

**73 FLRA No. 11**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
COUNCIL 222  
(Union)

and

UNITED STATES  
DEPARTMENT OF HOUSING  
AND URBAN DEVELOPMENT  
(Agency)

0-AR-5580

DECISION

June 14, 2022

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

**I. Statement of the Case**

Arbitrator Garvin Lee Oliver found that the Agency did not violate the parties' collective-bargaining agreement or law when it discontinued holiday pay in excess of eight hours to employees who were not on a compressed work schedule. The Union filed exceptions challenging the award on nonfact and contrary-to-law grounds. Because the Union does not demonstrate that the award is deficient on either ground, we deny the exceptions.

**II. Background and Arbitrator's Award**

Article 16 of the parties' agreement (Article 16) establishes alternative work schedules for employees, including a "maxiflex" schedule.<sup>1</sup> In relevant part, the maxiflex provision states that employees may designate: "a different starting time . . . for each workday"; "a varying

number of hours to work each workday"; and a varying "number of hours per workweek . . . between 30 and 50 hours" or "the standard 40 hour workweek."<sup>2</sup> The provision also includes "[t]he previous 5/4/9 and 4/10 compressed work schedules" as "types of [m]axiflex [s]chedules."<sup>3</sup> Article 16 states that employees on a maxiflex work schedule "shall be credited with holiday leave according to the number of hours they were scheduled to work on that holiday."<sup>4</sup>

In mid-October 2018, the Agency advised the Union that, as required by law, it was implementing a new time-management system immediately. The Agency explained that employees on maxiflex work schedules, other than the 4/10 or 5/4/9 compressed work schedules, could not legally be paid more than eight hours of holiday pay. Therefore, it would require those employees to take leave to cover any additional hours.

The Union filed a grievance alleging that the Agency violated the parties' agreement and § 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute)<sup>5</sup> by repudiating and refusing to abide by Article 16's requirement that employees on a maxiflex schedule receive more than eight hours of holiday pay. The Agency denied the grievance and the Union invoked arbitration.

The Arbitrator framed the issues as whether the Agency violated: (1) the parties' agreement and law by not allowing holiday pay in excess of eight hours to employees on a maxiflex work schedule and (2) § 7116(a)(1), (5), and (8) of the Statute by repudiating the parties' agreement and refusing to abide by its negotiated terms.

Before the Arbitrator, the Union claimed that the parties' use of "maxiflex" in the parties' agreement differs from that described in the Office of Personnel Management (OPM) guidance. According to the Union, the parties used the term "maxiflex" to create a type of compressed work schedule with fixed starting and ending times each day.<sup>6</sup> On this basis, the Union asserted that employees on the parties' maxiflex schedule are entitled to holiday pay for the full number of hours they are scheduled to work that day. The Agency countered that a maxiflex work schedule allows more flexibility than a compressed

<sup>1</sup> Award at 2-3; *see also* Exceptions, Attach. 2 (CBA) at 64-67. Section 16.02(4)(b) defines a maxiflex schedule as "A type of alternative work schedule that contains core hours on 10 workdays or fewer in the biweekly pay period and in which a full-time employee has a basic work requirement of 80 hours for the biweekly pay period, but in which an employee may vary the number of hours worked on a given workday or the number of hours each week." CBA at 64.

<sup>2</sup> Award at 2-3 (quoting CBA, Art. 16, § 16.03(2)); *see also* CBA at 65.

<sup>3</sup> Award at 3 (quoting Art. 16, § 16.03(2)); *see also* CBA at 65 (listing two examples of maxiflex schedules in addition to the 5/4/9 and 4/10 schedules).

<sup>4</sup> Award at 3 (quoting Art. 16, § 16.06(2)(c)); *see also* CBA at 69. <sup>5</sup> 5 U.S.C. § 7116(a)(1).

<sup>6</sup> *See* Award at 5; Exceptions, Attach. 3, Union's Post-Hr'g Br. at 2. When asked how the maxiflex "compressed" schedule differed from a "flexible" work schedule, a Union representative testified that "[i]t would be kind of like a hybrid." Exceptions, Attach. 8, Tr. at 98.

work schedule and therefore the maxiflex provision creates a “hybrid schedule, which is contrary to the Federal Employees Flexible and Compressed Work Schedule Act of 1982” (the Act)<sup>7</sup> and Authority precedent.<sup>8</sup>

The Arbitrator agreed with the Agency and determined that the maxiflex work schedule in the parties’ agreement was a hybrid work schedule that was contrary to the Act. Therefore, he found that the Agency did not violate the law or Article 16 when it discontinued holiday pay over eight hours to employees on maxiflex work schedules. He also found that the Agency did not violate the Statute by repudiating the parties’ agreement and refusing to abide by its negotiated terms, and he dismissed the grievance.

