64 FLRA No. 130

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 11
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY TRANSPORTATION CENTER
FORT EUSTIS, VIRGINIA
(Agency)

0-AR-4442

DECISION

April 28, 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 Jonathan E. Kaufmann 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 found that the Agency violated the parties' agreement by failing to convert certain flexible (FLEX) employees to regular appointments, but he limited the award to cover only employees in FLEX status on the date that the grievance was filed. He also divided the costs of arbitration between the parties.

For the reasons that follow, we deny the exceptions.

II. Background and Arbitrator's Award

The Union filed individual and class grievances alleging that the Agency's practice of requiring FLEX employees to serve two years before converting them to regular appointments violated Article 22, § 3 of the parties' agreement. [1] *See* Award at 1, 4-5. The grievances were unresolved and submitted to arbitration, where, as relevant here, the Arbitrator framed the following issues:

> If the grievance[s were] timely and properly filed, did the Union establish that the Agency violated Article 22 of the CBA?
>
> If the Union [establishes that the Agency violated Article 22], what is the appropriate remedy?

Id. at 3.

The Arbitrator found that the "Agency violated the agreement when it left employees in a FLEX status after their first year of employment," where those employees were otherwise entitled to a conversion to a regular appointment. *Id.* at 7, 10. Consequently, as to those employees who were being improperly denied a conversion on the date that the class grievance was filed, the Arbitrator found that the Agency committed continuing violations that rendered the grievance timely. *See id.* at 7, 9.

However, the Arbitrator found that, on several previous occasions, the Union and its predecessor had grieved the Agency's failure to convert FLEX employees to regular appointments but had chosen not to pursue the issue to arbitration. *See id.* at 9. In light of this unexplained delay by the Union, [2] the Arbitrator determined that management should not be "forc[ed] . . . to go back in time and attempt to determine the status of FLEX employees before the filing of these grievances." *Id.* Accordingly, the Arbitrator rejected the Union's request to provide remedies under the Back Pay Act for a period of six years preceding the grievances and, instead, limited his award of backpay and benefits retroactive to the filing dates of the grievances, but not before those dates. *Id.* at 9-10.

In conclusion, the Arbitrator determined that the grievance should be "sustained in part and denied in part," and he equally divided the arbitration costs between the parties. *Id.* at 10.

1. Article 22, § of the parties' agreement provides, in pertinent part: "[T]he [Agency] agrees to limit FLEX appointments to permanent, continuing Regular . . . positions to one year; after which the incumbent FLEX employee will be converted to a Regular appointment or allowed to compete for the position[.]" Award at 2.

2. "The [u]nion['s] Chief Negotiator testified . . . that he continually urged [the Union and its predecessor] to pursue these claims[on behalf of FLEX employees denied conversions, and h]e was not sure why" they did not. *Id.* at 8.

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that the award is contrary to the Back Pay Act because the Arbitrator "erroneously limited the relief to which the Union was entitled[.]" Exceptions at 1. Specifically, the Union argues that the Arbitrator should have granted relief for a period of six years prior to the filing of the grievances because the Back Pay Act's statute of limitations is six years. [3] *Id.* at 4. By limiting the award to a shorter period, the Union contends that the Arbitrator violated the Act. For support the Union cites: *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *Karahalios v. NFFE, Local 1263*, 489 U.S. 527, 536 (1989); *Acton v. U.S.*, 932 F.2d 1464, 1466 (Fed. Cir. 1991) (*Acton*); *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 811 (1990)).

In addition, according to the Union, the parties' agreement requires that the losing party pay for all arbitration costs. Exceptions at 5-6 (citing Article 40, § 2 of the agreement). [4] The Union contends, in this regard, that the Agency was the "losing party" at arbitration and that the Arbitrator's allegedly improper failure to award the Union all of its requested remedies resulted in wrongly denying the Union the status of "prevailing party" under the agreement. Exceptions at 5. Therefore, the Union contends that it should be recognized as the "prevailing party" and that the Agency should be assessed all costs. *Id.*

