65 FLRA No. 40

INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS
LOCAL 4
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
PORTSMOUTH NAVAL SHIPYARD
PORTSMOUTH, NEW HAMPSHIRE
(Agency)

0-AR-4652

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DECISION

October 26, 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 Tim Bornstein 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.

As relevant here, the Arbitrator found that the grievance was not substantively arbitrable.[1] Award at 34. For the reasons discussed below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency's Equal Employment Opportunity (EEO) Program improperly "f[ell] under the Human Resources Office . . . in the [Agency's] organizational structure[,]" in violation of EEO regulations and Article 3, Section 5, and Article 5, Section 1, of the parties' agreement.[2] Award at 2-3. The Agency denied the grievance, and the Union invoked arbitration. *Id.* at 4-5.

The Arbitrator considered the Agency's claim that the grievance was not substantively arbitrable.[3] As relevant here, the Arbitrator noted the Agency's claim that the grievance "violates both statutory and contractual rights of management to determine its organization" under § 7106(a)(1) of the Statute and Article 2 of the parties' agreement.[4] *Id.* at 30. The Arbitrator also noted the Union's claim that an arbitrator may not rely on § 7106 of the Statute to determine that a grievance is not arbitrable. *Id.* at 32. The Arbitrator then stated:

> If the [S]tatute were the only relevant consideration here, the Union's position might be persuasive. But it is not[,] because the parties incorporated in Article 2 of their contract language respecting [§] 7106(a)(1) management rights. Accordingly, the question in this case is whether the parties intended that management's Article 2 rights could be challenged in Article 7's negotiated grievance procedure. Logically, it follows that, because the parties agreed to the incorporation of [§] 7106(a)(1) rights in Article 2 of their contract, those rights of

1. The Arbitrator also found that the grievance was procedurally arbitrable, and that the Union's request for information was "moot." Award at 33-34. As those finding are not at issue here, we do not discuss them further.

2. With regard to EEO regulations, the Union cited 29 C.F.R. part 1614, Equal Employment Opportunity Commission (EEOC) Management Directive 110, Ch. 6, IV(A), EEOC Management Directive 715, and Executive Order 13164. *See* Award at 2-4. With regard to the parties' agreement, Article 3, Section 5 states, in pertinent part, that "all employees in the unit will be treated fairly and equitably in the application and/or interpretation of the Statute, rules and regulations." *Id.* at 5-6. Article 5, Section 1 states, in pertinent part, that the parties agree that they are "governed by existing or future laws and regulations of appropriate authorities, such as Presidential Executive Orders[.]" *Id.* at 6.

3. The Arbitrator did not state what issues were before him, and the parties did not stipulate to what issues the Arbitrator would resolve.

4. Article 2 of the parties' agreement states, in pertinent part, that "nothing in this AGREEMENT shall affect the authority of the [Agency] . . . to determine the . . . organization . . . of the [Agency.]" Award at 5.

> management are exempt from challenge in the grievance procedure.[5]

Id. at 33. Accordingly, the Arbitrator found that the grievance was not arbitrable, and he dismissed the grievance. *Id.* at 33-34.

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the award fails to draw its essence from the parties' agreement because Articles 5 and 7 permit grievances alleging violations of law, and Article 7 permits grievances over matters "concerning . . . the effect or interpretation or a claim of breach" of the parties' agreement. Exceptions at 17-18. Additionally, the Union argues that Article 7, Section 2 "explicitly states that 'only' 11 discrete issues are excluded from coverage of this grievance procedure[,]" indicating that other matters, including the Union's grievance, are grievable.[6] *Id.* at 18. The Union further asserts that the grievance is arbitrable under Article 34, which the Union claims "contains . . . a directive to follow EEO laws[.]"[7] *Id.* at 17.

The Union also contends that the award is contrary to law for three reasons. First, the Union claims that the Authority has held that § 7106 does not bar arbitrability. *Id.* at 9-10 (citing *AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 466 (2009); *U.S. Dep't of Hous. & Urban Dev.*, 62 FLRA 52, 53 (2007); *U.S. Dep't of Homeland Sec., Customs & Border Prot. Agency, N.Y., N.Y.*, 61 FLRA 72, 75 (2005) (*DHS*)). Second, the Union asserts that the grievance "does not violate management's rights" because it seeks to "make the Agency follow the law." *Id.* at 15. Third, the Union alleges that the award is "contrary to law because it allows the Agency to use § 7106(a) to violate federal regulations." *Id.* at 14.

B. Agency's Opposition

The Agency contends that the award does not fail to draw its essence from the parties' agreement. Opp'n at 10. Additionally, the Agency asserts that the Union's contrary-to-law exceptions are misplaced because the Arbitrator based his award on "specific contract language found in Article 2 . . . and Article 7 . . . not upon statutory grounds." *Id.* at 6.

