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U.S. Department of Agriculture, Food Safety and Inspection Service and American Federation of Government Employees, National Joint Council of Food Inspection Locals

Federal Labor Relations Authority

62 FLRA No. 67

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Related Index Numbers

4.2 Federal Laws and Programs

4.30 Federal Laws and Programs, Back Pay Act

22.5 Union Activities

22.51 Union Activities, Official Time for Representational Activities

22.512 Union Activities, Official Time for Representational Activities, Past Practice

22.518 Union Activities, Official Time for Representational Activities, Remedies for Improper Denial

22.519 Union Activities, Official Time for Representational Activities, Violation of Statute/Contract

44.6 Union Rights and Responsibilities

44.62 Union Rights and Responsibilities, Union Officials/Stewards

44.623 Union Rights and Responsibilities, Union Officials/Stewards, Official Time

47.8 Grievance Arbitration Awards

47.86 Grievance Arbitration Awards, Review

47.861 Grievance Arbitration Awards, Review, Grounds

47.8611 Grievance Arbitration Awards, Review, Grounds, Violation of Law

47.8614 Grievance Arbitration Awards, Review, Grounds, Does Not Draw Its Essence From the Agreement

Judge / Administrative Officer

Dale Cabaniss, Chairman and Carol Waller Pope, Member

Ruling

The FLRA upheld the award of an arbitrator who concluded the agency violated law and the agreement when it refused to allow union officials to continue to perform representational duties at their homes.

Meaning

The FLRA concluded that section 359 of P.L.106-346 does not prohibit union representatives from performing representational duties on official time at home because it does not speak to official time at all.

Case Summary

The dispute came about as a result of the FLRA's decision in HUD, 60 FLRA 311, 104 LRP 46283, upholding the award of an arbitrator who found that Section 359 of P.L. 106-346 did not allow the performance of union representational duties while employees were in a telecommuting status. The FLRA found that the law allowed only the performance of officially assigned agency duties and that union representational duties are not included within that term.

Relying on HUD, the agency notified the union that no representational work could be performed from representatives' homes. There was no dispute that union officers had been performing representational duties from home offices for an extended period of time.

The arbitrator concluded that HUD did not apply. He found no evidence that the union representatives were authorized to perform officially assigned duties at their homes under the telecommuting law. The arbitrator concluded the union officers were not in a telecommuting status and section 359 was inapplicable. Instead, the arbitrator found that the official time used by the representatives was negotiated into the collective bargaining agreement and augmented by the longstanding practice of performing union duties from home offices.

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As a remedy, the arbitrator ordered a return to the status quo, restoration of all annual leave and back pay for leave without pay used by the representatives in order to perform union duties at their homes.

The FLRA found the award was not contrary to law. The FLRA noted that all aspects of official time use are mandatory subjects of bargaining, including where it will be performed. The FLRA explained that an agreement that representatives perform representational duties at home is permitted by the statute unless prohibited by some other law. The FLRA noted that section 359 does not speak to official time and thus does not prohibit its use at representatives' homes. The FLRA explained that a particular benefit may be established by agreement of the parties where it is not otherwise required by law.

The FLRA found the remedy ordered by the arbitrator was in accord with the Back Pay Act. It refused to entertain the agency's assertion that the award interfered with its right to assign work and direct employees because that argument was not raised before the arbitrator.

Full Text

HEADER

I. Statement of the Case

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

The Arbitrator held that the Agency violated the parties' agreement and § 7116(a)(5) of the Statute by unilaterally terminating a past practice permitting Union officials to perform representational duties on official time at their home offices. The Arbitrator ordered the Agency to restore the past practice and to reimburse any Union officials who used annual leave or leave without pay (LWOP) as a direct result of the Agency's actions.

For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The employees represented by the Union are food inspectors who perform their work at sites owned by private companies, such as meat and poultry slaughter houses. These companies have no obligation to make space or equipment available to the Union and the Arbitrator found it undisputed that various officers of the Union have, for many years, been permitted to perform representational duties on official time at their home offices.

