

**66 FLRA No. 122**

NATIONAL FEDERATION  
OF FEDERAL EMPLOYEES  
LOCAL 1001  
(Union)

and

UNITED STATES  
DEPARTMENT OF THE AIR FORCE  
VANDENBERG AIR FORCE BASE, CALIFORNIA  
(Agency)

0-AR-4799

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DECISION

May 10, 2012

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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 Fredric N. Richman 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.

The Arbitrator found that the Union's grievance was not procedurally arbitrable because it failed to comply with the procedural requirements in the parties' agreement. For the reasons set forth below, we deny the Union's exceptions.

### **II. Background and Arbitrator's Award**

The Union presented a "union grievance" on behalf of "all bargaining unit employees." Award at 2. The grievance alleged that the Agency violated the Fair Labor Standards Act (FLSA) when it failed to classify employees as nonexempt and failed to pay employees overtime. *Id.* The Agency argued that the grievance was not arbitrable on procedural grounds. *Id.* The grievance was not resolved and was submitted to arbitration. The parties stipulated to the relevant issue as follows: "Must the grievance be dismissed as non-arbitrable due to the grievants' repeated failures to comply with the

requirements of the collective bargaining agreement's negotiated grievance procedure?" *Id.* at 3.

Although the Union asserted that it presented a "union grievance," as defined in paragraph 7 of the parties' agreement,<sup>1</sup> the Arbitrator determined that the grievance was instead a group grievance, as defined in paragraph 6.<sup>2</sup> *Id.* at 62-63. According to the Arbitrator, the definition of a union grievance was ambiguous, but if a grievance could be characterized as an employee or group grievance, it could not be defined as a union grievance. *Id.* at 62. The Arbitrator concluded that the Union's grievance met the definition of a group grievance because it was "filed on behalf of all bargaining unit employees" and "purports to assert the individual [FLSA] rights of employees." *Id.* at 63.

The Arbitrator then concluded that the Union failed to comply with the procedures of paragraph 6, requiring the Union to "set forth the written identification of an employee's name as well as the names of other[s] concerned." *Id.*; *see also id.* at 64. The Arbitrator found that either the Union purposefully withheld the names or it did not have any credible evidence of any employees having claims against the Agency. *Id.* at 63. In the alternative, the Arbitrator determined that, even assuming the grievance could be characterized as a union grievance under paragraph 7, the Union did not supply the supporting documents and information required by that section of the parties' agreement. *Id.* at 64.

The Arbitrator also alternatively found that the Union's third step grievance was untimely. *Id.* at 66. The Arbitrator rejected the Union's argument that the FLSA statute of limitations applied to the grievance, finding that the procedures in the parties' agreement applied instead. *Id.* at 65. The Arbitrator also rejected

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<sup>1</sup> Paragraph 7 of the parties' agreement defines "union grievances" as "grievances which are not an individual or group grievance and may be initiated only by the Union [p]resident or designee . . . [T]he grievance must include a statement of the issue being grieved, any pertinent supporting documents/information and a statement of the requested remedy." Award at 62.

<sup>2</sup> Paragraph 6 of the parties' agreement, titled Group Grievances, provides:

The [p]arties agree that when several employees have an identical grievance, the Union will select one (1) case for processing and the decision will apply to all concerned. The Union will provide written identification of the employee's name in which the grievance will be processed, as well as the names of others concerned. The procedures outlined in paragraph 5 of this Article will apply.

Award at 5.

the Union's argument that the pleading rules of the Federal Rules of Civil Procedure (FRCP) applied, finding that the FRCP are not applicable in arbitration resulting from a collective bargaining agreement. *Id.* He further concluded that the Agency did not waive the time limits by failing to produce requested data. *Id.* at 66.

Accordingly, the Arbitrator dismissed the Union's grievance because it was not procedurally arbitrable. *Id.* at 67.

### III. Positions of the Parties

#### A. Union's Exceptions

The Union argues that the award is contrary to law. Exceptions at 12. According to the Union, because the parties' collective bargaining agreement does not exclude FLSA claims, the grievance procedure is the employees' "sole mechanism for FLSA relief." *Id.* at 13. The Union contends that the employees' right to pursue an action under the FLSA "cannot be abrogated in any way," even if the parties were to agree otherwise. *Id.* The Union asserts that, by finding the grievance to be a group grievance, the Arbitrator effectively barred the employees' statutory right to proceed as a collective action. *Id.* at 14. The Union also argues that the award is inconsistent and contradictory because, although the Arbitrator found that the Union's grievance was a group grievance – which, by definition, would require the grievants to have identical claims – he also found that the questions of law and fact that affected each employee predominated over the claims that were common to all employees. *Id.* at 15.

