

66 FLRA No. 93

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 3828
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
COMMUNITY CORRECTIONS CENTER
SAN ANTONIO, TEXAS
(Agency)

0-AR-4790

DECISION

February 22, 2012

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 Oliver J. Butler, Jr. filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority’s Regulations. The Agency filed an opposition to the Union’s exceptions.

The Arbitrator denied the Union’s grievance, which alleged that the grievants’ supervisor (the supervisor) created a hostile work environment by continuously engaging in racially discriminatory behavior toward them. For the following reasons, we deny the Union’s exceptions.

II. Background and Arbitrator’s Award

The Union filed a grievance alleging that the supervisor created a hostile work environment by continuously engaging in racially discriminatory behavior toward the grievants. Award at 2. The grievance was unresolved and submitted to arbitration. After finding that the parties did not present a “joint submission of the issue for arbitration,” the Arbitrator framed the issues as follows: “[W]hether . . . [the supervisor] has created a hostile work[] environment for [the grievants] . . . in that she is and has been engaging in a pattern of continuing

and on-going racially motivated discriminatory behavior toward [them, and, if so,] what remedies are . . . appropriate[?]” *Id.* at 2-3.

As an initial matter, the Arbitrator declined to admit into evidence certain exhibits concerning incidents that occurred several months before and after the filing of the grievance because those incidents were “too remote.” Exceptions, Attach. 7, Tr. at 25-27, 48-61. With respect to the merits of the grievance, the Arbitrator found that, although the evidence “reflect[ed] numerous complaints” about the supervisor, the Union failed to “establish by a preponderance of the credible evidence that any action or non-action by [the supervisor] resulted in the creation of a hostile working environment.” Award at 16 (internal quotation marks omitted). In this connection, the Arbitrator determined that “the Union proffered not a scintilla of evidence . . . which even suggested that any action or non-action of [the supervisor] . . . was based on or due to any racially motivated or racially discriminatory animus by her toward the [grievants].” *Id.* at 17 (emphasis omitted). Accordingly, he denied the grievance. *Id.* at 18.

III. Positions of the Parties

A. Union’s Exceptions

The Union argues that the Arbitrator denied it a fair hearing by “inappropriately, and without notice, narrow[ing] the issues presented in the initial grievance.” Exceptions at 14. In this connection, the Union claims that both the Union and Agency submitted issues statements to the Arbitrator that addressed certain agreement provisions, and that neither the issues statements nor the cited provisions “limit[ed] the issue to one of racial discrimination.” *Id.* at 15. The Union also argues that the Arbitrator denied it a fair hearing by: (1) without prior notice, “arbitrarily rul[ing] that the Union could only present evidence regarding [the supervisor’s] abusive behavior towards subordinates that occurred” in a particular time period (the grievance period); and (2) “improperly limit[ing] witness testimony” to events that occurred within the grievance period and excluding several exhibits that related to events that fell outside of that period. *Id.* at 15-17. In this regard, the Union contends that the Arbitrator “effectively ignored the characterization of th[e] grievance as a continuing violation.” *Id.* at 16.

B. Agency’s Opposition

The Agency argues that the Arbitrator did not err in framing the issues for arbitration because the parties did not stipulate to them, and that the award is not deficient because the Arbitrator confined the award to the framed issues. Opp’n at 6-7. The Agency also argues that the Arbitrator made a procedural-arbitrability

determination by precluding the Union from submitting exhibits that did not pertain to events occurring within the grievance period. *Id.* at 8-10. In this connection, the Agency contends that the Union directly challenges this determination and that, therefore, the Union does not provide a basis for finding the award deficient. *Id.* The Agency further contends that the Union's disagreement with the Arbitrator's evaluation of the evidence does not demonstrate that he failed to provide the Union with a fair hearing. *Id.* at 10.

IV. Analysis and Conclusions

The Union argues that the Arbitrator denied it a fair hearing in three respects. Exceptions at 14-19. An award will be found deficient on the ground that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole. *See AFGE, Local 1668*, 50 FLRA 124, 126 (1995) (*Local 1668*). It is well established that an arbitrator has considerable latitude in conducting a hearing and that an arbitrator's limitation on the submission of evidence does not, by itself, demonstrate that the arbitrator failed to provide a fair hearing. *See U.S. Dep't of Commerce, Patent & Trademark Office, Arlington, Va.*, 60 FLRA 869, 879 (2005) (*PTO*).

The Union's first fair-hearing argument is that the Arbitrator "inappropriately, and without notice, narrowed the issues presented in the initial grievance" and addressed only a racial-discrimination claim. Exceptions at 14. But there is no dispute that the Arbitrator framed the issues because the parties did not stipulate to them. *See Award at 2*. The Union cites nothing that required the Arbitrator to provide advance notice of his framing of the issues or precluded him from framing the issues in the absence of a stipulation. In addition, the Union does not demonstrate that the Arbitrator framed the issues in a manner that so prejudiced the Union as to affect the fairness of the proceeding as a whole. *See Local 1668*, 50 FLRA at 126. Accordingly, the Union does not demonstrate that the Arbitrator denied it a fair hearing in this regard.*

The Union's second and third fair-hearing arguments are that the Arbitrator: (1) ruled, without prior notice, that the Union could present evidence regarding only incidents that occurred during the grievance period; and (2) limited witness testimony and exhibits to events that occurred within that period. Exceptions at 15-17. In this connection, the Union asserts that the Arbitrator

"effectively ignored the characterization of th[e] grievance as a continuing violation." *Id.* at 16.

At the outset, we reject the Agency's contention that these two Union arguments challenge a procedural-arbitrability determination by the Arbitrator. Opp'n at 8-10. A procedural-arbitrability determination is a finding regarding whether a party has complied with the procedural requirements of a negotiated grievance procedure. *See AFGE, Local 703*, 55 FLRA 507, 508 (1999). Here, the Arbitrator did not make a finding regarding the procedural requirements of the parties' negotiated grievance procedure. Thus, the Union's arguments do not challenge a procedural-arbitrability determination.

With regard to the merits of these arguments, the Arbitrator excluded witness testimony and exhibits concerning incidents occurring outside the grievance period because they were "too remote." Exceptions, Attach. 7, Tr. at 25-27, 48-61. The fact that the Arbitrator limited the submission of exhibits and witness testimony does not, by itself, demonstrate that the arbitrator failed to provide a fair hearing. *See PTO*, 60 FLRA at 879. Moreover, the Arbitrator's limitation did not preclude the Union from submitting evidence that demonstrated a continuous pattern of racially discriminatory behavior by the supervisor during the grievance period. In addition, the Union cites nothing that required the Arbitrator to provide advance notice of his decision to consider only evidence that related to the grievance period. Accordingly, the Union's arguments do not provide a basis for finding that the Arbitrator denied it a fair hearing in these regards.

For the foregoing reasons, we deny the Union's fair-hearing exceptions.

V. Decision

The Union's exceptions are denied.

* We note that the Union does not claim that, in framing and resolving the issues, the Arbitrator exceeded his authority. *See Exceptions at 8*.