72 FLRA No. 72

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
NASHVILLE REGIONAL OFFICE
VA BENEFITS ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2470
(Union)

0-AR-5552

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DECISION

June 23, 2021

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

I. Statement of the Case

In this case, we uphold an award finding that the Agency violated the parties' collective-bargaining agreement by denying a disabled veteran (the grievant) leave without pay (LWOP) for medical treatment.

Before 2019, the Agency regularly permitted the grievant to take LWOP for medical treatment. In early 2019, the Agency required the grievant to provide a medical "treatment plan" to receive future approvals.[1] The grievant provided additional medical documentation, but the Agency found it insufficient and charged the grievant as absent without leave (AWOL) for several absences.

The Union grieved the denials of LWOP. During the pendency of the arbitration proceedings, the Agency suspended the grievant based on the AWOL charges. Arbitrator Ed W. Bankston subsequently issued an award finding that the Agency violated the parties' agreement by changing a past practice without notifying the Union and by denying the grievant's requests for LWOP. As a remedy, the Arbitrator directed the Agency to rescind the grievant's suspension.

The Agency filed exceptions, arguing that the award is contrary to Executive Order 5396 (the EO),[2] which requires federal agencies to grant an LWOP request from a disabled veteran who provides prior notice of an absence and medical documentation stating that treatment is necessary. Because nothing in the EO prevented the Arbitrator from enforcing the plain terms of the parties' agreement—which mandated that the Agency grant disabled veterans LWOP for medical treatment—we find that the award does not conflict with the EO.

In its other exceptions, the Agency argues that: the Arbitrator erred in finding that a past practice existed; the Arbitrator exceeded his authority; the award fails to draw its essence from the parties' agreement; and the award is based on two nonfacts. For the reasons that follow, none of these arguments demonstrate that the award is deficient. Thus, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievant is a disabled veteran who regularly requested LWOP to receive treatment for his service-connected disabilities. During a meeting in February 2019 (the February meeting), the Agency informed the grievant that he would need to provide a "treatment plan" in order to continue receiving LWOP for medical appointments.[3] The treatment plan needed to show the type of treatment that the grievant was receiving, the conditions for which he was being treated, and the frequency and duration of flare ups for those conditions.

Following the February meeting, the grievant provided additional medical documentation to the Agency, but the Agency deemed this documentation inadequate.[4] As a result, instead of granting the grievant's LWOP requests, the Agency charged him with AWOL for four absences in January and eight absences in February.

The Union grieved the AWOL charges, alleging that the Agency had violated the parties' agreement by changing an established past practice without notifying

[1] Award at 8.

[2] Special Leaves of Absence to be Given Disabled Veterans in Need of Medical Treatment, Exec. Order No. 5396, (July 17, 1930) (Exec. Order 5396).

[3] Award at 21-22.

[4] The grievant's personnel file already contained documentation of his service-connected disabilities before the February meeting. Exceptions, Attach. 4, Union's Ex. at 10-11 (listing the grievant's service-connected disabilities); *id.* at 19-71 (collection of reasonable accommodation requests for service-connected disabilities—with supporting notes from medical providers—and the Agency's responses to the requests).

the Union. In response, the Agency converted the AWOL charges before the February meeting to LWOP, but sustained the remaining AWOL charges.

The Union invoked arbitration. At arbitration, the Union proposed four issues for resolution, and the Agency proposed two. As the parties did not stipulate to any issues, the Arbitrator adopted all six issues for consideration but framed the ultimate issues as: "whether the grievant was improperly denied LWOP, and instead [was] improperly charged AWOL? If so, what is the appropriate remedy?"[5]

Between the Union's invocation of arbitration and the hearing, the Agency issued a proposed suspension to the grievant. During the hearing, the Arbitrator recommended that the Agency pause the grievant's proposed suspension pending the resolution of the grievance. But the Agency suspended the grievant for seven days and noted in the suspension letter that it considered only AWOL charges brought against the grievant after February 16, 2019, as the earlier AWOL charges were "pending before an arbitrator."[6]

The Arbitrator found that the Agency had violated Article 47, Section 4(B) of the parties' agreement by changing the type of medical documentation required for disabled veterans to receive LWOP.[7] He reasoned that the Union had established that the requirement for a treatment plan "either did not exist prior to . . . 2019, or w[as] not applied,"[8] and the Agency did not provide the Union with notice of the change.[9]

