72 FLRA No. 32

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 17
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
(Agency)

0-AR-5641

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DECISION

April 9, 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

Arbitrator Blanca E. Torres found that the Agency did not violate the parties' collective-bargaining agreement or § 7131 of the Federal Service Labor-Management Relations Statute (the Statute) by limiting official time to a negotiated contractual allocation. The Union filed exceptions on nonfact, essence, and contrary-to-law grounds. Because the Union does not demonstrate that the award is deficient on any of these grounds, we deny the exceptions.

II. Background and Arbitrator's Award

Article 48, Section 10(A) of the parties' agreement (Section 10(A)) provides that every local union will receive an allotment of official time equal to 4.25 hours per year for each bargaining unit position represented by that local union. Article 48, Section 1(B) of the agreement provides that union advocates may use the allotted official time to perform statutory representational activities specified in § 7131 of the Statute, such as handling grievances and complaints and other representational functions, and engaging in appropriate lobbying functions. And Article 48, Section 10(D) (Section 10(D)) provides that "[t]he minimum amounts of official time described in [Section 10(A)] are not intended to limit the amount of official time that can be negotiated by the parties locally."[1]

In January 2019, the Agency informed the Union that "official time granted for travel and attendance at appropriate training conferences will be deducted from the total allocation [of hours] provided in Article 48 of the [a]greement" (the January notice).[2] The Union filed a grievance alleging that the Agency violated a past practice of granting Union advocates official time beyond the contractual allocation for those purposes.[3] The grievance proceeded to arbitration.

The Arbitrator framed the issue as whether the Agency violated Article 48 and § 7131 of the Statute "by limiting official time to the allocated formula of 4.25 hours per bargaining unit employee, exclusive of the past practice of allowing additional official time for training, lobbying, and representational functions by union advocates?"[4]

As an initial matter, the Arbitrator found that the parties agreed that if a Union representative wishes to perform an appropriate representational function that lasts longer than their allotted official time, the representative must request additional official time and have the time approved by the immediate supervisor. She noted that, in 2018, the Agency implemented an electronic system for tracking time and attendance, including official-time requests, and that before this implementation "there was a lack of systematic tracking of official time."[5]

Regarding the amount of official time available to the Union, the Arbitrator found that, although Section 10(D) allows the parties to negotiate an increase in official time, they had not done so. She noted that "the Union found it unnecessary to bargain" over this matter because it assumed that a past practice of granting official time in excess of the contractual allocation was already established.[6] However, the Arbitrator found that the record contained "no reports, calculations, tracking methods, notes or any other conclusive evidence, by either party," that would either favor or disfavor the existence of a past practice.[7] Specifically, she found that a past practice may only be formed where management knows of, and acquiesces to, the practice. Finding insufficient evidence

[1] Award at 4.
[2] *Id.* at 5 (emphasis omitted).
[3] *Id.*
[4] *Id.* at 1.
[5] *Id.* at 7.
[6] *Id.* at 9.
[7] *Id.* at 10. While noting the testimonies of the Union president and the Agency's labor relations specialist, the Arbitrator found that "[t]here is no independent evidence showing that the alleged practice existed or not, or, if the practice existed, whether it was known and acknowledged by [the] Agency." *Id.* As such, she determined that the issue was "in equipoise" given the "directly opposing evidence on the alleged past practice of the parties." *Id.*

of the Agency's acquiescence, she concluded that the Union failed to satisfy its burden of proof that a past practice existed.

The Arbitrator, therefore, denied the Union's grievance.

She also found that, "*if* the alleged practice existed, it would be in violation of the express terms of the [parties' a]greement."[8] On this point, the Arbitrator noted that Article 48 "contains clear and unambiguous terms regarding the 4.25 formula and the parties' right to bargain over the increase of official time."[9]

On June 9, 2020, the Union filed exceptions to the award. The Agency did not file an opposition to the Union's exceptions.

