64 FLRA No. 127

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2505
(Union)

and

SOCIAL SECURITY ADMINISTRATION
DISTRICT OFFICE
BARTLESVILLE, OKLAHOMA
(Agency)

0-AR-4413

DECISION

April 27, 2010

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 Patrick J. Halter filed by the Union under § 7122(a) 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.

As relevant here, the Arbitrator found that the Agency violated the parties' agreement, but he determined that no remedy was necessary and denied the grievance.

For the reasons that follow, we deny the Union's exceptions.

II. Preliminary matter: The Agency's opposition is untimely and will not be considered.

The Agency's opposition was postmarked one day later than the filing deadline. In response to an order to show cause why its opposition should be considered, the Agency admits that its representative incorrectly calculated the filing deadline because the representative believed that federal holidays were excluded from the calculation. Resp. to Order to Show Cause at 1. Noting that the delay in filing was very brief, the Agency requests that the Authority "exercise its power to waive the expired time limit . . . ." *Id.* at 2. However, the Agency states that the Union opposes waiver of the filing deadline. *Id.* at 2 n.2.

Section 2429.23(b) of the Authority's Regulations states that the Authority, "as appropriate, may waive any expired time limit . . . in extraordinary circumstances." 5 C.F.R. § 2429.23(b). If a party fails to establish extraordinary circumstances for an untimely filing, then the Authority will not consider the filing. *See AFGE, Local 1917*, 55 FLRA 228, 228 n.1 (1999). The Authority has held that a party's miscalculation of time limits does not demonstrate extraordinary circumstances that warrant a waiver. *See, e.g.*, *AFGE, Local 1812*, 59 FLRA 447, 447 n.3 (2003). Consistent with this precedent, the Agency's argument provides no basis for waiving the expired time limit and considering the opposition. Accordingly, we find the Agency's opposition to be untimely filed and decline to consider it.

III. Background and Arbitrator's Award

An Agency employee, who was represented by the American Federation of Government Employees (AFGE), Local 3184 (Local 3184), transferred to another of the Agency's duty stations, where she then was represented by AFGE, Local 2505 (Local 2505, or the Union). However, for more than ten months after the employee's transfer, the Agency continued to credit her dues withholding to Local 3184, rather than Local 2505. Local 2505 filed a grievance alleging that the Agency: (1) failed to notify Local 2505 of the employee's transfer, which ultimately caused the miscrediting of the employee's dues withholding; and (2) failed to notify Local 2505 of an orientation session that occurred after the transfer. The grievance was unresolved and submitted to arbitration, where the Arbitrator framed the issues as follows: "Did the Agency violate Articles 1, 2, 6 and 11 in the . . . [a]greement? If so, what is the appropriate remedy?" Award at 2.

Before the Arbitrator, the Agency admitted that "managers may have overlooked" the Agency's obligation, under the parties' agreement, to notify Local 2505 after the employee's transfer. *Id.* at 4. The Union alleged that the Agency thereby violated the second sentence of Article 6, § 3(A) of the agreement and caused the miscrediting of the employee's dues. [1] To the contrary, the Arbitrator found that the employee's dues were miscredited because "Local 3184 did not notify the . . . personnel office [of the employee's transfer, as Local 3184] . . . preferred to retain the dues" and considered

1. Article 6, § 3(A), sentence two states, in pertinent part, "[W]ithin five working days, [m]anagement . . . will inform the [Union] that a bargaining-unit employee has changed duty stations[.]" Exceptions, Attach. C at 28; *see also* Award at 5.

such notifications "a low priority."[2] *Id.* at 4-5; *see also* Exceptions, Attach. C at 28 (Art. 6, § 3). In addition, the Arbitrator found that no remedial award was warranted in connection with the miscrediting of dues because "[r]ecently[, the Agency] has complied in good faith with th[e] notice [requirements of the second sentence of Article 6, § 3(A),] and prior failure to do so was not designed to bypass the [Union] or otherwise undermine its status." Award at 5.

Further, the Arbitrator found that the Agency's orientation session "violated Article 11[, § 13, which requires the Agency to include the Union in orientations,] and resulted in derivative violations of Article 1 and Article 2" of the agreement.[3] *Id.*; *see also* Exceptions, Attach. C at 100 (Art. 11, § 13). However, the Arbitrator concluded that the violation did "not warrant an FLRA-style posting because . . . the Agency has [subsequently] acted . . . to comply with . . . the [agreement.]" Award at 5.

For the foregoing reasons, the Arbitrator denied the grievance and declined to issue a remedy.

