64 FLRA No. 157

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES
CUSTOMS AND BORDER PROTECTION
JFK AIRPORT
QUEENS, NEW YORK
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1917
(Union)

0-AR-4264

_____

DECISION

May 28, 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 Martin Ellenberg 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 grievance alleges that the Agency suspended the grievant without just cause and denied her overtime and premium pay opportunities in violation of the collective bargaining agreement. The Arbitrator found that there was not just and appropriate cause for the suspension and directed the Agency to make the grievant whole for any lost compensation and benefit accruals. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievant, a Customs and Border Protection Officer working as a primary officer at an airport, received a letter proposing her removal based on alleged negligence in the performance of her duties. Award at 2. In the letter, the grievant was charged with failing to follow an established procedure when she admitted an arriving passenger, whom the Agency alleged was a possible match to an individual subject to a National Crime Information Center lookout (an "NCIC lookout"), through the primary lanes at Newark Liberty International Airport after a primary inspection, rather than referring him for a secondary inspection. *Id*. at 2-3. Prior to the issuance of this letter, the grievant had opportunities to earn overtime and premium pay. *Id*. at 8, 11. However, after its issuance, the grievant was relieved of her badge and firearm, was assigned administrative duties, and was unable to earn overtime and premium pay. *Id*. at 6, 9 & 12. These conditions remained until the grievant received a letter, more than ten months later, reducing the proposed penalty to a two-day suspension. *Id*. at 3.

The Union invoked arbitration to appeal the suspension. *Id*. Because the parties could not agree on a joint statement of the issues, the Arbitrator framed the following issues:

> 1. Was there just and appropriate cause for the Agency to suspend [the grievant] for two days[?] If not, what shall be the remedy?
>
> 2. Was the denial of overtime and premium pay opportunities [while the proposed disciplinary action was pending] a violation of the collective bargaining agreement? If so, what shall be the remedy?

Id. at 3; *see also* Tr. at 11-14.

The Arbitrator found that "there can be no doubt, whatsoever," that the passenger whom the grievant admitted was not the individual subject to the NCIC lookout. *Id*. at 13.[1] The Arbitrator noted, in this regard, that, after being admitted, the passenger was stopped at a "checkpoint" and was then cleared. *Id.* The Arbitrator also noted that, when the NCIC lookout's passport was swiped through a machine reader, his name appeared as a "hit," not a "match." *Id*. Based on his consideration of the record evidence, the Arbitrator found that, when a primary officer had "no real doubt" that a hit was not a match

1. The Arbitrator noted that, whereas the subject of the NCIC lookout was black, heavy, indicted for unpaid child support, and named Gary J., the passenger was white, slim, traveling with his wife and daughter, and named Gregory J. Award at 12. The two men also had different states of birth. *Id*. at 2.

for a lookout, she was not required to refer the hit to a secondary officer. *Id*. at 13-16. As such, the Arbitrator found that the grievant did not violate Agency policy when she admitted the passenger, and as a result, the Agency did not have just and appropriate cause to suspend the grievant. *Id*. at 17. For the same reason, the Arbitrator found that the Agency did not have just and appropriate cause to issue the letter proposing the grievant's removal. *Id*.

Regarding the lost opportunity to earn overtime and premium pay, the Arbitrator found no dispute that such opportunity was lost solely because the letter of proposed removal was issued. *Id*. The Arbitrator found that the Agency issued the letter of proposed removal without cause, reasoning that, even if the grievant had violated Agency policy, such violation was not significant enough to warrant her proposed removal. *Id*. at 16. In making this finding, the Arbitrator noted that, during the nine months between the alleged infraction and the issuance of the proposed removal letter, the Agency permitted the grievant to continue in her duties as a primary officer. *Id*. Moreover, the Arbitrator found that a comparison of the admitted passenger with the data on the NCIC lookout would not support a finding that the grievant's action had the potential to compromise national security. *Id*. The Arbitrator determined that, because the proposed removal letter was issued without cause, the denial of overtime and premium pay opportunities also was without cause. The Arbitrator found that this denial violated Article 27 of the parties' agreement, which prohibits the assignment of overtime as a reward or a penalty. *Id*. at 17.[2]

The Arbitrator directed the parties to determine the lost compensation for which the grievant should be reimbursed and, if they fail to reach an agreement, to submit their estimates for a final determination by the Arbitrator. *Id*. at 17-18.

2. Article 27 of the collective bargaining agreement provides, in relevant part:

> Overtime assignments will be distributed and rotated fairly and equitably among eligible and qualified employees. Supervisors shall not assign overtime work to employees as a reward or a penalty, but solely in accordance with the Service's need.

Exceptions, Attach., J. Ex. 1A at 51.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the Arbitrator exceeded his authority when he found that the Agency had no cause to propose the grievant's removal. Exceptions at 8-9, 11-15. The Agency contends that the issue before the Arbitrator was whether there was just and appropriate cause for the two-day suspension, not whether there was just and appropriate cause for the proposed removal letter. *Id*. at 11-12. Further, the Agency contends that the Arbitrator, in considering the letter, disregarded specific limitations that he had placed on his own authority. *Id*. at 13-15. The Agency contends, in this regard, that the Arbitrator stated several times during the hearing that the issue of removal, and, therefore, the letter of proposed removal, were not before him. *Id*. at 13-15.

