66 FLRA No. 3

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

ASSOCIATION OF
ADMINISTRATIVE LAW JUDGES
INTERNATIONAL FEDERATION OF
PROFESSIONAL AND
TECHNICAL ENGINEERS
(Union)

0-AR-4588

_____

DECISION

August 10, 2011

_____

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 Ronald Hoh filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.[1]

The Arbitrator sustained the portion of a grievance alleging that the Agency's denial of sick leave to the grievant violated the parties' collective bargaining agreement (CBA) and applicable law. The Arbitrator directed the Agency to make the grievant whole for the improper denial. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

As an Administrative Law Judge (ALJ), the grievant conducts hearings for the Agency. *See* Award at 9. The grievant scheduled a dental appointment (the appointment) for the same date that an assistant scheduled the grievant to conduct several hearings (the scheduled hearings). *See id.* at 11-12. The grievant's supervisor (the supervisor) later denied the grievant's sick leave request (leave request) for the appointment and designated him absent without leave (AWOL). *See id.* at 13-14. The Union filed a grievance that was not resolved, *id.* at 15, and the parties proceeded to arbitration on the following stipulated issues, as relevant here: "Did the [Agency] violate the [CBA] or law when it denied [the leave request] . . . ? If so, what shall the remedy be?" *Id.* at 2. Because the Agency asserted that it denied the leave request on the basis of the grievant's alleged violation of Article 18, Section 1 of the CBA,[2] the Arbitrator determined that the Agency bore the burden of proving "that such a violation occurred[] and that [the] denial of sick leave was proper based upon such a . . . contract violation." *Id.* at 25; *see also id.* at 36.

Although the Arbitrator found that, under Article 18, Section 1(B) of the CBA (Section 1(B)), the "grievant certainly could have and likely should have requested" leave for the appointment earlier than he did, the Arbitrator also found that "the Agency did not contend that such a late submission specifically violated [Section 1(B)]." *Id.* at 35. Therefore, the Arbitrator determined that the Agency did not meet its burden to establish that the grievant violated Section 1(B), or that the denial of leave was justified for that reason. *See id.* at 35-36.

With regard to whether the grievant failed to coordinate his leave request with the scheduled hearings, as required by Article 18, Section 1(C) of the CBA (Section 1(C)), the Arbitrator found that: (1) support staff scheduled the hearings in a manner that "did not follow the normal procedure"; (2) the grievant's assignments required him to be away from the office in the weeks prior to the scheduled hearings, and he lacked the "computer savvy" necessary to access the Agency's computerized scheduling system during that time; and (3) it was "reasonable to believe" that the grievant "never actually got [the hard copy of the] hearing" calendar showing the scheduled hearings. *Id.* at 34-35. Based on those findings, the Arbitrator determined that the Agency did not meet its burden to show that the grievant violated

[1] As discussed *infra* Part III., the Union's opposition is untimely, and we deny the Union's request to waive the expired time limit for filing.

[2] Article 18 of the CBA states, in pertinent part:

> *Section 1 – General Leave Provisions*
>
> . . . .
>
> B. [ALJs] will submit for approval a completed [leave request form] . . . in advance of all anticipated leave to permit the orderly scheduling of leave . . . .
>
> C. The parties acknowledge that hearing dockets are generally scheduled [sixty] to [ninety] days in advance. In recognition of that fact, the [ALJ] will coordinate the scheduling of anticipated annual or sick leave requests with his or her hearing calendar.

Award at 3-4 (quoting CBA Art. 18, § 1).

Section 1(C), or that the denial of leave request "was . . . appropriate for that reason." *Id.* at 35.

