73 FLRA No. 159

ASSOCIATION OF CIVILIAN TECHNICIANS
KENTUCKY LONG RIFLE CHAPTER 83
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
NATIONAL GUARD BUREAU
KENTUCKY ARMY NATIONAL GUARD
(Agency)

0-AR-5823

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DECISION

February 29, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator C. Forest Guest denied a grievance alleging that the Agency violated the parties' collective-bargaining agreement, § 706(2)(A) of the Administrative Procedure Act (APA) (Section 706(2)(A)),[1] and § 7116(a)(7) of the Federal Service Labor-Management Relations Statute[2] (the Statute) by implementing a new policy. The Union filed an exception on contrary-to-law grounds. Because the Union does not demonstrate that the award is contrary to law, we deny the exception.

II. Background and Arbitrator's Award

The Agency employs dual-status technicians, who are required to maintain membership in the National Guard as a condition of continued civilian employment.[3] Under 32 U.S.C. § 709(f)(1)(A) (Section 709(f)(1)(A)), technicians who have lost military membership in the National Guard "shall be promptly separated from military technician (dual status) employment by the adjutant general of the jurisdiction concerned."[4]

The National Guard Bureau (bureau) is a joint bureau of the Department of the Army and the Department of the Air Force, and acts as a liaison between those departments and the states' national guards. The bureau issues regulations pertaining to technicians' conditions of employment.

On June 29, 2020, the bureau published an instruction which, as relevant here, rescinded and replaced Technician Personnel Regulation (TPR) 715, dated July 13, 2007 (2007 TPR 715). The 2007 TPR 715 pertinently stated, "the one exception to the requirement for prompt termination upon loss of military membership is in pending disability[-]retirement claims. Under these circumstances, a technician who has lost military membership may be retained until the [Office of Personnel Management's (OPM's)] adjudication is received."[5] The new instruction (2020 TPR 715) removed this language and was "effective upon publication."[6]

On July 22, 2020, the Agency notified the Union that the bureau had recently updated its regulations. The Agency solicited comments and proposals from the Union related to impact and implementation bargaining over the updated regulations. The Agency requested a response by August 21, 2020, but the Union did not respond.

In April 2021, the Agency issued a thirty-day notice[7] of termination to a technician who had lost military membership but had a disability-retirement claim pending OPM adjudication. After the technician informed the Union of his proposed removal, the Union contacted the Agency regarding the policy of retaining technicians with pending disability-retirement claims. The Agency informed the Union that it was complying with 2020 TPR 715, under which the Agency would promptly separate technicians who lost military membership without exception for pending disability claims.

The Union filed a grievance challenging the Agency's implementation of the 2020 TPR 715, including the Agency's separation of the technician. The grievance alleged the Agency violated Article 20, Section 2 of the parties' agreement (Article 20), which states that "[i]f it is impossible for any incumbent to meet the regulatory requirements or qualifications standards, they must be removed from the position by appropriate personnel action in accordance with Technician Personnel Regulation

[1] 5 U.S.C. § 706(2)(A).
[2] 5 U.S.C. § 7116(a)(7).
[3] 32 U.S.C. § 709(b)(2); 10 U.S.C. § 10216.
[4] 32 U.S.C. § 709(f)(1)(A).
[5] Exception, Attach. 5, 2007 TPR 715 at 4; *see also* Opp'n, Ex. A3, Agency Reply to New Evidence at 3.
[6] Exception, Attach. 8, 2020 TPR 715 at 2.
[7] 32 U.S.C. § 709(f)(6) provides that a technician who is terminated "shall be notified [of the termination] in writing" and, except in circumstances not relevant here, "such notification shall be given at least [thirty] days before the termination date of such employment."

(TPR) 700 series."[8] In its grievance, the Union argued that Article 20 required the Agency to apply the TPR in effect when the parties executed the collective-bargaining agreement. Therefore, the Union alleged the Agency violated § 7116(a)(7) of the Statute by attempting to enforce a rule or regulation in conflict with the parties' agreement. The grievance also asserted that the Agency's departure from longstanding policy was arbitrary, capricious, and unlawful under Section 706(2)(A) and "the law of grievance[ ]arbitration."[9] The parties proceeded to arbitration, where they did not stipulate to the issues.[10]

At the outset of the award, the Arbitrator noted the Union did not respond when the Agency provided notice and an opportunity to bargain regarding implementation of the 2020 TPR 715. The Arbitrator found the Union's argument that the Agency erred in its application of 2020 TPR 715 relied on policies that were no longer applicable. The Arbitrator rejected the Union's argument that a 2003 OPM policy permitted the Agency to retain technicians with pending disability-retirement claims, despite the bureau's updated regulations. Instead, the Arbitrator found the National Defense Authorization Act for Fiscal Year 2016 (NDAA) suspended the previous procedure of retaining those technicians.

