64 FLRA No. 76

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY ADJUDICATION
AND REVIEW
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 25
(Union)

0-AR-4459

DECISION

January 29, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Ed W. Bankston 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.

In the award, the Arbitrator granted a motion the Union made during the arbitration for the Agency to pay the travel expenses and per diem of a Union representative who was also a grievant. For the following reasons, we conclude that the Arbitrator exceeded his authority when he granted the motion. Accordingly, we grant the Agency's exceptions to this portion of the Arbitrator's award.

II. Background and Arbitrator's Award

The Union's grievance concerned whether the Agency improperly provided confidential information to a Union official. When the parties could not resolve the grievance, the matter was submitted to arbitration.

Prior to the hearing, Union Representative and AFGE Council 214 President James Marshall requested that the Agency pay his travel expenses. This occurred more than a year after the underlying grievance had been presented. Award at 3. Marshall asked for travel expenses because, in addition to being the Union's representative at the arbitration, he was also a grievant and a witness. Agency Exceptions at 2-3. Marshall argued that Article 25, Section 5.E of the collective bargaining agreement (CBA) required the Agency to pay for grievants' and some witnesses' travel expenses. [2] *Id.* at 3. The Agency denied the request. *Id.*

At the hearing, the Union made a motion seeking payment of Marshall's travel expenses. The Union asked the Arbitrator to rule on whether Article 25, Section 5.E required the Agency to pay for the Union representative's travel costs and per diem because he was also a witness and a grievant at the hearing. *Id.*

The Arbitrator framed the issues at the end of the hearing. The Arbitrator's statement of the issues did not include whether the Agency was obligated to pay Marshall's travel expenses under the CBA. *Id.* at 3-4. However, when the Arbitrator finally issued his Award, he not only ruled on the issues framed at the hearing; he also granted the Union's motion for payment of Marshall's travel expenses Award at 32.

The Agency subsequently filed exceptions to this part of the Award.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the Arbitrator exceeded the scope of his authority because he ruled on an issue that was not properly before him. Agency Exceptions at 5. The Agency argues that the Arbitrator exceeds the scope of his authority when he resolves issues not submitted to arbitration. *Id.* The Agency contends that the Arbitrator was hired to decide the issues presented in the grievance. However, the Agency argues, part of his award relates to an issue that was not raised in the grievance; i.e., Marshall's entitlement to travel expenses. Therefore, the Agency concludes, that portion of the Award should be set aside. *Id.* The Agency suggests that the Union should have grieved this issue if the Union wanted the issue addressed. *Id.* at 5-6.

1. Chairman Pope's dissenting opinion is set forth at the end of the decision.

2. Article 25, Section 5.E states that "[t]he parties agree to keep the number of witnesses to a reasonable number. The union will pay all costs for its representatives and witnesses with the exception that the Agency will pay the travel and per diem costs of two union witnesses and the grievant at arbitration." Exceptions, Attachments (Exhibit E) at 157.

B. Union's Opposition

The Union argues that the Arbitrator has the authority to determine whether aggrieved parties at the hearing are entitled to travel and per diem expenses. Union Opposition at 2. The Union claims that it is not uncommon for arbitrators to rule on motions regarding travel and per diem issues at the actual hearing or in their Awards. *Id.* Therefore, the Union concludes, resolution of such a motion cannot be the basis for an exception. *Id.*

Furthermore, the Union contends that this issue could not have been a subject of the initial grievance because the issue did not develop until Marshall was identified as a witness and subsequently testified at the hearing. *Id.*

IV. Analysis and Conclusion

We find the award deficient on the narrow ground that the Arbitrator exceeded his authority in granting the Union's motion for travel expenses. Arbitrators exceed their authority when they "resolve an issue not submitted to arbitration." *AFGE Local 1617*, 51 FLRA 1645, 1647 (1996).

