64 FLRA No. 81

PROFESSIONAL AIRWAYS
SYSTEMS SPECIALISTS
(Union)

and

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

0-AR-4295

DECISION

February 17, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator M. David Vaughn filed by the Union under §7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator denied a grievance alleging that the Agency violated Article 60 of the parties' agreement by denying a bargaining unit employee's request to participate in an alternative work schedule (AWS). * For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The grievant is an Aviation Safety Inspector (ASI). The grievant previously elected to work a 5/4-9 Alternative Work Schedule (AWS), working eight nine-hour days and one eight-hour day during any two-week period, with every other Friday off. *See* Award at 7-8. The grievant requested to change to a 4-10 AWS. *See id.* at 9. The grievant's supervisor denied the grievant's request.

The Union filed a grievance on behalf of the grievant asserting that the denial of her request to change her work schedule from a 5/4-9 AWS to a 4-10 AWS violated Article 60 of the parties' agreement, which contains the provisions of the Agency's AWS program. *See id.* at 1. The grievance was unresolved and submitted for arbitration. At the arbitration, the parties stipulated to the following issues: "Did the Agency violate [the parties' agreement] when [g]rievant's request to work a 4-10 Compressed Work Schedule was disapproved? If so, what shall be the remedy?" *Id.* at 4.

The Arbitrator found that grievant's request for a 4-10 AWS was a request for a change in her tour of duty, and that such a request was subject to the Agency's right, expressed in Article 4 of the parties' agreement, to determine the numbers, types and grades of employees assigned to any tour of duty. *See id.* at 20.

The Arbitrator stated that the Agency's decision to deny the grievant's request was not unreasonable or an abuse of Agency discretion because "Article 4 reserves to Management the right to conclude that it cannot spare an employee from a particular shift (or that it does not want an additional employee on a particular shift) on a basis which is essentially unreviewable." *Id.* at 26. Accordingly, because Article 4 left to the Agency the right to refuse to allow the grievant to assume a 4-10 AWS, the Arbitrator denied the grievance.

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that the Arbitrator's award fails to draw its essence from the parties' agreement because his determination that Article 4 limits Article 60 "is unfounded in reason and unconnected to the wording and purpose" of the parties' agreement. Exceptions at 2. The Union asserts that the Arbitrator disregarded the plain, explicit language found in Article 4 that "nothing in the Agreement shall be interpreted or construed in any way to conclude that the Employer has agreed to negotiate on its retained management rights." *Id.* at 7. The Union argues that the Arbitrator ignored this directive and erroneously concluded that Article 60 was an agreement to negotiate retained management rights. *See id.* The Union asserts that "it is not plausible that the parties negotiated an extensive AWS process in Article 60 with the expectation that it would be nullified by the words in Article 4." *Id.* at 8.

*. The relevant portions of the parties' agreement are set forth in the attached Appendix.

The Union also asserts that the Arbitrator's award is premised on the nonfact that the Agency invoked Article 4 as a reason for denying the grievant's requested AWS. The Union argues that the Agency relied solely upon Article 60 in denying the grievant's request and merely referenced Article 4 to bolster its argument that management has the right to determine what operational requirements are under Article 60. *See id.* at 9, 10 n.10. The Union, accordingly, contends that the Arbitrator's statement that the Agency relied on Article 4 as a reason for denying the grievant's request was "disingenuous and not supported by the facts." *Id.* at 9.

B. Agency's Opposition

The Agency rejects the Union's assertion that the award fails to draw its essence from the parties' agreement. Specifically, the Agency argues that the Arbitrator correctly found that "the undiluted preservation of [m]anagement's rights [in Article 4] is the standard by which the specific provisions of the [a]greement are to be assessed." Opposition at 5. The Agency argues that it had the contractual authority to deny the grievant's AWS request because, as the Arbitrator correctly found, the management rights set forth under Article 4 are not limited by Article 60. *See id.* at 4-5. Moreover, the Agency contends that the Arbitrator correctly determined that, although Article 60 permits employee participation in AWS, Article 60 does not guarantee such participation. *See id.* at 7. The Agency additionally asserts that the issue stipulated by the parties was not limited to Article 60 and that the Arbitrator's findings are nothing more than a rational interpretation of the agreement.

The Agency also disagrees with the Union's assertion that the Arbitrator's award is based on a nonfact. The Agency contends that the Arbitrator's decision to apply Article 4 was a result of the evidence presented to him and his interpretation of the parties' agreement, and is, therefore, not something that can be challenged as a nonfact. *See id.* at 10.

IV. Analysis and Conclusions

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

In 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 Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 129, 132 (2007). Accordingly, the party appealing the award must establish 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. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990).

