64 FLRA No. 109

SPORT AIR TRAFFIC
CONTROLLERS ORGANIZATION
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
EDWARDS AIR FORCE BASE, CALIFORNIA
(Agency)

0-AR-4340

DECISION

March 29, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

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

The Arbitrator dismissed as non-arbitrable a grievance alleging that the Agency had improperly filled a supervisory position. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that a supervisory position had been filled in violation of 5 U.S.C. § 3326(c)(4), which provides for appointment of retired members of the armed forces to positions in the Department of Defense. One of the conditions for such an appointment is that "the position has not been held open pending the retirement of the retired member." Award at 6 (quoting 5 U.S.C. § 3326(c)(4)). Specifically, the Union alleged that the disputed supervisory position had been held open pending the retirement of an active member of the armed forces and that members of the bargaining unit "desired to apply for that position if the violation of 5 U.S.C. § 3326(c)(4) had not occurred." *Id.* The parties stipulated that the disputed supervisory position is not part of the bargaining unit. *Id.* at 3.

In its denial of the grievance, the Agency stated, "If the Union invokes arbitration, [then] the [Agency] reserves the right to raise an issue of grievability before the [A]rbitrator as a threshold issue." *Id.* at 4. The Union invoked arbitration, and a hearing was scheduled. Approximately one week before the scheduled hearing, the Agency notified the Union that it challenged the arbitrability of the grievance.

The Arbitrator framed the relevant issues as follows: (1) "Is the position at issue in this arbitration a supervisory position?"; (2) "Are supervisory positions excluded from coverage under the [parties'] [c]ollective [b]argaining [a]greement by Article 1, [§] 4?" [2] ; and (3) "If the answers to the above questions are affirmative, must the grievance be dismissed as non[-]arbitrable?" *Id.* at 1.

As an initial matter, the Arbitrator found that the issue of arbitrability was properly before him because the grievance and arbitration provisions of the parties' agreement do not set forth a time limit for raising arbitrability, and the Agency put the Union on notice that it intended to raise the issue of arbitrability if the Union invoked arbitration. *Id.* at 5, 6.

The Arbitrator held that the grievance was not substantively arbitrable because it concerned a supervisory position that was excluded from the coverage of the parties' agreement. In this regard, the Arbitrator stated that the Union's standing is "circumscribed" by the parties' agreement and by statute, "which excludes supervisory employees from the [b]argaining [u]nit." *Id.* at 6. In support of his decision, the Arbitrator stated that he was required to follow *Illinois Air National Guard, 182nd Tactical Air Support Group*, 34 FLRA 591 (1990) (*Air Nat'l Guard*), in which, according to the Arbitrator, the Authority denied exceptions to an arbitrator's finding that a grievance concerning the filling of a supervisory position was not arbitrable under the agreement at issue in that case.

1. The dissenting opinion of Member Beck is set forth at the end of this decision.

2. Article 1, § 4 provides:

> The Unit to which the agreement is applicable is composed of all nonsupervisory, nonmanagement civilian GS-2152 Air Traffic Control Specialists (ATCS) who are employed by Edwards AFB and provide air traffic control services for the Department of the Air Force, and the nonsupervisory, nonmanagement civilian GS-0856 Electronic Technicians who directly support those ATCS.

Award at 2.

As additional support, the Arbitrator cited the Union's reliance on "Air Force Manual 36-203[,]" which provides "an administrative remedy outside the collective bargaining agreement" for applicants who are not selected for promotion or are dissatisfied with the outcome of a selection process. The Arbitrator also stated that "the Union cannot correct a violation of law, which injures [u]nit employees[,] when seeking a position outside the [u]nit." *Id.* at 7. Therefore, the Arbitrator dismissed the grievance as non-arbitrable under the parties' agreement.

