

64 FLRA No. 92

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3627
(Union)

and

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY
ADJUDICATION AND REVIEW
RALEIGH, NORTH CAROLINA
(Agency)

0-AR-4385

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DECISION

February 26, 2010

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

I. Statement of the Case

The matter is before the Authority on exceptions to an award of Arbitrator Robert G. Williams 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 concluded that the Union's grievance was arbitrable and that the Agency had just cause to suspend the grievant for seven days. For the reasons set forth below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The grievant, a Case Technician (Technician), is responsible for closing files for Social Security disability claims that have been adjudicated by administrative law judges. To close a case, a Technician must "break down" the case file by, among other things: (1) entering information into an Agency database — the Case Processing and Management System (CPMS) — stating that no further action is required; and (2) promptly mailing the decision to a claimant. Award at 4. Technicians may not place non-broken down files in filing drawers, but must keep them in an open area so that supervisors may determine whether a Technician is behind in his or her duties. *See id.* at 5.

On April 20, the grievant's supervisor discovered in the grievant's filing drawer twenty-two files that, although entered into the CPMS as closed, had not been mailed. *See id.* The grievant's supervisor instructed the grievant to correct her error that morning. Several weeks later, the supervisor discovered eight additional non-broken down files in the grievant's filing drawer. *See id.*

On July 9, the Agency issued a proposal to suspend the grievant for seven days for falsifying information in the CPMS and failing to follow her supervisor's instructions. *See id.* at 1-2. On August 1, the Agency issued its decision to suspend the grievant. *See id.* at 2. The Union filed a grievance alleging that the decision to suspend was procedurally improper because it: (1) did not list the dates of the grievant's suspension; and (2) had been issued by the wrong official. *See Exceptions, Attach. 4* at 1. The Union also requested that the Agency withdraw its proposal and decision and transfer the grievant. *See id.* at 1-2. On August 23, the Agency withdrew its decision; however, the Agency did not withdraw its July 9 proposal or address the Union's request for a transfer. *See Award at 2; Exceptions, Attach. 5.* On August 24, the Agency issued a revised decision, setting forth the same facts and charges, but correcting the procedural errors that the Union had raised. *See Award at 2.*

The grievance was unresolved and submitted to arbitration. The parties were unable to stipulate to the issues for resolution; accordingly, the Arbitrator framed the following issues:

- A. Was the grievance arbitrable?
- B. Was the discipline for just cause to promote the efficiency of the service, and, if not, what shall be the remedy?

Id.

Prior to the hearing, the Agency contested the arbitrability of the grievance. According to the Agency, the grievance was not arbitrable because it concerned the August 1 decision to suspend, which the Agency had withdrawn. *See Exceptions, Attach. 9* at 1. Alternatively, the Agency argued that the Arbitrator should consider the grievance as a challenge to the August 24 decision. *See Opp'n* at 4. The Union contended that the August 1 and August 24 decisions were separate matters, and that, under Article 24, Section 9 of the parties' agreement, the Agency was required to "grant, partially

grant, or deny” the Union’s request for relief rather than merely withdraw the August 1 decision.¹ Exceptions at 5.

The Arbitrator held that, because the Union was not prejudiced by the replacement of the August 1 decision with the August 24 decision, the grievance was arbitrable as a challenge to the August 24 decision. *See* Award at 4. The Arbitrator found that the August 24 decision merely corrected procedural errors contained in the August 1 decision and did not allege any new facts or charges. *See id.* Moreover, the Arbitrator noted that the Agency had not withdrawn its July 7 proposal, which was the basis for both decisions. *See id.* at 3.

