66 FLRA No. 83

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1399
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
COMMAND NAVY REGION SOUTHWEST
MARCH AIR RESERVE BASE, CALIFORNIA
(Agency)

0-AR-4777

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DECISION

January 25, 2012

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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 exceptions to an award of Arbitrator Saundria Bordone 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 did not file an opposition to the Union's exceptions.

The Arbitrator found that the Agency did not violate the Statute or the parties' agreement when it denied the grievant official time to attend certain training. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

When the grievant became the Union's new treasurer, the Union arranged for her to attend a two-day "Financial Officers Training" (training) that covered, among other topics, the preparation of reports that the Union was required to file with other federal agencies. Award at 2-3. The Agency denied the Union's request for sixteen hours of official time for the grievant to attend the training, stating that the Agency believed the training constituted "internal union business," and the Union grieved the denial of official time. *Id.* at 3-4. The grievance was unresolved and submitted to arbitration, where the parties stipulated to the following issues: "Did the Agency violate federal law and/or the [parties'] agreement when it denied the [g]rievant official time to attend the . . . [t]raining . . . ? If so, what should the remedy be?" *Id.* at 1.

Article 7, Section 7 of the parties' agreement provides, in pertinent part, that "[o]fficial or duty time will NOT be utilized by union representatives for . . . internal business." *Id.* at 2. Article 7, Section 9 of the parties' agreement (Section 9) states, in relevant part:

> The [Agency] agrees that official time normally not to exceed [forty] hours per year may be administratively authorized for [u]nit representatives to attend training approved by the [Agency] which is designed to advise representatives on matters within the scope of the [Statute], which are of mutual benefit to the [Agency] and the Union.

Id.

Before the Arbitrator, the Union argued that both the parties' agreement and § 7131 of the Statute (§ 7131) required the Agency to approve the official-time request.[1] *Id.* at 5-6. Specifically, the Union argued that: (1) training Union representatives to prepare and maintain records and reports required by federal agencies is not "internal union business" as a matter of law, *id.* at 5; and (2) neither Section 9 nor the Statute permitted the Agency to deny official time for training where, as here, it was for the "mutual benefit" of the Agency and the Union, *id.* at 6. In contrast, the Agency argued that, under Section 9, "authorization of official time for training is at the Agency's discretion." *Id.* at 7.

The Arbitrator found that the training was not internal union business because the Authority has held that "preparing records and reports required by federal agencies is not internal union business within the meaning of . . . § 7131." *Id.* at 8 (citing *NTEU*, 38 FLRA 1366, 1368 (1991) (*NTEU*)). The Arbitrator also found that § 7131(d) merely requires parties to "*negotiate*" over the use of official time by union representatives, *id.* at 8, and that the Statute required the Agency to approve the use of official time for training only to the extent that the Agency had agreed to do so as the result of such negotiations, *id.* at 10.

The Arbitrator determined that the parties' negotiations concerning official time resulted in the "dispositive" statement in Section 9 that the Agency "'*may*'" approve official time for training. *Id.* at 9 (quoting Section 9). Thus, the Arbitrator found that

[*] The relevant provision of § 7131 is provided below.

"authorizing official time for [u]nit representatives to attend training [was] permissive, not mandatory" under Section 9. *Id.* at 10. In so finding, the Arbitrator rejected the Union's argument that Section 9 did not give the Agency "'unlimited discretion in denying official time for trainings'" as "not a reasonable interpretation of the parties' intent when negotiating that contract language." *Id.* at 9 (quoting Union's Post-Hearing Brief). Accordingly, the Arbitrator found that the Agency did not violate law or the parties' agreement when it denied the official-time request, and she denied the grievance. *Id.* at 10.