The general principles that apply are clear. An arbitrator may resolve only the issues properly submitted to arbitration. *Id.* The process by which issues are submitted to arbitration is well established. A grievance's statement of the issues may be adopted by an arbitrator, even if the parties disagree over how the issues should be formulated. *See* Elkouri & Elkouri, *How Arbitration Works*, 296 (Alan Miles Ruben, ed., BNA Books 6th ed. 2003). Issues may also be properly brought before an arbitrator when the parties have stipulated to them or when the arbitrator formulates them himself. *Id.* at 296-97*; Veterans Admin.*, 24 FLRA 447, 451 (1986). An arbitrator's formulation of the issues is to be afforded deference. *AFGE Local 1637*, 49 FLRA 125, 130 (1994).

However, once the issues have been framed, the arbitrator's authority in deciding the case has been defined, and the arbitrator may decide those issues only. "Arbitrators may legitimately bring their judgment to bear in reaching a fair resolution of a dispute as submitted to or formulated by them, but they may not decide matters which are not before them." *Veterans Admin.*, 24 FLRA at 451; *see generally* Elkouri & Elkouri, *supra* at 298 ("If a new issue arises at arbitration, an arbitrator ordinarily will refuse to consider the new matter over the objection of the other party."); *Fairweather's Practice and Procedure in Labor Arbitration*, 15-20 (Ray J. Schoonhoven, ed., BNA Books 4th ed. 1999). Where additional issues arise, an arbitrator may ask the parties for additional authorization. Elkouri & Elkouri, *supra* at 297.

The Arbitrator exceeded his authority when he resolved the issue regarding whether a Union representative can also be a witness or grievant for the purpose of having travel expenses paid by the Agency. As an initial matter, this issue is a substantive rather than procedural one. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 558 (1964) (distinguishing "arbitrability of the subject matter" from "a dispute [that] arises over the procedures to be followed"). The contract language in Article 25, Section 5.E of the collective bargaining agreement is ambiguous regarding how the Agency should treat an employee with such dual status. Therefore, when the Arbitrator resolved this issue, he did more than merely apply a provision of the contract to determine whether a procedure should have been followed (such as with questions of timeliness, witness sequestration, and the admissibility of evidence); he had to interpret the contract to determine whether a Union representative can also be viewed as a grievant or a witness.

Moreover, this new substantive matter was unrelated to the issues the Arbitrator had already formulated. Both the Union and the Agency proposed framing the issues around the Agency's allegedly improper disclosure of information to a Union official. Award at 4-5. When the Arbitrator stated his formulation of the issues, he also limited them in this fashion. Award at 5. Once the Arbitrator framed the issues, he was constrained from ruling on any unrelated substantive issues. "[T]he issue that the parties stipulated is the same as the issue the Arbitrator framed, and neither one required him to address the issue that he went on to decide." *U.S. Dep't of the Navy, Puget Sound Naval Shipyard, Bremerton, Wash.*, 53 FLRA 1445, 1449-50 n.3 (1998).

The dissent's claim that the mere submission of a motion to an arbitrator by a party, without more, is sufficient to properly bring a matter before the arbitrator is unfounded. *U.S. Dep't of Veterans Affairs, Med. Ctr., N. Chicago, Ill.* (*VA N. Chicago),* [3] *on which the dissent relies, is not germane. The* motions resolved by the arbitrator in that case raised threshold issues of arbitrability. *See VA N. Chicago*, 52 FLRA at 388-90. The arbitrator had to resolve those issues before he could process the grievance. The same cannot be said of the

3. 52 FLRA 387 (1996).

Union's travel expense motion in this case, which had no bearing on the arbitral process.

Also groundless is the dissent's reliance on *United States Department of Health and Human Services, Social Security Administration, Office of Hearings and Appeals* (*SSA*). [4] To begin with the most obvious distinction, *SSA* dealt with an entirely different issue. Unlike this case, the agency in *SSA* "except[ed] only [to] the portion of the award that require[d] payment to the Union" of a part of the union's arbitration costs. *Id.* at 833. The agency's "exceeded authority" exception was so limited, claiming only "that the Arbitrator [improperly] modified the fee provision of the agreement." *See id.* at 836. Thus, *SSA* does not directly present the issue whether the arbitrator exceeded his authority by deciding a matter involving, among other things, witness travel and per diem expenses.

