64 FLRA No. 199

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL UNDERSEA
WARFARE CENTER DIVISION
NEWPORT, RHODE ISLAND
(Agency)

and

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R1-134
FEDERAL UNION
OF SCIENTISTS AND ENGINEERS
LOCAL R1-144
(Unions)

0-AR-4405

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DECISION

July 29, 2010

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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 Jerome H. Wolfson 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 filed by the Agency. The Federal Union of Scientists, Local R1-144 and Engineers (FUSE) and the National Association of Government Employees, Local R1-134 (NAGE) (hereinafter "the Unions"), did not file an opposition to the Agency's exceptions.

The Arbitrator found that the Agency improperly failed to bargain with the Unions before removing Agency-purchased bottled water from its buildings. For the reasons that follow, we deny the Agency's exceptions.

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

II. Background and Arbitrator's Award

In the mid-1990s, the Environmental Protection Agency published a list of water fountains that were manufactured with lead-contaminated components, including water fountains in various Agency buildings. Award at 3. The Agency used appropriated funds to purchase and provide bottled water to buildings that contained lead-contaminated water fountains. *Id.* Over time, the Agency also began to provide bottled water to some buildings that did not contain lead-contaminated fountains, and the Agency also began to replace lead-contaminated fountains with lead-free fountains. *Id.* After July of 2006,[2] the Agency tested fountains for lead and determined that water from the fountains was safe for drinking. *Id.* at 7

On November 28 and December 1, the Agency met with FUSE and NAGE, and notified them that it no longer would supply bottled water and would not replace the existing supply when it ran out. *Id.* at 2. On December 18, the Agency notified the Unions that bottled water no longer was available. Id. FUSE filed a grievance on December 22, and NAGE filed a grievance on December 29. *Id.* The grievances alleged that the Agency violated "the [c]ollective [b]argaining [a]greement between the bargaining units and the [Agency] by removing, and failing to replace, bottled water without first negotiating with the Unions. *Id.* When the grievances were not resolved, they were submitted to arbitration. *Id.* at 1. The Arbitrator did not state the issues to be resolved.

Before the Arbitrator, the Agency argued that the grievances were not timely based on Article 28, Section 7 of the NAGE agreement[3] and Sections 11

2. All dates herein were in 2006 unless otherwise noted.

3. Article 28, Section 7 of the NAGE agreement provides that:

> Grievances or complaints initiated by the [Agency] or [NAGE] will be submitted to the Commander or the President of the Local, as appropriate. *The Commander, or his designated representative, shall arrange to meet within ten (10) workdays,after the act or occurrence which gave rise to the dispute or the knowledge by the Local or the employee of the event or action prompting the dispute*, with the President or his representative and any management officials involved, in an effort to reach settlement of the grievance. Following the meeting, the Commander or the President of the Union shall render his decision in writing to the other party as soon as practicable, but within ten (10) workdays

and 2.C. of the FUSE agreement.[4] Addressing this argument, the Arbitrator noted that the Agency "did not raise the timeliness objection at any of the discussion/step meetings" or at the times when the grievances were filed. Award at 5. In addition, he found that "[t]he manner in which the parties came to meet and communicate over the issue . . . was a process that developed during the existence of the specific issue herein[]" and "arose out of the relationship they established with each other in processing/handling the instant cause." *Id.* In this connection, he determined that the parties developed "deviations from the crafted contractual procedure" and that, although the deviations "did not develop as a practice over an extended period of time[,]" "[t]he actions/practice of the parties evolved during the entire pendency of the instant cause." *Id.* Further, the Arbitrator stated that "[a]rbitral precedent favors resolution of disputes on the merits," and that any doubts should be resolved in favor of arbitrability. Id. at 5-6. Moreover, he found that neither party was prejudiced by the timing of the grievances or the manner in which they were handled. Id. at 5. Accordingly, he found that the grievances were filed timely.

