73 FLRA No. 113

LABORERS INTERNATIONAL
UNION OF NORTH AMERICA
LOCAL 1776
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
SOUTH DAKOTA ARMY NATIONAL GUARD
(Agency)

0-AR-5846

_____

DECISION

June 23, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member
(Member Kiko concurring)

I. Statement of the Case

Arbitrator David S. Paull issued an award (the merits award) finding the Agency did not violate the parties' collective-bargaining agreement or § 7116(a)(5) the Federal Service Labor-Management Relations Statute (the Statute)[1] by prohibiting employees from wearing jeans and athletic shoes in the workplace. In a subsequent email (the costs award), the Arbitrator held that the Union was responsible for paying all of the costs of arbitration.

The Union filed exceptions to the awards on essence, contrary-to-law, and exceeded-authority grounds. We deny these exceptions because the Union does not demonstrate the awards are deficient.

II. Background and Arbitrator's Awards

Before the effective date of the parties' current collective-bargaining agreement (the CBA), under certain circumstances, employees were permitted to wear jeans and athletic shoes during duty hours. After the CBA took effect, the Agency informed several employees that they could no longer do so. The Union filed a grievance, arguing that the Agency violated: (1) the Statute by changing the Agency's dress code without giving the Union notice and an opportunity to bargain over the change; and (2) the CBA by prohibiting employees from wearing jeans and athletic shoes.

At the outset of the merits award, the Arbitrator stated that the "parties agreed that [he would] retain jurisdiction over the matter for a period of sixty days from the date the [o]pinion and [a]ward is issued in the event that the grievance is sustained, a remedy is granted[,] and either party raises a remedy-related question."[2]

Turning to the grievance's merits, the Arbitrator noted that Article 5, Section 5.10, Paragraph 2 of the CBA (Paragraph 2) states: "Personnel will generally wear business[-]casual attire and footwear that is compatible with their assigned position."[3] He also noted that Article 5, Section 5.10, Paragraph 6 of the CBA (Paragraph 6) prohibits specific items of clothing, but does not list jeans or athletic shoes. The Arbitrator found Paragraph 6 unambiguous in that respect.

However, the Arbitrator also found the parties specifically agreed to the term "business casual" in Paragraph 2 and "intended that it have some meaning."[4] Thus, he determined that term could not "be fully defined or understood merely by examining what the parties . . . specifically excluded" in Paragraph 6.[5] He also determined that Paragraph 2 does not define "business[-]casual" attire and footwear or otherwise address whether that term includes jeans or athletic shoes.[6] He concluded that Paragraph 2 was ambiguous in that regard.

Because of this ambiguity, the Arbitrator found it appropriate to examine the parties' bargaining history and practices. He determined that, before the negotiation of the CBA, the parties had a practice of allowing jeans and athletic shoes under certain circumstances. He also determined that, during the negotiations that led to the CBA, the Union proposed to specifically allow employees to wear those items.[7] According to the Arbitrator, that proposal indicated that the Union "had notice of the [Agency's] desire to modify" that practice, and that "the parties had the opportunity to bargain on the issue."[8] However, he found that the Agency rejected the Union's bargaining proposal, "indicat[ing] that there was no agreement regarding the continuation of the practice."[9] The Arbitrator concluded that the Agency did not violate

[1] 5 U.S.C. § 7116(a)(5).
[2] Merits Award at 4.
[3] Exceptions, Attach. C, Collective-Bargaining Agreement (CBA) at 18.
[4] Merits Award at 23.
[5] *Id.*
[6] *Id.*
[7] *See id.* at 10 (noting Union proposal to modify Paragraph 2 to state "jeans and athletic footwear are authorized").
[8] *Id.* at 25.
[9] *Id.*

the Statute or the CBA as alleged when it prohibited employees from wearing jeans and athletic shoes once the CBA took effect.

