64 FLRA No. 83

UNITED STATES
DEPARTMENT OF THE ARMY
UNITED STATES
ARMY CORPS OF ENGINEERS
MOBILE DISTRICT
MOBILE, ALABAMA
(Agency)

and

INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS
(Union)

0-AR-4297

DECISION

February 22, 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 Richard E. Gombert 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 exceptions.

The Arbitrator sustained a grievance alleging that the Agency violated the parties' agreement and/or Office of Management and Budget Circular No. A-76 (A-76) when it contracted out work without first conducting a cost comparison and negotiating with the Union. For the reasons that follow, we dismiss the Agency's management's-right exception and deny the remaining exceptions.

II. Background and Arbitrator's Award

The Agency contracted out certain work without first negotiating with the Union or comparing the cost of contracting out the work with the cost of having Agency employees perform the work. A grievance was filed and, when the grievance was not resolved, it was submitted to arbitration.

The Arbitrator framed the issues as follows:

> 1. Does the Arbitrator have jurisdiction to hear and decide the grievance[?]
>
> 2. Does the *collective bargaining agreement* require a cost comparison before a contract . . . is awarded to an outside contractor?

Award at 2 (emphasis added).

The Arbitrator noted that the parties disputed whether a Supplemental Handbook (the Handbook) to A-76 precluded him from exercising jurisdiction, but he found that the Handbook was "not dispositive of this case." *Id.* at 8. In this connection, he stated that the parties' agreement "contains language concerning the contracting out of work[,]" the Union "claims a violation of that language[,]" and the Arbitrator "has the jurisdiction to decide the meaning, application, and interpretation of those contractual provisions." [2] *Id.* at 9. The Arbitrator determined that the parties' agreement "requires good faith negotiations[]" and stated that the Union has "a right to discuss" the contracting out matter in this case with the Agency. *Id.* In this regard, the Arbitrator stated:

> The parties could discuss the pros and cons of contracting out or doing the work by in-house personnel. They could review the impact on current and future employees. They could look at the cost figures. Everyone wants to see the Government "get its money's worth." But, there weren't any negotiations in this instance.

Id.

In addition, the Arbitrator stated that "[i]t *also* appears to be clear that the [Agency] did not follow a couple of requirements" set forth in A-76 and, thus, "appears to have violated" A-76. *Id.* (emphasis added). He then stated:

> The totality of the evidence leads to the conclusion that the [Agency] violated the terms of the collective bargaining agreement *and* . . . A-76. It did not conduct a required cost comparison. It

1. Member Beck's dissenting opinion is set forth at the end of this decision.

2. The pertinent wording of the parties' agreement is set forth in the appendix to this decision.

> did not bargain in good faith with the Union over this operations and maintenance contract. It did not negotiate on personnel policies and practices and other matters relating to or affecting working conditions of the employees.

Id. (emphasis added).

Based on the foregoing, the Arbitrator sustained the grievance. He did not, however, provide a specific remedy.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the award is contrary to management's right to contract out under § 7106(a)(2)(B) of the Statute. Exceptions at 7-8. In addition, the Agency contends that the award does not reflect a plausible interpretation of the parties' agreement because the Arbitrator did not cite any agreement provisions requiring the Agency to either conduct a cost comparison or bargain with the Union in the circumstances of this case. *Id*. at 9-10. Finally, the Agency contends that the award is contrary to law because the Arbitrator did not have jurisdiction to decide whether the Agency was required to conduct a cost comparison in accordance with A-76. *Id*. at 5-7.

B. Union's Opposition

The Union contends that the award "primarily enforced the Agency's *contractual* agreement to negotiate with the Union about decisions and matters affecting the bargaining unit, including matters pertaining to contracting-out." Opp'n at 1 (emphasis in original). The Union also contends that even if the award is based in part on A-76, the Arbitrator had the authority to enforce A-76 because the current version of A-76 does not bar grievances regarding alleged violations of A-76. *Id*. at 7-8.

IV. Analysis and Conclusions

A. The Agency's management's-rights exception is dismissed.

The Agency argues that the award is contrary to management's right to contract out work under § 7106(a)(2)(B) of the Statute. Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, presented to the arbitrator.[3] *See, e.g., U.S. Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 59 FLRA 542, 544 (2003); *AFGE, Local 2145*, 55 FLRA 366, 368 (1999). The Agency could have presented this argument to the Arbitrator but failed to do so. Accordingly, we dismiss the exception as barred by § 2429.5 of the Authority's Regulations.

