67 FLRA No. 94

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 32
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
AUTOMATED COLLECTION SERVICE
DENVER, COLORADO
(Agency)

0-AR-4967

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DECISION

April 16, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Charles E. Krider. The Arbitrator sustained a grievance, but denied attorney fees. This case presents us with two substantive questions.

The first question is whether the award fails to draw its essence from the parties' agreement. Because the Union does not demonstrate that the Arbitrator's interpretation of the parties' agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement, the answer is no.

The second question is whether the portion of the award denying attorney fees is contrary to law and should be set aside. Because both parties agree that the award is contrary to law and requires remand, the answer is yes.

II. Background and Arbitrator's Award

The grievants normally work from 6:00 a.m. to 2:30 p.m. On one occasion, due to a snowstorm, the Agency gave the grievants four hours of administrative leave. On that day, the grievants worked from 10:00 a.m. to 2:30 p.m., a total of four and one-half hours. The Agency did not allow the employees to take their standard thirty-minute, unpaid lunch period that day, because the employees worked less than five hours. The grievants' timesheets, however, credited them with four hours of administrative leave and only four hours of work time.

The grievants sought to amend the timesheets to reflect the four and one-half hours worked, which would mean that their timesheets would reflect eight hours of scheduled work and thirty minutes of overtime. Acknowledging that the grievants worked four and one-half hours that day, the Agency instead sought to retroactively decrease the four hours of administrative leave to three and one-half hours. The Union filed a grievance, which was unresolved and submitted to arbitration.

At arbitration, the Agency argued that, in accordance with the parties' agreement, administrative leave is not intended to result in overtime pay. The Agency also argued that it could reduce the administrative leave to account for the thirty-minute, unpaid lunch break. The Arbitrator rejected both arguments, finding no language in the parties' agreement allowing for a retroactive reduction of administrative leave to avoid overtime pay or to account for employees' lunch breaks. Consequently, the Arbitrator awarded the grievants thirty minutes of overtime and sustained the grievance.

The Arbitrator subsequently considered whether the grievants "substantially prevailed" in accordance with Article 43, Section 4(A)(1) of the parties' agreement.[1] Under Article 43, Section 4(A)(1) an arbitrator can require an agency to pay 75% of the arbitrator's fee and expenses if the arbitrator determines that the grievant has "substantially prevailed."[2] The Arbitrator stated that he did not make that determination, and evenly split his fee and expenses between the parties. Finally, the Arbitrator found that the Agency's position was not clearly without merit, and hedenied the Union's request for attorney fees on that basis.

The Union filed exceptions to the award, and the Agency filed an opposition.

III. 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

[1] Award at 7.
[2] *Id.*

the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[3] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the parties' agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the parties' agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the parties' agreement; or (4) evidences a manifest disregard of the parties' agreement.[4] The Authority and the courts defer to arbitrators in this context because it is the arbitrator's construction of the parties' agreement for which the parties have bargained.[5]

The Union argues that the award fails to draw its essence from Article 43, Section 4(A)(1) of the parties' agreement because the grievants "wholly prevailed" and thus, the Agency should be required to pay 75% of the Arbitrator's fee and expenses.[6] Specifically, the Union contends that because the Arbitrator rejected the Agency's arguments, sustained the grievance, and granted the grievants overtime, it is "impossible" to conclude that the grievants did not "substantially prevail" within the meaning of Article 43, Section 4(A)(1).[7]

Article 43, Section 4(A)(1) states that "[t]he parties will each pay one-half (1/2) of the regular fees and expenses . . . of the arbitrator hearing a case unless the grievant substantially prevails *as determined by the arbitrator*."[8] While it is true that the Arbitrator sustained the grievance and awarded the grievants overtime, the Union points to no language in the parties' agreement that requires the Arbitrator to conclude that a party has substantially prevailed under such circumstances. Moreover, the Union points to no language in the parties' agreement defining what it means to substantially prevail under the terms of the agreement. Accordingly, the Union has not established that the Arbitrator's interpretation and application of Article 43, Section 4(A)(1) fails to draw its essence from the agreement.

Additionally, the Union argues that the Authority should not defer to the Arbitrator's interpretation of Article 43, Section 4(A)(1), because the Arbitrator did not provide an analysis.[9] This argument is without merit. Indeed, the Union identifies no language in the parties' agreement that requires the Arbitrator to provide any analysis or to explain the basis for his determination. Further, the Authority has held that the deference given to arbitrators regarding their interpretation of a collective-bargaining agreement is broad.[10] Considering this, we find that the Union has failed to establish that the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, and we deny the Union's essence exception.

B. The denial of attorney fees is contrary to law.

The Arbitrator denied the Union's attorney-fee request summarily, concluding that "[t]he Agency's position on the grievance was not clearly without merit."[11] The Agency concedes that the Arbitrator's denial of attorney fees is deficient in light of Authority precedent and the parties' agreement.[12] When an opposing party concedes that a portion of an award is deficient, the Authority sets aside that portion of the award.[13] As the Arbitrator is the appropriate authority under 5 C.F.R. § 550.807(a) for resolving attorney-fee requests, we remand the award to the parties for resubmission to the Arbitrator, absent settlement. The Arbitrator shall make sufficient findings under the parties' agreement, the Back Pay Act,[14] and 5 U.S.C. § 7701(g) in considering the Union's attorney-fee request.

IV. Decision

We deny the Union's exceptions in part, grant them in part, and remand the award to the parties for resubmission to the Arbitrator, absent settlement.

[3] *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[4] *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990).
[5] *Id.* at 576.
[6] Exceptions at 6.
[7] *Id.*
[8] Opp'n, Agency Ex. 1 at 123 (emphasis added).
[9] Exceptions at 7.
[10] *See SSA*, 64 FLRA 1119, 1121 (2010).
[11] Award at 8.
[12] Opp'n at 10-13.
[13] *See, e.g.*, *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 244 (2011); *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 300 (2000).
[14] 5 U.S.C. § 5596.