The Arbitrator also rejected the Union's argument that the Agency was refusing to follow past practice. Instead, the Arbitrator found that the Agency was correctly following the 2020 TPR 715. Therefore, he concluded the Agency's actions were not arbitrary, capricious, or an abuse of its discretion. The Arbitrator further concluded that the Agency did not violate the parties' agreement, the Statute, or the APA by terminating the technician.[11] Consequently, the Arbitrator denied the grievance.

The Union filed its exception to the award on June 24, 2022. The Agency filed an opposition to the Union's exception on July 8, 2022.

III. Analysis and Conclusion: The award is not contrary to law.

The Union argues that the award is contrary to law for several reasons.[12] 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.[13] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[14] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[15]

First, the Union claims the award is contrary to law because it fails to address several arguments the Union raised to the Arbitrator. Specifically, the Union alleges the Arbitrator "never addressed" the Union's argument that Section 709(f)(1)(A) did not prohibit the Agency from exercising the "discretion . . . authorized by OPM procedures" to continue its practice of retaining technicians until OPM adjudicated their disability-retirement claims.[16] The Union also contends

[8] Opp'n, Ex. A7, Kentucky National Guard, Joint Labor-Management Agreement (2012) at 48.

[9] Exception, Attach. 9, Grievance Notice to Agency at 1. Although the Agency's termination of the technician was the event that caused the Union to file the grievance, we find that the gravamen of the grievance is that the Agency violated the Statute and the parties' agreement by implementing a new policy concerning the termination of technicians who have lost military membership but have pending disability-retirement claims. *See id.* at 1-2; *see also U.S. Dep't of VA, Veterans Benefits Admin.*, 71 FLRA 1113, 1114 (2020) (*Veterans*) (Chairman Kiko dissenting in part on other grounds) (concluding that Authority had jurisdiction where "gravamen" of grievance challenged agency's decision to replace prior procedures with new policies, notwithstanding that implementation of the new policies involved removals). Accordingly, we find the grievance is not "inextricably intertwined with" matters covered under 5 U.S.C. §§ 4303 and 7512. *Veterans*, 71 FLRA at 1115.

[10] Although the Agency argued that the grievance was untimely under the parties' agreement, and thus not procedurally arbitrable, the Arbitrator rejected that argument. Because no exceptions challenge this determination, we do not discuss it further.

[11] Member Kiko notes that the Agency's termination of the grievant from dual-status employment as a result of his lost military membership "concern[ed] [his] fitness for duty" within the meaning of 32 U.S.C. § 709(f)(4). *See Dyer v. Dep't of the Air Force*, 971 F.3d 1377, 1384 (Fed. Cir. 2020). As a result, § 709(f)(4) precludes any right to appeal the termination "beyond the adjutant general." 32 U.S.C. § 709(f)(4) ("a right of appeal . . . shall not extend beyond the adjutant general of the jurisdiction concerned when the appeal . . . concerns fitness for duty"); *see Dyer*, 971 F.3d at 1384 (holding § 709(f)(4) precluded Merit Systems Protection Board jurisdiction over termination of technician from dual-status employment due to separation from National Guard). However, because the "gravamen" of the grievance concerned the Agency's implementation of a new policy, *see supra* note 9, and the Arbitrator did not separately consider the propriety of the grievant's termination, she finds it unnecessary to disturb the award on the basis that the grievant's separation was not appealable beyond the adjutant general.

[12] Exception Br. at 16-17.

[13] *AFGE, Council 222*, 73 FLRA 54, 55 (2022) (*Council 222*) (citing *U.S. Dep't of the Interior, Bureau of Land Mgmt., Eugene Dist., Portland, Ore.*, 68 FLRA 178, 180 (2015) (*Interior*)).

[14] *Id.* (citing *Interior*, 68 FLRA at 180).

[15] *Id.* (citing *Interior*, 68 FLRA at 180-81).

