65 FLRA No. 130

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
RICHMOND, VIRGINIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

0-AR-4315

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DECISION

March 17, 2011

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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 Frederick Day 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 found that the Agency violated the parties' agreement by terminating the Local Union President's (the President's) access to the Agency's computer system (system) following her discharge from employment. For the following reasons, we dismiss the Agency's exceptions in part and deny them in part.

II. Background and Arbitrator's Award

The President was discharged from her position at the Agency, but continued to serve in her representational role as President. Award at 3. When she was discharged, the Agency terminated her access to the system. *Id.*

A grievance was filed regarding this termination of access. *Id.* at 2. The grievance was unresolved and submitted to arbitration, where the parties stipulated the issues as follows: "Did the Agency violate the contract when it removed [the President's] computer access . . . ? If so, what shall be the remedy?" *Id.*

As an initial matter, the Arbitrator noted that the parties' agreement indicates that the "[Agency] and the Union have a mutual commitment to . . . a 'partnership[.]'" *Id.* at 7. The Arbitrator then found that Article 48, Section 1 of the agreement provides for Union "office space 'equipped with adequate telephone lines for [Federal Telecommunications System (FTS)], fax, and computer capabilities.'"[1] *Id.* The Arbitrator also noted that Article 48, Section 4 provides that the Agency shall also equip the Union office with various items, including "access to e-mail and administrative [Dynamic Host Configuration Protocol (DHCP)] functions . . . ."[2] *Id.*

The Arbitrator also found "no evidence that the [Union] is, in any way, non-compliant with all provisions of the Statute and the governing Union by[-]laws and governing mandates[,]" and that, therefore, "the [President] . . . has legal standing and status[.]" *Id.* at 8. In this connection, the Arbitrator found that "to deny her access to computer services is tantamount to the denial of the contractual service guaranteed the Union[,]" and would "isolate[e] the

1. Article 48, Section 1 states, in pertinent part:

> Section 1 – Local Union Office Space
> A. Management recognizes the importance and value of the Union's mission and purpose. Accordingly, management agrees to furnish office space to the Union appropriate for carrying out its representational and partnership duties[.]
> B. Each office will be equipped with adequate telephone lines for FTS, fax, and computer capabilities.

Award at 2.

2. Article 48, Section 4 provides, in pertinent part:

> Section 4 – Equipment
> A. The [Agency] will provide or make available to each Union office:
> 2. Personal computer with standard software, programs and capabilities compatible with the [Agency's] technology,
> 4. Access to e-mail and administrative DHCP functions in the Union office.

Id. at 2-3.

President [from] the most commonly used form of communications to carry out her mission[.]" *Id.* at 8-9. Accordingly, the Arbitrator sustained the grievance and directed the Agency to restore the President's system access. *Id.* at 10.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award is contrary to management's right to determine its internal security practices under § 7106(a)(1) of the Statute because the award "excessively interferes with management['s] right to maintain security over its information [and] information systems." Exceptions at 4. In this connection, the Agency contends that the award "fails to address the lack of control that the [A]gency would be able to exercise over an individual who is not an employee but has access to its internal data and communications process[,]" and that the Arbitrator's remedy "fail[s] to reconstruct what management would have done." *Id.* at 4-5.

The Agency also argues that the award is based on nonfacts because the Arbitrator erroneously found that: (1) "the President and Union are one and the same under the contract"; and (2) "computer access is the most commonly used form of communications." *Id.* at 5, 6. In this regard, the Agency maintains that the President's "status with respect to . . . her right to computer access is no greater than that of a private citizen." *Id.* at 5. The Agency also maintains that the Arbitrator erred by citing the concept of "partnership" to "rationaliz[e] [the President's] status" because, according to the Agency, "partnership" was "voided by Executive Order [(EO)] 13203[.]" *Id.* at 6.

Further, the Agency contends that the award fails to draw its essence from the parties' agreement. *Id.* at 6-7. In this connection, the Agency asserts that the award "negates the contractual language defining the . . . Union" by finding it to be synonymous with the President. *Id.* at 7. The Agency also asserts that a Regional Director (RD) of the Authority has determined that the agreement "'does not address whether access must be provided to any [Union] representative.'" *Id.* at 7; *see also id.*, Attach., RD's Dismissal Letter, in Case No. WA-CA-04-0692 (January 31, 2005) at 1 (declining to issue an unfair labor practice (ULP) complaint concerning termination of a Union steward's computer access in conjunction with his notice of termination from employment and months after he stopped serving as a steward).

