69 FLRA No. 32

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3911
(Union)

and

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2
NEW YORK, NEW YORK
(Agency)

0-AR-5134

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DECISION

March 4, 2016

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

I. Statement of the Case

The Agency implemented a revised travel manual that included a new baggage policy for employees traveling at Agency expense. The Agency read the manual as allowing, but not guaranteeing, reimbursement to employees for up to two personal bags for official travel. The Agency also read the manual as requiring employees to specify on their travel-authorization form the number of personal bags they intend to check. The Union disagreed, and filed a grievance. The Union claimed that under the manual, as incorporated into the parties' agreement, if employees choose to travel with two personal bags, they are entitled to reimbursement for both bags. The Union also claimed that employees are not required to specify on their travel-authorization form the number of personal bags they intend to check.

Arbitrator Dennis J. Campagna sustained the grievance in part, and denied it in part. The Arbitrator agreed with the Union that if employees choose to travel with two personal bags, they are entitled to reimbursement for both bags. But the Arbitrator agreed with the Agency that the Agency could require employees to specify on their travel-authorization form the number of personal bags they intend to check. The Union's exceptions raise four substantive questions.

The first question is whether the Arbitrator's award is contrary to law. The Union claims that the Arbitrator relied on an irrelevant law when he found that the parties' agreement did not prohibit the Agency from requiring employees to specify, on their travel-authorization form, the number of personal bags they intend to check. However, the Union bases its argument on a misinterpretation of the award, and does not demonstrate that the Arbitrator relied on Title VII of the Civil Rights Act of 1964 (Title VII)[1] in resolving the Union's contract-violation claim. Thus, the answer is no.

The second question is whether the award is based on a nonfact. The Union claims that the Arbitrator erred when he stated that the relevant provisions of Article 8 of the parties' agreement "[are] a substantially identical restatement of the anti[-]discrimination provisions contained in [Title VII]."[2] Because the statement that the Union challenges is an interpretation of the parties' agreement, and such interpretations may not be challenged as nonfacts, the answer is no.

The third question is whether the award fails to draw its essence from Article 8 of the parties' agreement. Because the Union does not show that the award's interpretation of the parties' agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement, the answer is no.

The fourth question is whether the Arbitrator exceeded his authority. The Union claims that the Arbitrator resolved an issue not before him by addressing whether the travel manual's policy was applied in a discriminatory fashion. The Union also claims that the Arbitrator exceeded his authority by failing to resolve whether employees are treated "unfairly and inequitably" under Article 8 of the parties' agreement.[3] Because the award is directly responsive to the stipulated issue as interpreted by the Arbitrator, and because the Union misinterprets the award, the answer is no.

II. Background and Arbitrator's Award

An employee submitted a travel-authorization form (form), but did not specify on the form the number of personal bags he intended to check. The Agency returned the form, and instructed the employee to specify the number of personal bags that he intended to check. The employee resubmitted his form with the following notation, in relevant part: "Traveler is authorized baggage fees for up to [two] checked bags."[4] The Agency disputed the employee's need for two personal bags and approved reimbursement for only one. The

[1] 42 U.S.C. §§ 2000e to 2000e-17.
[2] Award at 13.
[3] Exceptions Form at 24.
[4] Award at 4.

Union filed a grievance. The parties could not resolve the grievance, and submitted the matter to arbitration.

At arbitration, the parties stipulated to the following issues, in relevant part: (1) "Does [the Agency's travel manual] require a written notation on the [form] indicating the specific number of personal bags to be checked at government expense . . . ? If not, what shall be the remedy?"; and (2) "Is the Agency breaching Article 8 [of the parties' agreement] by requiring . . . employees to provide a specific written authorization on their [form concerning the number of personal bags they intend to check]? If so, what shall be the remedy?"[5]

Resolving the travel-manual issue, the Arbitrator sustained the Union's grievance, in part. Specifically, the Arbitrator found that "reimbursement for up to two . . . personal bags is not at the discretion of the travel[-]authorizing official."[6] He concluded that "[e]mployees *will* be reimbursed for checking up to two . . . personal bags."[7] But the Arbitrator also denied the Union's grievance, in part. He found that, under the travel manual, the Agency could require employees to "include the number of personal bags on their [form] for the purpose of *notice* to the travel[-]authorizing official as to the number of personal bags that will be checked."[8] As a remedy, the Arbitrator ordered the Agency to notify all employees of these requirements. The parties did not file exceptions to this part of the award.

