64 FLRA No. 194

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3937
(Union)

and

SOCIAL SECURITY ADMINISTRATION
REGION X
(Agency)

0-AR-4648

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DECISION

July 21, 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 M. Zane Lumbley 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 Agency's exceptions.

The Arbitrator found the Agency did not violate the parties' 2005 Master Labor Agreement (the 2005 MLA) when it refused to bargain over twelve memoranda of understanding (the 12 MOUs).

For the reasons that follow, we dismiss the Union's exception concerning § 7117 of the Statute, and we deny the remaining exceptions.

II. Background and Arbitrator's Award

As relevant here, in the past, the parties bargained over local mid-term agreements and incorporated those local agreements into their successive, national term agreements. Award at 7. In 2003, the Agency notified the Union that, upon expiration of the national agreement in existence at that time (the 2000 MLA), the Agency intended to terminate the 2000 MLA and all existing local agreements. *Id.* at 8. The parties then bargained over, and reached agreement on, a new national agreement, the 2005 MLA. *Id.* at 10.

Subsequently, the Agency notified the Union that it would no longer follow the 12 MOUs, which were locally negotiated agreements that existed prior to the 2005 MLA. *Id.* at 12. The Union requested bargaining, but when the Agency denied that request, the Union filed a grievance that was unresolved and submitted to arbitration. *Id.* at 12-13. At arbitration, the parties were unable to agree to a statement of the issues, and the Arbitrator framed them, in pertinent part, as follows:

> 1. Did the Agency violate the 2005 [MLA] by refusing to bargain over the [12] MOUs . . . ?
>
> 2. If so, what is the appropriate remedy?

Id. at 2.

The Arbitrator found it "undisputed" that, during negotiations over the 2005 MLA, "the Union never directly raised and attempted to preserve" the 12 MOUs. *Id.* at 11. The Arbitrator also found that, if the Union had wanted the 12 MOUs to survive the implementation of the 2005 MLA, then "it fell to the Union to ensure" such survival at the bargaining table, but that it had failed to do so. *Id.* at 19. As such, the Arbitrator determined that the 12 MOUs "ceased to exist" upon expiration of the 2000 MLA, and that "the practices embodied in them, except to the extent the parties agreed in negotiations to place portions of them in the 2005 MLA, reflected conditions of employment which the Agency was not obligated to honor after the 2005 MLA became effective[.]" *Id.* at 18. Accordingly, the Arbitrator found that the Agency did not violate the 2005 MLA when it denied the Union's request to bargain over the 12 MOUs. *Id.* at 22.

III. Positions of the Parties

A. Union's Exceptions

The Union requests oral argument before the Authority. Exceptions at 2-3. In addition, the Union argues that the award is based on a nonfact, specifically the Arbitrator's finding that the conditions of employment set forth in the 12 MOUs were no longer in effect as of the effective date of the 2005 MLA. *Id.* at 8-9. The Union also argues that, as those conditions of employment continued to exist as of the 2005 MLA's effective date, the award fails to draw its essence from Article 1, Section 2 of the 2005 MLA, which requires the Agency to bargain over changes in conditions of employment.[1] *Id.* at 3-4, 9. Finally, the Union argues that the award is contrary to §§ 7102(2), 7114 and 7117 of the Statute because it permits the Agency to "[u]nilaterally [a]brogate" the conditions of employment set forth in the 12 MOUs.[2] *Id.* at 4.

B. Agency's Opposition

The Agency asserts that the Authority should not grant oral argument. Opp'n at 2. In addition, the Agency asserts that the award is not based on a nonfact and does not fail to draw its essence from the 2005 MLA. *Id.* at 9-20. Further, the Agency asserts that the Union's exceptions regarding §§ 7102(2), 7114, and 7117 of the Statute should be dismissed because they were not raised before the Arbitrator. *Id.* at 24-25. Alternatively, the Agency contends that the Union has not demonstrated that the award is contrary to those statutory provisions. *Id.* at 25-28.

IV. Preliminary Matters

A. The Union's request for oral argument is denied.

Section 2429.6 of the Authority's Regulations provides that the Authority, in its discretion, may request or permit oral argument in any matter "under such circumstances and conditions as they deem appropriate." The Authority has denied requests for oral argument where the record provided a sufficient basis on which to render a decision. *See, e.g., Nat'l Mediation Bd.*, 56 FLRA 320, 320 n.3 (2000) (Chairman Wasserman, dissenting in part and concurring in part); *U.S. Info. Agency, Voice of Am.*, 33 FLRA 549, 550 n.1 (1988). As the record in this case provides a sufficient basis on which to render a decision, we deny the Union's request for oral argument.

