66 FLRA No. 132

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1804
(Union)

and

UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
(Agency)

0-AR-4801

_____

DECISION

June 12, 2012

_____

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

I. Statement of the Case

Arbitrator Philip W. Parkinson granted the Agency's motion to dismiss the grievance with prejudice because he found that the Union failed to proceed with its case. The Union filed exceptions to the award under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency did not file an opposition to the Union's exceptions. For the reasons set forth below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Union presented a grievance alleging various violations of the Fair Labor Standards Act (FLSA) and the parties' agreement on behalf of all bargaining unit employees in the Agency's Detroit office. *See* Award at 1; Exceptions, Ex. A, Motion for Dismissal for Want of Prosecution with Prejudice (Agency's Motion), at 4. The grievance was unresolved and was submitted to arbitration. Hearings were held, and an award was rendered on the liability portion of the Union's grievance. Award at 1-2. The matter then proceeded to the damages phase. The parties agreed to have separate hearings regarding this issue for each sector of employees within the office.[1] *See id*. at 2.

The Arbitrator held the first set of damages hearings for employees working in the Agency's public housing sector. *Id.* He later issued an award concluding that employees working in that sector were not entitled to overtime. *See id.*; Exceptions, Attach. A, Agency's Motion at 7-8. In response, the Union filed exceptions with the Authority contending, among other things, that the "Arbitrator acted improperly by ignoring certain requests for relief" and that the matter should be remanded to another arbitrator.[2] Exceptions, Attach. C, Union's Opp'n to Agency's Motion at 2; *see also* Award at 2; *NFFE, Local 1804,* 66 FLRA 512, 513 (2012) (Member Beck dissenting in part).

Before the Arbitrator issued his award concerning the public housing sector, the parties had scheduled hearings over three weeks in May and June to resolve the other sectors' entitlement to damages. Award at 2. After the Arbitrator issued his award, the Union requested that those hearings be cancelled until the Authority ruled on its exceptions. *See id.* at 2-3. Although the Arbitrator agreed to cancel the first week of hearings, the parties attended the second week of hearings because the Arbitrator had threatened to charge the cancelling party with a fee. *See id.*; Exceptions, Attach. A, Ex. 2, Email dated May 3, 2011 at 1. Additionally, the third week of hearings was cancelled because "the Union expressed no desire to continue with the proceedings at [that] time." Award at 3. No additional hearings were scheduled. *Id.*

The Agency subsequently presented the Arbitrator with a motion to dismiss the grievance with prejudice for want of prosecution. *Id.* The Arbitrator ordered the Union to submit a brief explaining why the Arbitrator should not grant the Agency's motion. *Id.* The Union submitted an opposition to the Agency's motion. *Id.* After receiving several emails from the parties concerning this matter, the Arbitrator closed the record. *Id.*

The Arbitrator concluded that, although the Union, as the moving party, has "the burden of proceeding with its case," *id.*, the Union did not make an effort to proceed with the remainder of the grievance, *see id.* at 4-6. Specifically, the Arbitrator found that the Union's disagreement with his previous award was "not a sufficient basis for not promptly proceeding with the

[1] The grievants work in seven different sectors: public housing, fair housing and equal opportunity, federal policy and management, community planning and development, multi-family, administrative, and single family. Award at 2.

[2] The Authority denied the Union's exceptions in *National Federation of Federal Employees, Local 1804*, 66 FLRA 512 (2012) (Member Beck dissenting in part).

balance of the grievance." *Id.* at 4. According to the Arbitrator, his conclusions with respect to the remaining sectors may differ from his public housing sector award because such conclusions would be based on the evidence and testimony presented to him concerning those sectors. *Id.* The Arbitrator also rejected the Union's position that the Arbitrator should stay the hearings until the Authority ruled on the Union's exceptions to his prior, unrelated award. *Id.* at 4-5. In this regard, the Arbitrator determined that the Union's assertion – that the Authority may rule that the Arbitrator acted improperly and may select another arbitrator to arbitrate the remaining portion of the grievance – was "not a sufficient basis to discontinue with the proceedings until a later date." *Id.* at 5-6. Moreover, he found that delaying the proceedings until the Authority issued its decision would burden unnecessarily the remaining grievants and the Agency. *Id.* at 4-5. In addition, the Arbitrator found that the Union's contention that it was unable to proceed until the Agency responded to its request for information was not a sufficient basis for delaying the hearings. *Id.* at 5.

