68 FLRA No. 58

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 271
(Union)

0-AR-5016

_____

DECISION

March 3, 2015

_____

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

I. Statement of the Case

Arbitrator Joseph A. Harris found that the Agency violated the parties' collective-bargaining agreement (dated 2012) and § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)[1] when it refused to bargain over the establishment of a health unit following its move to a new office.

This case presents the Authority with three substantive issues. The first issue is whether the Arbitrator's findings that the Agency established and maintained a health unit at its former office and that the past practice was not superseded by new language in the parties' agreement are nonfacts. Because the parties disputed the claimed nonfacts at arbitration, we deny this exception.

The second issue is whether the award fails to draw its essence from Article 27 of the parties' agreement. Because the Arbitrator's interpretation of that provision is not irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, we deny this exception.

The third issue is whether the Arbitrator's rejection of the Agency's "covered-by" argument fails to draw its essence from the parties' agreement. Because the "covered-by" doctrine does not provide a basis for setting aside an award on essence grounds, we deny this exception.

II. Background and Arbitrator's Award

In the past twenty-five years, the Agency's Brooklyn office has relocated twice. In 1992, the Agency moved into a building on Fulton Street (the Fulton Street Office), and in 2012, the Agency left the Fulton Street Office for a location in Metrotech Center (the Metrotech Office).

The Agency was the first tenant to move into the Fulton Street Office, and it oversaw the renovations of that space, which included the construction of facilities for an on-site health clinic. The clinic was staffed by Federal Occupational Health (FOH), and Agency employees had access to the clinic pursuant to an agreement between FOH and the Agency.

In connection with negotiations over the Agency's move to the Metrotech Office, the Union proposed that the Agency construct and staff a health unit at the new location. But the Agency took the position that it had no obligation to bargain over the establishment of a new clinic, citing Article 27 of the parties' agreement.

Article 27, Section 5.B-C of the parties' agreement provides:

> B. For [employees] assigned to [c]enter [c]ampuses, the [Agency] will provide [certain] services . . . , on a voluntary basis, to all employees whose health coverage does not provide for these services. The [Agency] has determined that when the population of any shift exceeds an average population of 500 employees for any quarter, nurse services will be provided.
>
> C. In [posts-of-duty] other than [c]enter [c]ampuses, where there are [f]ederally[ ]sponsored health facilities on premises staffed by trained medical professionals or technicians, the [Agency] will participate in the health unit so that [Agency] employees may avail themselves of the services.[2]

[1] 5 U.S.C. § 7116(a)(1), (5).

[2] Exceptions, Ex. D-1, Parties' Agreement at 92.

Article 27, Section 6 provides:

> Where full health facilities are not available on the premises, the [Agency] will provide first aid kits and will designate employees from among volunteers to maintain the kits. The [Agency] will ensure that every [post-of-duty] with more than 100 employees will have immediate access to emergency defibrillator equipment, as well as personnel trained to operate such equipment.[3]

And Article 27, Section 17 provides: "At [c]enter [c]ampuses, the [Agency] will continue to provide health services through an approved contract provider."[4]

The Agency argued that its practice at the Fulton Street Office was merely to participate in the FOH clinic, as required by the parties' agreement, and that its only obligation at the new office was to provide first aid kits and defibrillators. Conversely, the Union argued that the Agency "creat[ed] and maint[ained]" the health unit at the Fulton Street Office, "in spite of the fact that the [parties' agreement] did not require it to do so," which "established a past practice" of providing a health unit at the Agency's Brooklyn office.[5]

The Agency argued that Article 27 expressly addresses the subject of on-site health clinics or, alternatively, that the subject was "inseparably bound up with, and thus plainly an aspect of" the topics addressed by that article.[6] Accordingly, it argued that the "covered-by" doctrine provided a defense to the alleged failure to bargain. Further, the Agency argued that, even assuming a past practice had been established, it conflicted with the parties' agreement, and that the Agency was, therefore, under no obligation to continue it. Conversely, the Union argued that the "covered by" doctrine did not apply because a "past practice modifies [a collective-bargaining agreement]."[7]