Having addressed the grievant's alleged violations of the CBA, the Arbitrator evaluated the Union's allegations that the Agency violated the CBA and applicable law. In that regard, the Arbitrator determined that Article 18, Section 3(1) of the CBA (Section 3(1))[3] and 5 C.F.R. § 630.401 (§ 630.401)[4] required the Agency to grant sick leave for the grievant's "medical, *dental*, or optical examination or treatment[,]" as long as the grievant complied with the contractual procedures for requesting leave. *Id.* at 36 (emphasis added by Arbitrator). As the Agency did not establish that the grievant violated the CBA, the Arbitrator found that the Agency's denial of the leave request violated Section 3(1) and § 630.401. *Id.* Therefore, the Arbitrator directed the Agency to reclassify the time that grievant requested for the appointment as sick leave, rather than AWOL, and to make the grievant whole for any loss of pay owing to the denial of the leave request. *Id.* at 37.

III. Preliminary Matter

The Union concedes that its opposition is untimely but requests a waiver of the expired time limit under § 2429.23 of the Authority's Regulations (§ 2429.23). *See* Req. for Waiver at 1-2. The Union argues that the expired time limit should be waived because: (1) a "major snowstorm" forced the Union counsel's office, as well as certain federal government offices, to close on the day that the time limit expired; and (2) as a result of "holiday vacation schedules," counsel did not discover that the opposition had not been filed until eight days after the time limit's expiration. *See id.*

Under § 2429.23(b), an expired time limit may be waived upon a showing of "extraordinary circumstances" justifying the waiver. Even if the Authority were to find that the office closings constituted an extraordinary circumstance, the use of "personal leave" does not constitute an extraordinary circumstance, *see AFGE, Local 3615*, 65 FLRA 647, 648 n.5 (2011), and, thus, the Union has not established that extraordinary circumstances justify waiving the expired time limit for the additional filing delay after the office closings. Therefore, we deny the waiver request and do not consider the Union's untimely opposition.

IV. Agency's Exceptions

The Agency argues that the award is contrary to law because the Arbitrator did not "[r]ead [§ 630.401] together" with 5 C.F.R. § 630.402 (§ 630.402),[5] and, as a result, he did not recognize that "an employee's right to non-emergency sick leave must be balanced with the . . . duty to secure advance approval" for that leave. Exceptions at 3. In addition, the Agency contends that the award is contrary to the "standard legal principle" that the party alleging a contractual violation bears the burden of proving it. *Id.* at 19-20. According to the Agency, the stipulated issues required the Union to prove that the denial of sick leave violated the CBA. *Id.* at 20. Because the Arbitrator required the Agency to justify the denial of the leave request by proving that the grievant violated the CBA, the Agency asserts that the Arbitrator erred as a matter of law and decided an issue beyond the parties' stipulation, which, according to the Agency, exceeded the Arbitrator's authority. *See id.* at 20-21.

Moreover, the Agency argues that the award fails to draw its essence from the CBA in three respects. *Id.* at 4. First, the Agency asserts that – contrary to the Arbitrator's findings – it not only argued, but also proved, that the grievant violated Section 1(B) because he did not submit the leave request sufficiently "in advance" of the appointment. *Id.* at 5-6. Second, the Agency asserts that the Arbitrator should have found that the grievant failed to coordinate the appointment with his hearing schedule, as required by Section 1(C), because Section 1(C) includes a requirement that ALJs take "responsibility for knowing their hearing schedules[.]" *Id.* at 17; *see also id.* at 16-17. Third, the Agency argues that – as Section 3(1) "tracks the language" of § 630.401 – the award does not draw its essence from Section 3(1), for the same reasons that the award is contrary to § 630.401 when "[r]ead together" with § 630.402. *Id.* at 13-14.

V. Analysis and Conclusions

[3] Section 3(1) states, in pertinent part: "Subject to applicable regulations in 5 C.F.R. § 630.401 et seq., [an ALJ] must be granted sick leave when the [ALJ] . . . [r]eceives medical, dental or optical examination or treatment . . . ." Exceptions, Attach., Joint Ex. 1 at 18.

[4] Section 630.401 states, in relevant part: "[A]n agency must grant sick leave to an employee when he or she . . . [r]eceives medical, dental, or optical examination or treatment . . . ." 5 C.F.R. § 630.401(a)(1).

