

67 FLRA No. 134

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2431
(Union)

and

UNITED STATES
GENERAL SERVICES ADMINISTRATION
(Agency)

0-AR-4996

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DECISION

August 11, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

This case is before the Authority on exceptions to an award of Arbitrator James A. Cashen. The Arbitrator determined that the parties' collective-bargaining agreement did not provide for "a 'threshold' hearing"¹ to determine whether the Agency was obligated to provide records that the Union requested at a grievance meeting, and he denied the Union's grievance.

In its exceptions to the Arbitrator's award, the Union asserts that the award is deficient on three grounds: (1) the Arbitrator's determination that the agreement does not permit a "threshold hearing" fails to draw its essence from the agreement; (2) an additional statement that the Arbitrator made – that the Agency was not required to provide performance records – fails to draw its essence from the agreement; and (3) the award is contrary to § 7114(b)(4) of the Federal Service Labor-Management Relations Statute (the Statute).²

We deny the Union's first essence exception because it directly challenges the Arbitrator's procedural-arbitrability determination. And because the second essence exception and the contrary-to-law exception both challenge statements that constitute dicta rather than the Arbitrator's holding, they are insufficient to establish that the award is deficient.

¹ Award at 5.

² 5 U.S.C. §§ 7101-7135.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that an employee should have received a higher rating in two critical elements on his performance rating. At the step-one grievance meeting, the Union asked the Agency to provide the employee's performance records, but the Agency refused. The Union then elevated the grievance to the second step of the grievance procedure. In addition to appealing the Agency's denial of the step-one grievance, the Union also sought the grievant's performance records through "enforcement"³ of two additional provisions of the parties' agreement: Article 19, Section 11 – which requires supervisors to "maintain records of performance"⁴ – and Article 4, Section 5 – which incorporates the Agency's duty, under § 7114(b)(4) of the Statute, to provide certain information upon request. The Agency denied the Union's grievance, and the Union invoked arbitration.

Before the Arbitrator, the Union argued that: (1) the parties' agreement authorizes the Arbitrator to decide issues of arbitrability before deciding the merits of a grievance; (2) it was unlawful for the Agency to refuse to provide the records the Union had requested; and (3) Article 19 requires the Agency to maintain performance records. Conversely, the Agency argued that the agreement did not provide for a "threshold hearing" over the Agency's obligation to provide information. Further, the Agency argued that the parties' agreement does not permit the Union to raise "threshold issues" at the second step of the grievance process and that the parties' agreement does not provide for pre-arbitration discovery.

The Arbitrator agreed with the Agency, holding that the agreement does not "provide any mechanism for conducting a 'threshold' hearing"⁵ and that the parties' agreement does not provide for discovery. The Arbitrator also stated that the Agency did not violate Article 4, Section 5 and Article 19, Section 11 "when it refused to provide performance records" to the Union.⁶ And he denied the Union's grievance. The Union filed these exceptions, to which the Agency filed an opposition.

III. Analysis and Conclusions

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

Procedural arbitrability involves "procedural questions, such as whether the preliminary steps of the

³ Exceptions, Attach. 2 at 1.

⁴ Award at 2 (quoting Art. 19, § 11 of parties' agreement)

⁵ *Id.* at 5.

⁶ *Id.* at 6.

grievance procedure have been exhausted or excused,” and is distinguished from substantive arbitrability, which involves questions regarding whether “the subject matter of a dispute is arbitrable.”⁷ In particular, “substantive arbitrability is a question of subject[-]matter jurisdiction: whether the parties have agreed to arbitrate a particular category or type of dispute.”⁸

The issue presented here is similar to the one in *Bell Atlantic-Pennsylvania v. Communication Workers of America, Local 13000 (Bell)*.⁹ There, a union sought to arbitrate a grievance through the “regular arbitration procedure,”¹⁰ but the employer refused, contending that the particular dispute could be brought only under the “expedited arbitration procedure.”¹¹ The U.S. Court of Appeals for the Third Circuit determined that the dispute did not concern substantive arbitrability because the employer “d[id] not contend that it did not agree to arbitrate [the type of] disputes” at issue in that case.¹² Rather, the court explained, the employer disagreed with the union’s claim that these disputes were “subject to a particular arbitration procedure,”¹³ which it held was a procedural issue appropriate for resolution by the arbitrator.

