

66 FLRA No. 77

FRATERNAL ORDER
OF POLICE
LODGE NO. 158
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL SUPPORT ACTIVITY
CRANE, INDIANA
(Agency)

0-AR-4761

—
DECISION

December 21, 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 Cynthia S. Stanley 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.

The Arbitrator dismissed in part, denied in part, and sustained in part a grievance concerning the efforts of three employees to challenge their position descriptions and/or classifications. For the reasons discussed below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The parties' dispute concerns three employees. After one of the three employees (Grievant A) was selected for a General Schedule (GS)-7 instructor position, he informed his supervisors that he believed that his position should be reclassified as a GS-9 because his duties were essentially the same as those of the GS-9 senior-instructor position. Award at 3. His supervisors agreed, raised the issue with the Agency's Human Resource Office (HRO), and submitted a position review to the Agency. *Id.* at 3-4. In the position review, Grievant A's supervisor stated that Grievant A's position description was inaccurate and that his position should be

upgraded to GS-9. *See* Exceptions, Attach. 4 at 3-4. The Agency responded by directing Grievant A's supervisor to "cease all correspondence" concerning the request. Award at 4.

Grievant A also filed a classification appeal challenging his position description and classification, but the Agency stated that it would not process the appeal unless Grievant A agreed in writing that his position description was classified correctly. *Id.* Grievant A declined to do so. *Id.*

After a different employee (Grievant B) was selected for a GS-7 dog-handler position, he informed his supervisor that he believed that his position should be reclassified as a GS-8 because dog handlers at other Agency facilities – who were employed under a most-efficient-government-organization (MEO) – were classified as GS-8. *Id.* at 5. The position descriptions of the dog handlers employed under the MEO differed from those of Grievant B and another GS-7 dog handler (Grievant C), who were not part of the MEO. *Id.* Because Grievant C was deployed overseas and unable to personally discuss his similar concern with the supervisor, Grievant B included Grievant C in his complaint to the supervisor. *Id.* The supervisor agreed with the grievants' concerns and raised the issue with the HRO, but the supervisor and HRO were not able to resolve the issue because Grievants B and C were not part of the MEO. *Id.*

Later, Grievant B filed a classification appeal on behalf of himself and Grievant C. *Id.* The Agency transmitted their classification appeal to the appropriate department for processing, but failed to do so by the deadline set forth in Agency regulations. *Id.* Also, during that transmission, part of the file disappeared. *Id.* The classification appeal was returned as incomplete, although the missing information had been part of the original appeal as filed by Grievant B. *Id.* at 5-6.

The three grievants filed a grievance claiming that the Agency had violated Article 16 of the parties' agreement (Article 16) in various respects.¹ *Id.* at 5. The grievance was unresolved and was submitted to arbitration.

The Arbitrator stated the issues as follows: "Whether the issue before the [A]rbitrator is arbitrable under Article 16 If so, whether the Agency has failed to comply with Article 16 . . . , and if not, what the remedy shall be."² *Id.* at 1.

Regarding arbitrability, the Arbitrator found that some of the claims before her included the classification of positions, "which cannot be arbitrated according to the terms of Article 16 and Article 18" of the parties' agreement,³ and found that she had "no jurisdiction over that subject matter." *Id.* at 6. However, the Arbitrator found that "the issue of how the Agency complied with Article 16" was arbitrable. *Id.*

Turning to the specific circumstances of each grievant, the Arbitrator noted that Grievant A's classification claim included an "equal pay issue," *id.* at 4, but she declined to address that issue. In this regard, she found that whether she had jurisdiction over claims under 5 U.S.C. § 5101(1) (§ 5101(1))⁴ was "unclear from the evidence" because the parties' agreement "was not

provided in full."⁵ *Id.* at 7. With respect to whether the Agency violated Article 16 as to Grievant A, the Arbitrator found that Grievant A's supervisors complied with the agreement by submitting a position review to the Agency. *Id.* However, she found that the Agency "did not substantively reply to [the position review], but rather . . . told [one of the supervisors] to cease contacts about the issue." *Id.* at 6. The Arbitrator found that this violated Article 16. *Id.* As a remedy, she directed the Agency to process Grievant A's classification appeal, "this time in compliance with Article 16." *Id.* at 7.

