

70 FLRA No. 163

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL SUPPLY SYSTEMS COMMAND
FLEET LOGISTICS CENTER
(Agency)

and

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 17
(Union)

0-AR-5325

DECISION

September 19, 2018

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

I. Statement of the Case

Arbitrator Edward B. Valverde issued an award finding that the Agency was required to pay an employee (the grievant) certain overtime. The Arbitrator interpreted Article 30, Section 5 of the parties' agreement (Article 30) as mandating the overtime, despite the fact that U.S. Department of Defense Instruction 1400.25-V810 (the Instruction) prohibits it. Because the Arbitrator's interpretation of Article 30 is irrational and implausible, we find that the award fails to draw its essence from the parties' agreement.

II. Background

The grievant is responsible for taking fuel samples from fuel trucks at the Agency's facility. Her normal duty hours consist of an eight-hour day plus a half-hour unpaid lunch break, making her total workday 8.5 hours. One day, the Agency required her to sample fuel from a truck just before her lunch break, and she was injured while doing so. Her supervisor directed her to go to the Agency's medical center for treatment. Because of the time that the grievant spent receiving treatment, she missed her lunch break and did not leave the Agency's facility until one hour later than she was scheduled to work that day. In total, she was at the Agency's facility

for 9.5 hours, but the Agency compensated her for only eight hours of work.

Subsequently, the grievant requested payment for the additional 1.5 hours, but the Agency denied that request. The Union filed a grievance, alleging that the denial violated Article 30. The grievance went to arbitration.

The Union argued that Article 30 entitled the grievant to 1.5 hours of overtime pay. Article 30 states that "[o]n the day of an on-the-job injury, time spent related to an on-the-job injury[] is considered duty time for pay purposes."¹

The Agency argued that Article 30 mandates payment only for treatment time that occurs during an employee's regular work hours. The Agency asserted that its interpretation of Article 30 was supported by the Instruction, which prohibits paying the grievant overtime. As relevant here, the Instruction states that an employee who is injured during his or her shift "will be credited only for the number of regular hours he or she was *scheduled* to work that day," excluding overtime.² To support its argument that the Arbitrator should interpret Article 30 in harmony with the Instruction, the Agency also cited Article 2. Article 2 states that the parties agree that they "are governed by . . . published [A]gency policies and regulations in existence at the time [when the parties' agreement] is approved."³ The Instruction is such an Agency policy.

The Arbitrator rejected the Agency's argument and interpreted Article 30 as meaning that, on the day of an on-the-job injury, *all* treatment time related to that injury is compensable duty time, even if it extends past an employee's scheduled hours. Based on this interpretation, he found that Article 30 and the Instruction conflict. Consequently, he applied Authority precedent holding that a collective-bargaining provision – not an agency-wide rule or regulation – governs the disposition of a matter to which they both apply.⁴ Thus, he found that the Agency violated Article 30 by failing to pay the grievant for the 1.5 hours, and he directed the Agency to pay the grievant 1.5 hours of overtime.

¹ Award at 3.

² Exceptions, Ex. 11, Instruction (Instruction) at 54 (emphasis added).

³ Award at 3.

⁴ *Id.* at 10 (citing *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017); *U.S. Dep't of the Treasury, IRS*, 68 FLRA 145, 147 (2014); *U.S. Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 FLRA 186, 190 (1990)).

On October 28, 2017, the Agency filed exceptions to the award, and on November 27, 2017, the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusion: The award fails to draw its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator interpreted Article 30 as creating a broad overtime-pay entitlement that conflicts with the Instruction.⁵ An award fails to draw its essence when the appealing party establishes, as relevant here, that the award cannot in any rational way be derived from the agreement or does not represent a plausible interpretation of the agreement.⁶

According to the Agency, Article 30 and the Instruction *do not* conflict.⁷ We agree.

