71 FLRA No. 205

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VAMC
POPLAR BLUFF, MISSOURI
(Agency)

0-AR-5626

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DECISION

October 29, 2020

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Before the Authority: Collen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the Federal Service Labor-Management Relations Statute (Statute) and the parties' collective-bargaining agreement by failing to respond to the Union's information requests and requiring Union members to use official time for training. Arbitrator Dennis A. Kist issued an award that sustained the grievance in part. The Union filed exceptions challenging the Arbitrator's award on contrary to law, essence, and nonfact grounds. Because the Union failed to raise one of its contrary-to-law arguments before the Arbitrator and failed to support its nonfact argument, we dismiss those exceptions. We deny the Union's remaining exceptions because they do not demonstrate that the award is deficient.

II. Background and Arbitrator's Award

Under the parties' collective-bargaining agreement, the Union is allotted a bank of official time that includes "4.25 hours per year" for each bargaining unit employee (BUE) that it represents.[1] Before 2018, the Agency would grant Authorized Absence (AA) leave for Union representatives to attend training. The AA leave would not count against the Union's bank of official-time hours.

In December 2018, the Union requested, and the Agency granted, AA leave for eight Union representatives to attend a training in March 2019. When the representatives returned from the training, the Agency instructed them to change their AA leave to official time, which would be deducted from the Union's bank of official time.

Subsequently, the Union submitted multiple information requests under § 7114(b)(4) of the Statute[2] regarding the past use of AA leave. The Agency failed to respond to those requests. The Agency then informed the Union that it had exhausted all of the official time allotted under the parties' agreement.

The Union filed a grievance alleging that the Agency violated the Statute and the parties' agreement by failing to provide it with the requested information and by denying the representatives AA leave for attending the training. In its grievance, the Union incorporated the information requests and also requested as remedies that the Agency grant AA leave for future trainings, correct the leave records for Union representatives who were not granted AA leave for past trainings, and "make the Union whole," including paying attorney fees and costs.[3] The Agency denied the grievance and the Union invoked arbitration.

As relevant here, the Arbitrator framed the issues as whether the Agency violated the parties' agreement and committed an unfair labor practice (ULP) by: (1) "undercounting the number of BUEs, thereby reducing the amount of [o]fficial [t]ime allocated to the Union"; (2) "chang[ing] . . . conditions of employment by charging training time that counts against [o]fficial [t]ime, rather than as Authorized Absence which does not count against the Union's bank of [official-time] hours"; (3) "fail[ing] to provide information as requested by the Union"; and (4) "den[ying] AA for approved training in March 2019."[4]

The Arbitrator found that the Step 3 grievance contained "no reference" to the issue of whether the Agency undercounted BUEs for official-time allocation purposes.[5] And he found that the Union did not put the Agency on "actual notice" of the issues being grieved because the Union failed to raise the undercounting issue in its grievance or include it in an amended grievance.[6]

[1] Award at 4.

[2] 5 U.S.C. § 7114(b)(4).
[3] Award at 11.
[4] *Id.* at 14.
[5] *Id.* at 18.
[6] *Id.*

Therefore, the Arbitrator concluded that the issue of the Agency allegedly undercounting BUEs was not properly before him and he declined to address that issue.

The Arbitrator also concluded, however, that the Agency violated the parties' agreement and committed a ULP by not responding to the Union's information requests. On this point, he found that, under both the parties' agreement and the Statute, the Agency was required to respond to the request "in a timely manner" and explain any reasons for not providing the requested information.[7] The Arbitrator explained that by failing to respond to the Union's requests for months and providing only a "conclusory denial" when it denied the Union's grievance,[8] the Agency violated the parties' agreement and committed a ULP.

The Arbitrator also found that by failing to grant the eight Union representatives AA leave for training, the Agency changed a condition of employment without giving the Union notice, as required by Article 49, Section 4(a) of the parties' agreement. He also found that the Agency committed a ULP by changing a condition of employment without bargaining with the Union.

As remedies, the Arbitrator directed the Agency to "cease and desist" from "[f]ailing to timely provide information requests, pursuant to 5 [U.S.C. §] 7114(b)(4)"; provide all the unredacted information requested in the Union's information requests; reimburse the eight representatives "for all time, pay, and benefits lost due to compelling them to change their time from [AA] to [o]fficial [t]ime"; and restore any official time to the Union's allotment that was lost due to the Agency's charging the employees with official time.[9]

The Union filed exceptions to the Arbitrator's award on April 27, 2020, and requested an expedited, abbreviated decision.[10] The Agency filed an opposition to those exceptions on April 29, 2020.[11]

III. Preliminary Matters

A. An expedited, abbreviated decision is not appropriate in this case.

An expedited, abbreviated decision is a decision that "resolves the parties' arguments without a full explanation of the background, arbitration award, parties' arguments, [or] analysis of those arguments."[12] Under § 2425.7 of the Authority's Regulations, an expedited, abbreviated decision is appropriate when "an arbitration matter . . . does not involve allegations of unfair labor practices under 5 U.S.C. [§] 7116."[13] Because this case involves an allegation of a ULP, we find that an expedited, abbreviated decision is inappropriate.[14] Accordingly, we deny the Union's request.

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

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.[15] The Union argues that the award is contrary to the Fair Labor Standards Act (FLSA).[16] However, there is no evidence in the record that the Union raised any arguments concerning the FLSA before the Arbitrator even though it could have done so. Accordingly, we dismiss this exception.

