65 FLRA No. 209

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL AIR STATION
PENSACOLA, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1960
(Union)

0-AR-4688

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DECISION

June 30, 2011

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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 Frederick P. Ahrens 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 concluded that the Agency violated the parties' collective bargaining agreement (the agreement) by failing to authorize uniform allowances for certain of its employees in accordance with applicable government-wide and Agency regulations.

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

II. Background and Arbitrator's Award

The Agency requires its police officers and its firefighters to wear uniforms. Award at 4. Article 36, Section 36.02 of the agreement requires the Agency to authorize a uniform allowance for employees required to wear uniforms. [1] The uniform allowance is to be "in accordance with applicable regulations." *Id.* at 5 (quoting Article 36, Section 36.02).

The uniform allowance that the Agency authorized has two components: an initial uniform allowance and an annual uniform allowance. *See* Award at 6. Employees receive an initial uniform allowance when they are first hired. *See* Exceptions at 2-3; *id.*, Attach., Encl. 14 at 2. Employees also receive an annual uniform allowance to defray the cost of replacement uniforms. Exceptions at 3; *id.*, Attach., Encl. 14 at 3.

The Arbitrator found that the Agency increased the initial and the annual uniform allowances in 2007. Award at 4. However, the Agency did not begin implementing the increases until 2010. *See id.* at 4, 10. As part of the implementation process, the Agency required employees to fill out a "self-certification form[,]" certifying the amount of the initial and annual uniform allowances they had received in prior years, and the amount of personal funds they had spent for required uniform articles. *Id.* at 4. Employees were then paid a make-up annual uniform allowance based in part on what they had actually paid for required uniform articles. *Id.* at 4-5.

The Union, which had not agreed to the self-certification procedure, filed a grievance. *Id.* at 1. The grievance raised the issue whether the Agency violated Article 36, Section 36.02 of the agreement by failing to pay employees the proper uniform allowance in accordance with the applicable regulations. *Id.* at 1-3. When the grievance was not resolved, it was submitted to arbitration.

The Arbitrator framed a threshold arbitrability issue and a merits issue, respectively, as follows:

> Does the Arbitrator have the authority to issue[] an award in this matter?
>
> . . . .
>
> Did the [Agency] violate the [a]greement, Article 36, Section 36.02[,] by not authorizing a revised uniform allowance in accordance with applicable regulations? If not, what is the proper remedy?

Award at 2 & 3.

1. Article 36, Section 36.02 states that "[i]f the Employers require UNIT employees to wear uniforms[,] the Employers will authorize uniform allowances in accordance with applicable regulations." Exceptions, Attach., Encl. 3 at 1; *see also* Award at 5.

As to the threshold matter, the Agency contended that the grievance was not arbitrable because the Agency was not the proper party to the grievance. Instead, the Agency claimed that the Commander Navy Region Southeast (the Region) was the proper party to the grievance.[2] *Id.* at 1-2. The Arbitrator rejected this contention and determined that the Agency was the proper party. *Id*. at 3. The Arbitrator found that the agreement specifically designates the Agency and the Union as parties to the agreement. *Id.* He further found that the parties had not agreed to substitute the Region for the Agency as a party to the agreement pursuant to Article 40, Section 40.03,[3] which addresses the procedures for modifying the agreement. *Id*. For these reasons, the Arbitrator determined that the grievance was arbitrable. *Id.*

Addressing the merits, the Arbitrator determined that the Agency violated Article 36, Section 36.02 of the agreement by failing to authorize uniform allowances for its employees in accordance with applicable government-wide and Agency regulations. *Id.* at 10. Specifically, he found that the regulations did not allow the Agency to determine the amount of the annual uniform allowance based on the employees' uniform replacement costs. *Id*. at 9. Rather, the Arbitrator found, this amount must be based on the cost of all required uniform articles "pro-rated for the estimated life" of those articles. *Id.* at 8-9 (citing Agency Notice CNIC 12594).[4]

The Arbitrator also found that the applicable regulations do not require employees to self-certify out-of-pocket expenses for the Agency's use in determining the initial or annual uniform allowances. *Id.* However, he found that employees may be required to provide evidence, acceptable to the Agency, such as receipts, of their initial purchase of uniforms, for the Agency's use in determining an employee's initial uniform allowance. *Id.* at 9. The Arbitrator specifically noted that this requirement did not extend to determination of the annual uniform allowance because the annual uniform allowance is based on the proration of uniform costs over estimated uniform life. *Id.* at 9-10.

