

63 FLRA No. 108

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES
LOCAL 1454
(Union)

and

UNITED STATES DEPARTMENT
OF VETERANS AFFAIRS
VETERANS BENEFITS ADMINISTRATION
HOUSTON REGIONAL OFFICE
HOUSTON, TEXAS
(Agency)

0-AR-4304

DECISION

May 18, 2009

Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator James W. Hoose filed by the Union under § 7122 of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.¹

The Union filed a grievance appealing the grievant's proposed removal for unacceptable performance. The Arbitrator found that the Union failed to properly file its grievance and, thus, concluded that the case was not properly before him. The Union filed exceptions to

1. The Authority issued an Order to the Union to show cause why the exceptions should not be dismissed on the ground that the Authority lacks jurisdiction under § 7122(a) and § 7121(f) of the Statute because the grievance relates to a proposed removal. The Union responded that the Authority has jurisdiction. Upon review, it appears that there may be a conflict in Authority precedent on this point. *Compare United States Dep't of Transp., Fed. Aviation Admin.*, 54 FLRA 480, 480 n.1 (1998) (*DOT*) with *United States Patent and Trademark Office*, 15 FLRA 243 (1984) (*PTO*). In this case, as the Agency does not dispute the Union's claim that the Authority has jurisdiction and as we deny summarily the exceptions on the merits, we assume jurisdiction for the purposes of the decision and will await an appropriate case in which to resolve the apparent inconsistency between *DOT* and *PTO*.

the award, claiming that it is contrary to law and based on a nonfact.

For the reasons discussed below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The grievant was placed on a Performance Improvement Plan (PIP) after she failed to meet the Agency's mandated work productivity levels. Award at 2, 4. After the grievant was removed from the PIP, her productivity again decreased, and the Agency issued a proposed removal of the grievant. *Id.* at 4-5. Subsequently, the Regional Director held a meeting with the grievant, the Union president, and an Agency labor-management relations official, to discuss the proposed removal. Award at 5. At the meeting, the Union provided management with a memorandum entitled "*Oral Response Meeting Minutes.*" *Id.* at 6, 10. The Union claims that the memorandum served as its Step 3 grievance. *Id.* at 6. Several weeks after the meeting, the Agency issued a letter to the grievant informing her that she was being demoted instead of being terminated. *Id.* at 5-6. In response, the Union invoked arbitration on the proposed removal. *Id.* at 6.

The Union argued to the Arbitrator that the memorandum it presented to management served as the Step 3 grievance. Award at 6. The Union further argued that the Agency did not properly respond to the Step 3 grievance and, as such, the parties' agreement required that the grievance be resolved in favor of the grievant. *Id.* at 6, 9-10. The Union moved for summary judgment on this ground. *Id.* In response, the Agency argued that the memorandum was not a Step 3 grievance. *Id.* at 8-9. According to the Agency, as the Union had not filed a grievance, the case was not arbitrable. *Id.* at 8.

The Arbitrator denied the Union's request for summary judgment, noting that any failure on the part of the Agency to properly respond to the Union's purported Step 3 grievance was excusable, based on the Agency's good faith belief that the memorandum was not a Step 3 grievance. Award at 10. As for whether the grievance was arbitrable, the Arbitrator found that the Union had not filed a Step 3 grievance. *Id.* at 10-11. As such, the Arbitrator concluded, as relevant here, that "[t]he issue as presented is not properly before the Arbitrator and can not be ruled upon."² *Id.* at 11.

2. Despite finding the grievance inarbitrable, the Arbitrator "share[d] his observations" on the merits of the case. Award at 11. In view of our decision, we do not address the merits.

III. Positions of the Parties

The Union asserts, without explanation, that the award is based on nonfact. Exceptions at 2. The Union also asserts that the award is contrary to law. According to the Union, the Arbitrator “failed to determine the issue of the definition of law as to what constitutes a grievance.” *Id.* at 5.

The Agency contends, in its opposition, that the Union “fails to cite any basis in the [S]tatute upon which the Authority can grant a review.” Opposition at 3.

IV. Analysis and Conclusions

The Authority generally will not find an arbitrator’s ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the procedural ruling itself. *See, e.g., AFGE, Local 3882*, 59 FLRA 469, 470 (2003). However, such ruling may be found deficient on the ground that it is contrary to law. *See id.* (citing *AFGE, Local 933*, 58 FLRA 480, 481 (2003)). In addition, such ruling may be found deficient on grounds that do not directly challenge the ruling itself, which include claims that an arbitrator was biased or exceeded his or her authority. *See id.*

Here, the Arbitrator concluded that the grievance was not properly before him, because the Union failed to properly file a grievance. The Arbitrator’s ruling constitutes his determination that the grievance was not procedurally arbitrable. *See Fraternal Order of Police, N.J. Lodge 173*, 58 FLRA 384, 385 (2003) quoting Elkouri & Elkouri, *How Arbitration Works* 305 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997 (“Procedural arbitrability involves ‘procedural questions, such as whether the preliminary steps of the grievance procedure have been exhausted or excused,’ and is distinguished from substantive arbitrability, which involves questions regarding whether the ‘subject matter of a dispute is arbitrable.’”). *See also, e.g., AFGE, Local 2459*, 51 FLRA 1602, 1607 (1996) (noting that cases denied on procedural arbitrability grounds are disposed of “procedurally and not on the merits”). As the Authority generally will not find a procedural arbitrability ruling deficient on grounds that directly challenge that ruling, we deny the Union’s unexplained nonfact exception. *E.g., AFGE, Local 1242, Council of Prison Locals 33*, 62 FLRA 477 (2008).

The Union also fails to demonstrate that the Arbitrator’s award is contrary to law. In order for the award to be found deficient on this basis, the Union must establish that it conflicts with applicable, statutory, procedural requirements. The Union has failed to identify

any such requirements with which the award allegedly conflicts. *See United States Dep’t of Homeland Sec., United States Customs and Border Prot., United States Border Patrol, El Paso, Tex.*, 61 FLRA 122, 124 (2005). Therefore, the Union’s contrary to law exception is denied.

V. Decision

The Union’s exceptions are denied.