

65 FLRA No. 166

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
AIRCRAFT CERTIFICATION SERVICE
(Union)

0-AR-4608

DECISION

April 29, 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 exceptions to an award of Arbitrator Parker Denaco 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 issued an award finding that the grievant's one-day suspension was not for such cause as to promote the efficiency of the service. For the reasons discussed below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency suspended the grievant for one day for an alleged absence without leave in violation of her leave restriction letter. Award at 6, 8. The Union filed a grievance. When the parties were unable to resolve the grievance, they submitted it to arbitration.

The Union requested an expedited hearing pursuant to the parties' collective bargaining agreement (agreement). The agreement's expedited arbitration procedures require an arbitrator to issue a decision within twenty-one days after the arbitration hearing. *Id.* at 4. At the hearing, the parties stipulated the issue as: "Whether the [one]-day suspension imposed on the

[g]rievant, . . . for unauthorized absence . . . was for such cause as to promote the efficiency of the service? If not, what shall the remedy be?" *Id.* at 10.

The arbitration hearing was held on November 10, 2009. *See id.* at 1-2. Upon completion of the hearing, the Arbitrator agreed to accept post-hearing briefs. *Id.* at 2; *see also* Exceptions at 5. The Union maintained that the parties' long-standing past practice in expedited arbitrations was to waive the twenty-one day deadline for the arbitrator's award and to mutually agree to a briefing schedule once the parties received the transcript. Opp'n at 3. The Agency, however, refused to deviate from the agreement's timeline and insisted that the award be issued within twenty-one days from the hearing. *Id.* at 4; *see also* Exceptions at 4-5; *id.*, Attach. 6. The Arbitrator agreed, and informed the parties that briefs would be due at least two weeks before the award's due date. Exceptions at 6.

The Union subsequently asked the Arbitrator for an extension of time until December 4 to file its brief, in order to obtain the transcript and attend to other pending matters. *Id.* at 7. The Arbitrator gave the parties a deadline of November 24 to submit their briefs. *Id.* at 7-8. On November 20, the Union submitted its brief to the Arbitrator by email and overnight mail. Exceptions, Ex. 6. On November 23, the Agency submitted its brief to the Arbitrator by overnight mail and to the Union by regular mail. Exceptions at 8.

The Arbitrator received the Union's brief on November 21 and the Agency's brief on November 24, but did not review either until November 24. Award at 2. On November 28, the Arbitrator issued his award. *Id.* at 26. He found that the grievant's one-day suspension did not promote the efficiency of the service and directed the Agency to rescind the suspension and expunge it from all of the Agency's systems of records. *Id.*

III. Positions of the Parties**A. Agency's Exceptions**

The Agency contends that the award is contrary to law because the Arbitrator considered the Union's brief even though the brief was not served on the Agency. Exceptions at 10-12. In support, the Agency claims that the Federal Mediation and Conciliation Service's (FMCS's) regulations, specifically 29 C.F.R. § 1404.4(b), mandate that the Arbitrator follow the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (Code of

Professional Responsibility).^{*} The Agency argues that the Code of Professional Responsibility prohibited the Arbitrator from considering the Union's brief because the Agency was not served with a copy. *Id.* at 11-12.

The Agency also contends that the Arbitrator denied it a fair hearing by depriving the Agency of an opportunity to rebut any factual errors or new evidence that the Union's brief may have contained. *Id.* at 13-16.

B. Union's Opposition

The Union argues that the Arbitrator properly considered both briefs. *Opp'n* at 6. The Union also contends that the parties never agreed to an exchange of briefs and, "if the Agency did not receive a copy of the Union's brief, it was a mere oversight" on the Union's part. *Id.* at 7. In addition, the Union points out that the Agency could have contacted the Union to obtain a copy of the Union's brief, which the Agency has not done "to date." *Id.* at 5; *see also id.* at 7. The Union also asserts that the parties do not usually file rebuttal briefs and it is unlikely that the Agency would have requested leave to submit one here due to the twenty-one day timeline. *Id.* at 9. Finally, the Union argues, the Agency has failed to show that it was prejudiced by not receiving the Union's brief. Mere speculation that there may be prejudice, the Union argues, does not support a claim that the Arbitrator denied the Agency a fair hearing. *Id.* at 9-10.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Agency claims that the award is contrary to law because the Arbitrator considered the Union's brief in violation of 29 C.F.R. § 1404.4 and the Code of Professional Responsibility. When an exception challenges an award's consistency with law, the Authority reviews the question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying this standard, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The FMCS has developed a set of standards for professional behavior of arbitrators. Arbitrators must meet the FMCS's standards to be listed on its roster of arbitrators. *See* 29 C.F.R. § 1404.4. If an arbitrator on the roster fails to meet the standards, then a party may file a complaint with the FMCS and the FMCS may remove that arbitrator from the roster for violation of FMCS regulations or the Code of Professional Responsibility. *See* 29 C.F.R. §§ 1404.4(f) and 1404.5(a) & (d).