[16] Exception Br. at 16.

the award is contrary to law because the Arbitrator "failed to decide the Union's severance pay claim."[17]

Under Authority precedent, arbitrators are not required to set forth specific findings, discuss all allegations in a grievance,[18] or specifically address every argument raised by a party.[19] Correspondingly, an arbitrator's failure to discuss specific arguments does not establish that the arbitrator did not consider them.[20] Accordingly, the Arbitrator's failure to explicitly address some of the Union's arguments does not provide a basis for finding the award contrary to law. Moreover, the parties did not stipulate, and the Arbitrator did not frame, an issue regarding severance pay, and the Union did not file an exceeded-authority exception to the award.[21]

The Union also argues the award is contrary to law because the Arbitrator "failed to recognize" that the Agency's change in its interpretation of Section 709(f)(1)(A) was "arbitrary and capricious" – and "therefore in violation of [Section 706(2)(A)] and the law of arbitration under 5 U.S.C. § 7121(b)(1)(C)(iii)" – because the change was "not contemporaneously and sufficiently explained."[22] Section 7121(b)(1)(C)(iii) of the Statute states that any negotiated grievance procedure must include procedures that "provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration."[23] Here, the grievance was arbitrated, and the Arbitrator concluded that the Agency's action was not arbitrary or capricious.[24] The Union does not explain how § 7121(b)(1)(C)(iii) required the Arbitrator to find otherwise as a matter of law.[25] Therefore, the Union's argument regarding § 7121(b)(1)(C)(iii) does not demonstrate that the award is contrary to law.[26]

As for Section 706(2)(A), that provision of the APA concerns judicial review of agency actions and provides that a "reviewing court shall . . . set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[27] However, the Union fails to establish either that the Arbitrator was required to apply the precedent cited by the Union[28]; or that the Arbitrator erred in finding the Agency's reason for implementing the 2020 TPR 715 – to comply with new bureau rules based on changes to law made in the NDAA[29] – was rational.[30] Therefore, the Union has not demonstrated that the Arbitrator erred, as a matter of law, in concluding that the Agency did not act arbitrarily and capriciously. We note that neither party raises the extent to which Section 706(2)(A) is properly applied in an arbitral context, so we do not address that matter.

The Union further argues the Arbitrator erred by "fail[ing] to recognize" that the bureau lacked authority to

[17] *Id.* at 17.

[18] *See NFFE, Loc. 259*, 45 FLRA 773, 777 (1992) (*NFFE*) (citing *U.S. DOL, Wash., D.C.*, 41 FLRA 472, 476-77 (1991) (*DOL*)); *see also U.S. Dep't of Com., Pat. & Trademark Off.*, 41 FLRA 1042, 1049 (1991) (citing *DOL*, 41 FLRA at 476-77).

[19] *U.S. Dep't of HUD*, 71 FLRA 616, 620 (2020) (Member DuBester concurring) ("arbitrators are not required to address every argument that is raised by the parties" (citing *Haw. Fed. Emps. Metal Trades Council*, 70 FLRA 324, 325 (2017); *AFGE, Loc. 3911*, 64 FLRA 686, 687-88 (2010)); *NFFE*, 45 FLRA at 779 (citing *U.S. Dep't of the Army, Transp. Ctr, Fort Eustis, Va.*, 45 FLRA 480 (1992)).

[20] *See NFFE*, 45 FLRA at 779.

[21] *AFGE, Loc. 2092*, 73 FLRA 596, 597 (2023) (explaining that a basis for finding an arbitrator exceeded their authority is when "they fail to resolve an issue submitted to arbitration" (citing *NTEU, Chapter 149*, 73 FLRA 413, 415 (2023)).

[22] Exception Br. at 16.

[23] 5 U.S.C. § 7121(b)(1)(C)(iii).

[24] Award at 8.

[25] *See Fraternal Ord. of Police, Lodge No. 168*, 70 FLRA 338, 339 (2017) (denying contrary-to-law argument where excepting party failed to show that cited law required arbitrator to reach a different conclusion (citing *Portsmouth Naval Shipyard, Portsmouth, N.H.*, 49 FLRA 1522, 1533 (1994)).

[26] *See, e.g.*, *U.S. DOJ, Fed. BOP*, 68 FLRA 311, 314 (2015) (rejecting argument that award was contrary to § 7121(b)(1)(C)(iii) where excepting party did not cite to any authority supporting its argument that provision required the arbitrator to find that the grievance was barred).

[27] 5 U.S.C. § 706(2)(A).

