

67 FLRA No. 147

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2041
(Union)

and

GENERAL SERVICES ADMINISTRATION
(Agency)

0-AR-4966

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DECISION

September 16, 2014

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

I. Statement of the Case

Arbitrator Carrie B. Washington determined that a grievance filed by the Union was not procedurally arbitrable because the grievance lacked the specificity required under the parties' agreement. This case presents us with two substantive questions.

The first question is whether we should set aside the Arbitrator's arbitrability determination because it is based on nonfacts or fails to draw its essence from the parties' agreement. Because the Arbitrator's determination concerns procedural arbitrability, and that determination cannot be directly challenged on nonfact or essence grounds, the answer is no.

The second question is whether the Arbitrator's arbitrability determination is contrary to law. Because the Union has not demonstrated that the Arbitrator's procedural-arbitrability determination conflicts with statutory procedural requirements that apply to the parties' negotiated grievance procedure, the answer is no.

II. Background and Arbitrator's Award

After a series of confrontations between the grievant and an Agency supervisor involving the grievant's HIV status, the Union filed a grievance. The grievance alleged that the Agency violated (1) Article 23, Section 21.C of the parties' agreement (Article 23-21C), which addresses AIDS in the workplace, and (2) "all other relevant sections of the [parties' agreement], laws[,]

and regulations."¹ Subsequently, at the arbitration hearing and in its post-hearing brief, the Union also claimed that the Agency violated specific provisions of the Rehabilitation Act,² the Privacy Act,³ § 7116 of the Federal Service Labor-Management Relations Statute (the Statute),⁴ and the parties' agreement (other than Article 23-21C). When the matter was submitted to arbitration, the Arbitrator framed the issue, as relevant here, as whether the grievance was arbitrable.

The Arbitrator first addressed the Union's claims that the Agency violated the Rehabilitation Act, the Privacy Act, § 7116, and the parties' agreement (other than Article 23-21C). The Arbitrator considered whether the Union had met the requirements under Article 33, Section 6 of the parties' agreement (Article 33-6), which states that "[a]ll grievances filed under [the parties' agreement] will include . . . [i]f appropriate, the provision(s) of law, regulation, or [the parties' agreement] which allegedly has been misinterpreted, misapplied, or violated."⁵ She found that Article 33-6 required that the Union plead in its grievance which specific provisions of law, regulation, or the parties' agreement the Agency allegedly violated. The Arbitrator found that the Union had not met that specificity requirement because the grievance alleged only that the Agency violated Article 23-21C, and did not specify any provisions of law, regulation, or other provisions of the parties' agreement until the hearing and its post-hearing brief. For these reasons, the Arbitrator found that the Union's claims that the Agency violated the Rehabilitation Act, the Privacy Act, § 7116, and the parties' agreement (other than Article 23-21C) were not procedurally arbitrable.

For other reasons, the Arbitrator found the Union's claim that the Agency violated Article 23-21C substantively non-arbitrable. Because the Union does not challenge this finding in its exceptions, it is not before us.

The Union filed exceptions to the Arbitrator's award. The Agency filed an opposition to the Union's exceptions.

III. Preliminary Matters

A. The Union's exceptions are timely.

The Agency contends that the Union's exceptions are untimely because they were filed "one day late."⁶ Section 7122(b) of the Statute requires that

¹ Award at 16.

² 29 U.S.C. § 701 (2000).

³ 5 U.S.C. § 552a.

⁴ 5 U.S.C. § 7116.

⁵ Award at 10 (citing parties' agreement Art. 33, § 6).

⁶ Opp'n at 1-2.

exceptions be filed within thirty days from the date of service of the award.⁷ Under § 2425.2(b) of the Authority's Regulations,⁸ the thirty-day period for filing exceptions begins to run the day after the award's date of service.

It is undisputed that the Arbitrator served the award on the parties by e-mail on June 18, 2013.⁹ Counting thirty days beginning on June 19, 2013 – the day *after* the award's date of service – in accordance with § 2425.2(b), the due date for filing exceptions was July 18, 2013. Because the Union filed its exceptions with the Authority on July 18, 2013, we find the exceptions timely.

- B. We dismiss the Union's exception that fails to raise a recognized ground for review under § 2425.6(e)(1) of the Authority's Regulations.

