

67 FLRA No. 67

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL OF FIELD LABOR LOCALS
(Union)

and

UNITED STATES
DEPARTMENT OF LABOR
OFFICE OF THE ASSISTANT SECRETARY FOR
ADMINISTRATION AND MANAGEMENT
(Agency)

0-AR-4922

DECISION

February 19, 2014

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members¹

I. Statement of the Case

Arbitrator Daniel N. Kosanovich found that the grievance was untimely and, therefore, not procedurally arbitrable. This case presents us with two questions.

The first is whether the Union's claim that the award fails to draw its essence from the parties' collective-bargaining agreement provides a basis for finding the award deficient. Because parties may not directly challenge procedural-arbitrability determinations on essence grounds, the answer is no.

The second is whether the Arbitrator's procedural-arbitrability determination is contrary to the Back Pay Act.² Because the Back Pay Act does not establish a filing period for negotiated grievance procedures, the answer is no.

II. Background and Arbitrator's Award

The Agency initially hired the employee at issue here (the grievant) into a General Schedule (GS)-9 position. She became eligible for a promotion to the GS-11 level on October 26, 2008, but the Agency did not promote her at that time. Rather, the Agency

promoted her to a GS-11 on August 30, 2009, and then to a GS-12 in 2010. On February 10, 2011, the grievant filed a grievance challenging the Agency's decision not to promote her on October 26, 2008.

The parties' agreement provides that a grievance "must be presented in writing . . . within thirty (30) calendar days of when the bargaining[-]unit employee or [the Union] has learned or may reasonably be expected to have learned of its cause."³ The Arbitrator found that, under this provision, the grievance was untimely because it was not filed within the thirty-day period. The Arbitrator rejected a claim by the Union that the Back Pay Act provided a six-year filing period. In this regard, he found that the six-year period in the Back Pay Act "relate[s] to the period of *recovery*."⁴ Accordingly, the Arbitrator concluded that the grievance was "time[-]barred and not arbitrable."⁵

The Union filed exceptions to the Arbitrator's award, and the Agency filed an opposition to the Union's exceptions.

III. Analysis and Conclusions

The Union argues that the Arbitrator's finding that the grievance was untimely: (1) fails to draw its essence from the parties' agreement;⁶ and (2) is contrary to law, specifically, the Back Pay Act.⁷

An arbitrator's finding regarding the timeliness of a grievance is a procedural-arbitrability determination.⁸ The Authority will not find a procedural-arbitrability determination deficient on grounds that directly challenge the determination itself – including essence challenges.⁹ The Union's essence exception directly challenges the Arbitrator's procedural-arbitrability determination. Therefore, consistent with these principles, the exception provides no basis for finding the award deficient.

As for the Union's Back Pay Act claim, the Authority has held that a procedural-arbitrability determination may be challenged on the ground that it is contrary to law.¹⁰ Before the Authority will find the determination contrary to law, the challenging party must establish that the determination is contrary to procedural requirements established by statute that apply to the

¹ Member Pizzella did not participate in this decision.

² 5 U.S.C. § 5596.

³ Award at 4.

⁴ *Id.* at 6 (emphasis added).

⁵ *Id.*

⁶ Exceptions at 5.

⁷ *Id.* at 3-4.

⁸ *AFGE, Local 3283*, 66 FLRA 691, 692 (2012).

⁹ *Union of Pension Emps.*, 67 FLRA 63, 65 (2012).

¹⁰ *NAIL, Local 11*, 64 FLRA 709, 711 (2010) (*Local 11*); *AFGE, Local 3882*, 59 FLRA 469, 470 (2003).

parties' negotiated grievance procedure.¹¹ This approach recognizes that a statute could establish a filing period that may apply to such procedures.¹² But the Authority has held that the Back Pay Act does not establish a filing period for negotiated grievance procedures.¹³ Therefore, the Union's reliance on the Back Pay Act provides no basis for finding the award contrary to law.

IV. Decision

We deny the Union's exceptions.

¹¹ *U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 122, 124 (2005).

¹² *Id.*

¹³ *Local 11*, 64 FLRA at 711; *AFGE, Local 933*, 58 FLRA 480, 482 (2003).