The instant dispute arose as a result of the Authority's decision in AFGE, National Council of HUD Locals 222, AFL-CIO, 60 FLRA 311 (2004) (HUD). In that case, the Authority held that the statute authorizing agencies to establish telecommuting policies for employees, § 359 of Public Law 106-346 (§ 359), applies only to "officially assigned duties" and does not apply to representational duties performed on official time.1 HUD, 60 FLRA at 313. As such, the Authority denied the union's exceptions asserting that the union official at issue had a statutory right to telecommute on official time. The Authority also upheld the arbitrator's conclusion that the parties had not established a past practice permitting union officials to telecommute on official time. Id. at 314.

The Agency concluded, based on HUD, that its long-standing practice of permitting Union officials to perform representational duties at home on official time was illegal. The Agency terminated the past practice and the Union filed a grievance, which was unresolved and submitted to arbitration.

As relevant here2, the Arbitrator determined the issues before him to be as follows:

[D]id the Agency properly conclude that the official time practice at issue here was illegal under the FLRA's HUD decision and authority cited therein?

If the practice at issue here is not illegal under the FLRA's HUD decision, did the Agency violate the parties' collective bargaining agreement and/or 5

U.S.C.

1 Public Law 106-346, § 359 states:

Each executive agency shall establish a policy under which eligible employees of the agency may participate in telecommuting to the maximum extent possible without diminished employee performance. Not later than 6 months after the date of the enactment of this Act, the Director of the Office of Personnel Management shall provide that the requirements of this section are applied to 25 percent of the Federal workforce, and to an additional 25 percent of such workforce each year thereafter.

Dep't of Transp. & Related Agencies - Appropriations Act, Pub. L. No. 106-346 § 359, 114 Stat. 1356 (2000).

2 Before the Arbitrator, the Agency disputed the timeliness of the grievance. As this issue is not raised in the Agency's exceptions, it will not be addressed in this decision.

[§] 7116(a)(5) when it unilaterally terminated the work-at-home official time practice without fulfilling its statutory bargaining obligations?

Award at 12.

The Arbitrator determined that the HUD decision did not have "any relevance or applicability to the instant matter." Id. at 15. In this regard, the Arbitrator concluded that HUD concerned the status of employees performing officially assigned duties under the telecommuting law. The employees at issue in this case, the Arbitrator found, were not performing officially assigned duties and were acting pursuant to an established past practice that predated the enactment of the telecommuting law "by many years." Id. As there was no evidence that Union officials ever performed officially assigned duties at home or that they were ever authorized to work under any sort of telecommuting program, the Arbitrator found that they were not "telecommuters within the meaning of § 359 or HUD." Id. at 16.

The Arbitrator further concluded that the Union officials performing representational work at their homes were not performing the work of the Agency. Instead, they were using official time, "a general statutory entitlement under 5 U.S.C. [§] 7131 (d), the particulars of which are negotiable and are for these parties, set forth in Article 7 of their [agreement], as augmented over the years by the long-standing and acknowledged past practice at issue here." Award at 16. He then found that the Agency had violated Article 4, § 1 of the parties' agreement and 5 U.S.C. § 7116(a)(5) by unilaterally terminating a past practice involving a substantively negotiable matter without fulfilling its statutory duty to bargain.4 As a remedy, the Arbitrator ordered the Agency to restore the status quo ante by reinstating the practice the Agency had terminated. In addition, he awarded restored annual leave to Union officials who used annual leave and awarded back pay to officials who used LWOP as a result of the Agency's violation, pursuant to the Back Pay Act, 5 U.S.C. § 5596.

3 Article 7, § 4 of the parties' Labor Management Agreement provides as follows:

The Chairperson will receive a block of 100% official time during the calendar year. Council ¿Presidents ... will receive a block of 50% of official time during the calendar year. Reasonable official time may be requested for time needed in excess of blocked time. All other Union representatives, shall request reasonable official time to perform labor-management representational responsibilities as provided for under this article.

Union's Opposition, Attachment 3 at 23.

