64 FLRA No. 191

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY
ADJUDICATION AND REVIEW
(Agency)

and

ASSOCIATION OF
ADMINISTRATIVE LAW JUDGES
INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS
(Union)

0-AR-4402

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DECISION

July 19, 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 Charles J. Coleman 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 found that the Agency violated the parties' collective bargaining agreement (CBA) and its own regulations when it processed allegations of bias against Administrative Law Judges (ALJs) without affording the ALJs notice and an opportunity to respond. The Arbitrator sustained the grievances and awarded remedies.

For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievants, two Agency ALJs, decide benefits claims (claims) that are filed with the Agency. Benefits claimants who disagree with an ALJ's disposition of their claims may file with the Appeals Council (the Council) a Request for Review (RfR) of the ALJ's decision. *See* Award at 1, 6. Both grievants rendered decisions that claimants contested through RfRs, which resulted in the Council finding that the grievants' decisions exhibited bias. As the grievants did not learn about the allegations against them until after the Council issued its formal findings of bias, the Union filed grievances, alleging that the Agency had processed the RfRs in a manner that violated the CBA and Agency regulations. *Id.* at 1-2. When the grievances went unresolved, they were consolidated and submitted to arbitration, where, as relevant here, the Arbitrator framed the issues as follows: Did the "actions of the Agency violate[] obligations [under] the CBA and the relevant regulations[?] . . . . And, if indicated, [what remedy is to be] provide[d] . . . consistent with the . . . CBA and appropriate . . . regulations?" *Id.* at 11-12.

The Arbitrator found that the "CBA requires . . . that complaints of bias . . . 'shall be brought to the attention of the [ALJ] as soon as possible . . . consistent with law.'" *Id.* at 10 (quoting CBA Art. 21, § 4.B).[1] The Arbitrator also found that the CBA and certain Agency regulations required the Agency to allow ALJs to comment on bias allegations. *Id.* at 14-15 (citations omitted). The Arbitrator determined that the applicable regulations were compatible with the CBA's "require[ments] that ALJs accused . . . be notified of that action before the Appeals Council has completed its investigation and be allowed to submit information[.]" *Id.* at 14 (citing CBA Art. 5, § 4.C; Art. 21, § 4.B); *see also* Award at 16.

The Arbitrator determined that, despite the aforementioned contractual and regulatory requirements, neither grievant received notice of, or an opportunity to respond to, the bias allegations before the Council rendered its final decisions on them.[2] *Id.* at 7. As relevant here, the Arbitrator directed that the "requirement . . . in Article 21[, Section 4.B] of the CBA . . . be applied literally" so that an ALJ "charged with bias [will] be notified 'as soon as possible'" about an allegation and will have "an opportunity to defend against it."[3] *Id.* at 15-16.

1. The pertinent wording of Article 21, Section 4.B is set forth *infra* Part IV.A.

2. In cases where "there is a finding of bias against [an] ALJ . . ., the Council sends its findings over to the [Office of the Chief Administrative Law Judge, or] OCALJ[,] for possible discipline." Award at 6.

3. The Arbitrator also ordered the Agency to observe its own bias-allegation regulations and to expunge certain

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award fails to draw its essence from the CBA because the CBA addresses only the disciplinary responsibilities of the OCALJ -- not the Council's handling of RfRs. *See* Exceptions at 17 & n.3, 18-19. Specifically, the Agency asserts that the award confuses the Council's role as an appellate body for claimants with the OCALJ's role as a personnel administrator for ALJs, and, therefore, represents a "patently unreasonable" construction of the CBA. *Id.* at 9-10, 17-18 (citations omitted).

The Agency further contends that the award is contrary to federal regulations and Agency policy[4] because it "requires that . . . ALJs . . . participate in the appellate process[ing]" of RfRs, which the Agency contends must remain "distinct from the [investigatory and disciplinary] actions taken by management[,]" including the OCALJ. *Id.* at 3, 7; *see also id.* at 5, 12-15, 20. According to the Agency, the Arbitrator's construction and enforcement of the CBA conflicts with the Agency's rules and regulations, which, the Agency asserts, the Arbitrator also misinterpreted. *Id.* at 12-15 (citations omitted).

B. Union's Opposition

The Union contends that, because Article 21 of the CBA provides for the notice to ALJs that the award requires, the award draws its essence from the agreement. *See* Opp'n at 1-2, 11. The Union also contends that the award is "entirely consistent with federal regulation[.]" *Id.* at 1.

references to the grievants from the Agency's records. *See id.* at 18.