Addressing the merits of the grievance, the Arbitrator held that the Agency’s decision to suspend the grievant for seven days “was warranted under the just cause doctrine[.]” *Id.* at 6. The Arbitrator found that, by placing non-broken down files in filing drawers, the grievant was attempting to hide the files and cover her mistakes. *See id.* According to the Arbitrator, this was an intentional act of dishonesty that “warrant[ed] severe discipline.” *Id.*

III. Positions of the Parties

A. Union’s Exceptions

The Union alleges that the award is based on a nonfact because it is based on the August 24 decision. The Union argues that this decision was not before the Arbitrator because the grievance only challenged the August 1 decision. *See* Exceptions at 3. Additionally, the Union claims that the award is based on a nonfact because the Arbitrator created a charge of “hiding work” to sustain the Agency’s disciplinary action. *Id.* at 3-4.

The Union also contends that the Arbitrator exceeded his authority because: (1) he failed to resolve whether the Union was entitled to any relief as a result of the Agency’s withdrawal of the August 1 decision; (2) he ruled on the August 24 decision even though it was not before him for consideration; and (3) by considering the August 24 decision, he disregarded specific limitations on his authority contained in Article 25, Section 6 of the parties’ agreement.² *See id.* at 4-5.

The Union further argues that the Arbitrator’s award fails to draw its essence from the parties’ agreement because: (1) the Arbitrator did not resolve whether the Union was entitled to any relief as a result of the Agency’s withdrawal of the August 1 decision, and (2) the Arbitrator based his award on the August 24 decision. *See id.* at 6-7. The Union also contends that the Arbitrator failed to interpret properly the parties’ agreement. *See id.* at 7-8.

Finally, the Union contends that the Arbitrator’s award directly conflicts with the evidence and testimony concerning how the Agency must address arbitrability issues and what actions the Agency must take before it proposes a short-term suspension. *See id.* at 8.

B. Agency’s Opposition

The Agency contends that the Union’s argument that the award is based on nonfacts is without merit. The Agency argues that the August 24 decision was properly before the Arbitrator because the Agency argued that the Arbitrator should treat the Union’s grievance as a challenge to that decision. *See* Opp’n at 6. The Agency further asserts that the Arbitrator’s decision to consider the August 24 decision was a procedural arbitrability determination, and, as such, the Union’s exception must be denied because it directly challenges this determination. *See id.* at 6-7. The Agency also counters the Union’s claim that the Arbitrator created a new charge of hiding work. The Agency argues that, contrary to the Union’s contention, the Arbitrator’s determination that the grievant hid files was merely one of the findings on which the Arbitrator relied to conclude that discipline was warranted. *See id.* at 7-10.

The Agency further argues that the Arbitrator did not exceed his authority. The Agency contends that, in the absence of any stipulated issues, the Arbitrator was permitted to frame the issues for resolution. As such, the Agency asserts that it was appropriate for the Arbitrator to rule on which decision — if any — was before him for consideration because one of the issues he framed for resolution was whether the grievance was arbitrable. *See id.* at 12. The Agency further argues that the Arbitrator was not required to resolve the Union’s claim that it was entitled to relief as a result of the Agency’s withdrawal of the August 1 decision because this claim was not one of the issues that he had framed for resolution. *See id.* at 12-13. Further, the Agency

1. Article 24, Section 9, “Procedures for Employee Grievances,” provides, in relevant part, that the Agency “will either grant, partially grant, or deny the relief sought” by the Union in its grievances. Exceptions at 6.

2. Article 25, Section 6, “Effect of Arbitrator’s Award,” provides: “[t]he arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any terms of this agreement.” Opp’n, Attach. L at 2.

alleges that the Arbitrator did not disregard specific limits on his authority when he considered the August 24 decision because that decision was within the scope of the issue that he had framed for resolution. *See id.* at 13-14.

The Agency also asserts that the Arbitrator's award draws its essence from the parties' agreement because the Agency's withdrawal of the August 1 decision partially granted the Union relief. *See id.* at 15-16. Additionally, the Agency contends that nothing in the parties' agreement prohibited the Agency from withdrawing the August 1 decision and replacing it with the August 24 decision. *See id.* at 16. Further, the Agency argues that the Union's claim that the Arbitrator failed to interpret properly the parties' agreement is simply a restatement of its essence argument, and should similarly be denied. *See id.* at 18-20.

