69 FLRA No. 50

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS #33
LOCAL 0922
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
FORREST CITY, ARKANSAS
(Agency)

0-AR-5149

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DECISION

May 3, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

Arbitrator Thomas A. Cipolla issued an award finding that the Agency "did not violate the [parties' a]greement, laws, regulations[,] or any contractual obligation" when an Agency supervisor took a day of sick leave without executing a delegation of authority authorizing another individual to act in her place.[1] There are two questions before us.

The first question is whether the Arbitrator exceeded his authority when he (1) resolved an issue that was not before him; (2) failed to "direct the parties to the Federal Service[] Impasse[s] Panel" (FSIP);[2] and (3) "substituted his opinion" [3] for that of the Authority, under § 7117 of the Federal Service Labor-Management Relations Statute (the Statute), by making a negotiability determination.[4] Because (1) the Arbitrator's findings are directly responsive to the issue that he framed, (2) the case does not implicate FSIP's statutory responsibilities, and (3) the case does not concern a negotiability dispute under § 7117, the answer is no.

The second question is whether the award is based on two nonfacts. Because the Union's nonfact exceptions are based on a misinterpretation of the award, the answer is no.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency violated § 7116 of the Statute[5] and the parties' agreement when an Agency supervisor took a day of sick leave, but did not execute a delegation of authority authorizing another individual to act in her place during her absence. The parties did not resolve the grievance, and they submitted the matter to arbitration.

Before the Arbitrator, the Union explained that it filed the grievance because "signature authority of management is necessary for many things at the [prison]," and "employees need[ed] to know who [could] sign [certain] documents,"[6] such as "release packets for inmates, . . . leave slips . . . , or [paperwork related to other] administrative functions."[7] The Union also claimed that, before the practice of sending out delegations of authority began, employees "weren't able to find the [acting] supervisor, and . . . didn't know who had signature authority."[8]

At arbitration, the Union claimed that the parties had stipulated that there was an agreement (the delegation agreement) between the parties that required managers to delegate their authority when absent,[9] and the Union produced two Agency emails addressing delegation-of-authority responsibilities. The Agency argued, as relevant here, that it "did not violate the [parties' a]greement, laws, or regulations."[10]

The parties could not agree on a stipulated issue, so the Arbitrator framed the issue as "whether or not the emails are an agreement between the Union and the Agency that may be enforced under the [parties'] agreement or any recognized principles of labor relations."[11]

[1] Award at 14.
[2] Exceptions at 4.
[3] *Id.* at 3.
[4] 5 U.S.C. § 7117.
[5] *Id.* § 7116 (defining unfair labor practices).
[6] Award at 12.
[7] Exceptions, Attach. 1 (Tr.) at 9-10 (Union's opening statement to Arbitrator).
[8] *Id.* at 10 (Union's opening statement to Arbitrator).
[9] Award at 8; *see also* Tr. at 54 (Union representative asserting that "[t]he Agency and the [Union] have stipulated that there was an agreement in place on January 24 that the Agency would send out . . . acting delegations for absent managers for signature purposes and accountability"); *id.* at 55 (Agency representative agreeing to the stipulation asserted by Union counsel).
[10] Award at 12.
[11] *Id.* at 12-13.

The Arbitrator found in favor of the Agency. He concluded that (1) the parties' agreement is silent on the delegation issue; (2) the parties' agreement requires that "contractual addition[s] or revision[s]" must be in writing and signed by the parties; and (3) the Agency's emails to managers – requiring them to delegate their authority during absences – are not enforceable agreements because "they are not signed by any party and[,] in particular[,] the Union is not even mentioned in them."[12] Therefore, the Arbitrator denied the grievance.

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

III. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Union claims that the Arbitrator exceeded his authority.[13] An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to persons who are not encompassed by the grievance.[14] Where the parties fail to stipulate the issue, the arbitrator may formulate the issue on the basis of the subject matter before him or her, and this formulation is accorded substantial deference.[15] In those circumstances, the Authority examines whether the award is directly responsive to the issue the arbitrator framed.[16]

The Union's first exceeds-authority exception argues that the Arbitrator erred when he determined that there was no delegation agreement despite an Agency "'stipulat[ion]' that the agreement for the delegations was in place."[17] The Union claims that the Arbitrator decided an issue not submitted to arbitration because, by stipulating to the existence of the delegation agreement, the parties placed it "outside the [A]rbitrator['s] purview."[18]

We find the Union's first exceeds-authority exception unpersuasive because the award is directly responsive to the issue as framed by the Arbitrator. As discussed above, the parties did not agree upon the issues to be determined at arbitration, so the Arbitrator framed the issue as "whether or not *the emails* are an agreement between the Union and the Agency *that may be enforced* under the [parties'] agreement or any recognized principles of labor relations."[19]