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

With respect to the Agency's challenge to the Arbitrator's interpretation of the parties' agreement, the Authority may set aside arbitration awards only on certain specified grounds, including, as relevant here, "grounds similar to those applied by Federal courts in private sector labor-management relations[.]" 5 U.S.C. § 7122(a)(2). The Federal courts' standard in reviewing arbitral contract interpretations is highly deferential, as evidenced by the Supreme Court's statement that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious errors does not suffice to overturn his error." *United Paperworkers Int'l Union, AFL-CIO v. Misco*, 484 U.S. 29, 38 (1987). "In short, the relevant question . . . is not whether the arbitrator erred-or even seriously erred-in interpreting the contract. Rather, the question is whether the arbitrator was 'even arguably construing or applying the contract." *Nat'l Postal Mail Handlers Union v. Am. Postal Workers Union*, 589 F.3d 437, 441 (D.C. Cir. 2009) (*NPMHU v. APWU*) (quoting *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001)).

Consistent with these principles, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' agreement only 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

3. Section 2429.5 provides, in pertinent part, that "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator."

of the agreement for which the parties have bargained."[4] *Id*. at 576.

The Arbitrator cited contract provisions that involve advising the Union regarding contracting-out matters, negotiating with the Union, and the circumstances under which the Agency will conduct a cost study regarding contracting out. *See* Award at 2-4. The Arbitrator interpreted these provisions and found that, in the future, the Agency is required to bargain with the Union before contracting out functions similar to the functions at issue in the grievance, and that "all parties will make good-faith efforts to determine whether the services could be performed with equal or greater cost-effectiveness by in-house employees." *Id.* at 10. The contract provisions cited expressly require advising and negotiating with the Union. *See infra*, Appendix. Moreover, although they do not expressly mandate that the parties make good-faith efforts to determine whether the services could be performed with greater cost-effectiveness by in-house employees, they also do not prohibit such efforts. Thus, it was not irrational, unfounded, implausible, or a manifest disregard of the agreement for the Arbitrator to interpret them as imposing such a condition. *See id.* Accordingly, we deny the Agency's essence exception.

C. The Agency's contrary-to-law exception does not provide a basis for setting aside the award.

The Authority has held that where an arbitrator bases his or her award on separate and independent grounds, an excepting party must establish that all of the grounds are deficient in order to demonstrate that the award is deficient. *See, e.g., U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000). If the excepting party does not demonstrate that one of the separate and independent grounds for the award is deficient, then it is unnecessary for the Authority to resolve exceptions concerning the other separate and independent ground(s). *See id.*

In this case, the Arbitrator framed one of the pertinent issues as whether the "*collective bargaining agreement* require[s] a cost comparison." Award at 2 (emphasis added). He found that the Handbook "is not dispositive of this case[,]" and that he had "jurisdiction to decide the meaning, application[,] and interpretation of th[e] *contractual provisions*[]" at issue. *Id.* at 8, 9 (emphasis added). Addressing those provisions, he determined that the parties' agreement "requires good faith negotiations[]" and "discuss[ions]" with the Union, as well as discussions regarding "the pros and cons of contracting out[,]" including "look[ing] at the cost figures." *Id.* at 9. He found that, by failing to comply with those provisions, the Agency "violated the terms of the *collective bargaining agreement*[.]" *Id.* (emphasis added). We have denied the Agency's essence exception. Thus, as the Arbitrator's finding of a contractual violation constitutes a separate and independent basis for his award, there is no basis for setting aside the award.

We note that the Agency's exceptions could be construed as arguing that A-76 deprived the Arbitrator of jurisdiction over the entire grievance, including the alleged contractual violation. However, the Agency does not cite, and the record does not disclose, any authority for the proposition that A-76 precludes arbitrators from resolving claims alleging contractual violations, as opposed to claims alleging violations of A-76 itself. *Cf. AFGE, Local 1513*, 52 FLRA 717, 718-22 (1996) (grievance alleging violation of A-76 found not arbitrable). Accordingly, to the extent that the Agency makes this argument, we reject it.