B. Union's Opposition

As an initial matter, the Union argues that the Authority should dismiss the Agency's exception regarding management's rights because the Agency raises the argument for the first time in its exceptions. Opp'n at 3. Further, the Union claims that "[t]here is no foundation for finding any impairment of the [A]gency's right to make security determinations." *Id.* at 4.

With respect to the nonfact exceptions, the Union contends that: (1) the Agency's arguments are "simply a disagreement with the Arbitrator as to the interpretation of the contract"; (2) there was "ample evidence" presented at the hearing demonstrating "the frequent use of e-mail communications"; and (3) "the [A]gency is confusing a particular partnership initiative" addressed by the EO with the general concept of "partnership" cited by the Arbitrator. *Id.* at 4-5.

Finally, the Union argues that the award draws its essence from the agreement because "[i]t is not implausible to interpret the language regarding computer access to include, at least, the president of the [Union]." *Id.* at 5. Further, the Union claims that the RD's decision cited by the Agency is "clearly inapplicable" because it "do[es] not constitute any sort of precedent" and involved different facts. *Id.* at 6.

IV. Preliminary Issues

A. The Authority has jurisdiction to resolve the Agency's exceptions.

Under § 7122(a) of the Statute, the Authority lacks jurisdiction to resolve exceptions to awards "relating to" a matter described in § 7121(f) of the Statute. Matters described in § 7121(f) include adverse actions, such as removals, that are covered under 5 U.S.C. § 7512 and are appealable to the Merit Systems Protection Board (MSPB) and reviewable by the United States Court of Appeals for the Federal Circuit (Federal Circuit). *See, e.g., U.S. Dep't of Commerce, Patent & Trademark Office, Arlington, Va.*, 61 FLRA 476, 477 (2006).

The Authority directed the Agency to show cause why its exceptions should not be dismissed for lack of jurisdiction pursuant to § 7122(a) of the Statute because the award "concerns a matter that could be considered 'inextricably intertwined' with a removal[.]" *See* Order to Show Cause at 1-2. In its response, the Agency asserts that "the loss of

computer access is not an 'adverse action' appealable to the MSPB[,]" and that the Union "brought a separate grievance related to the [President's] proposed removal . . . ." Agency's Response at 4. Further, the Agency maintains that "the MSPB reviewed [the President's] termination, issued a decision, and did not address [the President's] computer access." *Id.* at 3. Finally, the Agency contends that the present matter of "whether the Agency may remove a [U]nion member's or officer's computer access . . . is not inextricably intertwined with [the President's] termination." *Id.*

The Authority will determine that an award relates to a matter described in § 7121(f) "when it resolves, or is inextricably intertwined with," a § 7512 matter. *See AFGE, Local 1013*, 60 FLRA 712, 713 (2005). In making that determination, the Authority looks not to the outcome of the award, but to whether the claim advanced in arbitration is one reviewable by the MSPB, and, on appeal, by the Federal Circuit. *See id.* The Authority has found that an award was inextricably intertwined with a removal where, for example, "the MSPB or an arbitrator w[ould] examine the propriety of an [absence without leave (AWOL)] charge in determining whether an employee was lawfully removed based on such a charge." *See U.S. Dep't of Veterans Affairs, Med. Ctr., Newington, Conn.*, 53 FLRA 440, 443 (1997) (*Newington*). The Authority has also found that a supplemental award that specifically granted remedies for an unlawful removal was inextricably intertwined with the removal. *See U.S. Dep't of Transp., Fed. Aviation Admin.*, 57 FLRA 580, 581 (2001) (*FAA*). The fact that a grievant has separately challenged his or her removal before the MSPB is not dispositive of whether the award is inextricably intertwined with the removal. *See Newington*, 53 FLRA at 441.

Here, the stipulated issue before the Arbitrator was whether "the Agency violate[d] the contract when it removed [the grievant's] computer access[?]" Award at 2. The Arbitrator expressly noted that "[a]t the time of the hearing in the instant matter, [the grievant's] discharge was [before the MSPB] and [as of] yet unresolved[,]" and his award did not address whether the President's removal was proper. *Id.* at 3. As such, we find that the award does not resolve a § 7512 matter.

