

71 FLRA No. 126

UNITED STATES
DEPARTMENT OF HEALTH
AND HUMAN SERVICES
OFFICE OF MEDICARE
HEARINGS AND APPEALS
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 212
(Union)

0-AR-5417

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DECISION

April 3, 2020

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

I. Statement of the Case

In this case, we deny exceptions challenging Arbitrator Sara Adler's determination that the Agency acted arbitrarily and in violation of the parties' collective-bargaining agreement (CBA or agreement) when it denied the grievants' requests for a fourth day of telework.

The Agency argues that the Arbitrator's award fails to draw its essence from the parties' agreement, is based on a nonfact, and is contrary to law because it excessively interferes with management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Federal Service Labor-Management Relations Statute (Statute).¹

Because we find that the Arbitrator's award is a plausible interpretation of the parties' agreement, that the Agency failed to put forth an argument providing a basis for finding the award based on a nonfact, and that the Arbitrator's award, which is based on the particular facts of this case, is not contrary to law, we deny the Agency's exceptions.

¹ 5 U.S.C. § 7106(a)(2)(A)-(B).

II. Background and Arbitrator's Award

The grievants are attorney-advisors who draft opinions for administrative law judges. Both grievants were teleworking three days a week when the Agency announced plans to downsize its office space, which would require the attorneys to share offices.² Both grievants subsequently requested a fourth day of telework. The Agency denied both requests and the Union grieved the denials. The parties were unable to resolve the grievances and the matters proceeded to a consolidated arbitration.

In her award dated September 6, 2018, the Arbitrator framed the issue as "[d]id the Agency violate the parties' . . . [a]greement[] when it denied [g]rievants' requests for a fourth day of telework" and, "[i]f so, what is the appropriate remedy?"³ She referred to Article 26, Section 4(B) (Article 26) of the parties' agreement which states, in part, that the Agency will consider telework requests on a "case by case basis" and will not make telework decisions "in an arbitrary and capricious manner."⁴ The Arbitrator noted that there was no evidence the grievants were less than fully successful in teleworking three days a week. She stated that "[o]ver time the Agency's proffered reasons for denying the fourth day of telework have shifted and . . . there is no particularized objective evidence that supports the Agency's denials."⁵ She further stated that it appeared the Agency was "simply uncomfortable" with four days of telework and that the denials did not take into account the new, downsized office space.⁶ The Arbitrator concluded that "[i]n the absence of evidence that a fourth day of telework by these [g]rievants would compromise the mission of the Agency in any way, I find that the denials are arbitrary (although not capricious) and in violation of the Agency's contractual obligation."⁷ The Arbitrator ordered the Agency to grant the grievants' requests for a fourth day of telework.

The Agency filed exceptions to the award on October 4, 2018 and the Union filed an opposition to the Agency's exceptions on November 5, 2018.

² See Opp'n, Attach. 5, Memorandum of Understanding Between Office of Medicare Hearings and Appeals and NTEU Regarding Office Sharing (MOU).

³ Award at 2.

⁴ Exceptions, Attach. 1, Collective Bargaining Agreement (CBA) at 95. Article 26, Section 4(B) states in full that "[t]he parties agree that specific individual participation in telework must be considered on a case by case basis. The decision will not be made in an arbitrary and capricious manner. The [Agency] will administer the telework program in a fair and equitable manner." *Id.*

⁵ Award at 4.

⁶ *Id.*

⁷ *Id.*

III. Analysis and Conclusions

A. The award does not fail to draw its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement⁸ because it conflicts with the plain language of Article 26.⁹ Specifically, the Agency contends that the Arbitrator's finding that the Agency's decisions were "arbitrary (although not capricious)"¹⁰ is incompatible with the plain meaning of Article 26, which, according to the Agency, requires decisions to be both arbitrary *and* capricious.¹¹

Article 26 states that the Agency will not deny telework requests in an "arbitrary and capricious manner."¹² We are not persuaded by the Agency's argument that the parties intended for the phrase "arbitrary and capricious" to be interpreted as separate standards requiring separate analysis and findings, contrary to its common interpretation. The term "arbitrary and capricious" is one that has acquired a distinct meaning in administrative law over the years. As the Agency references, under the Administrative Procedure Act, the phrase "arbitrary and capricious" is generally well-accepted as one thought, and finding one *or the other* is commonly assumed to meet the standard.¹³

Thus, we cannot conclude that the Arbitrator's finding that the Agency violated the parties' agreement by acting arbitrarily, although not capriciously, is incompatible with the plain meaning of Article 26 nor an implausible interpretation of the parties' agreement.¹⁴

We deny the Agency's exception.

