65 FLRA No. 64

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE COMMISSARY AGENCY
RANDOLPH AIR FORCE BASE, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1035
(Union)

0-AR-4190

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DECISION

December 9, 2010

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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 Milden J. Fox Jr. 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.[1] The Union filed an opposition to the Agency's exceptions.

As relevant here, the Arbitrator found that the Agency admitted favoritism. For the reasons that follow, we set aside the award.

II. Background and Arbitrator's Award

The grievance alleges that the Agency violated Article 27, Section 2 of the parties' agreement by exhibiting favoritism toward a particular Computer Assisted Ordering Worker (CAO-1) in several respects.[2] The grievance was submitted to arbitration, where the Arbitrator framed the issue as follows: "Did the Agency violate any law, rule, regulation or [c]ontract in the way it treated CAO-1 in comparison to other members of the Randolph Commissary bargaining unit? If so, what, if any, is the remedy?" Award at 17.

The Arbitrator found that the Union "failed to prove that any employee was disadvantaged in a monetary or job performance manner." *Id.* at 26. However, the Arbitrator found that the Agency "admitted . . . that favoritism has taken place." *Id.* Accordingly, the Arbitrator sustained the grievance. *See id.* at 27.

1. The Arbitrator's award resolved three grievances, specifically, grievances pertaining to: (1) alleged Agency favoritism (the favoritism grievance); (2) light duty work for an employee who required safety shoes (the safety shoe grievance); and (3) an employee's termination (the termination grievance). We note that the Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural regulations, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the prior Regulations were in effect during the time period when the parties had the opportunity to file exceptions, we apply the prior Regulations. Applying those Regulations, as the award was served on the parties on December 24, 2006, the thirty-day period for filing exceptions ended on January 22, 2007. *See former* 5 C.F.R. § 2425.1(b) (thirty-day period included date of service of award). As the award was served by regular U.S. mail, five days were added to the filing period, extending the due date until January 27, 2007. *See former* 5 C.F.R. § 2429.22. As that date was a Saturday, the due date was again extended until Monday, January 29, 2007. *See former* 5 C.F.R. § 2429.21. On January 25, 2007, the Agency filed timely exceptions. Although a cover sheet to the exceptions referred to both the favoritism grievance and the safety shoe grievance, the Agency's exceptions addressed only the favoritism grievance. On February 22, 2007, the Authority issued a deficiency order directing the Agency to submit four copies of its exceptions. On February 28, 2007, the Agency responded to the order by resubmitting its original exceptions regarding the favoritism grievance and, for the first time, submitting exceptions regarding the safety shoe grievance. As the latter exceptions were not filed by the January 29, 2007, due date for filing exceptions, those exceptions are untimely, and we do not consider them further. Additionally, as no exceptions were filed regarding the termination grievance, we do not consider that grievance further. Thus, our reference to the "award" herein concerns the award regarding the favoritism grievance.

2. Article 27, Section 2 of the parties' agreement provides that "[a]ll personnel shall be treated with fairness, equity, and dignity in all matters without favoritism or regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition." Award at 5.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the Arbitrator's finding that the Agency admitted that favoritism had occurred is a nonfact. Exceptions at 2. The Agency states that, after the award issued, it contacted the Arbitrator to inquire about the basis for the finding of the admission and the Arbitrator responded that the admission was contained in the Agency's post-hearing brief. *See id.* at 4. In response, the Agency asserts that "[a]t no time did the Agency . . . admit that favoritism had occurred[,]" and contends that it was "not rational to draw an inference from the Agency's brief that it was admitting [to] . . . favoritism[.]" *Id.* The Agency also contends that the award is contrary to the Federal Rules of Evidence insofar as the Arbitrator relied on the Agency's post-hearing brief, as that brief does not constitute evidence. *See id.*

B. Union's Opposition

The Union contends that the Agency's nonfact exception provides no basis for finding the award deficient. In this regard, the Union asserts that the Authority will not find an award deficient on this ground if the alleged nonfact is based on an arbitrator's determination of a factual matter that the parties disputed at arbitration. *See* Opp'n at 2.

IV. Analysis and Conclusions

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 NFFE, Local 1984*, 56 FLRA 38, 41 (2000). The Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.*

Here, the Arbitrator found that the Agency had admitted favoritism. *See* Award at 26. However, there is nothing in the award, or in the portion of the Agency's post-hearing brief relied on by the Arbitrator, supporting a conclusion that the Agency admitted favoritism. Thus, the finding is clearly erroneous. Moreover, the finding is central to the award. In this regard, the Arbitrator found that the Union did not establish that the Agency acted improperly, "[b]ut it has been admitted by the Agency that favoritism has taken place." *Id.* A review of the award as a whole leads to the conclusion that, but for the Arbitrator's erroneous finding, he would not have found favoritism. In addition, contrary to the Union's assertion, there is no basis to conclude that this particular factual finding — that the Agency conceded favoritism — was disputed below. Therefore, the central fact underlying the award is clearly erroneous, but for which the Arbitrator would have reached a different result. Accordingly, we find that the award is based on a nonfact, and set it aside.[3] *See, e.g., AFGE, Local 507*, 58 FLRA 378, 381 (2003) (Chairman Cabaniss dissenting).

V. Decision

The award is set aside.

3. As we find that the award is based on a nonfact, it is unnecessary to address the Agency's claim that the award is contrary to the Federal Rules of Evidence.