The Arbitrator also found that the Agency violated Article 35, Section 10(F) of the parties' agreement by denying the grievant LWOP. As relevant here, Section 10(F) provides that "LWOP is granted at the discretion of the [Agency], except . . . [w]hen a disabled veteran requests LWOP for medical treatment."[10] The Arbitrator determined that requiring a treatment plan constituted an exercise of discretion specifically prohibited by Section 10(F). In addition, noting that the treatment plan appeared to be a personal policy preference of a new Agency director, the Arbitrator found that it constituted an "arbitrary and capricious" restraint on the grievant's right to request leave, in violation of Article 35, Section 1.[11]

Before the Arbitrator, the Agency argued that the EO required a disabled veteran to submit medical documentation in order to receive LWOP for treatment.[12] The Arbitrator found that the EO was "subjugated" by the parties' agreement and, therefore, he did not consider its application to the grievant's LWOP requests.[13]

To remedy the violations, the Arbitrator directed the Agency, as relevant here, to (1) rescind the requirement for a treatment plan, (2) convert all AWOL charges against the grievant between January 10, 2019, and the date of the award to LWOP, and (3) rescind the grievant's seven-day suspension based on those AWOL charges. The Arbitrator explained that the issues before him encompassed all of the AWOL charges, not just those before February 16, because all of the AWOL charges stemmed from the Agency imposing new conditions on the use of LWOP.

The Agency filed exceptions to the award on October 15, 2019,[14] and on October 28, 2019, the Union filed an opposition to the Agency's exceptions.

[5] Award at 4.
[6] *Id.* at 22.
[7] Article 47, Section 4(B) provides that "[p]roposed changes in personnel policies, practices, or working conditions affecting the interests of one local union shall require notice to the [p]resident of that local." *Id.* at 7 (quoting Art. 47, § 4(B)).
[8] *Id.* at 24.
[9] *Id.* at 16. Regarding the change, the Arbitrator found that, "[a]ccording to [a witness], the newly 'established leave procedures' are: 1. Provide documentation regarding the treatment you received from a healthcare provider; or 2. Provide a treatment plan from your healthcare provider." *Id.* at 23.
[10] *Id.* at 7 (quoting Art. 35, § 10(F)).
[11] *Id.* at 19. Article 35, Section 1 provides that "[n]o arbitrary or capricious restraints will be established to restrict when leave may be requested." *Id.* at 23 (quoting Art. 35, § 1(E)).
[12] The EO provides:

> With respect to medical treatment of disabled veterans who are employed in the executive civil service of the United States, it is hereby ordered that, upon the presentation of an official statement from duly constituted medical authority that medical treatment is required, such annual or sick leave may be permitted by law and such leave without pay as may be necessary shall be granted by the proper supervisory officer to a disabled veteran in order that the veteran may receive such treatment, all without penalty in his efficiency rating.
>
> The granting of such leave is contingent upon the veteran's giving prior notice of definite days and hours of absence required for medical treatment in order that arrangements may be made for carrying on the work during his absence.

Exec. Order No. 5396.
[13] Award at 19.

III. Analysis and Conclusions

A. The Agency fails to establish that the award is contrary to the EO or the VA Handbook.

The Agency argues that the award is contrary to the EO.[15] When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo.[16] In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[17]

Here, the Agency argues that the award requires it to grant LWOP in circumstances not permitted by the EO.[18] In relevant part, the EO states that when a disabled veteran presents medical documentation, LWOP "shall be granted . . . contingent upon the veteran[] giving prior notice" of the absence.[19] The Agency identifies no wording in the EO that either prohibits the Agency from granting LWOP to disabled veterans without medical documentation or requires disabled veterans to submit a particular type of medical documentation, such as a "treatment plan."[20] Moreover, the Arbitrator found that the parties' agreement was clear: "LWOP is granted at the discretion of the [Agency], *except* . . . [w]hen a disabled veteran requests LWOP for medical treatment."[21] Based on a plain reading of Article 35, Section 10(F), the Arbitrator determined that the Agency was "disallowed any form or manner of discretion," and that the Agency had exercised discretion in denying the grievant's request.[22]

As the Agency fails to establish any conflict between the award and the EO,[23] we deny this contrary-to-law exception.[24]

The Agency also argues that the award is deficient because it is contrary to an agency rule—the VA Handbook.[25] Relying on its contention that the award conflicts with the EO, the Agency claims that the award must also conflict with the VA Handbook because the Handbook "merely reiterates" the EO's requirements.[26] As we have denied the Agency's EO-based exception, we also deny this exception.[27]