B. The Union's exception regarding § 7117 of the Statute is dismissed, but its exceptions regarding §§ 7102(2) and 7114 are properly before the Authority.

Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, presented to an arbitrator. *E.g., AFGE, Local 1633*, 64 FLRA 732, 733 (2010). Here, the record does not indicate that the Union cited § 7117 of the Statute before the Arbitrator, although it could have done so. Accordingly, consistent with § 2429.5, we dismiss the Union's exception regarding § 7117. However, the record indicates that the Union did raise §§ 7102(2) and 7114 of the Statute before the Arbitrator. *See, e.g.*, Opp'n, Attach. 5 (Union Post-Hearing Brief) at 3 n.2. Accordingly, the Union's exceptions regarding those statutory sections are properly before us, and we resolve them below.

V. Analysis and Conclusions

A. The award is not based on a nonfact.

To establish that an award is based on a nonfact, a party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry AFB*). The Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed before the arbitrator. *Id.* at 594.

1. Article 1, Section 2 of the 2005 MLA provides: "In order to change any conditions of employment that were in effect on the effective date of this Agreement and that are not covered by this Agreement, the Agency shall provide notice, and, upon request, bargain with the Union to the extent required by law and in accordance with Article 4 of this Agreement." Award at 4.

2. Section 7102(2) of the Statute provides that employees have the right "to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter." Section 7114 of the Statute sets forth "[r]epresentation rights and duties" of exclusive representatives, including the right to "negotiate collective bargaining agreements covering[]" bargaining-unit employees. Section 7117 of the Statute discusses, among other things, the "[d]uty to bargain in good faith[.]"

The Union's nonfact exception challenges the Arbitrator's finding that the conditions of employment covered by the 12 MOUs were not in effect on the effective date of the 2005 MLA. The parties disputed this matter before the Arbitrator. *Compare* Award at 14 (Union argued that "the practices contained [in the 12 MOUs] were ongoing when the 2005 MLA took effect[]") *with id.* at 16 (Agency argued "terms embodied in [the 12 MOUs] ceased to exist no later than" the effective date of the 2005 MLA). As such, the exception does not provide a basis for finding that the award is based on a nonfact, and we deny the exception. *See Lowry AFB*, 48 FLRA at 594.

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

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 is the arbitrator's construction of the agreement for which the parties have bargained." *Id*. at 576.

As noted previously, Article 1, Section 2 of the 2005 MLA provides, in pertinent part, that the Agency shall give the Union notice and an opportunity to bargain over changes to "any conditions of employment that were in effect on the effective date of" the 2005 MLA. Award at 4. As discussed above, the Arbitrator found that the conditions of employment set forth in the 12 MOUs were not in effect as of the effective date of the 2005 MLA, and we have rejected the Union's claim that this finding is based on a nonfact. Thus, there is no basis for finding that Article 1, Section 2 of the MLA required the Agency to bargain, and the Union has not demonstrated that the Arbitrator's finding that there was no contractual obligation to bargain is irrational, implausible, unfounded, or evidences a manifest disregard of the agreement. Accordingly, we deny the essence exception.

C. The award is not contrary to §§ 7102(2) and 7114 of the Statute.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an 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 a *de novo* standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See 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 Union's argument regarding §§ 7102(2) and 7114 of the Statute is premised on the claim that the Agency unilaterally terminated conditions of employment -- specifically, those embodied in the 12 MOUs -- that existed as of the effective date of the 2005 MLA. However, as discussed previously, the Arbitrator found that the conditions of employment set forth in the 12 MOUs did not exist as of the effective date of the 2005 MLA, and, in assessing the Union's contrary-to-law exceptions, we defer to the Arbitrator's factual finding in this regard. *See NFFE, Local 1437*, 53 FLRA at 1710. Thus, the Union's exceptions regarding §§ 7102(2) and 7114 of the Statute do not provide a basis for finding the award deficient, and we deny these exceptions.

VI. Decision

The exception concerning § 7117 of the Statute is dismissed, and the remaining exceptions are denied.