68 FLRA No. 22

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
BORDER PATROL
SAN DIEGO SECTOR
SAN DIEGO, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 1613
(Union)

0-AR-5039

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DECISION

December 15, 2014

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

I. Statement of the Case

Arbitrator Louis M. Zigman found that the Agency could not challenge the arbitrability of the Union's grievance because the Agency did not timely raise its arbitrability challenge. On the merits of the grievance, the Arbitrator found that the Agency violated the parties' collective-bargaining agreement when it: (1) denied two employees (the grievants) waivers of the statutory cap on overtime earnings (the cap) set forth in the Customs Officer Pay Reform Act (COPRA),[1] and (2) restricted the amount of administratively uncontrollable overtime (AUO) that the grievants were permitted to work. There are three substantive questions before us.

The first question is whether the award is based on nonfacts. The Agency argues that two of the Arbitrator's findings are not supported by any evidence, and challenges the Arbitrator's finding regarding a third matter that was disputed at arbitration. Because these types of claims do not demonstrate that the award is based on a nonfact, the answer is no.

The second question is whether the Arbitrator's finding that the grievance was arbitrable fails to draw its essence from the parties' agreement. Because the Arbitrator's determination that the Agency failed to timely raise its arbitrability challenge is itself a procedural-arbitrability ruling that is not subject to a direct challenge on essence grounds, we find that the Agency's argument does not provide a basis for finding the award deficient.

The third question is whether the award violates law, rule, or regulation by requiring the Agency to grant the grievants waivers of the cap. The Arbitrator directed the Agency to compensate the grievants for the overtime that they lost as a result of the Agency's contractual violation, but did not direct the Agency to grant any waivers. Further, even assuming that he did direct the Agency to grant waivers of the cap, the regulation[2] implementing COPRA expressly provides that an award of backpay is not subject to the cap. Accordingly, we find that the Agency provides no basis for finding the award contrary to law, rule, or regulation in this regard.

II. Background and Arbitrator's Award

At the beginning of the fiscal year at issue in this case, the Agency submitted a list of its canine handlers (handlers) to Agency headquarters, which granted all of the handlers on the list a waiver of the cap. The grievants completed their training to become handlers several months after the list was submitted, and, when they learned that their names had been excluded from the list, they requested that their supervisor submit their names for waivers. The grievants' supervisor inquired about obtaining waivers, but the Agency denied the grievants' waiver requests with the explanation that "no more [overtime] waivers would be considered at that point in the fiscal year."[3]

AUO is a type of overtime available to certain employees who are in positions that require substantial amounts of "irregular, unscheduled overtime duty."[4] AUO compensation is paid on an annual basis and is determined as "an appropriate percentage, not less than [ten] percent nor more than [twenty-five] percent, of the rate of basic pay for the [employee's] position," based on the number of overtime hours worked.[5] Prior to being denied waivers, the grievants worked enough overtime hours to earn the highest percentage of AUO pay. After the waiver denials, the Agency instructed the grievants to limit their overtime hours so that they would not exceed the lowest percentage of AUO pay. Following the grievants' waiver denials and restrictions on their ability to

[1] 19 U.S.C. § 267(c)(1).

[2] 19 C.F.R. § 24.16.
[3] Award at 5.
[4] 5 U.S.C. § 5545(c)(2).
[5] *Id.*

work AUO, the Union filed a grievance, which went to arbitration.

The Arbitrator framed the issues, in relevant part, as: (1) "Is the grievance arbitrable?"; and (2) "If so, did the Agency violate the [parties'] agreement with regard to the distribution of overtime to [the grievants]?"[6]

At arbitration, the Agency argued, for the first time, that the grievance was not arbitrable. Specifically, according to the Agency, the Union did not comply with the parties' agreement because it did not file its grievance within thirty days of the day on which the grievants were told that they had not been granted waivers. In response, the Union argued that the Agency had waived its right to raise arbitrability as a procedural defense because it did not raise the defense prior to arbitration.