Regarding Grievants B and C, the Arbitrator found that their individual circumstances -- including, among other things, the fact that their position descriptions were not under the MEO that the comparable dog-handlers' position descriptions fell under -- "justif[ied] a different outcome" from what she directed with regard to Grievant A. *Id.* The Arbitrator acknowledged that the Agency had failed to timely transmit their classification appeal and that the disappearance of part of that appeal was "concerning." *Id.* But she found that Agency regulations provided no remedy for the lack of timeliness, and that she had no authority to address these issues because "[n]either the failure to observe the time limits, nor the loss of part of the file give the arbitrator jurisdiction over *classification* issues." *Id.* (emphasis added). Accordingly, she denied the grievance with regard to Grievants B and C.

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the Arbitrator exceeded her authority by failing to resolve the issue of whether the Agency "failed to comply with Article 16 as it pertains to" Grievants B and C. Exceptions at 11. Specifically, the Union argues that the Arbitrator: (1) failed to resolve an issue regarding the accuracy of those grievants' position descriptions, and whether these position descriptions should be standardized with those of other dog handlers at the Agency, and (2) erroneously distinguished those grievants from Grievant A and failed to award them relief, despite finding that the Agency violated the parties' agreement. *Id.* at 10-12. In addition, the Union claims that the Arbitrator exceeded her authority by failing to resolve the issue of whether the Agency violated § 5101(1). *Id.* at 6.

Further, the Union asserts that the award is contrary to law in two respects. First, the Union contends

¹ Article 16 provides, in pertinent part:

Any employee who believes his/her job classification is incorrect may, at any time, bring this matter to the attention of his/her supervisor. If the supervisor agrees that a revised job description and/or reconsideration of the job classification is in order, he/she will promptly initiate the appropriate action If the employee is not satisfied with the results obtained, he/she may make an informal complaint to the [HRO]. A member of the HRO will then discuss the case with the employee. . . . If the question is not resolved to the employee's satisfaction . . . he/she may file a formal classification appeal . . . but may not grieve such a matter under Article 18 (Negotiated Grievance Procedures) or Article 19 (Arbitration) of this [a]greement.

Award at 1-2.

² As discussed below, the Union does not claim, and there is no record evidence indicating, that the parties stipulated the issues.

³ Article 18 of the parties' agreement specifies matters that are excluded from the agreement's negotiated grievance procedure, including "[t]he classification of any position." Award at 2.

⁴ Section 5101(1) provides, in pertinent part, that, "in determining the rate of basic pay . . . the principle of equal pay for substantially equal work will be followed[.]" 5 U.S.C. § 5101(1).

⁵ Although the Arbitrator referred to the equal-pay statute at issue as the "Equal Pay Act," Award at 7, she was referring to § 5101(1). *See* Award at 4 (referring to "5 USC Section 5101 et seq." as the "Equal Pay Act"). The Equal Pay Act prohibits gender discrimination, which was not at issue in this case. *See* 29 U.S.C. § 206(d).

that the Arbitrator's determination that the grievance was not arbitrable because it concerned classification is contrary to § 7121(c)(5) of the Statute (§ 7121(c)(5)).⁶ *Id.* at 6-7. Second, the Union argues that the award is contrary to the equal-pay principles in § 5101(1) because the record evidence showed that all three grievants were doing substantially the same work as coworkers who were paid more. *Id.* at 7-8.

Finally, the Union asks the Authority to "remedy the Agency's violations, as well as the deficiencies within the . . . [a]ward" and argues that "[b]ecause this will most likely result in a reclassification of the [grievants'] respective positions," the Authority should award the grievants backpay and attorney fees. *Id.* at 12.

B. Agency's Opposition

The Agency argues that the Arbitrator did not exceed her authority. Specifically, the Agency argues that Grievants B and C "did not challenge the duties and responsibilities identified in their [position description], rather they wanted their [position description] reclassified to a higher grade level." Opp'n at 9. According to the Agency, the Arbitrator resolved the issue of whether the Agency violated Article 16 as to Grievants B and C by finding that she had no jurisdiction over their claims because they concerned classification. *Id.* at 9-10. In addition, the Agency contends that the Arbitrator did not err by not resolving the alleged violation of § 5101(1) because that issue was not before her. *Id.* at 8-9.

The Agency also argues that the award is not contrary to law. Specifically, the Agency asserts that the Arbitrator's finding that the grievants' claims included classification issues that could not be grieved under Article 16 does not conflict with § 7121(c)(5). *Id.* at 7. The Agency also argues that the award is not contrary to § 5101(1) because the Agency's alleged violation of that statute was not before the Arbitrator. *Id.* at 8-9. Finally, the Agency objects to the Union's request for backpay and attorney fees. *Id.* at 10-11.

