**64 FLRA No. 28**

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
NEW YORK, NEW YORK
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 238
(Union)

0-AR-4153

DECISION

October 29, 2009

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 Theodore O. Prenting 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 Union filed a grievance alleging that the Agency improperly interpreted and applied the notice provision in the parties' collective bargaining agreement (CBA) by failing to allow the Union the proper amount of time permitted under the CBA to respond to the Agency's notice of its decision to consolidate its financial services and to request negotiations concerning such decision. The Arbitrator found that the grievance was arbitrable and sustained the grievance on the merits.

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

## II. Background and Arbitrator's Award

In October 2004, the Executive Vice-President of the Union notified the Agency that it had received a copy of a document entitled "Agency Decision to Consolidate Financial Services." Award at 4. In response, the Agency informed the Union that the document was an internal management document and that once a determination had been made on the implementation of the proposed consolidation, it would officially notify the Union. The Union requested to bargain over the Agency's decision and its impact and implementation, and enclosed ground rules proposals. On December 13, 2004, the Agency notified the Union, pursuant to Article 45 of the parties' CBA, of the decision to implement the consolidation and enclosed a tentative implementation schedule and a counter proposal to the Union's ground rules proposals.[1] Thereafter, the parties exchanged proposals on ground rules and substantive issues. Later, they exchanged communications on ground rules proposals. The Agency submitted a counter offer reiterating that a number of the Union's proposals were nonnegotiable. However, the Agency informed the Union that it was still willing to meet for substantive negotiations even if negotiations over ground rules were not finalized.

The parties continued to communicate concerning ground rules and substantive proposals and, at the Union's request, the Agency provided the Union a document declaring six ground rules proposals nonnegotiable. Thereafter, on March 25, 2005, the Union filed a negotiability appeal with the Authority. On April 14, 2005, the Agency rescinded its earlier substantive proposals and replaced them with its Financial Consolidation Plan (Consolidation Plan) and a corresponding implementation schedule that was provided to the Union. Later, the Union learned from the Agency's reply brief to the Union's response to the Agency's Statement of Position to the Authority that the Agency claimed the Union had lost its opportunity to bargain by failing to respond to the Agency's April 14 proposal within 14 days as required by Article 45 of the parties' CBA. According to the Arbitrator, the Union, "believi[ng] the Agency's interpretation of Article 45 . . . was incorrect," filed the instant grievance.[2] Award at 7. The grievance was submitted to arbitration.

1. The pertinent text of Article 45 is set forth in the Appendix to this decision.

2. Also, on June 14, 2005, the Union filed an Unfair Labor Practice (ULP) charge alleging that the Agency had refused to bargain over proposals that were not materially different from proposals previously found negotiable by the Authority. Award at 7. Thereafter, on August 24, 2005, the Union's petition for review was dismissed without prejudice to the Union's right to file a negotiability appeal after the ULP and grievance were resolved. S*ee*, Exceptions, Attachment 6. Later, the Regional Director (RD) of the FLRA, Boston Regional Office found that the evidence was sufficient to establish that the Agency violated the Statute, but concluded that authorization of a complaint was not warranted under the prosecutorial discretion policy of the General Counsel. Award at 7 and Exceptions, Attachment 7 at 2. An appeal of the RD's decision was denied**.** The Union refiled the negotiability appeal. Simultaneously with the issuance of the decision in this case, a decision on the appeal was issued on October 29, 2009. *See AFGE, Council 238*, 64 FLRA No. 27 (October 29, 2009).

The Agency first claimed that the grievance was not arbitrable because it had no obligation to bargain over its decision to consolidate the financial services. The Arbitrator found that the grievance was procedurally arbitrable. [3]

With regard to the merits, the parties agreed that the following issue should be decided by the Arbitrator: "[w]as the Agency's interpretation of . . . Article 45 [of the CBA] correct, and if not, what is the appropriate remedy?" *Id.* at 3.