For the foregoing reasons, we find that the Arbitrator's finding of a contractual violation provides a separate and independent basis for his award, and that the Agency's contrary-to-law exception provides no basis for setting aside the award.[5] Accordingly, we deny the exception.

V. Decision

The Agency's management's-right exception is dismissed, and the remaining exceptions are denied.

4. The dissent eschews these well-established principles of deference and, instead, effectively engages in a *de novo* textual analysis of the parties' agreement. This is inconsistent with the Statute, which requires the Authority to review essence exceptions on a very narrow basis. *See SSA*, 63 FLRA 691, 692 (2009) (citing S. Rep. No. 95-1272, 95th Cong., 2d Sess. 153 (1978)). Applying the appropriate standard, we note that, as the court stated in *NPMHU v. APWU*, in interpreting a collective bargaining agreement, an arbitrator is not limited to "the plain text of [the] contract[.]" 589 F.3d at 443. Rather, an arbitrator "may look to other sources-including the 'industrial common law'-for help in construing the agreement." *Id.* (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82). We also note that the court decisions cited by the dissent are inapposite because they do not involve court review of arbitration awards and, as such, do not involve the deferential standards that courts apply in such circumstances. Further, we question the dissent's reliance on a dissenting opinion from the Supreme Court, rather than the majority opinion. *See City of Owensboro v. Owensboro Waterworks Co.*, 243 U.S. 166, 184 (1917) (Clarke, J., dissenting). Finally, because the Agency does not claim in its exceptions that the Arbitrator exceeded his authority, that issue, discussed by the dissent, is not properly before the Authority.

5. Thus, it is unnecessary to resolve the Union's assertion that the current version of A-76 does not bar grievances over alleged violations of A-76.

APPENDIX

ARTICLE 2
DEFINITIONS

2.18 NEGOTIATION: Bargaining by Representatives of the Employer and the Union on appropriate issues relating to terms of employment, working conditions, and personnel policies and practices with the view toward arriving at a formal agreement.

ARTICLE 3
MANAGEMENT RIGHTS AND OBLIGATIONS

3.1 . . .

c. Nothing in this Article shall preclude Management and Union from negotiating:

. . . .

(2) Procedures which Management Officials will observe in exercising any authority under this Article; or

(3) Appropriate arrangements for Employees adversely affected by the exercise of any authority under this Article by such Management Officials.

ARTICLE 5
UNION RIGHTS and OBLIGATIONS

5.5 The Union has the right to—

a. negotiate on appropriate issues relating to terms of employment, working conditions, and personnel policies and practices;

b. negotiate on matters affecting conditions of employment and on the impact of any new policy or changes in policy affecting the Employee or their conditions of employment;

c. propose new policy, changes in policy, or resolutions to problems, in consonance with its rights to represent;

d. make requests, in accordance with 5 USC 7106(b), that is

(i) procedures which Management Officials of the Agency will observe in exercising any authority under this section; or

(ii) appropriate arrangements for Employees adversely affected by their exercise of any authority under this section by such Management Officials.

ARTICLE 28
CONTRACTING OUT of WORK

It shall be the policy of the Employer to openly and fully advise the Union regarding any proposed Contracting out of a new or revised function. The Employer will notify the Union when the District determines that a study will be conducted to Contract Out functions and it appears that a RIF may result. The Union will also be advised when the study is completed. When it has been determined that a function will be Contracted Out that may result in a RIF the Employer will inform the Union in accordance with the Article on RIF. The Employer will also notify the Union when the District determines that a study will be conducted to Contract Out new functions that have been authorized and that normally would be performed by Unit members.

Exhibit 2.

Member Beck Dissenting Opinion

I agree with the Majority in one respect. The Agency could have presented to the Arbitrator its argument regarding management's rights, but it failed to do so. Therefore, the exception based on this argument is properly dismissed pursuant to § 2429.5 of our regulations.

