69 FLRA No. 20

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2152
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
SIERRA NEVADA HEALTH CARE SYSTEM
(Agency)

0-AR-5121

_____

DECISION

December 21, 2015

_____

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

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement (CBA) by discriminating against a part-time employee (the grievant) based on his union activity. Specifically, the Union argued that the Agency improperly rejected the grievant's repeated requests for full-time employment, assigned him to an indefinite detail (the detail), and suspended him for five days (the suspension). Arbitrator Fred Butler denied the grievance because he found that: (1) the Union failed to show a nexus between the Agency's actions and the grievant's "indirect[]" participation in representational activity as a union representative;[1] and (2) a portion of the grievance was untimely filed. This case presents us with four substantive questions.

The first question is whether the award is contrary to law in three respects. Because the Arbitrator was resolving a purely contractual matter, the Union's first claim – that the Arbitrator refused to apply the proper legal framework to determine whether the Agency engaged in discriminatory conduct – does not show that the award is contrary to law. Because challenges to dicta do not show that an award is deficient, the Union's second claim – that the Arbitrator erred by finding that the Union could have filed an unfair-labor-practice (ULP) charge with the National Labor Relations Board (NLRB) – fails because it challenges dictum. And because the Union fails to support its third claim – that the Arbitrator applied a "higher standard"[2] to the grievant in connection with the Arbitrator's understanding of the CBA – that claim also fails.

The second question is whether the award fails to draw its essence from the CBA because the Arbitrator failed to address whether the Agency violated certain articles of the CBA. Because the Union does not establish that the award is irrational, unfounded, implausible, or in manifest disregard of the CBA, the answer is no.

The third question is whether the Union was denied a fair hearing because: (1) the Arbitrator precluded the Union from presenting, and refused to consider, evidence "relating to the detail";[3] or (2) the Agency's purportedly bad-faith offer to rescind the suspension prevented the Union from arguing that the suspension was based on anti-Union animus.[4] Because the Union does not support these contentions, the answer is no.

The fourth question is whether the award is incomplete, ambiguous, or contradictory, so as to make implementation impossible, because the Arbitrator: (1) "refus[ed] to issue a decision on a significant portion of the grievance";[5] (2) "failed to receive or consider evidence" regarding the Agency's failure to convert the grievant to full-time employment;[6] or (3) "refused to hear the remaining issues[,] citing lack of timeliness."[7] Because the Union does not show how implementation of the award is impossible, the answer is no.

II. Background and Arbitrator's Award

The grievant, a union steward, worked as a part-time registered nurse in the Agency's medical-surgical unit. Over a period of approximately fourteen months, the Agency denied the grievant's multiple requests for reassignment to a full-time position. Due to an investigation into allegations that the grievant kicked a coworker, the Agency detailed the grievant to another department. Over a year after detailing the grievant, the Agency suspended the grievant for five days.

---

[1] Award at 19 (internal quotation marks omitted).

[2] Exceptions at 11.

[3] *Id.*

[4] *Id.* at 6.

[5] *Id.* at 7, 17.

[6] *Id.* at 8.

[7] *Id.* at 17.

In response to the suspension, the Union filed a grievance alleging that the Agency engaged in discriminatory conduct by denying the grievant's repeated requests for conversion from part-time to full-time employment, placing him in an indefinite detail, and suspending him. The Agency denied the grievance as untimely but transferred the grievant from the detail to a full-time position. The parties submitted the grievance to arbitration.

As relevant here, the Arbitrator framed the issues before him as "[w]hether the Agency[] had just cause to [suspend] the [g]rievant," whether the Agency engaged in discriminatory conduct in violation of the CBA, and "whether the [g]rievance relating to the refusal to reassign the [g]rievant was timely filed."[8]

The Arbitrator first noted that the question of whether the Agency had just cause to suspend the grievant was no longer before him because the grievant accepted, at the hearing, the Agency's offer to rescind the suspension.

