**66 FLRA No. 12**

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE LOGISTICS AGENCY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 916
(Union)

0-AR-4203

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DECISION

August 30, 2011

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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 Joann Donovan 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 Union filed several grievances challenging the Agency's decision to change the work locations of three bargaining unit employees. Award at 10. The Arbitrator found that the Agency violated the parties' past practice and sustained the grievance.

For the reasons set forth below, we deny the Agency's exceptions.

## II. Background and Arbitrator's Award

The Agency notified the grievants that it was relocating them from one warehouse to another warehouse at the Agency's facility. *Id.* The Agency did not provide the grievants with the opportunity to volunteer to move and/or refuse the change in location. *Id.* at 11. In addition, the Agency did not inform the grievants that they were being moved in accordance with "inverse seniority." *Id.* The grievants reported to their new duty locations, but each grieved the change on the ground that the Agency had conducted it improperly. When the parties could not resolve the dispute, they submitted the matter to arbitration.

As relevant here, the Arbitrator framed the issue as, "[w]as the [Master Labor Agreement (MLA)] between [the Agency] and [the Union] violated when the [Agency] moved [the grievants] from one building/warehouse to another and/or [were] the appropriate procedures followed to accomplish said move?"[2] *Id.* at 2.

Although the Arbitrator determined that the Agency had not violated the explicit terms of the MLA concerning reassignments or reorganizations, she found that the Agency had violated an established past practice for relocating the employees. *Id.* at 13. In this regard, the Arbitrator found that the parties have a past practice under which the Agency would: (1) provide the Union with written notification fifteen days before relocating employees; and (2) provide employees with the opportunity to voluntarily relocate in order of seniority, and, when there is an insufficient number of volunteers, relocate employees by inverse seniority. *Id.* at 12-13.

As a general matter, the Arbitrator stated that a past practice may attain the status of a contractual right and duty where it is not inconsistent with the parties' collective bargaining agreement. *Id.* at 13. Absent evidence or language in the MLA that the parties had "nullif[ied] or modif[ied] the established past practice," the Arbitrator concluded that the past practice had been "accepted and condoned" by both parties and "[could not] be unilaterally modified or terminated during the term of the contract." *Id.* Accordingly, the Arbitrator found that the Agency had violated the past practice and ordered it to make the grievants whole and return them to their former positions and locations. *Id.* at 14.

[1] The Authority issued an Order directing the Union to correct procedural deficiencies in the filing of its opposition under §§ 2429.25 (number of copies) and 2429.7 (statement of service) of the Authority's Regulations. The Union did not respond to the Order or subsequent Order to Show Cause why the Authority should not disregard the opposition due to its failure to correct the deficiencies. Accordingly, we decline to consider the Union's opposition. *See U.S. Dep't of Veterans Affairs, Jefferson Barracks Nat'l Cemetery, St. Louis, Mo.*, 61 FLRA 861, 861 n.1 (2006).

[2] The Arbitrator also framed an issue concerning disparate treatment and addressed a request for information, related to the grievances. As the Arbitrator's findings with respect to those issues are not challenged on exceptions, we do not address them further.

## III. Agency's Exceptions

The Agency claims that the Arbitrator exceeded her authority by resolving two issues that were not submitted to arbitration. Exceptions at 13. First, the Agency argues that the parties set forth the issue at arbitration "as one of interpretation and application of the [MLA] provisions and applicable past practice as to '*reassignment*' and/or '*reorganization*'" and not just any employee relocation. *Id.* According to the Agency, any determination as to whether it violated the past practice should have been limited to situations concerning reassignments and/or reorganizations. *Id.* at 14. The Agency argues that the Arbitrator erroneously considered whether it violated an existing past practice when the grievants' relocation did not result from a reassignment and/or reorganization. The Agency asserts that, although arbitrators may decide issues that necessarily arise from the issue to be decided at arbitration, they are not free to decide issues "wholly separate from the clear issue presented," as the Arbitrator did in this case. *Id.* at 15 (citing *U.S. Dep't of Justice, Fed. Corr. Facility, Fort Worth, Tex.*, 17 FLRA 278 (1985) (*DOJ*)).

