64 FLRA No. 33

UNITED STATES
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL OF HUD LOCALS 222
(Union)

0-AR-4159

DECISION

November 3, 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 Roger P. Kaplan filed by the Agency under § 7122 (a) 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 sustained a grievance alleging that the Agency failed to make timely payments of awards in violation of the parties' collective bargaining agreement (CBA). For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The parties agreed that this "case should be decided on the briefs and the Stipulation of the Parties (Stipulation)[,]" rather than a hearing. Award at 1. The stipulation states that "[t]he parties agree that the entire record shall consist of the [J]oint [E]xhibits and stipulations . . . plus the Parties' Briefs on the Issue of Remedy." Exceptions, Ex. 2. The stipulation further states, in relevant part, the following:

> 5. All Bargaining unit employees have been paid performance awards for years 2003 thru 2005.
>
> 6. The Agency failed to timely pay thousands of Bargaining Unit employees their Awards under the CBA provisions cited [in the stipulation].
>
> 7. The Agency has not given any employee any other remedy for the stipulated failure to timely pay these Awards.

Award at 3.

As the parties could not agree on a stipulation of the issue, the Arbitrator framed it as follows: "[w]hat is the appropriate remedy, if any, for [the Agency's] failure to make timely payments of awards pursuant to the CBA?" *Id.* at 2.

In its brief to the Arbitrator, the Agency argued that the Union did not establish that the Agency failed to pay awards timely. The Agency asserted that it "paid awards timely, consistent with its interpretation of the requirements of Article 11.02(3) of the CBA." [*] *Id.* at 5. The Agency further maintained that there "was an established past practice of paying the awards that the Union did not contest for several years." *Id.* at 4.

The Arbitrator found that the Agency's argument concerning Article 11.02(3) was directly contrary to Stipulation 6. The Arbitrator found that, "[i]n light of Stipulation 6, there can be only one conclusion[,] that [the Agency] failed to timely pay awards." *Id.* The Arbitrator considered the Agency's past practice claim and noted that the Agency explained in its brief the procedure for paying awards that it alleged it had followed since 1999, without objection from the Union. However, the Arbitrator found that there were no facts in the Stipulation to support that argument. *Id.* The Arbitrator thus found that there was no evidence to support the Agency's past practice claim.

The Arbitrator found that the "crux of the dispute . . . is whether the failure to timely pay awards, in violation of the CBA, meets the requirements of the Back Pay Act for the payment of interest, reasonable attorney's fees, costs and expenses." *Id.* The Arbitrator stated that the Agency disputed that such back pay was due employees, while the Union argued that the violation of the parties' CBA satisfied the requirements of the Back Pay Act. Noting the requirements of the Back Pay Act, as well as Authority precedent, the Arbitrator found that "[h]ad the grievants not already been awarded backpay . . . , [he] would have found" that the Agency's violation of the CBA satisfied the requirements of the Back Pay Act. *Id.* at 7. The Arbitrator also noted the requirements for awarding attorney fees under 5 U.S.C. § 7701(g) and Authority precedent holding that there is no requirement that back pay be awarded in the

*. The relevant provisions of the CBA are set forth in the Appendix to this decision.

same proceeding that determines entitlement to attorney fees. Applying such requirements, the Arbitrator found that the grievants were entitled to interest and reasonable attorney fees.

Further, the Union requested that interest be awarded for six years, the maximum amount permitted under the Back Pay Act. The Agency sought to limit the period to 2005. The Arbitrator found that, as Stipulation 5 states that "[a]ll Bargaining Unit employees have been paid performance awards for years 2003 thru 2005[,]" and as there was no other evidence in the record on when awards were paid, "interest should only be paid back to 2003, since the Stipulation establishes that awards were paid late in 2003, 2004 and 2005." *Id.* at 8. The Arbitrator also found that Article 22.15(1) of the CBA allows either party to grieve "a continuing condition at any time." *Id.* (quoting Article 22.15(1)). Thus, the Arbitrator found that the Agency's failure to timely pay awards was a "continuing condition." *Id.* at 9-10. The Arbitrator, therefore, rejected the Agency's effort to limit the period to 2005.

