69 FLRA No. 67

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS #33
LOCAL UNION NUMBER 922
(Union)

and

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

0-AR-5163

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DECISION

July 19, 2016

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

I. Statement of the Case

This case is before the Authority on exceptions to an award issued by Arbitrator Dennis F. Knecht. The Arbitrator concluded that an earlier settlement agreement resolved "[t]he total issue, including the instant grievance"[1] – effectively making the matter before him moot.

In its exceptions to the Arbitrator's award, the Union argues that the award is based on a nonfact and is contrary to law, and that the Arbitrator exceeded his authority. Because the Union's exceptions challenge statements that were not essential to the Arbitrator's resolution of the grievance, and are therefore dicta,[2] they do not provide a basis for finding the award deficient. We therefore deny the Union's exceptions.

[1] Award at 16.
[2] *See Black's Law Dictionary* 549 (10th ed. 2014) (defining judicial dictum as "[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision"); *id.* at 1240 (defining *obiter dictum* as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential").

II. Background and Arbitrator's Award

The Agency is a federal prison complex consisting of minimum-security, low-security, and medium-security facilities. When an inmate requires medical attention outside of the complex, the Agency first classifies the inmate's medical trip and – depending on its classification – seeks escort officers (officers) to transport and guard the inmate. The Agency classifies these trips as either unscheduled or emergency medical trips. For unscheduled medical trips, the Agency must first exhaust its overtime roster to find eligible officers. For emergency medical trips, the Agency does not have to use its overtime roster and can fill escort positions by assigning officers already at work. How medical trips are classified has been a longstanding controversy between the parties.

In June 2014, the Union filed a grievance (the June grievance) alleging that the Agency deliberately misclassified a medical trip as an emergency to avoid paying overtime. Specifically, the Union alleged (1) that the Agency had misclassified a routine medical trip as an emergency, and (2) as a result, an Agency manager had improperly assigned on-duty officers, resulting in the loss of overtime pay for the grievants. The Agency denied the June grievance, and the Union invoked arbitration. However, the parties continued to discuss the medical-trip classification matter and there was no immediate attempt to schedule the arbitration proceeding.

In October 2014, the Union filed a second grievance (the October grievance) alleging that the Agency had continued its misclassification of medical trips, and had inappropriately "circumvent[ed] the overtime roster."[3] In response to the grievance, the Agency sent an email to its staff setting forth the classification requirements for medical trips. In pertinent part, the email stated that trips by ambulance or air evacuation will be classified as an emergency medical trip, while trips by non-emergency vehicles will be classified as an unscheduled medical trip.

The Union replied to the Agency's email, stating that it "accept[ed the Agency's] informal resolution," and was "pleased that the [A]gency has finally recognized the difference [between] 'emergency' and 'unscheduled'" medical trips.[4] Further, the Union stated that "[t]his agreement is binding under the [parties' m]aster [a]greement," and that "[f]ailure to adhere to the resolution will result in the reinstatement of the grievance to arbitration (to include damages)."[5] Five days later, and at the Union's request, the Agency replied to the Union's

[3] Award at 11.
[4] *Id.* at 13.
[5] *Id.*

email and reconfirmed its medical-trip classification process.

One month after this email exchange, the Union scheduled the June grievance for arbitration. At arbitration, the parties disputed the emails' effect on the June grievance. The Union argued that "whatever settlement may have occurred [regarding the October grievance] on the classification of emergency medical trips[ ] d[id] not extend to [the June] grievance,"[6] while the Agency argued that the email exchange was a settlement agreement that resolved the June grievance. The parties did not stipulate to, and the Arbitrator did not specifically frame, any issues.

