65 FLRA No. 161

SOCIAL SECURITY ADMINISTRATION
LOUISVILLE, KENTUCKY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3627
(Union)

0-AR-4350

_____

DECISION

April 28, 2011

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

I. Statement of the Case

The matter is before the Authority on exceptions to an award of Arbitrator Michael L. Allen 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 Arbitrator found that the Agency violated the parties' agreements with regard to its distribution of Recognition of Contribution (ROC) awards. In addition, he directed the Agency to vacate the ROC awards that had been granted for the year at issue, stated that a particular management official (the Deciding Official) was required to personally evaluate and decide upon award nominations for that year, and retained jurisdiction over the implementation of remedies.

For the reasons that follow, we dismiss the Agency's exceptions in part and deny them in part.

II. Background and Arbitrator's Award

The parties have several agreements involving employee awards, including: (1) a 2000 nationwide agreement (the 2000 Agreement); (2) a 2005 nationwide agreement (the 2005 Agreement); (3) an additional agreement regarding ROC awards (the ROC Agreement); (4) a Memorandum of Understanding (MOU) setting forth the procedures that the Agency "must follow during the nomination process for ROC awards[;]" and (5) an Award Handbook (Handbook) containing the criteria that the Agency will consider in determining which employees would receive ROC awards. Award at 2-3.

When the Agency distributed ROC awards to certain employees but not others, the Union filed a grievance on behalf of nine employees who had not received such awards. *Id.* at 2-3. The grievance was unresolved and submitted to arbitration, where the Arbitrator framed the issues as follows:

> [W]hether the Agency complied with the [MOU[2]] . . . and/or Article 17 of the [2000 Agreement[3]], and/or Article 3, Section 2 of the [2005 Agreement[4]] in deciding whether to approve or deny "ROC" award nominations for nine (9) . . . personnel . . . ? If not, . . . whether the said . . . personnel were treated fairly and equitably by the Agency in its consideration of their ROC awards for said performance period? If either of the said questions is to be answered in the negative, then the final issue herein is the scope of the appropriate remedy.

Id. at 2.

The Arbitrator determined that the parties had agreed to several restrictions on "[m]anagement's otherwise virtually unfettered right to assess nominations[,]" including Article 3, Section 2A of the 2005 Agreement, which requires the Agency to

1. Member Beck's separate opinion, dissenting in part, is set forth at the end of this decision.

2. The pertinent wording of the MOU is set forth below.

3. Article 17, Section 2B of the 2000 Agreement provides, in pertinent part, that the Agency must consider the "relative significance and impact of [the employee's] contributions . . . in determining which type of awards would constitute appropriate recognition, and, for monetary awards, in determining the amount of money to be granted." Award at 10, 15-16.

4. The pertinent wording of the 2005 Agreement is set forth below.

"treat . . . its employees 'fairly and equitably.'" *Id.* at 16. The Arbitrator found that, under the review and approval process set forth in the agreements, "the Deciding Official -- and not the first-line supervisor -- must be the person who, 'decides to approve, deny or reject the ROC award nomination,' and who provides a written 'appropriate justification' for the said decision 'on the Action Form.'" *Id.* The Arbitrator found that "[p]recisely the opposite" occurred because first-line supervisors "not only nominated the ultimate recipients, but also made . . . the decision to approve the ROC awards, even providing the narrative justification and then 'rubber-stamping' the signature of the Deciding Official to the Action Form." *Id.* at 17. According to the Arbitrator, "[b]y relegating the decision-making autonomy to others, the appearance of 'fair and equitable treatment' was . . . seriously compromised[,]" in violation of the parties' agreements. *Id*. at 19.

With regard to remedy, although the Union proposed that each grievant receive a ROC award, *see id*. at 13, the Arbitrator declined to "adopt the proposal of the Union as to remedy[,]" *id*. at 19. Instead, he vacated the ROC awards that the Agency had granted and directed the Deciding Official to "personally review, evaluate and decide each of the nominations, explaining his reasons for approving or disapproving each nomination." *Id.* at 19-20. The Arbitrator also required that such actions be completed within sixty days of the date of his award and "expressly reserve[d] his jurisdiction to consider any complaint as to the decision of the Deciding Official." *Id.* at 20.

