66 FLRA No. 138

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1938
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
ARMY CORPS OF ENGINEERS
HUNTINGTON, WEST VIRGINIA
(Agency)

0-AR-4785

_____

DECISION

June 20, 2012

_____

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Samuel S. Stone filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator denied a grievance seeking mileage reimbursement and overtime compensation for travel between the grievants' homes and their temporary work location.

For the reasons that follow, we dismiss the Union's public-policy exception and deny the Union's remaining exceptions.

II. Background and Arbitrator's Award

The grievants' permanent duty station is the Bellevue Lock and Dam. During the time period in dispute, the Agency required the grievants to perform work at a temporary work location, the Willow Island Lock and Dam. Award at 4. The Union filed a grievance alleging that the Agency violated the Fair Labor Standards Act (FLSA) and its implementing regulations, the Department of Defense Civilian Personnel Joint Travel Regulations (JTRs), and the parties' agreement by denying the grievants mileage reimbursement and overtime compensation for travel between their homes and the temporary work location. *Id.* at 1, 2; *see* Exceptions, Attach. at 24, Union's grievance. The grievants argued that they should be provided mileage reimbursement and overtime pay for the increase in their travel distances and times as a result of their assignment to the temporary work location. Award at 3, 4. The parties did not resolve the grievance and submitted it to arbitration.

The Arbitrator did not set forth a statement of the issues to be resolved at arbitration. He concluded that the Agency did not violate the FLSA and its implementing regulations, the JTRs, or the parties' agreement by denying the grievants mileage reimbursement and overtime compensation for travel between their homes and the temporary work location. The Arbitrator relied on 5 C.F.R. § 551.422(d), a regulation that implements the FLSA, *id.* at 18, 20-21, and provides that "an agency may prescribe a mileage radius of not greater than 50 miles to determine whether an employee's travel is within or outside the limits of the employee's official duty station for determining entitlement to overtime pay for travel," 5 C.F.R. § 551.422(d)); *see also* Award at 18. The Arbitrator found that, under § 551.422(d), travel between an employee's home and the employee's permanent official duty station or an alternate worksite within the official duty station local travel area is not hours of work. *Id.* at 18-19, 20-21.

The Arbitrator also relied on the "Commander's Policy Memorandum No.14" (Memorandum #14), setting forth the Agency's determinations on the official duty station local travel area. *See id.* at 20 (citing Memorandum #14, *id.* at 13-15). The Arbitrator found that, under Memorandum #14, the grievants' temporary work location and permanent official duty station are in the same official duty station local travel area. *Id.*

Based on the foregoing, the Arbitrator found that the grievants' travel between their homes and their temporary work location constituted normal home-to-work travel and not hours of work under the FLSA. *See id.* at 20-21. Therefore, the Arbitrator concluded, the grievants were "not entitled to mileage reimbursement or overtime pay" for travel to their temporary work location. *Id.* at 20-21. Accordingly, the Arbitrator denied the grievance.

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the award is deficient on all eight grounds for review of arbitrators' awards identified in the Authority's Regulations.

The Union asserts that the award is contrary to public policy. Exceptions at 15-16. In support, the Union cites various laws, government-wide regulations, and Agency regulations, and claims that the award conflicts with all of these laws and regulations. *Id.* at 16.

The Union also asserts that the Arbitrator was biased. The Union argues that "[t]he [A]rbitrator went by what [the] [A]gency presented and not what the [U]nion presented . . . ." *Id.* at 15. In addition, the Union contends, the Arbitrator denied the Union a fair hearing. In support, the Union argues that "[t]he [A]rbitrator seemed to not have paid attention to pro[o]f the [U]nion presented." *Id.* at 16.

Further, the Union claims, the award is contrary to law, government-wide regulations, and Agency regulations because the award "conflict[s] with all the [l]aws and [r]egulations" set forth in the exceptions. *Id.* at 13; *see id.* at 3-14. The Union also asserts that the award is incomplete, ambiguous, or contradictory as to make implementation of the award impossible. *See id.* at 14-15. In this regard, the Union argues that "[t]he . . . award is unclear as it conflicts with [the various laws and regulations set forth in the exceptions] and because . . . implementation of the award ask[ed] for is not granted." *Id.* at 15. And the Union maintains that the award is based on nonfacts, again relying on an alleged conflict with the various laws and regulations cited in the exceptions. *Id.* at 16-17.