Finally, the Arbitrator limited his award to determinations of uniform allowances for previous time periods, under the parties' agreement that expired on April 22, 2010. *Id.* at 10. The Arbitrator stated that subsequent uniform allowances are governed by the parties' new collective bargaining agreement. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the award is contrary to law and fails to draw its essence from the agreement.

According to the Agency, the Arbitrator's arbitrability determination is contrary to law because the Arbitrator erroneously failed to recognize that the Agency and the Union are not the proper parties to the grievance. Exceptions at 5-6. Specifically, the Agency claims, after the consolidation petition was granted, the parties were no longer bound to the agreement's grievance procedure. *Id*. Moreover, the Agency asserts, after consolidation, statutory rights such as filing grievances could be exercised only by certain representatives of the parties. Here, the Agency asserts, those representatives are the Region and the national Union. *Id*. Therefore, the Agency argues, it is not a proper party to the grievance. *Id.* Furthermore, the Agency claims, the Union did not have standing to file the grievance because the national Union did not authorize it to act on the issue of employees' uniform allowances. *Id.* at 6.

The Agency also argues that the Arbitrator's arbitrability determination fails to draw its essence from the agreement. Specifically, the Agency argues

2. During the term of the agreement, the Region filed a representation petition in Case No. AT-RP-08-0003 to consolidate several local bargaining units into one national unit. Exceptions at 2. One of these local units included the Agency's employees. *Id.* The consolidation petition was granted and a new certification of representative issued. As a result, a new consolidated unit, referred to as Commander, Navy Installations Command (CNIC), was created. *Id.*, Attach., Encl. 4. The agreement involved in this case remained in effect until a new collective bargaining agreement covering CNIC was negotiated. *Id*. at 2-3, 5.

3. Article 40, Section 40.03 provides:

> No agreement, alteration, understanding, variation, waiver, or modification of any terms or conditions contained herein shall be made unless such agreement is made and executed in writing between both PARTIES and has been ratified by the UNION and approved by the Department of Defense.

Exceptions, Attach., Encl. 3 at 78-79; *see also* Award at 3.

4. The relevant portion of CNIC 12594 states that the Region "shall determine and document the appropriate amount of annual uniform allowance paid to employees based on the cost pro-rated for the estimated life of the minimum required uniform articles . . . as well as any additional uniform items the Region deems necessary." Exceptions, Attach., Encl. 14 at 3.

that the Arbitrator failed to consider Article 40.01[5] of the agreement, which addresses circumstances that terminate the agreement. *Id.* at 11.

On the merits, the Agency asserts that the award is contrary to 5 C.F.R. § 591.103(c), under which the Agency "establish[es] policies to administer the uniform allowance program, including uniform standards acceptable to the agency." *Id.* at 6 (quoting 5 C.F.R. § 591.103(c)). Citing the preamble to this regulation,[6] as published in the Federal Register, the Agency argues that § 591.103(c) requires that employees provide the Agency evidence of their uniform purchases. *Id.* at 6 (citing 72 Fed. Reg. 20,701 (April 26, 2007)). However, the Agency claims, the Arbitrator erroneously determined that employees are not required to provide evidence of their uniform purchases for the Agency's use in determining the amount of the annual uniform allowance. *Id.* at 7-8.

The Agency also contends that the award is contrary to § 591.103(c) because it conflicts with the regulation's preamble, as published in the Federal Register, which grants the Agency sole discretion to decide what evidence is acceptable to verify employees' purchase of uniforms. *Id.* at 9 (citing 72 Fed. Reg. at 20,701). Based on the Agency's discretion to determine "uniform purchase documentation requirements," the Agency argues that the Arbitrator erred when he determined that employees' self-certifications of out-of-pocket uniform expenses may not be utilized to determine the uniform allowance. *Id.* at 8-9.

The Agency further argues that the award is contrary to CNIC 12594(5)(d).[7] *Id.* at 8-10. Specifically, the Agency argues that it may require employees to complete self-certification forms because this process satisfies the regulation's requirement that the Agency establish and maintain records of employee uniform purchases. *Id.* at 9-10. Therefore, the Agency contends, the Arbitrator erred when he determined that the Agency cannot require employees to provide self-certification forms as evidence of their uniform purchases.

