

64 FLRA No. 140

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
PORTLAND, MAINE
(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Union)

0-AR-4421

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DECISION

May 11, 2010

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Before the Authority: Carol Waller Pope, Chairman,
and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Craig E. Overton filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.¹

The Arbitrator determined that the grievance was arbitrable and that the Agency violated its contractual obligations to allow requested oral presentations in connection with other grievances, and to timely respond to those grievances. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Union filed a grievance claiming that the Agency violated the parties' 2003 collective bargaining agreement (2003 agreement) by not allowing requested oral presentations in earlier grievances and by failing to provide timely responses to those grievances. Award at 2-3. The Agency responded that the grievance was procedurally defective because a new collective bargaining agreement became effective in 2006

(2006 agreement), and the grievance should have been filed under that agreement rather than the 2003 agreement. *Id.* at 3. The matter was not resolved and was submitted to arbitration.

The Arbitrator stated the issues as: "Is the grievance arbitrable? If so, what shall be the disposition of the grievance, including remedy, if any?" *Id.* at 2 (citation omitted). With regard to arbitrability, the Arbitrator found that, although the Union filed the grievance under the 2003 agreement, both the grievance procedure of the 2003 agreement and the grievance procedure of the 2006 agreement cover the subject matter grieved. *Id.* at 11. Accordingly, he concluded that "the power and authority granted to the Arbitrator is virtually identical" under both agreements. *Id.* at 10. He stated that "there is no question that both parties acknowledge that [the] language contained [in the 2003 agreement] is language that binds both parties[.]" but he found that, "as long as the raising party makes clear to the receiving party what the perceived problem is[.]" there is no requirement that a particular contract be cited." *Id.* at 10-11. For these reasons, he determined that the grievance was arbitrable. *Id.*

On the merits, the Arbitrator found that the wording regarding oral presentations is identical in both agreements and that the wording makes oral presentations mandatory when requested. *Id.* at 21. He also found that both agreements require the Agency to provide timely decisions regarding grievances, absent extenuating circumstances. *Id.* at 22-23. In addition, he found that the Agency failed to meet these requirements, and, without specifying what agreement was violated, he concluded that the Agency violated the contractual wording. *Id.* at 24.

III. Positions of the Parties**A. Agency's Exceptions**

The Agency contends that "[t]he Arbitrator's decision regarding jurisdiction was based on an error of fact." Exceptions at 5. In this regard, the Agency cites the Arbitrator's statement that "there is no question that both parties acknowledge that [the] language contained [in the 2003 agreement] is language [that] binds both parties." *Id.* (quoting Award at 10). As to this statement, the Agency argues that it "has consistently maintained that the language of the 2003 [agreement] is expired and is not binding on the [p]arties." Exceptions at 5.

1. The Union also filed a motion to dismiss the Agency's exceptions because the Agency failed to timely serve the Union with a statement of service. However, the Agency cured the deficiencies. *See* Agency Cure of Deficiencies. Accordingly, we deny the motion and resolve the exceptions.

The Agency also contends that the Arbitrator's arbitrability determination is contrary to law. The Agency asserts that "[t]he Arbitrator's exercise of jurisdiction over the arbitration . . . is inconsistent with the decision of the FLRA's [General Counsel (GC)] to uphold implementation of the 2006 [agreement] by dismissing [the Union's] [unfair labor practice (ULP)] charges regarding it."² *Id.*

The Agency further contends that "the Arbitrator's exercise of jurisdiction over this grievance . . . exceeds his authority under the 2006 [agreement]." *Id.* at 2.

B. Union's Opposition

The Union contends that there is no error of fact and that the Arbitrator's arbitrability determination is not contrary to law. Opp'n at 4-10, 11. The Union also contends that the Agency fails to establish that the Arbitrator exceeded his authority. *Id.* at 3-4, 11.

IV. Analysis and Conclusions

In *United States Department of Transportation, Federal Aviation Administration*, 64 FLRA 612 (2010) (*FAA*), as in this case, the Union filed a grievance under the 2003 agreement, and the Agency denied the grievance on the basis that it should have been filed under the 2006 agreement. The arbitrator in *FAA* determined that the grievance was arbitrable because both the 2003 and 2006 agreements cover the subject matter that was grieved and set forth the same substantive standards. The Authority denied the Agency's exceptions to the arbitrability determination, finding that: (1) the determination was a procedural-arbitrability determination because there was no question of whether the subject matter of the dispute was arbitrable; and (2) as a procedural-arbitrability determination, the determination was generally not subject to challenge. *FAA*, 64 FLRA at 613.

Similarly, here, the Arbitrator found, and the Agency does not dispute, that both the 2003 and 2006 agreements cover the subject matter that was grieved and set forth the same substantive standards with respect to oral presentations and timeliness of Agency decisions. The Arbitrator further found that, as

the grievance made clear what the dispute was about, there was no requirement that a particular contract be cited. Consequently, as in *FAA*, the exceptions do not challenge a substantive-arbitrability determination of whether the subject matter is covered by the grievance procedure, but, instead, challenge the Arbitrator's arbitrability determination that the grievance met the procedural conditions to resolution on the merits. Accordingly, consistent with *FAA*, we conclude that the determination is a procedural-arbitrability determination and that the determination is generally not subject to challenge.

As acknowledged in *FAA*, one of the grounds on which a procedural-arbitrability determination is subject to challenge is a claim that the arbitrator exceeded his or her authority, but only insofar as the exceeded-authority claim "do[es] not directly challenge the [arbitrability] determination itself." *Id.* (quoting *AFGE, Local 104*, 61 FLRA 681, 683 (2006)). In *FAA*, the Authority denied the Agency's exceeded-authority exception because the Agency's exceeded-authority arguments directly challenged the arbitrator's arbitrability determination itself. 64 FLRA at 613. Here, the Agency's exceeded-authority arguments again directly challenge the Arbitrator's arbitrability determination itself. Consequently, the Agency's exceeded-authority exception provides no basis for finding the determination deficient, and we deny the exception.

With regard to the Agency's exception that the determination is deficient as based on an error of fact, claimed errors of fact provide no basis for finding a procedural-arbitrability determination deficient because they directly challenge the determination itself. *E.g.*, *AFGE, Local 933*, 58 FLRA 480, 481 (2003) (nonfact exception provided no basis for finding the arbitrator's arbitrability determination deficient because it directly challenged the determination itself). As the Agency's exception directly challenges the procedural-arbitrability determination itself, we deny this exception. *See id.*

With regard to the Agency's contrary-to-law exception, a procedural-arbitrability determination can be found deficient as contrary to law. *E.g.*, *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 122, 124 (2005) (*DHS*). In this connection, the Authority has recognized that "procedural requirements may be established [by statute] that apply to negotiated grievance procedures and . . . that a statute could be enacted establishing a filing period for grievances." *AFGE, Local 933*, 58 FLRA

2. More specifically, the Agency notes that the Union filed a ULP charge alleging that the Agency violated the Statute by unilaterally implementing the 2006 agreement and that the GC dismissed the charge, denied the Union's appeal of the dismissal, and denied reconsideration of the denial of the appeal. On this basis, the Agency contends that the GC "upheld the validity of the Agency's actions." Exceptions at 4.

at 481. Consequently, in order for a procedural-arbitrability determination to be found deficient as contrary to law, the appealing party must establish that the determination is contrary to procedural requirements established by statute that apply to the parties' negotiated grievance procedure. *DHS*, 61 FLRA at 124. As the Agency's reference to actions of the Authority's GC fails to establish any such procedural requirement, we deny this exception. *See id.*

V. Decision

The Agency's exceptions are denied.