65 FLRA No. 3

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3438
(Union)

and

SOCIAL SECURITY ADMINISTRATION
(Agency)

0-AR-4639

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DECISION

August 20, 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 Michael L. Allen filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.[1]

The Arbitrator concluded that the Union failed timely to invoke arbitration and that, even if the Union had timely invoked arbitration, he would not grant the grievant's request for relief. Accordingly, he denied the grievance.

For the reasons that follow, we deny the exceptions.

II. Background and Arbitrator's Award

The Agency reimbursed the grievant for certain expenses. *See* Award at 2-3. Subsequently, the Agency notified the grievant that she had been overpaid and initiated debt collection for the amount of overpayment. *Id.* at 4. The grievant contested her liability and alternatively sought a waiver. *See id.* at 4-5. In accordance with the parties' Memorandum of Understanding (MOU),[2] they moved to expedited arbitration. *See id.* Without a stipulation of issues, the Arbitrator proceeded to determine: (1) whether the Union invoked arbitration within "the time limit permitted by the MOU[;]" and, if arbitration had been timely invoked, (2) whether "the debt . . . under review is justly due and owing by the [g]rievant[.]" *Id.* at 8.

The Arbitrator found that the Union did not invoke arbitration within the time frame permitted by the MOU, *id.* (quoting MOU, cl. 12), and that, "as a threshold matter, [this] fatal flaw" required him to deny the grievance. *Id.* at 7. He further explained that, "[e]ven assuming, *arguendo*, that the . . . challenge . . . could somehow be deemed . . . timely," he would deny the grievance on its merits. *Id.* at 8-9.

III. Preliminary Matter

In its amended, sworn statement of service (Statement), the Union avers that it served its exceptions on the Agency by certified mail on March 19, 2010.[3] *See* Union's Am. Statement of Serv. (June 17). After receiving the Statement, the Authority's Office of Case Intake and Publication issued an order to the Agency, explaining that, although the Agency in its opposition asserted that the Union's exceptions were postmarked on March 23, "the Agency did not provide any evidence or documentation of the . . . postmark." Order to Show Cause (June 23) (Order) at 2 (citing Opp'n at 2). The Order further explained that, if the Union served the exceptions on March 19, as indicated by the Statement, then "the Agency's opposition had to be postmarked . . . no later than April 26[] in order to be considered timely." Order at 1-2 (citing 5 C.F.R. §§ 2425.1(c), 2429.21(b), 2429.22). As the opposition was postmarked on April 27, the Agency was ordered to show cause why the Authority should consider the opposition. *Id.* at 2.

The Agency timely responded to the Order, but its response included only a copy of the Order and a copy of an envelope bearing a March 23 postmark. *See* Resp. to Order. Although the copied envelope is addressed to the prior Agency representative in this case and bears the return address of the Agency facility at which the Union is located, the Agency

1. We address the timeliness of the Agency's opposition below.

2. The MOU provides for expedited arbitration in cases where an employee disputes indebtedness or seeks a waiver of debt. *See* Award at 5; *see also* Exceptions, Attach. 1 at 8 (MOU, cl. 12).

3. All subsequent dates in this section refer to 2010.

provides no further explanation of its submission. In particular, the Agency does not contest the accuracy of the Union's sworn statement that the Union served its exceptions on March 19. The copied envelope submitted by the Agency, without more, does not establish that the exceptions were served on March 23; it merely establishes that an envelope with a preprinted return address was mailed to the prior Agency representative and that the envelope was postmarked on March 23. In particular, the submission establishes neither the contents of the depicted envelope nor the identity of its sender. As such, the Agency has not demonstrated that the Union's exceptions were served on March 23. Accordingly, we conclude that the Agency's opposition is untimely, and we do not consider it. *See* 5 C.F.R. § 2425.1(c).

IV. Union's Exceptions

The Union asserts that the Arbitrator "did not consider material evidence and facts presented[.]" Exceptions at 3. According to the Union, the Arbitrator "ignored" an email that the Union argues is evidence of its timely invocation of arbitration. *See id.* at 5. The Union asserts that the Arbitrator denied it a fair hearing and exhibited bias by "willful[ly] and deliberate[ly] exclu[ding]" this piece of evidence, which he does not reference in the award. *Id.* In addition, the Union contends that the Arbitrator exhibited bias by failing to address the Union's argument that the Agency waived its right to challenge the timeliness of the Union's invocation of arbitration. *Id.* (citing Art. 24, § 6 of the parties' agreement).[4] Moreover, the Union argues that the award is contrary to law, rule, or regulation because the Arbitrator "ignored [f]ederal [l]aw" when he determined that the Agency properly denied the grievant's request for a waiver of her liability. *Id.* at 6-7 (citing 4 C.F.R. pts. 91-92 (standards for evaluating waiver requests)).

V. Analysis and Conclusions

A. The Arbitrator did not deny a fair hearing or exhibit bias.

The Union challenges the Arbitrator's determination that it failed to timely invoke arbitration. An arbitrator's timeliness determination is a procedural-arbitrability ruling. *See AFGE, Local 1501*, 56 FLRA 632, 636 (2000). The Authority generally will not find an arbitrator's ruling on procedural arbitrability deficient on grounds that directly challenge the procedural-arbitrability ruling itself. *See 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, as relevant here, include claims that an arbitrator denied a party a fair hearing or was biased. *See AFGE, Council of Prison Locals, Local 3977*, 62 FLRA 41, 43-44 (2007); *see also U.S. Equal Emp't Opportunity Comm'n*, 60 FLRA 83, 86 (2004) (citing *AFGE, Local 2921*, 50 FLRA 184, 185-86 (1995)).