As in *Bell*, the parties here do not dispute that the Union may grieve (and arbitrate) disputes over the Agency’s obligation to provide information. Rather, they dispute whether the Arbitrator may hold a “threshold hearing” to determine this issue before conducting a hearing on whether the Agency violated the parties’ agreement when it rated the grievant. In other words, they disagree as to whether “a particular arbitration procedure”¹⁴ – the “threshold hearing” – is available under these circumstances. Accordingly, the Arbitrator’s determination that the parties’ agreement did not authorize the “threshold hearing” is a procedural-arbitrability determination.

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.¹⁵ However, the Authority will find a procedural-arbitrability determination deficient on the ground that it is contrary to

law.¹⁶ For a procedural-arbitrability determination to be found deficient as contrary to law, the appealing party must establish that the determination is contrary to procedural requirements established by statute that apply to the parties’ negotiated grievance procedure.¹⁷ The Authority will also consider challenges to procedural-arbitrability determinations based on grounds that do not directly challenge the determination itself, such as claims that an arbitrator was biased or exceeded her authority.¹⁸

The Union argues that the Arbitrator’s determination that the parties’ agreement did not allow him to decide “threshold issues” fails to draw its essence from the agreement. This argument directly challenges the Arbitrator’s procedural-arbitrability determination. Therefore, the Union has not established that the award is deficient on this basis, and we deny the exception.

B. The Union’s remaining exceptions provide no basis for finding the award deficient.

Where an arbitrator finds that a grievance is not procedurally arbitrable, any comments he or she makes concerning the merits of the grievance are dicta and do not provide a basis for finding the award deficient.¹⁹

Here, the Union argues that the Arbitrator should have “[b]lended” Article 19, Section 11 with Article 4, Section 5 to conclude that the Agency “is required to provide the performance records [that] supervisors keep to the Union at the start of the grievance process.”²⁰ And it argues that the award is contrary to § 7114(b)(4) of the Statute, which requires an agency to furnish information to a union, upon request and “to the extent not prohibited by law,” if, as relevant here, the requested information is “necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining.”²¹ Thus, both of the Union’s remaining exceptions concern the merits of its grievance.

However, because the Arbitrator had already determined that the grievance was not procedurally

⁷ *Fraternal Order of Police, N.J. Lodge 173*, 58 FLRA 384, 385 (2003) (quoting Elkouri & Elkouri, *How Arbitration Works* 305 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997)).

⁸ *Id.* (quoting *EEOC*, 53 FLRA 465, 476 n.12 (1997)).

⁹ 164 F.3d 197 (3d Cir. 1999).

¹⁰ *Id.* at 199.

¹¹ *Id.*

¹² *Id.* at 202.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *NFFE, Local 1001*, 66 FLRA 647, 648 (2012) (citing *AFGE, Local 3882*, 59 FLRA 469, 470 (2003) (*Local 3882*)).

¹⁶ *AFGE, Council of Prison Locals, Council 33*, 66 FLRA 602, 604 (2012) (*Council 33*) (citing *Local 3882*, 59 FLRA at 470).

¹⁷ *Id.* (citing *U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 122, 124 (2005)).

¹⁸ *Id.* (citing *U.S. Dep’t of VA, Reg’l Office, Winston-Salem, N.C.*, 66 FLRA 34, 37 (2011)).

¹⁹ See *Council 33*, 66 FLRA at 605 (citing *United Power Trades Org.*, 63 FLRA 208, 209 (2009) (*Power Trades*); *AFGE, Local 2172*, 57 FLRA 625, 629 (2001) (*Local 2172*)).

²⁰ Exceptions at 3.

²¹ *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 66 FLRA 669, 672 (2012) (citing 5 U.S.C. § 7114(b)(4)).

arbitrable, any comments he made on the merits of the Union's grievance are dicta.²² Accordingly, the Union's second essence exception and contrary-to-law exception provide no basis for finding the award deficient, and we therefore deny them.

IV. Decision

We deny the Union's exceptions.

²² See *Council 33*, 66 FLRA at 605 (citing *Power Trades*, 63 FLRA at 209; *Local 2172*, 57 FLRA at 629).