70 FLRA No. 142

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 238
(Union)

0-AR-5339

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DECISION

July 13, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester concurring in part;
Member Abbott concurring)

I. Statement of the Case

The Union requested official time for certain employees to attend, and travel back from, a conference. The Agency granted official time for attendance at the conference, but denied it for the return travel. Arbitrator Elliot H. Shaller issued an award finding that the Agency violated Article 6 of the parties' master collective-bargaining agreement (Article 6) by denying the travel portion of the Union's official-time request.

Because the Agency does not except to all of the separate and independent grounds for the award, the exceptions provide no basis for finding the award deficient. Therefore, we deny the Agency's exceptions.

II. Background

Since 2005, the Union has participated in an annual three-day legislative conference held by the American Federation of Government Employees. The primary purpose of the conference is to permit employees to engage in lobbying activities on behalf of the Union. For the 2017 conference, the Union requested four days of official time for thirty-one employees – three days for attendance at the conference and one day for return travel. Ultimately, the Agency granted the employees official time to attend the conference. However, it denied official time for the fourth day, stating that official time for travel was not authorized.

The Union filed a grievance alleging, in relevant part, that the Agency had violated Article 6 by denying the travel portion of its official-time request. Article 6 states, as relevant here, that official time "shall be granted in reasonable and necessary amounts to Union representatives for representational purposes."[1]

The grievance went to arbitration, where the parties agreed that the Arbitrator would address, as relevant here, whether the Agency had violated Article 6 by denying official time for the return travel.

The Arbitrator observed that Article 6 did not specifically refer to travel, but permitted employees official time for "representational purposes."[2] The Arbitrator reasoned that Article 6 would be "hollow" if it authorized official time for representational activities – such as the conference – but not for the travel necessary to perform those activities.[3] Thus, he found that if the parties had intended to exclude travel from the activities that could be performed on official time under Article 6, then they would have done so explicitly. Because the parties had not done so, the Arbitrator interpreted Article 6 as entitling employees to official time for travel related to representational purposes.

"In addition to [his] interpretation of the language of [Article 6] itself," the Arbitrator found that the parties, for more than ten years, had a practice under which the Agency granted official time for return travel from the conference.[4] The Arbitrator rejected the Agency's argument that – by denying the official-time request – the Agency had ended the past practice. Instead, the Arbitrator found that the practice supported his interpretation of Article 6.

In sum, the Arbitrator held that the Agency violated Article 6 by denying official time for the employees' return travel.

On January 4, 2018, the Agency filed exceptions to the Arbitrator's award, and, on February 8, 2018, the Union filed an opposition to those exceptions.

III. Analysis and Conclusion: The Agency's exceptions do not challenge a separate and independent ground for the award.

Where an arbitrator has based an award on separate and independent grounds, the Authority has

[1] Award at 3 (quoting Master Agreement Article 6, § 8).
[2] *Id.* at 12 (quoting Master Agreement Article 6, § 8).
[3] *Id.* at 13.
[4] *Id.* at 15-16.

consistently required the excepting party to establish that *all* of the grounds are deficient in order to have the award found deficient.[5] If the excepting party does not do so, then it is unnecessary to address exceptions to the other grounds.[6] The Authority has applied this principle where, for example, an arbitrator has based his or her award on a contract interpretation *and* a separate finding of past practice, and the excepting party has challenged only the past-practice finding.[7]

Here, the Agency excepts only to the Arbitrator's consideration of, and findings related to, the parties' past practice.[8] In response, the Union argues that the Arbitrator's interpretation of Article 6 was based on that provision's "specific language" – not the parties' past practice.[9] Thus, the Union asserts that even if the Agency's past-practice arguments had merit, the Arbitrator interpreted Article 6's wording "irrespective of the parties' previous ten years of application of this provision."[10]

While the Arbitrator addressed past practice, he did so only to support his prior conclusion that "*the language of* [*Article 6*] *itself*" entitled employees to official time for travel.[11] Rejecting the Agency's past-practice argument, the Arbitrator found that the parties had a longstanding past practice, which the parties had not ended, of granting official time for return travel from the conference.

Nonetheless, the Arbitrator's interpretation of Article 6's *wording* constitutes a separate basis for the award that is independent from his past-practice findings.[12] By failing to except to the Arbitrator's interpretation of the wording of Article 6, the Agency provides no basis for finding the award deficient.[13] Accordingly, consistent with Authority precedent, we deny its exceptions.[14]

Although we deny the Agency's exceptions, we note that the Union's official-time request, and the parties' roughly ten-year past practice, exemplify why Executive Order No. 13,837[15] is necessary. The Executive Order's purpose is to "ensure that taxpayer-funded union time is used efficiently and authorized in amounts that are reasonable, necessary, and in the public interest."[16] Four consecutive days of official time for thirty-one employees to engage in lobbying activities is simply not an effective or efficient use of government resources. In fact, under the Executive Order, neither attendance at the conference, nor any associated travel, would be a permissible use of official time.[17] However, the Executive Order was not in effect when the Agency granted the official-time request or when the employees attended the conference. Therefore, it does not apply to this dispute.