The Union argues that the Arbitrator abused her discretion because her "failure to find any wrongdoing in light of the admissions of unlawful behavior is unreasonable and out of proportion with the facts in this case."¹⁰ Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to dismissal or denial if: [t]he excepting party fails to raise and support" the grounds listed in § 2425.6(a)-(c), "or otherwise fails to demonstrate a legally recognized basis for setting aside the award."¹¹ Thus, an exception that does not raise a recognized ground is subject to dismissal under the Authority's Regulations.¹² The Union's argument does not articulate a ground currently recognized by the Authority for reviewing an arbitration award.¹³ Because the Union does not raise a recognized ground or cite legal authority to support a ground not currently recognized by the Authority, we dismiss the exception.¹⁴

IV. Analysis and Conclusions

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

The Union contends that the Arbitrator erred in determining that the grievance was non-arbitrable.¹⁵ In

particular, the Union argues that the Arbitrator erroneously determined that the grievance lacked the specificity required to support the Union's allegations that the Agency violated the Rehabilitation Act, the Privacy Act, and § 7116.¹⁶ In the Union's view, this part of the award: (1) is based on nonfacts;¹⁷ (2) fails to draw its essence from the parties' agreement;¹⁸ and (3) is contrary to law.¹⁹

Procedural arbitrability involves questions of whether a grievance satisfies a collective-bargaining agreement's procedural conditions, while substantive arbitrability involves questions of whether the grievance's subject matter is arbitrable.²⁰ An arbitrator's determination as to whether a grievance contains sufficiently specific alleged violations of law, as required by a collective-bargaining agreement, concerns the grievance's procedural arbitrability.²¹

The Authority generally will not find an arbitrator's ruling on a grievance's procedural arbitrability deficient on grounds that directly challenge the procedural-arbitrability ruling itself.²² This includes claims that an award is based on a nonfact²³ or fails to draw its essence from a collective-bargaining agreement.²⁴ However, a procedural-arbitrability determination may be directly challenged and found deficient on the ground that it is contrary to law.²⁵ For a procedural-arbitrability determination to be found deficient as contrary to law, the excepting party must establish that the determination conflicts with statutory procedural requirements that apply to the parties' negotiated grievance procedure.²⁶

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 9.

²⁰ *AFGE, Local 3615*, 65 FLRA 647, 649 (2011) (*Local 3615*).

²¹ *AFGE, Local 1235*, 66 FLRA 624, 624-25 (2012) (*Local 1235*) (finding arbitrator's conclusion that grievance did not meet specificity requirements in collective-bargaining agreement to be procedural-arbitrability determination); *Local 3615*, 65 FLRA at 649 (same).

²² *Local 3615*, 65 FLRA at 649.

²³ *AFGE, Local 3283*, 66 FLRA 691, 692 (2012) (*Local 3283*) (denying nonfact exception because it directly challenged arbitrator's procedural-arbitrability determination).

²⁴ *U.S. Dep't of the Navy, Naval Air Station, Whiting Field*, 66 FLRA 308, 309 (2011) (*Navy*) (denying essence exception because it directly challenged arbitrator's procedural-arbitrability determination).

²⁵ *Id.* at 309.

²⁶ *U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 122, 124 (2005).

⁷ 5 U.S.C. § 7122(b).

⁸ 5 C.F.R. § 2425.2(b).

⁹ Exceptions at 1; Opp'n at 2.

¹⁰ Exceptions at 8.

¹¹ 5 C.F.R. § 2425.6(e)(1).

¹² *AFGE, Local 1858*, 66 FLRA 942, 943 (2012).

¹³ 5 C.F.R. § 2425.6(a)-(b).

¹⁴ *AFGE, Local 738*, 65 FLRA 931, 932 (2011).

¹⁵ Exceptions at 5.