The Arbitrator denied the Union's contract-violation claims under the second stipulated issue. The Union's claims rested on Article 8 of the parties' agreement. Article 8, Section 1 provides, in pertinent part, that "all employees shall be treated fairly and equitably and without discrimination in regard to their political affiliation, Union activity, race, color, religion, national origin, gender, sexual orientation, marital status, age, or non-disqualifying handicapping conditions."[9] Section 4(B) provides, in pertinent part, that "[a]ll employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, marital status, age, or handicapping condition, and with proper regard for their privacy and [c]onstitutional rights."[10]

The Arbitrator concluded that the Agency did not violate Article 8 of the parties' agreement. Specifically, the Arbitrator found that "there has been no assertion by the Union that the Agency applied [the travel manual's p]olicy in a discriminatory fashion based on the protected elements [in Article 8, Sections 1 and 4(B)]."[11] The Arbitrator also noted that Article 8 is "a substantially identical restatement of the anti[-]discrimination provisions contained in [Title VII]."[12] Based on the Union's failure to assert any type of discriminatory behavior by the Agency, the Arbitrator denied the part of the Union's grievance alleging that the Agency violated the parties' agreement.

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

III. Analysis and Conclusions

A. The award is not contrary to law.

The Union claims that the award is contrary to law because the Arbitrator based the award on "an irrelevant law."[13] Specifically, the Union claims that the Arbitrator erroneously applied Title VII in resolving the Union's contract-violation claim.[14]

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.[15] 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.[16] In making that assessment, the Authority defers to the arbitrator's underlying factual findings,[17] unless a party demonstrates that the findings are deficient as nonfacts.[18]

The Union's claim is based on a misinterpretation of the award. In support of its claim that the award is contrary to law, the Union relies on the Arbitrator's statement that Article 8 of the parties' agreement is "a substantially identical restatement of the anti[-]discrimination provisions contained in [Title VII]."[19] However, the Union does not show that the Arbitrator applied Title VII in resolving the contractual issues before him. In considering the second

[5] *Id.* at 1.
[6] *Id.* at 12.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 13.
[11] *Id.*
[12] *Id.*
[13] Exceptions Form at 5.
[14] *Id.*
[15] *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)).
[16] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[17] *Id.*
[18] *NAGE, Local R4-17*, 67 FLRA 4, 6 (2012) (*NAGE*) (citing *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008)).
[19] Award at 13.

stipulated issue, the Arbitrator found that "there has been no assertion by the Union that the Agency applied [the travel manual p]olicy in a discriminatory fashion based on the protected elements [in Article 8, Sections 1 and 4(B)]."[20] The Arbitrator concluded that absent such an assertion, "I must find and conclude that there has been no breach of Article 8 in the instant matter."[21] As the Union does not demonstrate that the arbitrator erred, as a matter of law, in reaching this conclusion, the Union does not establish that the award is contrary to law.

Because the Arbitrator did not apply Title VII in resolving the contractual issues before him, the Arbitrator's alleged misstatement about Title VII was irrelevant to his resolution of those claims. And "because the Arbitrator's statement is unnecessary to the disposition of his decision, it constitutes dictum and provides no basis on which to consider whether the award is contrary to law."[22]

We therefore find that the Union misinterpreted the award, and reject the Union's claim that the Arbitrator erroneously applied Title VII. Thus, it is unnecessary to address the Union's related contrary-to-law claims that the award "would seem to be contrary to 5 U.S.C. § 7112(a),"[23] and that the Arbitrator conflated Title VII "with the protections afforded [to] employees under the Civil Service Reform Act [of 1978], the Equal Pay Act, . . . the Age Discrimination in Employment Act of 1967,"[24] and "the Rehabilitation Act."[25]

Accordingly, we deny the Union's contrary-to-law exceptions.

B. The award is not based on a nonfact.

The Union claims that the award is based on a nonfact.[26] Specifically the Union claims that the Arbitrator's finding that Article 8 of the parties' agreement is "a substantially identical restatement of the anti[-]discrimination provisions contained in [Title VII]" is based on a nonfact.[27]

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.[28] In addition, an arbitrator's conclusion that is based on an interpretation of a collective-bargaining agreement does not constitute a fact that can be challenged as a nonfact.[29]

The Union's nonfact claim lacks merit. The Union claims that the award is based on the Arbitrator's allegedly erroneous finding that Article 8 of the parties' agreement is "a substantially identical restatement of the anti[-]discrimination provisions contained in [Title VII]."[30] That finding, however, is based on the Arbitrator's interpretation of the parties' agreement.[31] And, as discussed above, an arbitrator's conclusion that is based on an interpretation of a collective-bargaining agreement does not constitute a fact that can be challenged as a nonfact.[32] Thus, the Union does not demonstrate that the award is deficient on nonfact grounds.

Accordingly, we deny the Union's nonfact exception.

C. The award does not fail to draw its essence from the parties' agreement.

The Union claims that the award fails to draw its essence from Article 8 of the parties' agreement for two reasons.[33] First, the Union claims that it is "implausible" that Article 8 of the parties' agreement is "substantively identical to [Title VII]."[34] Second, the Union claims that "[t]he [A]rbitrator also ignored testimony as to how the [p]arties had been treating the language . . . in Article 8, Section 1 [of the parties' agreement];"[35] i.e., as requiring that employees "be treated fairly and equitably."[36] For the reasons below, we deny the Union's essence claims.