Second, the Agency claims that the Arbitrator exceeded her authority by finding an unfair labor practice (ULP). *Id.* at 16. In this regard, the Agency claims that, by resolving a past practice claim, the Arbitrator addressed a ULP. The Agency argues that, as the ULP claim was not submitted to arbitration, the only issue that was to be resolved at arbitration was a claim based on the MLA. By resolving a past practice claim, the Agency claims that the Arbitrator addressed a ULP. Accordingly, the Agency claims that the Arbitrator exceeded her authority.

In addition, the Agency contends that the award does not draw its essence from the MLA because, even though the Arbitrator found that the Agency's relocation of the grievants did not violate the MLA, she sustained the grievance. *Id.* at 19. The Agency argues that the award shows a manifest disregard for the MLA because it imposes requirements on the Agency that are not set forth in the MLA. *Id.* Specifically, the Agency argues that the award requires the Agency to follow certain procedures when relocating employees in situations other than those resulting from a reassignment or reorganization. Accordingly, the Agency claims that the award substantially changes the "content, character, and essential meaning of the parties' [MLA]." *Id.*

The Agency further contends that the award is ambiguous and contradictory because the Arbitrator decided both that the Agency did not violate the MLA and that it violated past practice. *Id.* at 20.

Finally, the Agency contends that, even assuming it was within the scope of the Arbitrator's jurisdiction to resolve a ULP, the finding of a past practice ULP is a nonfact because the Union failed to establish such ULP by a preponderance of the record evidence. *Id.* at 21. The Agency also contends that the evidence presented at arbitration was insufficient to establish a past practice. *Id.* at 22.

## IV. Analysis and Conclusions

### A. The Arbitrator did not exceed her authority.

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *See U.S. Dep't of Def., Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996). In the absence of a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference. *See U.S. Dep't of the Army, Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997).

With regard to the Agency's claim that the Arbitrator erroneously framed the issue to be resolved at arbitration, it is well established that in the absence of a stipulated issue, an arbitrator is only required to address and resolve the issues that he or she framed for resolution. *See AFGE, Local 2142*, 58 FLRA 692, 694 (2003) (arbitrator did not exceed his authority where findings were directly responsive to the issue he framed). Here, the Arbitrator framed the relevant issue as, "[w]as the [MLA] between [the Agency] and [the Union] violated when the [Agency] moved [the grievants] from one building/warehouse to another and/or [were] the appropriate procedures followed to accomplish said move?" Award at 2. The Arbitrator determined that the relocations did not meet the definitions of reassignment or reorganization as provided by the MLA, but that the Agency had violated the parties' established past practice when relocating the grievants. As such, the Arbitrator resolved the issue that she framed.

Further, the Agency's reliance on *DOJ* is misplaced. That case concerns exceptions claiming that an arbitrator exceeded his authority based on his award of relief to non-grievants, which is not the case here. *DOJ*, 17 FLRA at 278. Here, the Arbitrator decided and remedied only the issue as she framed it. As we defer to the Arbitrator's formulation of the issue, and as the Arbitrator resolved the issue accordingly, we find that the Arbitrator did not exceed her authority in this regard and deny the Agency's exception.

With regard to the Agency's claim that the Arbitrator exceeded her authority because she improperly found a ULP, there is nothing in the record to indicate that the Arbitrator found a ULP as a result of her conclusion that the Agency violated past practice. In this regard, it is within the Arbitrator's authority to find a violation of a past practice without finding a ULP. *See, e.g., U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 171 (2010). Accordingly, as the Arbitrator's determinations were responsive to the issue that she framed and resolved the issue in its entirety, we deny the exception.