As stated above, Article 30 provides that "[o]n the day of an on-the-job injury, time spent related to an on-the-job injury[] is considered duty time for pay purposes."⁸ Article 30 does not expressly refer to treatment that occurs outside an employee's regular work hours.⁹ Nevertheless, the Arbitrator found that Article 30 requires compensation for *all* time spent receiving treatment.¹⁰ Whereas Article 30 is silent about overtime in these circumstances, the Instruction expressly addresses, and prohibits, overtime for treatment of an on-the-job injury.¹¹ The Arbitrator's interpretation of Article 30's silence on the overtime issue in disregard of, and in conflict with, the Instruction is irrational and

implausible.¹² Consequently, we find that the award fails to draw its essence from Article 30.¹³

IV. Decision

We set aside the award.¹⁴

⁵ Exceptions at 16-17.

⁶ *AFGE, Local 2152*, 69 FLRA 149, 152 (2015) (citing *AFGE, Council 220*, 54 FLRA 156, 159 (1998)).

⁷ Exceptions at 15-17.

⁸ Award at 3.

⁹ See Exceptions at 17 (arguing that, when read in context, Article 30 clearly "was intended to ensure that employees who are injured on the job would be compensated while receiving treatment *during their regular work hours*" (emphasis added)).

¹⁰ Award at 9.

¹¹ Instruction at 54.

¹² See, e.g., *U.S. Small Bus. Admin.*, 70 FLRA 525, 527-28 (2018) (Member DuBester concurring, in part, and dissenting, in part) (finding arbitrator's determination that agency had waived a clear contractual right was not a plausible interpretation of the parties' collective-bargaining agreement because, among other things, the agreement contained no wording regarding waiver).

We note that reading Article 30 in harmony with the Instruction would also be consistent with Article 2's instruction that the parties are "governed by . . . published agency policies and regulations in existence at the time [when the parties' agreement] is approved." Award at 3.

¹³ Member Abbott notes that there is an irony here which should not be overlooked. The grievant complains that she did not receive 90 minutes of overtime after she was released from duty to seek medical care which was paid entirely by the federal government. According to the Union's analysis, had the emergency room been crowded, then the grievant would have been entitled to up to NINE HOURS of overtime, until 11:59 p.m. What is overlooked entirely is that had the grievant's injury turned out to be more serious, she would have been eligible to receive up to 45 days of continuation-of-pay benefits. It is apparent to me that once the grievant preserved her rights to proceed under the Federal Employees Compensation Act (FECA) (by filing Form CA-1), she forfeited any nebulous contractual claim to overtime.

¹⁴ Because we set aside the award, we need not address the Agency's remaining exceptions or determine whether they are properly raised before us. See, e.g., *U.S. Dep't of Transp., FAA*, 70 FLRA 687, 689 n.36 (2018) (Member DuBester dissenting).

Member DuBester, dissenting:

I disagree with the majority's decision to set aside the Arbitrator's award.

The Arbitrator finds Article 30's language "plain and clear."¹ I agree. Article 30 provides, simply, that "[o]n the day of an on-the-job injury, time spent related to an on-the-job injury . . . is considered duty time for pay purposes."² Applying the provision's "plain and clear" language, the Arbitrator finds that the time the grievant spent receiving medical treatment for his on-the-job injury, on the day he was injured, should, in the provision's words, be "considered duty time for pay purposes"; that is, should be compensable.³ The Arbitrator's interpretation flows directly from the provision's plain language. The further question, whether that compensable time is regular time, or overtime, is something determined by the particular circumstances of each case, independent of Article 30.

Ironically, it is the majority's interpretation of Article 30, not the Arbitrator's, that is implausible, irrational, and in manifest disregard of the provision's plain language. Whatever the majority's reasons for adopting this interpretation, those reasons have nothing to do with the parties' intent when they negotiated Article 30. One thing is evident, however. Apparently, the majority is now in the business of rewriting parties' contracts for them.

¹ Award at 9.

² *Id.*

³ *Id.*