**65 FLRA No. 180**

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 299
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY
(Agency)

0-AR-4731

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DECISION

May 27, 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

This matter is before the Authority on exceptions to an award of Arbitrator Jerome H. Ross 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.

The Arbitrator found that the Union's grievance was neither grievable nor arbitrable based on the Authority's decision in *United States Department of Defense, National Imagery & Mapping Agency, St. Louis, Missouri*, 57 FLRA 837 (2002) (then-Member Pope dissenting) (*NIMA*). For the reasons that follow, we deny the Union's nonfact exception, set aside the award in part, and remand the award to the parties for resubmission, absent settlement, to an arbitrator of their choice.

## II. Background and Arbitrator's Award

The Union filed a grievance alleging that certain employees did not receive the merit pay increases to which they were entitled under the Agency's national "Merit Pay & Bonus Guidelines" (National Guidance). Award at 2 & n.2. When the grievance was unresolved, it was submitted to arbitration, where the Arbitrator framed the following issue for resolution: "Is [the grievance] grievable/arbitrable under the parties' [collective bargaining agreement (CBA)]?"[2] *Id.* at 3.

As an initial matter, the Arbitrator rejected the Union's contention that the Agency's Policies and Procedures Manual (PPM) waived the Agency's right to contest the grievability of the parties' dispute. *See id.* at 4, 7 (citing PPM 3110-30).[3] In addition, the Arbitrator found that he was "constrained to follow" the Authority's decision in *NIMA*, *id.* at 6 (internal quotation marks omitted), and, as such, he determined that *NIMA* "require[d]" him to find that "merit pay determinations . . .[,] under [s]tatute[4] and case precedent, [are] within the sole and exclusive province of the Agency[,]" *id.* at 6, 7. Therefore, he concluded that the grievance was

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

2. In this regard, a footnote in the CBA's article on the negotiated grievance procedure (NGP) states, in pertinent part:

> The [Agency] and the Union disagree over whether matters related to compensation and benefits are subject to the grievance and arbitration procedures. It is the [Agency]'s position that these matters are not subject to the [NGP], as a matter of law, . . . pursuant to 12 [U.S.C. § ]481. . . .

Award at 3 n.6 (quoting CBA Art. 27, n.∗).

3. PPM 3110-30 states, in pertinent part:

> Employee compensation and decisions affecting permanent increases to employee base pay, lump-sum payments and salary differentials are not grievable. This includes, for example, . . . the amount of a merit pay increase . . . as long as the amounts awarded are consistent with [Agency] policies.

Award at 4.

4. The statutory provisions relevant to the Arbitrator's finding are 12 U.S.C. §§ 481 and 482. 12 U.S.C. § 481 pertinently provides that the Comptroller shall employ certain individuals "without regard to the provisions of other laws applicable to officers or employees of the United States[,]" and 12 U.S.C. § 482 pertinently provides that, "[n]otwithstanding any of the provisions of [§] 481 . . . to the contrary, the Comptroller . . . shall fix the compensation . . . of, and appoint and direct, all employees of the Office of the Comptroller of the Currency."

"neither grievable nor arbitrable under the . . . CBA[.]" *Id.* at 8.

## III. Positions of the Parties

### A. Union's Exceptions

The Union asserts that the Arbitrator's finding that PPM 3110-30 does not waive the Agency's right to contest the grievability of this dispute is based on a nonfact because "the PPM[,] as written[,] clearly establishes" that the Union may grieve inconsistent applications of the Agency's compensation policy. Exceptions at 4. In addition, the Union argues that the award is contrary to law because, according to the Union, it may grieve and arbitrate "decisions that [are] inconsistent with the Agency's unilaterally established pay policy." *Id.* at 3; *see also id.* at 6-7. In this regard, the Union contends that nothing in the CBA excludes matters involving the application of previously established compensation policies, such as the National Guidance, from the NGP. *See id.* at 6-7. Moreover, the Union contends that, for various reasons, the Arbitrator "erred in . . . applying the holding in *NIMA*" to the instant dispute. *Id.* at 8; *see also id.* at 5-7.

### B. Agency's Opposition

The Agency argues that the Union's nonfact exception does not challenge a "fact" found by the Arbitrator. Opp'n at 7. In addition, the Agency asserts that the Arbitrator correctly found the grievance to be neither grievable nor arbitrable. *Id.* at 2-3. In this regard, according to the Agency, "[c]ompensation matters [involving the Agency's employees] are not grievable or arbitrable . . . because grievances over th[o]se matters would interfere with the Comptroller's authority . . . to set compensation 'without regard to the provisions of other laws applicable to officers or employees of the United States.'" *Id.* at 2 (quoting and citing 12 U.S.C. §§ 481, 482). Moreover, the Agency contends that "*NIMA* . . . is controlling in this case" and that the Arbitrator's grievability and arbitrability findings are consistent with *NIMA*. *Id.* at 8 (emphasis omitted); *see also id.* at 6, 8-9.