B. The award does not fail to draw its essence from the agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that 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 collective bargaining 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. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). 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.

The Agency argues that the award shows a manifest disregard for the MLA because "the finding of a past practice with regard to every work location change [and not just those resulting from a reassignment or reorganization] conflicts substantially with the [MLA]." Exceptions at 20. Here, the Arbitrator's interpretation of the MLA is based on her finding that the MLA was modified when the parties established a past practice with regard to employee relocation. Award at 13.

Under Authority precedent, an arbitrator may appropriately determine whether a past practice has modified the terms of a collective bargaining agreement. Such a determination is a matter of contract interpretation subject to the deferential essence standard of review. *U.S. Dep't of Homeland Sec., Customs & Border Prot., El Paso, Tex.*, 61 FLRA 684, 686 (2006); *NTEU, Chapter 207*, 60 FLRA 731, 734 (2005); Elkouri & Elkouri, *How Arbitration Works*, 630 (Alan Miles Ruben, ed., BNA Books 6th ed. 2003) ("[a]n arbitrator's award that appears contrary to the express terms of the agreement may nevertheless be valid if it is premised upon reliable evidence of the parties' intent") (quoting *Int'l Bhd. of Elec. Workers, Local 199 v. United Tel. Co. of Fla.*, 738 F.2d 1564, 1568 (11th Cir. 1984)). Here, the Arbitrator ruled that the Agency violated a past practice that modified the terms of the MLA. An award, such as this, that upholds a past practice by finding that it modifies the parties' agreement, is not irrational, unfounded, implausible, or in manifest disregard of the modified agreement. *See AFGE, Local 1633*, 64 FLRA 732, 734 (2010). Accordingly, we deny the Agency's exception.

C. The award is not incomplete, ambiguous, or contradictory so as to make implementation impossible.

The Authority will find an award deficient when it is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible. *See U.S. Dep't of Labor, Mine Safety & Health Admin., Se. Dist.*, 40 FLRA 937, 943 (1991). For an award to be found deficient on this ground, the appealing party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain. *NATCA*, 55 FLRA 1025, 1027 (1999) (Member Wasserman dissenting as to other matters).

The Agency fails to explain how implementation of the award is impossible because the award is unclear or uncertain. Consequently, the Agency's exception fails to establish that the award is deficient, as alleged. *See e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 64 FLRA 916, 919 (2010); *see also AFGE, Local 2206*, 59 FLRA 307, 311 (2003). Accordingly, we deny the Agency's exception.

D. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id*. In addition, an arbitrator's conclusion that is based on an interpretation of the parties' collective bargaining agreement does not constitute a fact that can be challenged as a nonfact. *See NLRB*, 50 FLRA 88, 92 (1995). The Authority has long held that disagreement with an arbitrator's evaluation of evidence and testimony, including the determination of the weight

to be accorded such evidence, provides no basis for finding the award deficient. *See AFGE, Local 3295*, 51 FLRA 27, 32 (1995). Further, where the premise of a nonfact exception is erroneous, the Authority denies the exception. *See AFGE, Local 2923*, 65 FLRA 561, 563 (2011).

The Agency argues that the award is based on a nonfact because, "in order to have found that the Agency violated a past practice, the Union must have carried the burden of proving the elements of the alleged ULP by a preponderance of the evidence." Exception at 21. As set forth above, there is no evidence in the record that the Arbitrator found a ULP. Accordingly, the premise of the Agency's claim is erroneous, and we deny it. *See AFGE, Local 2923*, 65 FLRA 561, 563 (2011).

To the extent the Agency asserts that the evidence and testimony in the record do not support a finding of a past practice, this constitutes a disagreement with the arbitrator's evaluation of the evidence and testimony, including the determination of the weight to be accorded such evidence. As such, it does not provide a basis for finding the award deficient, *see AFGE, Local 3295*, 51 FLRA at 32, and we deny the exception.

## V. Decision

The Agency's exceptions are denied.