When the Arbitrator sent the merits award to the parties, he also sent them a copy of his bill, which split the costs of arbitration equally between the Union and the Agency. The Agency then emailed the Arbitrator, citing provisions in the CBA that (1) authorize the Arbitrator to determine the "non-prevailing [p]arty" and (2) require the non-prevailing party to pay arbitration costs.[10] The Agency asserted that the merits award did not explain the bill dividing costs equally, and requested clarification from the Arbitrator. In response, the Arbitrator acknowledged his "failure to specify a prevailing party" in the merits award and permitted the parties an opportunity to make arguments regarding the prevailing-party determination and related costs allocation.[11]

The Union argued the Arbitrator lacked jurisdiction to make any further determinations because his jurisdiction ended when he issued the merits award and, thus, he was "functus officio."[12] In response, the Agency argued that the CBA expressly required the Arbitrator to determine a prevailing party for purposes of allocating costs. Because the Arbitrator did not determine a prevailing party, the Agency argued that the merits award lacked "dispositive findings on the allocation of costs" and was incomplete.[13]

The Arbitrator found that, although the merits award did not address the "question of who is the prevailing party" and allocate arbitration costs accordingly, the Agency raised that issue at arbitration.[14] Thus, the Arbitrator reasoned that the "completion exception" to the "functus officio" doctrine permitted him to address the unresolved costs issue.[15]

Resolving that issue, the Arbitrator found that the Union was the non-prevailing party and, under the CBA, was responsible for all of the arbitration costs.

The Union filed exceptions to the awards on November 22, 2022, and the Agency filed an opposition on December 20, 2022.

III. Analysis and Conclusions

A. The Union does not demonstrate that the award fails to draw its essence from the parties' agreement.

The Union argues the award fails to draw its essence from the CBA.[16] The Authority will find an arbitration award fails to draw its essence from a CBA when the appealing party establishes 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.[17] Mere disagreement with the arbitrator's interpretation and application of a CBA does not provide a basis for finding an award deficient.[18]

The Union argues the Arbitrator erred by finding that the CBA is ambiguous with regard to whether it bars employees from wearing jeans or athletic shoes,[19] because Paragraph 6 does not include those in the list of prohibited items.[20] According to the Union, the Arbitrator erred by relying on the parties' practices and bargaining history to interpret an unambiguous contract provision.[21]

As discussed above, the Arbitrator found that Paragraph 6 unambiguously does not list jeans and athletic shoes as prohibited items. However, he also found that Paragraph 2 requires employees to "generally wear business casual attire and footwear that is compatible with their assigned position";[22] that the parties intended that term to have its own meaning; and that the CBA does not define that term. For those reasons, the Arbitrator found the CBA ambiguous as to whether it prohibits jeans and athletic shoes, and that it was appropriate to consider past practice and bargaining history.

The Union does not address the Arbitrator's findings regarding Paragraph 2 or explain why they are irrational, unfounded, implausible, or in manifest disregard of the agreement.[23] Consequently, the Union does not demonstrate that the Arbitrator's ambiguity

[10] Exceptions, Attach. D, Arbitration Cost Email (Costs Award) at 5 (citing Section 12.9 of the CBA); *see also* CBA at 71 ("The cost of an Arbitrator, to include fees and travel, shall be borne by the non-prevailing [p]arty. Any dispute as to who the non-prevailing [p]arty is shall be decided by the Arbitrator.").
[11] Costs Award at 5.
[12] *Id.* at 2.
[13] Opp'n, Ex. B, Agency Resp. at 3-4.
[14] Costs Award at 1.
[15] *Id.* (citing *Teamsters Union, Loc. 115 v. Desoto, Inc.*, 725 F.2d 931 (3rd Cir. 1984); *LaVale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569 (3rd Cir. 1967)).
[16] Exceptions at 7-10.
[17] *NTEU*, 73 FLRA 315, 320 (2022) (Chairman DuBester concurring).
[18] *Id.*
[19] Exceptions at 8.
[20] *Id.* at 7-8.
[21] *Id.* at 9.
[22] Merits Award at 21-23.
[23] Exceptions at 7-10.

finding fails to draw its essence from the CBA, and we deny the essence exception.

B. The award is not contrary to law.

The Union argues that the award is contrary to law on two grounds.[24] When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.[25] Applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[26] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.[27]

First, the Union argues that the Arbitrator erred as a matter of law by relying on parol evidence – the parties' practices and bargaining history – to interpret "unambiguous" contractual provisions.[28] However, as discussed above, the Union has not demonstrated that the Arbitrator erred by finding the CBA ambiguous. The Authority has denied contrary-to-law exceptions challenging an arbitrator's reliance on parol evidence to interpret ambiguous CBA provisions.[29] Consistent with this precedent, we reject the Union's first contrary-to-law claim.

