfact because the Arbitrator correctly found an established past practice of not cancelling overtime assignments with less than seven days’ notice. *Opp’n* at 8-10. As to essence, the Union argues that the Agency’s exception fails to meet the “high threshold” for showing that an award is deficient. *Id.* at 10-11. In addition, the Union asserts that the award is not contrary to § 7106(a)(2)(A) and (D) or § 7101 of the Statute. *Id.* at 6-7. Finally, the Union contends that the award is not contrary to management’s right to assign work under § 7106(a)(2)(B) because Section 8 is an enforceable appropriate arrangement under § 7106(b)(3). *Id.* at 5-6.

IV. Preliminary Issue

The Authority’s Regulations that were in effect when the Agency filed its exceptions provided that “[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator.” 5 C.F.R. § 2429.5.² Before the Arbitrator, the Agency argued that to interpret Section 8 to allow cancellation of overtime with less than seven days’ notice only when employees return from scheduled leave would excessively interfere with management’s right to assign work under § 7106(a)(2)(B). Award at 6. There is no indication in the record that the Agency argued to the Arbitrator that such an interpretation of Section 8 would also conflict with § 7106(a)(2)(A) and (D) and § 7101. As these issues could have been, but were not, presented to the Arbitrator, § 2429.5 precludes the Agency from raising them for the first time in exceptions. Accordingly, we dismiss these exceptions.

V. Analysis and Conclusions

A. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *E.g., U.S. Dep’t of the Treasury, IRS, Andover, Mass.*, 63 FLRA 202, 205 (2009) (*IRS*). The Authority will not find an award deficient on the basis of an arbitrator’s determination on any factual matter that the parties disputed at arbitration. *Id.*

The Agency claims that the Arbitrator erroneously found a past practice of paying employees for overtime when scheduled overtime is cancelled with less than seven days’ notice.³

2. The Authority’s Regulations concerning the review of arbitration awards, as well as certain related procedural regulations, including § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Agency’s exceptions were filed before that date, we apply the earlier Regulations.

3. The Authority views an exception to an arbitrator’s finding of whether a past practice exists as asserting a nonfact. The Authority views an exception to an arbitrator’s interpretation of a past practice as asserting that the award fails to draw its essence from the agreement. *E.g., U.S. Dep’t of the Army, Corps of Eng’rs, Nw. Div. & Seattle Dist.*, 64 FLRA 405, 408 n.5 (2010). As the Agency disputes the finding of a past practice, the Agency correctly challenges the award on nonfact grounds. *Id.*

However, the parties disputed this matter before the Arbitrator. Award at 8; Exceptions at 28-29 (“[T]he Agency produced witnesses to dispute past practice at the facilities involved in the grievances[.]”). Consequently, the Agency’s exception provides no basis for finding that the award is based on a nonfact, and we deny the exception. *See IRS*, 63 FLRA at 205.

B. The award does not fail to draw its essence from the agreement.

For an award to be found deficient as failing to draw its essence from the collective bargaining agreement, it must be established 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. *U.S. Dep’t of Labor (OSHA)*, 34 FLRA 573, 575 (1990).

The Agency’s essence exception misconstrues the award. In this connection, the Agency fails to show that the Arbitrator interpreted and applied the term “normally” to “declare” that Section 8 is “negotiable[.]” Exceptions at 33. To the contrary, the Arbitrator specifically concluded that the “inclusion of the standard ‘normally’ into an otherwise non-negotiable provision does not necessarily render it negotiable” and “does not insulate the provision from a challenge as to enforceability.” Award at 9, 13. For this reason, the Arbitrator did not agree with the Union’s argument that the term “normally” makes Section 8 negotiable and enforceable. *Id.* at 13. Instead, she concluded that Section 8’s requirement to honor an overtime assignment, except in certain specified situations is enforceable as an appropriate arrangement negotiated under § 7106(b)(3). *Id.* at 9-13. Nothing in the Agency’s exception establishes that the Arbitrator’s interpretation and application of the term “normally” is irrational, unfounded, implausible, or manifestly disregards the agreement. Accordingly, we deny this exception.⁴

4. We note that the Arbitrator’s interpretation of Section 8 is not necessarily the only plausible interpretation, and that the Agency’s interpretation is also plausible. However, it is not the Authority’s job to second-guess arbitrators by choosing the best among several interpretations of contract language and that, if an arbitrator’s interpretation is plausible, then the Authority’s inquiry ends.

