64 FLRA No. 39

UNITED STATES
DEPARTMENT OF HEALTH
AND HUMAN SERVICES
NATIONAL INSTITUTES OF HEALTH
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2419
(Union)

0-AR-4181

DECISION

November 25, 2009

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 Ira F. Jaffe 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 sustained in part a grievance alleging that the Agency breached the parties' agreement and/or applicable rules and regulations when it contracted out certain bargaining-unit work.

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

II. Background and Arbitrator's Award

The Agency conducted an A-76 study of its property management services. [1] As part of that process, the Agency established a Most Efficient Organization (MEO), a reconfigured Agency organization to perform property management services on a more cost-effective basis. The Agency imposed a hiring freeze in property-management services for the duration of the A-76 process, which lasted more than four years. Award at 3. During this period, staffing shortages arose due to employee retirements and the opening of new buildings requiring additional staff. To meet these staffing needs, the Agency decided to contract out the work using private contractors. *Id.* at 4.

The Union filed an institutional grievance contending that this use of contractor employees to perform bargaining-unit work violated Article 33 of the parties' agreement, [2] and that use of some of the contractor employees violated government-wide federal regulations governing the Agency's use of contractors. When the grievance was not resolved, it was submitted to arbitration. The Arbitrator framed the issue to be: "[W]hether the Agency . . . breached the Negotiated Agreement between it and the Union, . . . and/or applicable federal government-wide contracting rules and regulations, in contracting out certain . . . bargaining unit work and, if so, to determine the appropriate remedy." [3] *Id.* at 1-2.

Before the Arbitrator, the Agency conceded that when it decided to contract out this work, it failed to: (1) provide the Union with advance notice of the decision to contract out; (2) confer with the Union about this decision or its effects; or (3) provide the Union with a Statement of the Work and afford it an opportunity to bid on the work. *See id.* at 5, 35. However, the Agency maintained that Article 33 pertains only to contracting out under OMB Circular A-76 and that it does not apply to the temporary hiring of contractor employees, such as those at issue here. The Arbitrator noted the lack of evidence of the relevant bargaining history, and found that the record lacked "any clear showing of a mutual intention during bargaining to limit Article 33 to A-76 situations." *Id.* at 34. The Arbitrator examined each sentence of Article 33 in detail and concluded that while some sections are explicitly limited to A-76 review situations, others are "broader in scope[.]" *Id.* at 35. Therefore, the Arbitrator found that the Agency had violated Article 33, Section 2 by failing to provide the Union with required documentation and failing to meet and confer with the Union regarding any impact on bargaining-unit employees. *Id.* at 42.

1. An A-76 study is a study mandated by the Office of Management and Budget's Circular A-76, prohibiting agencies from providing a commercial service if it may be procured from a more economical commercial source. Award at 2.

2. Article 33 sets forth the parties' agreement regarding contracting out and is provided in the appendix to this decision.

3. It is unclear from the record whether the parties stipulated the issue.

The Arbitrator also concluded that the Agency's decision to contract out violated several government-wide rules and regulations. In particular, the Arbitrator found that the Agency violated 5 C.F.R. § 300.503(c)'s restrictions on the use of temporary contractors. [4] *Id.* at 38. In addition, the Arbitrator found that the Agency violated 5 C.F.R. § 300.504 by using temporary contractors for longer than the maximum allowable periods permitted by that regulation. [5] *Id.* at 39. The Arbitrator also found that the contracts "appear[ed]" to involve personal-services contracts that are prohibited by 48 C.F.R. § 37.104, absent exceptions that the Arbitrator found inapplicable. [6] *Id.* The Arbitrator determined that because the contracting out violated these regulations, it also violated Article 33, Section 4 of the parties' agreement. *See id.* at 40.

The Arbitrator directed the Agency to adhere to all government-wide rules and regulations in connection with future contracting out of bargaining-unit work, as required by Article 33, Section 4, and to adhere in the future to the notice, meet and confer, and informational requirements of Article 33, Section 2 of the parties' agreement. *See id.* at 41.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the Arbitrator exceeded his authority by ignoring contractual language and imposing restrictions on management that were never intended by the parties, and that the award does not draw its essence from the parties' agreement. Exceptions at 2, 6. In this regard, the Agency asserts that the Arbitrator erred by holding that Article 33 "as a whole is clearly intended to apply to contracting out of work that is governed by the provisions of OMB circular No. A-76[,]" but proceeding to interpret some sections of that article as also applying to non-A-76 contracting-out situations. *Id.* at 7.

In addition, the Agency asserts that Article 33 is an appropriate arrangement intended to apply only to contracting out in A-76 situations. *Id.* at 11. The Agency asserts that the Arbitrator's interpretation of Article 33 as applying to all contracting out of bargaining-unit work broadens the intent of that article, and excessively interferes with the Agency's rights to contract out and assign work. *Id.* According to the Agency, the Arbitrator's interpretation of Article 33 requires notice to, and discussion with, the Union every time the Agency finds a need to contract out, thereby threatening its mission. *Id.* at 11-12.