B. Union's Opposition

The Union asserts that the Agency cannot argue that the parties are not the proper parties to the grievance because the validity of the agreement was never challenged at arbitration. Opp'n at 1. In the alternative, the Union claims that the agreement remained in effect until a collective bargaining agreement covering the consolidated units, including the Agency, was negotiated. *Id.* Therefore, the Union asserts, the Arbitrator correctly found that the agreement was enforceable by the parties at the time the grievance was filed. *Id.* at 2.

In addition, the Union opposes the Agency's essence exception, claiming that the Agency never argued before the Arbitrator that the agreement had terminated pursuant to Article 40.01. *Id.* at 3.

On the merits, the Union contends that the Agency's argument that the award is contrary to § 591.103(c) fails because this regulation does not require employees to provide the Agency with self-certifications of their out-of-pocket uniform expenses. *Id.* at 2-3. This regulation, the Union argues, only requires the Agency to establish a policy verifying that employees spent their allowances on uniforms. *Id.* at 3. The Union also asserts that the Agency cannot use the self-certification forms to determine the initial or annual uniform allowances. *Id.* at 2-3.

IV. Preliminary Issue

The Agency claims that the award is contrary to law because the award fails to recognize that the Agency and the Union are not the proper parties to the grievance. Exceptions at 5.

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 AFGE, Local 3882*, 59 FLRA 469, 470 (2003). However, a procedural arbitrability determination may be directly challenged and found deficient on the ground that it is contrary to law. *See id.* (citing *AFGE, Local 933*, 58 FLRA 480, 481 (2003)). In order for a procedural arbitrability determination to be found deficient as contrary to law, the appealing party must establish that the determination is contrary to procedural

5. Article 40.01 of the agreement provides that "this agreement shall terminate at any time it is determined that the UNION is no longer entitled to exclusive recognition under the [Statute]." Exceptions, Attach., Encl. 3 at 77.

6. The relevant portion of the preamble provides:

> At a minimum, OPM expects such policies will . . . require employees to provide evidence acceptable to the agency of the employee's purchase of one or more uniforms . . . .

7. The relevant portion of CNIC 12594(5)(d) provides that the Agency is "responsible for developing and maintaining records that verify all required uniform articles are purchased and/or issued to each employee [and] the cost breakdown of each item purchased." Exceptions, Attach., Encl. 14 at 3.

requirements established by statute that apply to the parties' negotiated grievance procedure. *See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 122, 124 (2005).

The Arbitrator's determination that the Agency and the Union are the proper parties to the grievance concerns the grievance's procedural arbitrability. *See U.S. Dep't of Veterans Affairs, Louis Stokes Med. Ctr., Cleveland, Ohio*, 64 FLRA 911, 912-13 (2010) (Authority determined that exception concerning whether employee was proper grievant involved arbitrator's procedural arbitrability determination); *AFGE, Local 1931*, 50 FLRA 279, 281 (1995) (arbitrator's finding that grievance was not arbitrable because grievant did not fall within contractual definition of employee under parties' negotiated grievance procedure was procedural arbitrability determination). However, the Agency has failed to identify any procedural requirements established by statute that apply to the parties' negotiated grievance procedure, with which the Arbitrator's award conflicts. Therefore, the Agency's contention provides no basis for finding the Arbitrator's determination deficient. [8]

Accordingly, we deny the Agency's contrary to law exception that alleges that the grievance is not arbitrable.

8. In addition, the Agency asserts for the first time, as an essence exception, that the Arbitrator failed to consider Article 40.01 of the agreement, which addresses circumstances that terminate the parties' agreement. Exceptions at 10-11. Under § 2429.5 of the Authority's Regulations, the Authority generally will not consider evidence or arguments that could have been, but were not, presented to the arbitrator. *See Soc. Sec. Admin.*, 57 FLRA 530, 534 (2001) (citing *NAGE, Local R4-45*, 53 FLRA 517, 520 (1997); *U.S. Agency for Int'l Dev.*, 53 FLRA 187, 187 n.2 (1997)). There is no indication in the record that the Agency raised this argument in the proceedings before the Arbitrator. Moreover, the Agency could have raised the argument because the issue of whether the agreement was in effect was in dispute before the Arbitrator. Because the issue raised by Article 40.01 was not presented to the Arbitrator, but could have been, it is not properly before the Authority under § 2429.5 of the Authority's Regulations. *See, e.g. U.S. Dep't of the Army, The Adjutant General, Mo. Nat'l Guard, Bridgeton, Mo.*, 56 FLRA 1104, 1106 (2001). For this reason, we dismiss the Agency's essence exception challenging the grievance's arbitrability. We note that § 2429.5 was amended effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). For purposes of this case, we apply the prior Regulation that was in effect at all times relevant to the processing of this case.

