64 FLRA No. 201

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2823
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
CLEVELAND REGIONAL OFFICE
(Agency)

0-AR-4610

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DECISION

July 30, 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 David L. Beckman 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.[1]

The Arbitrator found -- based on a determination by a regional director (RD) of the Authority that the Agency had no duty to bargain at the national level over the implementation of a skills-certification program -- that the Union's grievance concerning the Agency's failure to bargain locally was nonarbitrable. For the following reasons, we deny the Union's procedural-arbitrability exception, but we set aside the award as contrary to law and remand it to the parties for resubmission to an arbitrator of their choice, absent settlement.

1. In addition, as discussed further below, the Union filed a request for oral argument and leave to file supplemental submissions.

II. Background and Arbitrator's Award

The Agency implemented a skills-certification program (the program) for use in making promotion decisions. Award at 7. The Union requested to bargain locally over the program, but the Agency denied this request, contending that it had no duty to do so. *Id.*

The Union filed a grievance asserting that the Agency: (1) violated the parties' agreement by failing to bargain locally over the program (failure-to-bargain claim); and (2) at the local level, "deviated" from national agreements and policies by (a) "using a perverse performance appraisal system;" (b) "creating a culture in which the quantity of benefits claims rated is emphasized to the detriment of the quality of those ratings[;]" and (c) "providing inadequate training" (collectively referred to as the local-deviation claims). *Id.* at 7, 13. The grievance was unresolved and submitted to arbitration.

Prior to the arbitration hearing, the Agency filed with the Arbitrator a motion arguing that the grievance was nonarbitrable because the Union had failed to follow national grievance procedures and because the grievance did not involve an issue that was within the Agency's duty to bargain. Exceptions, Attach. M at 3-6. The Agency also argued that it had preserved its right to raise this nonarbitrability argument by timely raising a defense of nongrievability during the processing of the grievance. *Id.* at 2.

Also prior to the arbitration hearing, the RD dismissed an unfair labor practice (ULP) charge filed by the national union alleging that the Agency unlawfully refused to bargain nationally over the program. Award at 8.

In the award, the Arbitrator framed the issue as follows: "Does the instant grievance lack procedural arbitrability under Article 42 in that the grievance (1) was not presented by the proper party, (2) was not presented to the proper party, and (3) was not presented in the proper forum[?]" *Id.* at 2. As an initial matter, the Arbitrator determined that, during the processing of the grievance, the Agency had timely raised a nongrievability argument, and thereby preserved the right to raise, in arbitration, the nonarbitrability of the grievance. *Id.* at 12. The Arbitrator also determined that the Union's local-deviation claims were "a backdoor attempt to negotiate over the [program,]" and he did not address them further. *Id.* at 13.

In addition, citing the RD's determination that the Agency had no duty to bargain nationally, the Arbitrator found that if "there is no national bargaining obligation, there can be no local bargaining obligation." *Id.* at 11. He further found that the facts of the Union's grievance "cannot be distinguished from the facts which underlie the decision by the [RD]." *Id.* The Arbitrator determined that the grievance was "not arbitrable, given the existence of the FLRA ruling[,]" and "dismiss[ed] the grievance for lack of arbitrability[.]" *Id.* at 14. The Arbitrator did not retain jurisdiction.

Following the arbitration hearing, but before the Arbitrator issued the award, the Authority's Office of the General Counsel (OGC) granted the national union's appeal of the RD's dismissal of the ULP charge.[2] Exceptions, Attach. N at 1. After the Arbitrator issued his award, the Union filed with the Arbitrator a motion for reconsideration of his award in light of the OGC's decision to grant the appeal. Exceptions, Attach. O at 1. However, the Arbitrator denied the Union's motion because the award "was meant to be final and binding[,]" and because he "ha[d] no power to change it." Exceptions, Attach. R at 2.

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the Arbitrator's finding that the Agency preserved its right to raise the issue of nonarbitrability fails to draw its essence from Article 42, Section 4 of the parties' agreement.[3] Exceptions at 12-13. The Union also argues that the award is contrary to law because the Arbitrator based his dismissal of the grievance on the RD's subsequently overturned dismissal of the national union's ULP charge. *Id.* at 9-12.

The Union further asserts that the dismissal of the grievance fails to draw its essence from the parties' agreement on two additional grounds. First, the Union contends that the Arbitrator violated the parties' agreement by finding that its local-deviation claims were "a backdoor attempt to negotiate over the [program]." *Id.* at 13-15 (quoting Award at 13). Second, the Union claims that the Arbitrator's determination that the grievance was not arbitrable because there was no duty to bargain nationally and, therefore, locally, violated Article 44, Section 4 of the parties' agreement.[4] *Id.* at 15-16. The Union requests that the Authority "overturn [the award], find the [Union's] claims arbitrable, and order the parties to proceed to arbitration." *Id.* at 16.

