

64 FLRA No. 133

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 53
(Union)

0-AR-4294

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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 Marilyn H. Zuckerman 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.

The Arbitrator concluded that the Agency violated the parties' collective bargaining agreement (CBA) by finding the grievant negligent for losing, and directing her to repay, money that she lost in the course of her duties. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievant is a tax resolution representative who is responsible for converting cash received from taxpayers to money orders. One day, she mistakenly exchanged \$3,000 in cash for \$2,000 in money orders, and she did not recover the remaining \$1,000. The Agency proposed to reprimand her for "carelessness in performance of duty for failure to safeguard funds." Award at 5. In resolution of the proposed reprimand, the Agency, the Union, and the grievant entered into an alternative discipline agreement (ADA) pursuant to the CBA. Under the ADA, the grievant acknowledged that she had been careless, and the Agency placed a letter of counseling in her discipline file. In addition, "Agency

management told [the grievant] that the matter was over[,] that she would not have to repay the money lost and . . . that the [ADA] fully resolved the matter." *Id.*

Subsequently, the Agency notified the grievant that she had been found negligent under the definition of "negligence in the Internal Revenue Manual [IRM.]"¹ *Id.* at 6. Accordingly, the Agency provided her with a notice and demand pursuant to 26 U.S.C. § 7804(c)² to repay the lost money with interest. The grievant made several payments, but did not repay the entire amount. *Id.* at 6-7.

The grievant filed a grievance over the demand, which the Agency denied on the basis that the IRM, not the CBA, governed determinations of negligence. The grievance was not resolved and was submitted to arbitration, where the parties were unable to stipulate the issues. The Arbitrator framed the issue, in pertinent part, as "[w]hat shall be the disposition of the grievance?"³ *Id.* at 8.

The Arbitrator found that the ADA precluded the Agency from recouping the lost funds. *Id.* at 25. In the Arbitrator's view, the ADA determined that the grievant was "careless and not negligent," and finally resolved all issues as to the grievant's failure to safeguard funds. *Id.* at 28. She also determined that, in finding the grievant negligent under the IRM, the Agency failed to follow the procedures required by the CBA and improperly attempted to obtain "two bites at the apple." *Id.* at 26, 29. She further found that, under the CBA, when provisions of the IRM are in "specific conflict" with the CBA, the CBA "govern[s]." *Id.* at 23-24. For these reasons, the Arbitrator concluded that the Agency's finding of negligence under the IRM violated the CBA. *Id.* at 25. Accordingly, she sustained the grievance and ordered the Agency to rescind the finding of negligence and "repay the [g]rievant the total amount that she was forced to repay the Agency with interest." *Id.* at 25, 31.

1. IRM 3.0.167.5.3 requires that a finding of negligence be based on a standard of "reasonable care," which is defined as "a standard of simple or ordinary negligence, not gross negligence." Award at 21.

2. Section 7804(c) provides, in pertinent part, that if an Agency employee "fails to account for and pay over any amount of money . . . collected . . . , the Secretary shall issue notice and demand . . . for payment of th[at] amount[.]"

3. The Arbitrator also resolved an issue of arbitrability, which is not in dispute here.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is based on a nonfact because the Arbitrator erred in finding that the CBA governs the determination of whether the grievant was negligent. Exceptions at 9. In this regard, the Agency asserts that there is no provision in the CBA that discusses the recoupment of funds under § 7804(c) and the standard to be applied. *Id.* Similarly, the Agency argues that the award is contrary to *U.S. Department of the Army, Blue Grass Army Depot, Lexington, Kentucky*, 41 FLRA 1206 (1991) (*Blue Grass Army Depot*). Specifically, the Agency claims that *Blue Grass Army Depot* requires that a collective bargaining agreement must address recoupment for that agreement to govern over an agency regulation, and, in this case, the CBA does not address recoupment. *Id.* at 11.

The Agency also contends that the award is contrary to the IRM. *Id.* at 14. The Agency reiterates its argument that the IRM negligence standard governs over the CBA and asserts that the Arbitrator's determination that the grievant was not negligent is contrary to the IRM standard. *Id.* at 15.

B. Union's Opposition

The Union contends that the exceptions should be dismissed for lack of jurisdiction because the award relates to a reduction in pay, which is a matter described in § 7121(f) of the Statute over which the Authority lacks jurisdiction under § 7122(a) of the Statute. Opp'n at 14-15.

