65 FLRA No. 89

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1815
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY AVIATION CENTER
OF EXCELLENCE
FORT RUCKER, ALABAMA
(Agency)

0-AR-4666

DECISION

January 20, 2011

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 an exception to an award of Arbitrator William H. Mills 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 exception.[1]

The Arbitrator found that the grievance was substantively non-arbitrable. For the following reasons, we deny the Union's exception.

II. Background and Arbitrator's Award

The Agency requires employees to undergo periodic medical examinations. Award at 1-2. The Union filed a grievance on behalf of all bargaining unit employees requesting that the parties enter into a memorandum of agreement or memorandum of understanding to clarify whether the Agency or employees bore the responsibility for paying these medical examinations when performed by private physicians or medical facilities. *Id.* The grievance was unresolved and submitted to arbitration. *Id.* at 2.

Prior to the arbitration hearing, the Agency challenged the substantive arbitrability of the grievance, and the parties agreed that the Arbitrator should resolve the arbitrability issue before addressing the merits of the case. *Id.* Accordingly, the Arbitrator framed the threshold issue as: "Is the present dispute arbitrable?" *Id.* at 1.

As an initial matter, the Arbitrator noted that "[i]t seems inescapable that the Union's grievance is seeking to compel midterm bargaining." *Id.* at 14. Relying on the Supreme Court's decision in *National Federation of Federal Employees, Local 1309 v. Department of the Interior*, 526 U.S. 86 (1999) (*NFFE*), he further found that the Authority has "the sole power to determine 'whether, when, and where midterm bargaining is required[,]'" and, therefore, "an arbitrator obviously has no authority to compel it." Award at 16-17. Accordingly, the Arbitrator dismissed the grievance as non-arbitrable. *Id.* at 17.

III. Positions of the Parties

A. Union's Exception

The Union contends that the Arbitrator "appears to misunderstand that the matter grieved was simply a 'follow the prevailing law' [g]rievance issue . . . and [that] this matter was never a request to change or amend, add to, or delete from [the parties' agreement], . . . which is the predicate goal and intent of mid-term bargaining[.]" Exception at 1-2. The Union further argues that the "[i]nterpretation of pre-existing regulation[s] or issues between the two parties to the [parties' agreement] is not an attempt to initiate formal mid-term bargaining[.]" *Id.* at 2.

B. Agency's Opposition

The Agency asserts that the Union's exception does not "address with specificity . . . how the award violates [the] law or is otherwise deficient on other grounds[.]" Opp'n at 2. It also asserts that the Arbitrator made a procedural arbitrability determination, and that the Union's exception challenging that determination does not provide a basis for finding the award deficient. *Id.* at 3.

1. In addition, as discussed below, the Authority issued an Order to Show Cause why the exception should not be dismissed, and the parties filed supplemental submissions.

IV. Preliminary Issue

Although the Authority's Regulations do not provide for the filing of supplemental submissions, § 2429.26 of the Authority's Regulations provides that the Authority may, in its discretion, grant leave to file "other documents" as deemed appropriate. *See, e.g., Cong. Research Employees Ass'n, IFPTE, Local 75*, 59 FLRA 994, 999 (2004). The Authority generally will not consider submissions filed without requesting leave or permission. *See, e.g, NAIL, Local 6*, 63 FLRA 232, 232 n.1 (2009) (*NAIL*). In addition, where the Authority does not consider a submission, it also generally does not consider filings that respond to that submission. *See U.S. Dep't of the Army, Corps of Eng'rs, Portland Dist.*, 62 FLRA 97, 98 (2007) (*Corps of Eng'rs*).

The Union filed a motion to strike the Agency's opposition. *See* Union's Motion to Strike. As the Union failed to request permission to file its motion to strike, we do not consider it. *See NAIL*, 63 FLRA at 232 n.1.

The Agency requested leave to file a response to the Union's motion to strike. However, as the submission responds to arguments raised in a submission that we have not considered, we do not consider it. *See Corps of Eng'rs*, 62 FLRA at 98.

In addition, after the Authority issued an Order to Show Cause directing the Union to correct procedural deficiencies in the filing of its exception, the Union filed a response that includes arguments concerning the award. To the extent that these arguments constitute exceptions to the award, they are untimely, and we do not consider them.

The Agency filed a supplemental submission arguing that the Authority should not consider the additional merits arguments in the Union's response to the Order to Show Cause. As we have not considered those arguments, we need not consider the Agency's supplemental submission responding to those arguments. *Id.*

V. Analysis and Conclusions

As an initial matter, the Agency claims that the Union is challenging a procedural arbitrability determination. 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." *Fraternal Order of Police, New Jersey Lodge 173*, 58 FLRA 384, 385 (2003) (Chairman Cabaniss dissenting) (quoting Elkouri & Elkouri, *How Arbitration Works* 305) (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997). As the Arbitrator's arbitrability determination was based on the subject matter of the grievance, not a procedural provision of the parties' agreement, he made a substantive -- not procedural -- arbitrability determination. Thus, we find that the Agency's argument does not provide a basis for declining to consider the merits of the Union's exception.

We construe the Union's contention that the Arbitrator "appears to misunderstand . . . the matter grieved" as an argument that the Arbitrator exceeded his authority by failing to resolve an issue submitted to arbitration and/or resolving an issue not submitted to arbitration. Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to persons who are not encompassed within the grievance. *See U.S. Dep't of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 307-08 (1995). In the absence of a stipulated issue, an arbitrator's formulation of the issues is accorded substantial deference. *See AFGE, Local 933*, 58 FLRA 480, 482 (2003) (*AFGE*). In addition, an arbitrator does not exceed his or her authority where the award is directly responsive to the formulated issues. *See, e.g., AFGE, Local 4044*, *Council of Prisons Local 33*, 57 FLRA 98, 99 (2001).

Here, the parties did not stipulate to the issues before the Arbitrator. The Arbitrator framed the issue as: "Is the present dispute arbitrable?" Award at 1. In resolving this issue, the Arbitrator determined that "the Union's grievance is seeking to compel midterm bargaining[,]" and that "an arbitrator . . . has no authority to compel it." *Id.* at 14, 17. In making the foregoing findings, the award was directly responsive to the issue as formulated by the Arbitrator. The Union provides no basis for finding that the Arbitrator either failed to resolve an issue

that was properly before him or resolved an issue that was not properly before him. Thus, the Union has not demonstrated that the Arbitrator exceeded his authority, and we deny the exception. [2]

VI. Decision

The Union's exceptions are denied.

2. We note that the Arbitrator found that, based on the Supreme Court's decision in *NFFE*, he could not direct the parties to engage in mid-term bargaining. Award at 15-17. The issue before the Court in *NFFE* was whether the "duty to bargain extends to a clause proposed by a union that would bind the parties to bargain mid-term[.]" 526 U.S. at 88. In resolving that question, the Court concluded that "the Statute delegates to the FLRA the legal power to determine whether the parties must engage in mid-term bargaining[.]" *Id*. The Court did not address whether arbitrators may, or may not, direct parties to engage in mid-term bargaining. In any event, although the Union cites decisions involving the right to engage in mid-term bargaining, the Union's exception appears to be arguing that the issue of mid-term bargaining was not before the Arbitrator. Accordingly, we do not construe the exception as alleging that the award is contrary to law.