The Agency contends that the Arbitrator's finding regarding the proposed removal letter is also contrary to law because it interferes with the Agency's right to decide what penalty to impose in a disciplinary action and, therefore, is contrary to § 7106(a)(2)(A) of the Statute. *Id*. at 9, 15-20.

Further, the Agency contends that the award is based on two nonfacts: (1) that the proposed removal letter was issued without cause, *see id*. at 9-10, 21-22; and (2) that the record evidence did not clearly establish that the Agency's policy required primary officers to "refer all passengers who were possible matches to NCIC lookouts for secondary examinations." *Id*. at 10, 23-27.

B. Union's Opposition

The Union contends that the Arbitrator did not exceed his authority when he decided that the proposed removal letter was issued without cause because this finding pertains directly to the issue before him concerning the denial of overtime and premium pay opportunities. Opp'n at 17-19. In addition, the Union contends that the Agency mischaracterizes the Arbitrator's comments regarding whether the letter was at issue before him and that the Agency itself placed the proposed removal letter before the Arbitrator. *Id*. at 19. According to the Union, the Agency argued, both at the hearing and in its post-hearing brief, that it "had t[he] right to deprive [the g]rievant of premium pay and overtime opportunities because she received a proposed removal." *Id*.

As for the Agency's contention that the award was contrary to § 7106(a)(2)(A) of the Statute, the Union notes that this issue was not raised below; as a result, the Union contends, the Agency may not raise this issue now in its exceptions. *Id*. at 19. Finally, the Union contends that the Agency's nonfact exceptions are nothing more than disagreements with the Arbitrator's factual findings. *Id*. at 17.

IV. Preliminary Issue

In its exceptions, the Agency contends that the Arbitrator's finding regarding the proposed removal letter is contrary to § 7106(a)(2)(A) of the Statute because it interferes with the Agency's right to decide what penalty to impose in a disciplinary action. Exceptions at 9. Under 5 C.F.R. § 2429.5, an issue that could have been, but was not, presented to an arbitrator will not be considered by the Authority. *See U.S. Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 59 FLRA 542, 544 (2003). Although the Agency argued below that an award of overtime to the grievant would be contrary to § 7106(a)(2)(B) of the Statute because it would interfere with management's right to assign work, *see* Agency's Post-Hearing Brief at 36-37, the Agency did not argue that such an award would be contrary to § 7106(a)(2)(A) of the Statute. Moreover, the Agency did not explain in its exceptions why it could not have presented this issue to the Arbitrator. Therefore, we dismiss this exception.

V. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In the absence of a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference. *See U.S. Dep't of the Army, Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997).

The parties in this case did not stipulate the issues for resolution. Accordingly, the Arbitrator formulated the issues. The Agency does not contend that the Arbitrator's formulation of the issues was unreasonable. Rather, the Agency contends that the Arbitrator's finding that the proposed removal letter was issued without cause is not directly responsive to the first issue formulated by the Arbitrator -- i.e., whether there was just and appropriate cause for the final Agency action of suspension, and that the Arbitrator, in considering the letter, disregarded specific limitations that he had placed on his own authority. The Agency ignores, however, that this finding is directly responsive to the second issue formulated by the Arbitrator -- i.e., whether the grievant's loss of overtime and premium pay opportunities violated the parties' agreement.

Moreover in considering the letter, the Arbitrator did not ignore specific limitations that he had placed on his own authority. Although the Agency correctly states that Arbitrator noted that the grievant's proposed removal was not before him and that the proposed removal letter was not relevant to the first issue before him, the Arbitrator specifically found that the letter was determinative regarding the second issue. *See* Award at 17 (noting that it was undisputed that the grievant's loss of overtime and premium pay opportunities were due to the proposed removal letter). Moreover, as the Union notes, the Agency itself argued that, because the grievant received a letter proposing her removal, the Agency had the right to deprive her of premium pay and overtime opportunities. *See id.* at 12 (noting that Agency argued that, under Agency policy, an employee who has been served with a proposed removal letter "is ineligible to work overtime").

Accordingly, we find that the Arbitrator did not exceed his authority and we deny this exception. *See, e.g., AFGE, Local 2145*, 63 FLRA 78, 80 (2009) (arbitrator did not exceed his authority where award was directly responsive to issues before him).

B. 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 NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, 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.*

Both nonfacts alleged by the Agency -- that the proposed removal letter was issued without cause and that the Agency's policy did not clearly require primary officers to refer all potential matches to a secondary officer -- were disputed at arbitration. *See* Award at 4-8; 10 (testimony on Agency policy); 10 (testimony on appropriateness of proposed removal); Agency's Post-Hearing Brief at 11-14; 22 n.9

(argument that the proposed removal letter was based on grievant's negligent noncompliance with Agency policy); 14-19 (argument on Agency policy). Consequently, the Agency's claim provides no basis for finding that the award is deficient because it is based on a nonfact. *See U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593-94 (1993) (award not deficient based on a nonfact where excepting party challenges a factual matter that the parties disputed at arbitration).

Accordingly, we deny this exception.

VI. Decision

The Agency's exceptions are denied.