B. Agency's Opposition

According to the Agency, the Authority has rejected the argument that the Back Pay Act renders timely any backpay grievance filed within six years of the grievable event. *See* Opp'n at 4-6 (citing *AFGE, Council of Prison Locals, Local 3977*, 62 FLRA 41 (2007); *AFGE, Local 933*, 58 FLRA 480 (2003) (*Local 933*); *AFGE, Local 916*, 47 FLRA 165 (1993) (*Local 916*)). The Agency contends that the Arbitrator's decision limiting the coverage of the grievance is consistent with the Back Pay Act and that, therefore, the Union is making an impermissible direct challenge to a procedural-arbitrability determination. *See id.*

Regarding arbitration costs, the Agency contends that the exception should not be considered because it fails to comply with § 2425.2(c) of the Authority's Regulations. [5] *See id.* at 6. In this regard, the Agency notes that the exception cites Article 40, § 2 from the parties' agreement, which the Agency claims does not concern arbitration costs. Moreover, the Agency contends that, even under Article 40, § 3, which concerns the division of arbitration costs, the Arbitrator was responsible for designating the losing party, and as neither party was so designated, costs were properly divided. [6] *Id.* at 7-8. The Agency argues further that the Union was not the prevailing party at arbitration. *Id.*

IV. Analysis and Conclusions

A. The award is not contrary to the Back Pay Act.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *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)). In applying the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & 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. *See id.*

It is unclear which of the Arbitrator's backpay determinations the Union is contesting in its contrary-to-law exceptions – the finding that the class grievance was timely only as to employees improperly retained in FLEX status at the time of the grievance's filing, the starting date for backpay calculations, or both. As the exceptions can be fairly construed to contest both of these determinations, we address them both.

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3. The Back Pay Act provides, in pertinent part:

> The pay, allowances, or differentials granted under this section for the period for which an unjustified or unwarranted personnel action was in effect shall not exceed that authorized by the applicable law, rule, regulations, or collective bargaining agreement under which the unjustified or unwarranted personnel action is found, except that in no case may pay, allowances, or differentials be granted under this section for a period beginning more than 6 years before the date of the filing of a timely appeal or, absent such filing, the date of the administrative determination.

5 U.S.C. § 5596(b)(4).

4. *See infra* Part IV.B. regarding the Union's citation of § of Article 40, rather than §

5. The relevant language of § 2425.2(c) is set forth *infra* Part IV.B.

6. The pertinent language of Article 40, § 3 is set forth *infra* Part IV.B.

With regard to the Arbitrator's timeliness determination, an arbitrator's finding on the timeliness of a grievance constitutes a procedural-arbitrability determination, which may be found deficient only on grounds that do not challenge the determination itself. *NFFE, Local 422*, 56 FLRA 586, 587 (2000); *AFGE, Local 2921*, 50 FLRA 184, 185-86 (1995); *Nat'l Gallery of Art, Wash., D.C.*, 48 FLRA 841, 845 (1993) (*Nat'l Gallery of Art*). The grounds on which such an award may be found deficient include arbitrator bias or an arbitrator exceeding his or her authority. *See id.*; *U.S. Dep't of the Army, Aviation Ctr., Fort Rucker, Ala.*, 39 FLRA 1113, 1115 (1991). In addition, the Authority has resolved the merits of contrary-to-law exceptions that challenge procedural-arbitrability determinations. *Id.* This approach recognizes that statutory, procedural requirements may apply to negotiated grievance procedures and that a statute could establish a filing period for grievances. *See U.S. DHS, U.S. Customs & Border Prot., U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 122, 124 (2005). However, the Authority has also found that the "Back Pay Act does not, implicitly or explicitly, establish a filing period for negotiated grievance procedures." *Local 933*, 58 FLRA at 482.

The Union's exception effectively challenges the Arbitrator's procedural-arbitrability determination. Consistent with *Local 933*, we find that the only law cited by the Union – the Back Pay Act – does not establish a filing period for grievances. As such, the exception does provide a basis for finding the award contrary to law, and we deny this exception.

With regard to the award's limitation of the backpay-recovery period, it is well established that arbitrators have broad authority and discretion to fashion remedies. *See, e.g., U.S. Dep't of the Air Force, Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 47 FLRA 98, 101 (1993). In particular, the Authority has held that the Back Pay Act's six-year statute of limitations does not require an arbitrator to award backpay for a period of six years. *Nat'l Gallery of Art,* 48 FLRA at 846; *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 819, 829 (1993) (*SSA, Balt., Md.*) ("Nothing in the Back Pay Act limits the period of time for which an award of backpay can be made.").