The FMCS, however, has no authority to regulate arbitrators' actions. *See* 29 C.F.R. § 1404.4(d). Its regulations only set standards for arbitrators who want to be included on the roster. As relevant here, the only consequence for an arbitrator of not following the FMCS's regulations or the Code of Professional Responsibility is possible removal from the FMCS roster. Therefore, the cited FMCS regulations do not constitute a general restriction on arbitrators' authority and discretion with respect to arbitration proceedings. Consequently, that the Arbitrator may not have adhered to § 1404.4 and the Code of Professional Responsibility is not a basis for finding that the award is contrary to law. *Cf. Veterans Admin., Leavenworth, Kan.*, 34 FLRA 898, 902 (1990) (holding that Code of Professional Responsibility "is a privately developed set of standards for professional behavior and . . . is not a law, rule, or regulation . . . on which exceptions to an arbitration award can be predicated" (citations omitted)). Accordingly, we deny the Agency's contrary to law exception.

B. The Agency was not denied a fair hearing.

The Agency argues that the Arbitrator deprived the Agency of a fair hearing and prejudiced its rights by considering the Union's brief even though the Agency was not served with a copy. Exceptions at 13-16. The Authority will find an award deficient on the ground that the arbitrator failed to provide a fair hearing when it determines that an arbitrator's refusal to hear or consider pertinent and material evidence, or other actions in conducting the proceeding, prejudiced a party and affected the fairness of the proceeding as a whole. *See AFGI, Local 1668*, 50 FLRA 124, 126 (1995). An arbitrator, however, has considerable latitude in the conduct of the hearing. *See U.S. Dep't of Veterans Affairs Med. Ctr., Northport, NY*, 49 FLRA 630, 641-42 (1994) (arbitrator did not deny fair hearing by failing to afford agency an opportunity to respond to union's brief that was not served on agency); *U.S. Dep't of Housing & Urban Dev.*, 42 FLRA 813, 819 (1991) (arbitrator's issuance of decision before union filed brief did not deny union fair hearing).

^{*} 29 C.F.R. § 1404.4 is set forth in the appendix to this decision.

The only ground on which the Agency claims that it was denied a fair hearing is that it was “improperly deprived of its right to review, respond, or . . . clarify any factual errors or new evidence that may have been contained” in the Union’s brief. Exceptions at 16. The Agency, however, does not provide any evidence that it had such a right to file a rebuttal brief in this case. Moreover, it is undisputed that the Agency has not attempted to obtain a copy of the Union’s brief to ascertain whether there would have been any need, in its view, to file such a rebuttal. *See id.*; Opp’n at 5, 7.

In these circumstances, the Agency has not shown that the Union’s failure to serve a copy of its brief on the Agency prejudiced the Agency’s ability to fully and completely present its position before the Arbitrator. The Agency’s belief that it may have been prejudiced, without more, does not demonstrate that the Arbitrator denied the Agency a fair hearing by considering the Union’s brief. Accordingly, we deny the Agency’s fair hearing exception.

V. Decision

The Agency’s exceptions are denied.

APPENDIX

29 C.F.R. § 1404.4

(a) The Roster. FMCS shall maintain a Roster of labor arbitrators consisting of persons who meet the criteria for listing contained in § 1404.5 and who remain in good standing.

(b) Adherence of Standards and Requirements. Persons listed on the Roster shall comply with FMCS rules and regulations pertaining to arbitration and with such guidelines and procedures as may be issued by the OAS pursuant to Subpart C of this Part. Arbitrators shall conform to the ethical standards and procedures set forth in the Code of Professional Responsibility for Arbitrators of Labor Management Disputes, as approved by the National Academy of Arbitrators, Federal Mediation and Conciliation Service, and the American Arbitration Association (Code).

(c) Status of arbitrators. Persons who are listed on the Roster and are selected or appointed to hear arbitration matters or to serve as factfinders do not become employees of the Federal Government by virtue of their selection or appointment. Following selection or appointment, the arbitrator's relationship is

solely with the parties to the dispute, except that arbitrators are subject to certain reporting requirements and to standards of conduct as set forth in this part.

(d) Role of FMCS. FMCS has no power to:

- (1) Compel parties to appear before an arbitrator;
- (2) Enforce an agreement to arbitrate;
- (3) Compel parties to arbitrate any issue;
- (4) Influence, alter, or set aside decisions of arbitrators on the Roster;
- (5) Compel, deny, or modify payment of compensation to an arbitrator.

(e) Nominations and Panels. On request of the parties to an agreement to arbitrate or engage in fact-finding, or where arbitration or fact-finding may be provided for by statute, OAS will provide names or panels of names for a fee. Procedures for obtaining these services are outlined in subpart C of this part. Neither the submission of a nomination or panel nor the appointment of an arbitrator constitutes a determination by FMCS that an agreement to arbitrate or enter fact-finding proceedings exists; nor does such action constitute a ruling that the matter in controversy is arbitrable under any agreement.

(f) Rights of persons listed on the Roster. No person shall have any right to be listed or to remain listed on the Roster. FMCS retains its authority and responsibility to assure that the needs of the parties using its services are served. To accomplish this purpose, FMCS may establish procedures for the preparation of panels or the appointment of arbitrators or factfinders which include consideration of such factors as background and experience, availability, acceptability, geographical location, and the expressed preferences of the parties. FMCS may also establish procedures for the removal from the Roster of those arbitrators who fail to adhere to provisions contained in this part.