Addressing the framed issue, the Arbitrator analyzed the enforceability of the Agency's emails. The Arbitrator noted the parties' "stipulation that there was an agreement" regarding delegations of authority.[20] But, based on his interpretation of Article 4(b) of the parties' agreement, the Arbitrator concluded that the Union could not enforce the delegation agreement under the parties' agreement's grievance and arbitration procedures.[21]

The Arbitrator interpreted and applied Article 4(b), which provides that there "shall not be change[s to the parties' agreement] unless agreed to in writing by the parties."[22] Specifically, the Arbitrator concluded that the delegation agreement did not rise "to the level of a contractual addition or revision of the [parties' a]greement [that was] enforceable at arbitration"[23] because the emails "are not signed by any party[,] and . . . the Union is not even mentioned in them."[24] Thus, the Arbitrator found that the delegation agreement existed, but that it was, "at best[,] a resolution of an informal grievance and at least, perhaps no more than a suggestion by the rank-and-file or Union that management felt would be a good idea."[25]

These findings are directly responsive to the Arbitrator's framed issue. Further, Article 4(b), as interpreted by the Arbitrator, supports the Arbitrator's conclusion that the delegation agreement was not enforceable at arbitration, and the Union does not challenge the Arbitrator's interpretation or application of that provision on essence grounds. We therefore deny the Union's first exceeds-authority exception.

The Union's second exceeds-authority exception also lacks merit. The Union claims that the Arbitrator exceeded his authority by not "direct[ing] the parties to . . . FSIP[,] as [FSIP] maintain[s] jurisdiction in this matter."[26] But the Union does not argue, and the record does not show, that there were any facts or issues in the case that implicated in any way FSIP's involvement. In this regard, FSIP's role under the Statute is to investigate and resolve bargaining impasses.[27] As there is no

[12] *Id.* at 13.
[13] Exceptions at 2-5.
[14] *U.S. DOD, Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996).
[15] *E.g.*, *AFGE, Local 522*, 66 FLRA 560, 562 (2012) (*Local 522*); *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 887, 891 (2000); *U.S. Dep't of the Army, Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997).
[16] *Local 522*, 66 FLRA at 562.
[17] Exceptions at 2.
[18] *Id.*
[19] Award at 12-13 (emphasis added).
[20] *Id.* at 13; *see also* Tr. at 54-55.
[21] *See* Award at 13.
[22] *Id.* at 4.
[23] *Id.* at 13.
[24] *Id.*
[25] *Id.*
[26] Exceptions at 4.
[27] 5 U.S.C. § 7119(b)(5)(A)-(C).

suggestion that a bargaining impasse existed here, the Union's second exceeds-authority exception appears to be premised on a misunderstanding of FSIP's statutory function. Therefore, because the Union's second exceeds-authority exception does not establish that the Arbitrator failed to resolve a submitted issue, resolved an issue not submitted to arbitration, or otherwise exceeded his authority, we deny the exception.

The Union's third exceeds-authority exception likewise provides no basis for finding the award deficient. The Union claims that "the Arb[itrator] exceeded his authority" by making a negotiability determination.[28] However, a determination that an agreement is not enforceable, for failing to satisfy the requirements of a higher-level collective-bargaining agreement, concerns the interpretation of the parties' agreement, and is not a negotiability determination.[29] Therefore, because the Union's third exceeds-authority exception is premised on a misunderstanding of Authority precedent concerning negotiability issues, it does not establish that the Arbitrator exceeded his authority.

Accordingly, we deny the Union's exceeds-authority exceptions.

B. The award is not based on a nonfact.

The Union claims that the award is based on two nonfacts.[30] Specifically, the Union claims that the Arbitrator erred by: (1) finding that the emails were "directive[s] to management from management" because he "missed the fact that [the emails] went to all staff . . . including every bargaining[-]unit staff member";[31] and (2) making findings that were inconsistent with the "stipulat[ion] that an agreement was in place."[32]

To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[33] But arguments based on a misunderstanding of an award do not provide a basis for finding the award deficient as based on a nonfact.[34]

The Union's first nonfact exception lacks merit because the Union misinterprets the award. In this regard, the Arbitrator determined that the emails were "*directed to* management, not bargaining[-]unit employees."[35] He also found that "[*e*]*ven if the delegation of authority is to a bargaining*[-]*unit employee*, the onus for the delegation of authority being sent is on management employees and not any bargaining[-]unit employees."[36] And the Arbitrator concluded that the delegation responsibility was "purely something that directly affects management personnel."[37] Thus, the finding at issue does not concern who received the emails, but rather, upon whom the emails imposed responsibilities. Therefore, by arguing that "the [A]rbitrator missed the fact that [the email] went to all staff,"[38] the Union misinterprets the award, and does not demonstrate that a central fact underlying the award is clearly erroneous. Accordingly, we deny the Union's first nonfact exception.