III. Positions of the Parties

A. Union's Exceptions

The Union alleges that the award is based on a nonfact because the Arbitrator misapplied *Air Nat'l Guard*. According to the Union, the Arbitrator ignored the portion of that decision wherein the Authority distinguished that case from *Local R-1-185, NAGE*, 25 FLRA 509 (1987) (*NAGE*). The Union contends that, in *NAGE*, the Authority upheld an arbitrator's finding that a grievance concerning the filling of a supervisory position was arbitrable in the absence of a specific exclusion in the parties' agreement. Exceptions at 4. The Union further contends that there is no provision in the parties' agreement specifically excluding the filling of supervisory positions from the parties' negotiated grievance procedure, and the Arbitrator would have reached a different result if he had not misapplied *Air Nat'l Guard*.

In addition, the Union claims that the award fails to draw its essence from Article 1, § 4 of the parties' agreement. In this regard, the Union asserts that Article 1, § 4 "simply restates the composition of the [b]argaining [u]nit" and does not place any restrictions on the negotiated grievance procedure. Exceptions at 5. The Union contends that it is implausible that the composition of the bargaining unit places restrictions on the negotiated grievance procedure. To the contrary, the Union argues that the Arbitrator should have determined the scope of the parties' negotiated grievance procedure by relying solely on the text of Article 29, § 4 of the agreement, without reference to Article 1, § 4. *Id.* at 5-6. The Union also alleges that there is no provision in the parties' agreement precluding the Union from filing a grievance concerning a violation of any law in connection with the filling of a supervisory position. *Id.*

Further, the Union contends that the award is contrary to law. Specifically, the Union asserts that the award violates § 7106(a)(2) [3] because, under that section, "the negotiated grievance procedure is available to unions and employees to enforce external limitations contained in 'applicable laws.'" *Id.* at 7 (citations omitted). According to the Union, 5 U.S.C. § 3326(c)(4) constitutes such an applicable law. *See id.* The Union also argues that the award violates § 7103(a)(9) [4] of

3. Section 7106 provides, in pertinent part:

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency –

. . . .

(2) in accordance with applicable laws –

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted; [and]

(C) with respect to filling positions, to make selections for appointments from –

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source[.]

4. Section 7103 provides, in pertinent part:

(a) For the purpose of this chapter –

. . . .

(9) "grievance" means any complaint –

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning –

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

the Statute and paragraph 2.27 [5] of Air Force Manual 36-203.

Moreover, the Union argues that the Arbitrator failed to conduct a fair hearing because he allowed the Agency to raise the issue of arbitrability less than one week before the hearing, in violation of the parties' agreement. *Id.* at 8-9. In this regard, the Union states that Article 30, § 6 of the parties' agreement requires that any question concerning the arbitrability of a grievance be submitted to and decided by the Arbitrator prior to the hearing date. The Union acknowledges that the Agency gave it notice when it denied the grievance that, if the Union took the grievance to arbitration, then the Agency reserved its right to raise the arbitrability issue. However, the Union claims that it was placed at a "severe disadvantage" because the Arbitrator "decided not to hear the merits" of the dispute on the hearing date and instead "instructed the parties to send in their briefs" regarding arbitrability within three weeks after the hearing date. *Id.* at 9, 3. In addition, the Union contends that the Agency was allowed to submit two briefs, but the Union was allowed to submit only one.

Finally, the Union contends that the award violates public policy because the Agency has violated the Veterans Employment Opportunities Act (VEOA) of 1998, Public Law 105-339.

B. Agency's Opposition

With respect to the Union's nonfact claim, the Agency asserts that an interpretation of law cannot be challenged as a nonfact. Opp'n at 3 (citing *AFGE, Nat'l Border Patrol Council, Local 2455*, 62 FLRA 37 (2007) (*Local 2455*)). The Agency argues that the Union has not shown the Arbitrator's interpretation of *Air Nat'l Guard* to be implausible. The Agency also contends that, in addition to *Air Nat'l Guard*, other Authority precedent supports the Arbitrator's determination. *Id.* at 3-4 (citing *NAGE, Local R1-109*, 61 FLRA 588 (2006); *AFGE, Local 3911*, 59 FLRA 516 (2003) (Concurring Opinion of Chairman Cabaniss)).