In resolving this issue, the Arbitrator noted certain sub issues, such as "whether the Union had ten days from receipt of the Agency's April 14, 2005 [Consolidation Plan] to advise the Agency that it wished to enter into negotiations, 14 days to provide written proposals, and whether the Union's failure to do so resulted in [the Union] missing its opportunity to bargain over implementation of the Plan under Article 45[.]" *Id.* at 19.

Before the Arbitrator, the Union argued that the April 14 communication "was not properly served on its representative as required by Article 45, Section 2, and that it had previously demanded to bargain on [the matter], when it also submitted proposed ground rules for the negotiations." *Id.* The Union asserted that the April 14 communication was not a new management decision as meant by Article 45 but a proposal exchanged in the course of on-going negotiations. The Union also stated that the effect of the Agency's decision to consolidate its financial offices on unit employees was more than *de minimis.* On the other hand, the Agency asserted that it had provided the authorized agent of the Union with notification of its decision and the dates of implementation, and further contended that the Union failed to respond within the required time. The Agency also claimed that the impact of its decision on unit employees was *de minimis,* and that even if its interpretation of Article 45 was incorrect, "no remedies" could be awarded. *Id.* at 20.

Based on the evidence, the Arbitrator concluded that "while the April 14 [communication] constituted an official and proper notice to the Union, it was not a new management decision as envisioned under Article 45, and, therefore did not require a response on the part of the Union." *Id.* at 28. The Arbitrator found that this communication was "part of an on-going negotiation." *Id.* at 26. The Arbitrator also found that the impact of the decision on employees was more than *de minimis* and thus the Agency "must resume negotiations[]" with the Union over any remaining issues arising from the new Consolidation Plan. *Id.* at 28. The Arbitrator also considered the Union's request for a *status quo ante* remedy but determined, in the circumstances of this case, that such remedy was not appropriate.

The Arbitrator thus sustained the grievance, concluding that the Agency's interpretation of Article 45 was incorrect, and that the Union did not lose its opportunity to bargain over the new Consolidation Plan when it failed to respond to the April 14 communication. The Arbitrator ordered the Agency to resume bargaining with the Union over any remaining issues from the new plan.

## III. Positions of the Parties

### A. Agency's Exceptions

The Agency asserts that it "is *not* excepting to the Arbitrator's determination that [its] . . . interpretation of Article 45 was incorrect." Exceptions at 5 (emphasis in exceptions). Rather, according to the Agency, it is excepting to the Arbitrator's remedy directing it to "'resume negotiations with the Union over any remaining issues arising from the new Plan[.]'" *Id.* (quoting award at 29). The Agency asserts that the Arbitrator "went beyond his jurisdiction in issuing his remedy[]" and "usurped the role of the [Authority] contrary to [5 C.F.R. § 2424.30(a)]" *Id.* at 5 and 8. [4] The Agency asserts that the remedy is contrary to § 2424.30(a) because, under this regulation, if the Union wishes to pursue negotiations once the ULP or grievance [5] is resolved, the "Union has thirty days in which to [refile its petition with] the [Authority] in order to resume its negotiability petition." *Id* at 9. The Agency asserts that

3. As the Agency does not except to the Arbitrator's arbitrability determination, there will be no further discussion of this determination in this decision. *See* Exceptions at 4 n.5.

4. 5 C.F.R. § 2424.30(a) provides, in pertinent part:

> Except for proposals or provisions that are the subject of an agency's compelling need claim under 5 U.S.C. 7117(a)(2), where an exclusive representative files an unfair labor practice charge pursuant to part 2423 of this subchapter or a grievance alleging an unfair labor practice under the parties' negotiated grievance procedure, and the charge or grievance concerns issues directly related to the petition for review filed pursuant to this part, the Authority will dismiss the petition for review. The dismissal will be without prejudice to the right of the exclusive representative to refile the petition for review after the [ULP] charge or grievance has been resolved administratively, including resolution pursuant to an arbitration award that has become final and binding . . . .