## IV. Analysis and Conclusions

### A. The award is not based on a nonfact.

The Union asserts that the Arbitrator's finding that PPM 3110-30 does not waive the Agency's right to contest the grievability of this dispute is based on a nonfact. Exceptions at 4-5. 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 U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993). However, an arbitrator's interpretation of applicable law and regulations is not a "fact" that can be challenged as a nonfact. *See U.S. Dep't of Transp., Fed. Aviation Admin., Wash., D.C.*, 58 FLRA 23, 26 (2002) (Chairman Cabaniss dissenting as to another matter) (*FAA*); *see also U.S. Dep't of the Air Force, San Antonio Air Logistics Ctr., Kelly Air Force Base, Tex.*, 51 FLRA 1624, 1630-31 (1996) (arbitrator's application of agency regulations is not a fact challengeable as a nonfact).

PPM 3110-30 is an Agency regulation. Therefore, the Arbitrator's interpretation of PPM 3110-30 is not a "fact" that can be challenged as a nonfact. *See FAA*, 58 FLRA at 26. Consequently, we deny the nonfact exception.

### B. The Arbitrator's finding that the grievance is not grievable or arbitrable is contrary to law.

The Union argues that the award is contrary to law. 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). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

If a law indicates that an agency's discretion over a matter affecting employees' conditions of employment is intended to be "sole and exclusive" – i.e., that it is intended to be exercised only by the agency – "then the agency is not obligated under the Statute to exercise that discretion through collective bargaining." *NTEU*, 59 FLRA 815, 816 (2004) (then-Member Pope dissenting), *pet. for review denied*, 435 F.3d 1049 (9th Cir. 2006). In *NIMA*, the Authority held that an agency's sole and exclusive discretion to establish certain conditions of employment without bargaining also precludes grievances and arbitration over those conditions, once established. 57 FLRA at 842-43.

The Arbitrator found that *NIMA* "require[d]" him to find the instant dispute neither grievable nor arbitrable. Award at 6. The Union argues that *NIMA*

should not control the outcome of this dispute. *E.g.*, Exceptions at 8. For the reasons that follow, we agree.

In *National Treasury Employees Union, Chapter 302*, 65 FLRA 746 (2011) (Member Beck dissenting) (*Chapter 302*), the Authority reexamined and reversed *NIMA*, after concluding that: "(1) sole and exclusive discretion to establish certain conditions of employment does not preclude grievances over individual applications of those conditions of employment, once established; and (2) in reaching a contrary conclusion in *NIMA*, the Authority erred." *Id.* at 750; *see also id.* at 747-50 (analysis in support of reversing *NIMA*). Because *Chapter 302* held that "nothing in the Agency's sole and exclusive discretion to establish compensation precludes grievances over individual application of the Agency's established compensation system," *id.* at 750, the Arbitrator's finding that *NIMA* barred the grievance is contrary to law. Therefore, we grant the contrary-to-law exception and set aside the Arbitrator's finding that the grievance is neither grievable nor arbitrable.

Where the Authority sets aside an arbitrator's determination that a grievance is not arbitrable, the Authority remands the matter to the parties for submission, absent settlement, to an arbitrator of their choice. *E.g.*, *AFGE, Local 2823*, 64 FLRA 1144, 1147 (2010). Consistent with the foregoing precedent, we remand the award to the parties for resubmission, absent settlement, to an arbitrator of their choice.[5]

## V. Decision

The nonfact exception is denied, the Arbitrator's finding that the grievance is neither grievable nor arbitrable based on *NIMA* is set aside, and the award is remanded to the parties for resubmission, absent settlement, to an arbitrator of their choice.

5. We note that nothing in this decision precludes an arbitrator from finding, on remand, that the grievance is nongrievable or nonarbitrable for reasons other than those set forth in *NIMA*.

**Member Beck, Dissenting:**

I disagree with my colleagues' determination to set aside the Arbitrator's finding that the grievance in this case is neither grievable nor arbitrable.

For the reasons that I articulated in my recent dissent in *National Treasury Employees Union, Chapter 302*, 65 FLRA 746, 751 (2011), compensation decisions of the Comptroller are not subject to the grievance and arbitration procedures that exist under our Statute.