The Union asserts that the alternative bases relied on by the Arbitrator – that the grievance was untimely and did not comply with the procedural requirements for union grievances – are contrary to the parties' agreement. *Id.* at 16. The Union contends that, because the Agency did not respond to the Union's data request, the Union's time limits were "temporarily suspended"; accordingly, the step three filing was not untimely. *Id.* The Union also argues that it complied with the procedures for union grievances; according to the Union, no supporting documentation was necessary because the burden was on the Agency to prove that the employees' FLSA exemption status was correct. *Id.* at 16-17.

#### B. Agency's Opposition

The Agency argues that the Arbitrator's award constitutes a procedural arbitrability determination. Opp'n at 2. The Agency contends that the Union's exceptions "do nothing more than attack the Arbitrator's

contract interpretation and determination" that the Union failed to follow the procedures in the parties' agreement for filing grievances. *Id.* at 4. According to the Agency, the Arbitrator acted within his discretion when he determined that the Union did not comply with the grievance procedures by failing to provide supporting documentation. *Id.* at 6.

The Agency also asserts that the award is not contrary to law because the Union's exceptions disagree with both the Arbitrator's findings and his interpretation of the parties' agreement in making a procedural arbitrability determination. *Id.* at 7. Finally, the Agency argues that the award is not inconsistent because the Arbitrator found that, regardless of whether the grievance was a union or a group grievance, the Union did not provide any supporting documentation. *Id.* at 8.

### IV. Analysis and Conclusion: The Arbitrator's procedural arbitrability determination is not deficient.

The Union argues that the award is inconsistent and contradictory because, although the Arbitrator found that the Union's grievance was a group grievance – which, by definition, would require the grievants to have identical claims – he also found that the questions of law and fact that affected each employee predominated over the claims that were common to all employees. Exceptions at 15. The Arbitrator's rulings that the grievance was a group grievance under the parties' agreement and that the Union failed to follow the procedural requirements for processing group grievances are procedural arbitrability determinations. *See AFGE, Local 104*, 61 FLRA 681, 682 (2006) (finding that the arbitrator's determination that the union could not pursue the grievance as an institutional grievance was a procedural arbitrability determination). 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. *AFGE, Local 3882*, 59 FLRA 469, 470 (2003).

The Union's argument that the award is inconsistent and contradictory directly challenges the Arbitrator's procedural arbitrability ruling. Therefore, the Union has not established that the award is deficient on this basis. *See U.S. Dep't of Def., Dependents Sch.*, 55 FLRA 1108, 1110 (1999) (denying the agency's exception that the arbitrator erred in finding that the grievance constituted a group grievance because it directly challenged the arbitrator's procedural arbitrability determination).

The Union also argues that the Arbitrator's procedural arbitrability determination is contrary to law. Exceptions at 12. 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. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 122, 124 (2005).

According to the Union, the FLSA grants employees the right "to pursue a collective action," which cannot be waived, "even if a collective bargaining agreement were to state that parties agreed otherwise." Exceptions at 13. The Union argues that the Arbitrator effectively barred its right to pursue a collective action by finding that the grievance constituted a group grievance. *Id.* at 14. However, the Arbitrator did not find that the Union could not pursue a collective action, but simply found that the Union did not comply with the procedures in the parties' agreement for pursuing such action. *See Award at 67.* The Authority has held that, "having elected to pursue [FLSA claims] through the parties' negotiated grievance procedure, the Union is bound by the grievance procedures for which the parties collectively bargained." *IFPTE, Local 386*, 66 FLRA 26, 30 (2011) (*Local 386*). The Arbitrator found that the procedural requirements of the parties' agreement, rather than the FLSA, applied to the Union's grievance. Award at 65. Therefore, the Union's claim that the procedural requirements established by the FLSA apply to the parties' agreement is without merit, and we find that the award is not deficient on this basis. *See Local 386*, 66 FLRA at 30.

The Union also challenges the alternative bases relied on by the Arbitrator. Exceptions at 16-17. The Authority has recognized that, when an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient to have the award found deficient. *See Office & Prof'l Emps. Int'l Union, Local 268*, 54 FLRA 1154, 1158-59 (1998). Therefore, because the Union has not established as deficient the Arbitrator's procedural arbitrability determination that the Union did not comply with the procedures for processing a group grievance, it is unnecessary to resolve the Union's other arguments. *See Goddard Eng'rs, Scientists, & Technicians, Ass'n IFPTE, Local 29*, 60 FLRA 593, 594 (2005) (denying an exception to an award based on separate and independent grounds because the union did not establish that the arbitrator's procedural arbitrability determination was deficient).

## V. Decision

The Union's exceptions are denied.