

64 FLRA No. 110

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
AFL-CIO
(Union)
0-AR-4378

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DECISION

March 29, 2010

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Before the Authority: Carol Waller Pope, Chairman,
and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

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

The Arbitrator determined that the grievance was arbitrable and that the grievant's five-day suspension was not supported. She set aside the suspension and also directed the Agency to reinstate the grievant's duties involving community outreach, controller in charge, and on-the-job-training instruction (the disputed duties). For the reasons that follow, we deny the Agency's exception as to arbitrability, but conclude that the Arbitrator exceeded her authority in directing reinstatement of the disputed duties.

II. Background and Arbitrator's Award

The grievant was suspended for five days for inappropriate behavior and for failure to follow the instructions of her supervisor. The Union filed a grievance on the grievant's behalf contesting the suspension. Award at 2. The grievance stated that it was filed under the parties' 2003 collective bargaining agreement (2003 agreement). *Id.* The Agency denied the grievance on the basis that it was procedurally defective. Specifically, the Agency alleged that a new collective bargaining

agreement became effective in 2006 (2006 agreement) and that the grievance should have been filed under that agreement rather than the 2003 agreement. The matter was not resolved and was submitted to arbitration on the following stipulated issues:

1. Is the subject grievance, the five-day suspension of the Grievant for inappropriate behavior and failure to follow supervisory instruction . . . properly before the arbitrator?
2. Was the five-day suspension of the Grievant for inappropriate behavior . . . and failure to follow supervisory instruction made for the efficiency of the service?

Id.

Before the Arbitrator, the Agency reiterated its argument that the grievance was procedurally defective because it failed to cite the 2006 agreement. *Id.* at 5. The Union asserted that, even if it cited the wrong agreement, the grievance was not defective because neither the 2003 agreement nor the 2006 agreement requires that a grievance must correctly cite the applicable agreement. In addition, the Union noted that the substantive provisions relating to the imposition of discipline are the same in both agreements. *Id.*

In assessing the arbitrability of the grievance, the Arbitrator found that the complaint over the suspension is a grievance covered by the grievance procedure of either agreement. In addition, the Arbitrator found that there is no material difference between the two agreements with respect to the substantive provisions relating to the imposition of discipline. She concluded that there was a "meeting of the minds" as to the grievance being covered under a grievance procedure and as to the substantive provisions governing resolution of the grievance. *Id.* at 7. For these reasons, she determined that the grievance was arbitrable and that it was unnecessary to resolve the parties' dispute over which agreement governed the dispute. *Id.*

On the merits, the Arbitrator found that the Agency failed to support either charge that provided the basis for the suspension. Accordingly, she directed that the suspension be removed from Agency records and that the grievant be made whole for lost pay. In addition, she stated: "[A]s no justification was presented for removing the grievant from her positions involving [the disputed] duties, those shall also be reinstated." *Id.* at 20.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the Arbitrator exceeded her authority with respect to her arbitrability determination. In this regard, the Agency asserts that the Arbitrator lacked authority to resolve the grievance because it was procedurally deficient as an attempt to enforce terms of the expired 2003 agreement. Exceptions at 5. The Agency also asserts that the Arbitrator created "her own fictional arbitration clause[.]" *Id.*

With respect to the Arbitrator's resolution of the merits, the Agency contends that the Arbitrator exceeded her authority by directing reinstatement of the disputed duties, as these matters were not encompassed within the stipulated merits issue. *Id.* at 19. In addition, the Agency asserts that the directed reinstatement of the disputed duties impermissibly affects management's right to assign work pursuant to § 7106(a)(2)(B) of the Statute. *Id.* at 27.

B. Union's Opposition

As to the Arbitrator's arbitrability determination, the Union contends that it is a determination of procedural arbitrability that is not subject to challenge. Opp'n at 5. As to the Arbitrator's resolution of the merits, the Union contends that the Arbitrator's direction to reinstate the disputed duties was encompassed within her discretion to fashion a remedy and make the grievant whole for any harm that resulted from the unwarranted suspension. *Id.* at 16. In addition, the Union contends that the award is not contrary to management's rights. *Id.* at 18-19.