III. Analysis and Conclusions

A. The award is not based on nonfacts.

The Union argues that the award is based on nonfacts because: (1) the parties stipulated that a past practice existed,[10] (2) the Agency testimony on which the Arbitrator relied was hearsay instead of personal knowledge,[11] and (3) the Arbitrator's finding that the Agency did not knowingly acquiesce in the alleged past practice is not based on any facts in the record.[12] 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.[13] The Authority has held that mere disagreements with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, provides no basis for finding that an award is based on a nonfact.[14]

To support its first nonfact claim, the Union quotes from the award that "[t]he parties stipulate that from 2011 to 2018, stewards and officers of [the Union] have taken, without denial, official time in excess of the allotment [provided under the 4.25 formula]."[15] However, the referenced statement is not a stipulation of a past practice. Rather, as the Arbitrator found, it merely recognizes that the Agency did not dispute that its supervisors had occasionally approved additional official time to Union advocates beyond the contractual allocation.[16] More precisely, the Arbitrator found that the stipulation did not establish "whether management knowingly acquiesced to this practice" because the parties' testimonies were in equipoise.[17] The Union's disagreement with the Arbitrator's finding and evaluation of the evidence does not establish that his finding is clearly erroneous.[18]

In support of its second claim, the Union argues that the Arbitrator should not have relied on the testimony of an Agency labor relations specialist (the specialist) because the specialist's knowledge and testimony concerning the alleged past practice was based on hearsay.[19] However, this argument merely challenges the Arbitrator's evaluation of the evidence and, therefore, does not demonstrate that the award is based on a nonfact.[20]

The Union also claims that the Arbitrator erroneously found the specialist had been in her position since 2014.[21] But because the Arbitrator did not base her conclusion regarding the past practice on the length of time the specialist had been in her position, the Union's argument also does not demonstrate that the award was based on a nonfact.[22]

Finally, the Union argues that the Arbitrator's finding that the Agency did not knowingly acquiesce in the alleged past practice is not based on any facts in the record.[23] However, this argument does not provide a basis for finding the award is based on a nonfact.[24]

Accordingly, we deny the Union's nonfact exception.

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[8] *Id.* at 11 (emphasis added).
[9] *Id.*
[10] *See* Exceptions at 5 (citing Award at 11).
[11] *Id.* at 5-6; Award at 10.
[12] Exceptions at 7.
[13] *NFFE, Loc. 1984*, 56 FLRA 38, 41 (2000) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).
[14] *AFGE, Loc. 12*, 70 FLRA 582, 583 (2018) (*Local 12*) (citing *U.S. Dep't of the Air Force, Whiteman Air Force Base, Mo.*, 68 FLRA 969, 971 (2015) (*Air Force*)).
[15] Award at 7 (referring to the contractual allocation of 4.25 hours as the "4.25 formula").
[16] *See id.* at 9.
[17] *Id.*
[18] *Local 12*, 70 FLRA at 583.
[19] Exceptions at 5.
[20] *See Local 12*, 70 FLRA at 583; *Air Force*, 68 FLRA at 971; *see also AFGE, AFL-CIO, Loc. 3614*, 61 FLRA 719, 723 (2006) (assertions concerning hearsay constitute disagreement with the arbitrator's determination regarding the weight of witness testimony and fail to establish that the award is based on a nonfact).
[21] Exceptions at 5 (citing Award at 7).
[22] *See U.S. Dep't of Energy, Oak Ridge Off., Oak Ridge, Tenn.*, 64 FLRA 535, 539 (2010) (denying nonfact exception where party did not establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result).
[23] Exceptions at 7.
[24] *U.S. DOJ, Fed. BOP*, 68 FLRA 546, 547 (2015) (citing *NAIL, Loc. R4-45*, 55 FLRA 695, 700 (1999)) (argument that a finding is not based on any specific fact in the record does not establish award is based on a nonfact).

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

The Union argues the award fails to draw it essence from the parties' agreement because the Arbitrator found that "even if a past practice of granting official time in excess of the contractual allotment occurred, it would be in violation of the express terms of the parties' agreement."[25] To establish that an award fails to draw its essence from an agreement, the appealing party 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 collective-bargaining 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.[26]

Here, the Arbitrator found that the Union had not established that any past practice existed.[27] The Union's essence argument challenges the Arbitrator's hypothetical statement, which is mere dicta, because it was not essential to her resolution of the grievance.[28] As such, the Union's argument does not demonstrate how the award is irrational, unfounded, implausible, or in manifest disregard of the agreement.[29] Consequently, we deny this exception.

