68 FLRA No. 122

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1917
(Union)

0-AR-5007

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DECISION

July 23, 2015

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

I. Statement of the Case

This matter is before the Authority on exceptions filed by the Agency to both the initial and supplemental awards of Arbitrator Philip Tamoush. The Union did not file an opposition to the initial-award or supplemental-award exceptions. Because Case Nos. 0-AR-5007 and 0-AR-5007-SUPP involve the same parties and arise from the same arbitration proceeding, we have consolidated them for decision.[1] Also, as the Agency incorporates the initial-award exceptions by reference in the supplemental-award exceptions, and asserts that the latter exceptions "address both awards," [2] we will only address the supplemental-award exceptions.

Bargaining-unit employees at the Agency's New York District office (employees) had a long-standing practice of taking a one-hour, uninterrupted lunch break. The lunch break combined a thirty-minute lunch break with two fifteen-minute rest breaks to provide a one-hour, uninterrupted lunch break during the workday. This practice was changed on one particular day when the Agency Director ordered all employees to attend two Agency "town-hall" meetings and to take only a thirty-minute lunch break between the meetings.[3] As a result, the Union filed a grievance alleging that the Agency improperly prevented employees from taking their two fifteen-minute rest breaks as part of their one-hour, uninterrupted lunch break on the day of the meetings.

In the initial award, the Arbitrator sustained the Union's grievance in relevant part. The Arbitrator found that the Agency violated Article 27 of the parties' agreement – which provides for "an uninterrupted lunch period" – by denying the employees the one-hour, uninterrupted lunch break that had become "a past practice or tradition"[4] that the Agency had "condoned."[5] The Arbitrator remanded the matter to the parties "to negotiate a jointly acceptable remedy," and gave them the option of "refer[ring] the matter of specific remedy back to the [Arbitrator]."[6]

The parties could not agree on a remedy and resubmitted the issue to the Arbitrator. In his supplemental award, the Arbitrator awarded thirty minutes of administrative leave to employees who were denied their one-hour uninterrupted lunch break on the day of the meetings. There are three questions before the Authority.

The first question is whether the awards are contrary to law because they allegedly order the Agency to continue the practice of combining a lunch break with rest breaks – a practice that the Agency alleges is illegal. Because the Agency misinterprets the awards as ordering the Agency to continue the allegedly unlawful practice, the answer is no.

The second question is whether the Arbitrator's finding that the Agency violated the parties' agreement, and the Arbitrator's award of administrative leave, fail to draw their essence from the parties' agreement. Because the Arbitrator's interpretation of the parties' agreement is not implausible, and because the Agency has not demonstrated that the Arbitrator's exercise of his broad discretion to fashion remedies is improper, the answer is no.

The third question is whether the award's administrative leave remedy exceeds the Arbitrator's authority because, assuming that the Arbitrator's finding of a contract violation is deficient, the Arbitrator lacks a

[1] *E.g., U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 19 n.1 (2012) (consolidating cases where they involved same parties and arose from same arbitration proceeding).

[2] Supp. Exceptions at 1 n.1 (noting the supplemental exceptions address both awards and requesting consolidation of cases); *id.* at 2 n.2 (incorporating initial exceptions by reference); *id.* at 5 n.4 (conceding that sovereign immunity, Back Pay Act, and 5 C.F.R. §§ 551.501(a) and 550.111 arguments in initial exceptions are moot).

[3] Initial Award at 3.

[4] *Id.* at 3 (internal quotation marks omitted).

[5] *Id.* at 8.

[6] *Id.* at 11.

basis for awarding a remedy. Because we reject the Agency's claim that the Arbitrator's finding of a contract violation is deficient, and because this is the premise of the Agency's exceeds-authority exception, the answer is no.

II. Background and Arbitrator's Award

For approximately fourteen years, employees at the Agency's New York District office combined their thirty-minute unpaid lunch break with two fifteen-minute paid rest breaks to provide a one-hour, uninterrupted lunch break. This practice was changed on a particular day when the Agency Director ordered all employees to attend the broadcast of an Agency-wide town-hall meeting, then take a thirty-minute lunch break, and then return to work to attend a local town-hall meeting.

The Union filed a grievance alleging that the Agency violated the parties' agreement "when [the Agency] took a half hour from . . . employees without any compensation."[7] In response, the Agency conceded that "a past practice may have existed which . . . allowed employees to take a one[-]hour lunch break consisting of their 'unpaid' meal period combined with 'paid' breaks."[8] But the Agency argued that the practice of combining a thirty-minute employee lunch break with two fifteen-minute rest breaks was "an unlawful practice."[9] The parties ultimately submitted the grievance to arbitration. In the meantime, the Agency permanently discontinued the practice, and the parties negotiated a supplemental-collective-bargaining agreement addressing the matter.