The Arbitrator noted that Article 33 of the parties' agreement requires that arbitrability questions "should be raised at the earliest practical time."[7] The Arbitrator rejected the Agency's argument that, under Article 33, arbitrability could be raised at any time. The Arbitrator explained that Article 33(C) provides that questions of arbitrability may be "raised at any 'appropriate' time"[8] but that, once raised by the Agency, it is an arbitrator's responsibility to determine whether the timing was "appropriate."[9] Applying his interpretation of Article 33(C), the Arbitrator found that the Agency did not comply with that provision because the Agency raised the issue of arbitrability "*so long after* [it] was aware of th[e] potential defense."[10] Consequently, the Arbitrator found that the Agency had not raised the procedural defense of arbitrability at an "appropriate time" and, therefore, could not challenge whether the grievance was arbitrable.[11]

Regarding the merits of the grievance, the Arbitrator found that the Agency's explanations for its denials of the grievants' waivers and restrictions on the grievants' AUO "lacked specificity."[12] In addition, the Arbitrator rejected the Agency's arguments – which, he noted, changed with each level of the Agency's responses to the grievance – that the grievants were not granted waivers because: (1) they were still in training when the list was submitted; (2) their overtime earnings were not projected to exceed the cap; and (3) no more waivers would be granted for that fiscal year. The Arbitrator found that the Agency's explanations could apply to all handlers, yet "historically," waivers were granted for "all of the [handlers]" in the grievants' location.[13]

The Arbitrator also rejected an Agency argument that the grievants were not entitled to the higher AUO percentage because of the "unpredictability" of their AUO.[14] In that regard, the Arbitrator found that the Agency allowed handlers with waivers to work up to two hours of unscheduled overtime each shift, but instructed the grievants to leave their shifts before any other handlers.

Citing both Articles 27 and 30 as "[p]ertinent [c]ontractual [p]rovisions,"[15] the Arbitrator found that the Agency "violated the [parties'] agreement with regard to the distribution of overtime to [the grievants]"[16] by denying them waivers and restricting their ability to work AUO. As a remedy, the Arbitrator directed the Agency to pay the grievants backpay for "lost earnings . . . based on the difference in the average number of hours worked by their fellow . . . handlers" and the hours that the grievants worked.[17]

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

III. Preliminary Matters

A. The Agency's exceptions are timely.

The time limit for filing exceptions to an arbitration award is thirty days "after the date of service of the award."[18] The date of service is the date the award is deposited in the U.S. mail, delivered in person, deposited with a commercial delivery service, or, in the case of email transmissions, the date transmitted.[19] Absent evidence to the contrary, an arbitration award is presumed to have been served by mail on the date of the award.[20]

Here, the award is dated March 17, 2014,[21] but the Agency did not file exceptions until May 22, 2014.[22] Consequently, the Authority's Office of Case Intake and Publication issued an order to show cause why the Agency's exceptions should not be dismissed as untimely.[23] In response to the show-cause order, the

[6] Award at 7.
[7] *Id.* at 11.
[8] *Id.* at 10 (quoting Article 33(C) of the parties' agreement).
[9] *Id.*
[10] *Id.*
[11] *Id.* at 11.
[12] *Id.* at 15.
[13] *Id.* at 16.
[14] *Id.* at 17 (emphasis omitted).
[15] *Id.* at 6.
[16] *Id.* at 18.
[17] *Id.*
[18] 5 C.F.R. § 2425.2(b).
[19] *Id.* § 2425.2(c).
[20] *Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 32 FLRA 165, 167 (1988).
[21] Award at 1.
[22] Exceptions at 1.
[23] Order to Show Cause at 1-2.

Agency asserts that it is undisputed that the Arbitrator did not actually serve the award on the parties until April 23, 2014.[24] To support that assertion, the Agency submitted a series of emails from the Arbitrator indicating that, despite the date on the award, the Arbitrator did not serve the award on the parties until April 23.[25] Thus, the Agency has demonstrated that it filed its exceptions within thirty days of the actual date of service of the award, and we find that the Agency's exceptions are timely.