Regarding the merits of the grievances, the Arbitrator found that the Agency's practice of providing bottled water was grounded in Article 25, Section 6 of the NAGE agreement,[5] and that, by expanding the practice to buildings with lead-free drinking fountains, the parties effected "a modification to the actual written contract." *Id.* at 7. The Arbitrator also found that the Agency was required to bargain before changing this established past practice. *Id.* at 7-8. He rejected the Agency's reliance on federal fiscal laws and decisions of the United States Comptroller General, finding that he should not "look[] outside of the [c]ollective [b]argaining [a]greement between the parties." *Id.* at 9. The Arbitrator directed the Agency to resume providing bottled water at no charge to the employees in the buildings where it previously had done so. *Id.* at 10.

III. Agency's Exceptions

The Agency contends that the Arbitrator's finding that the grievances were timely fails to draw its essence from the parties' agreements. Exceptions at 7-10. The Agency contends further that, in finding the grievances timely, the Arbitrator exceeded his authority by rewriting the parties' negotiated time limits. *Id.*

The Agency also contends that the award is contrary to law, rule, and regulation because the Arbitrator expressly declined to consider whether federal fiscal law would prohibit the Agency from continuing to purchase bottled water.[6] In the alternative, the Agency argues that to the extent the Arbitrator considered and applied federal fiscal law,

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following the discussion. If either party is not satisfied with the decision, they may submit the grievance or complaint to arbitration by notifying the other party of their intent in writing within fifteen (15) workdays of receipt of a decision. Further processing of the case shall be in accordance with the article entitled "Arbitration."

Exceptions, Ex. B at 53-54 (emphasis added).

4. The FUSE grievance procedure provides, in pertinent part:

> Section 2
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> . . . .
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> C. Any complaint which is not taken up with the employee's immediate supervisor *within fifteen (15) calendar days*, by the employee(s) after the occurrence of the matter, or after the employee learns of the matter from which the complaint arose, *shall not be presented for consideration at a later date*.
> . . . .
>
> Section 11
>
> In lieu of the [Section 3] step-by-step procedure outlined above, a grievance initiated by the Union/[Agency] shall be reduced to writing and submitted to the Union President/Commanding Officer, as appropriate, *within 15 days after the act or occurrence which gave rise to the dispute*.

Exceptions, Ex. K at 1 & 4 (emphasis added).

5. Article 25, Section 6 of the NAGE agreement requires the Agency to "make every reasonable effort to maintain . . . high quality drinking and wash water facilities[.]" Exceptions, Ex. B at 42.

6. In addition, the Agency notes that the Arbitrator's refusal to address the fiscal law issue is contrary to Article 4, Section 1 of the NAGE agreement, which provides that the parties are to be "governed by existing or future laws and regulations of appropriate authorities. . . ." Exceptions at 14. There is no claim that the agreement imposes any obligations different from those imposed by law. Accordingly, we do not address the Agency's claim regarding the agreement separately from its claim regarding law.

the award should be set aside as contrary to the Anti-Deficiency Act, 31 U.S.C. §1341 and/or 31 U.S.C. § 1301(a) (the Purpose Statute).[7] *Id.* at 14-19. According to the Agency, these laws prohibit agencies from using appropriated funds for personal expenses of government employees, and the Comptroller General has found that, as a general rule, bottled water is considered a personal expense of government employees. *Id.* at 15-16 (citing *Decision Matter of: Dep't of the Army – Use of Appropriations for Bottled Water*, B-310502, (February 4, 2008); *Clarence Maddox – Relief of Liab. For Improper Payments*, B-303920, (Mar. 21, 2006); *Acting Comptroller Gen. Elliott to the Sec'y of the Navy*, 17 Comp. Gen. 698 (Mar. 2, 1938); *Comptroller Gen. McCarl to the Sec'y of the Agric.*, 2 Comp. Gen. 776 (May 24, 1923)). The Agency acknowledges Authority precedent holding that, once bottled water becomes an established condition of employment, an agency cannot stop providing the water without bargaining. Exception at 17 (citing *U.S. Dep't of Labor, Wash, D.C.*, 38 FLRA 899 (1990) (*DOL II*); *U.S. Dep't of Labor, Wash., D.C., et al.*, 37 FLRA 25 (1990) (*DOL I*)). However, the Agency requests that the Authority "clarify" those decisions by recognizing the "necessity requirement" for the purchase of bottled water for employees. Exceptions at 19.