B. The award is not based on a nonfact.

The Agency argues that the award is based on the nonfact¹⁵ that the arbitrary and capricious standard in Article 26 is limited to a showing of whether the mission of the Agency would be compromised by granting the grievants' telework requests.¹⁶ In addition, the Agency asserts that the Arbitrator failed to address the Agency's evidence regarding its reasons for denying the grievants' telework requests.¹⁷

⁸ The Authority will find that an arbitration award is 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 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. *AFGE, Local 1148*, 70 FLRA 712, 713 n.11 (2018) (Member DuBester concurring) (citing *U.S. Dep't of the Treasury, IRS*, 70 FLRA 539, 542 n.24 (2018) (Member DuBester concurring)).

⁹ Exceptions Br. at 5-6.

¹⁰ Award at 4.

¹¹ Exceptions Br. at 5-6.

¹² CBA at 95.

¹³ See, e.g., *Eagle Broad. Grp., Ltd. v. FCC*, 563 F.3d 543, 551 (D.C. Cir. 2009) (referencing the standard of review under 5 U.S.C. § 706(2)(A) of the Administrative Procedure Act and stating that "courts rarely draw any meaningful distinctions between acts that are arbitrary, capricious, or an abuse of discretion" and that "[a]rbitrary, capricious, or an abuse of discretion review under § 706(2)(A) is now routinely applied by the courts as one standard under the heading of arbitrary and capricious review") (internal quotations omitted); see also *U.S. Dep't of the Navy, Military Sealift Command*, 70 FLRA 671, 671 (2018) (Member Abbott concurring; Member DuBester dissenting) (holding that the arbitrator failed to apply the parties' contractual arbitrary *and* capricious standard and vacating the award on essence grounds because

there was no rational basis for concluding the action at issue was arbitrary *or* capricious).

¹⁴ See *U.S. Dep't of VA, Denver Reg'l Office*, 70 FLRA 870, 871 (2018) (Member DuBester concurring) (denying the agency's essence exception for failure to demonstrate that the arbitrator's interpretation was not a plausible interpretation of the parties' agreement); *IFPTE, Ass'n Admin. Law Judges*, 70 FLRA 316, 317 (2017) (denying essence exceptions for failure to establish that the arbitrator's interpretation of the plain meaning of the contract provisions was irrational, unfounded, implausible or in manifest disregard of the parties' agreement).

¹⁵ 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. *U.S. Dep't of State, Passport Servs.*, 71 FLRA 362, 363 n.3 (2019) (Member DuBester concurring; Chairman Kiko dissenting) (citing *NTEU, Chapter 32*, 67 FLRA 174, 175 (2014) (Member Pizzella concurring)).

¹⁶ Exceptions Br. at 5.

¹⁷ *Id.* at 6.

Here, the Agency is challenging the Arbitrator's interpretation of the phrase "arbitrary and capricious" in Article 26 to mean whether or not the grievants' telework requests would compromise the mission of the Agency.¹⁸ Because the Agency's argument challenges the Arbitrator's interpretation of the parties' agreement, which is not a factual matter, it provides no basis for finding that the award is based on a nonfact.¹⁹ Furthermore, to the extent that the Agency argues that the Arbitrator would have reached a different result because she did not discuss the "substantial record of evidence"²⁰ the Agency presented regarding its reasons for denying the telework requests, such an argument challenges the Arbitrator's weighing of the evidence and also does not provide a basis for finding that the award is based on a nonfact.²¹

We deny the Agency's exception.

C. The award is not contrary to law.

The Agency argues that the award is contrary to law²² because it excessively interferes with management's right to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute.²³ Specifically, the Agency contends that the Arbitrator, in

limiting the Agency to deciding telework requests based on mission-related reasons only, "effectively prevent[ed] the Agency from making such determinations on any other statutory management right basis, i.e., how employees are to perform in their jobs."²⁴

Here, the Arbitrator did not "prevent[] the Agency from making" telework determinations, or limit any future determinations, as the Agency argues.²⁵ The Arbitrator simply found that the Agency violated the parties' agreement in denying the telework requests in this case. Because the Agency's argument does not demonstrate that the award is contrary to law, we deny the Agency's exception.²⁶

IV. Decision

We deny the Agency's exceptions.

¹⁸ Award at 4; Exceptions Br. at 5.