IV. Analysis and Conclusions

Where an arbitrator's determination regarding the substantive arbitrability of a grievance is based on his or her interpretation of a collective bargaining agreement, the Authority applies the deferential essence standard to review that determination. *See, e.g., AFGE, Local 12*, 61 FLRA 456, 457-58 (2006) (citing *Nat'l Air Traffic Controllers Ass'n*, 56 FLRA 733, 735 n.3 (2000)). Here, the Arbitrator found that the grievance was not substantively arbitrable, and he based that finding on his interpretation of the parties' agreement. Award at 34.

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5. Article 7, Section 1 of the parties' agreement states, in pertinent part, that a "grievance means any complaint . . . concerning . . . the effect or interpretation or a claim of breach of this AGREEMENT [or] any claimed violations, misinterpretation or misapplication of any law, rule or regulation affecting conditions of employment." Award at 6.

6. Article 7, Section 2 of the parties' agreement states:

> Only the following types of actions are specifically excluded from the provisions of Article[] 7 . . . . Matters thus excluded may be subject to administrative and/or statutory appeals and should be addressed to the appropriate authority . . . :
> a. Any claimed violation of Subchapter III of Chapter 73 of Title 5 of the United States Code (relating to political activities);
> b. Retirement, life insurance, or health insurance;
> c. A suspension or removal under Section 7532 of Title 5 of the United States Code;
> d. Any examination, certification, or appointment;
> e. The classification of any position which does not result in the reduction in grade or pay of an employee;
> f. Termination of a temporary employee;
> g. Oral admonishment or reprimand, letters of caution and letters of requirement;
> h. Substance of performance elements and standards;
> i. An allegation or complaint of discrimination reviewable under Part 713 of [Office of Personnel Management] regulations;
> j. Separation of probationers;
> k. Reduction-in-force.

Exceptions, Attach at 24-26; Opp'n, Attach. 4 at 24-26.

7. Article 34 states, in pertinent part: "All qualified employees are assured equal employment opportunities in employment matters . . . . The [Agency] will publish and disseminate an [EEO] affirmative action plan in accordance with existing law and directives." Exceptions, Attach. at 154.

Thus, the question is whether the award fails to draw its essence from the parties' agreement.

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 argument. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to the arbitrator in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

The Arbitrator interpreted Articles 7 and 2 of the parties' agreement, stating that the question before him was "whether the parties intended that management's Article 2 rights could be challenged in Article 7's negotiated grievance procedure." Award at 33. The Arbitrator found that the parties intended to exclude such challenges "because the parties agreed to the incorporation of [§] 7106(a)(1) rights in Article 2 of their contract[.]" *Id.* In response, the Union generically asserts that Articles 7 and 5 permit grievances alleging violations of law. However, the Union does not demonstrate that the Arbitrator's finding, that Articles 7 and 2 preclude grievances challenging management's right to determine its organization, is irrational, unfounded, implausible, or evidences a manifest disregard of the agreement. *See, e.g., AFGE, Local 3979, Council of Prisons Locals*, 61 FLRA 810, 815 (2006). Further, although Article 7, Section 2 of the parties' agreement states that certain matters are "specifically excluded" from the negotiated grievance procedure, that section does not foreclose the possibility that other provisions of the agreement, such as Article 2, might also provide a basis for excluding additional matters from the negotiated grievance procedure. Exceptions, Attach. at 25. Moreover, nothing in either Article 7 or Article 5 specifically states that matters regarding Article 2 rights of management to determine its organization are specifically *included* in the negotiated grievance process. Accordingly, we deny these essence exceptions.

As to Article 34 of the agreement, the Union does not explain how the award fails to draw its essence from that section, which "assure[s] equal employment opportunities" and states that the Agency "will publish . . . [an] affirmative action plan in accordance with existing law[.]" Exceptions, Attach. at 154. Where a party fails to support its claim that an award fails to draw its essence from a collective bargaining agreement, the Authority denies the exceptions as a bare assertion. *See, e.g., AFGE, Council of Prison Locals 33, Locals 1007 & 3957*, 64 FLRA 288, 291 (2009) (party failed to explain essence exception). Consistent with this precedent, we deny this essence exception as a bare assertion.

With regard to the Union's contrary-to-law exceptions, those exceptions are based on the erroneous premise that the Arbitrator relied on § 7106, and not on the parties' agreement, to determine that the grievance was not substantively arbitrable. *See* Exceptions at 10-11, 14. As the Arbitrator relied on the parties' agreement to determine that the grievance was not substantively arbitrable, the Union's statutory arguments are misplaced. *See AFGE, Local 779*, 64 FLRA 672, 674 (2010) (contrary-to-law exception to arbitrator's interpretation of contract misplaced). *Cf. NTEU, Chapter 260*, 52 FLRA 1533, 1538 (1997) (nothing required the arbitrator, as a matter of law, to interpret contract to find grievance arbitrable). Therefore, we deny the Union's contrary-to-law exceptions.

V. Decision

The Union's exceptions are denied.