III. Union's Exceptions

The Union argues that the award is contrary to § 7131 and the Authority's decision in *NTEU*. Exceptions at 9-10. In support of this argument, the Union argues that where the parties' agreement "'reiterates'" or "'parallels'" a provision of the Statute, the Authority must interpret the agreement consistently with its interpretation of the Statute. *Id*. at 9 (quoting *NFFE, Local 2010*, 55 FLRA 533, 534 (1999) (*NFFE*); *U.S. Dep't of Def., Def. Mapping Agency, Aerospace Ctr., St. Louis, Mo.*, 43 FLRA 147, 153 (1991)). According to the Union, the Statute is "incorporated into" Section 9 "as it relates to official time being approved for training" because Section 9 states that official time may be approved for training "'on matters within the scope of the [Statute].'" *Id.* at 9-10 (quoting Section 9). Accordingly, the Union argues that because the Agency's denial of the official-time request was based solely on the Agency's belief that the training was internal union business – a position that is directly contradicted by *NTEU* – the award is contrary to law. *Id.* at 10.

Additionally, the Union argues that the award is based on a nonfact because "the Arbitrator found that the Agency denied the official time [request] based on its discretion, which was not true since the Agency denied the official time based on an incorrect belief that it was not legally allowed." *Id.* at 12.

Finally, the Union argues that the award fails to draw its essence from Section 9 because the Statute is "incorporated into the [a]greement," and the Agency's denial of official time was based solely on the Agency's "legally incorrect" conclusion that the training was internal union business. *Id.* at 7.

IV. Analysis and Conclusions

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 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 de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See, e.g., NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

Section 7131(d) provides that the use of official time for representational activities other than negotiations or participation in Authority proceedings is subject to negotiation. 5 U.S.C. § 7131(d). Under § 7131(d), union representatives in the bargaining unit "shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest." *Id.* "[A]ny entitlement to official time to engage in activities covered by § 7131(d) is a contractual, not statutory, entitlement." *U.S. Dep't of Veterans Affairs Med. Ctr., Richmond, Va.*, 64 FLRA 701, 707 (2010) (*Veterans*). Thus, § 7131(d) does not, by itself, provide any legal entitlement to official time, and the Union's reliance on that statutory provision does not provide a basis for finding the award contrary to law – even assuming that Section 9 "incorporate[s]" § 7131(d) into the parties' agreement. Exceptions at 10.

As for the Union's reliance on *NTEU*, that decision held that a bargaining proposal providing for official time for the preparation of reports required by federal agencies did not conflict with § 7131, 38 FLRA at 1368; it did not hold that, as a matter of law, official time must be granted for such purposes. Accordingly, the Union's reliance on *NTEU* does not provide a basis for finding the award contrary to law.

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

B. The award is not 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. *E.g.*, *U.S. Dep't of the Treasury, IRS*, 59 FLRA 34, 37 (2003) (*IRS*). However, a nonfact exception challenging a purported factual finding that the arbitrator did not actually make does not provide a basis for finding that an award is based on a nonfact. *Id.* The Union's nonfact exception is based on the claim that the Arbitrator erroneously found that "the Agency denied the official time [request] based on its discretion." Exceptions at 12. This argument is misplaced because the Arbitrator did not make a finding concerning the Agency's *reason* for its denial of official time. Rather, she found that "authorizing official time for [u]nit representatives to attend training [was] permissive, not mandatory" under

Section 9. Award at 10. Because the exception does not challenge a factual finding made by the Arbitrator, we deny the exception. *See, e.g.*, *IRS*, 59 FLRA at 37.

C. The award does not fail to draw its essence from the parties' agreement.

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). 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 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 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.

As discussed above, "any entitlement to official time to engage in activities covered by § 7131(d) is a contractual, not statutory, entitlement." *Veterans*, 64 FLRA at 707. Thus, even assuming that Section 9 incorporates § 7131(d) into the parties' agreement, as the Union claims, this would signify only that the Agency is bound to fulfill any previously-agreed-upon contractual obligation to grant official time. Here, the Arbitrator effectively found that Section 9's statement that the Agency "'may'" authorize official time meant that the Agency could exercise its discretion to deny official time for training. *See* Award at 9-10 (quoting Section 9). And the Union provides no basis for finding that the Arbitrator's interpretation of Section 9 is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. Further, the Union's claim that the Agency based its denial of official time solely on a "legally incorrect" conclusion that the training was internal union business, Exceptions at 7, is misplaced because, as discussed above, the Arbitrator did not make a finding concerning the Agency's reason for its denial of official time, *see* Award at 9-10. Accordingly, we deny this exception.

V. Decision

The Union's exceptions are denied.