III. Positions of the Parties

A. Agency's Exceptions

The Agency claims that the award is contrary to management's right to assign work under § 7106(a)(2) of the Statute. *See* Exceptions at 6-11. In this connection, the Agency asserts that the award fails to satisfy both prongs of the two-pronged test set forth in *United States Department of the Treasury, Bureau of Engraving & Printing, Washington, D.C.*, 53 FLRA 146, 153-54 (1997) (*BEP*). With regard to prong I of *BEP*, the Agency contends that the MOU -- as interpreted by the Arbitrator to require the Deciding Official to review, evaluate, and decide upon each of the award nominations -- is not a contract provision that was negotiated under § 7106(b) of the Statute. *See* Exceptions at 6-9. With regard to prong II of *BEP*, the Agency argues that the remedy directed by the Arbitrator "does not reflect a reconstruction of what the Agency would have done" if it had not violated the MOU. *Id.* at 9.

The Agency also claims that the award fails to draw its essence from the MOU. *Id.* at 4. Specifically, the Agency asserts that, contrary to the Arbitrator's interpretation, the MOU does not require a "wet" signature or "preclude[] the Deciding Official from delegating completion of the award forms or the writing of the narrative to subordinate managers." *Id.* at 5 (citation omitted).

In addition, the Agency contends that the Arbitrator exceeded his authority by directing that all ROC awards for the year at issue be vacated. *Id.* at 10-11. In this connection, the Agency claims that the arbitration involved "whether or not [nine] employees were not given awards appropriately[,] not whether all awards were inappropriately granted." *Id.* at 10.

Finally, the Agency claims that "[t]he Arbitrator was functus officio" when he "reserve[d] . . . jurisdiction to consider any complaint as to the decision of the Deciding Official." *Id.* at 11 (quoting Award at 20). In this connection, the Agency asserts that the Arbitrator's retention of jurisdiction "bypasses the negotiated grievance procedures" set forth in the 2005 Agreement. *Id.*

B. Union's Opposition

The Union claims that the award is not contrary to management's right to assign work and that it draws its essence from the MOU. *See* Opp'n at 3, 2. The Union also claims that the Arbitrator was not functus officio because "it is not uncommon for an [a]rbitrator to retain jurisdiction for a period of time to resolve questions or problems that might arise concerning [an] award." *Id.* at 3.

IV. Preliminary Issues

The Authority's Regulations that were in effect when the Agency filed its exceptions provided that "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5 (§ 2429.5).[5] Under § 2429.5, the Authority will not consider any

5. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural regulations, including § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). Because the Agency's exceptions were filed before that date, we apply the earlier Regulations.

argument that could have been, but was not, presented to the arbitrator. *E.g.*, *AFGE, Local 2923*, 65 FLRA 561, 562 (2011).

Before the Arbitrator, the Union argued that the Agency violated the MOU by allowing individuals other than the Deciding Official to take various actions, including approving awards. *See* Award at 13. Thus, the Agency could have argued to the Arbitrator that interpreting the MOU in this manner would be contrary to management's right to assign work. However, there is no evidence in the record that the Agency did so. Accordingly, under § 2429.5, we dismiss the Agency's exception alleging that the Arbitrator's interpretation of the MOU is contrary to management's right to assign work.

By contrast, it is unclear whether the Agency could have raised, before the Arbitrator, its management-rights challenge to the Arbitrator's chosen remedy. In this connection, the Arbitrator expressly declined to award the remedy requested by the Union and, instead, awarded a different remedy. *See id.* at 19. As there is no basis in the record for finding that the Agency could have raised to the Arbitrator its management-rights argument regarding the awarded remedy, we do not apply § 2429.5 to bar that argument. *Cf. U.S. Dep't of the Treasury, IRS, Andover, Mass.*, 63 FLRA 202, 205 (2009) (applying § 2429.5 where challenged remedies had been requested before arbitrator). Instead, we address that argument below.

For the foregoing reasons, we dismiss the Agency's management-rights exception regarding the Arbitrator's interpretation of the MOU, but we resolve the Agency's management-rights exception regarding the Arbitrator's chosen remedy.

V. Analysis and Conclusions

A. The Agency has not demonstrated that the remedy is contrary to § 7106 of the Statute.

The Agency alleges that the Arbitrator's remedy is contrary to § 7106 of the Statute. The Authority reviews questions of law 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 standard of de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998) (*Local 1437*). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Authority recently revised the analysis that it will apply when reviewing management-rights exceptions to arbitration awards. *See U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-07 (2010) (Chairman Pope concurring) (*FDIC*). Under the revised analysis, the Authority assesses whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115. If so, then the Authority examines whether the award provides a remedy for a violation of either an applicable law, within the meaning of § 7106(a)(2) of the Statute, or a contract provision that was negotiated under § 7106(b). *Id.* In setting forth the revised analysis, the Authority rejected the continued application of the "reconstruction" requirement set forth in *BEP*, 53 FLRA 146. *See FDIC*, 65 FLRA at 106-07.

