70 FLRA No. 186

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE LOGISTICS AGENCY
DISPOSITION SERVICES
BATTLE CREEK, MICHIGAN
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1626
(Union)

0-AR-5371

DECISION

November 19, 2018

Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member Abbott concurring;
Member DuBester concurring)

I. Statement of the Case

In this case, we conclude that a request for arbitration is not untimely filed when the Agency fails to notify the Union for nearly six weeks that it denied a grievant's telework request or that an earlier response was its answer to the grievance.

Arbitrator Paul F. Gerhart issued an award determining, as relevant here, that the Union timely requested arbitration under Article 36 of the parties' collective-bargaining agreement (Article 36). The main question before us is whether that procedural-arbitrability determination is based on a nonfact. Because the Agency's nonfact argument (1) concerns a matter that the parties disputed before the Arbitrator and (2) challenges the Arbitrator's evaluation of the evidence, we find that it does not provide a basis for finding the award deficient on nonfact grounds.

II. Background and Arbitrator's Award

An employee (the grievant) was on a four-day-per-week telework schedule. During a reorganization, the Agency limited employees' weekly telework to no more than three days. As a result, the grievant's telework schedule changed to three days per week.

Eventually, the grievant requested to return to a four-day-per-week telework schedule (the telework request). The grievant's first- and second-line supervisors denied the request, but permitted the grievant to continue teleworking three days per week.

The Union filed a grievance with the director of financial services (the first director), alleging that the Agency violated the parties' agreement by denying the telework request. The first director delegated authority to respond to the grievance to the director of operationalized activity (the second director). The second director then authorized a labor relations specialist (the specialist) to communicate with the Union over the grievance and the telework request.

In a March 31, 2017 email, the specialist forwarded the Union a memo from the second director. In the memo, the second director stated that she was dismissing the grievance because the first- and second-line supervisors "did not have [the] authority to deny the [telework] request."[1] But the second director also stated that she was forwarding the *telework request* to the first director for proper consideration.

Shortly after the Union received that memo, it emailed the specialist expressing confusion as to whether the first director would also be considering *the grievance*. The specialist did not say that the second director's memo represented the Agency's final decision on the grievance.

Over a month later, in May 2017, the Union emailed the specialist asking about the status of the grievance. On May 9, the specialist responded, suggesting that the March 31 memo was the Agency's final decision on the grievance. The specialist also informed the Union – for the first time – that the first director had denied the telework request on April 4. The next day, on May 10, the Union replied, "Now [that] you have provided the official response to the grievance[,] . . . we are formally notifying management that we are taking the case to arbitration."[2]

The dispute proceeded to arbitration. As relevant here, the Arbitrator framed the issues as:

> 1. Is the matter arbitrable? That is, did the Union violate the procedural requirements as specified in Article 36

[1] Award at 41.
[2] *Id.* at 43.

> in such a manner that the matter is not arbitrable on procedural grounds?
> . . . .
>
> [2.] If the matter is arbitrable, did the Agency violate the [parties'] [a]greement when it disapproved [the] . . . telework request? If so, what is the appropriate remedy?[3]

Before the Arbitrator, the Agency contended that the Union had failed to request arbitration within the timeframe established in Article 36. Article 36 requires the Union to request arbitration over a grievance "within [twenty] workdays after receipt of the [Agency's] decision" on the grievance.[4]

The Arbitrator highlighted the series of emails between the Union and the specialist, and found that those emails "reflect[ed] [a] misunderstanding" between the Union and the Agency "for which the Agency was, at least in part, responsible."[5] Specifically, the Arbitrator found that the second director "confused matters" by dismissing the grievance – which concerned the telework request – but simultaneously forwarding the telework request to the first director for a decision.[6] As further evidence of the confusion, the Arbitrator noted that an Agency witness, while testifying, mixed up the second director's dismissal of the grievance with the first director's denial of the telework request.

The Arbitrator then concluded that because the grievance *concerned* the telework request, the first director's decision on the telework request represented the Agency's final decision on the grievance. Although the first director denied the telework request on April 4, the Arbitrator found that the Agency did not notify the Union of that denial until May 9.[7] And because the Union requested arbitration on May 10, the Arbitrator concluded that the Union's request was timely under Article 36. Thus, he determined that the grievance was procedurally arbitrable.