Finally, the Agency maintains that the Arbitrator's conclusion that it violated government-wide regulations is based on a nonfact. *Id.* at 12. The Agency notes the Arbitrator's finding that the contracting out "appears" to violate these regulations, and claims that the Arbitrator's "decision to hold that there was a violation simply by a cursory review of the situation without a full factual finding is unfair and unwarranted by the facts presented." *Id.* at 12-13.

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4. 5. C.F.R. § 300.503(c) provides that the services of temporary contractors shall not be used:

> (1) In lieu of the regular recruitment and hiring procedures under the civil service laws for permanent appointment in the competitive civil service, or
>
> (2) To displace a Federal employee.
>
> (3) To circumvent controls on employment levels.
>
> (4) In lieu of appointing a surplus or displaced Federal employee as required by 5 CFR part 330, subpart F (Agency Career Transition Assistance Plan for Displaced Employees) and subpart G (Interagency Career Transition Assistance Plan for Displaced Employees.)

5. 5 C.F.R. § 300.504 provides, in pertinent part:

> (a) . . . . An agency may use a temporary help service firm(s) in a single situation, as defined in § 300.503, initially for no more than 120 workdays. Provided the situation continues to exist beyond the initial 120 workdays, the agency may extend its use of temporary help services up to the maximum limit of 240 workdays.
>
> . . . .
>
> (1) An individual employee of any temporary help firm may work at a major organizational element (headquarters or field) of an agency for up to 120 workdays in a 24-month period. The 24-month period begins on the first day of assignment.
>
> (2) An agency may make an exception for an individual to work up to a maximum of 240 workdays only when the agency has determined that using the services of the same individual for the same situation will prevent significant delay.

6. 48 C.F.R. § 37.104 provides, in pertinent part: "(a) A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. . . . (b) Agencies shall not award personal services contracts unless specifically authorized by statute (e.g. 5 U.S.C. 3109) to do so."

B. Union's Opposition [7]

The Union argues that the award draws its essence from the parties' agreement. The Union also argues that the Arbitrator did not exceed his authority because the award is directly responsive to the issue before him. Opp'n at 7. The Union contends that the Agency has not established that the award excessively interferes with management's right to assign and/or contract out work. *Id.* at 8. In this regard, the Union notes that the award does not apply to all contracting out, but only to contracting out work previously performed by bargaining-unit employees where that contracting out substantially affects the bargaining unit. *Id.* at 8-9. Finally, the Union contends that the Agency has not demonstrated that the award is based on a nonfact.

IV. Analysis and Conclusions

A. The award does not fail to draw its essence from the parties' agreement.

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 Arbitrator examined each sentence of each section of Article 33 in reaching his conclusion that some of its obligations apply to contracting out that is performed outside the A-76 process. *See* Award at 33-34. Based on his review of the language of Article 33, and given the lack of bargaining history of that article, the Arbitrator concluded that the record lacked "any clear showing of a mutual intention during bargaining to limit Article 33 to A-76 situations." *Id.* at 34. The Agency provides no basis for finding that this conclusion is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. Accordingly, we deny this exception.

B. The Arbitrator did not exceed his authority.

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. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). Arbitrators are accorded substantial deference in the formulation of issues. *See U.S. Dep't of Transp., Fed. Aviation Admin. Chi., Ill.*, 41 FLRA 1441, 1448 (1991).

The Agency does not contend that the Arbitrator failed to resolve an issue, resolved an issue not submitted, disregarded specific limitations on his authority, or awarded relief to those not encompassed within the grievance. Rather, the Agency's exceeded-authority argument is a restatement of its essence claim. As discussed above, the Agency has provided no basis for finding that the award fails to draw its essence from the parties' agreement. Accordingly, we deny this exception.

C. The award is not contrary to management's rights to assign and/or contract out work under § 7106(a)(2)(B) of the Statute.

According to the Agency, the award interferes with management's rights to assign and contract out work under § 7106(a)(2)(B) of the Statute. As the Agency's exception challenges the award's consistency with law, we review the question of law raised by the exception and the award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a *de novo* standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local*

7. We accept the Union's opposition as timely filed. In this connection, a brief opposing exceptions to an arbitration award may be filed within 30 days after the date of service of the exceptions. 5 C.F.R. § 2425.1(c). Because the Agency served its exceptions on the Union by mail on January 5, 2007, any opposition by the Union had to be filed with the Authority by February 12, 2007. *See* 5 C.F.R. § 2429.22 (providing that whenever a party is served by mail, 5 days shall be added to the prescribed period for a responsive filing). Although the Union's opposition was correctly addressed and timely mailed, the United States Postal Service delivered it to the wrong agency. That agency returned the opposition to the Union, and the Union re-mailed its opposition on February 21, 2007. Although this re-filing was outside the designated time limits, we find extraordinary circumstances warrant waiving the time limit because the Union's untimely re-filing was due to circumstances beyond its control. *Cf. U.S. Dep't of Transp. Fed. Aviation Admin.*, 63 FLRA 15, 17 (2008) (finding no excuse for delay in union's response to Authority's order where order had been mailed to union office and union had not informed Authority that order should have been mailed to a home address).

