Congressional Accountability Office of Compliance
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FRATERNAL ORDER OF POLICE, DISTRICT OF COLUMBIA LODGE NO. 1 U.S. CAPITOL POLICE LABOR COMMITTEE, Union,	)	
and	)	Case No. 16-ARB-01
UNITED STATES CAPITOL POLICE, Employing Office.	)	

Before the Board of Directors: Barbara L. Camens, Chair; Susan S. Robfogel; Alan V. Friedman; Roberta L. Holzwarth; Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

I. Statement of the Case

This matter is before the Board on exceptions to a grievance arbitration award filed by the Fraternal Order of Police, District of Columbia Lodge No. 1 U.S. Capitol Police Labor Committee ("Union") under 5 U.S.C. § 7122, as applied by section 220(a) of the Congressional Accountability Act, 2 U.S.C. § 1351(a), and part 2425 of the Substantive Regulations of the Office of Compliance.

At the outset of the arbitration proceeding, the United States Capitol Police ("USCP") raised the issue whether the grievance was procedurally arbitrable. The parties stipulated that the substantive issue to be decided was as follows:

> Did the Department violate Article 18 of the Collective Bargaining Agreement when it failed to count hours of leave (counted as intermittent FMLA leave) toward Officer [Sean] Flynn's overtime threshold? If so what shall the remedy be?

After a hearing, the Arbitrator determined that the grievance was procedurally arbitrable, but he denied the Union's grievance on the merits.

For the following reasons, we deny the Union's exceptions.

II. Background and Arbitration Award

Article 18 of the governing collective bargaining agreement ("CBA") provides that the basic work period for bargaining unit employees is 14 consecutive days. Joint Hearing Exhibit (Ex.) 3 at 35. Officers are eligible to earn overtime compensation after they work 85 hours during the 14-day time period. *Id.* In this regard, Section 18.02(1) provides, in relevant part, that "[c]redit toward the overtime threshold of eighty-five hours will be given for actual hours worked, legal holidays, and all leave which has been applied for on the appropriate department form and approved." *Id.*

The grievant, Officer Sean Flynn, began working with the USCP in 2003, and at the time of the hearing, he held the rank of Private First Class. On September 13, 2014, Officer Flynn completed Forms CP-506-A requesting permission to use leave under the Family Medical Leave Act (FMLA) totaling up to 240 hours for himself and up to 240 hours for his wife. Joint Hearing Exs. 10, 12. Officer Flynn indicated on the forms that FMLA leave would be intermittent because he was unable to predict when flare ups of the chronic medical conditions at issue would occur, when care would be needed, or when his presence would be beneficial. *Id.*

On September 15, 2014,[1] the USCP Associate Director for the Office of Human Resources approved the FMLA requests for both Officer Flynn and his wife, acknowledging that "[t]he need specified by [Officer Flynn's] health care provider is for 'at any time of flare up'". Joint Hearing Ex. 13. The approval letter further stated:

> You are reminded that you must give 30 days [sic] notice when requesting to use leave under the FMLA entitlements or as soon as is practicable. In any event, you must give as much advance notice as possible. You must attempt to schedule leave so as not to disrupt the operations of the Department. Please coordinate all scheduling and leave requests with your immediate supervisor.
>
> You may elect to substitute accrued paid leave for unpaid FMLA leave. For the purposes of caring for your spouse you may elect to substitute annual leave, sick leave and compensatory time in lieu of unpaid FMLA leave.

Id.

On March 12, 2015, and again on March 25, 2015, Officer Flynn was unable to work because of his approved FMLA medical condition, and he called in prior to his shift to request to be paid compensatory time for his FMLA leave. On both occasions, when Officer Flynn returned to duty, he completed a Form CP-506, "Request for Approved Absence." Joint Hearing

[1] The arbitration award incorrectly states that the Associate Director's letter was dated September 15, *2015*.

Ex. 4. There is no dispute that the USCP approved both requests. The USCP, however, coded the approved leave on March 12 and 25 as "unscheduled," and it did not count the leave toward Officer Flynn's overtime threshold under Section 18.02(1) of the CBA.

Officer Flynn contacted his immediate supervisors, requesting that his leave for March 12 and 25, 2015, be coded as "scheduled" because he contended it had been approved in advance. His request was denied. He thereafter filed a grievance contending that the USCP's failure to code the approved leave as "scheduled" and count it toward his overtime threshold violated Article 18 of the CBA. The grievance was denied through Step 3, and the Union pursued it to arbitration.