Moreover, the Agency claims that the Union's essence exception constitutes "nothing more than a disagreement with [the] Arbitrator['s] legal conclusion that the grievance [is] not substantively arbitrable." *Id.* at 4-5. With respect to the Union's contrary-to-law exceptions, the Agency argues that the Union is attempting to argue the merits of the grievance before the Authority and that such arguments cannot be considered unless the Authority sets aside the Arbitrator's substantive arbitrability determination. *Id.* at 5.

Further, the Agency asserts that the Union has provided no basis for finding that the Arbitrator failed to conduct a fair hearing. *Id.* at 5-6. In this regard, to the extent the Union asserts that the issue of arbitrability should have been raised and decided prior to the hearing date, the Agency contends that there is no provision in the parties' agreement that supports this assertion. By agreeing to submit briefs on the issue of arbitrability to the Arbitrator, the Agency contends that the parties complied with Article 30, § 6 and that the Union elected not to submit a second brief to the Arbitrator. *Id.* at 6-7.

Finally, with respect to the Union's public-policy exception, the Agency asserts that the Union has failed to identify any explicit, well-defined, and dominant public policy with which the award allegedly conflicts. *Id.* at 7 (citing *AFGE, Local 507*, 61 FLRA 88 (2005); *Soc. Sec. Admin.*, 32 FLRA 765, 767 (1988)). As with the Union's contrary-to-law exceptions, the Agency asserts that the Union's argument that the Agency violated the VEOA goes to the merits of the Union's grievance and can only be considered if the Authority sets aside the Arbitrator's finding that the grievance is not substantively arbitrable.

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

Contending that the Arbitrator misapplied *Air Nat'l Guard*, the Union excepts that the award is based on a nonfact. To establish that an award is based on a nonfact, the appealing party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See, e.g.*, *NFFE, Local 561*, 52 FLRA 207, 210 (1996) (*Local 561*). However, when a determination alleged to constitute a nonfact is an interpretation of law, the determination cannot be challenged as a nonfact. *See, e.g.*, *NTEU*, 63 FLRA 198, 201 (2009); *Local 2455*, 62 FLRA at 40; *Local 561*, 52 FLRA at 210-11.

5. Opp'n, Attach. 4, ¶ 2.27 states:

> **Employee Complaints.** An employee, who believes his or her experience was not properly credited, was incorrectly ranked, or that the terms of the promotion plan were not otherwise followed, thereby depriving him/her of promotion consideration, is encouraged to discuss his/her concern informally with the local CPF [Civilian Personnel Flight]. If the issue concerns the ranking and referral process, the local CPF may contact the regional center or the appropriate career program. If the concern deals with the selection process, the matter should be resolved locally. If these efforts are unsuccessful, the employee may submit a formal grievance in accordance with negotiated or agency grievance procedures. CPFs must keep the appropriate career program informed of complaints concerning covered positions. . . .

The Union has not established that the Arbitrator's interpretation of *Air Nat'l Guard* constitutes a "fact" underlying the award. *See Local 2455*, 62 FLRA at 40; *Local 561*, 52 FLRA at 210-11. Accordingly, we deny the Union's nonfact exception.

B. The award does not fail to draw its essence from the parties' agreement.

The Union also argues that the arbitrability determination fails to draw its essence from Article 1, § 4 (Section 4) of the parties' agreement. As one of the Union's fair-hearing exceptions disputes the Arbitrator's interpretation and application of Article 30, § 6 (Section 6) of the parties' agreement, we construe that claim as an additional essence exception. [6]

An arbitrator's determination regarding substantive arbitrability under the terms of a collective bargaining agreement is subject to the deferential essence standard. *See, e.g.*, *AFGE, Local 12*, 61 FLRA 456, 457-58 (2006) (citing *Nat'l Air Traffic Controllers Ass'n*, 56 FLRA 733, 735 n.3 (2000)); *NAGE, Local R4-45*, 55 FLRA 695, 699-700 (1999). [7] In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review 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 U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it [i]s the arbitrator's construction of the agreement for which the parties have bargained[.]" *Id.* at 576.

