65 FLRA No. 37

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Union)

0-AR-4414

_____

DECISION

October 20, 2010

_____

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 Joseph M. Sharnoff, 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 did not file an opposition to the Agency's exceptions. The Agency also submitted a supplemental submission.[1]

The Union filed three grievances seeking the enforcement of a memorandum of understanding (MOU). The MOU set forth the Agency's procedures for reviewing the classification levels of air traffic control facilities. Exceptions at 5. The Arbitrator found the grievances arbitrable, sustained them, and ordered a *status quo ante* remedy. Award at 65.

For the following reasons, we deny one of the Agency's exceptions and dismiss the other two.

II. Background and Arbitrator's Award

The air traffic controller (controller) grievants work in Federal Aviation Administration (FAA) air traffic control facilities in Los Angeles, Houston, and Miami. FAA air traffic control facilities are classified from level 3 through level 12. Exceptions at 5. The classification level of a facility determines the controllers' pay at that facility. Award at 52. Controllers working at facilities with a classification of 12 receive the highest pay due to the facility's "high traffic count" and the complexity of the work performed. Exceptions at 5. Controllers working at facilities with lower classification levels receive lower pay because the work is not as complex as it is at the higher-rated facilities. *See id.*

The parties agreed to an MOU in 1999 that sets forth the procedures required when the Agency "validates" the classification level of facilities. *See* Award at 15-17. The Agency performs the validation process when a facility's traffic activity trend indicates the facility would be "eligible" for an upgrade or a downgrade. Award at 2-3. Under the MOU, the Agency must review and evaluate aircraft and traffic data collected pursuant to the procedures set forth in FAA Order 7210.57 (the Order). Exceptions at 5. The Agency must review this data within an appropriate time period. Award at 3, 17. The MOU requires that the Agency take prompt action to change a facility's classification level if, among other things, the data shows that the facility will be operating at the level required for the upgrade or downgrade for the subsequent 12 months. *Id.* at 3, 16-17.

The grievances allege that the Agency violated the parties' collective bargaining agreement (CBA), the MOU, and FAA rules, *inter alia*, when it failed to conduct the validation process required for the facilities' reclassification, and, if appropriate, their upgrade. *See* Award at 2-7, 53. The Agency denied the grievances and the matter was submitted to arbitration.

1. Under § 2429.26 of the Authority's Regulations, the Authority may, in its discretion, grant a party leave to file other documents as it deems appropriate. Here, the Agency requests leave because the Authority "might not have been aware of" a February 2009 case in which the United States District Court of Appeals for the District of Columbia found that the plaintiff air traffic controllers could not use the Administrative Procedure Act (APA) to "litigate their pay dispute" with the Agency. *See* Agency's Supplemental Submission at 3; *Filebark v. U.S. Dep't. of Transp.* 555 F.3d 1009, 1010 (D.C. Cir. 2009). We have considered the Agency's supplemental submission and find that it has no bearing on this case. *Filebark v. United States Department of Transportation* does not apply here, since the parties are not attempting to use the APA to litigate a pay dispute. Moreover, the two additional cases cited by the Agency in their supplemental submission are inapplicable to this case. Both cases pertain to individual position classifications which, as discussed below, are not at issue before the Authority in this proceeding.

The parties stipulated to the following issue to be resolved by the Arbitrator:

> Whether the Agency violated the terms of the November 3, 1999 MOU concerning facility grade levels, when it failed to conduct a validation study at Los Angeles center, Houston center and Miami center. If so, what shall the remedy be?

Id. at 8.

The parties each presented several arguments at arbitration. The Agency argued before the Arbitrator, *inter alia*, that the grievances were not arbitrable because they involved a classification matter under the CBA and § 7121(c)(5) of the Statute. *Id.* On the merits, the Union argued that the facilities at issue each complied with all of the steps required for the validation process to take place. In the Union's view, the Agency's failure to conduct the validation process violated the MOU and the Order. *Id.* at 53. The Agency claimed that the main reason why it did not conduct the validation process at the facilities involved was because the data that formed the basis for the validation process and "any resulting upgrade" was inaccurate. *Id.* According to the Agency, it properly delayed the validation process until the technical ability to obtain more accurate data became available. *Id.* at 54.

Addressing the threshold issue first, the Arbitrator determined that the grievances were arbitrable. *Id.* at 51-52. Specifically, the Arbitrator determined that the grievances were not excluded from the grievance process as matters concerning the classification of individual positions under § 7121(c)(5) of the Statute. The Arbitrator concluded that the MOU was negotiated by the parties to review the classification of air traffic control facilities, which the Arbitrator distinguished from the classification of individual controllers' positions. *Id.* In the Arbitrator's view, although controllers' pay would be affected by a reclassification of the facility at which they worked, the classification of controllers' positions would not be "directly" affected. *Id*. at 52. Accordingly, the Arbitrator found the grievances arbitrable.

