

67 FLRA No. 119

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 922
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
FORREST CITY, ARKANSAS
(Agency)

0-AR-4998

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DECISION

June 20, 2014

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Harold E. Moore found that an employee (the grievant) was not entitled to backpay for missed premium-pay opportunities while he was reassigned during a criminal investigation. There are three questions before us.

The first question is whether the award is contrary to law. Because the Union fails to support its contrary-to-law arguments, as required by § 2425.6 of the Authority's Regulations,¹ the answer is no.

The second question is whether the award fails to draw its essence from the parties' collective-bargaining agreement. Because the Union's essence argument fails to address the provisions of the agreement relied on by the Arbitrator, and does not explain how the provision cited by the Union applies to the issue that the Arbitrator resolved, the Union has not demonstrated that the award is irrational, unfounded, implausible, or in manifest disregard of the agreement. Therefore, the answer is no.

The third question is whether the award is based on a nonfact. Because the Union does not demonstrate that a central fact underlying the award is clearly

erroneous, but for which the Arbitrator would have reached a different result, the answer is no.

II. Background and Arbitrator's Award

At the onset of a criminal investigation related to his contact with a particular inmate, the grievant, a Recreation Specialist at the Agency's correctional facility, was interviewed by investigators from the Department of Justice's Office of Inspector General and the Federal Bureau of Investigation (collectively, investigators) at his home, while off duty, and without a Union representative present. According to the grievant, the investigators told him not to discuss the matter with anyone. During the investigation, the Agency reassigned the grievant to different positions with limited access to inmates and no opportunities for overtime, shift differentials, or holiday pay. When no criminal charges were filed against the grievant after sixteen months, the Agency restored the grievant to his original position.

The Union filed a grievance alleging that the Agency improperly denied the grievant the opportunity to earn premium pay during the sixteen months. The grievance went to arbitration.

The Arbitrator framed the issue as: "Did the Agency violate the [parties' collective-bargaining] [a]greement in the assignment during an investigation of the [g]rievant? If so, what is the remedy?"²

Before the Arbitrator, the Agency raised the issue of whether the grievance was untimely. The Arbitrator stated that the grievant "waited almost sixteen months [after he was reassigned] before bringing forth [the] grievance."³ Although the grievant claimed that he had waited to file the grievance because the investigators had directed him not to discuss the matter, the Arbitrator rejected that claim. Specifically, the Arbitrator stated that the investigators were not the grievant's supervisors and that, although the grievant did not request Union representation during the investigators' initial interview, both the Union and the grievant's supervisors were "entitled to know of his complaint."⁴ Despite these comments regarding timeliness, the Arbitrator did not dismiss the grievance as untimely; rather, he resolved the grievance on the merits.

In connection with the merits, the Arbitrator set forth relevant provisions of the parties' agreement. Article 5 of the agreement provides that management has the right "to determine the . . . internal[-]security practices of the Agency."⁵ Article 30, Section d states, in

² Award at 1.

³ *Id.* at 5.

⁴ *Id.* at 6.

⁵ *Id.* at 2.

¹ 5 C.F.R. § 2425.6.

relevant part: “Recognizing that the circumstances and complexities of individual cases will vary, the parties endorse the concept of timely disposition of investigations.”⁶ Article 30, Section g states that the Agency “retains the right to respond to an alleged offense by an employee which may adversely affect the [Agency’s] confidence in the employee or the security or orderly operation of the institution,” and provides that the Agency may “reassign the employee to another job within the institution . . . pending investigation and resolution of the matter.”⁷ The Arbitrator found that the reassignment of the grievant complied with Articles 5 and 30 and, while stating that “[s]ixteen months is a long time to complete an investigation,”⁸ the “additional time” was warranted because of the serious nature of the charges and the involvement of multiple agencies.⁹ Accordingly, the Arbitrator denied the grievance.

The Union filed exceptions to the Arbitrator’s award. The Agency filed an opposition to the Union’s exceptions.

III. Analysis and Conclusions

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

The Union asserts that the award is contrary to law, specifically the Back Pay Act¹⁰ (the Act), 5 U.S.C. § 2302, § 7116 of the Federal Service Labor-Management Relations Statute¹¹ (the Statute), and Agency Program Statement (PS) 3420.09.¹²

Section 2425.6(e)(1) of the Authority’s Regulations provides that an exception “may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground” listed in § 2425.6(a)-(c), “or otherwise fails to demonstrate a legally recognized basis for setting aside the award.”¹³ Under § 2425.6(b), a party arguing that an award is deficient on private-sector grounds must “explain how, under standards set forth in the decisional law of the Authority or federal courts,” the award is deficient.¹⁴

Other than quoting the Act, the Union makes no argument as to how the award is deficient under the Act.¹⁵ With regard to § 7116 of the Statute, 5 U.S.C. § 2302, and PS 3420.09, the Union argues that, at arbitration, it alleged violations of these provisions, and that the Arbitrator did not resolve those allegations.¹⁶ However, the Union has not excepted on the ground that the Arbitrator exceeded his authority¹⁷ by failing to resolve those allegations, and, as with the Act, the Union does not explain how the award conflicts with § 7116 of the Statute, 5 U.S.C. § 2302, or PS 3420.09.

Additionally, the Union’s exception includes a section entitled “Current Case Law,” in which it lists several Authority decisions regarding management rights under § 7106 of the Statute.¹⁸ However, the Union neither explains how any of those decisions apply here nor provides any other supporting arguments.

For the foregoing reasons, the Union has not supported its contrary-to-law claims. Accordingly, under § 2425.6(e)(1), we deny the Union’s contrary-to-law exception.