With respect to whether the grievance is inextricably intertwined with the grievant's removal, in contrast to *Newington*, the action at issue here -- termination of system access -- is not a basis for the removal. In fact, there is no dispute that the termination of system access occurred *after* the grievant's removal. Moreover, the award specifically provides a remedy for the President's loss of system access -- not for her removal. *See FAA*, 57 FLRA at 581. As such, we find that the award is not inextricably intertwined with the President's removal and, therefore, the Authority has jurisdiction over the Agency's exceptions.

B. Section 2429.5 of the Authority's Regulations bars the Agency's claim relating to § 7106 of the Statute.

The Authority's Regulations that were in effect when the Agency filed its exceptions provided that "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5.[3]

Before the Arbitrator, the Union requested that the Arbitrator "reinstate [the President] to 'full use and access to the computer system[.]" Award at 6. Thus, the Agency could have argued before the Arbitrator that restoring the grievant's access to the system would conflict with management's right to determine its internal security practices. There is no indication in the record that the Agency did so. As such, we dismiss this exception as barred by § 2429.5 of the Authority's Regulations. *See, e.g., U.S. DOD, Def. Distrib. Depot, Anniston, Ala.*, 61 FLRA 108, 109 (2005) (Authority will not consider arguments raised for the first time on exceptions).

V. Analysis and Conclusions

A. The award is not based on nonfacts.

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). 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. *NLRB*, 50 FLRA 88, 92 (1995).

3. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Agency's exceptions were filed before that date, we apply the prior Regulations.

The Agency argues that the award is based on a nonfact because the Arbitrator erred by finding that "the President and Union are one and the same under the contract." Exceptions at 5. In effect, the Agency's argument challenges the Arbitrator's interpretation of the parties' agreement. As stated above, an arbitrator's conclusion that is based on such an interpretation does not constitute a fact that can be challenged as a nonfact. *See NLRB*, 50 FLRA at 92. Accordingly, we deny this exception.

The Agency also argues that the Arbitrator erroneously found that "computer access is the most commonly used form of communications." Exceptions at 6. However, the Agency does not demonstrate that this finding is a clearly erroneous central fact, but for which the Arbitrator would have reached a different conclusion. Accordingly, we deny the exception.[4]

Finally, the Agency contends that the Arbitrator erred by citing the concept of "partnership" to "rationaliz[e] [the President's] status" because, according to the Agency, "partnership" was "voided by [EO] 13203." *Id.* However, the Agency does not explain how a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different conclusion. Accordingly, we deny the exception.

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

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard 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. *U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). 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 Agency contends that the award fails to draw its essence from the parties' agreement because it "negates the contractual language defining the . . . Union" by finding it to be synonymous with the President. Exceptions at 7. Article 48, Section 4 of the parties' agreement states that the Agency "will provide . . . to each Union office . . . [a]ccess to e-mail and administrative DHCP functions in the Union office." Award at 2-3. The Arbitrator found that "to deny [the President] access to computer services is tantamount to the denial of the . . . computer services guaranteed [to] the Union . . . in the [parties'] [a]greement." *Id.* at 8. The Agency provides no basis for concluding that this interpretation is irrational, unfounded, implausible, or in manifest disregard of the agreement. Accordingly, we deny this exception.

With regard to the Agency's reliance on an RD's decision in an unrelated case not to issue a ULP complaint concerning termination of a Union steward's computer access, the Authority has held that "the decision not to issue a complaint is a nonreviewable, nonprecedential exercise of the General Counsel's prosecutorial responsibility" and, "[t]herefore, the dismissal of the charge is not binding on [an] [a]rbitrator or the Authority." *AFGE, Local 2823*, 64 FLRA 1144, 1147 (2010) (quoting *Dep't of Def., Dependents Schs.*, 30 FLRA 1092, 1096 (1988)). Thus, the RD's decision not to issue a complaint in an entirely different case provides no basis for finding that the award is deficient. Accordingly, we deny the exception.

VI. Decision

The Agency's exceptions are dismissed in part and denied in part.

4. We note that, although the Union claims that there "was ample evidence" presented at the hearing demonstrating that computers are the most commonly used form of communication, Opp'n at 4, the record does not indicate whether the parties disputed that factual issue below.