The Arbitrator sustained the grievances on their merits. As relevant here, the Arbitrator found that the MOU requires facilities requesting an upgrade to have, among other things, "a complete and accurate set of data." *Id.* at 53. The Arbitrator found that the Order acknowledges that there are known problems with the data collection program used for the validation process. *Id.* at 56, 57. The Arbitrator further found that [the] Order nevertheless requires that the particular data collection system be used "'[u]ntil such time that appropriate automation capabilities are established[.]'" *Id.* at 57 (quoting the Order). Conversely, the Arbitrator also found that the Agency did not identify any language in the Order supporting its decision to not proceed with the validation process described in the Order at the time it was requested. *Id*. at 58.

For the reasons described above, the Arbitrator determined that the Agency's refusal to continue with the validation process based on the alleged inaccuracy of the data was "contrary to the commitments made by the Agency to conduct the validation process as a joint effort with [the Union]." *Id*. The Arbitrator concluded that "absent a revision of [the] Order and the MOU[,]" the Agency "was not free to ignore" these directives until it devised a better data source than the one that was being used. *Id*. at 62. In the Arbitrator's view, if, as the Agency claimed, there was a better data program to use, then the Agency could have revised the Order to take this into account. The Arbitrator also determined that the facilities at issue had each met the pre-conditions required for the validation process to be conducted. *Id*. at 58-62. Accordingly, the Arbitrator found that the validation process should have continued at each of the facilities at issue.

As a remedy, the Arbitrator ordered the parties to restart the validation process at the stage at which the Agency had interrupted its implementation. The Arbitrator directed the Agency to change the facilities' classification levels "[i]f the data is validated[.]" *Id.* at 65. The Arbitrator further ordered that the level change be made retroactive to a date "reasonably related" to the date by which the data could have been validated if the original validation process had been allowed to proceed. *Id.*

III. Agency's Exceptions

The Agency presents several arguments in its exceptions.

First, the Agency argues that the award is contrary to § 7121(c)(5) of the Statute and the CBA because the Arbitrator resolved a matter concerning classification. Exceptions at 2. The Agency asserts that just because it is exempt from the classification requirements under chapter 51 of Title 5 does not mean that § 7121(c)(5)'s exclusion of classification matters from the grievance process is inapplicable in this case. *Id*. at 5-6. According to the Agency, by

ordering the Agency to review and potentially raise the facilities' classification levels, the Arbitrator effectively "ordered the reclassification of all positions at certain en route FAA facilities[.]" *Id.* at 8.

Second, on the merits, the Agency argues that the award affects management's right to determine its "methods and means of classifying and grading positions/facilities." *Id* at 11. According to the Agency, the Arbitrator "mandated a procedure for classification of positions" by ordering the Agency to review the facilities' classification levels according to the procedure previously agreed to by the parties in the MOU. *Id.* at 9-11.

Third, the Agency claims that "intervening events [have] render[ed] the arbitration award unenforceable." *Id.* at 12 (citing *U.S. Dep't of Labor, Wash. D.C.*, 61 FLRA 603 (2006) (*DOL*)). According to the Agency, a CBA that it implemented on June 5, 2006 (the 2006 CBA), "abolished" the MOU "which was the basis for the . . . award[.]" *Id.* at 12. Accordingly, the Agency claims, it is not required to comply with the terms of the award.

IV. Analysis and Conclusions

For the following reasons, we deny the Agency's exception based on § 7121(c)(5) of the Statute, and dismiss the other two exceptions.

The Agency claims that the award is contrary to law on three different bases, as described below. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (*DOD*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

A. The award does not involve a classification matter under § 7121(c)(5) of the Statute and is therefore not contrary to law.

The Agency argues that the award is contrary to § 7121(c)(5) of the Statute because the Arbitrator resolved a classification matter within the meaning of that section. Section 7121(c)(5) of the Statute excludes from the coverage of negotiated grievance procedures any grievance concerning "the classification of any position which does not result in the reduction in grade or pay of an employee." 5 U.S.C. § 7121(c)(5).

