65 FLRA No. 5

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 933
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
DETROIT, MICHIGAN
(Agency)

0-AR-4408

_____

DECISION

August 25, 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 John S. Weisheit filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.[1]

The Arbitrator found that the grievance was untimely filed in part, and that the Agency did not violate the parties' agreement by temporarily assigning the grievant additional duties without providing extra compensation or notifying the Union. For the following reasons, we dismiss the Union's exceptions in part and deny them in part.

II. Background and Arbitrator's Award

The grievant was employed as a licensed practical nurse. Award at 5. From 2001-2003 and again in 2006, the Agency assigned the grievant to an acting Clinical Coordinator position. *Id.* at 6.

The Union filed grievances alleging that the Agency violated the parties' agreement by: (1) temporarily promoting the grievant without proper compensation; (2) not filling the temporary promotion through competitive procedures; (3) bypassing the Union by not notifying it of the grievant's temporary promotion; and (4) preselecting the grievant for the Clinical Coordinator position. *Id.* at 1-2, 7-8.

The grievances were unresolved and submitted to arbitration, where the Arbitrator framed the issues as follows: (1) "[w]ere the grievances timely filed"; (2) "did the [Agency] violate the [parties' agreement] in bypassing the Union in its right to represent a bargaining unit member"; and (3) "did the [Agency] violate Article 12, Section 2 (A) or 2 (B) in not temporarily reassigning the [g]rievant to the position of temporary Clinic[al] Coordinator at the pay rate set forth [by] the [g]rievant and the Union?"[2] *Id.* at 11-12.

As an initial matter, the Arbitrator found that the grievance was untimely filed with respect to alleged contract violations between 2001 and 2003. *Id.* at 11. Specifically, the Arbitrator determined that the actions were not of a continuing nature and that the Union did not file the grievance "within 30 days of the date the employee or Union became aware [of] or should have become aware of the act or occurrence" as required by Article 42, Section 7 of the parties' agreement. *Id.*

Next, the Arbitrator found that the Agency did not violate the parties' agreement by assigning the grievant additional duties as acting Clinical Coordinator without notifying the Union. *Id.* at 12. The Arbitrator found that the Agency's obligations

1. As discussed further below, the Union also filed a supplemental submission in response to the Agency's opposition.

2. Article 12, Section 2 of the parties' agreement provides, in pertinent part:

> (A) Employees detailed to a higher grade position for a period of more than ten (10) consecutive work days must be temporarily promoted. The employee will be paid for the temporary promotion beginning the first day of the detail . . . .
>
> (B) Temporary promotions in excess of sixty (60) calendar days shall be filled through competitive procedures. Temporary promotions of less than sixty (60) days shall be made in accordance with Section 1 among qualified employees.

Award at 4.

and Union's rights had limitations, specifically, that Article 1, Section 3(B) requires the Agency to allow Union representation only during "formal discussions[,]" which does not include "routine work assignments." *Id.* (emphasis omitted).

With respect to whether the Agency violated Article 12, Section 2(A) or 2(B) of the parties' agreement, the Arbitrator found unpersuasive the Union's arguments regarding "'Details', 'Reassignments' and 'Temporary Promotions'" because "[t]he relevant [c]ontract terms clearly state that the [Agency] retains the right to determine if and when such assignments are to be implemented." *Id.* at 13.

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that the Arbitrator erred in finding that the grievance was untimely filed in part. In this connection, the Union claims that the Agency's actions are "of a continuing nature[,]" and that the Union filed a grievance when it learned of the violations. Exceptions at 1-2. In addition, relying on § 7114(a)(2)(A) of the Statute and Articles 1 and 46 of the parties' agreement, the Union argues that the Agency was obligated to notify the Union before engaging in a formal discussion with the grievant concerning the assignment of additional duties because her service as acting Clinical Coordinator constituted a temporary promotion, as opposed to a routine work assignment.[3] *Id.* at 2. The Union further asserts that the Arbitrator took Article 1 "out of its context" by "assign[ing] new meaning to" the word "routine[.]" *Id.* The Union also argues that the Arbitrator's finding that the grievant was not entitled to additional compensation while serving as acting Clinical Coordinator is inconsistent with Article 12, Sections 1(C)(6) and 2(A).[4] *Id.* at 2-3. In this connection, the Union claims that the Agency did not refute the Union's claim to the contrary. *Id.* at 3.

B. Agency's Opposition

The Agency argues that the Union has failed to state a basis on which to set aside the award. Opp'n at 6. First, the Agency contends that the Union's timeliness argument directly challenges the Arbitrator's procedural-arbitrability finding and, therefore, does not provide a basis for finding the award deficient. *Id.* at 7-8. Second, the Agency asserts that the Union has presented "no argument or reasoning as to why [the award] is contrary to any law, rule, or regulation or asserted any other ground similar to those applied by Federal courts in private sector labor-management relations." *Id.* at 11.

IV. Preliminary Issues

A. The Authority will not consider the Union's supplemental submission.

After the thirty-day time period for filing exceptions had expired, the Union filed a supplemental submission in response to the Agency's opposition. However, the Union did not request permission to file this submission. Section 2429.26 of the Authority's Regulations requires a party filing a supplemental submission to request permission to file such a submission. 5 C.F.R. § 2429.26; *see also AFGE, Local 1061*, 63 FLRA 317, 317 n.1 (2009). Accordingly, we do not consider the Union's submission.