At arbitration, as relevant here, the parties stipulated to the following issues: "Did the Agency violate Article 27[, Section] 5 of the [parties' agreement] when [it] denied . . . employees a one-hour uninterrupted lunch [break] on [the day of the meetings] . . . ? If so, what shall be the remedy?"[10]

The Arbitrator focused his analysis on the parties' "past practice" of providing employees "a one-hour uninterrupted lunch hour."[11] He found that the parties had a "past practice or tradition of a one-hour[,] uninterrupted lunch break."[12] This "regular one-hour lunch break consist[ed] of a half-hour unpaid and two [fifteen]-minute breaks combined."[13] The Arbitrator found that the Agency "condoned" the practice.[14] As the Arbitrator later found in his supplemental award: "The long-standing practice of adding [thirty] minutes to employees' lunch breaks instead of [employees] taking their rightful two fifteen-minute breaks was clearly supported by both parties, was known, and observed as an 'extra-contractual' practice."[15]

The Arbitrator acknowledged that the practice of combining an unpaid lunch break with two paid rest breaks "may combine lawful and unlawful obligations."[16] But the Arbitrator found that by negotiating a supplemental agreement addressing the matter, "the parties have . . . dealt with this issue."[17] What remained for him to decide, the Arbitrator clarified, was "what occurred on [the day of the meetings]."[18] What "must be dealt with," the Arbitrator found, was "the 'paid half hour' being removed arbitrarily from some employees that day when they, perhaps, did not take their normal rest periods at all."[19] Sustaining the grievance in relevant part,[20] the Arbitrator concluded, "the matter of remedy for the time potentially taken away from those employees who did not take their normal rest break on [the day of the meetings] will be remanded to the parties for . . . negotiations."[21]

On remand, the parties could not agree on a remedy, and resubmitted the issue to the Arbitrator. In his supplemental award, the Arbitrator, "based on his perception of the equities involved," ordered the Agency to grant "[thirty]-minute[s of] administrative leave for every employee . . . who was denied their one[-]hour lunch break."[22] The Arbitrator stated that he intended that this remedy would "return to employees their two [fifteen]-minute contractual rest breaks denied them."[23]

The Agency filed exceptions to both the initial and supplemental awards. The Union did not file an opposition to the Agency's initial-award or supplemental-award exceptions.

[7] *Id.* at 4 (quoting Union's Ex. 3 at 2).
[8] *Id.* (quoting Union's Ex. 5 at 2).
[9] *Id.* (quoting Union's Ex. 5 at 2).
[10] *Id.* at 2.
[11] *Id.* at 3.
[12] *Id.* (internal quotation marks omitted).
[13] *Id.* (citing Attach. A3, Tr. at 6:17-19).
[14] *Id.* at 8.
[15] Supp. Award at 2.
[16] Initial Award at 9.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at 11.
[21] *Id.* at 9.
[22] Supp. Award at 1.
[23] *Id.* at 1-2.

III. Preliminary Matters

A. We take official notice of Federal Labor Relations Authority (FLRA) Case No. BN-CA-12-0446.

The Agency requests that the Authority take official notice of the FLRA's proceeding in Case No. BN-CA-12-0446 because "it . . . arises out of the same set of facts" in this case and addresses the Authority's precedent on the practice of combining unpaid lunch breaks with paid rest breaks.[24] In BN-CA-12-0446, the Union's unfair-labor-practice (ULP) charge alleged that the Agency violated the Federal Service Labor-Management Relations Statute (the Statute)[25] by discontinuing the practice of combining breaks to have a longer uninterrupted lunch break without first bargaining over the change and in retaliation for the Union filing a grievance.[26]

After an investigation of the Union's ULP charge, the FLRA's Boston Regional Director (RD) declined to issue a complaint and dismissed the charge.[27] The Union did not appeal the RD's decision. The Authority has consistently found it appropriate to take official notice of other Authority proceedings.[28] Accordingly, we take official notice of Case No. BN-CA-12-0446.[29] However, as the Agency does not demonstrate that the case is relevant to the merits of this case concerning the supplemental award's remedy of administrative leave for the employees' loss of an uninterrupted one-hour lunch break, we will not discuss it further.[30]

B. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Agency's contrary-to-law exceptions.

