74 FLRA No. 17

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

and

ASSOCIATION OF CIVILIAN TECHNICIANS
KENTUCKY LONG RIFLE CHAPTER
(Union)

0-AR-5832

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DECISION

November 7, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko and Anne Wagner, Members
(Member Kiko concurring)

I. Statement of the Case

Arbitrator John Remington issued an award finding the Agency violated the parties' agreement when it denied the grievant the use of accrued military leave. The Agency argues on exceptions that the award is: (1) incomplete, ambiguous, or contradictory, so as to make implementation of the award impossible; and (2) contrary to law. We deny the Agency's first exception, but we are unable to determine whether the award is contrary to law. Therefore, we remand the matter to the parties for resubmission to the Arbitrator, absent settlement, to make additional findings that address the pertinent legal standards.

II. Background and Arbitrator's Award

The grievant is a dual-status federal civilian technician under 32 U.S.C. § 709,[1] and, as such, is a member of the National Guard as a condition of his civilian employment. The grievant received orders to "active duty for operational support-reserve component (ADOS-RC)" effective December 15, 2018, through September 30, 2019, under the authority of 10 U.S.C. § 12301(d).[2]

Upon completion of this duty, the grievant requested accrued military leave under 5 U.S.C. § 6323. When the Agency denied the request, the Union filed a grievance alleging the Agency violated the parties' agreement. The Agency denied the grievance, stating that a technician "on ADOS or ADR [active-duty-reserve] orders of 180 days or more"[3] is ineligible to use accrued military leave under § 6323 because 32 U.S.C. § 709 makes such leave "inapplicable to . . . a National Guard technician . . . who is performing active [g]uard and [r]eserve duty" (AG&R duty) as defined in 10 U.S.C. § 101(d)(6).[4] The Agency explained that § 101(d)(6) defines AG&R duty as including National Guard duty "for the purpose of organizing, administering, recruiting, *instructing*, or *training* the reserve components."[5] Because the grievant's orders assigned him to serve as a "FSC Transportation Trainer,"[6] the Agency asserted the grievant was on AG&R duty within the meaning of § 101(d)(6), and thus ineligible for military leave.[7] Additionally, the Agency asserted the grievance was not arbitrable under the parties' agreement. In response, the Union invoked arbitration.

The parties stipulated the issue for arbitration as whether the grievance was procedurally and substantively arbitrable, and if so, whether the Agency "violat[ed] the provisions of the parties' [agreement]" and "[w]hat shall the remedy be?"[8]

As an initial matter, the Arbitrator addressed the Agency's argument that the grievance was not arbitrable under Article 10, Section 3 of the parties' agreement because it involved "the interpretation of published [A]gency policies above the state level, questions of law, or regulations of appropriate authorities outside the

[1] 32 U.S.C. § 709.
[2] Award at 3; *see also* Exceptions, Ex. A2, Grievant's Nat'l Guard Orders (Grievant's Orders) at 1.
[3] Award at 3.
[4] *Id.* at 4.
[5] 5 U.S.C. § 101(d)(6) (emphasis added); *see also* Exceptions, Ex. A5, Email Correspondence at 1 (Agency email to grievant defining AG&R duty and asserting grievant was ineligible for military leave).
[6] Grievant's Orders at 1.
[7] Exceptions, Ex. A7, Agency Grievance Resp. at 2 (arguing grievant's orders, directing him to serve as "FSC Transportation Trainer," "clearly identif[ied] that [grievant] was order[ed] to . . . National Guard duty . . . for the purpose of organizing, administering, recruiting, instructing, or training the reserve components" and was thus ineligible for military leave); *see also* Award at 11 (summarizing Agency's position).
[8] Award at 2.

[A]gency."[9] He found the matter involved the application, not the interpretation, of 32 U.S.C. § 709 and 10 U.S.C. § 101. He also found Article 10, Section 1 of the parties' agreement "clearly allows grievances concerning ['] any claimed violation . . . or misapplication of any law, rule[,] or regulation affecting conditions of employment.'"[10] Therefore, he rejected the Agency's arbitrability argument.