[5] We note that the Office of Personnel Management revised 5 C.F.R. part 630, subpart D – which includes 5 C.F.R. § 630.402 – after the filing of exceptions in this case. *See* 75 Fed. Reg. 75,363, 75,373 (Dec. 3, 2010) (effective Jan. 3, 2011, 5 C.F.R. § 630.402 redesignated as 5 C.F.R. § 630.404). At all times relevant here, § 630.402 stated, in pertinent part: "An employee must file an application – written, oral, or electronic, as required by the agency – for sick leave within such time limits as the agency may require. The employee must request advance approval for sick leave for the purpose of receiving medical, dental, or optical examination or treatment . . . ." 5 C.F.R. § 630.402 (2010).

A. The award is not contrary to law, rule, or regulation.

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 & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (*Nat'l Guard*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Agency asserts that the Arbitrator failed to evaluate the leave request in the manner required by § 630.402. *See* Exceptions at 3. Section 630.402 requires an employee to: (1) "file an application . . . for sick leave"; and (2) "request advance approval for sick leave for . . . examination or treatment[.]"[6] 5 C.F.R. § 630.402 (2010); *see* full text *supra* note 5. In this regard, § 630.402 does not require, as the Agency asserts, that the grievant "*secure* advance approval" in order to use sick leave for examination or treatment. Exceptions at 3 (emphasis added). The Arbitrator found, and the Agency does not dispute, that the grievant filed his leave request form (i.e., his "application . . . for sick leave") "*before* he left for his dental appointment[.]" Award at 35 (emphasis added). The Arbitrator's factual finding, to which we defer, *see Nat'l Guard*, 55 FLRA at 40, establishes that the grievant "file[d] an application" *requesting* approval *in advance* of the appointment, as § 630.402 requires. Therefore, the Agency has not demonstrated that the award is contrary to § 630.402, and we deny this exception.

The Agency also asserts that the Arbitrator's assignment of the burdens of proof violates a "standard legal principle." Exceptions at 19. If a particular standard of proof is required by a law, rule, or regulation, then an arbitrator's failure to apply that standard will provide a basis for finding an award deficient as contrary to law. *See, e.g., U.S. Dep't of Veterans Affairs Med. Ctr., Providence, R.I.*, 49 FLRA 110, 113 (1994). In the absence of a specified standard of proof, arbitrators have the authority to establish whatever standard they consider appropriate, and the Authority will not find an award deficient based on a claim that an arbitrator applied an incorrect standard. *See U.S. Dep't of Veterans Affairs, Nat'l Mem'l Cemetery of the Pac.*, 45 FLRA 1164, 1171 (1992). In addition, unless a law, rule, or regulation provides otherwise, an arbitrator's authority to establish the standard of proof encompasses the authority to specify which party has the burden of proof. *Id.* at 1171. In this case, the Agency has not identified a law, rule, or regulation that required the Arbitrator to assign the burdens of proof in a particular manner. Consequently, consistent with the above-cited precedent, we deny this exception.

B. The Arbitrator did not exceed his authority.

The Agency asserts that by assigning it a burden of proof, the Arbitrator decided an issue outside the scope of the parties' stipulated issues. *See* Exceptions at 20-21. As relevant here, arbitrators exceed their authority when they resolve an issue not submitted to arbitration. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). However, arbitrators do not exceed their authority by addressing an issue that is necessary to decide a stipulated issue. *Nat'l Air Traffic Controllers Ass'n, MEBA/NMU*, 51 FLRA 993, 996 (1996) (*NATCA*). In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulation of issues the same substantial deference that it accords an arbitrator's interpretation and application of a collective bargaining agreement. *See Soc. Sec. Admin., Balt., Md.*, 57 FLRA 181, 183 (2001).