1437, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

As relevant here, the Arbitrator found that the Agency violated Article 33, § 2 by "failing to meet and confer with the Union . . . relative to any impact on bargaining unit employees associated with the decision to contract out bargaining unit work[,]" and the Arbitrator directed the Agency to "cease and desist from similar future violations[.]" Award at 42. According to the Agency, this aspect of the award excessively interferes with its rights to assign work and contract out because:

> Management's ability to contract out work on a temporary basis would require notice and discussion with the union on every occasion it determines a need to use contractors. This threatens the agency's mission when it is unable to act quickly and responsively to its operational needs.

Exceptions at 11-12. [8]

To begin, the Agency mischaracterizes the award. As set forth above, the award merely requires the Agency to "meet and confer" with the Union regarding "impact" on employees from a decision to contract out; it does not require the Agency to meet and confer in the absence of impact. Award at 42. Moreover, the Agency's claim that the provision, as interpreted and applied by the Arbitrator, is not enforceable because it would prevent it from acting quickly is contrary to Authority precedent. In this regard, in *Antilles*, the Authority held that "proposals that simply defer the exercise of management rights pending the completion of the statutory bargaining process" are negotiable procedures. *See Antilles Consol. Educ. Ass'n*, 61 FLRA 327, 332 (2005). There is no argument, or basis for concluding, that the requirement in Article 33, § 2 to meet and confer on contracting-out decisions that affect unit employees imposes requirements other than those that already exist under the Statute. As such, *Antilles* supports the conclusion that Article 33, § 2 is an enforceable procedure. As the Agency makes no other arguments that the award is inconsistent with management rights, we deny this exception.

D. The award is not based on a nonfact.

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. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.* An exception that challenges an arbitrator's legal conclusions does not demonstrate that an award is based on a nonfact. *See, e.g., AFGE, Local 3690*, 63 FLRA 118, 120 (2009); *AFGE Council 215*, 60 FLRA 461, 466 (2004).

The Agency asserts that the award is based on a nonfact, but does not actually challenge any of the Arbitrator's factual findings. Instead, the Agency appears to dispute the Arbitrator's legal conclusions that the contracting out at issue violated Federal Acquisition Regulations and Civil Service Regulations. Exceptions at 12-13. As such, the exception does not demonstrate that the award is based on a nonfact. [9] *See, e.g., AFGE, Local 3690*, 63 FLRA at 120; *AFGE, Council 215*, 60 FLRA at 466. Accordingly, we deny this exception.

V. Decision

The Agency's exceptions are denied.

8. Despite the Agency's reference to its mission, the Agency does not cite 5 U.S.C. §7106(a)(1) or otherwise explain how the award affects the Agency's right to determine its mission. Exceptions at 11-12. To the extent the Agency's argument can be construed as raising a claim regarding the right to determine the Agency's mission, we reject it as a bare assertion. *See, e.g., U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Tuscon, Ariz.*, 63 FLRA 241, 244 (2009) (*Davis-Monthan*).

9. To the extent the Agency raises a contrary to law argument, the Agency does not provide any explanation for how the award is contrary to the various regulations at issue. A bare assertion that an award is contrary to law is insufficient to establish that the award is deficient. *See, e.g., Davis-Monthan*, 63 FLRA at 244.

APPENDIX

Article 33, Contracting Out, of the parties' agreement provides in pertinent part:

> *Section 1*. The Agency agrees to inform the Union as soon as possible, but in no case less than sixty (60) days prior to a review of the activity being conducted for the purposes of possible contracting out services currently being provided by bargaining unit employees.
>
> *Section 2*. When the Agency determines that bargaining unit work will be contracted out, the Agency will meet and confer with the Union concerning the impact on bargaining unit employees. The Union will be provided a copy of the performance work statement and contract solicitation document as soon as they are available. The Union's recommendations will be solicited and reviewed during the study concerning the most efficient organization and performance work statement.
>
> *Section 3*. The Agency agrees to exert maximum effort to find suitable employment for bargaining unit employees who are displaced as a result of contracting out . . . .
>
> *Section 4*. The Agency agrees to abide by all government-wide rules, and regulations with respect to contracting out activity.
>
> *Section 5*. Once a determination has been made to contract out services currently being conducted by the Bargaining Unit, the Union shall be notified of the solicitation for bids. The Union may submit bids to perform the services, at their discretion.
>
> *Section 6*. Segments of the bargaining unit (i.e.: MES, MAPB, PRB, NDCC, LB) shall not be reorganized for the sole purpose of circumventing the requirement of OMB Circular A-76.

Award at 13.