65 FLRA No. 195

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1547
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
LUKE AIR FORCE BASE, ARIZONA
(Agency)

0-AR-4615

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DECISION

June 20, 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 Douglas P. Hammond filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

As relevant here, the Arbitrator found that the due process and just cause standards incorporated in the parties' collective bargaining agreement (CBA) did not apply to the grievants' terminations from their positions as temporary employees.

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

II. Background and Arbitrator's Award

The grievants were employed by the Agency as temporary security guards. Award at 7. As a condition of their employment, the Agency required each grievant to sign a "Conditions of Temporary Limited Appointment Statement(s) of Understanding" (Statement). *Id.* at 10. The Statement indicated that, as temporary employees, they were "not covered by the adverse action procedures under 5 [U.S.C. §] 4303 and 5 [U.S.C. §] 7511" and could be "terminated at any time upon notice from the Agency." *Id.*

While on duty, the grievants had a fistfight. *Id.* at 7. An Agency supervisor gathered statements from other employees regarding the incident, but did not request statements from the grievants. *Id.* The Agency then notified each grievant that his employment was terminated based on "misconduct of fighting with another employee while on duty." *Id.* at 8.

The Union filed a grievance alleging that the Agency violated the CBA when it terminated the grievants' employment. *Id.* at 1. The matter was unresolved and was submitted to arbitration.

The Arbitrator framed the issues as whether "the grievance [is] properly before the Arbitrator in accordance with [the CBA]" and, if so, "was due process followed and was the termination of [the grievants] for just cause? If not, what is the appropriate remedy?" *Id.* at 3.

On the arbitrability issue, the Arbitrator found that the grievants were entitled to grieve their terminations under the CBA. *Id.* at 16. On the merits, the Arbitrator determined that the due process and just cause standards incorporated in the CBA did not apply to the grievants as temporary employees. *Id.* at 18-20. Finding that the Statement the grievants signed set forth the "conditions governing [their] temporary appointments," *id.* at 17, the Arbitrator further determined that "under [the] specific terms set forth in the signed statements[,]" the grievants' employment "could end for any legal reason[,]" *id.* at 18. In the Arbitrator's view, the grievants were not entitled to "commonly accepted due process requirement[s]" or "all the recognized steps . . . contained in the standard just cause provision." *Id.* at 18, 19. Therefore, the Arbitrator concluded, the grievants' "temporary appointments properly ended." *Id.* at 19.

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the award is deficient because: (1) it fails to draw its essence from the CBA; and (2) it is contrary to law.

With respect to the essence exception, the Union argues that, contrary to the Arbitrator's interpretation, the CBA does not exclude the grievants from the due

process and just cause standards incorporated in the CBA. Exceptions at 6. In this regard, the Union asserts that the grievants are part of the bargaining unit and no evidence was presented at arbitration that distinguishes temporary employees from the rest of the bargaining unit regarding disciplinary actions. *Id.* at 4. The Union also argues that the Arbitrator erred by finding that the grievants waived their contractual rights to due process and discipline for just cause by signing the Statement. *Id.* at 5-6. In addition, the Union contends that the Arbitrator failed to consider evidence presented at the arbitration hearing that other employees were given due process rights and an opportunity to respond to proposed disciplinary actions. *Id.* at 5, 7.

The Union also argues that the award is contrary to law "because it violate[s] the parties' [CBA]." *Id.* at 3.

B. Agency's Opposition

The Agency argues that it is irrelevant whether the Arbitrator erred in determining that the grievants waived certain of their rights under the CBA because the grievance was not arbitrable.[1] Opp'n at 2-3. Moreover, the Agency contends, even if the Arbitrator erroneously found that the grievants waived their rights, it was a "harmless error" because they had no rights to waive. *Id.* at 3-4. Finally, the Agency asserts, the Union's exceptions "merely disagree[]" with the award and mere disagreement with an award does not demonstrate that the award is deficient. *Id.* at 4.

IV. Analysis and Conclusions

The Union argues that the award fails to draw its essence from the CBA. Exceptions at 5-7. 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.

The Union bases its essence exception on three claims: (1) the CBA's due process and just cause standards apply to the grievants; (2) the grievants did not waive their contractual rights to due process and discipline for just cause by signing the Statement; and (3) the Arbitrator failed to consider evidence presented at the arbitration hearing concerning the rights other employees were afforded to respond to proposed disciplinary actions. Exceptions at 5-7.

With regard to the Union's argument that the CBA's due process and just cause standards apply to the grievants, as noted above, the Arbitrator rejected this claim based on the Statement each grievant signed when he was hired. The Statement provided that, as temporary employees, the grievants were "not covered by the adverse action procedures under 5 [U.S.C. §] 4303 and 5 [U.S.C. §] 7511" and that the grievants appointments "may be terminated at any time." Award at 10. Nothing in the language of the CBA's due process and just cause standards is inconsistent with the Arbitrator's interpretation. Moreover, the Arbitrator's finding that the CBA's due process and just cause standards do not apply to the terminations of temporary employees such as the grievants is consistent with Authority precedent. *See U.S. Dep't of the Air Force, Luke Air Force Base, Ariz.*, 65 FLRA 820, 822 (2011) ("[T]he Arbitrator's determination that the grievants could be terminated only for just cause . . . is . . . without merit because agencies have the right to terminate temporary employees summarily, and parties are barred from establishing additional procedural protections that are not provided to terminated, temporary employees by statute."). For the foregoing reasons, the Union fails to demonstrate that the award, finding that the due process and just cause standards incorporated in the CBA do not apply to the grievants, is irrational, unfounded, implausible, or in manifest disregard of the CBA.

With regard to the Union's argument concerning "waiver," for the reasons discussed above, the Union has not demonstrated that the Arbitrator erred in finding that the CBA's due process and just cause standards do not apply to the grievants. Therefore,

1. No exceptions were filed to the Arbitrator's finding that the grievance was arbitrable. Accordingly, that issue is not before us, and we do not address it further.

the grievants had no such contractual rights to "waive." Accordingly, the Union fails to demonstrate on this basis as well that the award is irrational, unfounded, implausible, or in manifest disregard of the CBA.

With regard to the Union's argument that the Arbitrator ignored certain evidence at the arbitration hearing concerning the rights afforded other employees, this argument does not demonstrate that the award is deficient for essence reasons under any of the tests set forth above. *See U.S. Dep't of the Navy, Naval Aviation Depot, Norfolk, Va.*, 36 FLRA 217, 222-23 (1990).

Accordingly, we deny the Union's essence exception.[2]

V. Decision

The Union's exceptions are denied.

2. In addition, the Union asserts that the award is contrary to law "because it violates the parties' [CBA]." Exceptions at 3. Because the Union has failed to identify any law with which the award allegedly conflicts, we reject the Union's exception as a bare assertion. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Immigration & Customs Enforcement*, 61 FLRA 503, 505 n.4 (2006).