5. The Agency asserts that before the arbitration hearing began, the Union informed the Agency that it was not pursuing the portion of the grievance that related to the ULP and that the only issue before the Arbitrator "was a contractual one[.]" Exceptions at 4.

the Arbitrator "has no . . . authority" over the negotiations process and "is not empowered to order the Agency to bargain . . . when there is a negotiability process which, under the [Authority's] regulations, can be activated by the Union." *Id.* at 9-10.

The Agency next asserts that that the Arbitrator exceeded his authority. According to the Agency, the parties' CBA limits the Arbitrator's jurisdiction to "'issues and charges'" raised at the last step of the grievance procedure. *Id.* at 11 (quoting Article 44, Section 3 of the CBA). The Agency contends that "[w]hile the Union sought a bargaining order" as a remedy, "at no point in its grievance did it allege that the Agency was refusing to bargain, a predicate claim" to a bargaining order request. *Id.* at 11. Therefore, the Agency contends that, in issuing the bargaining order, the Arbitrator resolved an issue not submitted to arbitration and thus disregarded a specific limitation of his authority under the parties' CBA.

The Agency contends that the award is based on a nonfact because the Arbitrator ignored a "key undisputed fact." *Id.* at 12. The Agency states that while the national level "'bargaining was unsuccessful[,]'" "Locals of the Union did participate" in bargaining. *Id.* at 12 and 13 (quoting Award at 10). The Agency thus contends that a "bargaining order runs contrary to these undisputed facts[.]" *Id.* at 14.

B. Union's Opposition

The Union asserts that the Agency's reliance on § 2424.30(a) of the Authority's regulations is misplaced. The Union contends that the Authority's Order dismissing its petition for review in *AFGE, Council 238* stated that the petition for review was dismissed without prejudice to the Union's right to refile its petition after "*both* the ULP charge and the grievance have been resolved administratively[.]" Opposition at 2 (quoting Authority's Order). The Union claims that the ULP charge has been resolved administratively, but the grievance has not, because the Agency filed the instant exceptions. The Union asserts that, as exceptions have been filed, the deadline for refiling its petition has not arrived and thus the Union cannot be found late in refiling its petition. The Union further contends that it is not clear what the Agency is arguing with respect to its claim that the "Arbitrator usurped the function of the Authority." *Id.* at 3.

The Union asserts that the Arbitrator did not exceed his authority. The Union contends that the Arbitrator's order for the Agency to resume negotiations with the Union "flows directly from the issue before the Arbitrator," which concerned the interpretation of Article 45 and the appropriate remedy to be awarded if the Agency's interpretation was erroneous.

As to the nonfact claim, the Union asserts that the Agency does not explain nor is it apparent how the Agency's assertion concerning local level bargaining over the implementation of the consolidation plan is a central fact.

## IV. Analysis and Conclusions

A. The award is not contrary to law

The Authority's role in reviewing arbitration awards depends on the nature of the exceptions raised by the appealing party. *See United States Customs Serv. v. FLRA*, 43 F.3d 682, 686 (D.C. Cir. 1994). In *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995), the Authority stated that if the arbitrator's decision is challenged, as it is here, on the ground that it is contrary to any law, rule, or regulation, the Authority will review the legal question *de novo*. In applying a standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Agency claims that the Arbitrator's remedy for its incorrect interpretation of Article 45 of the CBA — directing the Agency to resume negotiations with the Union — is contrary to § 2424.30 of the Authority's regulations because it "usurp[s]" the role of the Authority provided under this section. Exceptions at 9.