The Arbitrator found in favor of the Union. He concluded that there was an established past practice of the Agency maintaining a health unit – as opposed to merely participating in an existing health unit – at its Brooklyn office. He based this conclusion on his finding that the Agency "established" the health unit at the Fulton Street Office.[8] And he faulted the Agency for failing "to provide copies of its contracts with FOH regarding the [h]ealth [u]nit located in Brooklyn that would support its contention that the Brooklyn [h]ealth [u]nit was an FOH operation that the [Agency] participated in as opposed to an [Agency] operation run by the FOH on [the Agency's] behalf."[9]

The Arbitrator further held that the past practice did not conflict with the parties' agreement because, although "the plain language of Article 27 does not require [the Agency] to create a health unit at [the Metrotech Office]," it also does not "prohibit the establishment of one."[10] Moreover, the Arbitrator held that "to the extent that there [were] any conflict between the plain language of Article 27 and the Union's proposal [to establish a health unit at the Metrotech Office], it [would be] irrelevant because the . . . established past practice modified the [parties' agreement]."[11]

Finally, the Arbitrator observed that "Article 54(2)(C) requires the [p]arties to bargain over mid-term changes to past practices," and that "[t]here [wa]s no dispute that the Agency failed to bargain over the establishment of a health unit at [the Metrotech Office]."[12] "Therefore, having found that a past practice existed which did not conflict with the [parties' agreement], [the Arbitrator] conclude[d] that the Agency committed an unfair labor practice by failing to bargain with the Union."[13] Finally, the Arbitrator rejected the Agency's "covered-by" argument, concluding that "Article 27 neither expressly nor implicitly defines the Agency's obligations in a non-center office where there is no preexisting federally[ ]sponsored health unit."[14] As a remedy, the Arbitrator ordered the parties to bargain over the establishment of a health unit at the Metrotech Office and ordered the Agency to restore the status quo ante pending the completion of bargaining.

The Agency filed exceptions to the award, and the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matters

A. The Agency's exceptions are timely.

The Arbitrator served his award on the parties, by mail, on January 8, 2014. Including five additional days for service by mail,[15] the Agency's exceptions were

[3] *Id.*
[4] *Id.* at 94.
[5] Award at 5.
[6] *Id.* at 7 (citing Exceptions, Ex. B-1, Agency's Post-Hr'g Br. at 15); *see also U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1018 (1993) (citations omitted) (explaining Authority's test for "covered-by" defense).
[7] Award at 6 (citing Ex. B-2 (Union's Post-Hr'g Br.) at 20).
[8] *Id.* at 8.
[9] *Id.* at 9.
[10] *Id.* at 10.
[11] *Id.* at 12.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *See* 5 C.F.R § 2429.22.

due no later than February 12, 2014.[16] The Agency deposited its exceptions with the United Parcel Service (UPS) on February 12, 2014.

The Union argues that because the Agency filed its exceptions by commercial delivery service, the Authority needed to receive the exceptions on or before the filing deadline for the exceptions to be timely.[17] However, § 2429.21(b)(1)(iv) of the Authority's Regulations provides that, for documents filed by commercial delivery, the date of filing is the date of deposit with the delivery service.[18] As there is no dispute that the Agency deposited its exceptions with UPS on February 12, 2014 – the date by which the exceptions were due – the exceptions are timely.

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

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations,[19] the Authority will not consider evidence or arguments that could have been, but were not, presented to the arbitrator.[20] The Authority applies §§ 2425.4(c) and 2429.5 to bar challenges to a remedy if the remedy was requested by one of the parties and not objected to by the other.[21]

Here, the Agency argues that the Arbitrator's order to "maintain the status quo ante by installing and staffing a temporary health unit at [the Metrotech Office] for [twenty] hours a week"[22] is "[e]xcessive and [a]mbiguous."[23] The Union requested a status-quo-ante remedy in its grievance,[24] and the remedy that it requested in its post-hearing brief was virtually identical to that ordered by the Arbitrator.[25] But there is no indication that the Agency opposed the Union's remedial request before the Arbitrator or that the Agency sought (or was prevented from seeking) permission to respond to the Union's post-hearing brief, even though the award issued over a month after the parties exchanged post-hearing briefs.[26] Accordingly, we dismiss the Agency's challenge to the Arbitrator's remedy.