B. Agency's Opposition

In response to the Union's request that the Authority order the parties to proceed to arbitration, the Agency contends that, in light of the OGC's reversal of the RD's determination, "the appropriate remedy is remanding the matter back to the Arbitrator to have the award clarified, not proceeding to [a]rbitration." Opp'n at 5. In this connection, the Agency argues that a remedy ordering an arbitrator to proceed on the merits of the grievance would be: (1) moot because the OGC has already ordered the parties to bargain, and such an order is the only remedy available through arbitration; and (2) not ripe because the Agency has not yet met its national bargaining obligations under Article 44, Section 4 of the agreement, thus precluding consideration of the merits of a grievance concerning the Agency's local bargaining obligations. *Id.* at 4-5. The Agency also asserts that the Union's essence exceptions constitute nothing more than a disagreement with the Arbitrator's interpretation of the agreement. *Id.* at 7.

IV. Preliminary Issues

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

The Union filed a request for oral argument pursuant to § 2429.6 of the Authority's Regulations. The Union asserts that oral argument is necessary "to ensure that [an] important public policy issue is adequately addressed and to guarantee that the [A]rbitrator's misapplication of law and misreading of the parties' collective bargaining agreement is corrected." Request for Oral Argument at 2.

Section 2429.6 of the Authority's Regulations provides that the Authority, in its discretion, may permit oral argument in any matter "under such

2. The Authority has been administratively advised that, in April 2010, the Agency and national union reached a pre-complaint settlement in that matter.

3. Article 42, Section 4 of the agreement states, in pertinent part: "The [Agency] must assert any claim of nongrievability or nonarbitrability no later than the Step 3 decision." Exceptions, Attach. T at 171.

4. Article 44, Section 4 of the agreement states, in pertinent part: "On all policies and directives or other changes for which the [Agency] meets its bargaining obligation at the national level, appropriate local bargaining shall take place at individual facilities[.]" *Id.* at 178.

circumstances and conditions as they deem appropriate." 5 C.F.R. § 2429.6. 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); *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 Authority will not consider the Union's supplemental submissions.

The Union concurrently filed a "Request to File a Reply Brief and Declaration in Support of its Exception to a Final Arbitration Award[,]" a "Reply Brief in Support of its Exception to a Final Arbitration Award[,]"and a "Declaration of [Union Counsel] in Support of [its Reply Brief.]" The Union asserts that its supplemental submissions merit consideration because the Agency's opposition "mischaracterizes [the Union's] arguments and contains conflicting statements that must be clarified before the [Authority] may properly adjudicate this appeal." Request to File a Reply Brief and Declaration in Support of its Exception to a Final Arbitration Award at 1.

Section 2429.26 of the Authority's Regulations provides that the Authority may, in its discretion, grant leave to file "other documents" as deemed appropriate. *See, e.g.*, *Cong. Research Employees Ass'n, IFPTE, Local 75*, 59 FLRA 994, 999 (2004). A filing party must demonstrate why its supplemental submissions should be considered. *NTEU, Chapter 98*, 60 FLRA 448, 448 n.2 (2004). The Authority has denied requests for leave to file supplemental submissions on the basis of a party's contention that a party-opponent misstated a party's arguments or matters of law. *See Bremerton Metal Trades Council*, 64 FLRA 103, 104 (2009); *U.S. Dep't of the Navy, Naval Sea Sys. Command*, 57 FLRA 543, 543 n.1 (2001).

Here, the Union requests leave to address alleged mischaracterizations and conflicting statements contained in the Agency's opposition. However, such allegations do not merit granting leave to file supplemental submissions. *See id*. As the Union has failed to demonstrate why its supplemental submissions should be considered, we deny the Union's request and decline to consider the supplemental submissions.

V. Analysis and Conclusions

A. The Arbitrator's procedural-arbitrability determination is not deficient.

The Union's first essence exception challenges the Arbitrator's finding that the Agency had timely raised a claim that the grievance was not substantively arbitrable. The Authority has stated that procedural arbitrability involves questions of whether the procedural conditions to arbitrability have been met or excused, while substantive arbitrability involves questions of whether the subject matter of a dispute is arbitrable. *See, e.g., AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009) (*Border Patrol*). The Arbitrator's finding that the Agency timely raised a claim regarding the substantive arbitrability of the grievance is a procedural-arbitrability determination because it involves whether the procedural conditions necessary to determine the substantive arbitrability of the grievance have been met.