Section 4 limits "[t]he [u]nit to which the [parties'] agreement is applicable" to "all nonsupervisory, nonmanagement civilian" Air Traffic Control Specialists employed by the Agency and "the nonsupervisory, nonmanagement civilian" Electronic Technicians who directly support them. Award at 2. In the absence of a stipulation, the Arbitrator framed the issue, in part, as whether Section 4 excludes supervisory positions from coverage under the parties' agreement. *See id.* at 1. The Arbitrator found that such positions, including the one disputed in this case, are excluded from coverage by Section 4. The Arbitrator's construction of Section 4 does not conflict with the text of that provision, the text of Article 29, § 4, or any other provision of the agreement, nor is there any provision of law requiring the Arbitrator to reach a different result. [8] Accordingly, the Union has not demonstrated that the Arbitrator's interpretation is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement.

With regard to the exception concerning Section 6, that provision states, in pertinent part, "If there is a question of arbitrability, [then] that issue shall be submitted to an arbitrator and decided on written briefs prior to any hearing." Award at 3. The Union concedes that the Agency preserved its right to raise arbitrability, but the Union asserts that it was "severely disadvantaged" when the Arbitrator declined to hold a hearing on the merits of the dispute and instead directed the parties to brief only the issue of arbitrability. Exceptions at 9. The plain language of Section 6 provides that any issue regarding arbitrability "*shall be* submitted to an arbitrator and *decided on written briefs prior to any hearing*." Award at 3 (emphasis added). Further, the Union acknowledges that the Arbitrator postponed a hearing on the merits and granted both parties three weeks from the hearing date to prepare and submit briefs regarding arbitrability. *See* Exceptions at 3. Thus, the Union has failed to demonstrate how the Arbitrator's interpretation of Section 6 as requiring the parties to submit briefs on arbitrability prior to the hearing is irrational, unfounded,

6. The Union's other fair-hearing exception claims that the Agency was allowed to submit two briefs to the Arbitrator, whereas the Union was only allowed to submit one. As the Union has not provided any explanation of how this alleged occurrence deprived the Union of a fair hearing, we deny the claim as a bare assertion. *See, e.g.*, *NAGE, Local R5-188*, 59 FLRA 696, 697 n.4 (2004).

7. Where an arbitrator's substantive arbitrability determination is based on law, the Authority reviews that determination *de novo*. *See, e.g.*, *AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 466 (2009) (citing *NTEU*, 61 FLRA 729, 732 (2006)); *AFGE, Council 236, Region 2*, 61 FLRA 1, 2 (2005); *see also Fraternal Order of Police, N.J. Lodge 173*, 58 FLRA 384, 385-86 (2003) (describing distinction between substantive arbitrability determinations based on law and determinations based on contract, and explaining manner in which the Authority reviews those determinations); *cf. ACT, Show-me Army Chapter*, 58 FLRA 154, 155 (2002) (explaining that when arbitrator's substantive arbitrability determination is based on contract provisions that mirror, or are intended to be interpreted in the same manner as, the Statute, the Authority reviews determination *de novo*).

8. See *infra* Part IV.C. for discussion of the award's consistency with law.

implausible, or in manifest disregard of the parties' agreement.

C. The award is not contrary to law.

The Union argues that the award is contrary to § 7106(a)(2) because its grievance seeks to enforce 5 U.S.C. § 3326(c)(4) (§ 3326(c)(4)), which it asserts constitutes an "applicable law" within the meaning of § 7106(a)(2). *See* Exceptions at 6-7. 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 *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

According to the Union, negotiated grievance procedures are available to unions to enforce external limitations on management rights contained in applicable laws. *See* Exceptions at 7 (citations omitted). However, even if § 3326(c)(4) constitutes an applicable law within the meaning of § 7106(a)(2), the Union does not demonstrate how these statutory provisions establish that the Arbitrator's substantive arbitrability determination is contrary to law. That is, even if the Statute would *permit* alleged violations of § 3326(c)(4) to be grieved, that does not compel a conclusion that the *parties' agreement must encompass* such a grievance. Accordingly, the Union does not establish how the award is inconsistent with § 3326(c)(4) or § 7106(a)(2). For the foregoing reasons, we deny the Union's contrary-to-law exceptions.