¹⁹ See *U.S. Dep't of State, Passport Servs.*, 71 FLRA 12, 13 (2019) (finding that the arbitrator's interpretation of a settlement agreement was not a factual matter and thus did not provide a basis for finding the award based on a nonfact); *U.S. Dep't of VA, VA Reg'l Office, St. Petersburg, Fla.*, 70 FLRA 799, 801 (holding that "contractual interpretations may not be challenged as nonfacts"); see also *U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 170, 172 (2019) (Dissenting Opinion of Member Abbott) ("What distinguishes nonfact from complained-about mistakes is that the error must be a fact (*not a contract interpretation*, not a credibility determination, and not a weighing of the evidence) that is so 'central' that 'but for which' the arbitrator would have reached a different result.") (emphasis added).

²⁰ Exceptions Br. at 6.

²¹ See *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 70 FLRA 186, 187 (2017) ("the Authority will not find an award deficient on nonfact grounds based on a party's disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence").

²² When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any questions of law raised by the exception and the award de novo; in doing so, it determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. But the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts. *U.S. DOD, Educ. Activity*, 71 FLRA 373, 375 (2019) (Member DuBester concurring in part and dissenting in part) (citing *U.S. Dep't of State, Bureau of Consular Affairs, Passport Serv. Directorate*, 70 FLRA 918, 919 (2018)).

²³ Exceptions Br. at 6.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Additionally, in its exceptions, the Agency alleges that the Arbitrator exceeded her authority. Exceptions Br. at 4, 7. However, aside from this brief assertion, the Agency makes no argument that the Arbitrator failed to resolve an issue that was before her, resolved an issue that was not before her, disregarded a specific limit on her authority, or awarded relief to persons not encompassed in the grievance. See *SSA*, 71 FLRA 333, 334 n. 18 (2019) (Member Abbott concurring; Chairman Kiko dissenting) (citing *AFGE, Local 12*, 70 FLRA 582, 583 (2018); *U.S. Dep't of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 308 (1995)). Accordingly, we deny this exception as unsupported. See 5 C.F.R. § 2425.6(e)(1) ("[a]n exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support" its argument).

Member Abbott, concurring:

In order to avoid an impasse between the Members, I agree that the Arbitrator's award is not contrary to law for the reasons stated in our decision. However, I do not believe that our decision today goes far enough to explain why, under these circumstances, it is not contrary to law.

In *SSA*,¹ the Authority recently held that the arbitrator's interpretation of the parties' agreement excessively interfered with management's right to direct employees and assign work because it "prevent[ed] the Agency from determining" the appropriate number of hearings for its administrative law judges to schedule each month in order to be eligible for telework.² Here, unlike in *SSA*, the Arbitrator did not limit the Agency's right to decide telework requests, but instead found that the Agency did not provide a particular reason for the denials as to "*these [g]rievants*" and thus acted arbitrarily in denying the fourth day of telework.³ Consequently, the Arbitrator's award does not excessively interfere with management's right to assign work⁴ as did the award in *SSA*.

I also would have also taken this opportunity to clarify that the *frequency* of telework—the "when" an eligible employee may perform his or her duties away from the duty station and "when" that eligible employee must report to the duty station—is inherent to management's right to assign work.⁵ In my view, Authority precedent that indicates otherwise is wrongly decided and should no longer be followed.⁶

Even with this approach, the Agency's argument would fail to establish that the award excessively interferes with management's right to assign work.

¹ 71 FLRA 495 (2019) (*SSA*) (Member DuBester dissenting in part).

² *Id.* at 498.

³ Award at 4 (emphasis added).

⁴ See *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 71 FLRA 240, 242 (2019) (Member DuBester concurring) (finding that the agency failed to demonstrate how the arbitrator's award excessively interfered with its rights under § 7106(a)(2)(A) and denying its contrary to law exception).

⁵ See The Telework Enhancement Act of 2010 (Act), 5 U.S.C. §§ 6501-6506 (2010). The Act plainly requires that an agency's telework policy "shall ensure that telework does not diminish employee performance or agency operations." 5 U.S.C. § 6502(b)(1).

⁶ *U.S. Dept. of HHS, Ctrs. for Medicare & Medicaid Servs., Balt., Md.*, 57 FLRA 704, 707 (2002) (finding an award—based on a violation of the parties' agreement—requiring the agency to allow the grievant to telework two days per week was not contrary to management's right to assign work); see also *U.S. Food & Drug Admin., Detroit Dist.*, 59 FLRA 679, 682-83 (2004) (finding an award—based on a violation of the parties' agreement—allowing employees to telework nine out of ten days did not affect management's right to assign work).