Finally, the Agency contends that the award is based on a nonfact that the NAGE agreement applies to FUSE. *Id.* at 20. The Agency contends that, for this reason, the award also fails to draw its essence from the NAGE agreement and that the Arbitrator exceeded his authority by imposing on FUSE the terms of that agreement. *Id.* at 21.

IV. Analysis and Conclusions

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

The Agency's essence argument -- that the Arbitrator erred in finding that the grievances were timely filed -- challenges the Arbitrator's procedural arbitrability determination. *U.S. EEOC, Balt. Field Office, Balt., Md.*, 59 FLRA 688, 692 (2004). An arbitrator's ruling on procedural arbitrability may be found deficient only on grounds that do not challenge the ruling directly. *Id.* Such grounds include arbitrator bias or where the arbitrator has exceeded his authority. *Id.* As the Agency's essence argument directly challenges the Arbitrator's procedural-arbitrability ruling, it does not provide a basis for finding the award deficient. *Id.*

The Agency also contends that the Arbitrator "clearly exceed[ed] [his] authority" when he ignored applicable time limits in the parties' agreements. Exceptions at 10. As this exception also directly challenges the Arbitrator's procedural-arbitrability ruling, it likewise provides no basis for finding the award deficient.[8] See U.S. Dep't of Def. Educ. Activity, 60 FLRA 254, 256 (2004).

Accordingly, the Agency has not demonstrated that the Arbitrator's timeliness determination is deficient.

B. The award is not contrary to law.

The Agency contends that the award is contrary to the Anti-Deficiency Act and the Purpose Statute. 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

7. Although 31 U.S.C. § 1301 is not titled, it has been referred to as "the Purpose Statute." *See, e.g., Office of the Adjutant Gen., Mo. Nat'l Guard, Jefferson City, Mo.*, 58 FLRA 418, 418 (2003). The pertinent wording of the Anti-Deficiency Act and the Purpose Statute is set forth *infra*.

8. The dissent asserts that the exceptions do not directly challenge the Arbitrator's procedural-arbitrability determination because they "challenge the Arbitrator's failure to 'directly respond' to the issue placed before him -- whether the Unions' grievances were filed timely under the relevant CBA provisions." Dissent at 8. However, the Arbitrator *did* directly respond to that issue and found that, despite the parties' contractual limitations regarding timeliness, the parties' behavior demonstrated "deviations from the crafted contractual procedure" that, among other factors, supported a finding that the grievances were timely. Award at 5. In addition, the decisions cited by the dissent are inapposite because they did not involve challenges to arbitrators' procedural-arbitrability determinations. *See United Paperworkers Int'l Union v. Misco*, 484 U.S. 29 (1987); *U.S. Dep't of Veterans Affairs, Med. Ctr., Richmond, Va.*, 63 FLRA 553 (2009); *U.S. Dep't of Veterans Affairs, Augusta, Ga.*, 59 FLRA 780 (2004) (then-Member Pope dissenting in part); *AFGE, Local 1617*, 51 FLRA 1645 (1996). Finally, to the extent that the dissent finds that the award fails to draw its essence from the agreement, we note that the Authority recently reaffirmed the longstanding principle that parties may modify the terms of a collective bargaining agreement through practice, which is effectively what the Arbitrator found here. *AFGE, Local 1633*, 64 FLRA 732, 734 (2010).

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.*

In *DOL I* and *DOL II*, the Authority determined that the availability of potable water is a condition of employment. *DOL II*, 38 FLRA at 908; *DOL I*, 37 FLRA at 34. The Authority has recognized that conditions of employment may be established for bargaining-unit employees either by practice or agreement. 38 FLRA at 908. Here, the parties do not dispute that the Agency's provision of bottled water for many years was an established past practice. See Exceptions at 17. Thus, the provision of bottled water is a condition of employment.

