68 FLRA No. 89

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 200
(Union)

and

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WILLIAM J. HUGHES TECHNICAL CENTER
ATLANTIC CITY, NEW JERSEY
(Agency)

0-AR-5085

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DECISION

April 30, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Mariann E. Schick dismissed as non-arbitrable four grievances alleging that the Agency improperly filled two supervisory positions. As such, the Arbitrator did not reach the merits of the grievances.

The Union asks us to set aside the award, claiming that the award is contrary to law and Agency regulation, and that the award fails to draw its essence from the parties' collective-bargaining agreement. The Agency did not file an opposition to the Union's exceptions.

For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Union filed grievances on behalf of four bargaining-unit employees who applied, but were not selected, for two supervisory positions. The Union argued that the Agency failed to comply with the parties' agreement and Agency policy. The Agency argued that the matter was not arbitrable, because supervisory positions are not part of the bargaining unit and therefore are not subject to the parties' negotiated grievance procedure.

The Arbitrator framed the issues as: (1) whether the grievances are arbitrable; and, if so, (2) whether the Agency failed to comply with the parties' agreement and Agency policy in its non-selection of the four grievants.

The Arbitrator considered the Agency's argument that "matters concerning promotion procedures for supervisory positions do not involve the conditions of employment of bargaining-unit employees and are, therefore, outside the statutory duty to bargain."[1] The Arbitrator also found "no language" from the parties' agreement by which the Agency "agreed to negotiate with the Union on procedures for selection of managers."[2] The Arbitrator concluded that because the positions for which the grievants applied are supervisory, they are "outside the 'conditions of employment' subject to negotiation between the parties absent their agreement to do so."[3]

Thus, the Arbitrator concluded that the grievances are not arbitrable, and she did not reach the merits of the grievances. Accordingly, she denied all four grievances.

III. Analysis and Conclusions

A. The award is not contrary to law or Agency regulation.

The Union argues that the award is contrary to 5 U.S.C. §§ 2301 and 7106 and Agency Human Resources Policy Manual EMP 1.14 (the manual).[4]

Section 7122(a)(1) of the Federal Service Labor-Management Relations Statute provides that an arbitration award will be found deficient if it conflicts with any law, rule, or regulation.[5] In resolving an exception claiming that an award is contrary to law, the Authority reviews any question of law raised by the exception and the award de novo.[6] In applying the de novo standard of review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[7] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[8]

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[1] Award at 24.
[2] *Id.*
[3] *Id.* at 23.
[4] Exceptions at 6-9.
[5] 5 U.S.C. § 7122(a)(1).
[6] *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)).
[7] *See U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[8] *See id.*

Under Authority case law, an agency's selections and selection procedures for filling non-bargaining-unit positions are not subject to the parties' negotiated grievance procedures unless the agency has elected to agree to their coverage.[9] Consequently, the grievability of disputes over the filling of supervisory positions is a matter of contract interpretation.[10] The Union provides no basis for finding that the Arbitrator erred, as a matter of law, in finding that the parties had not agreed to the grievability of such disputes.

However, an award may be deficient if it is inconsistent with a governing agency regulation.[11] But where an agency regulation and an agreement both apply to the framed issue, the parties' agreement will govern the dispute.[12] In this case, the Arbitrator based her award on the language in the parties' agreement.[13] Thus, even assuming that the manual is relevant, the parties' agreement governs the disposition of this matter.[14] Any alleged inconsistency between the Agency policy and the award does not provide a basis for vacating the award because the award is based on the parties' agreement. Thus, the Union's exception does not provide a basis for finding the award contrary to the Agency policy.

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

The Union argues that the Arbitrator's arbitrability determination fails to draw its essence from the parties' agreement.[15] To support its argument, the Union relies on a different arbitrator's award, which found a grievance arbitrable in what the Union alleges were analogous circumstances involving similar language in the parties' agreement.[16]

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.[17] For an arbitrator's award to be found deficient as failing to draw its essence from a collective-bargaining agreement, it must be established 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.[18] 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."[19]

Extending a negotiated grievance procedure's scope to cover the filling of supervisory positions is a permissive subject of bargaining.[20] The Arbitrator found that there is no evidence that the Agency elected to negotiate over such coverage.[21] The Union does not challenge the Arbitrator's factual findings as nonfacts. Moreover, the Union's reliance on the award of a different arbitrator is misplaced, because the awards of arbitrators are neither precedential nor binding upon other arbitrators.[22] The Union has not demonstrated that the Arbitrator's conclusion that the grievances in this case are not arbitrable manifests a disregard of the parties' agreement or is implausible, irrational, or unfounded.

Accordingly, the Arbitrator's conclusion that the parties' negotiated grievance procedure does not cover the filling of supervisory positions does not fail to draw its essence from the parties' agreement, and we deny the exception.

IV. Decision

We deny the Union's exceptions.

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[9] *See NAGE, Local R1-109*, 61 FLRA 588, 590-91 (2006) (*NAGE*); *NTEU*, 25 FLRA 1067, 1079 (1987), *aff'd as to other matters*, 848 F.2d 1273 (D.C. Cir. 1988).
[10] *NFFE, Local 1442*, 64 FLRA 1132, 1134 (2010).
[11] *See U.S. Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 FLRA 186, 192 (1990).
[12] *See, e.g., U.S. Dep't of the Navy, Naval Training Ctr., Orlando, Fla.*, 53 FLRA 103, 108-09 (1997) (*Navy*).
[13] Award at 23-25 (citing to parties' agreement, Art. 17, §§ 1, 3, & 12; and Art. 22).
[14] *See, e.g., Navy*, 53 FLRA at 108-09.
[15] Exceptions at 10-17.
[16] *Id.* at 12.
[17] *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[18] *See U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[19] *Id.* at 576.
[20] *See, e.g., NAGE*, 61 FLRA at 590-91.
[21] Award at 24-25.
[22] *AFGE, Local 3342*, 58 FLRA 448, 451 (2003) (citing to *AFGE, Local 3615*, 54 FLRA 494, 501 (1998)).