Here, the Agency's exception is based entirely on the Arbitrator's alleged failure to reconstruct what the Agency would have done if it had not violated the MOU. As discussed above, the Authority has rejected continued application of the former reconstruction standard. Accordingly, we deny the exception.[6]

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

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;

6. For the reasons set forth in her concurring opinion in *FDIC*, 65 FLRA at 112 (Concurring Opinion of Chairman Pope), Chairman Pope would resolve this issue by determining whether the remedy is reasonably related to the negotiated provisions and the harm being remedied. *E.g.*, *U.S. Dep't of HHS, Substance Abuse & Mental Health Servs. Admin.*, 65 FLRA 568, 571 n.7 (2011). Doing so, Chairman Pope would deny the exception. Here, however, in order to form a majority opinion on this issue and avoid an impasse in the resolution of this case, she agrees to deny the exception for the above-stated grounds. *See, e.g.*, *AFGE, Local 727*, 62 FLRA 372, 374 (2008) (Separate Opinion of then-Member Pope) (joining majority opinion in order to avoid impasse in resolution of case).

(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.

The MOU states that "[o]nce the designated deciding official decides to approve, deny or reject the ROC award nomination, he/she will complete an [Action Form]." Exceptions, Attach. 3 at 5; Opp'n Ex. 1 at 5. The Action Form must include: (1) a written appropriate justification that "clearly articulate[s] the specific reason(s) that the employee's nomination(s) are approved, disapproved or rejected" and (2) the signature of the "designated deciding official[.]" Exceptions, Attach. 3 at 5; Opp'n Ex. 1 at 5, 10. Further, the MOU and Article 3, Section 2A of the 2005 Agreement expressly provide that employees shall be treated "fairly and equitably." Award at 16; Exceptions at 3.

Interpreting these provisions of the parties' agreements, the Arbitrator found that the "Deciding Official -- and not the first-line supervisor -- must be the person who, 'decides to approve, deny or reject the ROC award nomination,' and who provides a written 'appropriate justification' for the said decision 'on the Action Form.'" Award at 16. Requiring the "Deciding Official" to "personally review, evaluate[,] and decide each of the nominations" on the Action Form is consistent with the requirements set forth above, particularly where, as the Arbitrator found here, by "relegating" these actions to others, the Agency "seriously compromised" "the appearance of 'fair and equitable treatment[.]'" *Id*. at 19. The Agency does not establish that the Arbitrator's interpretation of the agreements is irrational, unfounded, implausible, or a manifest disregard of the agreements. Accordingly, the Agency does not demonstrate that the award fails to draw its essence from the agreements, and we deny the exception.

C. The Arbitrator did not exceed his authority by vacating all ROC awards for the year at issue.

An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to persons who are not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In addition, an arbitrator is granted broad discretion to fashion a remedy that the arbitrator considers to be appropriate. *See U.S. DOD Dependents Schs.*, 49 FLRA 658, 663 (1994). In this connection, although an arbitrator may not award relief to non-grievants, the mere fact that an arbitrator's remedy affects non-grievants does not demonstrate that the arbitrator exceeded his or her authority. *Compare SSA, Raleigh, N.C.*, 53 FLRA 43, 44-45 (1997) (arbitrator exceeded authority by awarding remedy to non-grievants), and *U.S. Dep't of the Air Force, Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 42 FLRA 680, 685-86 (1991) (same), *with NLRB*, 50 FLRA 88, 94 (1995) (arbitrator did not exceed authority by directing rerunning of selection action).

Here, the Arbitrator framed the issues, in pertinent part, as whether the Agency complied with the parties' agreements "in deciding whether to approve or deny 'ROC' award nominations for nine (9) . . . personnel for the performance period[;]" "[i]f not . . . whether the said . . . personnel were treated fairly and equitably by the Agency in its consideration of their ROC awards for said performance period[;]" and "[i]f either of the said questions is to be answered in the negative, then the final issue herein is *the scope of the appropriate remedy*." Award at 2 (emphasis added). The Arbitrator found that the Agency violated the parties' agreements in its awards-selection process, and as an appropriate remedy, he directed that the awards be vacated and the awards process be rerun in accordance with the agreements. These findings were directly responsive to the issues framed by the Arbitrator. Although the Arbitrator's remedy has some effect on non-grievants, in that it sets aside their ROCs (at least until the process is rerun), that fact alone does not demonstrate that the Arbitrator exceeded his authority. *See NLRB*, 50 FLRA at 94. Accordingly, we deny the exceeded authority exception.