The Agency argues that the award abrogates management's right to assign work under § 7106(a)(2)(B) of the Statute because "the Arbitrator interpreted the [parties'] agreement as preventing the Agency" from assigning the employees work while they are on a paid break.[31] Specifically, the Agency argues that the award "abrogates management's right to assign work"[32] during those rest breaks because the Arbitrator found that the grievants were "*guaranteed* paid rest breaks."[33] Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[34] At arbitration, although the Union claimed that the Agency improperly "den[ied the employees] their lawful paid rest breaks,"[35] the Agency did not raise the argument that "calling employees back to work" from a paid rest break[36] was within its right to assign work under § 7106(a)(2)(B) of the Statute. Accordingly, §§ 2425.4(c) and 2429.5 bar this argument, and we decline to consider it.[37]

C. One of the Agency's exceptions fails to raise a recognized ground for review.

The Authority's Regulations enumerate the grounds upon which the Authority will review arbitration awards.[38] In addition, the Regulations provide that if an excepting party argues that an arbitration award is deficient based on a private-sector ground not currently recognized by the Authority, then that party "must provide sufficient citation to legal authority that establishes the ground[] upon which the party filed its exception[]."[39] Further, § 2425.6(e)(1) of the Regulations cautions that an exception "may be subject to dismissal . . . if . . . [t]he excepting party fails to raise" a ground listed in § 2425.6(a)-(c) of the Regulations, or "otherwise fails to demonstrate a legally recognized basis for setting aside the award."[40] Thus, an exception that does not raise a recognized ground is subject to dismissal.[41]

The Agency argues that "even if the Authority finds that the award is not deficient and that affected employees are entitled to administrative leave as a remedy," affected employees are only entitled to fifteen minutes of administrative leave because they "enjoyed a [fifteen] minute grace period" in between the two meetings on the day of the town hall meetings.[42] This argument does not raise a ground for review currently

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[24] Supp. Exceptions at 9 n.6; 5 C.F.R. § 2429.5 (Authority may take official notice of such matters, "as would be proper").
[25] 5 U.S.C. § 7106(a)(2)(B).
[26] Supp. Exceptions, Attach. E (RD's Dismissal Letter and ULP Charge) at 1.
[27] *Id.* at 2-3.
[28] *See, e.g., U.S. GSA, Wash., D.C.*, 62 FLRA 104, 104 n.1 (2007) (*GSA*).
[29] *See* 5 C.F.R. § 2429.5 (Authority may take official notice of such matters, "as would be proper").
[30] *See, e.g., GSA*, 62 FLRA at 104 n.1.
[31] Supp. Exceptions at 13.
[32] *Id.*
[33] *Id.* (quoting Initial Award at 10) (emphasis added).
[34] 5 C.F.R. §§ 2425.4(c), 2429.5; *see, e.g., SSA, Region V*, 67 FLRA 155, 156 (2013) (*SSA*).
[35] Initial Award at 6.
[36] Supp. Exceptions at 13.
[37] *See, e.g., SSA*, 67 FLRA at 156.
[38] 5 C.F.R. § 2425.6(a)-(b); *see also NLRB Prof'l Ass'n*, 68 FLRA 552, 554 (2015) (*NLRB*).
[39] 5 C.F.R. § 2425.6(c).
[40] *Id.* § 2425.6(e)(1); *see also NLRB*, 68 FLRA at 554.
[41] *AFGE, Local 738*, 65 FLRA 931, 932 (2011) (citing *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011) (Member Beck dissenting in part)).
[42] Supp. Exceptions at 14.

recognized by the Authority, and the Agency does not cite any legal authority that supports a conclusion that the argument raises a private-sector ground not currently recognized by the Authority.[43] Accordingly, we dismiss this exception.

IV. Analysis and Conclusions

A. The awards are not contrary to law because they do not require the Agency to continue an unlawful practice.

The Agency claims that the awards are contrary to law because they "conclu[de] that the Agency had an obligation to continue . . . the unlawful practice of combining paid [rest] breaks with unpaid lunch periods."[44] 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.[45] 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.[46] In making that assessment, the Authority defers to the arbitrator's underlying factual findings,[47] unless a party demonstrates that the findings are nonfacts.[48]

The Agency's claim is based on a misinterpretation of the awards. Contrary to the Agency's claim, the awards do not find that the Agency has an obligation to continue the allegedly unlawful practice of combining paid rest breaks with unpaid lunch breaks. As the Arbitrator recognized, the parties "dealt with th[at] issue" when the Agency discontinued the practice and negotiated a supplemental agreement on that matter.[49] As the Arbitrator found, that issue "can be laid to rest."[50]

The awards' remedial focus is very narrow. Based on "his perception of the equities involved," the Arbitrator issued a remedy "to return to employees their two [fifteen]-minute contractual rest breaks denied them on [the day in question]."[51] The Arbitrator issued the remedy to "deal[] with the 'paid half hour' being removed arbitrarily [by the Agency] from some employees [on the day of the meetings]."[52]

Because the awards' remedy is limited to addressing an arbitrary Agency action, but does not require the Agency's continuation of any unlawful practice, the Agency does not demonstrate that the awards are contrary to law.