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[14] The Agency also filed a supplemental submission, which included a reply to the Union's opposition as well as a motion to strike an "impertinent" statement in the opposition. Supplemental Submission, Attach. 1, Agency's Mot. to Strike at 2. The Authority's Regulations do not provide for the filing of a reply to an opposition to a party's exceptions. *Nat'l Union of Lab. Investigators*, 46 FLRA 1311, 1311 n.1 (1993). Although § 2429.26(a) permits the filing of additional documents, the Authority has held that it is incumbent on the moving party to demonstrate why the Authority should consider such a supplemental submission. *U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 52 FLRA 622, 625 (1996). The Agency has not shown that its submission—which include a claim that the Union's opposition contained statements intended solely to "impugn" the Agency—should be considered. Agency's Mot. to Strike at 1. Therefore, we do not consider it. *See Dep't of the Navy, Naval Sea Sys. Command*, 57 FLRA 543, 543 n.1 (2001).

[15] Exceptions Br. at 25-26.

[16] *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014).

[17] *AFGE, Loc. 3955*, 69 FLRA 133, 133 (2015); *AFGE, Loc. 3506*, 65 FLRA 121, 123 (2010).

[18] Exceptions Br. at 26.

[19] Award at 7 (quoting Exec. Order No. 5396).

[20] Exceptions Br. at 25-26; *see also U.S. Dep't of Com., Pat. & Trademark Off.*, 65 FLRA 817, 819 (2011) ("[T]he Authority has held that parties may negotiate contractual entitlements that are greater than statutory entitlements."); *United Am. Nurses, D.C. Nurses Ass'n & United Am. Nurses Loc. 203*, 64 FLRA 879, 882 (2010) (holding that a particular provision of the Federal Service Labor-Management Relations Statute (the Statute) creates a "statutory floor and not a ceiling" because nothing in that provision prohibits unions from negotiating for an expanded entitlement).

[21] Award at 7 (emphasis added) (quoting Art. 35, § 10(F)).

[22] *Id.* at 17.

[23] Because the Agency fails to establish a conflict between the award and the EO, we need not resolve the Agency's argument challenging the Arbitrator's statement that the EO was "subjugated" by the parties' agreement. Award at 19.

[24] *See AFGE, Nat'l Citizenship & Immigr. Servs. Council, Loc. 2076*, 71 FLRA 115, 116 (2019) (then-Member DuBester concurring) (denying a contrary-to-law exception where the cited regulation did not prohibit the agency action permitted by the award). The Agency also argues that that the award is contrary to §§ 7106(b)(1) and 7117(a)(1) of the Statute. Exceptions Br. at 27. However, the Agency does not provide any explanation as to how LWOP for disabled veterans concerns "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or . . . the technology, methods[,] and means of performing work." *See id.* (quoting 5 U.S.C. § 7106(b)(1)); *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 621 (2014) (denying a contrary-to-law exception where the excepting party failed to establish that the cited law applies). As the Agency's § 7117(a)(1) argument relies on its contention that the award conflicts with the EO, the Agency also fails to establish that the award conflicts with § 7117(a)(1). *See* Exceptions Br. at 27.

[25] Exceptions Br. at 28-29.

[26] *Id.* at 29.

[27] *AFGE, Loc. 1698*, 70 FLRA 96, 99 (2016) (denying an exception where the argument was premised on another exception denied by the Authority); *Indep. Union Pension Emps. Democracy & Just.*, 68 FLRA 999, 1007 (2015) (denying exceptions that were based on a faulty exception); *U.S. DHS, U.S CBP*, 66 FLRA 409, 411 (2011) (denying an essence exception because it was "premised on the [a]gency's [rejected] claim that the award is contrary to law and regulation").

B. The Agency fails to establish that the Arbitrator's finding of a past practice is deficient.

The Agency argues that the award is contrary to law because the Arbitrator failed to comply with the evidentiary standards required to establish a past practice.[28] However, "[i]n arbitration cases, the Authority addresses issues as to whether a past practice exists under the nonfact framework."[29] Even if the Agency had raised a proper nonfact exception, the Authority will not find an award deficient on a nonfact basis where the alleged nonfact was disputed by the parties before the arbitrator.[30] Because the parties disputed the existence of a past practice before the Arbitrator,[31] we deny this exception.[32]

C. The Arbitrator did not exceed his authority in addressing the grievant's suspension.

The Agency argues that the Arbitrator exceeded his authority by directing the Agency to rescind the grievant's suspension because the grievance and the suspension decision concerned different AWOL charges.[33] According to the Agency, the suspension decision "did not consider any of the AWOLs issued prior to February 16, 2019 [that] were pending resolution before the Arbitrator,"[34] and, thus, the suspension decision was outside the scope of the issues submitted to arbitration.

