73 FLRA No. 71

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2076
NATIONAL CITIZENSHIP AND IMMIGRATION
SERVICE COUNCIL
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
(Agency)

0-AR-5800

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DECISION

December 8, 2022

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and Susan Tsui Grundmann, Members

I. Statement of the Case

Arbitrator David E. Walker issued an award dismissing the Union's grievance as procedurally inarbitrable because it was filed with a regional labor and employment relations (LER) office, rather than the Agency's national LER office. The Union filed exceptions alleging that the award is based on nonfacts and fails to draw its essence from the agreement. For the following reasons, we deny the exceptions.

II. Background

After the Agency announced the implementation of a new training program, the Union filed a grievance with the chief of the northeast regional office. The grievance alleged that the Agency violated the parties' agreement and law by failing to bargain before implementing the program. In its grievance response, the Agency "rejected" the grievance as "procedurally deficient inasmuch as it [was] filed in the wrong forum (local versus national)."[1] The grievance went to arbitration.

Under Article 13, Section (h)(1) of the parties' agreement, "[n]ational grievances must be filed with the LER Division Chief or designee located at [Agency] headquarters."[2] The Arbitrator determined that the grievance was national in scope because it concerned a policy that was affecting approximately 4,000 employees nationwide. Therefore, the Arbitrator found that the grievance should have been filed as a national grievance with the national LER office, rather than with a regional LER office.

In characterizing the grievance as local – rather than national – the Union cited Executive Order (EO) 14,003's instruction to agencies to bargain over permissive subjects, which include bargaining below the level of recognition. The Arbitrator rejected this argument, stating that "the question in this proceeding is simply the arbitrability of the Union's grievance . . . not the negotiability of the subjects . . . that are covered by the [EO]."[3]

Because the grievance was filed with the wrong LER office, the Arbitrator dismissed the grievance as procedurally inarbitrable.

The Union filed exceptions to the award on March 15, 2022, and the Agency filed an opposition to the exceptions on April 1, 2022.

III. Analysis and Conclusions

A. The award is not based on nonfacts.

The Union argues that the award is based on four nonfacts. First, the Union claims the Arbitrator wrongly stated that the Agency rejected the "grievance documentation," when the Agency actually rejected the "arguments made within the . . . grievances."[4] Second, the Union argues the Arbitrator wrongly stated that "[t]here does not appear to be any dispute but that there was an

[1] Opp'n, Ex. 6, Agency Resp. to Union Step II Grievance at 1.
[2] Exceptions, Attach. 3, Collective-Bargaining Agreement (CBA) at 48.
[3] Award at 4.
[4] Exceptions at 7.

error in the service of the . . . [g]rievance,"[5] when in fact there was "no agreement that the . . . [g]rievance[] [was] errantly filed."[6] Third, the Union challenges the Arbitrator's statement that "[c]lerical error cannot be[,] and here it has not been[,] advanced as an excusable reason for failing to comply with service of process directions of the" parties' agreement.[7] According to the Union, that statement – which the Arbitrator made in the context of speculating that the Union's procedural error "may be related to the confusing nature of the policy name"[8] – was the result of the Agency's "deliberate[] conflat[ion]" of two policies "to confuse the Arbitrator."[9] Fourth, the Union contends that, in discussing EO 14,003, the Arbitrator erroneously stated that "occupational training" may be "[a]n example of what subjects may be 'elected' for bargaining."[10]

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.[11] Here, the Arbitrator interpreted the parties' agreement and found the Union filed the grievance with the wrong LER office. Even assuming the Arbitrator's challenged statements are erroneous, the Union provides no basis for finding that, but for those alleged errors, the Arbitrator would have reached a different result and found the grievance properly filed. As such, the Union's arguments do not demonstrate that the award is based on nonfacts, and we deny the nonfact exceptions.[12]

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

The Union contends that the Arbitrator's finding that it was required to file the grievance with the national LER office fails to draw its essence from the parties' agreement.[13] According to the Union, the Arbitrator premised that finding on a belief that the grievance was a national grievance.[14] However, the Union claims there is no provision in the agreement that allows a local union to file a national grievance, and the agreement requires a national grievance to "state . . . that the grievance is a national grievance" – which the grievance did not do.[15]

The Authority will find an arbitration award fails to draw its essence from a collective-bargaining agreement 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.[16]

As stated previously, the Arbitrator determined that the grievance was national in scope because it concerned a policy that was affecting approximately 4,000 employees nationwide.[17] Article 13, Section (h)(1) of the agreement pertinently states that "Union [n]ational grievances must be filed with the LER Division Chief. . . ."[18] Citing that requirement, the Arbitrator found that the grievance was improperly filed with a regional LER office, rather than the national LER office.

The Union does not cite any provision of the agreement that precluded it from filing a national grievance. Further, the contractual requirement that national grievances state that they are national grievances does not detract from the Arbitrator's finding that the Union *should* have filed the grievance as a national grievance. The Union does not cite any contractual wording that conflicts with the Arbitrator's findings or otherwise demonstrate that those findings are irrational, unfounded, implausible, or in manifest disregard of the agreement. Thus, the Union does not demonstrate that the award fails to draw its essence from the agreement, and we deny the essence exception.[19]

IV. Decision

We deny the Union's exceptions.

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[5] *Id.* (quoting Award at 2) (internal quotation marks omitted).
[6] *Id.*
[7] *Id.* (quoting Award at 3) (internal quotation marks omitted).
[8] Award at 3.
[9] Exceptions at 7.
[10] *Id.* at 8.
[11] *U.S. Dep't of HHS*, 73 FLRA 95, 96 (2022).
[12] *See, e.g.*, *AFGE, Council 215*, 66 FLRA 137, 142 (2012) ("[E]ven assuming [that] the [a]rbitrator's speculation . . . [was] erroneous, it does not establish that a central fact underlying the award is clearly erroneous.").
[13] Exceptions at 10.
[14] *Id.*
[15] *Id.* (quoting Art. 13, § (h)(1)).
[16] *NTEU*, 73 FLRA 315, 320 (2022) (Chairman DuBester concurring); *NAGE,* 71 FLRA 775, 776 (2020) (citing *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017)).
[17] *See* Award at 2; *see also* CBA at 48 ("National grievances are grievances over subjects that affect more than one local.").
[18] CBA at 48.
[19] *See, e.g.*, *U.S. Dep't of State, Passport Serv.*, 73 FLRA 201, 203 (2022) (denying essence exception that failed to demonstrate inconsistency between award and agreement).