On the merits, the Arbitrator analyzed the type of duty the grievant performed, and whether use of military leave is permitted for that duty. The Arbitrator first found it undisputed that the grievant was not on a type of duty called "[a]ctive [g]uard [r]eserve duty" (AGR duty).[11] He then addressed the Agency's argument that there was a distinction between "AGR duty" and "AG&R duty" – where AG&R duty would render the grievant ineligible to use accrued military leave. He rejected that argument, finding the Agency failed to provide "evidence to support its contention that [the g]rievant was on an assignment known as [AG&R d]uty or that such a distinct category of military duty even exists."[12] The Arbitrator further noted that Agency regulation 135-200 (AR 135-200) states ADOS-RC duty "is an authorized voluntary tour of [active duty] performed [pursuant] to 10 [U.S.C. §] 12301(d), which is other than AGR duty."[13] On this basis, the Arbitrator found that, because the grievant was on ADOS-RC, he was not on AGR duty, "nor could [the grievant's duty] be reasonably categorized as [AG&R] duty."[14]

The Arbitrator further found that the "[32 U.S.C.] § 709(g)(2) military[-]leave prohibition applies to § 709 technician personnel, but only when they are activated to perform AGR military duty as defined in 10 U.S.C. § 101(d)(6)," and that the "prohibition does not apply when the § 709 technicians perform other military duty."[15] The Arbitrator concluded that because the grievant was ordered to perform duty that was "*other* than AGR duty," he was entitled to accrued military leave.[16]

As a remedy, the Arbitrator directed the Agency to pay the grievant for the requested military leave.

The Agency filed exceptions on August 5, 2022, and the Union filed an opposition on August 31, 2022.

III. Analysis and Conclusion

A. The Agency does not demonstrate that the award is incomplete, ambiguous, or contradictory so as to make implementation impossible.

The Agency argues that the award is incomplete, ambiguous, or contradictory because the Arbitrator "failed to rule on whether the matter was procedurally arbitrable," and made "no reference to the [A]gency's claim that the matter was not procedurally arbitrable."[17] However, the Agency does not identify the claim which it argues the Arbitrator failed to address, set forth any arguments as to why this alleged failure rendered the award incomplete, or offer any arguments about why implementing the award would be impossible. Accordingly, we find the Agency fails to support its argument, and we deny this exception.[18]

B. We remand the award for further findings.

The Agency argues the award is contrary to law because the Arbitrator failed to analyze whether the grievant's orders qualified as AG&R duty as defined by 10 U.S.C. § 101(d)(6), which would render the grievant ineligible to use military leave.[19]

The Authority reviews questions of law de novo.[20] In applying a standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[21] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are based on nonfacts.[22] An arbitrator's failure to apply the correct legal analysis does not render an award contrary to law if "the arbitrator's

[9] *Id.* at 4. Article 10, Section 3 provides in relevant part: "Questions involving the interpretation of . . . provisions of law, or regulations of appropriate authorities outside the agency shall not be subject to this grievance procedure." *Id.* at 7.
[10] *Id.* at 12 (quoting Art. 10, § 1); *see also id.* at 6. The Arbitrator also noted the grievance alleged a contract violation, which fell within the scope of the parties' "broad grievance procedure." *Id.* at 12-13.
[11] *Id.* at 13 n.4.
[12] *Id.* at 13 (internal quotation marks omitted).
[13] *Id.*
[14] *Id.*
[15] *Id.* at 14.
[16] *Id.*
[17] Exceptions at 16.
[18] 5 C.F.R. § 2425.6(e)(1) ("[a]n exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground"); *see AFGE, Loc. 3601*, 73 FLRA 515, 516 (2023) (denying, as unsupported, an exception alleging an award was incomplete, ambiguous, or so contradictory as to make implementation of the award impossible where party failed to offer supporting arguments (citing 5 C.F.R. § 2425.6(e)(1)); *U.S. Dep't of the Air Force, Davis-Monthan Air Force Base*, 72 FLRA 716, 717 n.17 (2022) (Chairman DuBester concurring))).
[19] Exceptions at 8.
[20] *NTEU, Chapter 298*, 73 FLRA 350, 352 (2022) (citing *U.S. Dep't of the Navy, Naval Med. Ctr. Camp Lejeune, Jacksonville, N.C.*, 73 FLRA 137, 140 (2022)).
[21] *Id.*
[22] *Id.*

legal conclusions are consistent with law, based on the underlying factual findings."[23]