An agency may not change the condition of employment without fulfilling its bargaining obligations. *DOL II*, 38 FLRA at 910. In this regard, the agency is obligated to negotiate over such a change unless it is precluded from doing so by statute or regulation. *DOL I*, 37 FLRA at 36.

The Agency argues that purchasing bottled water would violate the Anti-Deficiency Act and the Purpose Statute. The Anti-Deficiency Act, 31 U.S.C. § 1341, precludes an agency from expending funds: (1) in excess of those appropriated for the fiscal year in which the expenditure is made; and (2) prior to their appropriation. 31 U.S.C. § 1341(a)(1)(A) and (B); *Office of the Adjutant Gen., Mo. Nat'l Guard, Jefferson City, Mo.*, 58 FLRA 418, 420 (2003).[9] The Purpose Statute, 31 U.S.C. § 1301, prohibits the use of funds for purposes other than those for which the funds were appropriated "unless as otherwise provided by law."[10] *AFGE, Local 1647*, 59 FLRA 369, 371 (2003).

In *Comptroller Gen. McCarl to Maj. Gen. Anton Stephan, D.C. Militia*, 6 Comp. Gen. 619 (March 25, 1927), the Comptroller General set forth a "necessary expense" rule to be applied when determining whether an expense is necessary for the expenditure of appropriated funds. *See DOL I*, 37 FLRA at 34-35. The Comptroller General, in interpreting this rule, has stated that an agency has "reasonable discretion" to determine how to carry out the object of an appropriation, and that this determination is to be made on a case-by-case basis. *See Principles of Fed. Appropriations Law*, 4-20 – 4-21 (2004 Ed.). Regarding the use of appropriations for bottled water, the Comptroller General has stated "no objection" so long as the agency "administratively determines" that this is the best way to provide potable water. *Decision Matter of: Dep't of the Army – Use of Appropriations for Bottled Water*, B-310502, (February 4, 2008).

None of the Comptroller General decisions, including those cited by the Agency, permits unilateral termination of a practice to provide bottled water. The Authority recognized this principle in *DOL I*, where it held that the "necessary expense" rule does not require "that an agency make its determination [of necessity] unilaterally or without the benefit of negotiations with the exclusive representative of the employees affected by the change." *DOL I*, 37 FLRA at 35-36. In this connection, the Authority held that nothing in the federal fiscal laws or Comptroller General decisions prohibits agencies from exercising through negotiation the discretion they possess to "determine whether there is sufficient evidence of the necessity to purchase [water] from the Government's standpoint." *Id. See also DOL II*, 38 FLRA at 912 (bargaining over the continuation of the practice of providing bottled water was not inconsistent with federal law or Comptroller General decisions). As the Authority has held, "insofar as an agency has discretion regarding a matter affecting conditions of employment it is obligated under the Statute to exercise that discretion through negotiation unless precluded by regulatory or statutory provisions." *DOL I*, 37 FLRA at 36 (quoting *NTEU*, 21 FLRA 6, 10 (1986)).

9. 31 U.S.C. § 1341 provides, in pertinent part:

> (a) (1) An officer or employee of the United States Government or of the District of Columbia government may not --
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> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or]
> (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law[.]

10. 31 U.S.C. § 1301 provides, in pertinent part: "(a) Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

For the foregoing reasons, the Authority finds that the award is not contrary to the Anti-Deficiency Act or the Purpose Statute.

The Agency also claims that the award is deficient because the Arbitrator refused to apply the Anti-Deficiency Act and the Purpose Statute. The Authority has held that an arbitrator's failure to apply a particular legal analysis "does not render [an] award deficient because . . . in applying the standard of *de novo* review, the Authority assesses whether the arbitrator's legal conclusions are consistent with law, based on the underlying factual findings." *AFGE, Nat'l Border Patrol Council*, 54 FLRA 905, 910 n.6 (1998). Given the Authority's finding that the Arbitrator's legal conclusions are not contrary to law, the Authority finds that the award is not deficient.

C. The Agency's remaining exceptions do not demonstrate that the award is deficient.

The Agency asserts that the Arbitrator applied the NAGE agreement to FUSE and that, as a result: the award is based on a nonfact; the award fails to draw its essence from the NAGE agreement; and the Arbitrator exceeded his authority.

