70 FLRA No. 156

FRATERNAL ORDER OF POLICE
LODGE No. 168
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
87TH AIR BASE WING
(Agency)

0-AR-5296

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DECISION

August 24, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and James T. Abbott and Ernest DuBester, Members

I. Statement of the Case

Arbitrator William J. DiCindio found the Union's grievance untimely, and thus not procedurally arbitrable under the parties' agreement. There are three questions before us.

The first question is whether the Arbitrator's finding that the grievance was untimely is contrary to law. Because the Union fails to show that the award is deficient on this ground, the answer is no.

The second question is whether the Arbitrator's determination that the grievance was untimely is based on nonfacts. Because the Union's nonfact arguments merely attempt to relitigate the Arbitrator's evaluation of the evidence, the answer is no.

The third question is whether the award fails to draw its essence from the parties' agreement. Because the Arbitrator's interpretation of the agreement is not irrational, unfounded, implausible, or in manifest disregard of the agreement, the answer is no.[1]

[1] Member Abbott concurs in the decision to deny all exceptions. However, he does not believe that this decision is drafted in such a manner which provides sufficient clarity for the labor-management relations community. *See U.S. Small Bus. Admin.*, 70 FLRA 745, 745 n.1 (2018).

II. Background and Arbitrator's Award

The grievant is a police officer at the Agency's military base in Lakehurst, New Jersey. As part of the grievant's duties, he is required to carry a firearm.

On April 5, 2016,[2] the grievant drove onto the base while talking on his cell phone. A police officer stationed at the entry gate told the grievant "multiple times"[3] to stop talking on his phone while driving but, the Agency alleged, the grievant did not comply. Subsequently, the Agency issued the grievant a ticket for talking on his cell phone while driving. The Agency also withdrew the grievant's authorization to carry a firearm, placed the grievant on the Agency's "Do Not Arm" (DNA) list, and reassigned him to alternative work pending the matter's investigation.[4]

On April 29, the Union filed a grievance challenging the Agency's withdrawal of the grievant's authorization to carry a firearm. The grievant's loss of his authorization resulted in his reassignment to alternative work. The Union also alleged that the reassignment caused the grievant to lose overtime and premium pay.

The parties' grievance procedure has four steps to follow before invoking arbitration. Article 56 § 12.01 of the agreement describes the procedure. At Step 1, "an employee/representative will first present the grievance in writing to the employee's first level supervisor. The immediate supervisor will review the complaint and provide a written response within seven calendar days."[5] Steps 2-4 permit the grieving party to seek reconsideration of the supervisor's decision by submitting the grievance to each of those steps within fifteen calendar days of the decision at the previous step. At Step 2, the grievance is submitted to the "87 SFS Section Chief."[6] At Step 3, the grievance is submitted to the Security Forces Squadron Commander (Commander).[7] Finally, at Step 4, the grievance is

[2] All subsequent dates are 2016 unless otherwise noted.
[3] Award at 3.
[4] *Id.* at 4.
[5] *Id.* at 5-6 (quoting the parties' collective-bargaining agreement).
[6] *Id.* at 6. Article 56 § 12.02 (Art. 56.12.2) (Step 2) states that "[i]f the employee/representative is not satisfied with the decision in Step 1, they may seek further consideration of the grievance by submitting the grievance to the 87 SFS Section Chief or designated representative(s) within [fifteen] calendar days."
[7] *Id.* Article 56 § 12.03 (Art. 56.12.3) (Step 3) states that "[i]f the employee/representative is not satisfied with the decision in Step 2, they may seek further consideration of the grievance by submitting the grievance to the 87 SFS [(Security Forces Squadron)] Commander or his designated representative(s) within [fifteen] calendar days."

submitted to the "87 MSG Commander."[8] A grievance is "deemed resolved" if neither the Union nor the employee advances the grievance to the next step.[9]

Although the Union filed the grievance at Step 1, the Agency did not issue a Step 1 decision on the grievance. Instead, the Agency proceeded directly to Step 3 and submitted the grievance to the Commander. The Agency did this because, it later explained, the grievance involved putting the grievant on the DNA list, and the Commander "is the only person who can order and sign a DNA letter, or respond to such grievances."[10]

On May 17, the Commander denied the grievance. The next day, the Union "acknowledged receipt of" the Step 3 denial,[11] but did not request reconsideration at Step 4 within the agreement's 15-day time limit.

Instead, the Union continued to process the grievance through all the grievance procedure's steps. Accordingly, after the Agency failed to respond to the grievance at Step 1, the Union submitted the grievance at Step 2. And when the Agency again did not respond, the Union submitted the grievance at Step 3. The Union's submission at Step 3 was after the Agency provided its Step 3 response. Finally, on June 8, the Union submitted the grievance at Step 4, more than 15 days after the Agency's May 17 Step 3 denial of the grievance. The Agency denied the grievance as untimely under Art. 56.12.04.[12]

The parties disagreed about whether the grievance was timely and submitted the matter to arbitration. As relevant here, the Arbitrator framed the issue as whether "the grievance [is] arbitrable under the [parties' a]greement."[13] The Union argued that the Agency improperly skipped Steps 1 and 2 of the grievance procedure, and that the Union timely filed its grievance at Steps 1-4 under Article 56. The Agency responded that it properly started the grievance at Step 3 because the Commander is the only person authorized to respond to the grievance, and that the Union's response to the May 17, Step 3 denial was untimely.