The Union also contends that the award is based on the Arbitrator's interpretation of the CBA and that the Agency's disagreement with that interpretation fails to establish that the award is based on a nonfact or conflicts with *Blue Grass Army Depot*. *Id.* at 7-12. The Union further argues that, as the Arbitrator interpreted the CBA to govern over the IRM, any alleged conflict of the award with the IRM does not provide a basis for finding the award deficient. *Id.* at 14.

IV. Analysis and Conclusions

A. The Authority has jurisdiction to resolve the exceptions.

Under § 7122(a) of the Statute, the Authority lacks jurisdiction to resolve exceptions to an award "relating to a matter described in § 7121(f)" of the Statute. 5 U.S.C. § 7122(a). As relevant here, the matters described in § 7121(f) include matters covered under 5 U.S.C. § 7512. In turn, § 7512 covers, as relevant

here, "reduction[s] in pay[.]"⁴ 5 U.S.C. § 7512(4). For purposes of § 7512, "pay" is defined as "the rate of basic pay fixed by law or administrative action for the position held by an employee[.]" 5 U.S.C. § 7511(a)(4). Accordingly, for a reduction in pay to be covered under § 7512, the pay reduction must be in the employee's basic pay. *U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin.*, 58 FLRA 333, 336 (2003).

It is not disputed that the recoupment did not affect the grievant's basic pay. Consequently, the award does not relate to a reduction in pay covered under § 7512. Thus, the award does not relate to a matter described in § 7121(f), and we have jurisdiction to resolve the Agency's exceptions. *See id.; Veterans Admin. Reg'l Office*, 30 FLRA 3, 4 (1987).

B. The award is not based on nonfacts.

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. *E.g., U.S. Dep't of the Treasury, IRS, Ogden Serv. Ctr., Ogden, Utah*, 64 FLRA 65, 68 (2009). However, an arbitrator's interpretation of a collective bargaining agreement does not constitute a fact that can be challenged as a nonfact. *Id.*

The finding alleged by the Agency to be a nonfact constitutes the Arbitrator's interpretation of the CBA to conclude that, consistent with the ADA, the CBA precluded the Agency from recouping the lost funds. As the alleged nonfact constitutes the Arbitrator's interpretation of the CBA, the Agency provides no basis for finding the award based on a nonfact. *See id.* Accordingly, we deny this exception.

C. The award is not contrary to Authority precedent, and the IRM provides no basis for finding the award deficient.

The Agency contends that the award is contrary to *Blue Grass Army Depot* because the Arbitrator erroneously found that the CBA governed the disposition of the grievance. Exceptions contending that an award is contrary to Authority precedent are reviewed as contrary-to-law exceptions. *See, e.g., U.S. Dep't of the Treasury, IRS, Nat'l Distribution Ctr., Bloomington, Ill.*, 64 FLRA 586, 592 (2010). As such, the Authority reviews the award *de novo*. In applying a *de novo* standard of review, the Authority assesses whether the arbi-

4. Section 7512 also covers "removal[s,]" "suspension[s] for more than 14 days[,]" "reduction[s] in grade" and "furlough[s] of 30 days or less[.]"

trator's legal conclusions are consistent with the applicable standard of law. *Id.*

In *Blue Grass Army Depot*, the Authority reiterated that a collective bargaining agreement, rather than an agency regulation, governs the disposition of a matter to which they both apply. 41 FLRA at 1209-10. With respect to the award under review in that case, the Authority deferred to the arbitrator's interpretation of the collective bargaining agreement as governing the disposition of the disputed matter and denied the agency's exception contending that the award was contrary to an agency regulation that allegedly covered the disputed matter. *Id.* at 1210.

Similarly, here, the Arbitrator found that the CBA governed the disposition of the grievance. The Agency does not contend that the Arbitrator's interpretation of the CBA fails to draw its essence from the CBA, and we have found that its nonfact exception provides no basis for finding the interpretation deficient. As the Agency provides no basis for finding deficient the Arbitrator's interpretation of the CBA as governing the matter in dispute, we defer to that interpretation and find that the award is consistent with *Blue Grass Army Depot*. For the same reasons, the Agency's alleged inconsistency between the award and the IRM provides no basis for finding the award deficient. *AFGE, Local 1658*, 61 FLRA 80, 82 (2005) (Chairman Cabaniss concurring as to another matter); *Blue Grass Army Depot*, 41 FLRA at 1210. Accordingly, we deny these exceptions.

V. Decision

The Agency's exceptions are denied.