Regarding the discrimination claim, the Union argued that the Agency discriminated against the grievant because of his union affiliation in violation of Article 17 of the CBA. In pertinent part, Article 17 provides that "all employees shall be treated fairly and equitably and without discrimination in regard to their . . . union activity," and that "[n]o employee will be subjected to intimidation, coercion, harassment, or unreasonable working conditions as reprisal or [to] be used as an example to threaten other employees."[9] According to the Union, the Agency "repeatedly denied [the grievant's] full-time employment [requests], placed [him] in a [414-]day detail, [and] suspended [him] from the Agency"[10] because he had participated "in several significant grievances that resulted in substantial wins for employees."[11]

However, the Arbitrator found that there was "no showing [of] a nexus between . . . [the grievant's representational] activity and the Agenc[y's] actions."[12] Accordingly, the Arbitrator concluded that, "[w]ithout more direct evidence," the grievant's allegations of discrimination failed.[13] The Arbitrator also noted that the Union "could have" filed a ULP charge with the NLRB,[14] but pursued the issue as a contract violation.[15]

With respect to the timeliness issue, the Union made several arguments in support of its position that it either (a) timely filed the grievance or (b) was barred from doing so by the Agency's actions. The Arbitrator rejected these arguments. In particular, the Arbitrator noted that, due to the grievant's status as a union steward, the Arbitrator was holding the grievant to a "higher standard . . . with regard to his knowledge" and understanding of the CBA.[16] Accordingly, the Arbitrator found that that the portion of the grievance "relat[ed] to the refusal to reassign the [g]rievant"[17] was untimely under the CBA.[18]

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

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Union's exceptions.

The Union contends that the Arbitrator's procedural-arbitrability determination is "contrary to law or policy."[19] Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the Arbitrator.[20]

According to the Union,[21] the Arbitrator erred by not considering the "equitable principles" established by the Merit Systems Protection Board (MSPB) in *Alonzo v. Department of the Air Force*.[22] Throughout the grievance process, and at arbitration, the Agency maintained that the Union's grievance was untimely.[23] But the Union did not claim before the Arbitrator, as it does now, that the equitable principles in *Alonzo* applied to the parties' negotiated grievance procedure. Because the Union did not present such an argument to the Arbitrator, but could have done so, it may not present it now to the Authority. Therefore, we find that

---

[8] Award at 18-19; *see also id.* at 4 (framing the issues as "[w]hether the Agency violated the CBA" by refusing to reassign the grievant, whether the grievance relating to the "refusal to reassign" the grievant was timely filed, and "[w]hether the Agency had just cause to discipline the [g]rievant").
[9] *Id*. at 5.
[10] *Id.* at 10.
[11] *Id.* at 9.
[12] *Id.* at 19.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 9 (noting that the parties agreed that the issues were "considered contract violations").
[16] *Id.* at 20.
[17] *Id.* at 18.
[18] *Id.* at 21.
[19] Exceptions at 17.
[20] 5 C.F.R. §§ 2425.4(c), 2429.5.
[21] Exceptions at 17-18.
[22] 4 M.S.P.R. 180, 184 (1980) (identifying relevant factors that establish good cause for waiving the time limitation for filing an appeal before the MSPB).
[23] *See* Award at 9; Exceptions, Attach. 1 (Tr.) at 25-27, 29, 115-17; Exceptions, Attach. 4 (Agency's Closing Br.) at 1, 3-7, 12.

§§ 2425.4(c) and 2429.5 of the Authority's Regulations bar the Union's exception.[24]

IV. Analysis and Conclusions

A. The award is not contrary to law.

As relevant here, the Union asserts that the award is contrary to law in three respects.[25] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo, but defers to the arbitrator's underlying factual findings unless the excepting party establishes that they were based on nonfacts.[26]

First, the Union argues that it presented a "prima facie case of discriminatory animus based on union affiliation"[27] under 5 U.S.C. § 2302(b)(9)(B) and § 7116(a)(4) of the Federal Service Labor-Management Relations Statute (the Statute),[28] and that the Agency was obligated, under Authority and MSPB precedent,[29] "to demonstrate a [non-pretextual] . . . justification" for its conduct.[30] According to the Union, the Arbitrator erred by "refus[ing] to apply this framework."[31]