As relevant here, arbitrators exceed their authority by resolving issues not submitted to arbitration.[35] It is well settled that when parties do not agree on the issues, arbitrators have the discretion to frame them.[36]

Here, as the parties did not stipulate to the issues, the Arbitrator adopted each party's issues for consideration in resolution of his framed issues.[37] The Arbitrator framed the ultimate issues broadly as "whether the grievant was . . . improperly charged [with] AWOL . . . [and] [i]f so, what is the appropriate remedy."[38] The Arbitrator found that "[i]t [wa]s not just 'hours prior to February 16, 2019,' at issue," as the Agency had argued.[39] Instead, the issues concerned all AWOL charges occurring after the Agency's "untoward imposition of conditions upon the use of LWOP" in January 2019.[40] Because the Agency had relied on AWOL charges based on these new conditions to suspend the grievant, the Arbitrator directed the Agency to rescind the grievant's suspension.[41]

Based on the above, we conclude that the Arbitrator's rescission of the grievant's suspension was directly responsive to the issues that the Arbitrator adopted and framed—specifically, "what is the appropriate remedy" if the Agency "improperly charged [the grievant with] AWOL."[42] Therefore, we deny the Agency's exceeded-authority exception.[43]

D. The Agency does not establish that the award relied on a nonfact.

The Agency argues that the award is based on two nonfacts.[44] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[45] Disagreement 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

[28] Exceptions Br. at 30-32.
[29] *AFGE, Loc. 801*, 64 FLRA 791, 792 (2010) (*Loc. 801*); *AFGE, Council 238*, 62 FLRA 466, 468 (2008) (*Council 238*).
[30] *U.S. Dep't of the Treasury, IRS, Greensboro, N.C.*, 61 FLRA 103, 105 (2005); *SSA, Off. of Hearings & Appeals*, 58 FLRA 405, 407 (2003).
[31] Exceptions, Attach. 1, Agency's Post-Hr'g. Br. at 14-20 (arguing that no past practice existed before January 10, 2019); Award at 8 (summarizing Union's argument that a past practice of granting disabled veterans' requests for LWOP for medical treatment existed).
[32] *Loc. 801*, 64 FLRA at 792 (denying a nonfact exception to an arbitrator's finding of a past practice where the alleged nonfact was disputed before the arbitrator); *Council 238*, 62 FLRA at 468 (same). The Agency also argues that a past practice may not alter a government-wide rule, such as the EO. Exception Br. at 31-32. However, for the reasons stated above, we find that the award does not conflict with the EO and deny this exception.
[33] Exceptions Br. at 32-33.
[34] *Id.* at 33.
[35] *NTEU*, 70 FLRA 57, 60 (2016).
[36] *U.S. Dep't of VA Med. Ctr., Richmond, Va.*, 70 FLRA 900, 901 (2018) (*Richmond*). (then-Member DuBester concurring) (citing *AFGE, Loc. 3627*, 64 FLRA 547, 550 (2010)).
[37] Award at 3-4.
[38] *Id.* at 4.
[39] *Id.* at 23.
[40] *Id.* at 24.
[41] *Id.* at 25.
[42] *Id.* at 4.
[43] *Richmond*, 70 FLRA at 901 (holding that an arbitrator did not exceed his authority where "the award and remedies [were] directly responsive to the issues he framed"); *U.S. Dep't of the Treasury, IRS, Off. of Chief Couns.*, 70 FLRA 783, 784 n.15 (2018) (then-Member DuBester dissenting) ("[A]rbitrators do not exceed their authority by . . . addressing an issue that necessarily arises from issues submitted to arbitration.").
[44] Exceptions Br. at 34-36.
[45] *AFGE, Loc. 1594*, 71 FLRA 878, 880 (2020) (citing *U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010)).

nonfact.[46] In addition, the Authority has held that the "absence of facts does not support a nonfact exception."[47]

In its first nonfact exception, the Agency argues that the Arbitrator erroneously characterized testimony. The Agency argues that, contrary to the award, an Agency witness never described the requirement for a treatment plan as a "newly established" leave procedure.[48] However, this exception ignores the Arbitrator's placement of quotation marks, thereby mischaracterizing the award. The Arbitrator stated that, "[a]ccording to [the witness], the newly 'established leave procedures'" required veterans to provide medical documentation for each incident of leave as well as to have a treatment plan on file.[49] The Arbitrator used quotation marks to demonstrate that the witness testified to the existence of "established leave procedures," but the Arbitrator used the word "newly" to convey *his* finding that the treatment-plan requirement did *not* exist before January 2019.[50]

Accordingly, this exception does not establish that the Arbitrator relied on a nonfact.[51]

In its second nonfact exception, the Agency argues that the Arbitrator erroneously concluded that "the prior . . . managers . . . who granted [the] [g]rievant's LWOP requests before 2019 did so based upon different considerations."[52] To support this exception, the Agency claims that "there is no evidence as to the basis by which the prior . . . managers made their decisions."[53] Because this argument challenges the Arbitrator's evaluation of the evidence, and is based on an alleged absence of facts, it provides no basis for finding that the award deficient. Therefore, we deny this exception.[54]

IV. Decision

We deny the Agency's exceptions.