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency claims that the Arbitrator relied on two nonfacts.[27] 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.[28] The Authority will not find an award deficient based on the arbitrator's determination of any factual matter that the parties disputed at arbitration.[29]

Here, the Agency argues that the Arbitrator's finding that "the health unit at [the Fulton Street Office] was established by the [Agency]" is a nonfact.[30] However, because the parties disputed this matter at arbitration, the Agency's claim does not establish that the award is based on a nonfact.[31]

The Agency also claims that the Arbitrator's finding that the Agency "continued to maintain the health unit since 1992 without repudiation" is a nonfact.[32] It argues that new contract language included in the parties' 1998 collective-bargaining agreement superseded the alleged past practice.[33] Thus, the Agency claims that "the [A]rbitrator's determination that the Agency knowingly continued a past practice that conflicted with those new terms of the [a]greement" is incorrect, and that his finding "of a past practice that had the effect of modifying the terms of Article 27" is therefore erroneous.[34] However, as with the Agency's first nonfact argument, the parties disputed this matter before the Arbitrator. Therefore, the Arbitrator's resolution of the

[16] *See* 5 U.S.C. § 7122(b) (requiring exceptions to arbitration awards to be filed within thirty days of service by the arbitrator); 5 C.F.R. §§ 2425.2(b) (same), 2429.22(a) (providing five additional days to file for documents served by mail).
[17] Opp'n Br. at 3-5.
[18] 5 C.F.R. § 2429.21(b)(1)(iv).
[19] *Id.* §§ 2425.4(c), 2429.5.
[20] *E.g.*, *AFGE, Local 3571*, 67 FLRA 218, 219 (2014) (citing *U.S. DHS, CBP*, 66 FLRA 495, 497 (2012); 5 C.F.R. §§ 2425.4(c), 2429.5).
[21] *E.g.*, *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 357 (2014) (citing *USDA, Farm Serv. Agency, Kan. City, Mo.*, 65 FLRA 483, 484 n.4 (2011)).
[22] Award at 13.
[23] Exceptions at 12.
[24] *Id.*, Ex. D-2, Grievance at 1.
[25] *Compare* Union's Post-Hr'g Br. at 28 (requested remedy), *with* Award at 13 (awarded remedy).
[26] *See AFGE, Council of Prison Locals, Local 405*, 67 FLRA 395, 397 (2014) (dismissing exception for failure to challenge argument raised in union's brief before arbitrator where over a month passed between exchange of briefs issuance of award and agency did not allege that parties' agreement or arbitrator prohibited filing of reply briefs).
[27] Exceptions at 6.
[28] *E.g.*, *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993).
[29] *E.g.*, *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 626, 628 (2012) (*Laredo*) (citing *NAGE, SEIU, Local R4-45*, 64 FLRA 245, 246 (2009) (*Local R4-45*)).
[30] Exceptions at 6.
[31] *Laredo*, 66 FLRA at 628 (citing *Local R4-45*, 64 FLRA at 246).
[32] Exceptions at 6; *see also* Award at 9.
[33] Exceptions at 6-7.
[34] *Id.* at 7 (citing *U.S. Dep't of the Treasury, IRS, Louisville Dist., Louisville, Ky.*, 42 FLRA 137, 140 (1991)).

dispute provides no basis for finding the award deficient.[35]

Accordingly, we deny the Agency's nonfact exceptions.

B. The award draws its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement.[36] 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.[37] Under this standard, the Authority will find an arbitration award 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.[38] The Authority and the courts defer to the arbitrator's interpretation of the collective-bargaining agreement "because it is the arbitrator's construction of the agreement for which the parties have bargained."[39]

The Agency argues that the Arbitrator's determination that the Agency was obligated to bargain over the establishment of a health unit at the Metrotech Office fails to draw its essence from the parties' agreement because it "conflicts with the clear provisions of Article 27."[40] Specifically, the Agency claims that the Arbitrator's "finding that Article 27 does not address the Agency's obligation to provide health units is contradicted by the plain and unambiguous language of the [parties' a]greement[,] which requires the Agency to establish health[-]unit facilities at [c]enter[-c]ampus locations and contains no similar requirement for non-[c]enter[-c]ampus locations."[41]

The Arbitrator acknowledged the Agency's arguments concerning Article 27.[42] But he found that although "the plain language of Article 27 does not require [the Agency] to create a health unit at [the Metrotech Office]," it also did not "prohibit the establishment of one."[43] Accordingly, the Arbitrator found that the practice did not conflict with the parties' agreement.[44] Because this interpretation is not irrational, unfounded, implausible, or in manifest disregard of the agreement, the Agency has not established that the award fails to draw its essence from Article 27 of the parties' agreement.