While arbitrators are required to apply statutory standards when they resolve an alleged ULP,[32] the record establishes that the issues framed by the Arbitrator did not include a ULP or any other statutory claim.[33] At the arbitration hearing, the Union argued that the Agency violated Article 17 of the CBA,[34] and the parties agreed that the arbitration concerned "contract violations."[35] As such, the Arbitrator framed the issue as whether "the Agency violated the *CBA*";[36] he did not address § 2302(b)(9)(B) or § 7116(a)(4). Further, while the Authority has applied statutory standards in assessing the application of contract provisions that mirror, or are intended to be interpreted in the same manner as, the Statute,[37] the Arbitrator did not find – and the Union does not claim – that Article 17 mirrors the Statute. Accordingly, the Union's argument provides no basis for finding that the Arbitrator's failure to apply the asserted framework is contrary to law.[38]

Second, the Union claims that the award is contrary to law because the Arbitrator remarked that, if the Union had pursued the matter by alleging a ULP – rather than a contract violation – the Union could have filed a ULP charge with the NLRB.[39] However, as discussed above, the issue before the Arbitrator was whether "the Agency violated the *CBA*."[40] Consequently, the Arbitrator's misstatement about the appropriate forum for filing a ULP charge was irrelevant to his resolution of the *contractual* claim before him. And because the Arbitrator's statement is unnecessary to the disposition of his decision, it constitutes dictum and provides no basis on which to consider whether the award is contrary to law.[41]

Third, the Union argues that the Arbitrator's application of a "higher standard"[42] of knowledge to the grievant's understanding of the timeliness requirements of the CBA – based on the grievant's experience as a union steward – is "not grounded in law."[43] But the Union does not cite any law to support its argument. Under § 2425.6(e)(1) of the Authority's Regulations, "[a]n exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support" its argument, "or otherwise fails to demonstrate a legally recognized basis for setting aside the award."[44] Because the Union failed to support its contention, we deny this exception under § 2425.6(e)(1).[45]

Based on the foregoing, we deny these contrary-to-law exceptions.

---

[24] *See, e.g.*, *U.S. DHS, U.S. CBP, Wash., D.C.*, 65 FLRA 98, 101 (2010).
[25] Exceptions at 7-9.
[26] *E.g., U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 567-68 (2012) (citing *U.S. DHS, U.S. CBP*, 66 FLRA 335, 340 (2011)).
[27] Exceptions at 15.
[28] *Id.* at 8-9 (citing 5 U.S.C. §§ 2302(b)(9)(B), 7116(a)(4)).
[29] *Id.* at 9 (citing *Flores v. Dep't of the Army*, 98 M.S.P.R. 427 (2005)).
[30] *Id.* at 3; *see also id.* at 8-9, 15.
[31] *Id.* at 9, 16.
[32] *AFGE, Local 54*, 67 FLRA 369, 370-71 (2014) (*Local 54*) (citing *U.S. GSA, Ne. & Caribbean Region*, N.Y.C., N.Y., 60 FLRA 864, 866 (2005)).
[33] *See* Award at 4, 18.
[34] Tr. at 122-23.
[35] Award at 9.
[36] *Id.* at 4 (emphasis added).
[37] *See, e.g.*, *AFGE, Local 1164*, 64 FLRA 599, 600-01 (2010).
[38] *See, e.g.*, *Local 54*, 67 FLRA at 370-71; *AFGE, Local 2128*, 66 FLRA 801, 803 (2012).
[39] Exceptions at 7-8 (discussing Award at 19).
[40] Award at 4 (emphasis added).
[41] *See AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009) ("Statements that are dicta do not provide a basis for finding an award deficient because . . . [they] do not constitute a determination on the merits.").
[42] Award at 20.
[43] Exceptions at 11.
[44] 5 C.F.R. § 2425.6(e)(1).
[45] *Id.*; *see, e.g.*, *U.S. DHS, U.S. CBP*, 68 FLRA 1015, 1022 (2015) (Member Pizzella dissenting).

B. The award does not fail to draw its essence from the CBA.

The Union contends that the award fails to draw its essence from the CBA because the Arbitrator "fail[ed] to address [certain] contract violations."[46] Specifically, the Union alleges that the Agency violated: Article 12 because the grievant was indefinitely detailed;[47] Article 22 because the Agency did not notify the Union of its investigation;[48] and Article 61 because the grievant did not receive first consideration for full-time-position vacancies.[49] The Union asserts that the Arbitrator's failure to address the alleged violations of Articles 12, 22, and 61 was "contrary to the spirit of" the CBA.[50]