Section 2424.30 prescribes the conditions under which "the Authority" will resolve both negotiability and bargaining obligation disputes in a negotiability case. [6] 5 C.F.R. § 2424.30. In particular, § 2424.30 "makes it clear that the bargaining obligation disputes that the Authority will resolve in a negotiability proceeding are those that otherwise would be resolved pursuant to an unfair labor practice charge or a grievance alleging an unfair labor practice[,]" that is, statutory bargaining obligation disputes. *AFGE, Local 3529*, 57 FLRA 172, 176 (2001). Thus, § 2424.30 of the Authority's Regulations addresses only Authority procedures for processing negotiability cases. Section 2424.30

6. A bargaining obligation dispute arises when the parties disagree on whether there is a duty to bargain over an otherwise negotiable proposal in light of the specific circumstances in that case. A negotiability dispute arises where the parties disagree on the legality of a proposal or provision. *See* 2424.2 of the Authority's Regulations.

does not address, and thus does not limit, an arbitrator's authority to resolve either a statutory or a contractual duty to bargain issue. As § 2424.30 does not limit an arbitrator's authority to resolve either a statutory or a contractual duty to bargain issue, the Agency has not demonstrated that the award is contrary to § 2424.30. Accordingly, we deny this exception.

B. The Arbitrator did not exceed his authority

The Agency contends that "[w]hile the Union sought a bargaining order in its requests for remedies, at no point in its grievance did it allege that the Agency was refusing to bargain, a predicate claim . . . for a bargaining order." Exceptions at 11. The Agency asserts, therefore, that by issuing a bargaining order as a remedy the Arbitrator resolved an issue not submitted to arbitration and thus disregarded a specific limitation of his authority under the parties' CBA. An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to persons who are not encompassed by the grievance. *See United States Dep't of Defense, Army and Air Force Exchange Serv.*, 51 FLRA 1371, 1378 (1996).

In this case, the Arbitrator properly exercised his authority in resolving the issue agreed to by the parties of: [w]as the Agency's interpretation of the [parties' CBA] Article 45 correct, and if not, what is the appropriate remedy?" Award at 3. As the issue agreed to by the parties included a determination of the proper remedy, the Agency has not demonstrated that the Arbitrator exceeded his authority by devising a remedy for the Agency's violation of the parties' CBA. Accordingly, we deny this exception.

C. The award is not based on a nonfact

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See United States Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993). The Authority will not find an award deficient on the basis of the arbitrator's determination on any factual matter that the parties disputed at arbitration. *Id.* at 594 (citing *Nat'l Post Office Mailhandlers v. United States Postal Serv.*, 751 F.2d 834, 843 (6th Cir. 1985)).

The Agency asserts that the award is based on a nonfact because the Arbitrator ignored a key undisputed fact that while national level bargaining was unsuccessful some locals did participate in bargaining. However, there is nothing in the award that indicates that local level bargaining over the Consolidation Plan was determinative of the Arbitrator's finding that the Agency violated Article 45 of the parties' CBA by incorrectly interpreting Article 45 as it concerned the Union's opportunity to bargain at the national level over such plan. Therefore, local level bargaining was not a central fact and thus the Agency's claim does not provide a basis for finding the award deficient. *See, e.g., United States Dep't of Veterans Affairs*, 60 FLRA 479, 482 (2004); *NAGE, Local R1-109*, 58 FLRA 501, 503 (2003). Accordingly, we deny this exception.

## V. Decision

The Agency's exceptions are denied.

## APPENDIX

Article 45 provides, in relevant part, as follows:

ARTICLE 45

Section 1.The parties agree that the circumstances under which negotiations are appropriate during the life and term of this agreement are included and described below:

. . . .

B. At the Union's option, when the Employer, at any level, exercises a management right and the impact of that decision creates adverse impact on bargaining unit employees;

. . . .

Section 2.In situations (A) and (B) described in Section 1, the Employer will notify the authorized agent of the Union in advance in writing of the proposed change or management decision and its impact. (It is understood that the Agency is not required to negotiate on its decisions which do not adversely affect the bargaining unit.) Employer will notify the authorized agent of its decision and date of implementation. When negotiation is desired, the authorized agent will indicate his/her desire to enter into negotiations by advising the authorized Agency representative in writing within ten (10) days from receipt followed by written proposals within fourteen (14) days from receipt. Upon request, the Employer will explain the proposed change or the management decision and its impact to the designated union representative.

Award at 3 and Exceptions, Attachment 1.