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

Under § 2425.4(c) of the Authority's Regulations, a party may not rely on any argument that "could have been, but w[as] not, presented to the arbitrator,"[26] and § 2429.5 likewise provides that the Authority will not "consider any . . . arguments . . . that could have been, but were not, presented in the proceedings before the . . . arbitrator."[27] The Agency argues that that the award is deficient because the Arbitrator exceeded his authority by relying on Article 27 to find a violation of the parties' agreement.[28] The Agency also argues that the award fails to draw its essence from the parties' agreement because Article 27 does not apply to AUO.[29] According to the Agency, Article 27 was not raised until the Union's post-hearing brief to the Arbitrator, which "divested the [A]gency of notice and opportunity to defend against the alleged violation" of that provision.[30]

The Authority has held that, if a party does not respond to an argument first raised in an opposing party's brief to an arbitrator, and there is no basis for finding that the party was precluded from responding, then that party is barred from raising its responsive argument for the first time before the Authority.[31] Here, even if the Agency was not aware that the Union was claiming a violation of Article 27 until it received a copy of the Union's brief to the Arbitrator,[32] over a month passed between the filing of the Union's brief and the Arbitrator's award.[33] And the Agency does not argue that it was precluded from responding to the Union's brief.[34] Thus, the Agency could have, and should have, presented its arguments regarding Article 27 to the Arbitrator.[35] Because the Agency did not do so, we dismiss the Agency's exceeds-authority and essence exceptions regarding Article 27.[36]

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Agency challenges three of the Arbitrator's findings as nonfacts. To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[37] However, the Authority will not find an award deficient based on the arbitrator's determination of any factual matter that the parties disputed at arbitration.[38] And disagreement with an arbitrator's evaluation of evidence, including the arbitrator's determination of the weight to be given such evidence, provides no basis for finding the award deficient as a nonfact.[39] Further, the Authority has held that an argument that no evidence was presented at arbitration to support an arbitral finding does not demonstrate that an award is based on a nonfact.[40]

First, the Agency contests the Arbitrator's finding that "all other [handlers] are[,] and were[,] routinely granted waivers" because, according to the Agency, there is "no evidence in the record" to support that finding.[41]

[24] Agency's Resp. to Order to Show Cause at 1.
[25] *Id.*, Attachs., Emails from the Arbitrator to the parties, dated April 23, 2014.
[26] 5 C.F.R. § 2425.4(c).
[27] *Id.* § 2429.5.
[28] Exceptions at 9.
[29] *Id.* at 12.
[30] *Id.* at 9.
[31] *USDA, Farm Serv. Agency, Kan. City, Mo.*, 65 FLRA 483, 484 & n.4 (2011) (*Farm Serv.*) (finding that the agency could have raised its argument before the arbitrator, where the union's post-hearing brief was filed after the agency's brief and nearly a month passed before the arbitrator issued award); *U.S. DOJ, Fed. BOP, Wash., D.C.*, 64 FLRA 1148, 1152 (2010) (dismissing exception under 5 C.F.R. § 2429.5, where the agency failed to demonstrate that it had "no opportunity to respond" to the union's attorney-fee request filed simultaneously with the agency's brief).
[32] Exceptions, Attach. 3.
[33] Award at 1.
[34] *See, e.g., AFGE, Council of Prison Locals, Local 405*, 67 FLRA 395, 397 (2014).
[35] *Id.* (citing *Farm Serv.*, 65 FLRA at 484 n.4).
[36] *U.S. DOL*, 67 FLRA 287, 288-89 (2014) (finding that the agency could have responded to arguments raised in the union's post-hearing brief when there were two weeks between when the union filed its brief and the award issued).
[37] *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 623 (2014) (*White Sands*) (citing *U.S. Dep't of VA, Med. Ctr., Wash., D.C.*, 67 FLRA 194, 196 (2014)).
[38] *SPORT Air Traffic Controllers Org.*, 68 FLRA 9, 11 & n.38 (2014) (*SPORT*) (citing *Int'l Bhd. of Elec. Workers, Local 26*, 67 FLRA 455, 457 (2014)).
[39] *USDA, Forest Serv.*, 67 FLRA 558, 560 (2014) (*Forest Serv.*).
[40] *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 836, 842 (2000) (*DOD*) (finding that a claim that "no evidence has been presented" to support the arbitrator's factual finding did not demonstrate that a central fact underlying the award was clearly erroneous); *NAGE, Local R4-45*, 55 FLRA 695, 697, 700 (1999) (noting agency argument that "[n]o evidence" supported finding, and holding that an "absence of facts" does not demonstrate that an award is based on nonfact).
[41] Exceptions at 15.