Furthermore, the Arbitrator determined that the Union had "no desire" to schedule hearings to resolve the remainder of the grievance. *Id.; see also id.* at 6 (concluding that, as of late November, the Union had made no effort to schedule additional hearings). Specifically, the Arbitrator indicated that, although the parties initially scheduled three weeks of hearings, the parties only participated in hearings during the second week and "[v]ery little was accomplished with considerable delay during the course of [those] hearings." *Id.* at 5. Moreover, according to the Arbitrator, the Union's representative at those hearings was adamant that the Union did not want to schedule any additional hearings. *Id.* As a result, the Arbitrator granted the Agency's motion to dismiss the grievance with prejudice for want of prosecution. *Id.* at 6.

III. Union's Exceptions

The Union asserts that the Arbitrator's award is deficient as based on a nonfact because the Union did not fail to proceed with its case. Exceptions at 6-8. Among other things, the Union argues that it properly believed that future hearings must be stayed until the Authority ruled on its exceptions. *Id.* at 6. The Union maintains that it participated in all hearings that the parties scheduled, including those that occurred after the Arbitrator issued his award concerning the public housing sector. *Id.*; *see also id.* at 7. Moreover, the Union argues that, at the conclusion of the second week of hearings, the parties clearly contemplated that additional hearings would be held; "the only question was when and in front of whom." *Id.* at 7.

Also, the Union claims that the award is contrary to law because the Arbitrator "lacked the authority to dismiss this case for want of prosecution." *Id.* at 8 (emphasis omitted). The Union contends that "[t]he only legal basis that the Agency and Arbitrator relied upon in dismissing the [g]rievance is *Rizk v. Mayad*, 603 S.W.2d 773, 776 (1980)," a Texas Supreme Court decision that has no bearing on the case. *Id.*

The Union further maintains that the Arbitrator exceeded his authority. *Id.* at 8-10. According to the Union, the Arbitrator completely failed to address its contention that, based on precedent, he should require the parties to select another arbitrator to decide the issue of whether he "should recuse himself from these proceedings." *See id.* at 10; *see also id.* at 9 (citing *Pitta v. Hotel Ass'n of N.Y.C., Inc.,* 806 F.2d 419 (2d Cir. 1986); *Equal Emp't Opportunity Comm'n*, 53 FLRA 465 (1997)).

Furthermore, the Union contends that the Arbitrator failed to provide it with a fair hearing. *Id.* at 10-11. Specifically, the Union argues that the Arbitrator did not allow it to have a hearing. *Id.* at 10. The Union also maintains that the Arbitrator never informed it that, if it did not schedule additional hearings, he would dismiss the grievance. *Id.* at 10-11. In addition, the Union asserts that, "in light of the many outstanding issues, it did not [b]elieve it was appropriate to conduct additional hearings." *Id.* at 11.

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union claims that the Arbitrator's finding that it failed to proceed with its case is based on a nonfact. Exceptions at 6-8. 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. *E.g., Soc. Sec. Admin., Dall. Region*, 65 FLRA 405, 407 (2010). The Authority will not find an award deficient on the basis of the arbitrator's determination on any factual matter that the parties disputed at arbitration. *E.g., AFGE, Local 3957, Council of Prison Locals*, 61 FLRA 841, 845 (2006).