IV. Union's Exceptions

The Union argues that the award fails to draw its essence from the parties' agreement because the Arbitrator found violations of several articles of the agreement but denied the grievance. *See* Exceptions at 5, 7 (citing *U.S. Dep't of Justice, INS, Del Rio Border Patrol Sector, Tex.*, 45 FLRA 926 (1992) (*Del Rio Border Patrol*)). The Union also argues that the award is based on a nonfact because the Arbitrator made factual findings that the Agency violated various provisions of the agreement but nevertheless denied the grievance. In this regard, the Union contends that the Arbitrator's findings and conclusions are tantamount to an erroneous factual finding that the Agency complied with the agreement. *See id.* at 8. Finally, the Union requests that the Authority set aside the award and remand to the Arbitrator with instructions to direct the Agency to: (1) post a notice regarding its violations of the agreement; and (2) compensate the Union in an amount equal to the employee's misdirected dues withholding. *Id.* at 9-10 (citing *Dep't of HHS, SSA, Chi., Ill.*, 13 FLRA 264 (1983); *Dep't of Health, Educ. & Welfare, Region IV, Atlanta, Ga. and Dep't of HHS, Region IV, Atlanta, Ga.*, 5 FLRA 458 (1981)).

V. Analysis and Conclusions

A. The award draws its essence from the parties' agreement.

The Union argues that the award does not draw its essence from the agreement because the Arbitrator found violations of the agreement but denied the grievance. In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor* (*OSHA*), 34 FLRA 573, 575 (1990) (*OSHA*). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

The Union argues that this case is analogous to *Del Rio Border Patrol*, in which the Authority determined that an award did not draw its essence from an agreement because the arbitrator essentially found that the agency had complied with a just-cause provision in the agreement, but he nevertheless set aside the agency's disciplinary action. Exceptions at 5 (citing *Del Rio Border Patrol*, 45 FLRA at 932-33 ("[T]he [a]rbitrator looked beyond the provisions of the . . . agreement and . . . reached a conclusion . . . contrary to his findings under the just[-]cause provision . . . .")). As the award deprived the agency of its expressly reserved right under the agreement to discipline employees for just cause, the Authority set aside the award. *Del Rio Border Patrol*, 45 FLRA at 933.

---

2. When "Local 3184 offered[, upon receiving a written request from Local 2505,] to pay the [miscredited] dues," Local 2505 refused the offer. Award at 4-5.

3. Article 11, § 13 states, "The [Agency] will provide the Union an opportunity to address new employees during orientation sessions and will introduce new employees to the Union representative. [The Agency] will notify the designated local . . . of orientation sessions." Exceptions, Attach. C at 100. Article 1 provides that both parties will comply with all applicable laws and regulations, and Article 2 details the Union's right, among others, not to be "restrain[ed], interfere[d] with, or coerce[d]" by the Agency in the performance of its representative functions, as provided by the Statute and the agreement. Exceptions, Attach. C at 4-5; *see also* Award at 2-3.

Unlike the agency in *Del Rio Border Patrol*, the Union does not identify a provision of the parties' agreement that the award directly and expressly contradicts. Specifically, the Union does not identify a provision in the agreement that explicitly requires an arbitrator to award remedies upon finding any violation of the agreement. [4] Therefore, the Union has failed to establish that the award is irrational, unfounded, implausible, or in manifest disregard of the agreement. *See OSHA*, 34 FLRA at 575.

For the foregoing reasons, we deny the essence exception.

B. The award is not based on a nonfact.

The Union argues that the award is based on a nonfact because the Arbitrator found, as a factual matter, that the Agency violated the agreement, yet he declined to provide a remedy. To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, an arbitrator's conclusion that is based on an interpretation of the parties' collective bargaining agreement does not constitute a fact that can be challenged as a nonfact. *See NLRB*, 50 FLRA 88, 92 (1995).

Despite the Union's contention to the contrary, the Arbitrator did not implicitly base his award on an erroneous factual finding that the Agency complied with all of the provisions of the parties' agreement. Instead, the Arbitrator found that, although the Agency had not fully complied with certain provisions of the agreement, in light of the nature of the violations and the context in which they occurred, the Union had not suffered any harm that warranted a remedial award. *See* Award at 4-5. To the extent that the Union is contending that the parties' agreement required the Arbitrator to grant remedies for the violations found, as noted above, a party may not challenge an interpretation of a collective bargaining agreement as a nonfact. *See NLRB*, 50 FLRA at 92.

For the foregoing reasons, we deny the nonfact exception.

VI. Decision

The Union's exceptions are denied.

4. We note that, although the Union cites Authority precedent to support its argument that the remedies it requested would be appropriate under that precedent, the Union does not argue that the award is contrary to law.