70 FLRA No. 171

UNITED STATES
DEPARTMENT OF THE AIR FORCE
355TH FSS/FSMC
DAVIS-MONTHAN AIR FORCE BASE, ARIZONA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2924
(Union)

0-AR-5272

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DECISION

September 28, 2018

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

I. Statement of the Case

In this case, we find an arbitrability determination to be contrary to law because the Arbitrator improperly found that an existing and binding grievance procedure was defunct. We thus reaffirm the long-standing principal that the grievance procedures under an existing agreement continue in full force and effect until the parties negotiate and implement a successor agreement.

The Agency originally rejected a grievance on the ground that the Union (AFGE) filed it under the wrong collective-bargaining agreement (CBA). The Arbitrator found the grievance arbitrable because he determined that the CBA that the Agency claimed should apply – one the Agency had negotiated with the previous union, the National Federation of Federal Employees (NFFE) – was not binding on the parties. Because that conclusion was incorrect, we set aside the award.

II. Background and Arbitrator's Award

As relevant here, the Agency has two groups of bargaining-unit employees, Group One and Group Two. For many years, AFGE represented Group One, and NFFE represented Group Two. AFGE and the Agency had a CBA containing a negotiated grievance procedure for Group One (the AFGE agreement), and NFFE and the Agency had a CBA containing such a procedure for Group Two (the NFFE agreement). At some point, NFFE stopped representing Group Two, and eventually the Federal Labor Relations Authority (FLRA) certified AFGE as the exclusive representative of Group Two. Subsequently, the Agency and AFGE began negotiating a CBA to replace the NFFE agreement, but did not agree on which grievance procedure – the one in the AFGE agreement, or the one in the NFFE agreement – would apply to Group Two until the parties executed a new CBA. At all times relevant in this case, the parties had not yet negotiated a new CBA for Group Two.

AFGE sometimes filed grievances for Group Two under the NFFE agreement and sometimes filed them under the AFGE agreement. At some point, the Agency began rejecting, as improperly filed, Group Two grievances filed under the AFGE agreement. In response, AFGE filed an unfair-labor-practice (ULP) charge with the FLRA's Office of the General Counsel. The ULP charge alleged that the Agency had unilaterally changed the working conditions of Group Two when it stopped accepting grievances filed under the AFGE agreement.

After AFGE filed the ULP charge, the Agency suspended a Group Two employee for five days, and AFGE challenged the suspension by filing a grievance under the AFGE agreement. The Agency rejected the grievance and argued that AFGE should have filed it under the NFFE agreement; the Agency also stated that it would have denied the grievance on the merits.

Meanwhile, the parties were negotiating settlement of the ULP charge, and the Agency agreed to hold the grievance in abeyance until the parties completed those negotiations. As part of the negotiations, AFGE proposed, and the Agency rejected, wording specifying that the Agency would process the grievance under the AFGE agreement. The Agency proposed that AFGE withdraw the grievance, but AFGE refused. However, AFGE agreed to withdraw nine other pending grievances as part of the settlement. The parties subsequently executed a Memorandum of Agreement (MOA) to settle the ULP, and included AFGE's agreement to withdraw the nine grievances in its terms. The MOA also states, in part, that until AFGE and the Agency execute a CBA to replace the NFFE agreement, the AFGE agreement's grievance and arbitration provisions will apply to Group Two.

After the parties executed the MOA, the Agency again rejected the grievance as improperly filed. The parties then submitted the grievance to arbitration.

As pertinent here, the Arbitrator first addressed whether the grievance was arbitrable. The Arbitrator

found that the NFFE agreement expired over thirty years ago and that there was no evidence that either party was routinely complying with its terms. He concluded that the NFFE agreement was "defunct"[1] and that he could not find that AFGE was a "successor"[2] bound by the terms of the NFFE agreement. Consequently, the Arbitrator stated that the Agency could not unilaterally force AFGE to follow the NFFE agreement's grievance procedure. Additionally, the Arbitrator determined that AFGE could not unilaterally force the Agency to apply the AFGE agreement's grievance procedure to Group Two because there was no past practice of the parties filing Group Two grievances under the AFGE agreement. The Arbitrator then stated that "[*h*]*aving concluded that . . . neither party could require the other to follow either agreement*," the "answer" to whether the grievance was arbitrable "is found in the MOA."[3]

The Arbitrator found that the MOA's provision that Group Two grievances would be processed under the AFGE agreement's grievance procedure applied to the grievance because: (1) the MOA did not specify that it applied only to grievances filed after its effective date, and (2) AFGE agreed to withdraw other pending grievances, but not this grievance. Therefore, he concluded that the grievance was arbitrable because AFGE filed it under the AFGE agreement.

On the merits, the Arbitrator sustained the grievance, directed the Agency to rescind the grievant's suspension, and awarded backpay.

On March 20, 2017, the Agency filed exceptions to the award. On April 6, 2017, AFGE filed an opposition to the Agency's exceptions.

