70 FLRA No. 159

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VA REGIONAL OFFICE
ST. PETERSBURG, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1594
(Union)

0-AR-5352

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DECISION

August 30, 2018

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

I. Statement of the Case

In this case, after the conclusion of performance year 2014 (PY 14), the Agency "curved" the productivity standard for the highest performance level of a critical element. The Union filed a grievance because the Agency implemented the change or curve without bargaining. The Union also grieved the performance review of one employee. Arbitrator Sandra Mendel Furman denied the grievance concerning the performance review, but found that the Agency had violated the parties' agreement by not bargaining before it implemented the curve.

The Agency challenges as nonfacts the Arbitrator's findings that the Agency violated the parties' agreement. Because the Authority will not find an award deficient as based on a nonfact where the excepting party challenges an arbitrator's interpretation of the parties' agreement or facts disputed at hearing, we deny this exception.

The Agency argues that the Arbitrator exceeded her authority when deciding an issue outside of the parties' stipulated issues. Because we find that the Arbitrator decided an issue not submitted to arbitration, we grant this exception and modify the award accordingly.

II. Background and Arbitrator's Award

In PY 14, the grievant was a ratings veterans service representative (RVSR). During that year, the Agency implemented changes to critical elements of the performance standards for RVSRs. In particular, new standards were implemented in May 2014, only to be rescinded in August of 2014. The original standards were then reinstated. The Agency determined that employees' May-August 2014 performance would not be evaluated and that PY 14 would extend an additional two months, through November 30, 2014.

In December 2014, the Agency decided to "curve" the productivity critical element for the "exceptional" level when evaluating PY 14. The Agency lowered the standard from 5.5 to 3.95, so that more employees (~10%) could be rated as exceptional.

In January 2015, the grievant received a "[f]ully [s]uccessful" performance rating and not the "[o]utstanding"[1] that he believed he had earned and the Union filed a grievance.

At arbitration, the parties stipulated to two issues on the merits:

> 1. Did the Agency . . . violate the parties' labor-management agreement when it curved output performance standards for FY 2014 without first satisfying its bargaining obligation? If so, what is the appropriate remedy?
>
> 2. Did the Agency . . . violate the parties' labor-management agreement in its timeliness and performance evaluation of [the grievant] for the period of October 1, 2013 to November 30, 2014 and if so, what is the appropriate remedy?[2]

At the hearing, the Agency also argued that the grievance was untimely, because it was filed more than thirty days after the grievant reviewed a draft of the performance evaluation with his supervisor.

The Arbitrator found that the grievance was timely, because it was filed within thirty days of the final,

[1] "An 'Outstanding' summary rating is attained when the achievement levels for all elements are designated as 'Exceptional.'" Award at 11 (quoting Collective-Bargaining Agreement, Art. 27, § 7(G)).
[2] *Id.* at 9.

signed performance evaluation, but she found that the Union had failed to meet its burden regarding the individual grievant's request for an outstanding performance rating.

However, the Arbitrator determined that the Agency had violated the parties' agreement when it unilaterally curved the production performance standard and extended the length of the performance year, implementing these changes without providing notice and an opportunity to bargain. The Arbitrator also found that the Agency violated the agreement when it failed to hold Step 2 and 3 grievance hearings or respond to the grievance on the merits. As a remedy, the Arbitrator ordered the Agency to cease and desist from unilaterally altering performance standards without providing the Union with notice and an opportunity to bargain, as provided for in the parties' agreement. She also ordered the Agency to cease and desist from failing to hold grievance hearings and meetings as provided for in the parties' agreement.

The Agency filed exceptions to the award on February 16, 2018, and the Union filed an opposition on March 19, 2018.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's contrary-to-law argument.