Chairman Kiko, dissenting:

For the following reasons, I disagree with my colleagues, and would set aside the award as failing to draw its essence from the agreement.

The Authority has recently, *and repeatedly*, held that when an agreement's wording is plain, arbitrators may not look beyond the collective-bargaining agreement – to extraneous considerations – to modify the agreement's clear and unambiguous terms.¹ Yet, that is exactly what the majority does here.² Instead of practicing what the Authority preaches, the majority relies on extraneous considerations to determine whether Article 26, Section 4(B) of the parties' agreement precludes Agency conduct that is "arbitrary *and* capricious"³ or "arbitrary *or* capricious."⁴ But, to answer that question, we need look only to the plain wording of Article 26, which plainly precludes "arbitrary *and* capricious" telework denials.⁵

Despite Article 26's plain wording, the majority goes outside of the parties' agreement, to the Administrative Procedure Act (APA), to determine the parties' intent.⁶ Based on considerations such as the APA's arbitrary-and-capricious standard and courts' interpretations of it, the majority then modifies the parties' agreement to preclude Agency conduct that is "arbitrary *or* capricious," or, in this case, only "arbitrary."⁷ In doing so, the majority undermines the stability of the plain terms of the parties' agreement⁸ – which, again, specifically precludes only "arbitrary *and* capricious" conduct.⁹ Further, by acting inconsistently with our recent essence precedent,¹⁰ the

majority's decision injects confusion into this area of law. For these reasons alone, I dissent.

Applying the appropriate standard,¹¹ I would conclude that the award fails to draw its essence from the parties' agreement. The Arbitrator found that Agency's telework denials were arbitrary but "not capricious" – lending further support to the conclusion that those terms, as used in Article 26, have *distinct* meanings.¹² Nevertheless, the Arbitrator concluded that the Agency violated Article 26.¹³ Because that conclusion clearly conflicts with the plain wording of Article 26 and the Arbitrator's own interpretation of it, I would find that the award evidences manifest disregard of the agreement.¹⁴ As a result, I would not reach the question of whether the award excessively interferes with management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute.

Based on the above, I dissent.

¹ *U.S. DOD, Educ. Activity*, 71 FLRA 373, 375 (2019) (Member DuBester concurring in part and dissenting in part); *U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 179, 180 (2019) (*DOT*) (Member DuBester dissenting); *U.S. Dep't of the Army, 93rd Signal Brigade, Fort Eustis, Va.*, 70 FLRA 733, 734 (2018) (*Army*) (Member DuBester dissenting).

² Majority at 3.

³ Exceptions, Attach. 1, Collective-Bargaining Agreement (CBA) at 95 (emphasis added).

⁴ Exceptions Br. at 4; *see also* Award at 4.

⁵ CBA at 95 (emphasis added).

⁶ Majority at 3.

⁷ *See* Award at 4 (finding that the Agency violated Article 26 because its actions were arbitrary, but not capricious).

⁸ *See U.S. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (Member DuBester concurring in part and dissenting in part) (noting the "statutory policy of providing parties 'with stability and repose with respect to [the] matters [that they have] reduced to writing'" (citation omitted)).

⁹ CBA at 95.

¹⁰ *See U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 387, 388-89 (2019) (Member DuBester

dissenting in part) (finding that arbitrator erred by relying on extraneous consideration to modify unambiguous wording of agreement); *DOT*, 71 FLRA at 180 (same); *Army*, 70 FLRA at 734 (same).

¹¹ The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the excepting 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 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. *AFGE Local 1738*, 71 FLRA 505, n.11 (2019) (Member DuBester concurring) (citing *Library of Cong.*, 60 FLRA 715, 717 (2005)).

¹² *See* Award at 4 (indicating that the terms "arbitrary" and "capricious," as used in Article 26, have distinct meanings by finding that the Agency's denials were arbitrary but "not capricious").

¹³ *Id.*

¹⁴ *See U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (Member DuBester dissenting) (finding that award evidenced manifest disregard of agreement where arbitrator ignored agreement's plain wording); *U.S. Dep't of VA, Med. Ctr., Asheville, N.C.*, 70 FLRA 547, 548 (2018) (Member DuBester dissenting) (finding that an award failed to draw its essence from an agreement where the award conflicted with the plain wording of the agreement); *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993) (finding that an award showed a manifest disregard of an agreement where the arbitrator's interpretation was not compatible with the plain wording of that agreement).