As relevant here, the parties stipulated to the following issues for resolution: "Did the [Agency] violate the [CBA] or law when it denied [the leave request] . . . ? If so, what shall the remedy be?" Award at 2. In order to resolve those issues, the Arbitrator assigned the burdens for proving the alleged violations. *See id.* at 24-25. Because the Arbitrator possessed the authority to assign burdens as necessary to decide the stipulated issues, *see NATCA*, 51 FLRA at 996, the Agency has not demonstrated that the Arbitrator exceeded his authority, and we deny this exception.

C. The award draws its essence from the CBA.

The Agency alleges that the award fails to draw its essence from the CBA – in particular, Sections 1(B), 1(C), and 3(1). *See* Exceptions at 5-6, 16-17, 13-14. In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the

[6] Although § 630.402 also requires that an application for leave be filed "within such time limits as the agency may require," the Agency has not identified any "time limits" that it has established for sick leave applications, and, thus, we do not address that requirement in the discussion above.

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) (*OSHA*). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576. In addition, a party's disagreement with an arbitrator's factual findings in the course of applying an agreement at arbitration does not demonstrate that an award fails to draw its essence from the agreement. *See AFGE, Local 12*, 61 FLRA 507, 509 (2006) (*AFGE, Local 12*).

Despite the Arbitrator's finding to the contrary, the Agency argues that it did assert at arbitration that the grievant violated Section 1(B) because he did not submit his leave request sufficiently "in advance[.]" Exceptions at 5-6. However, whether the Agency argued that position at arbitration is a factual matter, *see NFFE, Local 1636*, 45 FLRA 1045, 1047-48 (1992), and, as stated previously, disagreements with the Arbitrator's factual findings do not demonstrate that the award fails to draw its essence from the agreement, *see AFGE, Local 12*, 61 FLRA at 509.[7] Thus, the Agency has not established that the Arbitrator's findings regarding Section 1(B) are irrational, unfounded, implausible, or in manifest disregard of the CBA, and we deny this exception. *See OSHA*, 34 FLRA at 575.

As for Section 1(C), it states: "The parties acknowledge that hearing dockets are generally scheduled [sixty] to [ninety] days in advance. In recognition of that fact, the [ALJ] will coordinate the scheduling of anticipated annual or sick leave requests with his or her hearing calendar." Award at 4 (quoting CBA Art. 18, § 1(C)). The Arbitrator's failure to extrapolate from that provision a contractual requirement that ALJs take "responsibility for knowing their hearing schedules," Exceptions at 17, is not irrational, unfounded, implausible, or in manifest disregard of the CBA, because no such requirement appears in the wording of Section 1(C) or any other provision of the CBA cited in the exceptions. *See OSHA*, 34 FLRA at 575. Moreover, the Arbitrator found that the grievant did not fail to coordinate his leave with the scheduled hearings, as required by Section 1(C), because the grievant did not know about the scheduled hearings until the day before they were to occur. *See* Award at 34-35. The Arbitrator's determination that the grievant could not have failed to coordinate events that were unknown to him also is not irrational, unfounded, implausible, or in manifest disregard of the CBA. *See OSHA*, 34 FLRA at 575. Therefore, we deny this exception.

The Agency argues further that the award does not draw its essence from Section 3(1), for the same reasons that the Agency asserts that the award is contrary to § 630.401 when "[r]ead together" with § 630.402. *See* Exceptions at 13-14. For the reasons discussed in support of our finding that that award is not contrary to § 630.402, *see supra* Part V.A., we find that the Arbitrator's interpretation and application of the substantially similar wording in Section 3(1) is not irrational, unfounded, implausible, or in manifest disregard of the CBA, *see OSHA*, 34 FLRA at 575. Consequently, we deny this exception.

VI. Decision

The Agency's exceptions are denied.

[7] To the extent that this contention could be construed as a nonfact exception, the Agency's entire argument on this point is that it "did argue at the arbitration hearing that [the grievant] violated § 1(B)." Exceptions at 6. Thus, even if we were to evaluate the contention as a nonfact exception, we would deny it as a bare assertion. *E.g., AFGE, Local 405*, 63 FLRA 149, 152 n.9 (2009) (rejecting nonfact exception as bare assertion because it did not include supporting evidence).