IV. Decision

We deny the Agency's exceptions.

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[5] *E.g.*, *SSA*, 69 FLRA 208, 210-11 (2016) (*SSA*); *U.S. Dep't of the Army, Blue Grass Army Depot, Richmond, Ky.*, 58 FLRA 314, 314-15 (2003) (*Army Depot*).

[6] *E.g.*, *Army Depot*, 58 FLRA at 315.

[7] *SSA*, 69 FLRA at 210-11.

[8] Exceptions Br. at 5-9 (arguing that the award is contrary to Authority precedent on past practice); *id.* at 9-10 (arguing that the master agreement precluded the Arbitrator from considering the parties' past practice); *id.* at 10-11 (claiming that there was insufficient evidence to establish that a past practice existed); *id.* at 13-14 (arguing that the Agency was entitled to change the parties' past practice).

[9] Opp'n at 7-8 (arguing that the Arbitrator's "determination was based on his interpretation of the specific language of Article 6 and the issue of whether or not travel . . . should reasonably be included in the definition of 'representational purposes'").

[10] *Id.* at 8; *see also id.* at 10 ([T]here is no indication that the issue of 'past practice' was a critical factor in the Arbitrator's determination, having only been addressed in his . . . [a]ward after analyzing the specific language and meaning of Article 6.").

[11] Award at 15; *see id.* (noting that the consideration of the parties' past practice was "[i]n addition to" the interpretation of the wording of Article 6); *id.* at 17 (finding that the Agency's attempts to change the past practice had no effect on Article 6, which he "interpreted . . . as calling for official time for travel in connection with Union representational activities").

[12] *See SSA*, 69 FLRA at 211 (arbitrator's past-practice finding and plain-wording interpretation of an agreement constituted separate and independent grounds for the award); *U.S. Dep't of the Treasury, IRS*, 68 FLRA 329, 332 (2015) (same).

[13] *See SSA*, 69 FLRA at 211; *Army Depot*, 58 FLRA at 315.

[14] We note that the Agency's argument that the award conflicts with the Federal Service Labor-Management Relations Statute (the Statute) also focuses on past practice. Exceptions Br. at 14 (arguing Agency "was free to change a past practice regarding official time for travel from the [c]onference, if one existed"). However, to the extent that the Agency argues that the Arbitrator's interpretation of Article 6 is inconsistent with the Supreme Court's interpretation of § 7131(a) of the Statute in *Bureau of Alcohol, Tobacco, & Firearms v. FLRA*, 464 U.S. 89 (1983), we disagree. *See* Exceptions Br. at 11-12. That case involved an alleged *statutory* entitlement to travel and per diem *expenses* – not, as here, an alleged *contractual* entitlement to *official time* to engage in travel.

[15] Exec. Order No. 13,837, 83 Fed. Reg. 25,335 (May 25, 2018).

[16] *Id.* at 25,335.

[17] *See id.* at 25,337 (Section 4(a)(i) specifically prohibits employees from receiving official time for "lobbying activities").

Member DuBester, concurring in part:

I agree with the determination to deny the Agency's exceptions. In doing so, the Authority fulfills its statutory responsibility to adjudicate this case.

However, I do not agree with the majority's inclusion in the opinion of an overreaching editorial on official time and the related executive order. Although the general topic of official time, and the executive order, are very important issues in the federal labor-management community and elsewhere, they are irrelevant to resolving the Agency's exceptions. For this reason, such dicta has no place in Authority decisions resolving the legal issues in particular cases.

Member Abbott, concurring:

The Agency has not established that the Arbitrator's interpretation of Article 6 is deficient in any respect, and the Agency's exceptions are properly denied.

However, I do so for reasons that are different than my colleagues.

This grievance was always about the parties' disagreement about Article 6; specifically, whether the Agency was obligated to approve travel time related to Union representatives attending a "legislative" conference on official time.[1] Although the parties argued about, and the Arbitrator considered and addressed, the parties' differing perceptions about Article 6 and how it had been applied in the past, the Union's grievance alleged, nothing more and nothing less than, a violation of Article 6;[2] the stipulated issues concerned Article 6;[3] and the Arbitrator's award was based on Article 6. It is thus not helpful to unilaterally assert that the award was based on "separate and independent grounds"[4] and not address the sum and substance of the Agency's exceptions.

The idea − that a single-issue grievance may be parsed, after the fact, into separate parts (aka "grounds") unilaterally *by the Authority* − is just the "type of legal gymnastics which creates confusion for federal unions and agencies alike."[5] I agree that the Agency's exceptions are not artful. I even would go so far as to say that they are sloppy, unfocused, and fail to demonstrate that the Arbitrator's interpretation of Article 6 is deficient in any respect.

But, from my point of view, the Authority does not encourage better and more precise filings when we fail to address directly the one and only question that is relevant to the disposition of the case before us.

[1] Award at 2.
[2] *Id.* at 7.
[3] *Id.* at 2.
[4] Majority at 3.
[5] *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 623, 625 (2018) (Concurring Opinion of Member Abbott).