In addition, the Union contends that the award fails to draw its essence from the parties' agreement. The Union states that the pertinent contract language "is in the grievance." *Id.* at 17. Regarding its essence claim, the Union argues that the award "is unfounded as it contradicts" the various laws, government-wide regulations, and Agency regulations set forth in the exceptions. *Id.*

Finally, the Union contends, the Arbitrator exceeded his Authority. *Id.* at 18. In support, the Union explains that it "presented to the [A]rbitrator [various laws and regulations] and it appears the [A]rbitrator never looked at them in making his decision." *Id.* The Union also argues in this connection that the Arbitrator committed a variety of legal and factual errors. *See id.* at 18-19.

B. Agency's Opposition

The Agency asserts that the award is not contrary to public policy. Opp'n at 7. The Agency also argues that the Union has provided no basis for finding that the Arbitrator was biased. *Id.* at 6-7. In addition, the Agency claims that the Arbitrator did not deny the Union a fair hearing because the award indicates that the Arbitrator considered all of the evidence and arguments presented by the Union. *Id.* at 7-8.

Further, the Agency contends, the Union's contrary-to-law exception lacks merit because the Union fails to provide any argument or explanation as to how the award violates any of the cited laws or regulations. *Id.* at 3-5. The Agency also asserts that the award is not deficient on the ground that it is incomplete, ambiguous, or contradictory as to make implementation impossible. In this regard, the Agency argues that the Union fails to show that the award is "unclear." *Id.* at 6. The Agency further claims that the Union does not provide any arguments in support of its claims that the award is based on nonfacts and fails to draw its essence from the parties' agreement. *Id.* at 8-9. Finally, the Agency contends, the Arbitrator did not exceed his authority because he resolved all of the issues presented to him. *Id.* at 9-10.

IV. Preliminary Issue

The Union contends that the award is contrary to public policy, citing the award's alleged conflict with various laws and regulations. *See* Exceptions at 15-16.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator. 5 C.F.R. §§ 2425.4(c) & 2429.5;[1] *see U.S. Dep't of Homeland Sec., Customs & Border Prot.*, 66 FLRA 495, 497 (2012).

The record indicates that, in the proceeding before the Arbitrator, the Union was aware of the issues that it now challenges on public-policy grounds. And the legal authorities the Union relies on in support of its public-policy exception are the same legal authorities it relied on in its grievance. *See* Award at 1; Exceptions, Attach. at 24, Union's grievance. Although the Union was aware of these issues in the proceeding before the Arbitrator, the Union did not make a public-policy

[1] Section 2425.4(c) provides, in pertinent part, that exceptions may not rely on "any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented to the arbitrator." Section 2429.5 provides, in pertinent part, that the "Authority will not consider any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented . . . before the . . . arbitrator."

argument to the Arbitrator. As the Union could have, but did not, present this argument to the Arbitrator, we find that §§ 2425.4(c) and 2429.5 bar the Union's public-policy exception. *See Broad. Bd. of Governors*, 66 FLRA 380, 384 (2011). We therefore dismiss this exception.

V. Analysis and Conclusions

A. The Arbitrator was not biased.

The Union claims that the Arbitrator was biased because "[t]he [A]rbitrator went by what [the] [A]gency presented and not what the [U]nion presented . . . ." Exceptions at 15.

To establish that an arbitrator was biased, the excepting party must demonstrate that the award was procured by improper means, that there was partiality or corruption on the part of the arbitrator, or that the arbitrator engaged in misconduct that prejudiced the rights of the party. *E.g., AFGE, Local 648, Nat'l Council of Field Labor Locals*, 65 FLRA 704, 711 (2011) (*Local 648*). In reviewing awards under these standards, the Authority has repeatedly held that an assertion that an arbitrator's findings were adverse to the excepting party, without more, does not establish bias. *Id.*

Here, the extent of the Union's support for its exception is its reliance on the Arbitrator's alleged improper agreement with "what [the] [A]gency presented" and his rejection of "what the [U]nion presented." Exceptions at 15. As stated above, that an arbitrator's findings are adverse to one party does not, without more, establish bias. *Local 648*, 65 FLRA at 711. Accordingly, we deny this exception.