The Authority has consistently described grievances concerning classification under § 7121(c)(5) as involving "the grade level of the duties assigned to, and performed by, the grievant[.]" *AFGE, Local 1858*, 59 FLRA 713, 715 (2004); *accord SSA*, 31 FLRA 933, 936 (1988). Consistent with this, the Authority has found that arbitration awards assessing whether a grievant's duties are improperly classified concern classification under § 7121(c)(5). *See, e.g., SSA*, 60 FLRA 62, 64-65 (2004) (arbitrator assessed duties permanently assigned to grievant's position and found that grievant should be compensated at higher grade); *U.S. Dep't of Veterans Affairs, Med. Ctr., Muskogee, Okla.*, 47 FLRA 1112, 1116-17 (1993) (arbitrator compared duties of positions with classification standards for higher-graded positions and found positions should be reclassified). However, the Authority has not found that an award involves classification under § 7121(c)(5) merely because the award involves the amount of employee's pay. *See, e.g., U.S. Dep't of Transp., FAA*, 61 FLRA 634, 636 (2006) (*FAA*) (citing *U.S. Dep't of Labor*, 12 FLRA 639, 640 (1983) (grievance concerning whether grievants were entitled to hazard differential pay did not involve classification under § 7121(c)(5)); *Int'l Org. of Masters, Mates & Pilots, Marine Div., Pan. Canal Pilots Branch*, 51 FLRA 333, 340 (1995) (proposals concerning the process of setting the amount of compensation to be assigned to a position classification that had already been established by the agency did not involve classification under § 7103(a)(14)(B)).

The record fails to substantiate the Agency's claim that the grievances are not arbitrable as matters concerning classification under § 7121(c)(5).[2] As the Arbitrator found, interpreting the parties' MOU, the classification actions involved in this case concern "the 'reclassification' of *air traffic control facilities*," not the "distinct and different" matter of "the

2. The Agency correctly notes, Exceptions at 5-6, that its exemption from the requirements of chapter 51 of title 5 does not make § 7121(c)(5) inapplicable in this case. *See FAA*, 61 FLRA at 635. However, the Arbitrator did not resolve the grievances against the Agency on this basis. Therefore, this argument by the Agency does not provide any basis for finding the award deficient.

classification of individual positions or groups of similar positions[.]" Award at 51 (emphases in original). This process entails a "review and analysis of traffic data on record for each facility." *Id.* at 52 (quoting the MOU). Moreover, in a finding that the Agency does not specifically dispute, the Arbitrator concluded that "[n]o individual employee 'position' or the 'positions' of groups of similarly assigned employees will be affected directly by this review and analysis of traffic data and/or the resulting *reclassification of facilities.*" *Id.* (emphasis in original). The only effect that the Arbitrator found that the reclassification of facilities would have was an effect on controller pay. *Id.* We defer to the Arbitrator's undisputed factual findings. *See DOD*, 55 FLRA at 40. Additionally, as noted above, an effect on pay does not establish that a matter involves classification under § 7121(c)(5). *See FAA*, 61 FLRA at 636. Accordingly, we find that the award is not contrary to law because it involves a classification matter under § 7121(c)(5) of the Statute.

B. The Agency's exception that the award affects management's right to determine the methods and means of performing work under § 7106(b)(1) of the Statute is barred by § 2429.5 of the Authority's Regulations.

The Agency's argument that the award affects management's right to determine the methods and means of performing work, Exceptions at 11, is not properly before the Authority. Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, presented to an arbitrator. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008). Where a party makes an argument for the first time on exceptions that could, and should, have been made before the arbitrator, the Authority applies § 2429.5 to bar the argument. *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, USP Admin. Maximum (ADX), Florence, Colo.*, 64 FLRA 1168, 1170 (2010); *U.S. Dep't of Transp., FAA*, 64 FLRA 387, 389 (2010).[3]

Although the Agency made several arguments before the Arbitrator, there is no indication in the record that the Agency argued, as it does in its exceptions, that the award affects management's right to determine the methods and means of performing work. The Agency could have, but did not, argue to the Arbitrator that awarding the Union's requested remedy would affect the Agency's right to determine the methods and means of performing work. Accordingly, we dismiss the Agency's exception based on that management right.

C. The Agency's exception that "intervening events" render the award unenforceable is barred by § 2429.5 of the Authority's Regulations.

Like the Agency's management rights argument discussed in the previous section, the Agency's argument that "intervening events" render the award unenforceable, Exceptions at 11-12, is not properly before the Authority.

There is no indication in the record that the Agency argued to the Arbitrator that its implementation of the 2006 CBA barred the Arbitrator's enforcement of the 1999 MOU. The Agency had ample opportunity, before the Arbitrator rendered his award in July 2008, to argue that the MOU had been rendered unenforceable by subsequent events; i.e., its implementation of the 2006 CBA in June 2006. However, the Agency did not. Accordingly, and apart from other considerations, we dismiss the Agency's exception based on its implementation of the 2006 CBA.

V. Decision

The Agency's exception based on § 7121(c)(5) of the Statute is denied. The remaining exceptions are dismissed.

3. Section 2429.5 was amended October 1, 2010. For purposes of this case, we apply the previous version of the regulation that was in effect at all times relevant to the processing of this case.