B. The Union's claims relating to § 7114(a)(2)(A) of the Statute and Article 12, Section 1(C)(6) of the parties' agreement are barred by § 2429.5 of the Authority's Regulations.

Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, presented in the proceedings before the arbitrator. *See, e.g., U.S. Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 59 FLRA 542, 544 (2003). In its

3. Section 7114(a)(2)(A) of the Statute states, in pertinent part:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at - -
>
> (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment[.]

5 U.S.C. § 7114(a)(2)(A).

The Union does not cite to specific sections of Articles 1 and 46 in its exceptions. However, with regard to Article 1, it refers to wording contained in Article 1, Section 3(B), which is set forth *supra*. We construe the Union's exceptions as relying on that section.

4. Article 12, Section 1(C)(6) provides, in relevant part: "The Department will notify the Union of all details." Exceptions, Attach., Master Agreement at 32.

exceptions, the Union argues that § 7114(a)(2)(A) of the Statute and Article 12, Section 1(C)(6) of the parties' agreement required the Agency to notify the Union before assigning the grievant additional duties. Exceptions at 2. However, there is no evidence that the Union raised these issues before the Arbitrator, although it could have done so. We note that, although the Union cited other agreement provisions regarding details at arbitration, it did not raise a claim concerning Article 12, Section 1(C)(6). Accordingly, the Union is not permitted to raise such issues for the first time here, and we dismiss these exceptions.

V. Analysis and Conclusions

A. The Arbitrator's procedural-arbitrability determination is not deficient.

The Authority generally will not find an arbitrator's ruling on the procedural- arbitrability of a grievance deficient on grounds that directly challenge the procedural- arbitrability ruling itself. *See AFGE, Local 3882*, 59 FLRA 469, 470 (2003). However, the Authority has stated that a procedural-arbitrability determination may be found deficient on grounds that do not directly challenge the determination itself, which include claims that an arbitrator was biased or that the arbitrator exceeded his or her authority. *See id*; *see also U.S. Equal Emp't Opportunity Comm'n*, 60 FLRA 83, 86 (2004) (citing *AFGE, Local 2921*, 50 FLRA 184, 185-86 (1995)). An arbitrator's determination regarding the timeliness of a grievance constitutes a determination regarding the procedural-arbitrability of that grievance. *United Power Trades Org.*, 63 FLRA 208, 209 (2009).

Here, the Arbitrator found that the Union's grievance was untimely filed with respect to alleged contract violations between 2001 and 2003. This finding constitutes a procedural-arbitrability determination. *See id.* As the Union's exception directly challenges this procedural-arbitrability determination, we deny the exception. *See AFGE, Local 3882*, 59 FLRA at 470.

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

We construe the Union's argument that the award is inconsistent with Article 1, Section 3(B), Article 46, and Article 12, Section 2(A) of the agreement as a claim that the award fails to draw its essence from the parties' agreement. To demonstrate that an award fails to draw its essence from a collective bargaining agreement, a party must show that the award: (1) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (2) does not represent a plausible interpretation of the agreement; (3) cannot in any rational way be derived from the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA)*. 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." *Id.* at 576.

With regard to Article 46 of the parties' agreement, the Union does not state what section of that Article it is relying on or provide any support for its claim that the award is inconsistent with that Article. Accordingly, we deny the Union's claim as a bare assertion. *See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Port of Seattle, Seattle, Wash.*, 60 FLRA 490, 492 n.7 (2004) (Chairman Cabaniss concurring).

With regard to Article 1, Section 3(B), the Arbitrator found that the Agency's obligations and Union's rights had limitations, specifically, that Article 1, Section 3(B) requires the Agency to allow Union representation only during "formal discussions[,]" which does not include "routine work assignments." Award at 12. (emphasis omitted). However, the Arbitrator made no finding that a formal discussion occurred, and the Union does not provide a basis for finding otherwise. Further, to the extent that the award can be construed as finding that the assignment to the Coordinator position was a "routine work assignment[,]" the Union's reliance on a dictionary definition of the word "routine" does not demonstrate that the Arbitrator's interpretation of "routine work assignments" in Article 1, Section 3(B) is implausible, unfounded, irrational, or in manifest disregard of the agreement. *OSHA*, 34 FLRA at 575. Accordingly, we find that the award does not fail to draw its essence from Article 1, Section 3(B), and we deny the exception.

Finally, with respect to Article 12, Section 2(A), the Arbitrator found that "the Union's arguments raised on this issue are found unpersuasive regarding detailed rights in attaining 'Details', 'Reassignments' and 'Temporary Promotions'" because "[t]he relevant [c]ontract terms clearly state that the [Agency] retains the right to determine if and when such assignments are to be implemented." Award at 13. The Union provides no basis for finding that the Arbitrator erred in finding that the Agency retained discretion to decide whether an assignment is a detail,

reassignment or temporary promotion. Thus, the Union fails to show that the Arbitrator's finding that the Agency's assignment of the grievant to the acting Clinical Coordinator position did not violate this Article is implausible, unfounded, irrational, or in manifest disregard of the agreement. Accordingly, we find that the award does not fail to draw its essence from Article 12, Section 2(A), and we deny the exception.

VI. Decision

The Union's exceptions are dismissed in part and denied in part.