[28] Exception Br. at 9 n.10 (arguing that the Arbitrator was required, but failed, to make specific findings in determining whether the Agency's action was arbitrary and capricious (citing *Nat'l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875 (D.C. Cir. 2020))); 7-8 (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962); *AFGE v FLRA*, 25 F.4th 1 (D.C. Cir 2022)); 8-9 (citing *Bargmann v. Helms*, 715 F.2d 638, 640-41 (D.C. Cir. 1983); *C.J. Cmty. Servs. v. FCC*, 246 F.2d 660, 664 (D.C. Cir. 1957)); 15 (citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). We note that "an arbitrator's failure to apply a particular legal analysis 'does not render [an] award deficient because . . . in applying the standard of de novo review, the Authority assesses whether the arbitrator's legal *conclusions* are consistent with law, based on the underlying factual findings.'" *AFGE, Loc. 3911*, 64 FLRA 686, 687 (2010) (quoting *AFGE, Nat'l Border Patrol Council*, 54 FLRA 905, 910 n.6 (1998)).

[29] Award at 8. To the extent the Union argues that the *bureau's* change in statutory interpretation which led to the Agency's implementation of 2020 TPR 715 was arbitrary and capricious, we note that the bureau is not a party in this case.

[30] As the Authority has recently recognized, the standard that courts use to assess whether an agency action is arbitrary and capricious under Section 706(2)(A) is "highly deferential," and an agency's action is presumed valid if a rational basis for the action exists. *U.S. DOL, Off. of Lab. Mgmt. Standards, Div. of Enf't, Tracy Shanker, Chief*, 73 FLRA 573, 577 (2023) (citing *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 114 (1st Cir. 2009); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976); *Nat'l Mining Ass'n v. United Steel Workers*, 985 F.3d 1309, 1320 (11th Cir. 2021)).

"replace" the 2003 OPM policy because the matter fell "within OPM's authority."[31] However, the Union did not provide a copy of the OPM policy.[32] Moreover, the Union does not support its argument with citation to any governing legal authority. Therefore, we reject the Union's argument as unsupported.[33]

Finally, the Union challenges the Arbitrator's finding that the NDAA suspended the Agency's practice of retaining technicians. According to the Union, the Arbitrator "identified no applicable provision" to support this finding, and no such argument "was presented either in the grievance proceedings or to the [A]rbitrator."[34] However, the Union has failed to set forth any argument or authority supporting its claims that the Arbitrator's finding on this point was contrary to law. Thus, we also reject this argument as unsupported.[35]

Accordingly, we deny the Union's contrary-to-law exception.[36]

IV. Decision

We deny the Union's exception.

[31] Exception Br. at 16.

[32] In its opposition, the Agency states that the "memorandum referenced is an outdated, National Guard Bureau (NGB) memorandum, not an Office of Personnel Memorandum (OPM)." Opp'n at 14.

[33] 5 C.F.R. § 2425.4(a) (exceptions must be "self-contained" and set forth "[a]rguments in support of the stated grounds, including specific references to the record, citations of authorities, and any other relevant documentation"); *U.S. Dep't of VA, John Pershing Veterans Admin.*, 71 FLRA 511, 512 (2020); *AFGE, Loc. 3354*, 64 FLRA 330, 333 (2009) (*Local 3354*) ("when a party fails to provide any arguments or authority to support an exception, the Authority will deny the exception as a bare assertion" (citing *U.S. DHS, U.S. CBP, Port of Seattle, Seattle, Wash.*, 60 FLRA 490, 492 n.7 (2004) (Chairman Cabaniss concurring))).

[34] Exception Br. at 17.

[35] 5 C.F.R. § 2425.4(a); *Local 3354*, 64 FLRA at 333.

[36] Consistent with her concurrence in *Laborers Int'l Union of N. Am., Loc. 1776*, 73 FLRA 591, 595 (2023) (Concurring Opinion of Member Kiko), Member Kiko reiterates that she respects the decision of the United States Supreme Court concerning whether Adjutants General are "subject to the authority of the [Federal Labor Relations Authority] when acting in their capacities as supervisors of [national guard] dual-status technicians." *Ohio Adjutant Gen.'s Dep't v. FLRA*, 143 S. Ct. 1193, 1201 (2023). Therefore, despite her previously expressed reservations on this issue, *see, e.g.*, *U.S. DOD, Ohio Nat'l Guard*, 71 FLRA 829, 833 (2020) (Member Abbott concurring in part) (Dissenting Opinion of Chairman Kiko), *pet. for review denied sub nom. Ohio Adjutant Gen.'s Dep't v. FLRA*, 21 F.4th 401, 409 (6th Cir. 2021), *aff'd*, 143 S. Ct. 1193, 1201 (2023), Member Kiko no longer raises jurisdictional objections to the Authority's resolution of cases involving units of the national guard.