The parties jointly appointed the Arbitrator to decide the grievance. After conducting a hearing on August 17, 2016, the Arbitrator issued the instant award, which denied the grievance on the merits.[2] The Arbitrator first rejected the Union's position that the language of Section 18.02 of the CBA clearly and unambiguously resolved the dispute:

> In the present case, it cannot be said that the language speaks for itself. Specifically, Section 18.02(1) speaks in terms of leave applied for and approved by a supervisor. When Officer Flynn applied for his FMLA leave, he did not designate any specific days, there was no mention of what day Officer Flynn would be absent, but rather, days would be taken when necessary.

Award at 15. Further, the Arbitrator noted that the USCP's September 15, 2014 approval letter for Officer Flynn's FMLA leave reminded him, inter alia, that he must "give as much advance notice as possible," "attempt to schedule leave so as not to disrupt the operations of the Department," and "coordinate all scheduling and leave requests with [his] immediate supervisor." *Id.* The letter, according to the Arbitrator, showed that "simply authorizing an employee to take FMLA leave is not the same as scheduling and taking authorized days off; that the days to be taken as FMLA days still had to be scheduled." *Id.* Thus, the Arbitrator concluded, "it cannot be said that the approval of Officer Flynn's FMLA leave was the same as authorizing or specifying in advance what days he would be absent from work." *Id.*

The Arbitrator also credited the testimony of USCP Deputy Chief Chad Thomas that "when officers call out sick or are unable to report to work because of family illnes[s]es, the absences may be authorized absences, but that they are not scheduled in advance and thus these

[2] As stated above, at the hearing the USCP raised an issue of procedural arbitrability, contending that the Union did not submit the grievance in a timely manner. The Arbitrator determined that the grievance was procedurally arbitrable, finding that: (1) the USCP waived the right to challenge the timeliness of the Union's grievance because the challenge was not asserted prior to the arbitration hearing; and (2) the grievance alleged a continuing contract violation. Award at 12-14. The USCP does not challenge the Arbitrator's determination on review, and we find no basis to disturb it.

absences are not counted in the 85-hour overtime threshold." *Id.* at 15-16. The Arbitrator thus concluded that:

> It would certainly appear that treating Officer Flynn's intermittent FMLA absences the same as the Department treats sick calls shows that unscheduled, intermittent absences are not scheduled absences within the meaning of Section 18.02(1). Moreover, the Department's treatment of Officer Flynn's intermittent FMLA absences is consistent with the long established practice of not treating such intermittent absences, whether due to sick leave or FMLA leave, as counting toward the 85-hour overtime threshold.

Id. Accordingly, the Arbitrator denied the Union's grievance.

III. The Union's Exceptions

The Union seeks review of the Arbitrator's award on the following grounds: (1) the award fails to draw its essence from the parties' collective bargaining agreement; (2) the award is contrary to law, rule or regulation; and (3) the award is based on a non-fact. The USCP has filed a submission in opposition to the Union's exceptions.

IV. Standard of Review

The standard for the Board's review of exceptions to an arbitration award is whether the award is deficient: (a) because it is contrary to any law, rule, or regulation; or (b) on other grounds similar to those applied by Federal courts in private sector labor-management relations. Substantive Regulations § 2425.3.

V. Analysis

In entering into a collective bargaining agreement, parties effectively bargain for the arbitrator's construction of their agreement, entitling the arbitrator's interpretation to great deference. Thus, courts set aside an arbitrator's interpretation only in rare instances, so as not to undermine the federal policy of settling labor disputes by arbitration. *FOP/U.S. Capitol Police Labor Committee v. U.S. Capitol Police*, No.14-ARB-01, 2014 WL 7215202 (Dec. 12, 2014); *Boston Med. Ctr. v. Serv. Employees Int'l Union, Local 285*, 260 F.3d 16, 21 (1st Cir. 2001). Accordingly, the scope of the Board's review of arbitration decisions is also extremely narrow. *See, e.g., AFSCME v. The Office of the Architect of the Capitol*, No. 13-ARB-01, 2014 WL 793368 (Feb. 26, 2014); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) ("When an arbitrator resolves disputes regarding the application of a contract the arbitrator's 'improvident, even silly, factfinding' does not provide a basis for a reviewing court to refuse to enforce the award."); *U.S. Customs Serv. v. FLRA*, 43F.3d 682, 686-687 (D.C. Cir. 1994) (stating that where an arbitrator's award implicates only the collective bargaining

agreement, the Authority's role of reviewing award is limited to that of federal courts in private sector labor-management relations). Nonetheless, an arbitrator's interpretation of a collective bargaining agreement "must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice." *Boston Med. Ctr.*, 260 F.3d at 21.