The Arbitrator agreed with the Agency that the grievance was untimely. First, he concluded that the Agency properly began the grievance at Step 3. He found that the deciding officials at Steps 1 and 2 had no authority to respond to the grievance since "[it] is undisputed that . . . [the] Commander . . . has the sole authority to resolve DNA grievances."[14] The Arbitrator concluded, therefore, that the Agency properly began the grievance at Step 3 because the Commander "comes in" at Step 3.[15] The Arbitrator also found that the parties had previously initiated grievances at Step 3.[16]

The Arbitrator next concluded that the Union had failed to comply with the fifteen-day period to advance a grievance to Step 4 under the parties' agreement.[17] The Arbitrator found that the Agency's May 17 response was "unambiguously"[18] titled a "Step 3" response,[19] and that the Union acknowledged receipt of the response the day after it was issued.[20] The Arbitrator found that the Union nonetheless failed to respond within fifteen workdays as required by the agreement. He concluded that "the Union did not comply with the unequivocal and unambiguous language agreed to by the [p]arties in [Art.]56.12.04 and [Art.]56.14 of the [a]greement, regarding timeliness in the grievance procedure,"[21] and denied the grievance as untimely.

On July 5, 2017, the Union filed exceptions with the Authority, and on August 3, 2017, the Agency filed an opposition to the Union's exceptions.

III. Analysis and Conclusions:

A. The Arbitrator's procedural-arbitrability determination is not contrary to law.

The Union argues that the Arbitrator's procedural-arbitrability determination is contrary to the U.S. Supreme Court's decisions[22] in *United Steelworkers of America v. American Manufacturing Co.*,[23] *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,[24] and *United Steelworkers of America v. Enterprise Wheel & Car Corp.* (*the Steelworkers Trilogy*).[25] Specifically, the Union argues that the award is contrary to the Court's holding

[8] *Id.* Article 56 § 12.04 (Art. 56.12.04) (Step 4) states that "[i]f the employee/representative is not satisfied with the decision in Step 3, they may seek further consideration of the grievance by submitting the grievance to the 87 MSG Commander or designee within [fifteen] calendar days."
[9] *Id.* at 7. Article 56 §14.
[10] *Id.* at 4.
[11] *Id.*
[12] *See supra*, note 7.
[13] Award at 2.
[14] *Id.* at 12.
[15] *Id.*
[16] *Id.* at 8, 19.
[17] *Id.* at 18.
[18] *Id.* at 15.
[19] *Id.* at 14, 16.
[20] *Id.* at 14.
[21] *Id.* at 19-20.
[22] Exceptions at 5, 9, 10, 12, 16.
[23] 363 U.S. 564 (1960).
[24] 363 U.S. 574 (1960).
[25] 363 U.S. 593 (1960).

that there is a "presumption" of finding grievances arbitrable.[26]

The Authority will find a procedural-arbitrability determination deficient if the determination is contrary to law.[27] However, in order for a procedural-arbitrability ruling to be found deficient as contrary to law, the appealing party must establish that the ruling conflicts with statutory procedural requirements that apply to the parties' negotiated grievance procedure.[28]

Contrary to the Union's argument, *the Steelworkers Trilogy* did not address *procedural*-arbitrability determinations. The Court held that there is a rebuttable presumption of *substantive* arbitrability; that is, whether the subject matter of a grievance is arbitrable.

Further, the Arbitrator did not, as the Union argues, apply a "presumption of . . . non-arbitrability" and construe an "ambiguity" against the Union.[29] Instead, weighing the evidence, the Arbitrator found that there was no ambiguity in the Agency's Step 3 response,[30] or the timeliness requirements under the parties' agreement.[31] Based on this, the Arbitrator concluded that the grievance was not arbitrable.[32]

Thus, the Union has not demonstrated that the Arbitrator's findings are contrary to law. Accordingly, we deny the Union's contrary-to-law exception.[33]

B. The Union has not demonstrated that the award is deficient as based on nonfacts.

The Union claims that the Arbitrator's determination that the grievance was untimely is based on two nonfacts. Specifically, the Union challenges the Arbitrator's findings that (1) grievances about DNA issues may start at Step 3 of the grievance process; and (2) the Commander is the only Agency official authorized to resolve grievances about DNA issues.[34]

To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[35] Further, disagreement with an arbitrator's evaluation of the evidence, including the weight to be accorded such evidence, does not provide a basis for finding that an award is based on a nonfact.[36]

The Union's nonfact exception lacks merit. Here, the Union's nonfact exception merely challenges the Arbitrator's evaluation of the evidence. The record shows that both parties provided testimonial and documentary evidence and disputed these issues throughout arbitration.[37] And, in weighing the evidence, the Arbitrator agreed with the Agency and found that the grievance was properly addressed at Step 3 by the Commander, the only official authorized to resolve the grievance.[38] The Union's attempt to relitigate these findings before the Authority does not provide a basis for finding the award is based on a nonfact.[39]

Accordingly, we deny the Union's nonfact exception.