Second, the Agency argues that the award is based on "the erroneous conclusion that the grievants' annual compensation was somehow reduced from the previous year," despite the absence of evidence or argument regarding reductions to the grievants' compensation from the previous year.[42] Consistent with the principles set forth above, the Agency's claim that no evidence supports these findings provides no basis for concluding that the award is based on nonfacts.[43] Third, the Agency argues that the award was based on the Arbitrator's finding that handlers are entitled to two hours of AUO per day even though there was no way to determine the hours that the grievants would have worked.[44] But the amount of AUO hours that handlers typically worked each day was disputed at arbitration.[45] Therefore, consistent with the principles set forth above, the Agency's argument provides no basis for finding that the award is based on a nonfact.[46]

Accordingly, we deny the Agency's nonfact exceptions.

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

The Agency argues that the Arbitrator's arbitrability determination fails to draw its essence from the parties' agreement.[47] Specifically, the Agency argues that the Arbitrator incorrectly interpreted Article 33(C) by finding that the Agency's failure to raise the issue of arbitrability at an earlier time caused it to forfeit that procedural defense.[48]

Procedural arbitrability involves questions of whether a grievance satisfies a collective-bargaining agreement's procedural conditions.[49] The Authority generally will not find an arbitrator's procedural-arbitrability determination deficient on grounds that directly challenge the procedural-arbitrability ruling itself, including a claim that an award fails to draw its essence from a collective-bargaining agreement.[50] An arbitrator's finding that a party has waived its procedural defense by failing to timely raise the defense is a procedural-arbitrability determination.[51]

Here, the Arbitrator found that the Agency waived its procedural defense by failing to timely raise it. Consistent with the principles set forth above, that is a procedural-arbitrability determination.[52] Because the Agency's essence exception attempts to directly challenge that procedural-arbitrability determination,[53] the exception does not provide a basis for finding the award deficient. Thus, we deny the exception.

C. The award is not contrary to law.

The Agency argues that the award is contrary to COPRA,[54] the Anti-Deficiency Act,[55] and 5 U.S.C. § 5545(c). In resolving an exception claiming that an award is contrary to law, the Authority reviews any question of law raised by an exception and the award de novo.[56] In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[57] Under this standard, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[58]

Under COPRA, the overtime pay that "a customs officer may be paid in any fiscal year may not exceed $[3]5,000;[59] except that the Commissioner of Customs or his [or her] designee may waive this limitation in individual cases in order to prevent excessive costs or to meet emergency requirements of the Customs Service."[60] The Agency contends that the award is contrary to COPRA because the Arbitrator had no authority to "ignore or override" the cap or grant waivers to the grievants.[61] However, the Arbitrator's findings that the Agency violated the parties' agreement by denying the grievants waivers and restricting their overtime hours do not include directions to the Agency to override the cap or grant waivers.[62] Rather, the award requires that the Agency pay the grievants for the overtime that they lost "based on the difference in the average number of hours worked" by the handlers who were not restricted in their hours and the hours that the grievants were permitted to work, in order to remedy the Agency's contractual violations.[63]

[42] *Id.* at 16.
[43] *DOD*, 56 FLRA at 842.
[44] Exceptions at 16.
[45] *Id.*, Attach. 4, Tr. at 28, 40, 49-53; Exceptions, Attach. 4b, Agency Ex. 1 at 1.
[46] *SPORT*, 68 FLRA at 11.
[47] Exceptions at 12.
[48] *Id.* at 12-13.
[49] *AFGE, Local 2041*, 67 FLRA 651, 652 & n.22 (2014) (citing *AFGE, Local 3615*, 65 FLRA 647, 649 (2011)).
[50] *Id.* (citations omitted).
[51] *White Sands*, 67 FLRA at 624 (finding that a claim that the arbitrator misinterpreted the parties' agreement by finding that the agency waived its procedural arguments directly challenges the arbitrator's procedural-arbitrability determination).
[52] *Id.*
[53] *Id.*
[54] 19 U.S.C. § 267(c)(1).
[55] 31 U.S.C. § 1341(a)(1).
[56] *White Sands*, 67 FLRA at 621 (citation omitted).
[57] *Forest Serv.*, 67 FLRA at 560.
[58] *Id.* (citation omitted).
[59] Consolidated Appropriations Act 2012, Pub. L. No. 112-74, 125 Stat. 786, 946 (2011) (increasing the overtime cap to $35,000 for fiscal year 2012).
[60] 19 U.S.C. § 267(c)(1).
[61] Exceptions at 7.
[62] Award at 17-18.
[63] *Id.* at 18.