On January 6, 2020, the Union filed exceptions to the award, and on February 6, 2020, the Agency filed an opposition to the Union’s exceptions.

### III. Analysis and Conclusions

#### A. The award is not based on a nonfact.

The Union argues that the award is based on a “clearly erroneous” factual finding that maxiflex schedules under the parties’ agreement “are distinct from compressed work schedules.”<sup>9</sup> To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.<sup>10</sup> However, a challenge to an arbitrator’s legal conclusion or interpretation of the parties’ agreement cannot be challenged as a nonfact.<sup>11</sup>

Although the Union disagrees with the Arbitrator’s conclusion that the parties’ maxiflex schedule is an impermissible hybrid schedule, the Union does not identify any factual finding that is clearly erroneous.<sup>12</sup> Instead, it argues that, “as used in the [a]greement, [m]axiflex refers to compressed work schedules.”<sup>13</sup> This argument is inconsistent with the Union’s testimony that the parties’ maxiflex schedule is a “hybrid” schedule.<sup>14</sup> Moreover, the Union’s argument challenges the Arbitrator’s interpretation of the parties’ agreement and his legal conclusions. This does not provide a basis for finding that the award is based on a nonfact.<sup>15</sup> Therefore, we deny this exception.

#### B. The award is not contrary to law.

The Union argues that the award is contrary to law because the Arbitrator: (1) incorrectly concluded that a maxiflex work schedule under the parties’ agreement is a hybrid work schedule;<sup>16</sup> and (2) failed to find that the Agency repudiated the parties’ agreement.<sup>17</sup> 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.<sup>18</sup> In applying the standard of de novo review, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the applicable standard of law.<sup>19</sup> And in making that assessment, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party establishes that they are nonfacts.<sup>20</sup>

The Authority has found that “hybrid schedules,” which combine elements of compressed and flexible work schedules, are contrary to the Act.<sup>21</sup> Under the Act, both compressed and flexible work schedules have an “80-hour biweekly basic work requirement” for full-time

<sup>7</sup> 5 U.S.C. §§ 6120-6133 (1988 & Supp. V 1993).

<sup>8</sup> Award at 5.

<sup>9</sup> Exceptions at 8.

<sup>10</sup> *NLRB, Pro. Ass’n*, 68 FLRA 552, 554 (2015).

<sup>11</sup> *NAIL, Loc. 5*, 70 FLRA 550, 552 (2018).

<sup>12</sup> Exceptions at 3-4. The Union asserts that the “entirety of the [a]ward’s findings of facts” is based on only four factual findings, but does not allege that any of those findings are clearly erroneous. *Id.* at 4.

<sup>13</sup> *Id.* at 9.

<sup>14</sup> Exceptions, Attach. 8, Tr. at 98.

<sup>15</sup> *NTEU*, 69 FLRA 614, 619 (2016) (rejecting nonfact exception based on legal conclusions and contract interpretation).

<sup>16</sup> Exceptions at 5-6.

<sup>17</sup> *Id.* at 7-8.

<sup>18</sup> *U.S. Dep’t of the Interior, Bureau of Land Mgmt., Eugene Dist. Portland, Ore.*, 68 FLRA 178, 180 (2015) (*Interior*).

<sup>19</sup> *Id.* The Union asserts that the Arbitrator gave no indication as to why he came to his conclusion that the maxiflex schedule was contrary to law, Exceptions at 3-4, but does not explain how this renders the award deficient. Moreover, in conducting de novo review, the Authority assesses whether the arbitrator’s legal

conclusion – not his or her underlying reasoning – is consistent with the relevant legal standard. *U.S. DHS, U.S. CBP*, 68 FLRA 276, 277 (2015); *see also U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Tucson, Ariz.*, 65 FLRA, 267, 270 (2010) (deferring to arbitrator’s factual findings and finding arbitrator not required to specify or discuss specific items of evidence on which an award is based or which otherwise were considered); *NAGE, Loc. R1-109*, 46 FLRA 535, 547 (1992) (arbitrators are not required to set forth any specific findings or analysis in an opinion (citing *U.S. Dep’t of Com., Pat. & Trademark Off.*, 41 FLRA 1042, 1049 (1991))).