The Arbitrator granted the Union's request for reasonable attorney fees, and directed the parties to attempt to resolve the amount of such fees. The Arbitrator retained jurisdiction for the filing of a petition for attorney fees, should the parties be unable to resolve the matter. Interpreting Article 23.04 of the CBA, the Arbitrator also found that the Agency was the losing party and directed it to pay the Arbitrator's fees and expenses.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the award is based on a nonfact because it never stipulated to being late on award payments for the years 2003 through 2005. The Agency contends that, in the Stipulation, it only agreed that the Agency was late in the past on award payments and that all employees were paid awards for the years 2003 through 2005. *See* Exceptions at 5, Stipulation Number 5 and 6. The Agency contends that Stipulation Number 6 does not state what year or years that the Agency was late nor was there any evidence presented to support the conclusion that award payments were late for the years 2003 through 2005. *See id.* The Agency asserts that it stipulated that it was late "because of an established past practice that modified the terms of Article 11.02 of the CBA." *Id.* The Agency contends that this alleged nonfact was not disputed at the pre-hearing or in the parties' briefs.

The Agency also asserts that the Arbitrator failed to weigh the evidence supporting an established past practice. In this regard, the Agency contends that the Arbitrator failed to examine any evidence that supported its past practice position, and the Arbitrator reached his decision solely on Stipulation 6. *See id.* at 7. The Agency argues that, contrary to Article 11.02 of the CBA, there was an established past practice that dated "back to 1999, that the [U]nion was fully aware of and did nothing to challenge." *Id.* The Agency contends that this past practice "amended Article 11.02 by paying awards to employees who received . . . Outstanding and *Highly Successful* ratings unlike the language in Article 11.02 which provides awards to employees with Outstanding ratings" and also "eliminated the time frame for processing awards . . . ." *Id.* at 7, 8. (emphasis in original).

Lastly, the Agency contends that the award is based on Article 11.02 of the CBA, which only covers employees with Outstanding ratings. According to the Agency, during the period in issue, it also paid awards to employees with Highly Successful ratings. The Agency claims that it cannot implement the award because the award does not state whether employees with Highly Successful ratings should also be paid interest.

B. Union's Opposition

Citing § 2425.1(d) and 2(d) of the Authority's Regulations, the Union contends that the Agency "failed to provide [it] with the exhibits cited in its exceptions." Opposition at 2. The Union asserts that the Agency cites Exhibits 1 through 7, but "failed to include [most] of these exhibits in its submission to the Union." *Id.* at 3. The Union contends that the Agency's exceptions were supported by a one page document and a printout of employee lists of 2005 Highly Successful award recipients. The Union asserts that such documents "were not tabbed, marked, titled or distinguished with any sign indicating which exhibit they reflected." *Id.* Additionally, the Union asserts that Ex. 3 and 6 were not introduced for the Arbitrator's consideration and "cannot be considered now" because such documents were "available at the time of the hearing, and no good cause is shown for [their] introduction[.]" *Id.*

The Union asserts that the award is not based on a nonfact. Referring to the parties' Stipulation, the Union contends that the Agency has failed to demonstrate that a central fact underlying the award was clearly erroneous but for which a different result would have been reached.

The Union claims that the Agency's assertion that the Arbitrator failed to weigh the evidence has no merit. The Union asserts that the Stipulation did not include

any facts concerning a past practice, and the Arbitrator addressed the Agency's argument and found that there were no facts in the record to support that argument. Further, the Union argues that the Agency introduced memoranda from 1999 to 2005 for the first time in its exceptions that would "allegedly" demonstrate that a past practice was established. *Id.* at 9. The Union argues, citing 2429.5 of the Authority's regulation, that these memoranda should not be considered because the Agency "never introduced any evidence" at the arbitration regarding employees who received Highly Successful ratings. *Id.* at 8-9.

The Union further contends that the Agency's assertion concerning Highly Successful ratings does not establish a past practice and provides no basis for finding the award deficient. In this regard, the Union claims that while the Agency focuses on Section 11.02, which concerns awards for an Outstanding rating, Section 11.06, "encompass[es] *all* awards provided by the Agency." *See id.* at 10.

IV. Analysis and Conclusions

A. Preliminary Matter

As mentioned above, the Agency filed a supplemental submission in response to the Union's opposition. In the response, the Agency submitted several attachments and a statement certifying service of the attachments on the Union. The Agency did not seek leave to file the submission. The Authority issued an order directing the Agency to correct a procedural deficiency in the filing of its exceptions with respect to service on the Union of a complete copy of its exceptions, including copies of all attachments. The Agency filed a response to the Authority's Order in which it certified that it had complied with the order. Later, the Agency submitted additional documentation from the United States Postal Service showing service of the exceptions on the Union.