4 Article 4, § 1 provides: "In all matters relating to personnel policies, practices, and other conditions of employment, the parties will have due regard for the obligations imposed by Title 5, U.S.C, Chapter 71, of the Statute and this Agreement." Union's Opposition, Attachment 3 at 8.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the Arbitrator erred in concluding that it wrongly terminated its practice of permitting Union officials to perform representational duties at home. The Agency argues that the Authority,

in HUD, held that there was no statutory basis for allowing employees to use official time at their personal residences. According to the Agency, the Authority's conclusion that § 359 is the only law permitting employees to be paid while at home mandates that the award, finding the practice legal based on other authority, is contrary to law. Further, the Agency argues that, even if HUD is inapplicable to this case, the award is contrary to law because there is no authority to establish a practice of allowing Union representatives to use official time at their personal residences.

The Agency next argues that the practice of permitting Union representatives to use official time at their residences interferes with the Agency's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute because the employees would be unavailable for a work assignment if the Agency determined to shorten the official time. The Agency also asserts that the practice is "unconditional and unrestricted ... and without any accountability." Agency's Exceptions at 4. Further, the Agency contends that the practice does not constitute an arrangement for adversely affected employees under § 7106(b)(3) of the Statute.

In addition, the Agency claims that the award of back pay is contrary to law because the Agency did not deny official time to the Union representatives. Rather, the Union officials simply disagreed with the Agency over the location where representational duties on official time should be performed. According to the Agency, the Union chose not to bargain over additional facilities and services at Agency controlled space. The Agency also asserts that the Union did not establish that any Union representative was improperly denied official time at Agency controlled space. Further, the Agency argues that the award should be "limited to reinstating the contract benefit -use of official time at a personal residence." Id. at 5.

Finally, the Agency argues that, because there was no denial of official time, the award of back pay and annual leave does not draw its essence from the parties' agreement.

B. Union's Opposition

The Union claims that the Agency's exceptions mischaracterize the record in describing the prior official time practice as "unconditional and unrestricted ... and without any accountability." Union's Opposition at 2-3 (quoting Agency's Exceptions at 4). According to the Union, the undisputed evidence indicates that Union officials who used official time at their home offices requested approval in advance, informed their

supervisors how they could be reached while on official time, and reported their use of official time on mutually negotiated reporting forms.

The Union next argues that the Arbitrator correctly concluded that neither § 359, nor the Authority's HUD decision, foreclosed the parties' established practice. According to the Union, § 359 relates only to teleworking, not to official time, and does not prohibit anything. Id. at 7-8. The Union asserts that the HUD decision is inapposite because it merely holds that § 359 does not authorize union representatives on official time to telecommute, but does not hold that a contract term or practice that permits representatives to perform official time in their homes is illegal. Id. at 11. Further, the Union argues that the practice at issue was authorized and had "ripened into" a condition of employment that could not be terminated without bargaining pursuant to 5 U.S.C. §7116(a)(5). Id. at 13.

In addition, the Union contends that the Agency did not argue before the Arbitrator that enforcing the practice at issue would violate its rights to assign work and direct employees and that this argument is thus precluded by § 2429.5 of the Authority's Regulations.5 In the alternative, the Union contends that the award does not affect management's rights to assign work and direct employees because the practice pertains only to the location where employees utilize official time. Moreover, the Union argues that, even if the practice does affect management rights, the practice is an appropriate

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arrangement intended to ameliorate the adverse effects on Union representatives of representing employees located in private businesses. Further, according to the Union, the award reconstructs what the Agency would have done had it not violated the practice.

With respect to the Agency's claim that the remedy is contrary to law, the Union argues that the Agency has not specified a law with which the award conflicts. Alternatively, the Union argues that that award is not contrary to the Back Pay Act, 5 U.S.C. § 5596, because the Arbitrator had the authority to award back pay for the unjustified personnel action of terminating the past practice without bargaining and because he found the appropriate causal nexus between the personnel action and the loss of pay.

Next, the Union argues that the Agency has not specified any provision of the parties' agreement in support of its claim that the award fails to draw its essence from the agreements. Further, the Union asserts that the award does draw its essence from Article 4, § 2 of the parties' agreement, which requires the Union to represent the interests of all employees in the unit.

IV. Preliminary Issue

Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, presented to the arbitrator. See, e.g., United States Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.,

5 Section 2429.5 of the Authority's Regulations provides that "[t]he Authority will not consider ... any issue, which was not presented in the proceedings before the . . . arbitrator."

