73 FLRA No. 66

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1738
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
FAYETTEVILLE, NORTH CAROLINA
(Agency)

0-AR-5812

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DECISION

November 8, 2022

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and Susan Tsui Grundmann, Members

I. Statement of the Case

Due to the COVID-19 pandemic, the Agency informed the Union that it would be reducing the number of shifts that bargaining-unit employees work per week and increasing the hours for those shifts. The Union grieved the change, and Arbitrator Dennis R. Nolan issued an award finding that § 7106 of the Federal Service Labor-Management Relations Statute (the Statute) authorized the Agency to change the employees' schedules during an emergency.[1] Accordingly, the Arbitrator denied the grievance.

The Union filed exceptions arguing that the award is based on a nonfact and fails to draw its essence from a local supplemental agreement (local agreement) and the parties' master agreement (master agreement). Because the Union's nonfact exception merely challenges the Arbitrator's evaluation of the evidence, we deny it. Further, because the Union's essence exceptions do not establish that the Arbitrator's interpretation of either agreement is deficient, we deny those exceptions.

II. Background and Arbitrator's Award

In 2017, the Agency informed the Union of its intent to renegotiate the master agreement. Around the time that the parties began renegotiating the master agreement in 2019, the Agency notified the Union that it was terminating, rather than renewing, the local agreement. As relevant here, the local agreement defined bargaining-unit employees' daily schedules.

In March 2020, President Trump declared a national health emergency in response to the COVID-19 pandemic.[2] The next month, the Agency informed the Union that it would be changing certain healthcare workers' duty schedules in order to "provide full and efficient patient care."[3] The change shifted these employees "from a mixture of [eight]- and [twelve]-hour shifts that often varied in scheduled start and finish times [i]nto standardized [twelve]-hour shifts."[4] The Agency claimed that the new schedule would provide better coverage and reduce the number of days per week that employees would be exposed to COVID-19.

The parties ultimately agreed to engage in post-implementation bargaining over the change, and, after implementation, the Agency met with the Union and individual employees to address issues caused by the duty-schedule changes. When some employees remained dissatisfied, the Union filed a grievance, and the matter proceeded to arbitration.

As the parties did not stipulate to an issue, the Arbitrator framed the issues as whether "the Agency violate[d] the [master a]greement by moving the grieving employees to [twelve]-hour tours of duty[, and i]f so, what shall the remedy be?"[5] Before the Arbitrator, the parties disputed whether the change violated various provisions of the local and master agreements relating to employee work schedules.

The Arbitrator first considered whether the local agreement was still in effect. The Union alleged that Article 46 of the master agreement precluded the Agency from terminating the local agreement. Article 46 provides, in relevant part, that "[c]ontract provisions contained in [the local agreement] . . . will continue in effect insofar as they do not conflict with the [m]aster [a]greement."[6] However, Article 8 of the local agreement provides that the local agreement will be automatically renewed each year unless "either party . . . terminates the [local] agreement" by giving "the other party [timely]

[1] 5 U.S.C. § 7106(a)(2)(D).
[2] Award at 2 (citing Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Proclamation No. 9,994 (Mar. 13, 2020), 85 F.R. 15,337 (Mar. 18, 2020) (Emergency Declaration)).
[3] *Id.* at 2-3.
[4] *Id.* at 3.
[5] *Id.* at 4.
[6] *Id.* at 8.

written notice."[7] Finding that Article 46 preserved "all provisions of the local agreement," including Article 8, the Arbitrator held that the Agency could terminate the local agreement rather than renewing it.[8] Because the Agency's termination of the local agreement complied with Article 8, the Arbitrator did not consider whether the schedule change violated the local agreement.

Concerning the Union's arguments that the change violated the master agreement's scheduling provisions,[9] the Arbitrator assessed whether § 7106 of the Statute permitted the Agency to change shifts in order to address the COVID-19 pandemic. Section 7106(a)(2)(D) provides that an agency may "take whatever actions may be necessary to carry out the agency mission during emergencies."[10] Noting that President Trump declared the COVID-19 pandemic an emergency in March 2020, the Arbitrator found that, "[f]or the purposes of federal employment, there clearly was an emergency."[11] Further, the Arbitrator found that the Agency had demonstrated that the "shift changes were plausibly necessary to provide efficient coverage during the pandemic," and that such an action was consistent with § 7106(a)(2)(D).[12] Consequently, the Arbitrator concluded that the Agency did not violate the master agreement, and he denied the grievance.

The Union filed exceptions on May 13, 2022. The Agency did not file an opposition.

III. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union challenges as a nonfact the Arbitrator's finding that an emergency existed.[13] To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[14]

According to the Union, the Agency did not declare an emergency.[15] However, as the Arbitrator noted, the Agency informed the Union that it would be changing employee schedules shortly after President Trump declared COVID-19 a national health emergency.[16] Further, based on the President's declaration, the Arbitrator found that, "[f]or the purposes of federal employment, there clearly was an emergency."[17] The Union does not provide any evidence that these findings are erroneous, and, in fact, the Union concedes that there was "obviously . . . a national crisis related to the pandemic."[18] Moreover, this exception merely challenges the Arbitrator's evaluation of the evidence.[19] Consequently, we deny it.[20]

B. The Union does not establish that the award fails to draw its essence from either the local agreement or the master agreement.

