

71 FLRA No. 67

UNITED STATES
DEPARTMENT OF STATE
PASSPORT SERVICES
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1998
(Union)

0-AR-5432

DECISION

October 8, 2019

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

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, we deny exceptions to the award of Arbitrator M. David Vaughn who determined that the Agency violated the parties' collective-bargaining agreement when it unilaterally removed overhead storage bins from all employee workstations before satisfying its bargaining obligation.

The Agency argues that the award is based on nonfacts because the Arbitrator misconstrued the timeline of events and the testimony of the Agency's witnesses when he found that no "emergency" existed.¹ Because the Agency disagrees with the Arbitrator's evaluation of the evidence and fails to show that the Arbitrator's alleged misstatements constitute central facts underlying the award but for which the Arbitrator would have reached a different conclusion, we deny this exception.

The Agency also argues that the award fails to draw its essence from the parties' agreement and that the award is contrary to law. As the Agency primarily disagrees with the Arbitrator's factual findings, which we uphold, we also deny these exceptions.

¹ Exceptions Br. at 8.

II. Background and Arbitrator's Award

This case concerns changes to the workstations of Passport Specialists, who process and approve or deny applications for U.S. Passports. In 2017, the Agency began installing height-adjustable sit/stand desks at all Passport Specialist workstations. The desks included an overhead bin for storage and task lighting attached to the bin.

In March and April of 2017, in two separate incidents, recently installed overhead bins fell on employees at the Agency's Chicago office. The Agency determined that the overhead bins were knocked off from their brackets due to user error when the desks were raised to standing height and items on the desks collided with the bins. In November 2017, an overhead bin fell off its bracket, as opposed to being knocked off, and struck an employee at the Agency's New Orleans office. The Agency began to remove the bins from all Passport Specialist workstations.

The Union filed a grievance alleging that the loss of storage space and lighting was detrimental to employees and that the Agency violated the parties' agreement when it removed the bins before completing bargaining. The Agency argued that it determined the situation was an "emergency" under Article 12, § 7 of the agreement, which allows it to make unilateral changes to conditions of employment.² The parties were unable to resolve the dispute and the matter was submitted to arbitration.

At the hearing, the Arbitrator considered testimony that after the Chicago incidents the Agency consulted both the furniture manufacturer, AllSteel, who indicated it had never experienced this issue before, and another furniture manufacturer, who advised that overhead bins should not be installed with sit/stand desks.

Ultimately, the Arbitrator rejected the Agency's argument that the New Orleans incident posed an emergency situation demanding immediate action and found that the Agency violated the agreement by failing to conclude negotiations before removing the bins. The Arbitrator found that while the overhead bin situation constituted a reasonable concern, the situation was not an "emergency" and the Agency did not treat it as such because the process of removing the bins took over nine

² Award at 3-4. Article 12, § 7 of the parties' agreement provides that the Agency "will not unilaterally implement changes in personnel policies or practices or other general conditions of employment . . . unless Management is taking an action due to an emergency." *Id.* Article 3 of the agreement defines "Emergency Situation" as "[a] sudden, unexpected occurrence or set of circumstances demanding immediate action." *Id.* at 3.

months. Accordingly, the Arbitrator sustained the grievance in an award dated October 9, 2018.

The Agency filed exceptions to the award on November 8, 2018 and the Union filed an opposition on December 12, 2018.

III. Analysis and Conclusions

- A. The Agency has failed to demonstrate that the award is deficient as based on nonfacts.

The Agency contends that the Arbitrator's finding that there was no emergency situation is based on three nonfacts.³ Specifically, the Agency argues that the Arbitrator misconstrued the timeline of events and testimony of witnesses when he found that: (1) the Agency removed the bins without investigating the cause of the New Orleans accident and "despite AllSteel informing the Employer that it had never experienced such an issue before"; (2) that AllSteel's response suggested "user" error; and (3) that the other manufacturer whose opinion was sought "likely had an economic self-interest to discredit the competition."⁴

The Agency's nonfact arguments are without merit. The Agency first asserts that the Arbitrator erred in finding it did not investigate the cause of the New Orleans incident because it had provided witness testimony regarding the circumstances surrounding the Agency's decision to remove the overhead bins. Despite the Agency's emphatic reargument of its case, essentially the Agency disagrees with the Arbitrator's evaluation of the evidence, and that provides no basis for finding the award deficient.⁵

The Agency also argues at length that the Arbitrator misstated the evidence regarding its discussions with AllSteel and the other manufacturer. However, the Agency fails to demonstrate why these alleged misstatements are "central facts" that "but for which" the Arbitrator would have concluded differently.⁶ Notably, in making his decision, the Arbitrator also emphasized how long it took the Agency to remove the bins – nine months – and its failure to consider the interests of the employees and explore other options.⁷ Accordingly, the Agency's arguments also provide no basis for finding the award based on nonfacts.