A. *The Award Draws its Essence from the Parties' CBA.*

The Union contends in its first exception that the Arbitrator's award fails to draw its essence from the parties' CBA because it "adds language to the parties' Collective Bargaining Agreement which is not present, and relies upon his own, made up version of the Agreement to deny the Union's grievance." Union's Exceptions at 8. Specifically, the Union points out that, although the Arbitrator stated that "Section 18.02(1) speaks in terms of leave applied for and *approved by a supervisor*," *see* Award at 15, Section 18.02(1) contains no express requirement that leave "be approved by a supervisor" for purposes of counting toward the overtime threshold. The Union contends that the Arbitrator "then relied entirely on this newly added provision to deny the Union's grievance," and "[i]n so doing . . . fundamentally altered the parties' agreement as to how employees could request approved leave." *Id.* at 9. Because Officer Flynn complied with the plain language of the parties' CBA by requesting FMLA leave on the Department's approved forms, the Union contends that the Arbitrator's award "added a layer of approval that simply is not contemplated, mentioned, or required by the agreement." *Id*.

Although the Union is correct that Section 18.02(l) contains no express requirement that leave be approved "by a supervisor," it does not follow that the Arbitrator relied on this finding to deny the grievance. That is, the Arbitrator's determination that Officer Flynn's FMLA absences on March 12 and 25, 2015 did not count toward the 85-hour overtime threshold Section 18.02(1) was not based on a finding that the leave requests were unapproved by a supervisor. Indeed, there appears to be no dispute that Officer Flynn's absences on those dates were subsequently approved. Rather, as stated above, the Arbitrator determined that those approved FMLA absences did not count toward the overtime threshold because they were intermittent and not scheduled in advance.[3] Thus, the Arbitrator's erroneous finding that Section 18.02(1) speaks in terms of leave applied for and approved "by a supervisor" does not demonstrate that the award fails to draw its essence from the parties' CBA, and it does not provide a basis for reversing the

[3] Although it is true that Section 18.02(1) also does not contain the term "scheduled" or "scheduled in advance," we note that it states that "[c]redit toward the overtime threshold of eighty-five hours will be given for actual hours worked, legal holidays, and all leave which *has been applied for* on the appropriate department form and approved." In our view, the phrase "has been applied for" provides some indication that credit is given only for leave that has been scheduled in advance. In any event, the Union concedes that "the parties have agreed that employees who use leave which is requested and approved on the Department's required form *in advance of its use* are entitled to have that leave coded as 'scheduled' or 'approved,' and counted toward their overtime threshold in a pay period." Union Exceptions at 8 (emphasis added).

award. *See United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987) ("The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract.").[4]

B. *The Award is not Contrary to Law.*

The Union contends in its second exception that the award is contrary to law because the Arbitrator erroneously failed to conclude that the plain language of the parties' agreement was clear and unambiguous. Union Exceptions at 10-12. It maintains that, "based on the plain language of the CBA, 'leave which has been applied for on the appropriate department form and approved' includes intermittent FMLA leave—which has been requested pursuant to properly completed CP-506A and CP-1381 forms. . . . The 'appropriate department form' is not limited to the CP-506 form, as the Department contends, because if the parties intended to so limit the provision, they could have done so." *Id.* at 11.[5]

Again, the Union misconstrues the basis for the Arbitrator's award. The Arbitrator did not deny the grievance on the ground that Officer Flynn submitted his requests for FMLA leave on March 12 or March 25, 2015, on an inappropriate form. Rather, as stated above, the Arbitrator determined that the Form CP-506-A that Officer Flynn had completed on September 13, 2014 to request permission to use FMLA leave totaling up to 240 hours for himself and up to 240 hours for his wife in the upcoming calendar year was *not* "the same as authorizing or specifying in advance what days he would be absent from work." Award at 15. Because there is no other indication that Officer Flynn's FMLA absences on March 12 or 25 were authorized or scheduled in advance, the Arbitrator determined, in keeping with the parties' past practice, that they did not count toward the overtime threshold in Section 18.02(1). *Id.* We find no basis under the Board's deferential standard for disturbing the Arbitrator's determination.

[4] *Overseas Educ. Ass'n v. Dep't of Defense*, 4 FLRA 98 (1980), cited by the Union, is inapposite. In that case, the Federal Labor Relations Authority determined that the arbitrator "disregarded the terms of the agreement and fashioned a third type of pay status for the purpose of conducting labor-management business for which there is no rational basis in the agreement." *Id.* at 102-03. Here, by contrast, the Arbitrator did not create an additional type of pay status; rather, as stated above, he based his determination on the long established practice under the CBA of not treating intermittent unscheduled absences as counting toward the 85-hour overtime threshold.