The Union acknowledges that it received the documents served on it pursuant to the Authority's Order, but asserts that "due to an administrative error[, the documents] were not received by counsel." Union's Supplemental Submission at 2. The Union contends that the documents, in particular Ex. 3 and 6, should not be considered by the Authority because they "were not submitted to the Arbitrator during the course of the proceedings." *Id.*

The Authority's Regulations do not provide for the filing of a response to an opposition to a party's exceptions. 5 C.F.R. § 2429.26(a). Although § 2429.26(a) allows the Authority to grant leave to file additional documents based on a showing of need, the Authority has held that it is incumbent on the moving party to demonstrate why the Authority should consider such supplemental submissions. *NTEU, Chapter* 98, 60 FLRA 448, 448 n.2 (2004) (*NTEU*). The Agency has not demonstrated that its additional submission should be considered. *See, e.g., id.* 60 FLRA at 448 n.2. Accordingly, this submission will not be considered.

The Agency also filed a supplemental response to an Authority order that directed the Agency to show service of a complete copy of its exceptions on the Union. The Union filed a response to the submission. As the Agency's and the Union's submissions address the service issue, we will consider these submissions. Based on the record evidence, we further find that the Agency properly served the Union with a complete copy of its exceptions and attachments.

As to Exhibits 3 and 6, the Union objects to the Authority's consideration of these documents and asserts that the documents were not presented to the Arbitrator. Under § 2429.5 of the Authority's Regulations, the Authority will not consider documents that were in existence at the time of the arbitration hearing but not presented to the Arbitrator. *See United States Envtl. Prot. Agency, Region 2,* 59 FLRA 520, 524 (2003). The Agency relies on Ex. 3 and 6, which concern Highly Successful awards, to challenge the Arbitrator's past practice finding and his remedy that directs the Agency to pay interest to employees whose awards were not paid in a timely manner. There is no evidence contained in the record to show that Ex. 3 and 6 were presented to the Arbitrator or raised in the Agency's post-hearing brief. *See* Award at 5, Union's Opposition, Attachment, Agency's brief. Accordingly, we will not consider these documents.

B. The award is not based on a nonfact

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 a different result would have been reached. *See, e.g., SSA, Chi., N. Dist. Office*, 56 FLRA 274, 278 (2000). An arbitrator's determination as to any factual matter that the parties disputed at arbitration cannot establish that the award is based on a nonfact. *See id.*

The Agency asserts that the Arbitrator's finding that it was late in paying employee awards for the years 2003 through 2005 is based on a nonfact because it never stipulated to being late on award payments for those years. The Agency's assertion provides no basis for finding the award deficient. Stipulation 5 states that

"[a]ll Bargaining unit Employees have been paid performance awards for years 2003 thru 2005[.]" Award at 3. Stipulation 6 states that "[t]he Agency failed to timely pay thousands of Bargaining Unit employees their awards under the CBA provisions[.]" *Id.* The Agency attempted to limit the period covered by the award to 2005. *Id.* at 8. The Union disagreed. The Arbitrator specifically examined this stipulation and found that the "Stipulation establishes that awards were paid late in 2003, 2004 and 2005." *Id.* The Arbitrator then concluded that the Agency failed to timely pay awards for 2003-2005. *See id.* The Arbitrator's finding is a factual finding on a matter that was disputed at arbitration. As such, this finding cannot be challenged as a nonfact. *See, e.g., United States Dep't of Homeland Sec., Customs & Border Prot. Agency, N.Y., N.Y.*, 60 FLRA 813, 816 (2005); *Social Sec. Admin., Balt., Md.*, 57 FLRA 538, 540 (2001). Accordingly, we deny this exception.

C. The Arbitrator did not fail to conduct a fair hearing

We construe the Agency's argument that the Arbitrator failed to weigh the evidence supporting an established past practice as a contention that the Arbitrator failed to provide a fair hearing. *See, e.g., Nat'l Air Traffic Controllers Ass'n*, 62 FLRA 469, 470 (2008) (*NATCA*) (arbitrator's alleged failure to consider material facts construed as failure to provide a fair hearing). An award will be found deficient on this ground when it is established that an arbitrator's refusal to hear or consider pertinent and material evidence, or other actions in conducting the proceeding, prejudiced a party so as to affect the fairness of the proceeding as a whole. *See AFGE, Local 1668*, 50 FLRA 124, 126 (1995).