Despite finding the above analysis "dispositive" on the matter of procedural arbitrability,[8] the Arbitrator provided two other alternative, and "independent[]," rationales for finding the grievance arbitrable.[9] Because the details of those alternative rationales are not pertinent to our decision, we do not discuss them further.[10]

Ultimately, the Arbitrator addressed the merits of the grievance and concluded that the first director's denial of the telework request violated the parties' agreement.

On April 23, 2018, the Agency filed exceptions to the award, and, on May 23, 2018, the Union filed an opposition.

III. Analysis and Conclusion: The Agency fails to establish that the Arbitrator's procedural-arbitrability determination is based on a nonfact.

The Agency's exceptions do not challenge the Arbitrator's finding that the Agency violated the agreement. The Agency challenges only the Arbitrator's procedural-arbitrability determination, and argues that it is based on a nonfact.[11] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[12] 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.[13] In addition, disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be accorded such evidence, provides no basis for finding the award deficient.[14]

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[3] *Id.* at 9.
[4] Exceptions, Attach. 2, Ex. 1, Collective-Bargaining Agreement at 84.
[5] Award at 45; *see also id.* at 41 (email from Union to Agency asking whether the second director was "now sending [the grievance] back to [the first director] for a decision"); *id.* at 42 (email from Union to Agency stating that the Union has "been patiently waiting on a response to see how to move forward [on the grievance] and [it] never received it"); *id.* at 43 (in an email to the Agency, the Union states that it and the Agency "are on different pages" regarding the grievance).
[6] *Id.* at 45.
[7] The Arbitrator incorrectly stated that the Agency notified the Union on May 8, instead of May 9. *Id.* at 45; *see also id.* at 42 (referring to the May 9, 2017 email from the specialist to the Union).
[8] *Id.* at 46.
[9] *Id.* at 44.
[10] *Id.* at 46 (as a first alternative rationale, the Arbitrator assumed that April 7 was the triggering date, but declined to find the grievance non-arbitrbale because, even if the Union's request was untimely, nothing in the parties agreement required cancellation of the grievance); *id.* at 46-47 (finding, as a second alternative rationale, that the Agency waived its right to challenge the untimeliness of the request for arbitration by waiting until the hearing to object).
[11] Exceptions at 9-10.
[12] *E.g.*, *U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010) (*DOD*) (citing *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*NFFE*)); *see also AFGE, Local 3294,* 70 FLRA 432, 434 (2018) (Member DuBester concurring) (parties may challenge an arbitrator's procedural-arbitrability finding on nonfact grounds).
[13] *E.g.*, *DOD*, 65 FLRA at 311 (citing *NFFE*, 56 FLRA at 41).
[14] *E.g.*, *Fraternal Order of Police, Lodge No. 168*, 70 FLRA 788, 790 (2018) (citing *U.S. Dep't of the Air Force, Whiteman Air Force Base, Mo.*, 68 FLRA 969, 971 (2015)).

The Agency contends that there is "no support" for the Arbitrator's conclusion that the first director's denial of the telework request "was functionally part of the Agency's grievance decision."[15] However, even assuming that the challenged finding is factual, the parties disputed that very matter at arbitration,[16] and the Arbitrator based that conclusion on his evaluation of the evidence.[17] Thus, consistent with the principles set forth above, the Agency's argument fails to establish that the award is deficient on nonfact grounds.[18]

For these reasons, we deny the Agency's nonfact exception.[19] Although the Agency raises other exceptions, they concern the Arbitrator's alternative rationales.[20] As the Agency has not established that the Arbitrator's "dispositive" rationale is deficient,[21] it is unnecessary to address the other exceptions.[22]

IV. Decision

We deny the Agency's exception.

[15] Exceptions at 10.

[16] Exceptions, Attach. 4, Agency's Post-Hr'g Br. at 5 (contesting Union's claim that the first director's decision on the telework request "[w]as part of the grievance decision"); *see also* Award at 44 (noting that the Agency alleged that the Union was "conflat[ing]" the grievance and the telework request).

[17] Award at 40-45 (discussing the email evidence); *id.* at 44-45 (relying on witness testimony).

[18] *See AFGE, Local 0922*, 70 FLRA 34, 35-36 (2016) (denying nonfact exception where parties disputed alleged nonfact before the arbitrator); *AFGE, Local 1923*, 67 FLRA 392, 393 (2014) (summarily denying nonfact exception claiming that a "factual finding was not sufficiently supported" in the record).