Further, in complete contrast to this case, the travel expense and arbitrator fee matters in *SSA* related to threshold procedural issues concerning witness availability. As the Authority explained, *id.* at 838, the arbitrator's determinations that the disputed witness's testimony was "necessary to the case" and that the agency should pay the witness's travel expenses to make the witness available were inextricably bound up with the arbitrator's ability to process the grievance. The remedy accorded the union concerning the arbitrator's fee simply "reflect[ed] the Arbitrator's assessment of the expense of extra time attributable to the Agency's improper action," refusing to make the witness available. *Id.* The instant case, where threshold issues like witness availability were never an issue, does not present any parallel. *SSA* is therefore inapposite. [5]

It would have been preferable for the parties to resolve on their own whether the contract allows a Union representative to also act as a grievant or witness for the purpose of having travel expenses paid by the Agency. Unfortunately, they could not. In these circumstances, the Arbitrator might have formulated the issues in the arbitration more broadly, or asked the parties for additional authorization. In any case, the Arbitrator had the authority to decide only those issues that were properly before him. As he formulated the issues, this issue was not. Therefore, on this record, we are constrained to find the award deficient on the very narrow ground that the Arbitrator exceeded his authority when he ruled on a question arising under Article 25, Section 5.E of the collective bargaining agreement. [6]

V. Decision

For the foregoing reasons, the Authority finds that the Arbitrator exceeded his authority when he issued a decision that included a monetary award to the Union on an issue that was not properly submitted to arbitration, and *we grant the Agency's exceptions.*

4. 48 FLRA 833 (1993).

5. Contrary to the dissent's suggestion, *AFGE, Local 171*, 32 FLRA 965 (1988) does not eliminate an arbitrator's obligation to adhere to substantive arbitral principles such as those discussed previously in this decision, drawn from the private sector. *See AFGE, Local 171*, 32 FLRA at 966 (denying exceptions because "[t]he Union has failed to establish that the award is . . . deficient on other grounds similar to those applied by Federal courts in private sector labor relations cases.").

6. Although there is an ambiguity in Article 25, Section 5.E regarding an arbitration hearing participant, such as Marshall, who is both a grievant and a Union representative, our decision in no way indicates how we believe this provision of the collective bargaining agreement should be applied. In view of our decision, it is unnecessary to rule on the Agency Exception asserting that the Arbitrator's ruling fails to draw its essence from the contract.

Chairman Carol Waller Pope, Dissenting:

The majority sets aside the award of travel expenses despite the fact that this issue was expressly raised before the Arbitrator. The majority effectively does so based on a curious theory that, once an arbitrator frames issues in one portion of an award, the arbitrator is precluded from resolving additional issues in another portion of the award. The majority's approach improperly elevates form over substance and is inconsistent with Authority precedent. Accordingly, I dissent.

As an initial matter, it is undisputed that the Union, through a motion, expressly raised the issue of travel expenses before the Arbitrator. *See* Award at 32. As such, Authority precedent holds that the matter was properly before him. *See, e.g., U.S. Dep't of Veterans Affairs, Med. Ctr., N. Chi., Ill.*, 52 FLRA 387, 396 (1996) (*VA North Chicago*) (arbitrator did not exceed his authority when excepting party "failed to establish that the issues [he] addressed in ruling on . . . motions were not responsive to the issues and matters raised in th[e]se motions.") [1]

The majority does not appear to dispute this principle. In this connection, the majority acknowledges that "the Arbitrator might have formulated the issues in the arbitration more broadly," to include this issue. Majority Opinion at 4. Nevertheless, apparently because the Arbitrator did not list this issue in his issue statement at page 5 of the award, the majority effectively holds that the Arbitrator *precluded himself* from ruling on this issue.