59 FLRA 542, 544 (2003). The Union argues that the Authority should not consider the Agency's claim that the award violates its rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute because these issues were not presented to the Arbitrator.

The Authority has held that § 2429.5 precludes an Agency from raising a claim that an award interferes with its rights under § 7106 of the Statute where the claim could have been, but was not, raised before the Arbitrator. See United States Dep 't of the Treasury, IRS, 61 FLRA 304, 305 (2005).6 Here the Arbitrator adopted the Union's argument below that the parties had established a past practice of permitting Union representatives to perform official time at their home offices. The record indicates that the Agency did not object that the practice violated its management rights. As the Agency could have presented, but did not present, this argument to the Arbitrator, we dismiss the Agency's management rights exception.

V. Analysis and Conclusions

A. The award is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. See NTEU, Chapter 24, 50 FLRA 330, 332 (1995) (citing United States Customs Serv. v. FLRA, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). hi applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. See United States Dep't ofDef., Dep 'ts of the Army and the Air Force, Ala. Nat'I Guard, Northport, Ala., 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. See id.

1. Section 359 and the Authority's HUD decision

Section 7131 (d) of the Statute provides that "any employee representing an exclusive representative . .. shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest." As the Authority has noted, the legislative history indicates that § 7131 (d) "makes all other matters concerning official time for unit employees engaged in labor-management relations activity subject to negotiation ...." United States Dep't of the Air Force, HQ Air Force Materiel Command, 49 FLRA 1111, 1119 (Air Force) (quoting H.R

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6 Chairman Cabaniss notes that the Agency raised an issue before the Arbitrator arguing that the grievance was untimely. See Award at 7. The Arbitrator found that the grievance was timely filed in September 2005. The Chairman believes the Arbitrator's finding in this regard was in error. Since this matter was filed as a Union Grievance and alleges that the Agency violated the collective bargaining agreement by terminating work-at-home official time practice without "fulfilling its statutory bargaining obligationsf,]" Award at 12, the Chairman would find that the time period for filing the grievance began on March 10, 2005, when the Agency notified the Union that it was terminating the practice. Since the Agency failed to raise this issue in its exceptions, it may not be considered in our decision. See United States Dep't of Veterans Affairs Med. Or., Providence, R.I., 49 FLRA 110, 111 n.2 (1994).

Rep. No. 1403, 95th Cong., 2d Sess. 59, reprinted in Comm. On Post Office and Civil Service, House of Representatives, 96th Cong. 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978 (Comm. Print No. 96-7), at 705 (1979)) (emphasis in Air Force). Specifically, the Authority held that "the location at which official time is to be exercised" is a mandatory subject of bargaining. Id. Thus, consistent with this precedent, an agreement that representatives may perform representational duties on official time at their home offices is authorized by the Statute and enforceable unless another law prohibits the agreement.

In arguing that its long-standing practice of permitting representatives to perform representational duties on official time in their home offices is illegal, the Agency points to § 359 and the Authority's HUD decision. However, as the Authority explained in HUD, § 359 provides the statutory basis for an agency to establish a telecommuting program for employees to perform "officially assigned duties at home or [anjother work site ...." HUD, 60 FLRA at 313 (quoting H.R. Conf. Rep. No. 106-940, § 359, at 151 (2000), reprinted in 2000 U.S.C.C.A.N. 1063, 1143). As longstanding precedent holds that the performance of representational duties does not involve the "work" of an agency, the Authority held that § 359 does not provide an authorization for union representatives on official time to telecommute. Id. Applying this same rationale, § 359 also does not prohibit union representatives from performing representational duties on official time in their homes because it does not speak to the issue of official time at all.

The basic principle that a particular benefit may be established by agreement of the parties where it is not otherwise required by law is well-established. See Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 107 n. 17 (1983); NTEU, Chapter 138, 61 FLRA 642, 643 (2006) (noting that parties may agree to permit uniformed employees to wear civilian attire in certain situations, but that there is no right to this benefit), hi HUD, the Authority held that § 359 did not require that union officials be permitted to perform representational duties at home. That holding does not, however, imply that agencies are prohibited from agreeing, pursuant to other authority, to contract terms or practices to that effect. As § 7131 (d) of the Statute authorizes the negotiation of all aspects of official time and the Agency has pointed to no law which prohibits union officials from performing representational duties at home offices, we find that the Agency's past practice was not contrary to law.