Second, the Union argues the Arbitrator erred by failing to find that the Agency violated § 7116(a)(1) and (5) of the Statute when it "unilaterally changed working conditions and/or modified the prohibited clothing items by prohibiting jeans from being worn in the workplace, repudiating the" CBA.[30] However, the Arbitrator found that the Union had notice of, and an opportunity to bargain over, the Agency's intended elimination of the pre-CBA practice regarding jeans and athletic shoes, and that the parties ultimately did not agree to incorporate that practice in the CBA. In other words, the parties did not agree in their CBA to continue the practice, and the practice did not survive the CBA's negotiation.

The Union does not argue that any of the factual findings underlying the Arbitrator's analysis are nonfacts, so we defer to those findings.[31] Further, as discussed above, the Union does not demonstrate that the award fails to draw its essence from the CBA. Thus, the Union provides no basis for concluding that the Agency either unilaterally changed working conditions or repudiated the CBA. As a result, the Union's second argument does not demonstrate that the award is contrary to law.

Accordingly, we deny the Union's contrary-to-law exceptions.

C. The Arbitrator did not exceed his authority.

The Union argues that the Arbitrator exceeded his authority by issuing the costs award because he was functus officio and without jurisdiction to resolve that issue.[32] Under the doctrine of functus officio, once an arbitrator resolves matters submitted to arbitration, the arbitrator is generally without further authority.[33] Thus, unless arbitrators retain jurisdiction or receive permission from the parties, they generally exceed their authority by reopening and reconsidering an original award that has

[24] *Id.* at 10-12.

[25] *AFGE, Nat'l Citizenship & Immigr. Serv., Council 119*, 73 FLRA 490, 491 (2023) (*AFGE 119*); *U.S. Dep't of Interior, Nat'l Park Serv.*, 73 FLRA 418, 419 (2023) (*Nat'l Park Serv.*).

[26] *AFGE 119*, 73 FLRA at 491; *Nat'l Park Serv.*, 73 FLRA at 419.

[27] *AFGE 119*, 73 FLRA at 491; *Nat'l Park Serv.*, 73 FLRA at 419.

[28] Exceptions at 10-11 (citing *Great Lakes Program Serv. Ctr., SSA, Dep't of HHS, Chi., Ill.*, 9 FLRA 499, 508 (1982)).

[29] *See, e.g., U.S. Dep't of the Treasury, U.S. Customs Serv., Region IV, Mia. Dist.*, 41 FLRA 394, 396, 398-99 (1991). Member Kiko notes that the Authority has repeatedly held that arbitrators may not look beyond a collective-bargaining agreement – to extraneous considerations – to modify an agreement's clear and unambiguous terms. *E.g., U.S. Dep't of HUD*, 72 FLRA 450, 452 (2021) (Chairman DuBester dissenting); *U.S. DHS, U.S. CBP*, 71 FLRA 744, 745 (2020) (*CBP*) (Member Abbott concurring; Member DuBester dissenting); *U.S. Small Bus. Admin.*, 70 FLRA 525, 528 (2018) (Member DuBester concurring, in part, and dissenting, in part) (citing *Judsen Rubber Works, Inc. v. Mfg., Prod. & Serv. Workers Union, Loc. No. 24*, 899 F. Supp. 1057, 1064 (N.D. Ill. 1995)). Thus, an arbitrator may not properly rely on the parties' bargaining history to modify a contract's clear and unambiguous terms. *See, e.g., CBP*, 71 FLRA at 745 (arbitrator erred by considering extraneous evidence, including bargaining history, to interpret an unambiguous contract provision in a manner incompatible with the provision's plain wording). However, because the Arbitrator here found the parties' agreement to be ambiguous, and the Union has not established that finding fails to draw its essence from the agreement, the Arbitrator's reliance on bargaining history to interpret the agreement does not render the award deficient.

[30] Exceptions at 11-12. Although it is not clear that the Union raised a separate repudiation claim at arbitration, we assume, without deciding, that its repudiation claim is properly raised here. *See, e.g., USDA, U.S. Forest Serv., Law Enf't & Investigations, Region 8*, 68 FLRA 90, 92-93 (2014) (assuming, without deciding, that non-meritorious argument was properly raised on exceptions).

[31] *AFGE 119*, 73 FLRA at 491; *Nat'l Park Serv.*, 73 FLRA at 419.

[32] Exceptions at 12-13.