Moreover, even assuming that the remedy implicates the cap, the award is still not deficient, because COPRA's implementing regulation provides that "compensation awarded to a Customs Officer for work not performed, which includes overtime awards . . . made in accordance with back pay settlements, shall not be applied to any applicable pay[-]cap calculations."[64] Thus, we find that the Agency's argument does not demonstrate that the award is contrary to COPRA.[65]

The Anti-Deficiency Act[66] precludes an agency from expending funds: (1) in excess of those appropriated for the fiscal year in which the expenditure is made; and (2) prior to their appropriation.[67] The Agency does not explain how complying with the award would require it to expend funds in excess of, or prior to, their appropriation. Thus, the Agency's reliance on the Anti-Deficiency Act provides no basis for finding the award deficient.

The Agency also argues that the award is contrary to law because it "provides for payment of AUO that was not administratively uncontrollable," allegedly in violation of 5 U.S.C. § 5545(c) and 5 C.F.R. § 550.151.[68] Under §§ 5545(c) and 550.151, AUO is overtime that is not regularly scheduled.[69] While the Agency asserts that the Arbitrator erroneously found that handlers worked "an established number of hours" of AUO per day,[70] the Arbitrator did not find that handlers were *required* or *scheduled* by the Agency to work an established number of additional hours. He found that handlers were *permitted* to work, and would have worked, two hours of AUO per day, but for the Agency's contractual violations.[71] We defer to the Arbitrator's finding because, as discussed above, the Agency has not demonstrated that the Arbitrator's finding in this regard is a nonfact.[72] Thus, we find that the Agency's argument provides no basis for finding the award contrary to law or regulation.

The Agency also argues that the remedy of backpay is contrary to law because it awards backpay for overtime not worked.[73] The Authority has rejected this argument previously, explaining that "the fact that employees did not actually work overtime d[oes] not render a remedy of overtime compensation unlawful. Rather, the employees would have worked overtime had the agency not engaged in improper conduct and, therefore, they suffered the loss of pay because of that conduct."[74] Here, as discussed above, the Arbitrator found that the Agency failed to equitably distribute overtime as required by the parties' agreement and that, as a result, the grievants lost the opportunities to work overtime at a higher AUO percentage. Therefore, the Agency's argument provides no basis for finding the backpay remedy contrary to law.

Accordingly, we find that the Agency does not demonstrate that the Arbitrator's remedy of paying the grievants backpay equivalent to the average number of hours of overtime worked by other handlers is contrary to law.[75]

V. Decision

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

[64] 19 C.F.R. § 24.16(h).
[65] *U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 55 FLRA 553, 560 (1999) (finding that an award of backpay is not contrary to COPRA because 19 C.F.R. § 24.16(h) provides an exception to the cap on overtime pay).
[66] 31 U.S.C. § 1341.
[67] *Id.* § 1341(a)(1)(A)-(B).
[68] Exceptions at 7.
[69] 5 U.S.C. § 5545(c); 5 C.F.R. § 550.151.
[70] Exceptions at 8.
[71] Award at 17.
[72] *Forest Serv.*, 67 FLRA at 560 (citation omitted).
[73] Exceptions at 7 n.2.
[74] *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 62 FLRA 4, 7 (2007) (quoting *Fed. Emps. Metal Trades Council*, 39 FLRA 3, 9-10 (1991)).
[75] *Cf. U.S. Dep't of HHS, Navajo Area Indian Health Serv., Window Rock, Ariz.*, 56 FLRA 1035, 1036-37 (2000) (denying agency's exception alleging that a method of calculating backpay by using the average number of hours worked by the grievants was contrary to law).