The Arbitrator agreed with the Agency that the email exchange was a settlement agreement, and that the settlement resolved "[t]he total issue, including the [June] grievance."[7] He concluded that "the [June] grievance[ ] was resolved by the Union accepting resolution [of the October grievance], and confirmed by the Agency [five days later]."[8] The Arbitrator noted that the central issue in both grievances revolved around the proper classification of medical trips, and that the only difference between the two grievances is that the June grievance identified an Agency manager. The Arbitrator also considered the parties' correspondence regarding the Agency's settlement offer. Specifically, the Arbitrator found that the Union's response to the offer, which repeats the settlement-agreement terms and provides that "'[t]his agreement is binding under the [m]aster [a]greement,' unequivocally states the Union's position that this is settlement of the issue."[9] And the Arbitrator also considered the Agency's subsequent response, which confirmed the medical-trip classification process the Agency had delineated in the settlement. The Arbitrator congratulated the parties "for reaching a resolution that specifically defines this issue," and denied the Union's grievance.[10]

Finally, the Arbitrator noted that the Agency's prior medical-trip misclassifications were a violation of the master agreement. However, he concluded that "the Agency did not deliberately falsify the roster. And without any testimony to the contrary . . . [found] no basis that any personnel were harmed by the violation[ ]."[11] Thus, the Arbitrator denied the grievance.

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

[6] *Id.* at 14.
[7] *Id.* at 16.
[8] *Id.*
[9] *Id.* at 14.
[10] *Id.* at 16.
[11] *Id.* at 15.

III. Analysis and Conclusions: The Union's exceptions do not provide a basis for finding the award deficient.

The Union argues that the award is based on a nonfact,[12] is contrary to law,[13] and that the Arbitrator exceeded his authority.[14] Specifically, the Union alleges that the Arbitrator misapplied "stipulated" testimony regarding officers who would have worked overtime but for the Agency's violation.[15] And the Union argues that the Arbitrator erred in not awarding damages despite finding the Agency in violation of the agreement.[16]

In its opposition to the Union's exceptions, the Agency argues that the Union's exceptions "are moot because the Arbitrator ruled that the underlying grievance was resolved by [an earlier settlement]."[17]

An arbitrator has discretion to make determinations regarding the mootness of a grievance.[18] In this regard, an arbitrator's finding that a grievance is moot is akin to a determination of procedural-arbitrability under the parties' collective-bargaining agreement.[19] And, like a ruling on procedural-arbitrability, where an arbitrator finds that a grievance is moot, any comments the arbitrator makes concerning the merits of a grievance are dicta, and do not provide a basis for finding the award deficient.[20]

Here, the Arbitrator determined that the parties' earlier settlement agreement resolved "[t]he total issue, including the [June] grievance,"[21] effectively rendering the grievance moot.[22] In this regard, the Arbitrator concluded that the earlier settlement "specifically defines [what constitutes an emergency medical trip] to the point that it should be easily understood by all personnel, and if not completely eliminating disagreement over its administration, should make it easy to determine fault if the agreement is breached."[23]

[12] Exceptions at 1-2.
[13] *Id.* at 5-6.
[14] *Id.* at 2-5.
[15] *Id.* at 3-4.
[16] *Id.* at 5-7.
[17] Opp'n at 5.
[18] *NFFE, Council of Consol. Locals*, 52 FLRA 137, 139 (1996) (*NFFE*) (citing *Local Union No. 370 of the Int'l Union of Operating Eng'rs v. Morrison-Knudsen Co.*, 786 F.2d 1356, 1347-58 (9th Cir. 1986)).
[19] *See id.* at 140.
[20] *See AFGE, Council of Prison Locals, Council 33*, 66 FLRA 602, 605 (2012) (citing *United Power Trades Org.*, 63 FLRA 208, 209 (2009)).
[21] Award at 16.
[22] *See NFFE*, 52 FLRA at 140 (citation omitted) ("a determination of mootness . . . disposes of a grievance, in whole or in part, procedurally and not on the merits").
[23] Award at 16.

The Union does not challenge, directly or indirectly, the Arbitrator's findings regarding the grievance's mootness. Rather, the Union's exceptions challenge the Arbitrator's statements regarding the merits of the grievance,[24] which are dicta. As discussed above, the Union challenges the Arbitrator's discussion of "stipulated" testimony[25] and damages[26] – matters unconnected with the Arbitrator's resolution of the case. Therefore, because the Union's exceptions challenge dicta,[27] we deny these exceptions.

IV. Decision

We deny the Union's exceptions.

[24] *See* Exceptions 1-6.
[25] *See id.* at 1-5.
[26] *Id.* at 5-6.
[27] *AFGE, Council of Prison Locals 33, Local 3690*, 69 FLRA 127, 131 (2015) (citations omitted).