B. The Arbitrator did not deny the Union a fair hearing.

The Union contends that the Arbitrator denied the Union a fair hearing. Exceptions at 16. The Union argues that "[t]he [A]rbitrator seemed to not have paid attention to pro[o]f the [U]nion presented." *Id.*

The Authority will find that an arbitrator denied a fair hearing when the excepting party demonstrates that the arbitrator refused to hear or consider pertinent or material evidence or conducted the proceedings in a manner that so prejudiced a party as to affect the fairness of the proceedings as a whole. *U.S. Dep't of Transp., FAA*, 65 FLRA 320, 323 (2010). But it is well established that disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be accorded such evidence, provides no basis for finding an award deficient for failure to provide a fair hearing. *U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Louisville, Ky.*, 64 FLRA 70, 72 (2009). Because the Union's claim simply disagrees with the Arbitrator's evaluation of the evidence, we deny this exception.

C. The Union's remaining exceptions are denied as unsupported under § 2425.6 of the Authority's Regulations.

Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground" listed in § 2425.6(a)-(c), "or otherwise fails to demonstrate a legally recognized basis for setting aside the award." 5 C.F.R. § 2425.6(e)(1). In addition, under § 2425.6(b), a party arguing that an award is deficient on private-sector grounds has an express duty to "explain how, under standards set forth in the decisional law of the Authority or Federal courts," the award is deficient. Under § 2425.6(e)(1), an exception that fails to support a properly raised ground is subject to denial. *E.g., U.S. Dep't of Veterans Affairs, Cent. Tex. Veterans Health Care Sys., Temple, Tex.*, 66 FLRA 71, 73 (2011) (*VA Temple*).

1. The award is not contrary to law, impossible to implement, or based on nonfacts.

The Union claims that the award is contrary to law, government-wide regulations, and Agency regulations. Exceptions at 3-14. The Union also claims that the award is incomplete, ambiguous, or contradictory as to make implementation of the award impossible. *Id.* at 14-15. And the Union maintains that the award is based on nonfacts. *Id.* at 16-17.

In support of these different grounds for review, the Union makes one assertion. Specifically, the Union cites various laws, government-wide regulations, and Agency regulations, and asserts that the award conflicts with all of them. *Id.* at 3-14, 14-15, 17. However, the Union does not explain the alleged conflict, or how the award is deficient on any of these grounds under these laws and regulations. And the Union does not cite any law that required the Arbitrator to grant the requested remedy. Thus, the Union fails to support its assertions that the award is deficient on these grounds. *See, e.g., Fraternal Order of Police, Pentagon Police Labor Comm.*, 65 FLRA 781, 785 (2011). Accordingly, we deny these exceptions under § 2425.6(e) of the Authority's Regulations.

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

The Union contends that the award fails to draw its essence from the parties' agreement. Exceptions at 17.

Under § 2425.6(b) of the Authority's Regulations, a party arguing that the award fails to draw its essence from the parties' collective bargaining agreement has an express duty to "explain how, under standards set forth in the decisional law of the Authority or Federal courts," the award is deficient. 5 C.F.R. § 2425.6(b). In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes 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. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990) (*DOL*). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id*. at 576.

In support of its exception, the Union cites the grievance and asserts that the Arbitrator's "ruling is unfounded as it contradicts" various laws, government-wide regulations, and Agency regulations. Exceptions at 17-18. However, the Union's assertions do not explain how the award fails to draw its essence from the parties' agreement under the standards set forth above. Thus, the Union fails to support its assertion that the award is deficient on this ground. *See, e.g.*, *VA Temple*, 66 FLRA at 73. Accordingly, we deny this exception under § 2425.6(e) of the Authority's Regulations.

3. The Arbitrator did not exceed his authority.

The Union contends that the Arbitrator exceeded his authority. Exceptions at 18.

Under § 2425.6(b) of the Authority's Regulations, a party arguing that an arbitrator exceeded his or her authority has an express duty to "explain how, under standards set forth in the decisional law of the Authority or Federal courts," the award is deficient. 5 C.F.R. § 2425.6(b). In this regard, the standards set forth in the decisional law of the Authority require the excepting party to establish that the arbitrator failed to resolve an issue that was submitted to arbitration, resolved an issue that was not submitted to arbitration, disregarded specific limitations on his or her authority, or awarded relief to individuals who were not encompassed within the grievance. *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

The Union asserts that the Arbitrator ignored various laws and regulations, and committed legal and factual errors. Exceptions at 16-19. However, the Union's assertions fail to explain how the Arbitrator exceeded his authority under the standards set forth above. Thus, the Union fails to support its assertion that the award is deficient on this ground. *See, e.g.*, *VA, Temple*, 66 FLRA at 73. Accordingly, we deny this exception under § 2425.6(e) of the Authority's Regulations.

VI. Decision

The Union's public-policy exception is dismissed, and the Union's remaining exceptions are denied.