IV. Analysis and Conclusions

A. The Arbitrator did not exceed her authority.

The Union argues that the Arbitrator exceeded her authority by failing to resolve the issue of whether the Agency "failed to comply with Article 16 as it pertains to" Grievants B and C. Exceptions at 11. As relevant here, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration. *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, the arbitrator's formulation of the issue is accorded substantial deference. *See U.S. Dep't of the Army, Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997).

Here, the Union does not claim, and there is no record evidence indicating, that the parties stipulated the issues before the Arbitrator. As such, the Arbitrator had discretion to frame them, *see id.*, and she framed them as follows: "Whether the issue before the [A]rbitrator is arbitrable under Article 16 If so, whether the Agency has failed to comply with Article 16 . . . , and if not, what the remedy shall be." Award at 1.

The Union argues that the issues before the Arbitrator included an issue regarding the accuracy of Grievant B's and Grievant C's position descriptions, but the issue as framed by the Arbitrator did not include that specific issue, and there is no record evidence indicating that the issue was presented to her. As such, there is no basis for finding that the Arbitrator was required to resolve that issue.

With regard to the remaining issues regarding Grievants B and C, the Arbitrator did resolve those issues, but found that those grievants' particular circumstances did not justify granting the grievance regarding their claims. *See Award* at 7. Although the Union disagrees with the merits of the Arbitrator's resolution of those issues, it does not except, on essence or other grounds, to that resolution. As the Arbitrator addressed these issues, the Union's exception provides no basis for finding that the Arbitrator exceeded her authority in this regard.

The Union also argues that the Arbitrator exceeded her authority by failing to determine whether the Agency violated § 5101(1). But the Arbitrator's issue statement does not cite § 5101(1), *id.* at 1, and the Arbitrator found that there was insufficient record evidence to determine whether she had jurisdiction over § 5101(1) claims because the parties did not provide her with their entire agreement, *id.* at 7. The Union does not argue that the Arbitrator's determination that she needed the parties' entire agreement in order to determine the arbitrability of such a claim fails to draw its essence from the agreement. For these reasons, the Union does not provide a basis for finding that the Arbitrator was required to resolve the question of whether the grievants were entitled to recover under § 5101(1).

⁶ Under § 7121(c)(5), a grievance concerning "the classification of any position which does not result in the reduction in grade or pay of an employee" is removed from the scope of negotiated grievance procedures. 5 U.S.C. § 7121(c)(5).

For the foregoing reasons, we deny the Union's exceeded-authority exceptions.

- B. The award is not contrary to law, rule, or regulation.

The Union argues that the award is contrary to §§ 7121(c)(5) and 5101(1). In reviewing arbitration awards for consistency with law, rule, or regulation, the Authority reviews questions of law raised by exceptions to an arbitrator's award de novo. *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)).

The Union's argument regarding § 7121(c)(5) challenges the Arbitrator's finding that certain portions of the grievance were substantively non-arbitrable because they concerned classification matters. The Authority has held that where an arbitrator's substantive-arbitrability determination is based on law, the Authority reviews that determination de novo. *U.S. Dep't of Veterans Affairs, Med. Ctr., Hampton, Va.*, 65 FLRA 125, 127 (2010). But where an arbitrator's substantive-arbitrability determination is based on the arbitrator's interpretation of the parties' agreement, the Authority reviews challenges to this determination under the deferential "essence" standard. *Id.*

The Union's § 7121(c)(5) argument is premised on the notion that the Arbitrator based her substantive-arbitrability finding on a misinterpretation of that statutory section. But, in making that finding, the Arbitrator relied on the parties' agreement – not § 7121(c)(5).⁷ See Award at 6. As such, the Union's argument provides no basis for finding the award contrary to § 7121(c)(5).

With regard to the Union's § 5101(1) argument, as discussed above, the Arbitrator found that the alleged violation of § 5101(1) was not properly before her, and we have denied the Union's exceeded-authority exception to that finding. As the Union has not demonstrated that the Arbitrator was required to resolve an issue regarding § 5101(1), there is no basis for finding that the Arbitrator's failure to find a violation of § 5101(1) is contrary to law.

For the foregoing reasons, we deny the Union's contrary-to-law exceptions. And, in view of our denial of all of the Union's exceptions, we find it unnecessary to address the Union's request for backpay and attorney's fees, or the Agency's objection to that request.

V. Decision

The Union's exceptions are denied.

⁷ We note that the Union does not except to this finding on essence grounds.