[5] The Union notes that the USCP represented in its opening statement that it would call a witness to testify that the parties have never proposed, discussed, or agreed to a CBA provision concerning the appropriate form for scheduling and approving leave in advance, but that the USCP never called that witness. Union Exceptions at 11-12 n.1. The Union urges the Board to draw an adverse inference that if the witness "really *did* testify, his testimony would have supported the grievant's position." *Id.* (emphasis in original). Because it appears that the witness would have testified as to a matter that the parties do not dispute, i.e., that the parties have never proposed, discussed, or agreed to such a provision, we decline the Union's invitation to draw an adverse inference to the contrary.

Moreover, we agree with the Arbitrator that Section 18.02(1) does not speak for itself on this issue. That is, it does not answer the dispositive issue here, i.e., whether an approved request to use intermittent FMLA in the coming calendar year constitutes "leave which has been applied for on the appropriate department form and approved." Therefore, in resolving this question, the Arbitrator appropriately considered the parties' past practice in determining that it does not. Award at 16; *see FOP/U.S. Capitol Police Labor Committee,* No. 14-ARB-01, 2014 WL 7215202 *7 (considering past practice). We therefore reject the Union's position that doing so rendered the award contrary to law.

C. *The Award is not Based on a Non-Fact.*

In its final exception, the Union contends that the Arbitrator relied on a non-fact in finding that the USCP's treatment of Officer Flynn's intermittent FMLA absences is consistent with the long established practice of not treating such intermittent absences, whether due to sick leave or FMLA leave, as counting toward the 85-hour threshold. Union Exceptions at 12-13. It contends that, for purposes of the overtime threshold, until March 11, 2015, the USCP coded Officer Flynn's unforeseen FMLA leave as "scheduled," and counted it toward his overtime threshold in a given pay period. *Id.*

To establish that an award is based on a non-fact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which a different result would have been reached by the arbitrator. *United States Capitol Police Board, and Fraternal Order of Police, U.S. Capitol Police Labor Committee,* No. 01-ARB-01, 2002 WL 34461687 (Feb. 25, 2002). The Union has not met its burden here. As the Arbitrator noted in the award, USCP Deputy Chief Thomas testified at the hearing that on a prior occasion a supervisor made a mistake in coding Officer Flynn's FMLA leave as a scheduled absence and this was later corrected. Award at 7. The Arbitrator later implicitly credited Deputy Chief Thomas's testimony in concluding that the USCP's treatment of Officer Flynn's FMLA absences on March 12 and 25, 2015, was consistent with longstanding past practice. We decline to disturb the Arbitrator's determination to credit Chief Thomas's testimony. *See FOP/U.S. Capitol Police Labor Committee,* No. 14 ARB 01, 2014 WL 7215202 *6 (Dec. 12, 2014) (deferring to an arbitrator's credibility determination); *Sheehan v. Office of the Architect of the Capitol,* No. 08-AC-58 (Jan. 21, 2011) (observing that "credibility determinations are entitled to substantial deference, because it is the Hearing Officer who 'sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records'") (quoting *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962)); *Palace Sports & Entm't, Inc. v. NLRB,* 411 F.3d 212, 220 (D.C. Cir. 2005) (observing that the court "will not disturb the Board's adoption of an ALJ's credibility determinations 'unless those determinations are hopelessly incredible, self-contradictory, or patently unsupportable.'"). Accordingly, we reject the Union's position that the award is based on a non-fact.

Finally, we note that the Union also cites Section 825.209(h) of the Office of Compliance's FMLA Regulations, which provide that "[a]n employee's entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is to be determined by the employing office's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate)," and it correctly states that "the Department cannot treat an employee on FMLA leave differently than if that employee was on leave for a non-FMLA purpose (i.e., annual leave)." Exceptions at 11. The Union concedes, however, that "[n]either the FMLA nor the FMLA Regulations" are dispositive here, because they do not "address whether intermittent FMLA leave should be counted as 'hours worked' for purposes of an employee's overtime threshold." *Id.* In any event, we find no evidence in the record that the USCP has interpreted or applied Section 18.02(1) in a manner that violates the FMLA. Rather, as stated above, the dispositive factor in determining whether leave counts as "hours worked" for purposes of an employee's overtime threshold is not whether the leave is covered by an FMLA certification, but whether it has been scheduled and approved in advance. Thus, as the USCP states in its Opposition, "[a]n employee who takes scheduled leave or scheduled FMLA leave gets credit toward the overtime threshold. . . . An employee who takes unscheduled leave or unscheduled FMLA leave does not get credit toward the overtime threshold." Opposition at 13. Neither the FMLA nor the CBA requires a different result.

ORDER

The Union's exceptions to the Arbitrator's award are denied.

It is so ORDERED.

Issued, Washington, DC, March __, 2017.