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

The Union argues that the award fails to draw its essence from the parties’ agreement.¹⁹ The Authority will find an arbitration award deficient as failing to draw its essence from a 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.²⁰

Although the Arbitrator relied on Articles 5 and 30 of the parties’ agreement in finding that the grievant’s reassignments were proper,²¹ the Union does not challenge the Arbitrator’s interpretation of those articles.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 5.

⁹ *Id.* at 4.

¹⁰ 5 U.S.C. § 5596.

¹¹ *Id.* § 7116.

¹² Exceptions at 3-10.

¹³ *AFGE, Local 31*, 67 FLRA 333, 333 (2014) (citing 5 C.F.R. § 2425.6(e)(1)) (*Local 31*); see also *U.S. Dep’t of VA, Cent. Tex., Veterans Health Care Sys., Temple, Tex.*, 66 FLRA 71, 73 (2011) (explaining that under § 2425.6(e)(1) of the Authority’s Regulations, an exception that fails to support a properly raised ground is subject to denial).

¹⁴ *Local 31*, 67 FLRA at 333 (quoting 5 C.F.R. § 2425.6(b)).

¹⁵ Exceptions at 3-6.

¹⁶ *Id.* at 14-20.

¹⁷ See *AFGE, Local 2823*, 67 FLRA 171, 172 (2014) (noting the excepting party’s failure to make exceeded-authority argument).

¹⁸ Exceptions at 25 (citing *U.S. Dep’t of VA, Med. Ctr., Northampton, Mass.*, 53 FLRA 1743, 1746 (1998); *U.S. Dep’t of the Treasury, BEP, Wash., D.C.*, 53 FLRA 146, 151-54 (1997); *Dep’t of the Treasury, U.S. Customs Serv.*, 37 FLRA 309, 313-14 (1990)).

¹⁹ *Id.* at 3.

²⁰ *SSA, Office of Disability Adjudication & Review*, 64 FLRA 1000, 1001 (2010) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

²¹ Award at 4-5.

Instead, the Union argues that the Arbitrator's "assessment is the polar opposite of the clear contract language" found in Article 6, Section i of the agreement, and "can only be considered an expansion of the contract and [an] infringement on higher rule or law."²² The Union argues that the grievant "was interviewed at his residence while off duty by investigators," and asserts that Article 6 of the parties' agreement "unambiguously addresses the action of the [A]gency."²³ The record does not demonstrate that the Union made explicit arguments regarding Article 6 before the Arbitrator, but it did cite that provision in its grievance.²⁴ We assume, without deciding, that this citation is sufficient to allow the Union to raise that provision to us. However, for the following reasons, the Union's reliance on that provision does not demonstrate that the award fails to draw its essence from the agreement.

Article 6, Section i states that "[e]mployees being questioned by representatives of the Employer will be informed of the identity of the investigator, unless already known by the employee, and the investigator will present their credentials to the employee being interviewed and their Union representative, if applicable, prior to the commencement of the face-to-face questioning."²⁵ Section i, Subsection 1 states that "investigations/examinations under Section f. above will not take place at the residence of the employee without the consent of the employee," and Subsection 2 states that "time spent in investigations/examinations will be compensated in accordance with applicable pay regulations."²⁶

The Arbitrator framed the issue as whether the reassignment of the grievant during the investigation violated the parties' agreement, *not* whether the examination by the investigators violated the agreement. The Union does not explain how Article 6, which addresses how examinations are to be conducted, is relevant to the Arbitrator's resolution of the issue that he framed. Therefore, the Union fails to demonstrate that the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. Accordingly, we deny the exception.

C. The award is not based on a nonfact.

The Union argues that the award is based on nonfacts. Although the Union's nonfact exception is less than clear, it appears that the Union makes three nonfact

claims. First, the Union claims that the Arbitrator's finding that "the grievant did not request Union representation during the initial interview" is not sufficiently supported by evidence in the record.²⁷ Second, the Union argues that the finding that "[t]he investigators were not [the grievant's] supervisors or his collective[-]bargaining representative [with] whom he had daily contact during the sixteen months" is not supported by evidence in the record and, alternatively, "conflicts with the record."²⁸ Third, the Union contends that the Arbitrator found that the investigation was completed in sixteen months and that such a finding is contrary to the record.²⁹

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.³⁰ As discussed above, the Agency argued before the Arbitrator that the grievance was untimely because it was not filed until approximately sixteen months after the grievant's initial reassignment. The Arbitrator made the findings challenged by the Union in connection with his discussion of timeliness. Even though, in the challenged findings, the Arbitrator rejected the Union's arguments about why the grievance was not filed sooner, he did not dismiss the grievance as untimely. Instead, the Arbitrator resolved the merits of the issue before him – the propriety of the grievant's reassignments – to which the challenged findings are not relevant. Therefore, the challenged factual findings had no effect on the Arbitrator's ultimate conclusion. Consequently, the Union's exception provides no basis for finding that a central fact underlying the award is clearly erroneous, but for which the Arbitrator would have reached a different result. Accordingly, we deny the Union's nonfact exception.

IV. Decision

We deny the Union's exceptions.

²² Exceptions at 12.

²³ *Id.* at 11.

²⁴ Exceptions, Attach. 5, Formal Grievance Form at 1 (alleging that the Agency's violations of the parties' agreement "includ[ed], but [were] not limited to," Article 6, Section b).

²⁵ Exceptions at 11-12.

²⁶ *Id.* at 12.

²⁷ *Id.*

²⁸ *Id.* at 13-14.

²⁹ *Id.* at 19.

³⁰ *U.S. DHS, U.S. ICE*, 65 FLRA 529, 535 (2011) (citing *NFFE, Local 1984*, 56 FLRA 38, 41 (2000)).