The Authority's ability to review de novo an arbitrator's legal conclusions depends on the sufficiency of the record before it.[24] Thus, if an award fails to contain the factual findings necessary to enable the Authority to assess the arbitrator's legal conclusions, and the necessary findings cannot be derived from the record, then the Authority will remand the award to the parties for resubmission to the arbitrator, absent settlement, so that the requisite findings can be made.[25]

Under 5 U.S.C. § 6323(a)(1), technicians who are National Guard members may accrue up to fifteen days of military leave per year, which they may then use "for active duty, . . . or engaging in field or coast defense training under [§§] 502-505 of title 32 as a Reserve of the armed forces or member of the National Guard."[26] However, under 32 U.S.C. § 709(g)(2), "[5 U.S.C. §] 6323(a)(1) . . . does not apply to a person employed under this section who is performing [A]ctive Guard and Reserve duty (as that term is defined in [§] 101(d)(6) of title 10)."[27] Title 10, § 101(d)(6) defines "[A]ctive Guard and Reserve duty" as:

> active duty performed by a member of a reserve component of the Army, Navy, Air Force, or Marine Corps, or full-time National Guard duty performed by a member of the National Guard pursuant to an order to full-time National Guard duty, for a period of 180 consecutive days or more for the purpose of organizing, administering, recruiting, instructing, or training the reserve components.[28]

As noted above, the Arbitrator found that the Agency failed to provide "evidence to support its contention that [the g]rievant was on an assignment known as [AG&R d]uty or that *such a distinct category of military duty even exists*."[29] Rather, the Arbitrator determined that, because the grievant was on ADOS-RC, he was not on AGR duty under AR 135-200.[30] Finding AG&R duty was not a category distinct from AGR duty, the Arbitrator concluded the grievant was entitled to military leave.[31]

However, as described above, AG&R duty *is* a statutorily defined category of military duty. Thus, the Arbitrator erred in finding otherwise. Consequently, the Arbitrator applied an incorrect legal analysis, and erred by failing to determine whether the grievant's order was for AG&R duty under 10 U.S.C. § 101(d)(6)(A). Moreover, the Arbitrator's sole reliance on application of AR 135-200 is similarly flawed because his legal conclusion derived from this regulation was based on his determination that AG&R duty does not exist.

As the Arbitrator acknowledged, the grievant was ordered to "ADOS-RC" effective December 15, 2018, through September 30, 2019, under the authority of 10 U.S.C. § 12301(d).[32] Although the evidence suggests the grievant served as a "[t]rainer"[33] or "instructor"[34] while on duty, the Arbitrator made no findings about the grievant's specific duties. As a result, the award does not contain factual findings necessary for us to assess whether the grievant's order was for one of the purposes enumerated in 10 U.S.C. § 101(d)(6)(A) to be AG&R duty, and such findings cannot be derived from the record before us. Therefore, we cannot assess the Arbitrator's legal conclusion that the grievant was not entitled to military leave under § 6323(a)(1).

Accordingly, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for clarification consistent with this decision.[35] On remand, the resulting award should provide the necessary findings to apply the statutes described above.

IV. Decision

We deny the Agency's exceptions, in part, and remand the remaining matter to the parties for

[23] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 69 FLRA 197, 201 (2016) (*BOP Jesup*) (Member Pizzella dissenting, in part) (citing *NTEU*, 61 FLRA 618, 624 (2006)).
[24] *Id.* (citing *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998) (*Local 1437*)).
[25] *U.S. DOJ, Fed. BOP Metro. Corr. Ctr., San Diego, Cal.*, 73 FLRA 495, 497 (2023) (*BOP San Diego*) (citing *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 72 FLRA 146, 148 (2021) (Chairman DuBester dissenting in part on other grounds); *U.S. Dep't of HHS*, 72 FLRA 522, 524 (2021) (Chairman DuBester concurring)); *BOP Jesup*, 69 FLRA at 201 (citing *Local 1437*, 53 FLRA at 1710).
[26] 5 U.S.C. § 6323(a)(1).
[27] 32 U.S.C. § 709(g)(2).
[28] 10 U.S.C. § 101(d)(6)(A).
[29] Award at 13 (emphasis added) (internal quotation marks omitted).
[30] *Id.* n.4 (noting that the parties did not dispute that the grievant was not on AGR duty).
[31] *Id.* at 13-14.
[32] *Id.* at 3.
[33] Grievant's Orders at 1 (ordering grievant to report with "Purpose: FSC Transportation Trainer").
[34] Exceptions, Ex. A4 at 2 (email from Union president acknowledging grievant had been "performing instructor duties").
[35] *See BOP San Diego*, 73 FLRA at 497; *BOP Jesup*, 69 FLRA at 201-02 (remanding where arbitrator applied "incorrect legal analysis" but "the award fail[ed] to contain the factual findings necessary to enable [the Authority] to assess the [a]rbitrator's legal conclusion").