D. The Arbitrator was not *functus officio*.

Pursuant to the doctrine of *functus officio*, once an arbitrator has accomplished the resolution of the matter submitted, the arbitrator is without further authority. *See U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 58 FLRA 77, 80 (2002) (citation omitted) (then-Member Pope dissenting on other grounds); *AFGE, Local 2172*, 57 FLRA 625, 627 (2001). However, an arbitrator

may retain jurisdiction for the purpose of overseeing the implementation of remedies, even absent a joint request of the parties. *E.g., U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 56 FLRA 848, 852 (2000).

The Arbitrator directed the Deciding Official to personally evaluate award nominations and explain his reasons for approving or disapproving each nomination. *See* Award at 19-20. The Arbitrator then "expressly reserve[d] . . . jurisdiction to consider any complaint as to the decision of the Deciding Official" in this regard. *Id.* at 20. Thus, the Arbitrator retained jurisdiction for the purpose of overseeing the implementation of his chosen remedies. Consistent with the foregoing principles, the Arbitrator was permitted to do so, and the Agency's exception does not demonstrate that the award is deficient in this regard. Accordingly, we deny the exception.

VI. Decision

The Agency's exceptions are dismissed in part and denied in part.

Member Beck, Dissenting In Part:

I agree with my colleagues' conclusions that the Agency's management-rights exception regarding the Arbitrator's interpretation of the MOU should be dismissed and that the award properly draws its essence from the agreements. I disagree, however, with their determination that the Arbitrator did not exceed his authority when he vacated all of the ROC awards for the year at issue.

To be sure, arbitrators are granted broad discretion in the fashioning of appropriate remedies. However, despite the deference that we accord to arbitrators in this regard, the Authority has adhered to the fundamental principle that arbitrators must confine their awards and remedies to those issues presented for resolution. *See, e.g., Veterans Admin.*, 24 FLRA 447, 450 (1986) and cases cited therein. An arbitrator's authority to fashion a remedy does not extend to issues that are not submitted to arbitration. *U.S. Dep't of the Navy, Naval Sea Logistics Ctr., Detachment Atl., Indian Head, Md.*, 57 FLRA 687, 688 (2002).

As the Majority acknowledges, the Arbitrator clearly specified that the issues before him were: (1) whether the Agency complied with the parties' agreements in approving or denying "award nominations for *nine (9)* Louisville office ODAR personnel" and (2) whether "*said ODAR personnel*" were treated "fairly and equitably . . . ." Award at 2 (emphasis added). On its face, the issue was directed only at the Agency's actions with respect to nine employees at the Louisville ODAR. Thus, the award nominations of *other* personnel at the Louisville ODAR were not before the Arbitrator. The Arbitrator's remedy, however, orders that *all* ROC awards for the Louisville ODAR for the year in question be vacated and reconsidered. *See id.* at 19-20. By vacating the awards for the entire Louisville ODAR, the Arbitrator exceeded his authority because he failed to confine his decision and any possible remedy to the issues as he unambiguously stated them. *See SSA, Raleigh, N.C.*, 53 FLRA 43, 44-45 (1997) (arbitrator exceeded his authority by awarding administrative leave to all bargaining unit employees rather than only to the twelve employees named in the grievance); *U.S. Dep't of the Air Force, Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 42 FLRA 680, 685-86 (1991) (arbitrator exceeded his authority by ordering agency to conduct classification audits of all positions in certain wage grades where issue concerned only the grievant and did not refer to any other employee).

I do not mean to suggest that an arbitrator can never order relief that affects individuals who are not specifically identified in a grievance. Indeed, one can imagine an issue that might have warranted the remedy directed by the Arbitrator here. For example, the issue presented might have been: "Whether the Agency complied with the parties' agreements in approving or denying the award nominations for the Louisville ODAR personnel and, if so, what shall be the remedy?" However, the issue presented here was explicitly rather more limited.

Accordingly, I would find that the Arbitrator exceeded his authority by vacating ROC awards that were placed outside of his jurisdiction by the plain language of the issue presented.*

* Because I would vacate the portion of the award concerning this remedy, I would find it unnecessary to address whether the remedy is contrary to § 7106 of the Statute.