The Union cites *Acton* for the proposition that a decision-making authority "must use the statutory source of entitlement to . . . backpay to determine the statute of limitations [for a backpay claim.]" Exceptions at 3. However, *Acton* is inapposite here because the Arbitrator was fashioning a *remedy* for a successfully grieved claim under the Back Pay Act – *not determining* whether the Union's claim was made within the Back Pay Act's *statute of limitations*. *See Acton*, 932 F.2d at 1465. The Union's reliance on *Carter* is also misplaced. *Carter* involved the Fair Labor Standards Act (FLSA), and the framework for determining an appropriate recovery period under the FLSA differs from the standard that applies to Back Pay Act awards. In particular, FLSA precedent clearly holds that recovery periods are substantive legal matters, whereas Back Pay Act recovery periods are within the discretion of arbitrators, as long as awards do not exceed the maximum recovery authorized by law. *Compare AFGE, Local 1741*, 62 FLRA 113, 117-18 (2007) (FLSA recovery period), *with SSA, Balt., Md.*, 47 FLRA at 829 (Back Pay Act recovery period), *and Allen Park Veterans Admin. Med Ctr.*, 34 FLRA 1091, 1103 (1990) (same).

The other decisions cited by the Union also fail to support its exception: *Gilmer* established that a party at arbitration retains substantive statutory rights, but the Union has no substantive right to a six-year recovery period under the Back Pay Act; *Mitsubishi* held that parties will be bound to an agreement to arbitrate statutory claims, which undercuts the Union's argument for setting aside the Arbitrator's remedy-period determination; *Karahalios* affirmed that collective bargaining agreements do not divest employees of other statutory or regulatory remedies to which they are entitled, but limiting backpay recovery to a period of less than six years does not deny the Union a remedy to which it is entitled by either statute or regulation.

For the foregoing reasons, we deny this exception.

B. The division of arbitration costs does not fail to draw its essence from the parties' agreement.

The Agency claims that the Union's exception that all arbitration costs should have been assessed to the Agency fails to comply with § 2425.2(c) of the Authority's Regulations because it cites a provision of the parties' agreement that does not involve assessing arbitration costs. Section 2425.2 provides, in pertinent part, "An exception must be a dated, self-contained document which sets forth in full . . . (c) [a]rguments in support of the stated grounds, together with specific reference to the pertinent documents and citations of authorities . . . ." *Id.* The Authority generally does not "dismiss filings on the basis of minor deficiencies where the deficiencies did not impede the opposing party's ability to respond." *AFGE, Council 163*, 54 FLRA 880, 885 (1998). It appears that the Union inadvertently cited Article 40, § 2, which involves a fee for the services of the Federal Mediation and Conciliation Service, instead of Article 40, § 3, which involves assessing arbitration costs to the parties. This error clearly did not

impede the Agency's ability to respond because the Agency recognized that the applicable contract provision was Article 40, § 3, and it challenged the Union's assertions in detail. Therefore, we find that the exception is not procedurally deficient under § 2425.2(c).

As to the merits of the exception, we construe it to allege that the award fails to draw its essence from the parties' agreement. 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. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement 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) (*OSHA*). 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." *Id.* at 576.

Article 40, § 3 provides, in pertinent part: "The fee and expense, if any, of the arbitrator shall be borne by the losing party. The [a]rbitrator shall determine the losing party. If there is a split decision in which neither party can be designated as the losing party, the costs shall be borne equally." Opp'n at 6. The Arbitrator denied the grievance in part and sustained it in part, and he did not designate the Union as the "prevailing party" or the Agency as the "losing party." In addition, as we discussed above, we have found that the Arbitrator's limitation of the scope of the class grievance and his determination of the backpay-recovery period do not render the award deficient. Thus, there is no basis for the Union's claim that the Arbitrator erred by failing to designate the Union as the "prevailing party." Exceptions at 5. For these reasons, the Union has failed to establish that the division of costs is irrational, unfounded, implausible, or in manifest disregard of the agreement, and we deny this exception.

V. Decision

The exceptions are denied.