<sup>20</sup> *Interior*, 68 FLRA at 180-81.

<sup>21</sup> *GSA, Wash., D.C.*, 50 FLRA 136, 138-39 (1995) (*GSA*). *See also* Exceptions, Attach. 7, OPM Handbook on Alternative Work Schedules (OPM Handbook) at 2 (stating that there is “no authority to establish hybrid work schedules that borrow selectively from the authority for flexible work schedules and the authority for compressed work schedules in an effort to create a hybrid work schedule.”); *see also* OPM Handbook on Alternative Work Schedules, available at <https://www.opm.gov/policy-data-oversight/pay-leave/reference-materials/handbooks/alternative-work-schedules/#CWS>.

employees.<sup>22</sup> Under a “compressed work schedule” this work requirement is “scheduled for less than [ten] workdays” by the agency.<sup>23</sup> In contrast, under a “flexible work schedule,” the employee may “elect” his or her own schedule within limits set by the agency.<sup>24</sup> OPM guidance defines a maxiflex schedule as “[a] type of flexible work schedule . . . in which an employee may vary the number of hours worked on a given workday or the number of hours each week within the limits established for the organization.”<sup>25</sup>

The parties’ maxiflex provision allows employees to set their schedules with varying start and stop times and hours per workweek, consistent with the definition of a flexible work schedule in the Act and OPM guidance.<sup>26</sup> And, although Article 16 includes two examples of schedules in which an employee cannot vary the hours each workweek, which is consistent with the statutory definition of a compressed work schedule,<sup>27</sup> it also includes sample maxiflex schedules that are inconsistent with that definition.<sup>28</sup> Therefore, the record does not support the Union’s argument that the parties’ maxiflex schedule is a “compressed work schedule” or that the Arbitrator erred in finding that it created a hybrid schedule.<sup>29</sup>

Further, the Act provides that employees on flexible work schedules are entitled to only eight hours of holiday pay.<sup>30</sup> Therefore, to the extent that Article 16 permitted employees on a maxiflex schedule to be paid for more than eight hours, that provision is unlawful.<sup>31</sup> And as the Authority has found that an agency’s refusal to follow unlawful provisions does not constitute an unlawful repudiation,<sup>32</sup> the Union does not demonstrate that the award is contrary to law.

Accordingly, we find that the award is not contrary to law.

#### IV. Decision

We deny the Union’s exceptions.

<sup>22</sup> 5 U.S.C. §§ 6121(5), 6122(a)(2).

<sup>23</sup> *Id.* § 6121(5); 5 C.F.R. § 610.111(d); *see also* OPM Handbook at 5.

<sup>24</sup> 5 U.S.C. § 6122(a)(2); *see also* OPM Handbook at 5.

<sup>25</sup> OPM Handbook at 5. Although Article 16 substitutes “alternative” in place of “flexible,” it otherwise defines maxiflex the same as the OPM Handbook. *See supra* note 2; CBA at 64.

<sup>26</sup> Award at 2-3; *see also* CBA at 65.

<sup>27</sup> *See* CBA at 66 (including 5/4/9 and 4/10 schedules as examples of maxiflex schedules).

<sup>28</sup> *Id.* at 65-66. Examples 1 and 2 in Article 16 are sample maxiflex schedules showing different starting and ending times each day. *Id.* Also, in Example 1, an employee would work

ten workdays in a biweekly period, which is inconsistent with the statutory definition of a compressed work schedule. *Id.* at 65; *see* 5 U.S.C. § 6121(5) (the biweekly work requirement must be scheduled in “less than [ten] days”).

<sup>29</sup> Exceptions at 5, 6; *see* Award at 5-6.

<sup>30</sup> 5 U.S.C. § 6124. *But see* 5 C.F.R. § 610.406(a) (employees on compressed work schedules are “entitled to [holiday pay] for the number of hours of the compressed work schedule on that day”).

<sup>31</sup> *GSA*, 50 FLRA at 139; *see AFGÉ, Loc. 2128*, 58 FLRA 519, 523 (2003) (finding that to extent award precludes holiday pay for employees who worked hybrid schedule, award is consistent with law); *see also* 5 C.F.R. § 610.406(a).

<sup>32</sup> *GSA*, 50 FLRA at 139.