I disagree, however, with my colleagues that the Agency's essence exception should be denied. The single contract provision that pertains directly to the issue presented to the Arbitrator is Article 28, "Contracting Out of Work." [1] This contract provision requires management to "advise" the Union about certain developments and to "notify" the Union in certain circumstances. Nowhere does this provision even arguably require management to negotiate with the Union about whether work will be contracted out, nor does it even arguably require management to conduct studies or engage in cost comparisons before contracting out. Indeed, Article 28 quite plainly contemplates that sole discretion about whether to conduct studies or engage in cost comparisons resides with the employer; the provision speaks in terms of "when *the District* determines that a study will be conducted…" Award at 5 (emphasis added). The obligation to provide notice is not equivalent to the obligation to bargain. *U.S. Dep't of Agriculture*, 17 FLRA 281, 294 (1985) (Agency obligated to give the Union notice of policy prior to implementation and bargaining on impact and implementation); *FAA Seattle*, 14 FLRA 644, 649 (1984) (Agency required to provide notice to Union of decision to change holiday staffing and afford Union opportunity to negotiate concerning impact and implementation). The Arbitrator conjured from thin air an obligation on the part of the Agency to bargain about contracting out. In so doing, he evinced a manifest disregard for the very agreement that he was tasked with applying.

As explained above, I would find that the Arbitrator's Award does not represent a plausible interpretation of the parties' CBA. Therefore, unlike the Majority, I believe it is necessary to address the Agency's argument that the Award is contrary to law insofar as it is premised on violations of OMB Circular A-76 (in addition to, or instead of, contractual violations). To the extent the Arbitrator's Award relies on finding Agency violations of OMB Circular A-76, it is contrary to law.

The disposition of this exception must be considered in the context of our decision in *AFGE Local 1513*, 52 FLRA 717 (1996). In that case, we adopted the D.C. Circuit's conclusion that matters pertaining to OMB Circular A-76 (that is, an agency's decision whether to contract out particular functions) are not subject to the negotiated grievance procedure and arbitration. *Id*. at 721 (citing *IRS v. FLRA*, 996 F.2d 1246, 1250 (D.C.Cir. 1993)). [2] Pursuant to OMB Circular A-76, there are exclusive procedures for resolving disputes regarding an agency's compliance with the Circular, and such disputes are excluded from negotiated grievance procedures and arbitration. Award at 8; *see also* Union Exhibit 1, OMB Circular A-76, Section 5.G.

Finally, to the extent the Arbitrator based his Award on OMB Circular A-76, he exceeded his authority as even he defined it. He resolved the parties' competing versions of the substantive issue presented as follows:

> Does the *collective bargaining agreement* require a cost comparison before a contract . . . is awarded to an outside contractor?

(Emphasis added.) Thus, the Arbitrator understood – at the outset, at least – that he was to assess only whether the contract had been violated, not whether some other regulation or law had been violated. By finding a violation of OMB Circular A-76, [3] the Arbitrator exceeded his authority.

Accordingly, I would grant the Agency's exceptions.

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1. To be sure, the contract contains other, very general provisions referring to the parties' respective obligations to bargain with one another. However, basic canons of contract interpretation mandate that such generalized statements of axiomatic propositions are trumped by the much more explicit language of Article 28 detailing management's (minimal) obligations relating specifically to "contracting out of work." See City of *Owensboro v. Owensboro Waterworks Co.*, 243 U.S. 166, 184, 37 S.Ct. 322, 329 (1917) (specific provisions should always control general provisions in a contract where they conflict); *Simplot v. Chevron Pipeline Co*., 563 F.3d 1102, 1111 (10th Cir. 2009) (when general and specific provisions of a contract cannot be reconciled, specific provisions prevail); *Level 3 Communications v. Liebert Corp*., 535 F.3d 1146, 1154 (10th Cir. 2008); *Guidry v. American Public Life Insurance Co*., 512 F.3d 177, 183 (5th Cir. 2007) (it is a fundamental axiom of contract interpretation that specific provisions control general provisions); *Restatement (First) of Contracts*, § 236(c) ("where there is an inconsistency between general provisions and specific provisions, the specific provisions ordinarily qualify the meaning of the general provisions").

2. The Court determined that "the regulation sets out an exclusive method of resolving any claims regarding its implementation and forbids negotiation or arbitration over the process or decisions issuing from the process." *IRS and FLRA* at 1250.

3. The Arbitrator found that the Agency "did not follow a couple of requirements" in OMB Circular A-76 – to develop a cost estimate and to evaluate certain costs. Award at 9.