The Union argues that the award fails to draw its essence from both the local agreement and the master agreement.[21] For an award to be found deficient as failing to draw its essence from an agreement, the excepting 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 parties' agreement as to manifest infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard for the agreement.[22]

First, the Union contends that Article 46 of the master agreement prevented the Agency from terminating the local agreement.[23] Thus, according to the Union, the Arbitrator erred by failing to apply provisions of the local agreement that defined the hours of each shift.[24] However, the Arbitrator interpreted Article 46 as preserving "*all provisions* of the local agreement," including Article 8—the provision permitting either party

[7] *Id.*
[8] *Id.* at 11 (emphasis omitted).
[9] *Id.* at 7 (quoting Article 21, Section 2(C)(2)(d) ("Employees who wish to terminate or change their participation in a [compressed work schedule] may do so at the beginning of any pay period after notifying their supervisor at least one pay period in advance."); Article 21, Section 3(D) ("Employees shall not be required to report to work unless they have had at least [twelve] hours of off-duty time between work tours.")).
[10] *Id.* at 5 (quoting 5 U.S.C. § 7106(a)(2)(D)).
[11] *Id.* at 12.
[12] *Id.* at 12-13.
[13] Exceptions Br. at 7.
[14] *U.S. Dep't of HHS*, 73 FLRA 95, 96 (2022); *AFGE, Loc. 2142*, 72 FLRA 764, 765 (2022) (Chairman DuBester concurring).
[15] Exceptions Br. at 7.
[16] Award at 12 (citing Emergency Declaration, 85 F.R. at 15,337).
[17] *Id.*
[18] Exceptions Br. at 7.
[19] *See U.S. Dep't of VA, Nashville Reg'l Off., Nashville, Tenn.*, 71 FLRA 1042, 1043 (2020) (Member Abbott concurring on other grounds) (denying nonfact exception that "merely disagree[d] with the [a]rbitrator's evaluation of the evidence").
[20] *See U.S. Dep't of the Treasury, BEP, Wash., D.C.*, 41 FLRA 860, 876 (1991) (denying exception that "constitute[d] mere disagreement" with arbitrator's finding that an emergency did not exist for purposes of § 7106(a)(2)(D) of the Statute).
[21] Exceptions Br. at 3-4.
[22] *AFGE, Loc. 1594*, 71 FLRA 878, 879 (2020).
[23] Exceptions Br. at 3-4.
[24] *Id.* at 5.

to terminate the local agreement.[25] In addition, the Arbitrator concluded that the Agency had complied with Article 8's termination requirements.[26] The Union does not establish that the Arbitrator's interpretation of either Article 46 or Article 8 is irrational, implausible, unfounded, or manifests disregard for the agreements. Accordingly, we deny this exception.[27]

Second, the Union argues that the award conflicts with provisions of Article 21 of the master agreement that (1) limit when shifts can be scheduled and (2) concern compressed work schedules.[28] However, the Arbitrator found that § 7106(a)(2)(D) of the Statute authorized the Agency to change the duty schedules in order to carry out the Agency's mission during the pandemic.[29] In so finding, he determined that enforcing Article 21 in the manner requested by the Union would unlawfully interfere with the Agency's management right to act during an emergency.[30] Despite the Arbitrator basing his decision on statutory—rather than contractual—authority, the Union does not argue that the award is contrary to law.[31] Because "the Authority will not construe parties' exceptions as raising grounds that the exceptions do not raise,"[32] we consider this exception under only the essence standard raised by the Union.[33] The Union's argument fails to provide a basis for finding the award deficient under the essence standard.

Accordingly, we deny both essence exceptions.

IV. Decision

We deny the Union's exceptions.

[25] Award at 11.
[26] *Id.* at 11-12.
[27] *See NTEU*, 72 FLRA 182, 184-85 (2021) (denying essence exception where excepting party failed to demonstrate how arbitrator's interpretation of the parties' agreement failed to draw its essence from the agreement); *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 71 FLRA 304, 305-06 (2019) (then-Member DuBester concurring) (same).
[28] Exceptions Br. at 4 (arguing that the new duty schedule conflicts with Article 21, Section 3(D), which requires that employees receive at least twelve hours off between shifts), 5 (arguing that the new duty schedule is essentially a compressed work schedule and that Article 21, Section 2(C)(2)(d) provides employees with the right to terminate compressed work schedules).
[29] Award at 13.
[30] *Id.* at 12.
[31] *See* Exceptions Br. at 3.
[32] *U.S. Dep't of the Treasury, IRS*, 68 FLRA 329, 333 (2015) (quoting *AFGE, Loc. 3955, Council of Prison Locs. 33*, 65 FLRA 887, 889 (2011) (internal quotation marks omitted)).
[33] *See id.* (where excepting party's covered-by-doctrine argument would more appropriately be raised in support of a contrary-to-law exception, but was raised in support of essence exception, Authority would not construe exception as raising contrary-to-law ground); *U.S. DOD, Def. Logistics Agency, Distrib. Warner Robins, Warner Robins AFB, Ga.*, 71 FLRA 1029, 1031 n.23 (2020) (Member Abbott dissenting) (noting that Authority "review is confined to the arguments that the parties raise" (citing *Greenlaw v. United States*, 554 U.S. 237, 244 (2008))).