The Authority has held that where an arbitrator bases an 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 grounds is deficient, then it is unnecessary to resolve exceptions concerning the other separate and independent ground(s). *See id.*

The Arbitrator found that the provision of bottled water was established by past practice. This constitutes a separate and independent ground for his award. As the Agency does not demonstrate that the finding of a past practice is deficient, it is not necessary to resolve the Agency's exceptions to the Arbitrator's interpretation of the NAGE agreement. Accordingly the Authority denies the Agency's remaining exceptions.

V. Decision

The Agency's exceptions are denied.

Member Beck, Dissenting:

I do not agree with my colleagues that the Agency's exceeds authority exception directly challenges the Arbitrator's procedural arbitrability determination.

To be sure, we give substantial deference to an arbitrator's procedural arbitrability determination when that determination is based on an interpretation of the parties' collective bargaining agreement (CBA). *See United Power Trades Org.*, 63 FLRA 208, 209 (2009); *AFGE, Local 104*, 61 FLRA 681, 682-83 (2006); and *AFGE, Local 2921*, 50 FLRA 184, 185-86 (1995). However, unlike the arbitrators in the aforementioned cases, this Arbitrator made no finding with regard to the controlling CBA provisions. Instead, he offered only generalized policy pronouncements regarding harmful error and an abstract preference for resolving grievances on the merits rather than on procedural technicalities. *See* Award at 5.

These general propositions, however, do not relieve the Arbitrator of his obligation to interpret and apply the specific CBA provisions that were placed before him during the arbitration. Even though the parties failed to stipulate, and the Arbitrator failed to frame, an issue, it is undisputed that the Agency argued to the Arbitrator that the grievances were untimely under the applicable CBA provisions. *See id.*; Exceptions, Attach. J at 4-6. Therefore, the Arbitrator exceeded his authority when he failed to apply the relevant CBA provisions -- Article 28, Section 7 (for NAGE) and Section 11 (for FUSE) -- that establish specific time frames for presenting grievances. *See U.S. Dep't of Veterans Affairs, Med. Ctr., Richmond, Va.*, 63 FLRA 553, 557 (2009) (*VAMC Richmond*) (arbitrator exceeds authority when he fails to resolve an issue by not interpreting and applying relevant CBA provisions); *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996) (arbitrator exceeds his authority when he 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).[*]

[*] Alternatively, one might say that the Arbitrator's award fails to draw its essence from the collective bargaining agreement that he was tasked with applying, because the award manifestly disregarded clear language contained in the controlling CBA provisions. *U.S. Dep't of Veterans Affairs, Augusta, Ga.*, 59 FLRA 780, 783-84 (2004) (failure of arbitrator to reconcile inconsistencies between two

I do not agree, therefore, with the Majority that the Agency's exception directly challenges the Arbitrator's procedural arbitrability finding. To the contrary, the exceptions challenge the Arbitrator's failure to "directly respond" to the issue placed before him – whether the Unions' grievances were filed timely under the relevant CBA provisions. *See VAMC Richmond*, 63 FLRA at 557 (citing *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996)).

I am concerned also by the Majority's implied affirmation of the Arbitrator's conclusion that the Agency is precluded from raising the timeliness issue because the Agency failed to raise that issue during the grievance process. Slip op. at 2-3. I find no support in our precedent for that proposition. In theory, a requirement of that nature could be imposed on the parties by a specific provision in the parties' CBA, but nothing in this record establishes that such a requirement exists here. Similarly, § 2429.5 of the Authority's Regulations requires only that a matter be raised before an arbitrator in order to be addressed by the Authority. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 64 FLRA 841, 843 (2010) (citing *U.S. Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 59 FLRA 542, 544 (2003).

I would vacate the Arbitrator's award insofar as it concludes that the grievances were timely filed. Accordingly, I would find that the Arbitrator was without authority to address the merits of the grievance.

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applicable contract provisions evidences a manifest disregard of the agreement and is deficient as failing to draw its essence from the agreement). *See also United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (arbitrator may not ignore plain language of the contract).