The Union argues that the Agency now presents arguments that it did not present at arbitration.[3] 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.[4]

In its exceptions, the Agency argues that the award is contrary to law, specifically to management's right to determine the content of performance standards.[5]

After a review of the record, including both parties' post-hearing briefs to the Arbitrator, we find that the Agency failed to raise this argument, concerning management's right to determine the content of performance standards, to the Arbitrator. The Agency could have raised this argument because the parties had stipulated to the issues, which included whether the Agency had violated the parties' agreement "without first satisfying its bargaining obligation."[6] Because the Agency could have raised this argument before the Arbitrator, but did not do so, we will not consider this argument now. Consequently, we dismiss this exception.[7]

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

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.[8]

The Agency argues that two of the Arbitrator's findings were based on nonfacts. Specifically, the Agency argues that the Arbitrator erred when she concluded that (1) the Agency's extension of the performance year rendered the grievant's performance review untimely in violation of the parties' agreement and that (2) the Agency violated the parties' agreement when it curved the production standard without satisfying the agreement's bargaining obligations.[9] The Agency argues that these conclusions were nonfacts because it ultimately satisfied its bargaining obligation through a memorandum of understanding signed later in 2014.[10] It further argues that it timely notified the Union of the changes it intended to make and that the Union was untimely in filing a request to bargain.[11]

However, the Authority has held that "conclusions based on the [arbitrator's] interpretation of a collective-bargaining agreement" cannot be challenged as

[3] Opp'n at 6, 9-12.

[4] 5 C.F.R. §§ 2425.4(c), 2429.5; *AFGE, Local 3627*, 70 FLRA 627, 627 (2018) (*Local 3627*); *U.S. Dep't of the Treasury, IRS*, 70 FLRA 539, 540 n.5 (2018) (*IRS*); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bennettsville, S.C.*, 70 FLRA 342, 343 (2017) (*BOP*) (citing *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012)); *U.S. Dep't of the Air Force 82nd Training Wing, Sheppard Air Force Base, Tex.*, 65 FLRA 137, 139 n.4 (2010) (*Sheppard*).

[5] Exceptions Br. at 10 (citing *U.S. DOD, Def. Contract Mgmt. Agency*, 59 FLRA 396, 400-01 (2003) (Member Pope dissenting in part); *AFGE, Local 1858*, 56 FLRA 1115, 1119 (2001); *NTEU*, 3 FLRA 768, 775-76 (1980), *aff'd sub nom. NTEU v. FLRA*, 691 F.2d 553, 563-65 (D.C. Cir. 1982)).

[6] Award at 9; *see also* Exceptions, Ex. B, Agency's Closing Argument at 1.

[7] 5 C.F.R. §§ 2425.4(c), 2429.5; *Local 3627*, 70 FLRA at 627; *IRS*, 70 FLRA at 540 n.5; *BOP*, 70 FLRA at 343; *Sheppard*, 70 FLRA at 139 n.4.

[8] *NAIL, Local 5*, 70 FLRA 550, 551 (2018) (*NAIL*); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 69 FLRA 197, 200-01 (2016) (*Jesup*); *NLRB Prof'l Ass'n*, 68 FLRA 552, 554 (2015) (*NLRB*).

[9] Exceptions Br. at 6-8.

[10] *Id.* at 6.

[11] *Id.* at 7-8.

nonfacts.[12] Specifically, the Arbitrator found that the Agency failed to meet its bargaining obligation and violated Article 27, § 5 of the parties' agreement when it implemented changes, both to the performance standard and to the timing of the performance evaluation year, without completing bargaining with the Union.[13] These contractual interpretations may not be challenged as nonfacts.[14]

The Agency also argues that the Union violated the parties' agreement by delaying its request to bargain but that is a matter that was disputed at arbitration and therefore may not be challenged as a nonfact.[15]

B. The Arbitrator exceeded her authority.

The Agency argues that the Arbitrator exceeded her authority in finding the Agency had violated the parties' agreement when it failed to hold Step 2 and 3 grievance hearings, followed by Agency responses, on the merits of the grievance, because this conclusion was outside the scope of the parties' stipulated issues.[16]

The Authority will find that arbitrators exceed their authority when they resolve an issue that was not submitted to arbitration.[17]

On the merits, the parties stipulated to the two issues quoted above and, as a procedural matter, the Agency alleged that the grievance was untimely. After resolving these issues, the Arbitrator went beyond them when she found that the Agency violated the parties' agreement when it failed to hold Step 2 and 3 grievance hearings on the merits. In doing so, the Arbitrator exceeded her authority by deciding an issue that was not submitted to arbitration.[18] Accordingly, we modify the award to strike the portion relating to the Agency's failure to hold Step 2 and 3 grievance hearings on the merits of the grievance, while upholding the remainder of the award.