IV. Analysis and Conclusions

A. The Arbitrator's arbitrability determination is not deficient.

As recognized by the Authority, procedural arbitrability involves questions of whether the procedural conditions to arbitrability have been met or excused, while substantive arbitrability involves questions of whether the subject matter of a dispute is arbitrable. *See, e.g., AFGE Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009). Here, the Arbitrator found, and the Agency does not dispute, that both the 2003 and 2006 agreements cover the subject matter that was grieved and set forth the same substantive standards with respect to the imposition of discipline. Consequently, the exceptions do not challenge a substantive arbitrability determination. Instead, the exceptions challenge the Arbitrator's arbitrability determination

rejecting the Agency's claim that the reference to the 2003 agreement rendered the grievance procedurally defective. This is a procedural arbitrability determination because it finds that the grievance met the procedural conditions to resolution on the merits. *See id.*

As a procedural arbitrability determination, the Arbitrator's determination is generally not subject to challenge. *E.g., AFGE Local 104*, 61 FLRA 681, 682 (2006); *see also John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) ("Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."). One of the grounds on which a procedural arbitrability determination is subject to challenge is exceeded authority, but only insofar as the exceeded-authority claim "do[es] not directly challenge the [arbitrability] determination itself." *AFGE Local 104*, 61 FLRA at 683. Here, the parties specifically authorized the Arbitrator to determine whether the grievance was arbitrable, and the Agency makes no exceeded-authority arguments that do not directly challenge the Arbitrator's arbitrability determination itself. Consequently, the Agency provides no basis for finding the determination deficient. *See id.*

Accordingly, we deny the Agency's exception.

B. The Arbitrator exceeded her authority in directing reinstatement of the disputed duties.

As relevant here, the Authority will find that arbitrators exceed their authority when they resolve an issue that was not submitted to arbitration. *E.g., U.S. Dep't of the Treasury, U.S. Mint, Denver, Colo.*, 60 FLRA 777, 779 (2005) (then-Member Pope dissenting as to application) (*U.S. Mint*). The Authority, like the federal courts, accords arbitrators substantial deference in the determination of the issues submitted to arbitration. *E.g., Veterans Admin.*, 24 FLRA 447, 450 (1986) (*VA*). In cases in which the parties have stipulated the issue for resolution, arbitrators do not exceed their authority by addressing any issue that is necessary to decide the stipulated issue or by addressing any issue that necessarily arises from issues specifically included in the stipulation. *Id.* Moreover, in examining an arbitrator's interpretation of a stipulation of issues, the Authority grants the arbitrator the same substantial deference the Authority grants an arbitrator's interpretation of a collective bargaining agreement. *E.g., Air Force Space Div., L.A. Air Force Station, Calif.*, 24 FLRA 516, 518 (1986).

Despite this deference, the Authority has consistently held that arbitrators must confine their decisions

and remedies to those issues submitted to arbitration by the parties and that they “must not dispense their own brand of industrial justice.” *U.S. Mint*, 60 FLRA at 779 (quoting *VA*, 24 FLRA at 450 (citing *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960))). Likewise, although arbitrators may legitimately bring their judgment to bear in reaching a fair resolution of a dispute submitted to them, they may not decide matters that are not before them. *Id.* at 780.

There is no dispute that the stipulated merits issue before the Arbitrator did not expressly include issues concerning the disputed duties. In addition, the Arbitrator did not find, and there is no claim, that it was necessary to address such issues to resolve the stipulated issue regarding the propriety of the grievant’s suspension. Further, the Arbitrator did not find that issues regarding the disputed duties necessarily arose from the stipulated issue of the propriety of the suspension, and she did not interpret the stipulation to encompass such issues. Moreover, the Arbitrator made no finding that review of the disputed duties was based on, or related to, the improper suspension, and the Union provides no basis for finding that reinstatement of the disputed duties was necessary to make the grievant whole. In sum, the record provides no basis for authorizing the Arbitrator to address the disputed duties. Consequently, we find that the Arbitrator failed to confine her decision and remedies to the merits issue submitted by the parties to arbitration. *See U.S. Mint*, 60 FLRA at 779. Accordingly, we conclude that the Arbitrator exceeded her authority. *

V. Decision

We deny the Agency’s exception to the Arbitrator’s arbitrability determination. We conclude that the Arbitrator exceeded her authority in directing reinstatement of the disputed duties, and we strike that direction.

*. In view of this decision, we do not address the Agency’s contention that the order impermissibly affects management’s right to assign work pursuant to § 7106(a)(2)(B).