C. The award is not contrary to law.

The Union argues that the award is contrary to law because the Arbitrator failed to find that the Agency violated § 7116(a)(1) and (5) of the Statute when it changed a clearly established past practice without giving the Union notice and opportunity to bargain.[30] More specifically, the Union maintains that the Agency violated the Statute because bargaining over "[t]he amount of official time available to union representatives is a mandatory subject of bargaining."[31]

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.[32] 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.[33] In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the appealing party establishes that those findings are nonfacts.[34]

As previously discussed, the Arbitrator found that the Union did not establish that a past practice existed and the Union has failed to demonstrate that the Arbitrator's findings are nonfacts. Therefore, we defer to her finding.[35] And based on this finding, the Union did not establish that there was a change over which the Agency was required to bargain. Thus, the Union's argument does not demonstrate that the award is contrary to law, and we deny this exception.

IV. Order

We deny the Union's exceptions.

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[25] Exceptions at 8 (citing Award at 11).
[26] *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).
[27] Award at 10. Member Abbott notes that the Arbitrator also found that even "if the alleged [past] practice existed, it would be in violation of the express terms of the Agreement." *Id.* at 11.
[28] *AFGE, Loc. 3911*, 68 FLRA 564, 569 (2015) (denying an exception because it challenged an "[a]rbitrator's use of a hypothetical situation").
[29] *AFGE, Nat'l Council of Field Labor Locs.*, 71 FLRA 1180, 1181 (2020); *see also AFGE, Council of Prison Locs. #33, Loc. Union No. 922*, 69 FLRA 480, 481-82 (2016) (citing *AFGE, Council of Prison Locs. 33, Loc. 3690*, 69 FLRA 127, 131 (2015)) (denying exceptions challenging dicta).
[30] Exceptions at 9.
[31] *Id.* (citing *U.S. Dep't of the Air Force, HQ Air Force Materiel Command*, 49 FLRA 1111, 1119 (1994)).
[32] *U.S. Dep't of State, Bureau of Consular Affs., Passport Servs. Directorate*, 70 FLRA 918, 919 (2018) (*Passport*) (citing *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014) (*NOAA*)).
[33] *Id.* (citing *NOAA*, 67 FLRA at 358).
[34] *Id.* (citing *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (Member Pizzella concurring)).
[35] *Passport*, 70 FLRA at 919 (citing *NOAA*, 67 FLRA at 358).

Member Abbott, concurring:

I applaud Arbitrator Torres for catching the significance of the modernization of the Agency's time and attendance system and the mutual benefits that flow to management and employees alike when improvements like this are implemented.[1] This is perhaps the most significant takeaway from this dispute. As noted by the Arbitrator, the new reporting system resulted in more accurate reporting of all forms of time and attendance, including a more accurate record of the use of official time. As many reports have indicated, the explosion in hours of official time correlates in large part to the inability of agencies to accurately track[2] and unions to accurately report the actual number of hours spent on official time.

As I have noted before, how federal employees perform their work and the conditions under which they perform their work has changed dramatically from 1978 (the enactment of the Statute) to today. Just several small examples include: accessibility to and portability of computers; the broad acceptance of telework and alternative work schedules; the expansion of the Family and Medical Leave Act (including the recent passage of paid leave for federal employees), the Americans with Disabilities Act and reasonable accommodations; and the adoption of ergonomic standards and recommendations for the worksite – how the federal government, and its agencies, have worked to improve working conditions.

Unfortunately, the Authority, until recently, has failed to consider the positive impact that these advances have had on employee working conditions and what the Statute demands in this new environment. It is no small task for the Authority to apply a 1978 Statute to the realities of a 21st Century workforce. But the Authority can do only so much on its own because there are distinct limits to our reach.

Perhaps it is time to revisit the entirety of and scope of the Statute. Congress should consider how changes – in the nature and type of work performed by, the resources available to, and the flexibilities afforded by other laws to federal employees – since enactment of the Statute in 1978 have positively affected the working conditions of federal employees.

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[1] Majority at 2.

[2] Jessie Bur, *The Government Has Failed to Standardize 'Official Time' for Decades*, Federal Times (May 18, 2018), https://www.federaltimes.com/management/2018/05/18/the-government-has-failed-to-standardize-official-time-for-decades/ ("The federal government has had problems keeping record of official time usage for decades."); *see* U.S. GAO, *Rep. to the Chairman, Comm. on Veterans' Affairs, House of Representatives, Union Activities, VA Could Better Track the Amount of Official Time Used by Employees* 8 (2017), https://www.gao.gov/assets/gao-17-105.pdf ("VA Has No Standardized Way for Facilities to Record and Calculate Official Time, Which Hampers Its Ability to Accurately Track the Amount of Official Time Used Agency-Wide.").