IV. Analysis and Conclusions: The Union does not demonstrate that the award is deficient.

In its exceptions, the Union argues that the award fails to draw its essence from the parties' agreement.[17] Specifically, the Union alleges that the Agency violated Article 48, Section 10, Paragraph A and Article 49, Section 4, Paragraph A by undercounting BUE's and thereby unilaterally removing 869 hours from the Union's bank of official time.[18]

In support of its claim, the Union contends that the Arbitrator failed to address its attached exhibits

[7] *Id.* at 18-20.
[8] *Id.* at 19.
[9] *Id.* at 25-26.
[10] Exceptions Form at 9; Exceptions Br. at 1.
[11] The Agency opposed the Union's request for an expedited, abbreviated decision. Opp'n Form at 10.
[12] 5 C.F.R. § 2425.7.
[13] *Id.*
[14] Exceptions Form at 8; Exceptions Br. at 4.
[15] 5 C.F.R. §§ 2425.4(c), 2429.5; *AFGE, Local 3627*, 70 FLRA 627, 627 (2018); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bennettsville, S.C.*, 70 FLRA 342, 343 (2017) (citing *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012)).
[16] Exceptions Br. at 7.
[17] Exceptions Form at 5. In its exceptions brief, the Union did not assert that it was challenging the award on essence grounds, but did indicate that it was doing so on nonfact grounds. However, in its exceptions form, the Union answered "No" to the question as to whether it was challenging the award on nonfact grounds. *Id.* The Union also failed to provide any supporting argument in its brief for the nonfact ground. Accordingly, to the extent that the Union raised a nonfact exception, we deny it as unsupported. 5 C.F.R. § 2425.6(e)(1) (exceptions are subject to denial if they fail to support arguments that raise recognized grounds for review); *e.g.*, *U.S. Dep't of VA, Gulf Coast Veterans Health Care Sys.*, 69 FLRA 608, 610 (2016) (citing *NAGE, Local R3-10, SEIU*, 69 FLRA 510, 510 n.11 (2016)).
[18] Exceptions Form at 6-7.

regarding the calculation of official time to which the Union is entitled under the parties' agreement,[19] as well as the Union's demands for briefing and bargaining over the change to AA leave.[20] However, the Arbitrator found that the issue of whether the Agency undercounted BUEs was not included in the grievance,[21] and the Union does not challenge the Arbitrator's interpretation of the grievance. Moreover, because the Arbitrator found that the alleged undercounting issue was not before him, he had no need to apply the cited contract provisions in relation to this issue. Therefore, the Union's argument does not demonstrate that the award fails to draw its essence from those provisions.[22]

Additionally, as part of its essence argument in its exceptions form and as part of its contrary-to-law argument[23] in its exceptions brief, the Union asserts that the Arbitrator "failed to understand" that the Agency committed a ULP by not providing the information requested by the Union.[24] However, the Arbitrator found that the Agency committed a ULP, and he directed the Agency to provide the requested information to the Union and to cease and desist from failing to timely respond to information requests in the future.[25] Therefore, the Union's argument is based on a misunderstanding of the award, and does not demonstrate that the award is deficient on either essence or contrary-to-law grounds.[26]

Accordingly, we deny the Union's essence and contrary-to-law exceptions.

V. Decision

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

[19] *Id.*

[20] *Id.* at 7. To the extent that the Union asserts that its exhibits would have supported its allegation that the Agency committed a ULP by changing its practices regarding AA leave, the Arbitrator sustained the grievance as to that issue. *See Indep. Union of Pension Emps. for Democracy & Justice*, 71 FLRA 822, 823 (2020) (citing *Army Materials & Mechs. Research Ctr.*, 32 FLRA 1156, 1158 (1988)) (holding that arbitrators are not required to address every argument raised by the parties and that an arbitrator's failure to cite all the evidence upon which he or she relied in making findings does not demonstrate that an award is deficient).

[21] Award at 18.

[22] *NAIL, Local 10*, 71 FLRA 513, 515 (2020) (denying essence exception where the union failed to show that the arbitrator was required to address the cited contract provisions); *Nat'l Nurses United*, 70 FLRA 166, 168 (2017) (denying essence exception where arbitrator did not discuss or interpret the cited contract provisions and the union did not allege that the dispositive finding conflicted with the cited provisions); *see also U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 63 FLRA 553, 557 (2009) (argument that arbitrator failed to find contractual violations does not raise essence exception where arbitrator did not interpret or apply the cited provisions).

[23] In its Exceptions Form, the Union answered "No" to the question of whether it was challenging the award as contrary to law. Exceptions Form at 4.

[24] *Id.* at 8; Exceptions Br. at 4.

[25] Award at 25-26.

[26] *AFGE, Local 12*, 67 FLRA 387, 389 (2014) (citing *AFGE, Local 2382*, 66 FLRA 664, 667 (2012)) (exceptions based on misunderstandings of an arbitrator's award do not demonstrate that the award is deficient). The Union also argues that the Arbitrator failed to address an issue concerning the Agency charging the Union president as absent without leave (AWOL) when he was physically present at work. Exceptions Form at 7-8; Exceptions Br. at 3. However, the Arbitrator did not frame the issues to include an AWOL issue, and the Union did not assert in either its exceptions form or brief that it was challenging the award on the ground that the Arbitrator exceeded his authority.