This holding is contrary to Authority precedent in two respects. First, the Authority has held that an issue was properly before an arbitrator, despite the fact that the arbitrator's framed issues did not expressly include the disputed issue. *See, e.g., U.S. Dep't of Health & Human Servs., Soc. Sec. Admin., Office of Hearings & Appeals*, 48 FLRA 833, 838 (1993) (*SSA*) (arbitrator did not exceed his authority by resolving an issue regarding the arbitrator's fees, *see id.* at 838, despite the fact that the framed issues did not include that issue, *see id.* at 834). [2] Second, the Authority has held, with regard to the general issue of the "*form*" of an arbitration award, that the only requirements that an arbitrator must follow are those specified in a collective bargaining agreement, in the submission of the parties to the arbitrator, or by law. *See AFGE, Local 171*, 32 FLRA 965, 966 (1988). There is no assertion that the Arbitrator failed to satisfy any such requirements here. Thus, there is no basis for the majority's overly formalistic finding that the Arbitrator could not resolve the travel-expenses issue merely because he did not list that as an issue on the fifth page of his award. [3]

The Authority decisions cited by the majority do not support a contrary conclusion. In this regard, *Veterans Admin.*, 24 FLRA 447, 451 (1986), involved a situation where an arbitrator found no contractual violation, but ordered a remedy on the basis of testimony that related to the alleged contractual violation; that is not the situation presented in this case, where the Arbitrator found a contractual entitlement to expenses and, as a remedy, awarded them. In *U.S. Dep't of the Navy, Puget Sound Naval Shipyard, Bremerton, Wash.*, 53 FLRA 1445 (1998) (Member Wasserman dissenting), the Authority found that the arbitrator "addressed and resolved an issue that the parties did not submit to arbitration[,]" *id.* at 1449 n.2. As discussed above, that also is not the situation presented in this case, as the travel-expenses issue was submitted to arbitration.

In sum, the Arbitrator resolved an issue that was squarely before him. Thus, he did not exceed his authority, and I dissent.

1. The majority's attempt to distinguish VA North Chicago fails. Although VA North Chicago involved different facts than those in this case, the legal principle set forth in that decision clearly governs this case. In this connection, nothing in VA North Chicago — or anything else cited by the majority — indicates that arbitrators may address party motions only if they involve threshold issues of arbitrability.

2. The majority's attempt to distinguish *SSA* also fails. In fact, it is even clearer in this case that the Arbitrator did not exceed his authority. In *SSA*, as here, one party – the union – raised the issue of the agency's refusal to authorize certain expenses for a union witness. *See* 48 FLRA at 834. The arbitrator found that the agency violated the parties' agreement by failing to pay such expenses, and that this violation prolonged the arbitration process. *Id.* at 835. Accordingly, the arbitrator directed the agency to pay the portion of the arbitration fees that were attributable to its actions. *Id.* at 835-36. The Authority held that the arbitrator did not exceed his authority regarding the fee issue, *see id.* at 838, despite the fact that neither the fee issue nor the issue regarding witness expenses was included in the arbitrator's statement of the issue, *see id.* at 834. Thus, in *SSA*, the connection between the framed issue and the disputed issue regarding fees was more indirect than it is here.

3. I do not suggest that *AFGE, Local 171* "eliminate[s] an arbitrator's obligation to adhere to substantive arbitral principles . . . drawn from the private sector." Majority Opinion at 5 n.5. I suggest only that *AFGE, Local 171* remains good law as to the legal principles regarding the form of an arbitration award.

In addition to its exceeded-authority argument, the Agency contends that the award fails to draw its essence from the parties' agreement. Article 25, § 5.E. of the parties' agreement provides, in pertinent part, that "[t]he union will pay all costs for its representatives and witnesses with the exception that the Agency will pay the travel and per diem costs of two union witnesses and the grievant at arbitration." Exceptions, Attachments (Exhibit E) at 157. The Arbitrator found that the Union President was entitled to costs because he was not only a Union representative, but also a "grievant[.]" Award at 32. This finding is not irrational, unfounded, implausible, or in manifest disregard of the agreement. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). Accordingly, I would deny the Agency's essence exception as well.