Accordingly, we deny the Agency's contrary-to-law exception.

B. The awards do not fail to draw their essence from the parties' agreement.

The Agency argues that "the Arbitrator's conclusion that the Agency violated Article 27A . . . when it afforded bargaining unit employees a [thirty]-minute, rather than a one-hour, lunch break" fails to draw its essence from the parties' agreement.[53] When 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.[54] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' 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 parties' 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.[55] 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."[56]

Regarding Article 27A, the Agency argues that "Article 27A does not expressly or implicitly require a one-hour lunch break" because Article 27A "is completely silent with respect to the length of the lunch period."[57] Article 27A provides employees with "an uninterrupted lunch period."[58] The Agency acknowledges that it provided employees with only a thirty-minute lunch period on the day of the meetings.[59]

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[43] *E.g.*, *AFGE, Local 3911, AFL-CIO*, 68 FLRA 564, 566 (2015); *NAIL, Local 17*, 68 FLRA 97, 99 (2014).
[44] Supp. Exceptions at 8-9.
[45] *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)).
[46] *U.S. DOD, Dep't's of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998)).
[47] *Id.*
[48] *NAGE, Local R4-17*, 67 FLRA 4, 6 (2012).
[49] Initial Award at 9.
[50] *Id.*
[51] Supp. Award at 1.
[52] Initial Award at 9.
[53] Supp. Exceptions at 10-11.
[54] *See* 5 U.S.C. § 7122(a)(2); *see also AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[55] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[56] *Id.* at 576 (citing *Dep't of HHS, SSA, Louisville, Ky. Dist.*, 10 FLRA 436, 437 (1982).
[57] Supp. Exceptions at 11.
[58] Initial Award at 2.
[59] Supp. Exceptions at 11.

The Arbitrator found that the parties had a "past practice" or "tradition" of "a one-hour uninterrupted lunch hour."[60] For the Arbitrator to interpret Article 27A's requirement of "an uninterrupted lunch period" in the context of the parties "past practice" and "tradition" to mean *a one-hour* uninterrupted lunch period, and to find the Agency's admitted failure to provide such an uninterrupted lunch period a violation of Article 27A, is not irrational, unfounded, implausible, or in manifest disregard of the parties agreement. Accordingly, this Agency essence exception does not provide a basis for finding the awards deficient.

The Agency also argues that the awards fail to draw their essence from the parties' agreement because they award "administrative leave to make employees whole for missing a break, which they are not entitled to under the contract."[61] The Agency's claim does not demonstrate that the awards are deficient. Having found a contract violation, the Arbitrator exercised his broad discretion to fashion remedies[62] and awarded affected employees thirty minutes of administrative leave "based on his perception of the equities involved,"[63] including the harm caused when the Agency "arbitrarily removed" one half hour from employees' contractual one-hour uninterrupted lunch period on the day of the meetings.[64] The Arbitrator's remedy of thirty minutes of administrative leave addresses the harm caused by the Agency's "arbitrary" action, and nothing in the parties' agreement prohibits the Arbitrator's chosen remedy. Therefore, the Agency fails to demonstrate that the Arbitrator improperly exercised his remedial discretion.[65] We therefore deny this Agency essence exception.

Accordingly, we deny the Agency's essence exceptions.

C. The Arbitrator did not exceed his authority.

Repeating its claim that the Arbitrator erred when he found that the Agency violated Article 27A, the Agency argues that the Arbitrator exceeded his authority by awarding a remedy in the absence of a contract violation.[66] Because we reject the Agency's claim that the Arbitrator's finding of a contract violation is deficient, we also reject the Agency's exceeds-authority claim.

Accordingly, we deny the Agency's exceeds-authority exception.

V. Decision

We deny the Agency's exceptions.

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[60] Initial Award at 3 (internal quotation marks omitted).
[61] Supp. Exceptions at 12.
[62] *See U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Honolulu, Haw.*, 66 FLRA 858, 861 (2012) (finding arbitrators have "great latitude in fashioning remedies").
[63] Supp. Award at 1.
[64] Award at 9.
[65] *E.g., NTEU Chapter 98*, 60 FLRA 448, 451 (2004).
[66] Supp. Exceptions at 13-14.