C. The award is not contrary to law.

The Authority reviews questions of law raised by exceptions to an arbitrator’s award *de novo*. *E.g., NFFE Local 1437*, 53 FLRA 1703, 1709 (1998). In applying a standard of *de novo* review, we assess whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. *Id.* at 1710.

The Authority recently revised the analysis that it will apply when reviewing management-rights exceptions to arbitration awards. *See U.S. Envtl. Prot. Agency*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *Fed. Deposit Ins. Corp., Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102 (2010) (Chairman Pope concurring) (*FDIC*). Under the revised analysis, the Authority will first assess whether the award affects the exercise of the asserted management right.⁵ *EPA*, 65 FLRA at 115. If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b).⁶ *Id.* Also under the revised analysis, in determining whether the award enforces a contract provision negotiated under § 7106(b)(3), the Authority assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and (2) if so, whether the arbitrator’s enforcement of the arrangement abrogates the exercise of the management right. *See id.* at 116-18. In concluding

5. Member Beck agrees with the conclusion to deny the Agency’s exceptions. He does not agree, however, with his colleagues’ analysis of the contrary to law exception insofar as they address the question of whether the award affects the exercise of an asserted management right. For the reasons discussed in his Concurring Opinion in *EPA*, 65 FLRA 113, Member Beck concludes that, where, as here, the Arbitrator is enforcing a contract provision that has been accepted by the Agency as a permissible limitation on its management’s rights, it is inappropriate to assess whether the provision itself is an appropriate arrangement or whether it abrogates a § 7106(a) right. *Id.* at 120. The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. *Id.*; *see also FDIC*, 65 FLRA at 107. Member Beck concludes that the Arbitrator’s award is a plausible (even though not the only possible) interpretation of the parties’ agreement. Accordingly, Member Beck agrees that the Agency’s contrary to law exception should be denied.

6. When an award affects a management right under § 7106(a)(2) of the Statute, the Authority may also examine whether the award enforces an applicable law. *EPA*, 65 FLRA at 115 n.7.

that it would apply an abrogation standard, the Authority rejected continued application of an excessive-interference standard. *Id.* at 118.

It is not disputed that the award affects management's right to assign work. Consequently, we examine whether the Arbitrator enforced a contract provision negotiated under § 7106(b). The Arbitrator concluded that Section 8 was an enforceable appropriate arrangement under § 7106(b)(3). The Agency does not dispute that Section 8 is an arrangement, but argues that the Arbitrator's enforcement of Section 8 excessively interferes with the right to assign work. However, as stated above, we no longer apply an excessive-interference standard in determining whether an arbitrator has enforced a contract provision negotiated under § 7106(b)(3); rather, we apply an abrogation standard. *Id.*

The Authority has previously described an award that abrogates the exercise of a management right as an award that "precludes an agency from exercising" the right. *U.S. Dep't of the Army, Army Transp. Ctr., Fort Eustis, Va.*, 38 FLRA 186, 190 (1990) (*Ft. Eustis*) (quoting *Dep't of the Treasury, U.S. Customs Serv.*, 37 FLRA 309, 314 (1990)). In *Ft. Eustis*, the Authority concluded that the arbitrator's enforcement of the contract provision did not abrogate the exercise of a management right because, as interpreted by the arbitrator, the provision restricted management's right in only two situations and did not otherwise affect that right. *Id.* Here, the Arbitrator specifically found, and the Agency does not dispute, that Section 8 in no way precludes management from assigning an employee to work. Award at 14. Moreover, as interpreted by the Arbitrator, Section 8 restricts management's right to cancel overtime only in limited situations, specifically when management cancels with less than seven days' notice and for reasons other than those specified in Section 8. Consequently, the Agency fails to demonstrate that Section 8, as interpreted and applied by the Arbitrator, abrogates the exercise of the right to assign work. See *Ft. Eustis*, 38 FLRA at 190.

For the foregoing reasons, we conclude that the Arbitrator enforced a contract provision negotiated under § 7106(b)(3) of the Statute. Accordingly, the Agency fails to establish that the award is contrary to § 7106(a)(2)(B), and we deny this exception.

VI. Decision

The Agency's exceptions pertaining to § 7106(a)(2)(A) and (D) and § 7101 of the Statute are dismissed, and the remaining exceptions are denied.