Finally, the Agency asserts that the Union's disagreement with the Arbitrator's evaluation of the testimony and evidence does not provide a basis for finding the award deficient. *See id.* at 20-22.

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union asserts that the award is 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.*

The Union first contends that the award is based on a nonfact because it is based on the August 24 decision, which, according to the Union, was not before the Arbitrator. This argument is a direct challenge to the Arbitrator's resolution of the threshold procedural arbitrability issue. *Bremerton Metal Trades Council*, 59 FLRA 583, 589 (2004) (construing party's nonfact exception as a challenge to arbitrator's procedural arbitrability determination). As such, it does not provide a basis for finding the Arbitrator's determination deficient. *See, e.g., AFGF, Local 3882*, 59 FLRA 469, 470 (2003) (stating that the Authority generally will not find an arbitrator's ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the ruling itself).

The Union also asserts that the award is based on a nonfact because the Arbitrator created the charge of "hiding work" to sustain the Agency's disciplinary action. Exceptions at 3. In his award, the Arbitrator found that the Agency had just cause to suspend the grievant because her decision to hide files from her supervisor was an act of dishonesty. *See Award* at 6. Contrary to the Union's assertion, however, the Arbitrator did not consider the action of hiding files to be a separate charge; rather, the Arbitrator merely relied on this finding to support his conclusion that the grievant's conduct warranted discipline. Consequently, as the Union has not shown that the award is based on an erroneous central fact, the Union has failed to establish that the award is based on a nonfact. *See, e.g., AFGF, Local 3495*, 60 FLRA 509, 512 (2004) (award was not based on nonfact where union failed to establish that arbitrator equated grievant's charged conduct with a different type of misconduct).

Accordingly, we find that the award is not based on a nonfact.

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

The Union contends that the award fails to draw its essence from the parties' agreement because it was based on the August 24 decision. Like the nonfact argument discussed above, this argument is a direct challenge to the Arbitrator's procedural arbitrability issue. *See, e.g., U.S. Dep't of the Navy, Naval Undersea Warfare Ctr., Div. Newport, Newport, R.I.*, 63 FLRA 222, 224 (2009) (party's essence challenge was direct challenge to procedural arbitrability determination). As such, it too provides no basis for finding the Arbitrator's determination deficient. *See id.*

Accordingly, we find that the award does not fail to draw its essence from the parties' agreement.

C. The Arbitrator did not exceed his authority.

The Union also contends that the Arbitrator exceeded his authority. An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to persons who are not encompassed within the grievance. *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 Air Force*, 61 FLRA 797, 801 (2006).

The Union first contends that the Arbitrator exceeded his authority because he failed to resolve an issue that the Union contends was submitted to arbitration — specifically, whether the grievant was entitled to any relief due to the Agency’s withdrawal of the August 1 decision. *See* Exceptions at 4-5. In the absence of a stipulation, however, an arbitrator is only required to address and resolve the issues that he or she framed for resolution. *See, e.g., AFGE, Local 3957, Council of Prisons Locals*, 61 FLRA 841, 843 (2006) (arbitrator was not required to resolve an issue raised by a party where it was not included in the issues he framed for resolution). Because the parties could not agree on the issues to be resolved, the Arbitrator framed two issues for resolution: whether the August 6 grievance was arbitrable and whether the discipline was appropriate. Whether the Union was entitled to any relief as a result of the Agency’s withdrawal of the August 1 decision was not an issue that the Arbitrator framed for resolution; therefore, it was not an issue that he was required to resolve. Accordingly, he did not exceed his authority by failing to do so. *See id.*