[46] *U.S. Small Bus. Admin., Birmingham, Ala.*, 72 FLRA 106, 106 (2021).
[47] *U.S. DOJ, Fed. BOP*, 68 FLRA 546, 547 (2015).
[48] Exceptions Br. at 34.
[49] Award at 23.
[50] *Id.*; *see also id.* at 15-16 (comparing the 98.99% approval rate for the grievant's LWOP requests before January 10 without a treatment plan on file with the 80-90% denial rate after January 10).
[51] *See AFGE, Council of Prison Locs. #33, Loc. 0922*, 69 FLRA 351, 353 (2016) (denying a nonfact exception where the excepting party misinterpreted the award); *AFGE, Loc. 3652*, 68 FLRA 394, 397 (2015) (same); *see also U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 103, 105 (2019) (denying an essence exception where the agency's exception misinterpreted the award); *SSA*, 69 FLRA 208, 210 (2016) (holding that an exception based on misreading of an award provides no basis for finding that the award fails to draw its essence from the parties' agreement).
[52] Exceptions Br. at 34-35.
[53] *Id.* at 35.
[54] *U.S. Dep't of VA, Boise VA Med. Ctr.*, 72 FLRA 124, 128 (2021) (Member Abbott concurring; Chairman DuBester dissenting in part) (denying an exception where the excepting party was "merely disputing the weight the [a]rbitrator ascribed to evidence and testimony"); *U.S. Dep't of VA, Nashville Reg'l Off., Nashville, Tenn.*, 71 FLRA 1042, 1043 (2020) (Member Abbott concurring) (denying nonfact exception where excepting party argued there was "no evidence" to support award); *AFGE, Loc. 953*, 68 FLRA 644, 646 (2015) (denying a nonfact exception where the excepting party challenged the arbitrator's evaluation of evidence).

Member Abbott, concurring:

I agree with the majority's decision to uphold the arbitrator's award.

However, I write separately to address the timeliness[1] of this decision, or lack thereof. The issuance of the Authority's decision comes a year and a half after the respective filings in this case. The primary contract provision at issue in the above decision is Article 35, Section 10(F)(1) of the parties' CBA. Art. 35, § 10(F)(1) is a nationwide contract provision that covers over 265,000 bargaining unit employees.[2] Therefore, prolonging the resolution of the party's exceptions impacted a number of bargaining unit employees across all VA facilities. Issuing this decision in a timely manner may well have avoided any number of disputes, grievances, or cases that arose while the parties waited for an answer from the Authority.

Particularly when faced with cases concerning nationwide contract provisions such as the one before us, we should put forth more effort and fortitude to review and decide cases in a timely fashion. Furthermore, we should view these cases with a broader lens to account for the reach it will have on both the specific grievant that is the subject of the issue and *all* grievants who may be directly or indirectly impacted by our decision and the contract provision that pervades it.

We owe nothing less to the parties that come before us and who may be stuck in limbo indefinitely awaiting our decision.

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[1] I have continued to note the lack of timeliness in several other Authority opinions, including *U.S. Department of the Army*, 72 FLRA 363, 368 (2021) (Concurring Opinion of Member Abbott); *see U.S. EPA, Off. of Rsch. & Dev., Ctr. for Envtl. Measuring & Modeling, Gulf Ecosystems Measurement & Modeling Div., Gulf Breeze, Fla.*, 71 FLRA 1199, 1202-03 (2020) (Concurring Opinion of Member Abbott) (discussing the Authority's failure to meet internal case processing goals of 210 and 365 days, respectively); *see also U.S. EPA*, 72 FLRA 114, 115 n.12 (2021).

[2] Brittany Holder, *Largest Veterans Affairs Department Union Overwhelmingly Votes Against Ratifying Collective Bargaining Agreement*, AFGE (Jan. 8, 2021), https://www.afge.org/publication/largest-veterans-affairs-department-union-overwhelmingly-votes-against-ratifying-collective-bargaining-agreement.