C. The award draws its essence from the parties' agreement.

The Union also claims that the Arbitrator "'interpret[ed]' the [agreement] contrary to its terms and [its] plain meaning."[40] In the Union's view, Article 56 does not include any requirement that grievances involving DNA issues be filed at Step 3.[41] Thus, according to the Union, the Arbitrator erred by upholding the Agency's unilateral action to elevate the grievance to Step 3.[42]

The Union's claim raises an essence exception because it sufficiently explains how the Arbitrator's

[26] Exceptions at 10.
[27] *NFFE, Local 479*, 67 FLRA 284, 285 (2014).
[28] *Id.*
[29] Exceptions at 10-11, 17.
[30] Award at 15-16.
[31] *Id.* at 18.
[32] *Id.* at 19-20.
[33] The Union requested leave to file a supplemental submission to address arguments raised in the Agency's opposition. We do not find the submission appropriate and deny the request. 5 C.F.R. § 2429.26(a); *see also Haw. Fed. Emp. Metal Trades Council*, 70 FLRA 324, 326 n.27 (2017).
[34] Exceptions at 4.
[35] *See U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010) (citations omitted); *see also U.S. Dep't of Interior, Bureau of Reclamation, Great Plains Region, Colo./Wyo. Area Office*, 68 FLRA 992, 995-96 (2015) reviewing the allegation that an arbitrator made mathematical error under the nonfact standard and modifying the award to correct that mathematical error); *see also AFGE, Local 3294*, 70 FLRA 432, 434 (2018) (Member DuBester concurring) (parties may challenge an arbitrator's procedural-arbitrability finding on nonfact grounds).
[36] *E.g., U.S. Dep't of the Air Force, Whiteman Air Force Base, Mo.*, 68 FLRA 969, 971 (2015) (*Air Force*).
[37] Award at 4-20.
[38] *Id.* at 14, 18-20.
[39] *Air Force*, 68 FLRA at 971.
[40] Exceptions at 4; *see also id.* at 4-6, 8, 10.
[41] *Id.* at 4.
[42] *Id.*

interpretation of the parties' agreement is deficient.[43] We will therefore address the claim on its merits.[44]

As the Arbitrator found, Article 56 of the agreement sets forth the parties' four-step grievance procedure.[45] Under this procedure, the Union has fifteen days to advance the grievance if it is not satisfied with the Agency's Step 3 response.[46] Moreover, Article 56 states that "where the Union or employee does not advance the grievance to the next Step, the grievance will be deemed resolved."[47]

Considering the Arbitrator's findings, we hold that the Union's essence exception is without merit. Here, the Arbitrator determined, in a finding that the Union does not successfully challenge as a nonfact, that the Commander has the sole authority to resolve DNA grievances. Further, it is undisputed that the Agency "clearly marked and unambiguously" stated that the Commander's denial was a Step 3 response.[48] Applying Article 56's plain requirements to these facts, we conclude that the Arbitrator's interpretation of the agreement, that the Union had fifteen days to elevate the Commander's Step 3 response to Step 4, is not irrational, unfounded, implausible, or in manifest disregard of agreement. And, because the Union did not file a Step 4 grievance within the allotted time, the Arbitrator's further determination, that the Union's subsequent filing is untimely, does not fail to draw its essence from the parties' agreement.

Accordingly, we deny the Union's essence exception.

IV. Decision

We deny the Union's exceptions.

[43] Finding that the Union's claim is sufficient to raise an essence exception, we will no longer follow Authority precedent to the extent that it is to the contrary. *See NLRB Prof. Ass'n*, 68 FLRA 552, 554 (2015) (holding that an argument that the arbitrator's interpretation of a particular contract article "violat[ed]" a provision of the parties' agreement did not raise a recognized ground for review under § 2425.6 of the Authority's Regulations).

Member DuBester notes that for reasons he explained in *AFGE, Local 1858*, 67 FLRA 327, 328 n.21 (2014), he agrees that the Union's challenge to the Arbitrator's "interpretation" of the parties' agreement in this case raises an essence exception.

[44] When reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *U.S. Dep't of the Treasury, IRS*, 70 FLRA 539, 542 n.24 (2018) (Member DuBester concurring) (citing *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014)). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective-bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *Id.* Additionally, challenges to an arbitrator's evaluation of the evidence, including determinations as to the weight to be accorded such evidence, do not demonstrate that an award fails to draw its essence from the parties' agreement. *NTEU, Chapter 299*, 68 FLRA 835, 838 (2015). In the absence of a successful nonfact exception, the Authority defers to an arbitrator's factual findings. *AFGE, Local 933*, 70 FLRA 508, 511 (2018); *AFGE, Local 3740*, 68 FLRA 454, 455 (2015); *U.S. DHS, U.S. CBP, Savannah, Ga.*, 68 FLRA 324, 326 (2015).

[45] Award at 7 (citing Article 56 of the agreement).

[46] *Id.*

[47] *Id.*

[48] *Id.* at 15-16.