Although the Agency also takes issue with the Arbitrator's characterization of its response to the New Orleans incident and how long it took the Agency to remove the overhead bins,⁸ again, disagreement with the Arbitrator's evaluation and weighing of the evidence provides no basis for finding that the award is based on nonfacts.⁹

Accordingly, we deny the exception.

- B. The award draws its essence from the parties' agreement.¹⁰

The Agency further maintains that its removal of the overhead bins was appropriate under Article 12, Section 7 of the parties' agreement because there was an

³ Exceptions Form at 7-9. 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. *NTEU, Chapter 32*, 67 FLRA 174, 175 (2014) (Member Pizzella concurring) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).

⁴ Exceptions Form at 7; see also Award at 36.

⁵ *AFGE, Local 12*, 70 FLRA 582, 583 (2018) (*Local 12*) ("[D]isagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, does not provide a basis for finding that an award is based on a nonfact." (internal citation omitted)); 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 . . . [—]and not a weighing of the evidence[—] that is so 'central' that 'but for which' the arbitrator would have reached a different result.") (internal citations omitted).

⁶ See, e.g., *United Power Trades Org.*, 67 FLRA 160, 163 (2013) (concluding that because the union failed to demonstrate that the arbitrator's alleged misstatement constituted a central fact underlying the award, it failed to show the award was based on a nonfact); *SSA, Se. Program Serv. Ctr., Birmingham, Ala.*, 64 FLRA 322, 323 (2009) (finding that because the agency failed to claim alleged misstatements concerned central facts that were clearly erroneous, the agency failed to establish the award was deficient).

⁷ Award at 36-37.

⁸ Exceptions Form at 8.

⁹ *Local 12*, 70 FLRA at 583.

¹⁰ Member Abbott notes that the Agency answered in the negative on the "e-Filing" form for its exceptions when it was asked whether it was excepting on the basis of essence or contrary-to-law. Exceptions Form at 4. Nonetheless, several paragraphs in the Agency's attached brief addressed exceptions on those bases. Therefore, those exceptions will be reviewed here.

emergency situation.¹¹ Additionally, the Agency asserts that it acted in accordance with Article 32, Section 11 of the parties' agreement to ensure the safety of its employees.¹² Although the Agency emphatically argues that it was faced with a safety emergency that necessitated its immediate action to protect its employees, the Arbitrator found that it was not. The Agency's disagreement with the Arbitrator's factual finding does not support an essence argument.¹³ Furthermore, the Agency otherwise fails to demonstrate how the Arbitrator's interpretation of Article 12, Section 7 is irrational, unfounded, implausible, or in manifest disregard of the agreement.

Therefore, we deny the Agency's exception.

C. The award is not contrary to law.

Finally, the Agency states that the Arbitrator's award is contrary to the Occupational Safety and Health Act¹⁴ and to § 7106(a)(2)(D) of the Federal Service Labor-Management Relations Statute, namely to the management right "to take whatever actions may be necessary to carry out the agency mission during emergencies."¹⁵ However, the Agency merely reasserts that the overhead bin situation after the New Orleans incident constituted an "emergency," which the

Arbitrator rejected and the Agency does not successfully challenge here. Consistent with § 2425.6(e)(1) of the Authority's Regulations,¹⁶ the Authority will deny an exception when the party fails to provide any argument to support it.¹⁷ Because the Agency does not otherwise explain how the award is contrary to the Statute, how it was necessary to carry out the Agency's *mission*, or how the two cases it cites apply to the facts presented here, we deny the exception as unsupported under § 2425.6(e)(1) of the Authority's Regulations.¹⁸

IV. Decision

We deny the Agency's exceptions.¹⁹

¹¹ When 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. *U.S. Dep't of VA, Denver Reg'l Office*, 70 FLRA 870, 871 n.7 (2018) (Member DuBester concurring) (citing *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014)). An award is deficient as failing to draw its essence from the collective-bargaining agreement when the appealing party establishes that the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. *AFGE, Nat'l Citizenship & Immigration Servs. Council, Local 2076*, 71 FLRA 115, 116 n.15 (2019) (Member DuBester concurring) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

¹² Article 32, Section 11 states, in pertinent part, that "Management will take reasonable steps to ensure the safety of all employees." Award at 7.

