68 FLRA No. 88

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
COUNCIL 33
(Union)

0-AR-5079

_____

DECISION

April 30, 2015

_____

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Charles J. Murphy issued an award finding that the Agency had violated Article 3 of the parties' agreement and § 7114(b)(3) of the Federal Service Labor-Management Relations Statute (the Statute)[1] when it implemented a new staff-search policy (the policy) before completing negotiations concerning the policy.

The Agency raises two substantive exceptions. First, the Agency alleges that the award is based on a nonfact. Because this exception relies on an alleged nonfact that is absent from the award, we deny this exception.

Second, the Agency alleges, on several grounds, that the award is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible. Because the Agency either bases its exception on a misinterpretation of the award or fails to demonstrate how the award would be impossible to implement, we deny this exception.

[1] 5 U.S.C. § 7114(b)(3).

II. Background and Arbitrator's Award

The grievance involves the negotiation over, and the implementation of, the policy. At a certain point, the Agency implemented the policy, and the Union filed a grievance claiming that the parties had not completed the negotiations over the policy. The grievance alleged, as relevant here, violations of the parties' agreement as well as § 7114(b)(3) of the Statute.[2] The matter was unresolved, and the parties submitted it to arbitration.

At arbitration, the Union argued, as relevant here, that, after mediation through the Authority's Collaboration and Alternative Dispute Resolution Office (CADRO), there were at least five proposals (the five proposals) that were neither fully negotiated nor withdrawn. Consequently, the Union argued, negotiations were not completed prior to the implementation of the policy, and the actions of the Agency violated the Statute and the parties' agreement. The Union also argued that, by including nonnegotiable language from the Code of Federal Regulations (the CFR language) in the policy, the Agency engaged in bad faith negotiation.

The Agency argued that it had fully negotiated the proposals and no longer had any duty to bargain over the issue. Specifically, the Agency argued that, although several proposals remained unresolved after mediation through CADRO, the Agency had declared those proposals nonnegotiable, and the Union did not subsequently file a negotiability appeal regarding these unresolved proposals.

After a hearing and the submission of post-hearing briefs, the Arbitrator determined that the Agency did not negotiate in bad faith by including the CFR language in its policy. However, the Arbitrator also found that "[b]argaining was not completed as to [the five proposals] and . . . there was and is a continuing duty to bargain in regard to them."[3] Consequently, the Arbitrator found that the Agency had bargained in bad faith and thereby violated the parties' agreement as well as § 7114(b)(3) of the Statute.

As relevant here, the Arbitrator ordered the following remedy: the Agency will (1) "meet and bargain with the Union over [the policy] including[,] but not limited to[,] those proposals identified herein"; (2) "cease and desist from enforcing or otherwise implementing [the policy] until such time as the parties complete negotiations in accordance with the Statute and the parties' agreement"; (3) "hold in abeyance until negotiations on [the policy] are completed any

[2] *Id.*
[3] Award at 14.

investigations or disciplinary actions, which are not criminal in nature, against staff [that] may have resulted from the Agency's unilateral implementation of [the policy]"; and (4) "unless it shall agree to remove the CFR language [from] the policy, include in any final version of [the policy] a statement that the CFR language contained in the policy was outside the duty to bargain under [the Statute] and therefore was not bargained with the Union [(the disclaimer text)]."[4]

The Agency filed exceptions to the award, and the Union filed an opposition to those exceptions.

III. Preliminary Matters

A. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar certain exceptions and arguments.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the Arbitrator.[5]

In its exceptions, the Agency argues that it had no duty to bargain because "the record . . . clearly shows that the parties subsequently completed negotiations, and [the Agency] reached agreement with the Union" on the five proposals.[6] However, before the Arbitrator, the Agency never argued that the Union affirmatively agreed to the proposals, only that the Agency had declared them nonnegotiable, and that the Union did not file a negotiability appeal on those proposals. The Agency maintains that it was unaware that the Union contended that the five proposals had not been fully negotiated until the arbitration hearing.[7] However, this would not have prevented the Agency from presenting these arguments in its post-hearing brief, submitted after the hearing and after the Agency knew the Union's contentions. Because these arguments could have been, but were not, raised before the Arbitrator, we find that the Regulations bar consideration of those arguments in support of the exceptions.[8] Because these arguments are the only arguments advanced in support of the Agency's exception alleging that the award is contrary to law because the Agency had no duty to bargain, we deny that exception.

The Agency also argues that the award is contrary to law because the Arbitrator did not apply the Authority's balancing test under *Federal Correctional Institution*.[9] According to the Agency, this test "weigh[s] against a status[-]quo[-]ante remedy."[10] Despite this, the Agency continues, the Arbitrator "effectively awarded" a status-quo-ante remedy.[11] However, the Agency did not argue at arbitration that it would be inappropriate to grant the Union's requested relief, which the Arbitrator granted, and the Agency now identifies as "effectively . . . status quo ante."[12] As such, the Agency cannot raise these arguments now. We dismiss this exception as barred by §§ 2425.4(c) and 2429.5 of the Authority's Regulations.[13]

B. The Authority will not dismiss the Agency's exceptions for including evidence not presented at arbitration.

The Union alleges that the Agency included two attachments that were not presented at arbitration.[14] Consequently, the Union argues that the Authority should dismiss the Agency's exceptions.[15] As noted above, the Authority will not consider evidence or arguments that could have been, but were not, presented to the arbitrator.[16] However, nothing in the Regulations indicates that including evidence not presented at arbitration alone warrants the dismissal of a party's exceptions.[17] As such, we do not dismiss the Agency's exceptions on these grounds.

