66 FLRA No. 87

UNITED POWER
TRADES ORGANIZATION
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
NORTHWESTERN DIVISION
PACIFIC REGION
(Agency)

0-AR-4769

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DECISION

January 31, 2012

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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 Anthony D. Vivenzio 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 Union filed a grievance claiming that the Agency violated the Water Resources Development Act of 1990 (WRDA) by contracting out work previously performed by bargaining-unit employees. The Arbitrator found that the Agency committed only a "technical" violation of the WRDA and declined to award a remedy. Award at 18. For the reasons set forth below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The bargaining-unit employees at issue work at several of the Agency's hydroelectric-power-generation projects in the Northwest. Award at 1. The WRDA prohibits the Agency from contracting out activities related to the maintenance of the Agency's facilities that were performed by bargaining-unit employees before and during 1990.[1] *See* 33 U.S.C. § 2321. The Union filed a grievance claiming that the Agency violated the WRDA when it contracted out the collection of oil samples to a private company because that work was previously performed by bargaining-unit employees. Award at 2. The parties did not resolve the grievance and submitted it to arbitration, where the Arbitrator framed the following issue: "Did the [Agency] violate the [WRDA] by contracting out [the collection of] the transformer oil samples . . . ? If so, what is the remedy?" *Id.* at 4.

At arbitration, the parties did not dispute that, before and during 1990, bargaining- unit employees collected oil samples from the projects' transformers. *Id.* at 13. But, according to the parties' stipulation, the *testing* of those oil samples was contracted out, beginning *before* 1990. *Id.* The parties stipulated that, since 1990, the Agency contracted out collection of the oil samples. *Id.* at 15. In addition, the parties stipulated that collecting the oil samples is related to the routine preventative maintenance of the transformers. *Id.*

The Arbitrator determined that, because bargaining-unit employees collected the oil samples before and during 1990, the Agency committed a "technical, but de minimis" violation of the WRDA by subsequently contracting out this work. *Id.* at 18. Based on the violation's de minimis nature, the Arbitrator declined to award a remedy. *Id.* at 19-20.

In the Arbitrator's view, Congress did not intend the Agency to be chargeable with a "substantive violation" of the WRDA in these circumstances. *Id.* at 17. The Arbitrator noted particularly the benefits, efficiencies, and reliability realized by having the same specialized company collect, transport, and test the oil samples each year; and the inefficiency of training bargaining-unit employees for the once-a-year task of collecting the samples. *Id.* The Arbitrator also noted the Agency's "legitimate concern" over past incidents of bargaining-unit employees' faulty sampling. *Id.* And the Arbitrator found no compelling reason to separate the oil sample collection from testing. *Id.* at 18. Finally, the Arbitrator concluded that the Agency's WRDA violation had only a de minimis effect on bargaining-unit employees' working conditions, hours of work, and pay. *Id.* at 20. The Arbitrator found that employees experienced "no substantial loss" in either hours worked or pay. *Id.* Based on these findings, the Arbitrator

[1] Specifically, the WRDA provides that "[a]ctivities currently performed by personnel . . . in connection with the operation and maintenance of hydroelectric power generating facilities . . . are to be considered as inherently governmental functions and not commercial activities. This section does not prohibit contracting out major maintenance or other functions which are currently contracted out . . . ." 33 U.S.C. § 2321.

declined to award the Union a remedy for the "technical, but de minimis" violation of the WRDA.[2] *Id.* at 18, 20-21.

III. Positions of the Parties

A. Union's Exceptions

The Union claims that the award is contrary to the WRDA because the Arbitrator declined to award a remedy although he found that the Agency violated the WRDA. Exceptions at 3. According to the Union, the WRDA contains no "de minimis exception" allowing the Arbitrator to deny the Union a remedy where the Agency violated the WRDA. *Id.* The Union also contends that the award is contrary to *Department of the Air Force, Nellis Air Force Base, Nevada*, 41 FLRA 1011, 1017-18 (1991) (*Air Force*), which the Union alleges provides a "narrow interpretation" of the de minimis principle. *Id.* at 3.

In addition, the Union argues that the award is deficient because the Arbitrator's finding that the Agency's WRDA violation was de minimis is a nonfact. *Id.* at 4.

B. Agency's Opposition

The Agency claims that the award is not contrary to law. According to the Agency, the Arbitrator's evaluation of the evidence and the record before him support his decision to deny the Union a remedy. Opp'n at 4. The Agency notes that the Authority grants arbitrators broad discretion in fashioning remedies. *Id.* at 6. Further, the Agency argues that the Union's reliance on *Air Force* is misplaced because, here, the Agency's WRDA violation did not harm employees, as supported by the Arbitrator's factual findings that the employees did not experience a loss in either hours worked or pay. *Id*.

In addition, the Agency claims that the award is not deficient as based on a nonfact because the parties disputed at arbitration whether the Agency's WRDA violation was de minimis. *Id.* at 6-7. The Agency cites Authority case law holding that the Authority will not find an award deficient on the basis of an arbitrator's determination of a factual matter that the parties disputed at arbitration. *Id.* at 7 (citing, *e.g.*, *Pension Benefit Guar. Corp.*, 64 FLRA 692, 696 (2010)).

[2] The Arbitrator also found that the grievance was timely filed. Award at 10. And he determined that the Agency did not violate the Statute when it failed to provide the Union with notice and an opportunity to bargain over the impact and implementation of the Agency's decision to contract out the collection of the samples. *Id.* at 20. As the Union does not challenge these conclusions, we do not address them further.

IV. Analysis and Conclusions

A. The award is not contrary to the WRDA and Authority precedent.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exceptions 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 the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Union claims that the award is contrary to law because the Arbitrator's failure to award a remedy is contrary to the WRDA and Authority precedent. Exceptions at 3.

Where the law requires a particular remedy, an arbitrator's failure to award that remedy will be found contrary to law. *NTEU*, 64 FLRA 833, 838 (2010) (citing *NTEU*, 48 FLRA 566, 571 (1993)). Here, the Union points to nothing in the WRDA that requires the Arbitrator to award a particular remedy. As the Union does not demonstrate that the Arbitrator failed to award a particular remedy required by the WRDA, we deny the Union's contrary-to-law claim based on the WRDA.

In addition, the Union's reliance on *Air Force* is unpersuasive. In *Air Force*, the employees suffered actual harm – loss of shift differential – as a result of the Agency's conduct. 41 FLRA at 1017. Here, the Union neither sets forth evidence demonstrating that the employees suffered any harm, nor challenges the Arbitrator's factual findings that employees experienced no loss in hours worked or pay. Award at 20. Accordingly, we deny the exception.

B. The award is not based on a nonfact.

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). When the determination alleged to be a nonfact constitutes an interpretation of law, that determination cannot be challenged as a nonfact. *See AFGE, Nat'l Border Patrol Council, Local 2455*, 62 FLRA 37, 40 (2007) (*AFGE*).

The Union claims that the award should be set aside because the Arbitrator's determination that the Agency's violation of the WRDA is de minimis is a nonfact. Exceptions at 3. The Arbitrator found that the Agency committed a "technical, but de minimis" violation of the WRDA. Award at 18. This constitutes a legal conclusion, not a factual one. *See NFFE, Local 1437*, 53 FLRA 1703, 1710-11 (1998) (citing *AFGE, Local 940*, 52 FLRA 1429, 1437-38 (1997)). Consequently, the Union may not challenge this determination as a nonfact. *See AFGE*, 62 FLRA at 40. Accordingly, we deny the exception.

V. Decision

The Union's exceptions are denied.