Additionally, we have rejected the Agency's nonfact challenge to the Arbitrator's conclusion that "to the extent that there is any conflict between the plain language of Article 27 and the Union's proposal, it is irrelevant because the . . . established past practice modified" the parties' agreement.[45] This finding is a separate and independent basis for the Arbitrator's determination that Article 27 did not relieve the Agency of its duty to bargain. When an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient in order to have the award found deficient.[46] As such, the Agency's essence exception provides no basis for finding the award deficient.[47]

Accordingly, we deny the Agency's essence exceptions.[48]

---

[35] *Laredo*, 66 FLRA at 628 (citing *Local R4-45*, 64 FLRA at 246).
[36] Exceptions at 8-11.
[37] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[38] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[39] *Id.* at 576.
[40] Exceptions at 8.
[41] *Id.*
[42] *See* Award at 10.
[43] *Id.*
[44] *Id.*
[45] *Id.* at 12.
[46] *See, e.g., U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, San Juan, P.R.*, 66 FLRA 81, 86 (2011) (citing *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000)).
[47] *Id.*
[48] Member Pizzella notes that, with regard to past practices, arbitrators normally follow the rule that "[a] practice is no broader than the circumstances out of which it has arisen . . . [and] that every practice must be carefully related to its origin and purpose." Richard Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements, in Arbitration and Public Policy, Proceedings of the 14th Annual Meeting of the National Academy of Arbitrators* 30, 32-33 (Spencer D. Pollard ed., 1961). Thus, while he agrees that the Arbitrator's factual findings support his conclusion that there was a past practice of providing a health clinic *at the Fulton Street office*, he is more skeptical of the Arbitrator's implicit conclusion that the past practice was providing a health clinic *for Brooklyn-based employees* and that this practice followed the employees to their new office. But as the Agency does not challenge the Arbitrator's conclusions as to the scope of the practice, he finds it unnecessary to determine whether the Arbitrator's conclusion is correct in this regard.

C. The Agency's "covered-by" argument provides no basis for finding the award deficient.

The Agency also argues that "the [A]rbitrator's rejection of the Agency's 'covered[-]by' argument fails to draw its essence from the terms of the [a]greement."[49]

Under § 2425.6(e)(1) of the Authority's Regulations, an exception "may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground" listed in § 2425.6(a)-(c), "or otherwise fails to demonstrate a legally recognized basis for setting aside the award."[50] And while an award's failure to draw its essence from the parties' agreement is a recognized private-sector ground,[51] the misapplication of the "covered-by" doctrine does not provide a basis for finding an award deficient under the essence standard set forth above. Rather the "covered-by" doctrine provides a basis for finding an arbitrator's finding of a statutory failure to bargain, under § 7116(a)(1) and (5), deficient on contrary-to-law grounds.[52] But the Agency does not except on the grounds that the award is contrary to law, and the Authority will not "construe parties' exceptions as raising grounds that the exceptions do not raise."[53] As a result, the Agency has failed to support its claim that the Arbitrator's interpretation fails to draw its essence from the parties' agreement.

Accordingly, we deny the Agency's "covered-by" exception.

IV. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

[49] Exceptions at 12; *see also id.* at 10 ("[T]he [A]rbitrator's [a]ward . . . ignores the plain language of the [parties' a]greement, ignores the unrebutted bargaining[-]history testimony, and does not represent a plausible interpretation of the terms [of the parties' agreement].").
[50] 5 C.F.R. § 2425.6(e)(1).
[51] *Id.* § 2425.6(b)(2)(i).
[52] *See, e.g., U.S. Dep't of the Navy, Marine Corps, Combat Dev. Command, Marine Corps Base, Quantico, Va.*, 67 FLRA 542, 546 (2014) (Member Pizzella dissenting).
[53] *AFGE, Local 3955, Council of Prison Locals* 33, 65 FLRA 887, 889 (2011).