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency contends that the award is based on a nonfact.[18] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[19] The absence of facts does not support a nonfact exception.[20]

---

[4] *Id.* at 16-17.
[5] 5 C.F.R. §§ 2425.4(c), 2429.5; *see also U.S. DOL*, 67 FLRA 287, 288 (2014) (*DOL*); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012) (*Local 3448*).
[6] Exceptions at 11.
[7] *Id.* at 17.
[8] *U.S. DHS, U.S. CBP*, 66 FLRA 335, 338 (2011).
[9] Exceptions at 23 (citing *Fed. Corr. Inst.*, 8 FLRA 604, 606 (1982)).
[10] *Id.* at 27.
[11] *Id.* at 22.
[12] *Id.* at 21.
[13] 5 C.F.R. §§ 2425.4(c), 2429.5; *DOL*, 67 FLRA at 288; *Local 3448*, 67 FLRA at 73-74.
[14] Opp'n at 2-3.
[15] *Id.*
[16] 5 C.F.R. §§ 2425.4(c), 2429.5; *DOL*, 67 FLRA at 288; *Local 3448*, 67 FLRA at 73-74.
[17] 5 C.F.R. §§ 2425.4(c), 2429.5.
[18] Exceptions at 19.
[19] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).
[20] *NAIL, Local R4-45*, 55 FLRA 695, 700 (1999) (*NAIL*).

The Agency argues that the Arbitrator based his decision "on the nonfact that the parties did not continue negotiating the five proposals at issue after the earlier ones were signed."[21] The Agency further alleges that, but for this nonfact, the Arbitrator would have reached a different result. However, the award does not indicate, and the Agency does not identify, where the Arbitrator found that the parties did or did not continue to negotiate on the five proposals after the parties had agreed to the earlier proposals. As such, the Agency relies on the absence of facts to support its exception. As noted above, the absence of facts provides no support for a nonfact exception.[22] Consequently, we deny this exception.

B. The award is not incomplete, ambiguous, or contradictory so as to make implementation impossible.

The Agency alleges that the award is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible.[23] To prevail on this ground, the appealing party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain.[24]

The Agency argues that the award is incomplete, ambiguous, or contradictory on four grounds: (1) "if the Agency is required to include [the disclaimer text] regardless of the result of further negotiations ordered by the Arbitrator, it is unclear what the parties are to negotiate regarding these five proposals";[25] (2) the Arbitrator stated that he had concerns regarding a status-quo-ante remedy, yet

> he effectively awarded [a] status[-]quo[-]ante [remedy] by seemingly requiring that the Agency meet and bargain with the Union over . . . unidentified, and an unspecified number of, proposals relating to the policy, and that the Agency "cease and desist from enforcing or otherwise implementing" [the policy].[26]

(3) "the Arbitrator stated his belief that the parties could expeditiously bargain and resolve the matter given the 'limited number of proposals at issue'"[27] but "[t]he [a]ward . . . is void of any description of the type of proposals that must be negotiated, as well as any limitation on the number of such proposals that must be negotiated";[28] and (4) the Arbitrator found that the Agency had not acted improperly when it included the CFR language in its policy, yet the remedy requires that the Agency either remove this language from or include the disclaimer text in the policy.

Concerning the first allegation, the award does not require the Agency to include the disclaimer text in the policy, but gives the Agency the choice to either remove the CFR language or to include the disclaimer language. Because the Agency bases this exception on a misinterpretation of the remedy, it does not provide a basis for finding the award deficient.[29] We deny this exception.

As to the remaining three allegations, the Agency fails to demonstrate how the Arbitrator's statements and his findings make the award impossible to implement. Specifically, the Agency does not explain how the award is impossible to implement in light of the Arbitrator's: (1) alleged contradictory statements regarding a status-quo-ante remedy; (2) belief as to the ease of negotiation; or (3) finding that the Agency had not acted improperly in including the CFR language in the policy. As a result, we deny this exception.[30]

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

[21] Exceptions at 19.
[22] *NAIL*, 55 FLRA at 700.
[23] Exceptions at 20.
[24] *U.S. Dep't of the Air Force, Grissom Air Reserve Base, Ind.*, 67 FLRA 302, 304 (2014) (quoting *U.S. DOD, Def. Logistics Agency*, 66 FLRA 49, 51 (2011)).
[25] Exceptions at 22.
[26] *Id.* at 21 (quoting Award at 16-17).
[27] *Id.* (quoting Award at 16).
[28] *Id.*
[29] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 66 FLRA 1046, 1049 (2012).
[30] *U.S. Dep't of VA, Bd. of Veterans Appeals*, 68 FLRA 170, 173 (2015).