resubmission to the Arbitrator, absent settlement, for further findings.

Member Kiko, concurring:

I agree with the majority that the Arbitrator erred by failing to consider whether the grievant was on Active Guard and Reserve (AG&R) duty when he requested military leave. Contrary to the Arbitrator's conclusion,[36] AG&R is a statutorily defined category of military duty,[37] and the Agency is statutorily prohibited from granting military leave to technicians on AG&R duty.[38] Thus, if the grievant's order to serve on "active duty for operational support-reserve component"[39] meets the statutory definition of AG&R duty, then he was not eligible for military leave.[40]

I write separately to highlight the uncontested facts in the record, which strongly suggest the grievant *was* on AG&R duty. AG&R duty is defined as "active duty performed . . . for a period of 180 consecutive days or more for the purpose of organizing, administering, recruiting, *instructing*, or *training* the reserve components."[41] Based on evidence in the record, the Agency ordered the grievant to report to active duty for a period of roughly nine months to serve as a "FSC Transportation *Trainer*."[42] Although the Union disputes the existence of AG&R as a separate category of duty,[43] it does not contest that the grievant was serving in active-duty status; that his tour was for a period longer than 180 days; or that he was training or instructing members of the reserve component.[44]

However, besides failing to carefully consider the relevant statutes, the Arbitrator also failed to make *any* factual findings concerning the nature and scope of the grievant's responsibilities while on this tour of duty. While the sparse evidence in the record suggests the Agency ordered the grievant to active duty for one of the purposes enumerated in 10 U.S.C. § 101(d)(6)(A), I am cognizant that the Authority must avoid conducting its own factfinding.[45] Therefore, I agree that it is appropriate, in an abundance of caution, to remand to this matter to the Arbitrator for further factual findings.

[36] Award at 13 ("The [Agency] offered no evidence to support its contention that [the g]rievant was on an assignment known as 'Active Guard and Reserve Duty' or that *such a distinct category of military duty even exists*." (emphasis added)).
[37] 10 U.S.C. §101(d)(6)(A).
[38] 32 U.S.C. § 709(g)(2) (providing that military leave under 5 U.S.C. § 6323(a)(1) "does not apply to a person employed under this section who is performing active Guard and Reserve duty (as that term is defined in [10 U.S.C. §] 101(d)(6) . . .)").
[39] Exceptions, Ex. A2, Grievant's Orders (Orders) at 1.
[40] *See* 32 U.S.C. § 709(g)(2).
[41] 10 U.S.C. §101(d)(6)(A) (emphasis added).
[42] Orders at 1 (emphasis added); *see also* Exceptions, Ex. A4, Agency Email at 1 (noting that the grievant was "ordered to active duty for a period over 180 consecutive days for the purpose of training the reserve component"). The record indicates that the grievant's initial tour was extended twice. Orders at 3-4.
[43] Opp'n Br. at 2-4 (arguing "[t]he Agency's remarkable assertion" that "Active Guard Reserve . . . duty" and "Active Guard *and* Reserve duty" are "two distinctive categories" is "without merit" (internal quotation marks omitted)).
[44] *See* Exceptions, Ex. A4, Union Email at 2 ("I was recently contacted by a tech[nician] who has been on an [active duty for operational support] order performing instructor duties.").
[45] *See AFGE, Loc. 1102*, 65 FLRA 148, 152 (2010) (remanding where arbitrator failed to make sufficient factual findings for Authority to evaluate whether agency violated applicable laws); *see also AFGE, Nat'l Council of HUD Locs. 222*, 54 FLRA 1267, 1276 (1998) ("[W]e not only defer to the [a]rbitrator's findings of fact, we also do not supplement those findings by engaging in our own factfinding.").