¹³ *AFGE, Local 3354*, 64 FLRA 330, 333 (2009) ("[A] disagreement with an arbitrator's factual finding does not provide a basis for concluding that an award fails to draw its essence from an agreement.>").

¹⁴ In its exceptions brief, the Agency also cites to the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678. Specifically, the Agency cites § 654(a), which states "Each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." *Id.* § 654(a).

¹⁵ 5 U.S.C. § 7106(a)(2)(D). The Agency contends that "The Statute provided the Agency with the right to remove the overhead bins in order to address [the] emergency." Exceptions Br. at 16.

¹⁶ 5 C.F.R. § 2425.6(e)(1) ("An exception may be subject to dismissal or denial if . . . [t]he excepting party fails to . . . support a ground" for review listed in § 2425.6(a)-(c)).

¹⁷ *NTEU, Chapter 67*, 67 FLRA 630, 630-31 (2014).

¹⁸ *Id.*; 5 C.F.R. § 2425.6(e)(1).

¹⁹ Member Abbott notes that indeed the Agency here did appear to be stuck between a rock and a hard place, namely, its concern for the safety of its employees mixed with the fear of not knowing when the next bin could fall. Nonetheless, dilemmas do not excuse or relieve the Agency of the obligations it had negotiated into its collective-bargaining agreement.

Member DuBester, concurring:

I concur in the decision to deny the Agency's exceptions. The majority suggests that requiring the Agency to adhere to its contractual bargaining obligations conflicts with its "concern for the safety of its employees."¹ The dissent takes this a step further to conclude that the Award "limits the Agency from taking the actions it deems necessary" to protect its employees' safety.² I believe these concerns are misplaced.

While the Award does require the Agency to cease further removal of the storage bins pending completion of its bargaining obligation, it also provides that "nothing shall prevent the Agency from taking interim measures to protect the safety of employees with respect to the bins."³ It also recognizes the parties' "share[d] . . . interest in providing employees with reasonable working conditions, as well as a safe work place."⁴ Accordingly, I do not believe the Award compromises the safety of the Agency's employees, or that it places the Agency in an "untenable position"⁵ by requiring it to fulfill its contractual bargaining obligations.

¹ Majority at 5 n.18.

² Dissent at 9.

³ Award at 40.

⁴ *Id.*

⁵ Dissent at 9 n.23.

Chairman Kiko, dissenting:

I am troubled by the majority's decision to uphold the Arbitrator's award. This decision strongly suggests that even when the agency, union, arbitrator, and Authority acknowledge the existence of a work environment *that causes physical harm to employees*, the agency may not implement changes to prevent future harm and, instead, must maintain the very dangers that put employees at risk until the completion of bargaining. I simply cannot subscribe to such a decision, and, for the following reasons, I dissent.

This case is entirely about employee safety. After the Agency installed adjustable sit/stand desks within certain employees' workspaces, overhead cabinets (bins) began *falling on, and injuring, those employees*.¹ In an attempt to prevent further injuries, the Agency trained employees on how to properly adjust their desks; ensured that the overhead bins were correctly installed; moved the desk controls to prevent further collisions between desks and overhead bins; and installed anti-collision software.² Nevertheless, the overhead bins continued to fall – next, *on an employee's head*, “causing [another] injury.”³ After that incident, multiple furniture manufacturers informed the Agency that further injuries “could occur” to employees using overhead bins with a sit/stand desk.⁴ Within two weeks, and upon the advice of its Environmental and Safety Division, the Agency declared an emergency and began the process of removing the overhead bins.⁵

In the Arbitrator's award, he acknowledged that the overhead bins were “unsafe,” and employees were injured by them.⁶ Yet, the Arbitrator determined that those circumstances did not constitute an emergency, and concluded that the Agency should have kept the bins installed until the Union and Agency finished bargaining over storage and lighting.⁷ The Agency now argues that the award is contrary to its right, under § 7106(a)(2)(D) of the Federal Service Labor-Management Relations Statute (the Statute), to take whatever actions may be

necessary to carry out the Agency's mission during emergencies.⁸

When reviewing a management-rights exception to an arbitration award, the first question that must be answered is whether the arbitrator has found a violation of a contract provision.⁹ If the answer to that question is yes, then the second question is whether the arbitrator's remedy reasonably and proportionally relates to that contract violation.¹⁰ If the answer to either of those questions is no, then we must vacate the award.¹¹ But, if the answer to the second question is yes, then the final question is whether the arbitrator's interpretation of the contract provision excessively interferes with a management right under § 7106(a).¹² If the answer to that question is yes, then the arbitrator's award is contrary to law, and we must vacate the award.¹³

Here, the answer to the first question is yes because the Arbitrator found that the Agency violated Article 12 of the parties' agreement by removing the overhead bins before completing bargaining.¹⁴

As for the second question, the Arbitrator directed the Agency to cease and desist from removing the overhead bins until the completion of bargaining, despite observing the “safety concerns” involved.¹⁵ Even assuming that the answer to the second question is yes, I find that the award must be set aside as it excessively interferes with the Agency's right under § 7106(a)(2)(D).