V. Analysis and Conclusions

A. The award is not contrary to 5 C.F.R. § 591.103(c).

The Agency argues that contrary to 5 C.F.R. § 591.103(c), the Arbitrator erroneously determined that employees are not required to provide evidence of their uniform purchases for the Agency's use in determining the amount of the annual uniform allowance. 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.*

As noted above, Section 591.103(c)'s plain language requires an agency to "establish policies to administer the [agency's] uniform allowance program[.]" *See AFGE, Local 1709*, 57 FLRA 453, 455 (2001) (relying on plain language to resolve a matter of statutory interpretation). However, contrary to the Agency's argument, § 591.103(c)'s plain language does not require employees to provide evidence of their uniform purchases for the Agency's use in determining their annual uniform allowance.

Similarly, the Agency contends that contrary to 5 C.F.R. § 591.103(c), the Arbitrator erroneously determined that employees' self-certifications of their uniform purchases may not be utilized to determine the uniform allowance. Exceptions at 8. However, the plain language of § 591.103(c), set forth above, also does not include such a requirement.

In addition, to the extent the Agency relies on the preamble to § 591.103(c), as published in the Federal Register, to argue that the award is contrary to the regulation, the Agency's reliance is misplaced. The Agency relies on the preamble to argue that, under § 591.103(c), employees are required to provide the Agency with evidence of their uniform purchases, and that the Agency has sole discretion to decide what evidence is acceptable. However, as with § 591.103(c)'s plain language, the language of the preamble does not address the particular evidence of their uniform purchases that employees may be

required to provide or the utilization of such evidence to determine the annual uniform allowance. In sum, § 591.103(c) neither sets forth any evidentiary requirements employees must meet in connection with the determination of their annual uniform allowances, nor requires employees to submit self-certifications of their uniform purchases.

Accordingly, we deny the Agency's exception that the award is contrary to 5 C.F.R. § 591.103(c).

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

The Agency argues that the award is contrary to Agency regulation CNIC 12594(5)(d). Specifically, the Agency asserts that employees must complete self-certification forms because that process satisfies CNIC 12594(5)(d)'s requirement that the Agency develop and maintain records of uniform purchases.

The Agency claims, and there is no dispute, that Article 36, Section 36.02 of the agreement requires the Agency to authorize uniform allowances consistent with Agency regulations, including CNIC 12594(5)(d). When a collective bargaining agreement incorporates the agency regulation with which an award allegedly conflicts, the matter becomes one of contract interpretation because the agreement, not the regulation, governs the matter in dispute. *E.g., AFGE, Council of Prison Locals 33*, 59 FLRA 381, 382 (2003). The Authority has found that where, "as plainly worded and interpreted by the [a]rbitrator," a collective bargaining agreement provides that certain matters are required to be conducted in accordance with an agency regulation, "the agreement effectively incorporates" the regulation. *U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 51 FLRA 1210, 1216-17 (1996) (*APHIS*).

In these circumstances, consistent with *APHIS*, we find that CNIC 12594(5)(d) is effectively incorporated into the agreement, and we treat the matter as one of contract interpretation. *Id.* Accordingly, we apply an essence analysis to assess the Agency's argument.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard 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. *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 Agency claims that employees must complete self-certification forms because this process satisfies CNIC 12594(5)(d)'s requirement that the Agency develop and maintain records. Exceptions at 9. Therefore, the Agency asserts, the award is contrary to CNIC 12594(5)(d) because the award precludes the Agency from requiring employees to provide self-certification forms as evidence of their uniform purchases.

CNIC 12594(5)(d) states that the Agency is "responsible for developing and maintaining records that verify all required uniform articles are purchased and/or issued to each employee [and] the cost breakdown of each item purchased . . . ." Exceptions, Attach., Encl. 14 at 3. As the Arbitrator found, the plain language of CNIC 12594(5)(d) does not mandate the use of self-certification forms. Award at 9. Therefore, the Arbitrator's conclusion that the Agency is precluded from using self-certification forms to determine the initial and annual uniform allowances is consistent with CNIC 12594(5)(d). Accordingly, the award is a plausible interpretation of the agreement and there is no basis for concluding that the award is irrational, unfounded, implausible, or in manifest disregard of the agreement.

Accordingly, we deny the Agency's exception.

VI. Decision

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