The Arbitrator found that Article 60 of the parties' agreement permits employees to request AWS; however, he also found that Article 4 preserves management's absolute right to determine tours of duty for its employees and prohibits any other part of the agreement from interfering with this right. *See* Award at 25. According to the Arbitrator, this language establishes that Article 4 necessarily limits any right set forth under Article 60. *See id.* The Arbitrator further noted that, whenever the Agency had exercised its rights under Article 4 in the past, the Agency had the final decision as to whether an employee could participate in an AWS. *See id.* Although the Union disagrees with the Arbitrator's reasoning, it has failed to explain how this reasoning is irrational, unfounded, implausible, or a manifest disregard of the parties' agreement. Accordingly, we find that the award does not fail to draw its essence from the parties' agreement and deny the exception. *See U.S. Dep't of Transp., FAA*, 63 FLRA 15, 18 (2008) (denying essence exception where party failed to establish that arbitrator's interpretation was irrational, unfounded, implausible, or a manifest disregard of the parties' agreement).

B. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the Union must show 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 the Treasury, IRS, Andover, Mass.*, 63 FLRA 202, 205 (2009). However, the Authority will not find an award deficient as based on a nonfact on the basis of an arbitrator's determination on any factual matter that the parties disputed at arbitration. *Id.*

The Union asserts that the Arbitrator's award is premised on a nonfact because Article 4 was not discussed during arbitration and was not the basis for the Agency's denial of the grievant's AWS request. However, as the Union acknowledges, the Agency did raise Article 4 in its post-hearing brief to the Arbitrator. *See* Exceptions at 9 n.9. Moreover, the award contains no indication that there was a dispute before the Arbitrator concerning whether the Agency relied on Article 4 to

deny the grievant's request. Award at 25. Because the Union concedes that the Agency raised Article 4 in its post-hearing brief, it logically follows that that the Arbitrator's statement concerning Article 4 is not clearly erroneous. The award, therefore, is not based on a nonfact. *See U.S. DHS, U.S. Customs & Border Prot., U.S. Border Patrol, El Paso, Tex.*, 60 FLRA 883, 885 (2005) (Member Armendariz dissenting as to other matters) (award not based on nonfact where party failed to establish that a central fact was clearly erroneous).

V. Decision

The Union's exceptions are denied.

APPENDIX

Article 4
Employer Rights

Section 1. Nothing in this Agreement shall affect the authority of the Employer:

a. To determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

b. In accordance with applicable laws –

(1) To hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(2) To assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(3) With respect to filling positions, to make selections for appointments from –

(a) Among properly ranked and certified candidates for promotion; or

(b) Any other appropriate source; and

(4) To take whatever actions may be necessary to carry out the agency mission during emergencies.

Section 2. Nothing in this Agreement shall be interpreted or constructed in any way to conclude that the Employer has agreed to negotiate on its retained management rights to determine the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work. The Employer retains all rights set forth in 5 U.S.C. 7106.

Article 60
Alternative Work Schedule (AWS) Program

It is the intent of the Parties that employees shall have the opportunity to enjoy the benefits of the AWS program.

Section 1. Definitions:

a. Normal Tour of Duty. A workday consisting of eight hours, exclusive of designated meal periods; normally scheduled Monday through Friday.

b. Alternative Work Schedule (AWS). A term which encompasses the many different types of flexible and compressed work schedules which offer alternatives to the traditional fixed work schedule.

c. Flexitime. An AWS within a normal workweek consisting of flexible time bands and core time bands.

d. Flexible Time Bands. The designated time bands during which an employee has the option to select and vary arrival and departure times.

e. Core Time Bands. The designated time bands during which an employee must be present for duty unless the employee is in an approved leave status or at lunch.

f. Compressed Work Schedule (5/4-9 Plan). An AWS within a bi-weekly pay period under which a full time employee fulfills an eighty (80) hour work requirement in eight nine-hour days and one eight-hour day, exclusive of designated meal periods.

g. Compressed Work Schedule (4-10 Plan). An AWS within a bi-weekly pay period under which a full time employee fulfills an eighty (80) hour work requirement in four 10-hour days, exclusive of designated meal periods, and one nonwork day per week.

Section 2. This Article does not supersede or otherwise affect the first 40-hour tours of duty policies and practices set forth in FAA Order 3600.6, Chapter 5 (1-6-84). FAA Order 3600.6 remains in full force and effect. The Union reserves the right to negotiate the impact of any changes to the Order.

Section 3. The following versions of AWS will be available to employees on a voluntary basis to the extent operational requirements permit: Flexitime, Compressed Work Schedule (5/4-9 Plan), and Compressed Work Schedule (4-10 Plan).

Section 4. Practice and Procedure:

a. An office manager retains the authority to approve flexitime or either of the versions of compressed work schedules provided the office manager is satisfied operational coverage is not affected or additional premium pay incurred. An office manager shall not disapprove an AWS request or terminate an employee's participation in AWS except for good cause. The reason for such disapproval or termination shall be communicated to the employee and the office representative at the time of the denial or termination.

Exceptions, Joint Exhibit 1 at 4, 49-50.