V. Decision

We dismiss the Agency's contrary-to-law exception. We deny the Agency's nonfact exception. We grant the Agency's exceeds-authority exception and modify the award accordingly.

[12] *See AFGE, Local 3974*, 67 FLRA 306, 308 (2014) (*Local 3974*) (citing *U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 56 FLRA 498, 501 (2000)) (arbitrator's determination of whether contractual bargaining obligation was met cannot be challenged as a nonfact); *U.S. DHS, U.S. ICE*, 65 FLRA 792, 795 (2011) (*ICE*) (same); *see also U.S. Dep't of the Navy, Marine Corps Combat Dev. Command, Marine Corps Base, Quantico, Va.*, 67 FLRA 542, 546 (2014) (unless a contract provision mirrors the Statute, arbitrator's determination of whether party met its contractual bargaining obligation "becomes a matter of contract interpretation for the [a]rbitrator" (quoting *ICE*, 65 FLRA at 795)).

[13] Award at 35-39.

[14] *Local 3974*, 67 FLRA at 308; *ICE*, 65 FLRA at 795.

[15] *NAIL*, 70 FLRA at 551 (citing *AFGE, Local 2258*, 70 FLRA 210, 213 (2017) (*Local 2258*); *AFGE, Local 3723*, 67 FLRA 149, 150 (2013)); *AFGE, Local 933*, 70 FLRA 508, 509 (2018); *Local 2258*, 70 FLRA at 212-13 (2017); *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 70 FLRA 186, 187-88 (2017); *Local 3974*, 67 FLRA at 308; *ICE*, 65 FLRA at 795.

[16] Exceptions Br. at 8.

[17] *U.S. Dep't of Transp., FAA*, 64 FLRA 612, 613 (2010) (*FAA*); *U.S. Dep't of the Treasury, U.S. Mint, Denver, Colo.*, 60 FLRA 777, 779-780 (2005) (*Mint*) (Member Pope dissenting); *Wash. Plate Printers Union, Local 2, IPPDSMEU & Graphic Commc'ns Int'l Union, Local 4B, AFL-CIO*, 59 FLRA 417, 420-21 (2003) (*Plate Printers*) (Member Pope dissenting).

[18] *FAA*, 64 FLRA at 613-14; *Mint*, 60 FLRA at 780; *see Plate Printers*, 59 FLRA at 420-21.

Member DuBester, concurring, in part and dissenting, in part:

I agree with my colleagues that the award is not based on a nonfact. I also agree that the Agency failed to raise its contrary to law argument before the Arbitrator.

However, I would not find that the Arbitrator exceeded her authority in finding that the Agency violated the parties' agreement by failing to hold Step 2 and Step 3 grievance hearings. Therefore, I dissent in part.

It is well-established that, in examining whether an arbitrator has exceeded his or her authority, the Authority grants an arbitrator's interpretation of a stipulation of issues the same substantial deference that it accords an arbitrator's interpretation and application of a collective-bargaining agreement.[1] While the parties' stipulated issues do not explicitly set forth the issues of Step 2 and 3 grievance hearings, it is clear that the Arbitrator found a direct connection between that issue and the second stipulated issue concerning timeliness.

As found by the Arbitrator, the issue of Step 2 and 3 grievance hearings "is sufficiently framed in the grievance and by record evidence."[2] Thus, the Agency had "notice" that, on the merits, the Union viewed the Agency's failure to hold such hearings to be a contract violation.[3] Moreover, as further found by the Arbitrator, by maintaining its position on procedural arbitrability "throughout the processing of the grievance" and thereby never responding to any claims made by the Union on the merits, the "parties entered arbitration without a full opportunity as contemplated under the [agreement] to resolve all differences."[4]

When considered in this context, I agree with the Arbitrator that a finding on the issue of Step 2 and 3 grievance hearings "is appropriate."[5]

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[1] *See U.S. Dep't of the Treasury, U.S. Mint, Denver, Colo.*, 60 FLRA 777, 781 (2005) (Dissenting Opinion of Member Pope) (citing *SSA, Balt., Md.*, 57 FLRA 181, 183 (2001)).
[2] Award at 33.
[3] *Id.*
[4] *Id.* at 38.
[5] *Id.* at 33.