Second, the Union contends that the Arbitrator exceeded his authority by considering the August 24 decision, which the Union argues was not properly before him. Although the Authority generally will not find an arbitrator’s ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the ruling itself, the Authority has held that a party may challenge such a determination on the basis that the arbitrator exceeded his or her authority. *See, e.g., AFGE, Local 3882*, 59 FLRA 469, 470 (2003). As stated above, one of the issues that the Arbitrator framed for resolution was whether the grievance was arbitrable. *See* Award at 2. To make that determination, the Arbitrator had to determine whether any of the Agency’s decisions to suspend the grievant were properly before him. Based on this framed issue, the Arbitrator found that the Union’s grievance was arbitrable as a challenge to the August 24 decision. Consequently, the Arbitrator’s finding is directly responsive to the issue that he framed, and the Union has failed to demonstrate that the Arbitrator exceeded his authority. *See, e.g., AFGE, Local 2145*, 63 FLRA 78, 80 (2009) (arbitrator did not exceed his authority where award was directly responsive to issues he framed).

Finally, the Union contends that the Arbitrator exceeded his authority by “disregarding specific limits on his authority.” Exceptions at 5. According to the Union, by considering the August 24 decision rather than the August 1 decision, the Arbitrator exceeded his authority under Article 25, Section 6 of the parties’

agreement by impermissibly adding to, altering, or modifying the agreement. *Id.* The Arbitrator determined that the Agency was permitted to withdraw the August 1 decision and replace it with the August 24 decision because: (1) the Agency had not withdrawn the July 7 proposal; (2) the August 24 decision merely corrected minor procedural errors in the August 1 decision; and (3) the substantive facts and charges in both decisions remained the same. The Union has not cited any portion of the parties’ agreement that prevents the Agency from withdrawing disciplinary decisions to correct procedural errors. Consequently, the Union has not established that the Arbitrator disregarded specific limitations on his authority. *See SSA, 57 FLRA 530, 537* (2001) (as arbitrator did nothing more than interpret parties’ agreement in accordance with issues before him, arbitrator did not disregard specific limitations on his authority).

Based on the foregoing, we find that the Arbitrator did not exceed his authority.³

D. The Arbitrator did not fail to conduct a fair hearing.

The Union also asserts that the award conflicts with the evidence and testimony concerning how the Agency must address arbitrability issues and what actions the Agency must take before it proposes a short-term suspension. We construe this assertion as a claim that the Arbitrator failed to provide the Union a fair hearing. *See, e.g., U.S. Dep’t of Veterans Affairs, Veterans Affairs Med. Ctr., Louisville, Ky.*, 64 FLRA 70, 72 (2009) (Member DuBester not participating) (VAMC). The Authority will find an award deficient on the ground that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole. *See AFGE, Local 1668*, 50 FLRA 124, 126 (1995).

3. The Union also argues that the award fails to draw its essence from the parties’ agreement because the Arbitrator did not address whether the Union was entitled to relief due to the Agency’s withdrawal of the August 1 decision. *See* Exceptions at 6-7. Relatedly, the Union contends that the award “does not represent a plausible interpretation of the agreement.” *Id.* at 7-8. These contentions raise the same issues as the Union’s claims that the Arbitrator exceeded his authority. Accordingly, we do not address these claims separately. *See SSA, Balt., Md.*, 57 FLRA 690, 693 n.6 (2002) (as agency’s claim that arbitrator exceeded his authority did nothing more than restate its essence claim, Authority did not address claims separately).

The Union's assertions take issue with the Arbitrator's evaluation of the evidence and his determination of the weight to be accorded such evidence. As set forth above, disagreements with an arbitrator's findings of fact and evaluation of the evidence and testimony, including the credibility of witnesses and the weight given their testimony, do not establish that an award is deficient. *See VAMC*, 64 FLRA at 72.

Accordingly, we find that the Arbitrator did not fail to conduct a fair hearing and deny the Union's exception.

V. Decision

The exceptions are denied.