The Authority will find an award deficient on the ground that the arbitrator failed to provide a fair hearing when it determines that an arbitrator's refusal to hear or consider pertinent and material evidence, or other actions in conducting the proceeding, prejudiced a party and affected the fairness of the proceeding as a whole. *See AFGE, Local 1668*, 50 FLRA 124, 126 (1995). To establish that an arbitrator was biased, the moving party must demonstrate that the award was procured by improper means, that there was partiality or corruption on the part of the arbitrator, or that the arbitrator engaged in misconduct that prejudiced the rights of the party. *See U.S. Dep't of Veterans Affairs Med. Ctr., N. Chi., Ill.*, 52 FLRA 387, 398 (1996) (*VAMC, N. Chi., Ill.*). The fact that an arbitrator does not mention a particular evidentiary item in his or her award does not demonstrate that the arbitrator refused to consider it or failed to provide a fair hearing. *See, e.g., AFGE, Local 3615*, 57 FLRA 19, 22 (2001). Further, the Authority will not find an award deficient merely because it does not address every argument raised by the parties. *See, e.g., U.S. Dep't of Homeland Sec., Customs & Border Prot. Agency, N.Y., N.Y.*, 60 FLRA 813, 816 (2005) (*DHS*); *NFFE, Local 259*, 45 FLRA 773, 777 (1992) (citing *U.S. Dep't of Labor, Wash., D.C.*, 41 FLRA 472, 476-77 (1991) (an arbitrator's failure to set forth specific findings does not provide a basis for finding an award deficient)).

With regard to the fairness of the hearing, the Union does not establish that the Arbitrator "ignored" or "exclu[ded]" material evidence, as opposed to crediting other evidence, when determining that the Union failed timely to invoke arbitration. *See* Award at 8 (crediting Agency Ex. 18 and finding untimely invocation); *see also AFGE, Local 22*, 51 FLRA 1496, 1497 (1996); *cf. U.S. Dep't of the Air Force,*

4. Article 24, Section 6 of the parties' agreement provides, in relevant part, "The parties agree to raise any questions of grievability or arbitrability of a grievance prior to the limit for the written answer in the final step of this procedure." Exceptions at 5 (internal quotation omitted).

Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla., 42 FLRA 680, 684 (1991) (declining to find procedural-arbitrability ruling deficient, despite allegation that arbitrator "ignore[d]" parties' agreement). In addition, as set forth above, the fact that the award does not mention the email referenced by the Union does not establish that the Arbitrator refused to consider it or failed to conduct a fair hearing. *See AFGE, Local 3615*, 57 FLRA at 22. Therefore, the Union has not established that the Arbitrator's conduct prejudiced it such that the fairness of the proceeding as a whole was affected, *see AFGE, Local 1668*, 50 FLRA at 126, and, consequently, has not established that the Arbitrator denied it a fair hearing.

With regard to the Union's allegation of bias, for the same reason that the Arbitrator's failure to mention an email does not establish that he denied the Union a fair hearing, it does not establish that the Arbitrator was biased. *See AFGE, Local 3615*, 57 FLRA at 22 (arbitrators need not mention every evidentiary submission in their awards). The only additional argument that the Union offers as an indication of bias is that the Arbitrator allegedly failed to address the Union's claim that, under the parties' agreement, the Agency waived any right to challenge the timeliness of the Union's invocation of arbitration. However, the Arbitrator was not required to address every argument raised by the parties. *See DHS*, 60 FLRA at 816. In addition, the Union does not allege that the award was procured by improper means, that the Arbitrator was corrupt, or that the Arbitrator engaged in misconduct that prejudiced the rights of the Union. *See VAMC, N. Chi., Ill.*, 52 FLRA at 398. Therefore, it has failed to establish that the Arbitrator was biased.

For the foregoing reasons, we deny the Union's fair-hearing and bias exceptions.

B. The Union's contrary-to-law exception does not provide a basis for setting aside the award.

The Union's contrary-to-law exception challenges the Arbitrator's determination that the Agency properly denied the grievant a waiver of the debt she owed. The Authority has recognized that when an arbitrator bases an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient in order to demonstrate that the award is deficient. *See, e.g., U.S. Dep't of the Treasury, Internal Revenue Serv., Oxon Hill, Md.*, 56 FLRA 292, 299 (2000) (*Oxon Hill*). In such circumstances, if the excepting party does not demonstrate that the award is deficient on one of the grounds relied on by the arbitrator, it is unnecessary to address exceptions to the other grounds. *See id.*

The Arbitrator determined that the Union's failure timely to invoke arbitration was a "fatal flaw" that required him to deny the grievance. *See* Award at 7. This timeliness determination constitutes a separate and independent basis for the award, and the Union has not established that this determination is deficient, *see supra* Part V.A. As such, it is unnecessary to address the Union's contention that the Arbitrator's alternative finding – that the Agency properly denied the grievant a waiver of debt – is contrary to law, rule, or regulation. *See Oxon Hill*, 56 FLRA at 299. Accordingly, we deny the exception.

VI. Decision

The Union's exceptions are denied.