When 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.[51] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' 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.[52] 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."[53] And the Authority has denied essence exceptions where the arbitrator's award does not conflict with the plain wording of the parties' agreement.[54]

Initially, we note that the Arbitrator did not discuss or interpret Articles 12, 22, or 61, and, therefore, the Union is not challenging the Arbitrator's interpretation of those provisions. In relevant parts, Articles 12, 22, and 61 obligate the Agency to provide the Union with advanced notice of investigations,[55] grant current employees first consideration for position vacancies,[56] and impose restrictions on details.[57] The Arbitrator, in his award, held that the "Union failed to show" discriminatory conduct.[58] He also held that the portion of the grievance pertaining to the Agency's failure to convert the grievant to full-time employment was untimely.[59] Because nothing in the award conflicts with Articles 12, 22, and 61, the Union's contention does not show that the award fails to draw its essence from the CBA.[60] Nor does the Union contend that the Arbitrator exceeded his authority by failing to address Articles 12, 22, and 61.

Because the Union does not establish that the Arbitrator's interpretation of the CBA is irrational, unfounded, implausible, or in manifest disregard of the CBA, we deny the Union's essence exceptions.

C. The Arbitrator did not deny the Union a fair hearing.

The Union argues that the Arbitrator denied it a fair hearing.[61] The Authority will find an award deficient on the ground that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole.[62]

According to the Union, the Arbitrator refused to consider, and precluded the Union from presenting, evidence "relating to the detail."[63] The Union also argues that the Agency's offer to rescind the grievant's suspension was not "genuine,"[64] and prevented the Union from "bringing forward relevant and substantial evidence" that the suspension was implemented with "complete disregard for" the CBA and law.[65] But the Union fails to support its claim with citations to the hearing transcript or other record evidence.[66] Because the Union has not shown that the Arbitrator refused to hear "relevant and substantial" evidence,[67] or that other

[46] Exceptions at 19.
[47] *Id.* at 20-21
[48] *Id.* at 19-20.
[49] *Id.* at 19.
[50] *Id.*
[51] *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[52] *Id.*
[53] *Id.* (quoting *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)) (internal quotation marks omitted).
[54] *AFGE, Local 1336*, 68 FLRA 704, 708 (2015) (*Local 1336*).
[55] Award at 6 (Article 22, Section 2(B) provides that "[the Agency] will inform the local union in advance of a formal administrative investigation when a bargaining unit employee is the subject of the investigation.").
[56] *Id.* (Article 61, Section 4(C) states that "[c]urrent employees will receive first consideration when filling position vacancies.").
[57] *Id.* at 4 (Article 12, Section 1(A) states that "[a] detail is the temporary assignment of an employee to a different position for a specified period of time.").
[58] *Id.* at 21.
[59] *Id.*
[60] *Local 1336*, 68 FLRA at 708.
[61] Exceptions at 6, 11.
[62] *AFGE, Local 1668*, 50 FLRA 124, 126 (1995).
[63] Exceptions at 11.
[64] *Id.* at 5.
[65] *Id.* at 6.
[66] *See* 5 C.F.R. § 2425.6(e)(1) ("An exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support [it].").
[67] Exceptions at 6.

actions in conducting the proceeding so prejudiced the Union as to affect the fairness of the proceeding as a whole, we deny the Union's fair-hearing exception.

D. The award is not incomplete, ambiguous, or contradictory so as to make the award impossible to implement.

The Union argues that the award is incomplete, ambiguous, or contradictory.[68] Under Authority precedent, for an award to be found deficient as incomplete, ambiguous, or contradictory, the excepting party must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain.[69]

The Union argues that the award is incomplete because the Arbitrator failed to address the allegation of discrimination as it related to the suspension,[70] refused "to receive or consider evidence" regarding the "Agency's failure to convert [the grievant] to full-time" employment,[71] and "refused to hear the remaining issues citing lack of timeliness."[72] However, the Union does not argue that the award is impossible to implement. Accordingly, the Union fails to demonstrate that the award is deficient based on the cited ground, and we deny this exception.

V. Decision

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

---

[68] *Id.* at 16-18.
[69] *E.g., AFGE, Local 1395*, 64 FLRA 622, 624 (2010) (citing *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1074 (2001)).
[70] Exceptions at 7, 17.
[71] *Id.* at 8.
[72] *Id.* at 17.