The Agency contends that the Arbitrator "failed to examine any evidence" that supported the Agency's "past practice" position and "made his decision solely on stipulation 6[.]" Exceptions at 7. However, the Arbitrator specifically examined and weighed the evidence as it concerned the Agency's past practice argument. In this regard, the Arbitrator stated:

> [The Agency] claimed that there was an established past practice of paying the awards. It explained in its brief the procedure for paying awards that it alleged was followed since 1999, without objection from the Union. While the [Agency's] brief set out details of how the Agency processed, approved and paid awards, there are no facts in the Stipulation that support the argument. The problem with this Agency argument is that there is no evidence [in the record] to support the argument.

Award at 5. Thus, in concluding that the Agency failed to establish that there was a past practice, the Arbitrator clearly examined the evidence in the record, but found that there was none to support the claim. Consequently, the Agency has not demonstrated that the Arbitrator failed to consider pertinent and material evidence, or that other actions in conducting the proceeding prejudiced the Agency so as to affect the fairness of the proceeding. *See NATCA*, 62 FLRA at 470. Accordingly, we deny this exception.

D. The award does not fail to draw its essence from the parties' CBA

The Agency contends that the award is based on Article 11.02 of the CBA which the Agency asserts only covers employees with outstanding ratings. According to the Agency, the award is deficient because, during the period in question, it also paid awards to employees with Highly Successful ratings, and, thus, it cannot implement the award as it does not state whether these employees should also be paid interest. We construe the Agency's exception as a claim that the award fails to draw its essence from the parties' CBA.

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.

In this case, the Arbitrator framed the issue as "[w]hat is the appropriate remedy, if any, for [the Agency]'s failure to make timely payments of awards pursuant to the CBA[.]" Award at 2. In resolving this issue, the Arbitrator considered the record evidence, including Stipulation 6, which states: "[t]he Agency failed to timely pay thousands of Bargaining Unit employees their awards under the CBA provisions cited

above." *Id.* at 3, 5. The CBA provisions referenced by Stipulation 6 include Article 11.02, which concerns awards for overall performance, and Article 11.06, which concerns prompt presentation of awards, and provides that "[m]anagement agrees to make awards as promptly as possible after the decision is made by [m]anagement to grant an award." *Id.* at 2. The Arbitrator evaluated the evidence, including Articles 11.02 and 11.06, and concluded that the Agency "failed to timely pay awards." *Id.* at 5. Thus, although Article 11.02 concerns awards for "outstanding performance rating" as the Agency contends, the wording of Article 11.06 is not limited to any particular award but provides for the prompt presentation of awards. Moreover, the issue before the Arbitrator concerned the Agency's failure to make "timely payments of awards pursuant to the [parties'] CBA[,]" which the Arbitrator resolved by applying provisions in the parties' CBA. *Id.* at 2. The Agency has not demonstrated that his interpretation of the CBA as requiring it to pay "[e]mployees who were not paid awards timely, going back to 2003," is so unfounded in reason and fact and so unconnected to the wording and purpose of the agreement as to manifest an infidelity to the obligation of the arbitrator; or is implausible, irrational; or evidences a manifest disregard of the agreement). *Id.* at 10. Consequently, the Agency has not demonstrated that the award fails to draw its essence from the parties' CBA. Accordingly, we deny this exception.

V. Decision

The Agency's exceptions are denied.

APPENDIX

Pertinent Provisions of the Collective Bargaining Agreement:

Article 11 - Incentive Awards Program

11.02 Awards for Overall Performance

(1) All Employees who have received an Outstanding performance rating for the year shall be eligible for:

. . . .

(b) A cash award of up to three (3) percent of the entrance level salary of the employee's grade for which the period of the award covers, rounded by the nearest five dollars ($5).

. . . .

(3) . . . Management shall process the award granted within three (3) pay periods of the date of the decision to make the awards or the appraisal, whichever is later.

11.06 Prompt Presentation of Award

Recognizing that awards are most effective when presented as promptly as possible after the performance or act that is being recognized, Management agrees to make awards as promptly as possible after the decision is made by Management to grant an award.

Award at 2; Exhibit 4.