The Union's nonfact claim is without merit. Even assuming that the challenged finding is a factual determination, the record demonstrates that the issue of whether the Union failed to proceed with its case was disputed at arbitration. *See, e.g.*, Exceptions, Attach. A, Agency's Motion at 2-3, 9; Exceptions, Attach. C, Union's Opp'n to Agency's Motion at 2-3. Because this alleged nonfact was disputed at arbitration, the Union's contentions regarding the accuracy of the fact do not provide a basis for finding the award deficient as based on a nonfact. *See U.S. Dep't of Homeland Sec.,*

U.S. Customs & Border Prot., 66 FLRA 335, 338-39 (2011) (finding that the agency's exception did not provide a basis for finding that the award was based on a nonfact because, even assuming that the arbitrator's finding with respect to the agency's integrity concerns was a factual determination, the parties disputed this matter at arbitration).

Accordingly, we deny the Union's exception.

B. The award is not contrary to law.

The Union asserts that the award is contrary to law because the Arbitrator "lacked the authority to dismiss this case for want of prosecution." Exceptions at 8. The Authority's Regulations specifically enumerate the grounds that the Authority currently recognizes for reviewing awards. *AFGE, Local 3354*, 66 FLRA 305, 307 (2011) (*Local 3354*) (citing 5 C.F.R. § 2425.6 (a)-(b)). Further, "an exception 'may be subject to dismissal or denial if[] . . . [t]he excepting party fails to raise and support a ground as required in'" § 2425.6(a). *Fraternal Order of Police, Pentagon Police Labor Comm.*, 65 FLRA 781, 785 (2011) (*Pentagon*) (quoting 5 C.F.R. § 2425.6(e)). As the Authority has explained, "an exception that fails to support a properly raised ground is subject to denial." *Local 3354*, 66 FLRA at 307 (internal citation omitted) (internal quotation marks omitted).

The Union cites no law, rule, or regulation with which the award conflicts. *See* Exceptions at 8. As a result, the Union has failed to support this ground. *See, e.g., Pentagon*, 65 FLRA at 785 (concluding that, because the union did not explain how the award was deficient under a particular case and did not cite any law that required the arbitrator to grant the requested remedy, the union failed to demonstrate that the award was contrary to law). Accordingly, we deny the Union's claim under § 2425.6(e)(1).

C. The Arbitrator did not exceed his authority.

The Union maintains that the Arbitrator exceeded his authority because he did not address its contention that he should require the parties to select another arbitrator to decide the issue of whether he "should recuse himself from these proceedings." Exceptions at 10; *see also id.* at 9. Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

Although the Union argues that the Arbitrator completely failed to address its contention that he should allow another arbitrator to decide its motion for recusal, the record demonstrates that the Arbitrator implicitly resolved this issue. In this regard, the Arbitrator indicated that it was the Union's contention that the Arbitrator should "be taken off . . . the case." Award at 4. The Arbitrator found that, "[i]t [was] regrettable that[,] because of an adverse decision on one portion of the grievance[,] there [was] a charge by the Union that there [was] bias on the part of the Arbitrator" and that "[t]his charge, besides being misguided, [was] not deserving of any further comment." *Id.* at 5. Moreover, by granting the Agency's motion, the Arbitrator inherently determined that he had jurisdiction and that he was not required to recuse himself. Because the premise of the Union's contention – that the Arbitrator completely failed to address its argument – is incorrect, the Union's exceeded authority exception provides no basis for finding the award deficient. *See Soc. Sec. Admin., Port St. Lucie Dist., Port St. Lucie, Fla.*, 64 FLRA 552, 553-54 (2010) (concluding that, because the premise of the agency's assertion – that the arbitrator failed to consider its classification argument – was incorrect, its assertion provided no basis for finding the award deficient).

Accordingly, we deny the Union's exception.