The Authority has long held that under § 7106(a)(2)(D), agencies have the right to (1) independently assess whether an emergency exists, and (2) decide what actions are needed to address the

¹ Award at 11-12.

² *Id.* at 11.

³ *Id.* at 13.

⁴ *Id.* at 35.

⁵ *Id.* at 12.

⁶ *Id.* at 36.

⁷ *Id.* at 38-39.

⁸ Exceptions Br. at 16; 5 U.S.C. § 7106(a)(2)(D). In support of its management-right exception, the Agency raises § 7106(a)(2)(D), quotes the right from that section of the Statute, cites two Authority decisions, and states that “the hazard posed to employees by the overhead bins was a safety emergency that required immediate action,” and the “Statute provided the Agency with the right to remove the overhead bins in order to address that emergency.” Exceptions Br. at 16. Unlike the majority, I find that this exception is sufficiently supported to avoid denial under 5 C.F.R. § 2425.6(e)(1).

⁹ *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 70 FLRA 596, 597 (2018) (Member DuBester dissenting).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Award at 37.

¹⁵ *Id.* at 40.

emergency.¹⁶ While agencies are not “free to label any particular set of circumstances an emergency,” if the record supports an agency’s emergency determination, then the Authority has found that it must be “sustained.”¹⁷

As noted above, the record here establishes that (1) office equipment was repeatedly injuring Agency employees;¹⁸ (2) before declaring an emergency, the Agency took several steps to prevent further injuries;¹⁹ and (3) both outside furniture manufactures,²⁰ and the Agency’s Environmental and Safety Division,²¹ advised against using overhead bins with sit/stand desks. Based on that record, it is clear that the Agency’s emergency determination is supported and that it acted within its statutory rights. By concluding otherwise, the award prohibits the Agency from exercising its right to determine that a situation where employees are indisputably being harmed in the workplace constitutes an “emergency.”²² Moreover, by requiring the Agency to maintain the overhead bins until the competition of bargaining, the award limits the Agency from taking the actions it deems necessary. For example, while bargaining is ongoing, even if another overhead bin falls on an employee, the award precludes the Agency from responding to that emergency situation by removing the

bins. Accordingly, I find that the award excessively interferes with § 7106(a)(2)(D).²³

¹⁶ *U.S. Dep’t of VA, VA Reg’l Office, St. Petersburg, Fla.*, 58 FLRA 549, 551 (2003) (VA); *see NFFE, Local 2059*, 22 FLRA 136, 140-41 (1986) (*Local 2059*); *see also U.S. Customs Serv., Wash., D.C.*, 29 FLRA 307, 315-25 (1987).

¹⁷ *See VA*, 58 FLRA at 551

¹⁸ Award at 11-13.

¹⁹ *Id.* at 11.

²⁰ *Id.* at 35.

²¹ *Id.* at 13.

²² *See Local 2059*, 22 FLRA at 140 (finding proposal that limited the definition of “emergency” inconsistent with the agency’s right to independently assess whether an emergency exists under § 7106(a)(2)(D)).

²³ I agree with Member Abbott that the Agency was “stuck between a rock and a hard place” – specifically, the two Union-filed grievances. Majority at 5 n.18. One alleged that the Agency’s use of the overhead bins violated the Agency’s contractual obligation to provide a safe work environment, and the other alleged that the Agency was contractually obligated to maintain the overhead bins until the parties completed bargaining. Award at 1, 13. Those grievances placed the Agency in a seemingly untenable position: either violate the parties’ agreement by removing the overhead bins or violate the parties’ agreement by leaving the overhead bins installed. In my opinion, the Agency rightfully chose the safety of its employees and did so consistent with the parties’ agreement and its rights under § 7106 of the Statute. *See Award* at 4 (the parties incorporated § 7106(a)(2)(D) into Article 12 of their agreement, which states that the Agency “will not unilaterally implement changes in personnel policies or practices or other general conditions of employment . . . unless [m]anagement is taking an action due to an emergency in accordance with 5 U.S.C. [§] 7106(a)(2)(D)” (emphasis added)).