[33] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 73 FLRA 376, 377 (2022) (*BOP Ashland*); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Guaynabo, P.R.*, 72 FLRA 636, 637 (2022) (*BOP Guaynabo*) (Member Abbott dissenting).

become final and binding.[34] However, federal courts and the Authority have recognized exceptions to the doctrine of functus officio,[35] including where an arbitrator completes an award by resolving an issue that was submitted to arbitration but not resolved in the initial award (the completion exception).[36]

The Arbitrator retained jurisdiction for sixty days "in the event that the grievance is *sustained*."[37] The Arbitrator did not *sustain* the grievance; he denied it. However, even assuming his retention of jurisdiction did not allow him to address additional issues, that is not dispositive here. The Arbitrator also found – and it is undisputed – that the Agency submitted the costs issue to the Arbitrator before he issued the merits award.[38] In this regard, the CBA provides both that the "cost of an [a]rbitrator, to include fees and travel, shall be borne by the non-prevailing [p]arty" and that "[a]ny dispute as to who the non-prevailing [p]arty is shall be decided by the [a]rbitrator."[39] In the merits award, the Arbitrator did not identify a prevailing party for purposes of allocating costs.[40] Therefore, unlike *NFFE, Local 11*, the Arbitrator addressed the fee issue only because the Agency put that issue before him for resolution and it remained unresolved.[41] Consequently, the completion exception applies, and the Arbitrator was not functus officio.[42]

For these reasons, we deny the Union's exceeded-authority exception.

IV. Decision

We deny the Union's exceptions.

[34] *BOP Ashland*, 73 FLRA at 377; *BOP Guaynabo*, 72 FLRA at 637.

[35] *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO, Loc. 631 v. Silver State Disposal Serv., Inc.*, 109 F.3d 1409, 1411 (9th Cir. 1997); *U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 22 (2012) (*Marshals Serv.*).

[36] *Marshals Serv.*, 67 FLRA at 22.

[37] Merits Award at 4.

[38] *Id.* at 18 (noting Agency argument that "[t]he Union should be held responsible for the costs of this arbitration per the CBA[]"); Costs Award at 1.

[39] CBA at 71; *see also* Costs Award at 1 (interpreting this CBA provision to "require[] an arbitrator to decide who is the prevailing party").

[40] Costs Award at 1 (acknowledging that, in the merits award, "[t]he question of who is the prevailing party was not resolved").

[41] 53 FLRA 1747, 1750 (1998) ("More particularly, the Authority has held that an arbitrator did not have the power to reopen the allocation of fees relating to his own award, when the parties had not put that issue before him for resolution." (citing *GSA*, 34 FLRA 1123, 1128 (1990))).

[42] *Marshals Serv.*, 67 FLRA at 22 (finding that the completion exception applied when an arbitrator reasserted jurisdiction only to resolve an issue that the initial award failed to resolve).

Member Kiko, concurring:

In previous cases involving units of the national guard, I explained my strong reservations about exercising federal jurisdiction over Adjutants General because of the distinctly state character of their offices.[1] However, the United States Supreme Court recently addressed this issue, and the Court held that Adjutants General are "subject to the authority of the [Federal Labor Relations Authority] when acting in their capacities as supervisors of [national guard] dual-status technicians."[2] I recognize that the Court has clearly set forth "what the law is,"[3] and I respect the Court's pronouncement on this issue. Further, I am persuaded that the logic of the Court's decision extends to all cases before the Authority where a federal agency has designated an Adjutant General to supervise federal employees with rights under the Federal Service Labor-Management Relations Statute.[4] Accordingly, I will no longer raise jurisdictional objections to the Authority's resolution of cases involving units of the national guard.

[1] *See, e.g.*, *U.S. DOD, Ohio Nat'l Guard*, 71 FLRA 829, 833 (2020) (Member Abbott concurring in part) (Dissenting Opinion of Chairman Kiko), *pet. for review denied sub nom. Ohio Adjutant Gen.'s Dep't v. FLRA*, 21 F.4th 401, 409 (6th Cir. 2021), *aff'd*, 143 S. Ct. 1193, 1201 (2023) (*Ohio*).

[2] *Ohio*, 143 S. Ct. at 1201.

[3] *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[4] *See Ohio*, 143 S. Ct. at 1199-1200; *e.g.*, *Nat'l Guard Bureau, Air Nat'l Guard Readiness Ctr.*, 72 FLRA 350, 351 (2021) (Member Abbott concurring; Chairman DuBester dissenting in part) (noting that the National Guard Bureau "designated the state Adjutants General to 'appoint' and 'employ' . . . social workers assigned to their respective states" (quoting 10 U.S.C. § 10508(b)(2))).