The Authority generally will not find an arbitrator's ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the procedural-arbitrability ruling itself. *See, e.g., AFGE, Local 3882*, 59 FLRA 469, 470 (2003). However, the Authority has stated that a procedural-arbitrability determination may be found deficient on grounds that do not directly challenge the determination itself, which include claims that an arbitrator was biased or that the arbitrator exceeded his or her authority. *See id.; see also U.S. Equal Employment Opportunity Comm'n*, 60 FLRA 83, 86 (2004) (citing *AFGE, Local 2921*, 50 FLRA 184, 185-86 (1995)). The Union's first essence exception directly challenges the Arbitrator's procedural-arbitrability determination and, therefore, does not provide a basis for finding the award deficient. Accordingly, we deny the exception.

B. The award is contrary to law.

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.*

The Union disputes the Arbitrator's finding that he was bound by the RD's subsequently overturned dismissal of the ULP charge. The Authority has held that "the decision not to issue a complaint is a nonreviewable, nonprecedential exercise of the General Counsel's prosecutorial responsibility" and, "[t]herefore, the dismissal of the charge is not binding on the [a]rbitrator or the Authority." *Dep't of Def., Dependents Schs.*, 30 FLRA 1092, 1096 (1988) (citing *Turgeon v. FLRA*, 677 F.2d 937 (D.C. Cir. 1982)). Consequently, to the extent that the award is based on the Arbitrator's determination that he was bound by the RD's dismissal of the ULP charge, the award is contrary to Authority precedent.[5]

The Arbitrator also appears to have found the grievance substantively nonarbitrable based on his determination that if "there is no national bargaining obligation, there can be no local bargaining obligation." Award at 11. The Authority has held that "an issue concerning the scope of bargaining is not dispositive of an issue concerning the arbitrability of a grievance." *Border Patrol*, 63 FLRA at 467 (citing *NTEU, Chapter 15*, 33 FLRA 229, 238 (1988)). In this connection, a matter that is outside the duty to bargain is not necessarily outside the scope of a negotiated grievance procedure. *Border Patrol*, 63 FLRA at 467. Thus, insofar as the Arbitrator based his finding of nonarbitrability on a determination that the grievance did not involve an issue that was within the duty to bargain, the award is contrary to Authority precedent on this basis as well.

For the foregoing reasons, we set aside the Arbitrator's dismissal of the grievance as nonarbitrable as contrary to law. Where an arbitrator incorrectly dismisses a grievance as nonarbitrable, the Authority remands the award to parties for resubmission to an arbitrator of their choice. *See, e.g., AFGE, Local 1045*, 64 FLRA 520, 522 (2010). Accordingly, we remand the award to the parties for resubmission to an arbitrator of their choice, absent settlement.

We note the Union's request that the Authority "overturn [the award], find the [Union's] claims arbitrable, and order the parties to proceed to arbitration." Exceptions at 16. To the extent that the Union is requesting the Authority to direct an arbitrator to resolve the merits of the grievance, we note that the arbitrator on remand could find the grievance nonarbitrable on other grounds. For example, the arbitrator could determine that the grievance is nonarbitrable based on the procedural issues framed but left unresolved at arbitration, such as whether the grievance was presented by the right party, to the proper party, or in the proper forum. Thus, we deny the Union's request in this regard. As such, we also deny the Agency's arguments regarding mootness and ripeness, as they are responsive to the Union's request.

As for the Union's remaining essence exceptions, those exceptions contend that: the agreement provides no basis for the Arbitrator's finding that the Union's local-deviation and failure-to-bargain claims are the same claim; and the Arbitrator's determination that the grievance was not arbitrable because the national union had no duty to bargain violates the express language of the agreement. *Id.* at 13-16. Both of the challenged arbitral findings are premised on the Arbitrator's finding of substantive nonarbitrability, which we have set aside and are remanding for further proceedings. As such, we find that it would be premature to address these exceptions at this time.

VI. Decision

The award is set aside as contrary to law and remanded to the parties for resubmission to an arbitrator of their choice, absent settlement. The procedural-arbitrability exception is denied.

5. Although the Arbitrator issued his award after the OGC's reversal of the RD's determination, there is no evidence that he was aware of that reversal prior to issuing his award. In this connection, as discussed previously, the Union raised the OGC's reversal in a post-award motion, and the Arbitrator denied the motion on the ground that the award was intended to be final and that he consequently had no authority to change it. Therefore, it is unclear whether the Arbitrator would have reached a different result in the award had that reversal been raised to him prior to the award's issuance.