4. The Agency cites 20 C.F.R. §§ 404.900, 404.967, 404.969, 404.970, 404.977, 404.979, 416.1400; Procedures Concerning Allegations of Bias or Misconduct by Administrative Law Judges, 57 Fed. Reg. 49,186-03 (Oct. 30, 1992); Exceptions, Ex. F (Directive Concerning Interim Procedures and Responsibilities for Handling Complaints of Bias or Misconduct on the Part of Administrative Law Judges) (Jan. 15, 1993); Exceptions, Ex. H (HALLEX I-3-0-2. Composition and Function of the Appeals Council; HALLEX I-3-1-25. Unfair Hearing Allegations); Exceptions, Ex. J (POMS GN 03103.300(E) (Complaints of Alleged Bias or Misconduct by ALJs: Process – Initial Inquiry)).

IV. Analysis and Conclusions

A. The award draws its essence from the CBA.

The Agency contends that the award fails to draw its essence from the CBA because the CBA does not address the Council's handling of RfRs. Exceptions at 17 & n.3. In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review 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. *See 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.

Article 21, Section 4.B of the CBA provides, in pertinent part:

> Complaints of bias or misconduct made . . . and received by *either the Appeals Council (in the form of [an RfR])*, OCALJ, [or other Agency components] . . . shall be brought to the attention of the Judge as soon as possible by providing a copy of the complaint alleging bias or misconduct to the Judge consistent with law.

Exceptions, Ex. I (emphasis added). The Agency has failed to explain why it was irrational, unfounded, implausible, or in manifest disregard of the agreement for the Arbitrator to find that this provision applies to the Council's processing of RfRs. Accordingly, we deny the essence exception.

B. The award is not contrary to rule or regulation.

The Agency argues that the award is contrary to its rules and regulations regarding the Council. As relevant here, under § 7122(a)(1) of the Statute, an

arbitration award will be found deficient if it conflicts with governing agency rules and regulations. *See U.S. Dep't of Def., Army & Air Force Exch. Serv., Dallas, Tex.*, 53 FLRA 20, 26 (1997); *Overseas Educ. Ass'n*, 51 FLRA 1246, 1251 (1996); *U.S. Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 FLRA 186, 192 (1990) (*Fort Campbell*). However, parties' agreements, rather than agency rules or regulations, govern the disposition of matters to which they both apply.[5] *See U.S. Dep't of the Navy, Naval Training Ctr., Orlando, Fla.*, 53 FLRA 103, 108-109 (1997); *U.S. Dep't of the Treasury, U.S. Customs Serv., N.Y., N.Y.*, 51 FLRA 743, 746 (1996); *Fort Campbell*, 37 FLRA at 194.

In addition, 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 those 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.*

Even assuming, as the Agency alleges, that the Arbitrator interpreted the CBA in a manner inconsistent with the Agency's rules and regulations, the CBA, rather than the Agency's rules or regulations, governs the disposition of matters to which they both apply. *See Fort Campbell*, 37 FLRA at 194. Therefore, the Agency's rules and regulations provide no basis for setting aside the award's enforcement of CBA Article 21, Section 4.B.

As for the Agency's contentions that the Arbitrator erroneously found that the Agency's rules and regulations provide for notice of bias allegations to the grievants, the Arbitrator's finding of a CBA entitlement constitutes a separate and independent basis for the award. As we have found that the award draws its essence from the CBA, the Agency does not demonstrate that the contractual basis for the award is deficient. *See Oxon Hill*, 56 FLRA at 299. Therefore, the Agency's exceptions to the Arbitrator's interpretation of Agency rules and regulations do not provide a basis for setting aside the award.

V. Decision

The Agency's exceptions are denied.

5. Insofar as an arbitrator construes an agreement contrary to an applicable government-wide regulation, an award is unenforceable. *See U.S. Dep't of the Army, Evans Army Cmty. Hosp., Fort Carson, Colo.*, 58 FLRA 244, 245 (2002). However, none of the rules or regulations cited by the Agency are "government-wide rules or regulations[,]" within the meaning of § 7117(a) of the Statute, because they are not "generally applicable throughout the Federal Government." *Overseas Educ. Ass'n v. FLRA*, 827 F.2d 814, 816-18 (D.C. Cir. 1986); *see also NTEU, Chapter 6*, 3 FLRA 747, 751-56 (1980) (quoting H.R. Rep. No. 95-1403, at 51 (1978) ("The term 'Government-wide' shall be construed literally; only those regulations which affect the *Federal civilian work force as a whole* are 'Government-wide' regulations. . . . " (emphasis added)); *cf. Panama Canal Comm'n*, 54 FLRA 1316, 1322 (1998) (finding that parties' agreement "superseded" conflicting Agency regulation in the Code of Federal Regulations).