[19] Moreover, having reviewed the pertinent correspondence, we agree with the Arbitrator that the Agency's handling of the grievance and telework request unnecessarily "confused matters." Award at 45.

[20] *See* Exceptions at 7, 9 (arguing that the Arbitrator's first alternative rationale fails to draw its essence from the parties' agreement); *id.* at 8 (claiming that the Arbitrator exceeded his authority in rendering the first alternative rationale); *id.* at 9 (arguing that the Arbitrator's second alternative rationale has no basis in law or the parties' agreement).

[21] Award at 46.

[22] *See U.S. Dep't of VA, Med. Ctr., Hampton, Va.*, 65 FLRA 125, 129 (2010) (if the excepting party fails to establish that just one of the independent grounds supporting an award is deficient, then the award stands on that ground alone).

Member Abbott, concurring:

I agree wholeheartedly that the Agency has failed to show that the Arbitrator erred in concluding that the Union's grievance was filed in a timely manner.

I also believe that it is important for the Authority to clarify decisions (particularly those issued close in time) where distinctions in determinations might not be readily apparent to the labor-management relations community. Thus, it is imperative to clarify and explain how the circumstances of this case are quite distinct from those in our recent decision in *U.S. DOD, Education Activity (DOD)*[1] and why the two cases demand different outcomes.

The obvious but immaterial facts—that *DOD* came before us on exceptions from a determination of an administrative law judge in a ULP complaint and this case comes before us on exceptions from an arbitrator's determination in a grievance—serve no useful purpose other than my concurring colleague's frivolous attempt to detract from the relevant point in *DOD* (a decision with which my dissenting colleague disagreed). The *relevant* takeaway from *DOD* was that the clock for determining whether the union's ULP was timely began when the agency "*expressly notified* the union that it could not, and would not, fully comply with the [arbitrator's] awards."[2] But, as clear as the agency was in *DOD*, the Agency in this case was obtuse and anything but clear. From the Agency's March 31 response, it was not possible for the Union to know whether the Agency was or was not denying the telework request and whether the Agency's response was its answer to the Union's grievance, or both.[3] Therefore, unlike in *DOD* (where the agency's answer was clear and unmistakable), the clock for determining whether the Union's grievance was timely, here, could not begin to run until the Agency gave a clear answer on these two points.

There is an important lesson here, and it explains why the Union's request to arbitrate on May 10 was timely whereas the union's ULP filing in *DOD* was not.

Thank you, Member DuBester, for the history lesson on the different roles the Authority plays in ULP and arbitration cases. That is interesting but not at all illustrative here.

[1] *U.S. DOD, Educ. Activity*, 70 FLRA 654 (2018) (Member DuBester dissenting).

[2] *DOD*, 70 FLRA at 655 (emphasis added).

[3] Majority at 2.

Member DuBester, concurring:

I agree with the decision to deny the Agency's nonfact exception. I write separately to note that the other concurrence appears to have a fundamental misunderstanding of the Authority's different roles when it reviews exceptions to arbitrators' awards, and when it resolves unfair labor practice (ULP) cases in which an Authority administrative law judge (ALJ) has written a recommended decision.

The concurrence would uphold the Arbitrator's award in this case because the concurrence agrees with the Arbitrator's factual findings on timeliness. In the concurrence's view, comparing the Arbitrator's factual findings to the factual findings *the Authority made* in the ULP case he cites,[*] explains "why the two cases demand different outcomes."

But the Authority has different roles in ULP and arbitration cases. In ULP cases, the Authority is the factfinder. An ALJ's decision is only a "recommended" decision.

In contrast, in arbitration cases, the Authority defers to an arbitrator's factual findings, unless a party demonstrates that a particular factual finding is a nonfact, a daunting task.

We uphold the award in this case because the Agency fails to support its nonfact challenge to the Arbitrator's factual findings pertinent to the timeliness issue. Accordingly, we defer to the Arbitrator's findings. That, rather than how this case differs factually from the ULP case, explains the outcome the Authority reaches. Unlike in ULP cases, it is the Arbitrator, not the Authority, who is the ultimate factfinder. To the extent the concurrence views the Authority's role in arbitration cases differently, the concurrence errs.

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[*] *U.S. DOD, Educ. Activity*, 70 FLRA 654 (2018) (Member DuBester dissenting).