It is also well-established that an agency is required to fulfill its obligation to bargain in good faith before changing conditions of employment, which may be established by past practice. See United States Dep 't of Justice, Executive Office for Immigration Review, Bd. of Immigration Appeals, 55 FLRA 454, 456-57 (1999) (Member Wasserman concurring and then-Member Cabaniss dissenting on other grounds). Here, the Arbitrator found that the parties had a long-standing and undisputed past practice of permitting union representatives to perform representational duties on official time at home. His conclusions that this practice was not contrary to law and that the Agency was therefore

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required to negotiate prior to changing the practice are

consistent with the above authority. For this reason, we find that the Agency has not established that the award is contrary to law in this regard.

2. The Back Pay Act

The Agency objects to the award's remedy of restored annual leave or payment for LWOP, arguing that these remedies are illegal because a remedy is limited to "reinstating the contract benefit." Agency's Exceptions at 5. According to the Agency, the violation in this case related only to the location where representational duties would be performed, rather than the granting of official time, and the remedy should be limited to the location of representational duties. The Union objects that the Agency's argument is insufficiently specific because, according to the Union, the Agency does not point to any particular law that the award contravenes. However, the Arbitrator found leave and pay restoration appropriate under the Back Pay Act, 5 U.S.C. § 5596, and the Agency's argument relates to one of the necessary elements of a finding of liability under the Back Pay Act: that the unwarranted personnel action resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. See United States Dep 't of Health & Human Servs., 54 FLRA 1210, 1218-19 (1998) (HHS). As such, we will consider the Agency's exception under the Back Pay Act.

The Arbitrator awarded restored leave and pay based on his conclusion that Union representatives used annual leave and LWOP to work at home as a "direct result" of the Agency's unjustified and unwarranted personnel action. Award at 17. This finding satisfies the causation requirement of the Back Pay Act. Contrary to the argument of the Agency, there is no rule that a remedy is limited to reinstating contract benefits, which in this case would involve only reinstating the past practice. See United States Dep't of Justice, INS, San Diego, Cal, 51 FLRA 1094, 1098 (1996) (back pay awarded where agency violated contract provision excluding Sunday from basic workweek). Further, to the extent that the Agency's argument constitutes a challenge to the Arbitrator's factual conclusion that there was a direct connection between the Agency's violation and the Union official's use of annual leave or LWOP, the Agency provides no record support for its claims. It has, therefore, provided no basis on which to find the award deficient as contrary to law.

Accordingly, we deny the Agency's contrary to law exceptions. B. The award draws its essence from the parties' agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard 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 United States Dep 't of Labor (OSHA), 34 FLRA 573, 575 (1990). 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.

The Agency argues that the award of restored annual leave and pay for LWOP taken "does not draw its essence from the violation found by the [Arbitrator or the contract because there was no denial of official time." Agency's Exceptions at 5. The Agency does not, however, point to any term of the contract with which the award is inconsistent. Further, the Agency does not explain why it is irrational or implausible for the Arbitrator to find that its change of the past practice at issue directly led to the losses he remedied.

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As such, the Agency has not established that the award does not draw its essence from the parties' agreement or the past practice. See AFGE, Local 1441, 61 FLRA 201, 203-204 (2005) (argument that arbitrator failed to consider the significance or meaning of past practice evaluated under the essence standard).

Accordingly, we deny the Agency's essence exception. VI. Order

The Agency's exceptions are denied.

Statutes Cited

P.L. 106-346
5 USC 5596
5 USC 7116(a)
5 USC 7122(a)
5 USC 7106(a)
5 USC 7131(d)

Regulations Cited

5 CFR 2429.5

Cases Cited

60 FLRA 311
59 FLRA 542
61 FLRA 304
50 FLRA 330
43 F.3d 682
55 FLRA 37
49 FLRA 1111
49 FLRA 110
464 U.S. 89
61 FLRA 642
55 FLRA 454
54 FLRA 1210
51 FLRA 1094
54 FLRA 156
34 FLRA 573
61 FLRA 201

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