1. The Arbitrator's procedural-arbitrability determination cannot be challenged on nonfact or essence grounds.

In her award, the Arbitrator did not address the Union's allegations that the Agency violated the Rehabilitation Act, the Privacy Act, § 7116, and certain provisions of the parties' agreement, because she found that the grievance did not articulate these alleged violations with the specificity required by Article 33-6.²⁷ This finding is a procedural-arbitrability determination.²⁸

The Union argues that this part of the award is based on two nonfacts: (1) that "Article 33 [of the parties' agreement] requires citation to law[, rather than a] description of the law violated"²⁹ and (2) that "the Step[-]1 grievance did not specify . . . provisions of law violated."³⁰ The Union also argues that this part of the award does not draw its essence from the parties' agreement because the Arbitrator erroneously interpreted Article 33-6 to require that the grievance include citations to alleged violations of law.³¹ Because nonfact and essence exceptions do not provide a basis for challenging an arbitrator's procedural-arbitrability determination, these Union exceptions do not provide a basis for finding the award deficient.³²

Further regarding its nonfact exception, the Union's reliance on *GSA, Region 9*³³ to support that exception is misplaced. In *GSA, Region 9*, the Authority resolved on its merits a union's nonfact challenge to an arbitrator's procedural-arbitrability determination and remanded the case to the arbitrator.³⁴ But the Authority subsequently "clarif[ied its] previous decisions in procedural arbitrability cases,"³⁵ holding that it will not find an arbitrator's ruling on a grievance's procedural arbitrability deficient on grounds, like nonfact, that directly challenge the procedural-arbitrability ruling itself.³⁶ And the Authority repeated this clarification in a sequel to *GSA, Region 9*, when the union excepted to the arbitrator's decision on remand.³⁷ Consequently, *GSA, Region 9* does not support the Union's nonfact challenge to the Arbitrator's procedural-arbitrability determination in this case.

Consistent with the analysis set forth above, we find that the Union's nonfact and essence exceptions do not provide grounds for finding the award deficient.

2. The award is not contrary to law.

The Union asserts that the award conflicts with § 7121(b)(1)(A) and (B) of the Statute because requiring the grievance to include legal citations is not "fair and simple" and does not "provide for expeditious processing."³⁸ Specifically, the Union contends that "[w]hen the Agency is placed on actual notice by the grievance documents, then requiring a lay union official to know all citations to law is a burdensome and unnecessary obstacle . . . which the grievance was meant to eliminate."³⁹

The Arbitrator interpreted Article 33-6 as requiring the Union, in its grievance, to state which specific provisions of law, regulation, or the parties' agreement the Agency allegedly violated.⁴⁰ This interpretation, even if it adds to a party's requirements in filing a grievance, is not inconsistent with § 7121(b)(1) because, as the Authority held in *AFGE, Local 1235*,⁴¹ this section of the Statute merely sets forth "broad general criteria" concerning the character of negotiated grievance procedures.⁴² The Union's reliance on similar arguments that the Authority rejected in *AFGE, Local 1235* is also unavailing. And although the Union argues that the decision in *AFGE, Local 1235* "was wrongly held," the Union provides no basis for revisiting that decision.⁴³ For these reasons, the exception does not establish that the award is contrary to law.⁴⁴

Consistent with the analysis set forth above, we find that the Union's contrary-to-law exception does not provide a basis for finding the award deficient.

V. Decision

We dismiss, in part, and deny, in part, the Union's exceptions.

²⁷ Award at 18-19.

²⁸ *Local 1235*, 66 FLRA at 624-25; *Local 3615*, 65 FLRA at 649.

²⁹ Exceptions at 5.

³⁰ *Id.* at 5-6.

³¹ *Id.* at 7.

³² *Local 3283*, 66 FLRA at 692; *Navy*, 66 FLRA at 309.

³³ 48 FLRA 1348 (1994).

³⁴ *Id.* at 1358.

³⁵ *AFGE, Local 2921*, 50 FLRA 184, 186 (1995).

³⁶ *Id.* at 185-86; *Local 3283*, 66 FLRA at 692.

³⁷ *GSA*, 53 FLRA 925, 938 (1997).

³⁸ Exceptions at 9 (quoting 5 U.S.C. § 7121(b)(1)(A) and (B)).

³⁹ *Id.*

⁴⁰ Award at 18-19.

⁴¹ 66 FLRA 624.

⁴² *Local 1235*, 66 FLRA at 625 (quoting *AFGE, Local 1741*, 61 FLRA 118, 121 (2005)).

⁴³ Exceptions at 9.

⁴⁴ *Local 1235*, 66 FLRA at 624-25.