The Union's second nonfact exception also lacks merit because the Union misinterprets the award. As discussed above, in Section III.A., concerning the Union's exceeds-authority exceptions, the Arbitrator found that the delegation agreement existed, but that it was not "a contractual addition or revision of the [parties' a]greement [that was] enforceable at arbitration."[39] To the extent that the Union is claiming that the Arbitrator found that there was no delegation agreement, and that this finding is inconsistent with the "stipulat[ion] that an agreement was in place,"[40] the Union's claim is based on a misinterpretation of the award. Thus, the Union does not demonstrate that the award is deficient as based on a nonfact.

Accordingly, we deny the Union's nonfact exceptions.

IV. Decision

We deny the Union's exceptions.

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[28] Exceptions at 3.
[29] *See NAGE, Local R14-62*, 3 FLRA 670, 673 (1980) (disputes over contract interpretation do not give rise to a negotiability dispute that the Authority may resolve under § 7117 of the Statute); 5 C.F.R. § 2424.2(c) ("Negotiability dispute means a disagreement between an exclusive representative and an agency concerning the *legality* of a proposal or provision." (emphasis added)).
[30] Exceptions at 1-2.
[31] *Id.* at 2 (quoting Award at 14).
[32] *Id.* at 1.
[33] *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993).
[34] *E.g., U.S. Dep't of HUD*, 69 FLRA 213, 220 (2016) (citing *U.S. DHS, CBP*, 68 FLRA 157, 160 (2015)).
[35] Award at 13 (emphasis added).
[36] *Id.* (emphasis added).
[37] *Id.*
[38] Exceptions at 2.
[39] Award at 13.
[40] Exceptions at 1.

Member Pizzella, concurring:

According to the great philosopher, Plato "[j]ustice means minding one's own business and not meddling with other men's concerns."[1]

I agree with my colleagues that the Union's exceptions are without merit and should be denied. But I write separately to emphasize the key point of the Arbitrator's decision in this case – that this entire matter was none of the Union's business – a point which is not even given passing notice by the majority.

AFGE, Council of Prison Locals #33, Local 0922 (the Union) could not possibly be bored. During the past year, it has filed at least six unfair-labor-practice complaints against the Federal Correctional Complex in Forrest City, Arkansas (the Agency) and has taken those complaints to hearings before an administrative law judge of the Federal Labor Relations Authority.[2] Therefore, it is surprising that when a supervisor "called in sick"[3] but failed to "send out a delegation of authority message to her team,"[4] the Union decided to make the matter a cause célèbre.

Wait a minute!! How was that of concern to the Union? Quite simply, it wasn't.

According to the Arbitrator, "the whole matter appears to *be under the purview of management*";[5] there was *no agreement* between the Union and the Agency that would make a supervisor's delegation, or failure to make a delegation, "something *that would*[,] *or* possibly even *should*[,] *merit intervention by the Union*";[6] and, perhaps most important, there was a total "*absence of* showing any *harm* to bargaining unit employees."[7] Generally, an agreement, violation of that agreement, and harm to bargaining-unit employees are considered to be essential elements required in order to file a grievance.

In other words, even if the Agency had some policy which required the supervisor to issue a delegation of authority when she called in sick, the Arbitrator astutely noted that "it is management that has to deal with it, not the Union."[8] But there was little evidence that such a requirement actually existed and absolutely *no evidence* that there was any agreement between the parties concerning that practice.[9]

The notion that the Union would use official time, to pursue through the grievance procedure and to arbitration, a matter which does not involve, or concern, it whatsoever does not "contribute[] to the effective conduct of [government] business."[10]

Thank you.

[1] Plato, *The Republic* 4,433a (Francis MacDonald Cornford trans., Oxford University Press 1941).
[2] *Fed. BOP, Fed. Corr. Complex, Forrest City, Ark. & AFGE, AFL-CIO, Local 0922*, DA-CA-12-0338, DA-CA-12-0339, DA-CA-12-0340, DA-CA-12-0341, DA-CA-12-0342, DA-CA-12-0343 (2015).
[3] Award at 8
[4] *Id*. at 10.
[5] *Id.* at 14 (emphasis added).
[6] *Id.* (emphasis added).
[7] *Id.* (emphasis added).
[8] *Id.*
[9] *Id.* at 13.
[10] 5 U.S.C. § 7101(a)(1)(B).