D. The award is not contrary to public policy.

Although the Union claims that the award is contrary to the public policy embodied by the VEOA, 5 U.S.C. § 3304, the Union supports this claim with arguments that *the Agency* violated the VEOA, which presents no basis for finding that the substantive arbitrability determination in *the award* is deficient. *See* Exceptions at 9-10 ("[T]he Union discovered that the Agency is violating [the VEOA.]"). Therefore, we deny the public-policy exception.

V. Decision

The Union's exceptions are denied.

Member Beck, Dissenting:

I disagree with my colleagues' conclusion that the award draws its essence from Article 1, § 4 of the parties' agreement. For the reasons that follow, I believe that the Arbitrator's substantive arbitrability determination fails to draw its essence from that provision and would remand the award to the parties for resubmission to the Arbitrator, absent settlement, for a decision on the merits.

Article 1, § 4 limits "[t]he [u]nit to which the [parties'] agreement is applicable" to "all nonsupervisory, nonmanagement civilian" Air Traffic Control Specialists employed by the Agency and "the nonsupervisory, nonmanagement civilian" Electronic Technicians who directly support them. Award at 2. The Arbitrator found that, because the grievance concerned the filling of a supervisory position, this provision excluded the grievance from the coverage of the parties' agreement. By its plain language, however, Article 1, § 4 merely defines the composition of the bargaining unit; it cannot plausibly be read to limit the scope or subject matter of the grievances that may be brought pursuant to the parties' agreement.

Indeed, as noted by the Union, *see* Exceptions at 6, this issue is addressed in an entirely separate and distinct provision of the parties' agreement. *See id.*, Attach. 3 at 13-14. That provision — Article 29, § 4 — sets forth ten categories of grievances that are excluded from the coverage of the parties' negotiated grievance procedure. Significantly, grievances concerning the filling of supervisory positions are *not* included on that list. Thus, in my view, the Majority's finding that the Arbitrator's construction of Article 1, § 4 "does not conflict with . . . the text of Article 29, § 4," Majority at 7, is incorrect, and the Majority upholds an interpretation by the Arbitrator that evidences a manifest disregard of the parties' agreement. *See, e.g., AFGE, Local 547*, 19 FLRA 725, 727 (1985) (finding Arbitrator's award evidences manifest disregard of the parties' agreement because Arbitrator decided issue regarding incentive awards, which had been expressly excluded from the negotiated grievance procedure under the agreement); *see also Overseas Educ. Ass'n*, 4 FLRA 98, 102 (1980) (based on the Authority's reading of the parties' "entire agreement," the award fails to draw its essence from the agreement).

Accordingly, I believe that the Arbitrator's interpretation of Article 1, § 4 is implausible and evidences a manifest disregard of the parties' agreement, and, as a result, fails to draw its essence the parties' agreement. *See, e.g., SSA, Office of Labor Management Relations,*

60 FLRA 66, 67 (2004) (award deficient as not representing plausible interpretation of agreement); *U.S. Small Bus. Admin.*, 55 FLRA 179, 182 (1999) (award deficient because arbitrator's interpretation of agreement was incompatible with its plain wording); *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993) (award deficient because arbitrator's interpretation of agreement was incompatible with its plain wording). Consequently, consistent with Authority precedent, I would remand the award to the parties, absent settlement, for resubmission to the Arbitrator so that he can decide, on the merits, whether the Agency violated 5 U.S.C. § 3326(c)(4). *See, e.g., NTEU*, 61 FLRA 729, 733 (2006) and cases cited therein.