D. The Arbitrator did not fail to provide the Union with a fair hearing.

The Union asserts that the Arbitrator denied it a fair hearing. Exceptions at 10-11. An award will be found deficient on the ground that the Arbitrator failed to provide a fair hearing when the excepting party establishes that an arbitrator's refusal to hear or consider pertinent and material evidence, or other actions in conducting the proceeding, prejudiced a party so as to affect the fairness of the proceeding as a whole. *E.g., AFGE, Local 1668*, 50 FLRA 124, 126 (1995). However, an arbitrator has considerable latitude in the conduct of a hearing, and the fact that an arbitrator conducted a hearing in a manner that a party finds objectionable does not in and of itself provide a basis for finding an award deficient. *E.g., U.S. Dep't of Def., Def. Mapping Agency, Hydrographic/Topographic Ctr.*, 44 FLRA 103, 108-09 (1992). Further, federal courts have held that arbitrators are required only to grant parties a fundamentally fair hearing which provides adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator. *Id.* at 109.

The Union's assertion that the Arbitrator failed to provide it with a fair hearing is without merit. Specifically, the Union argues that the Arbitrator did not

allow it to have a hearing. Exceptions at 10. However, the record demonstrates that the Arbitrator provided the Union with three weeks of hearings to present its case. The Union chose not to take advantage of this opportunity. In this regard, the Union cancelled two weeks of scheduled hearings. *See, e.g.*, Award at 2-3, 5; Exceptions, Attach. A, Ex. 1, Tr. at 613-14. Moreover, the Arbitrator noted that, during the second week of scheduled hearings, the Union only "went through the motions" and accomplished very little. *See* Award at 5; *see also Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 480 (4th Cir. 2012) (taking into consideration that the plaintiff rather than the arbitrators "cut short the hearing on the issue of attorneys' fees" in finding that the arbitrators provided a fair hearing).

Also, the Union asserts that it was unaware that the Arbitrator would dismiss the grievance if it did not schedule additional hearings. Exceptions at 10-11. As an initial matter, during the second week of hearings, the Arbitrator expressed to the Union his dissatisfaction with the slow pace of the proceedings. *See, e.g.*, Exceptions, Attach. A, Ex. 1, Tr. at 613-15. Moreover, the record demonstrates that the Union was on notice that the grievance could be dismissed for want of prosecution when the Agency filed its motion. *See* Exceptions at 5 (acknowledging that it was aware of the Agency's motion asserting that the Arbitrator should dismiss the grievance for want of prosecution). Further, the Arbitrator also gave the Union the opportunity to file a brief to contest the Agency's motion to dismiss. Award at 3; *see also U.S. Dep't of the Air Force, Griffiss Air Force Base, Rome, N.Y.*, 36 FLRA 338, 341, 342-43 (1990) (rejecting the Union's contention that it was unaware that it had to rebut certain testimony given off-the-record and that, as a result, it was denied a fair hearing when, among other things, the Arbitrator permitted the parties to file post-hearing briefs).

Finally, although the Union argues that, "in light of the many outstanding issues, it did not [b]elieve it was appropriate to conduct additional hearings," Exceptions at 11, the Union has not shown that the Arbitrator improperly refused to delay the proceedings. *See U.S. Dep't of Health & Human Serv., Soc. Sec. Admin., Balt., Md.*, 37 FLRA 766, 773 (1990) (finding that the mere fact that an arbitrator did not grant a postponement of the hearing does not demonstrate that the arbitrator conducted the hearing unfairly). In this regard, the Arbitrator concluded it was inappropriate to delay the proceedings until the Authority issued its decision concerning his prior award. *See* Award at 5-6. The Arbitrator found that his conclusions with respect to the remaining sectors would not be dependent upon his public housing sector award because such conclusions would be based on the evidence and testimony presented to him concerning those sectors. *See id.* at 4. Moreover, the Arbitrator determined that delaying the proceedings would burden unfairly the remaining parties and the Agency. *Id.* at 4-5; *see also El Dorado Sch. Dist. #15 v. Cont'l Cas. Co.*, 247 F.3d 843, 848 (2001) (finding that a determination that "the parties had expended considerable time, effort and money based on the hearing dates" would provide a reasonable basis for an arbitrator's decision not to postpone the hearing).

In these circumstances, the Union has not shown that it was denied a fair hearing. Accordingly, we deny the Union's exception.

V. Decision

The Union's exceptions are denied.