

64 FLRA No. 112

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
RICHMOND, VIRGINIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

0-AR-4383

—————
DECISION

March 29, 2010

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 Martha R. Cooper filed by the Agency under § 7122 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.

The Arbitrator found that the Union's grievance was timely filed and that the Agency improperly failed to comply with a previous arbitration award. For the reasons discussed below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Union filed a grievance that claimed that the Agency failed to distribute overtime in accordance with the parties' agreement. *See* Award at 2, 10. In April 2006, Arbitrator Michael J. Pecklers issued an award (Pecklers Award) that sustained the grievance.¹ Pecklers Award at 28. As the amount of the Agency's back pay liability was unclear from the record, Arbitrator Pecklers remanded the matter to the parties to determine precisely how much money the Agency owed to the employees on whose behalf the grievance was filed. Award at 10, 13. Arbitrator Pecklers retained jurisdic-

tion over the matter for ninety days, which he said could be extended at either party's request. *See id.* at 14. Neither party sought to extend Arbitrator Pecklers' jurisdiction within ninety days. *See id.*

However, during that ninety-day period — specifically, on May 16 — the Agency filed exceptions to the Pecklers Award. *Id.* at 10. On June 2, also during the ninety-day period, the Authority issued an Order to Show Cause why the Agency's exceptions should not be dismissed as interlocutory. *Id.* at 10-11. The Agency did not respond to the Order to Show Cause, and the Authority subsequently dismissed the Agency's exceptions “without prejudice to the timely filing of exceptions after the arbitrator renders a final award.” *Id.* at 11 (quoting Authority's Order Dismissing Exceptions).

In October, after Arbitrator Pecklers' ninety-day retention of jurisdiction ended, the parties met to determine an appropriate remedy under the Pecklers Award. *Id.* After a meeting on October 25, the Union concluded that further discussions with the Agency would not be productive. *See id.* at 12. On November 15, the Union filed a grievance to enforce the Pecklers Award, and the parties selected Arbitrator Cooper — the Arbitrator whose award is at issue here — to resolve the grievance. *See id.* at 1-2, 12. As relevant here, the parties stipulated to the following issues: “Was the grievance timely filed by the Union? If so, did the Agency violate Arbitrator . . . Pecklers' decision[?]” *Id.* at 3.

The Arbitrator found that the contractual thirty-day time period for filing a grievance did not start to run until the Union determined, after the October 25 meeting with the Agency, that further discussions with the Agency would not be productive. *See id.* at 12. As the Union filed its grievance within thirty days of that meeting, the Arbitrator found that the grievance was timely. *See id.*

With regard to the merits of the grievance, the Arbitrator found that the Pecklers Award was binding on the Agency. *See id.* at 14-15. In this regard, the Arbitrator determined:

Arbitrator Pecklers' decision imposes an enforceable obligation on the [Agency], even though he . . . was *functus officio* as of the 91st day following the date that he issued. The FLRA's decision to dismiss the Agency's exceptions as interlocutory . . . provides no support for the [Agency's] position that Arbitrator Pecklers' decision is not final or binding as of the date of

1. All of the dates discussed hereinafter are from 2006.

this arbitration decision or as of the date that this grievance was filed.

Id. at 14-15.

The Arbitrator concluded that the Agency failed to compensate the employees who were entitled to back pay under the Pecklers Award and, thus, violated the award. *See id.* at 19-20. Pursuant to the guidelines set forth in the Pecklers Award, the Arbitrator directed the Agency to pay two employees back pay. *See id.* at 16-20.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the Arbitrator erred by finding that the Union timely filed its grievance. *See* Exceptions at 5-7. In this regard, the Agency claims that the contractual thirty-day filing period began to run on September 26, when the Agency informed the Union that the Agency had no obligation to comply with the Pecklers Award. *See id.* at 5-6. As the Union did not file its grievance within thirty days of this date, the Agency asserts that the grievance was untimely. *See id.* at 5-7. Further, the Agency claims that the record does not support the Arbitrator's determination that the parties were working to resolve the matter through October. *See id.* at 6.

On the merits, the Agency claims that the Arbitrator's finding that the Pecklers Award is binding upon the Agency is contrary to law. *See id.* at 7. In this regard, the Agency asserts that the Authority's Order to Show Cause, and Order Dismissing Exceptions, which dismissed the Agency's exceptions as interlocutory, indicate that the Pecklers Award was not final and binding on the Agency because the Pecklers Award did not contain a remedy. *See id.* The Agency argues that, as the parties did not subsequently determine a remedy in accordance with the Pecklers Award, the Pecklers Award did not become final and binding upon the Agency. *See id.* at 7-8. According to the Agency, the Union relinquished its ability to enforce the Pecklers Award by failing to timely request that Arbitrator Pecklers extend his jurisdiction. *See id.* at 9.

B. Union's Opposition

With regard to the Agency's argument on timeliness, the Union contends that the Agency "fails to identify any grounds for . . . review of this issue[.]" Opp'n at 4. With regard to the Agency's argument on the mer-

its, the Union claims that the Arbitrator "correctly found that the [Peckler Award] did create a binding obligation on the [A]gency." *Id.* The Union argues that there is "no reason to consider a failure of the Union to ask Arbitrator Pecklers to retain jurisdiction as a waiver on the merits[.]" *id.* at 5, and asserts that the Pecklers Award "ceased to be interlocutory once [Pecklers'] jurisdiction expired[.]" *Id.* at 6.

IV. Analysis and Conclusions

A. The Arbitrator's procedural-arbitrability determination is not deficient.

The Agency contends that the Arbitrator erred by finding that the Union timely filed its grievance. An arbitrator's determination regarding the timeliness of a grievance constitutes a determination regarding the procedural arbitrability of that grievance. *United Power Trades Org.*, 63 FLRA 208, 209 (2009). 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. *Id.* Here, the Arbitrator found that the Union's grievance was timely filed, and the Agency directly challenges this finding. *See U.S. Dep't of Homeland Sec., U.S. Customs and Border Prot., U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 122, 124 (2005). Therefore, we deny the Agency's exception as a direct challenge to the Arbitrator's finding of procedural arbitrability.

B. The award is not contrary to law.

The Agency claims that the Arbitrator's determination that the Pecklers Award is binding on the Agency is contrary to law. When a party's exception challenges an arbitration award's consistency with law, the Authority reviews the questions of law raised in the exception and the arbitrator's award *de novo*. *Soc. Sec. Admin. Headquarters, Balt., Md.*, 57 FLRA 459, 460 (2001). In applying the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable legal standard. *See U.S. Dep't of Def., Dep'ts of the Army and the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *Id.*

When a party fails to provide any arguments or authority to support its exception, the Authority will deny the exception as a bare assertion. *See U.S. Dep't of Homeland Sec., U.S. Customs and Border Prot., Port of*

Seattle, Seattle, Wash., 60 FLRA 490, 492 n.7 (2004). The Agency's contrary-to-law exception neither cites any law nor explains why the Arbitrator's determination that the Pecklers Award was binding on the Agency is contrary to law. Accordingly, we deny the exception as a bare assertion.²

V. Decision

The Agency's exceptions are denied.

2. We note that the Authority has held that "an arbitrator has the discretion to decide that an earlier award is binding[.]" and that the Authority accords deference to such a determination because the arbitrator is "making determinations that constitute factual findings and reasoning to which the Authority normally accords deference." *AFGE, Local 2459*, 51 FLRA 1602, 1606-07 (1996). Our denial of the contrary-to-law exception is consistent with these principles.