III. Analysis and Conclusion: The award is contrary to law.

The Agency argues that the award is contrary to law.[4] The Authority reviews questions of law raised by an exception de novo.[5] In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[6]

The Agency contends that, as a matter of law, AFGE was required to file the grievance under the NFFE agreement's negotiated grievance procedure.[7] In this regard, the Authority has stated that "when a negotiated agreement expires, personnel policies, practices, and matters affecting working conditions," including negotiated grievance and arbitration procedures, "continue to the maximum extent possible absent either an express agreement to the contrary or the modification of those conditions of employment in a manner consistent with the Statute."[8] Further, "such provisions survive and remain in full effect . . . even following the decertification of one exclusive representative and the installation of a new one."[9]

Here, even though the NFFE agreement has expired, the parties have neither reached an express agreement regarding a new grievance procedure nor modified the NFFE agreement in a manner consistent with the Statute.[10] Therefore, the NFFE agreement's grievance procedure remains in effect and is binding on the parties. Consequently, the Arbitrator erred, as a matter of law, in finding that the NFFE agreement is defunct and not binding.

AFGE argues that the Arbitrator found that the MOA is an agreement that modified the NFFE agreement.[11] According to AFGE, the MOA therefore provides a separate basis for the grievance's arbitrability. However, the Arbitrator found that the MOA was relevant only *because of* his erroneous determination that the NFFE agreement was "defunct."[12] Because the Arbitrator erred as a matter of law in finding the NFFE agreement's grievance procedures inapplicable, his subsequent interpretation of the MOA and the number of grounds for his determination are irrelevant and cannot provide a separate basis for the award. Thus, the grievance was not arbitrable because AFGE did not file it

[1] Award at 9.
[2] *Id.* at 10.
[3] *Id.* (emphasis added).
[4] Exceptions at 3-6.
[5] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995).
[6] *E.g.*, *GSA*, 70 FLRA 14, 15 (2016) (citation omitted).
[7] Exceptions at 4.
[8] *Indep. Union of Pension Emps. for Democracy & Justice*, 68 FLRA 999, 1004 (2015) (*Pension*) (citing *NTEU*, 64 FLRA 982, 985 n.4 (2010)). We note that in 2018 the Authority issued *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 501, 503-04 (2018), which clarified the meaning of "working conditions" and "conditions of employment."
[9] *Pension*, 68 FLRA at 1004 (citing *U.S. Nuclear Regulatory Comm'n*, 6 FLRA 18, 19-20 (1981)).
[10] *See* Award at 3 n.1.
[11] We note that it is *AFGE* (the successor union) which argues that the *NFFE* grievance procedures do not apply. The fact remains, however, that AFGE and the Agency have been unable to complete negotiations for a new agreement. While it is understandable that AFGE would *want* to use its own grievance procedures, as we explain herein, the terms of an existing agreement continue in effect and are binding on a successor union *until* the successor union and agency negotiate a new agreement.
[12] Award at 9; *see also id.* at 10 ("[h]aving concluded that . . . neither party could require the other to follow either agreement," the "answer" to whether the grievance was arbitrable "is found in the MOA").

under the proper agreement – the NFFE agreement – and we set aside the award.[13]

IV. Decision

We set aside the award.

[13] Because we set aside the award on the basis that the Arbitrator erred as a matter of law in finding the NFFE agreement inapplicable, we need not resolve the Agency's argument that the award is deficient because the Arbitrator found that AFGE is not a "successor" bound by the NFFE agreement. Exceptions at 6 (quoting Award at 10); *e.g.*, *AFGE, Local 2145*, 69 FLRA 7, 9 (2015).

Member DuBester, dissenting:

I disagree with the majority's decision to set aside the award. The Arbitrator's interpretation of the memorandum of agreement (MOA), which modified previous agreements, is not contrary to law. I would therefore uphold the Arbitrator's arbitrability determination.

The Arbitrator determines that the MOA applies to all pending grievances, including the grievance in this case.[1] However, the majority finds the Arbitrator's determination contrary to law. In the majority's view, "the Arbitrator found that the MOA was relevant only because of his erroneous determination that the NFFE agreement was 'defunct.'"[2]

The majority's determination in this case, rather than the Arbitrator's, is contrary to established legal principles. And, it is also based on a misinterpretation of the Arbitrator's award.

The parties had every right to negotiate an agreement superseding prior binding agreements. Consequently, the relevant question is not whether the NFFE agreement was defunct when the parties agreed to the MOA. Instead, the relevant question is whether the Arbitrator's interpretation of the MOA is independent of the Arbitrator's finding that the NFFE agreement was defunct.[3]

The answer is "yes." The Arbitrator's determination concerning the MOA's applicability is not premised in any way on his finding that the NFFE agreement was defunct.

The Arbitrator gives four reasons for his determination, none of which refer to the NFFE agreement. First, the Arbitrator cites "a general presumption of arbitrability."[4] Second, the Arbitrator finds that "[t]he Agency's proposal . . . to withdraw pending grievances," and "[t]he Union's agreement to withdraw other pending grievances[,] but not this one," suggest "that grievances not withdrawn would be covered by the MOA."[5]

Third, contrary to the Agency's argument, the Arbitrator finds that "the absence of language in the MOA" limiting its application only to newly-filed grievances "favors" interpreting the MOA to apply to the grievance in this case.[6] Finally, and in the Arbitrator's view "most importantly," the Agency held the grievance in this case in abeyance while the parties negotiated the MOA, "suggest[ing] an understanding that the grievance would fall under the MOA."[7]

Whether one finds the Arbitrator's reasons for applying the MOA compelling or not, those reasons are clearly not premised in any way on the Arbitrator's view of the NFFE agreement. In these circumstances, and because the majority misinterprets the award, I disagree with the majority's disposition of this case.

[1] Award at 11.
[22] Majority at 4 (emphasis omitted).
[3] AFGE, the current exclusive representative, also makes this argument. *See* Opposition Br. at 10.
[4] Award at 10.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 11.