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.[37] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the parties' agreement;

[20] *Id.*
[21] *Id.*
[22] *AFGE, Local 2152*, 69 FLRA 149, 151 (2015) (citing *AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009) ("Statements that are dicta do not provide a basis for finding an award deficient because . . . [they] do not constitute a determination on the merits.")).
[23] Exception Form at 9.
[24] *Id.* at 5.
[25] *Id.* at 6.
[26] *Id.* at 14-15.
[27] *Id.* at 15.
[28] *AFGE, Local 2382*, 66 FLRA 664, 667 (2012) (*Local 2382*).
[29] *See NLRB*, 50 FLRA 88, 92 (1995).
[30] Exceptions Form at 15.
[31] *Id.*
[32] *NLRB*, 50 FLRA at 92.
[33] Exceptions Form at 19.
[34] *Id.*
[35] *Id.* at 20.
[36] Award at 12.
[37] *AFGE, Council 220*, 54 FLRA 156, 159 (1998) (citing 5 U.S.C. § 7122(a)(2)).

(2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the parties' agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the parties' agreement; or (4) evidences a manifest disregard of the parties' agreement.[38] 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.[39] The Authority has found that an award fails to draw its essence from a collective-bargaining agreement when the award is expressly contrary to the wording of the agreement.[40] In addition, challenges to an arbitrator's evaluation of the evidence, including determinations as to the weight to be accorded such evidence, do not demonstrate that an award fails to draw its essence from a collective-bargaining agreement.[41]

The Union's essence claims lack merit. The Union's first essence claim is based on the faulty premise – which we reject in Section III.A., above – that the Arbitrator resolved the second stipulated issue by applying Title VII. As discussed above, the Arbitrator resolved the second stipulated issue by relying on the language of Article 8, not on the language of Title VII; his statement regarding Title VII was dictum. Regarding Article 8's language, the Arbitrator concluded – based on his interpretation of the Article – that to prevail on the second stipulated issue, the Union was required to assert that the Agency had acted contrary to Article 8's requirements, which he found the Union did not do. The Union does not show how this ruling conflicts with Article 8, or that the Arbitrator's interpretation of Article 8 is irrational, unfounded, implausible, or in manifest disregard of the agreement. Thus, we deny the Union's first essence claim.

The Union's second essence claim also lacks merit. The Union's claim – that the Arbitrator ignored testimony regarding the parties' interpretation of Article 8's language[42] – challenges the Arbitrator's evaluation of the evidence, and, as such, does not provide a basis to find the award deficient on essence grounds.[43] Thus, we deny the Union's second essence claim.

D. The Arbitrator did not exceed his authority.

The Union claims that the Arbitrator exceeded his authority in two ways. First, the Union claims that the Arbitrator resolved an issue not before him by finding that the Union failed to assert that the travel manual's policy was applied in a discriminatory fashion.[44] Second, the Union claims that the Arbitrator failed to resolve whether employees are treated "unfairly and inequitably" under Article 8 of the parties' agreement.[45]

Arbitrators exceed their authority when, as relevant here, they fail to resolve an issue submitted to arbitration, or resolve an issue not submitted to arbitration.[46] Arbitrators do not exceed their authority when the award is directly responsive to the stipulated issue.[47] In determining what issues were submitted to arbitration, the Authority gives arbitrators the same substantial deference that the Authority grants an arbitrator's interpretation of a collective-bargaining agreement, as discussed in Section III.C. above.[48]

Regarding the first exceeds-authority claim, the Union does not demonstrate that the Arbitrator exceeded his authority, because the award is directly responsive to the stipulated issue. As relevant here, the parties stipulated to the following issue: "Is the Agency breaching Article 8 [of the parties' agreement] by requiring . . . employees to provide a specific written authorization on their [form concerning the number of personal bags they intend to check]?"[49] As discussed above, Article 8, Section 1 of the parties' agreement provides that "all employees shall be treated fairly and equitably and without discrimination in regard to their political affiliation, Union activity, race, color, religion, national origin, gender, sexual orientation, marital status, age, or non-disqualifying handicapping conditions."[50] And Section 4(B) provides that "[a]ll employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, marital status, age, or handicapping condition, and with proper regard for their privacy and [c]onstitutional rights."[51]

[38] *SSA, Office of Disability Adjudication & Review*, 64 FLRA 1000, 1001 (2010) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).
[39] *Id.*
[40] *U.S. Small Bus. Admin.*, 55 FLRA 179, 182 (1999).
[41] *NTEU, Chapter 299*, 68 FLRA 835, 838 (2015) (*NTEU*).
[42] Exceptions Form at 20.
[43] *See NTEU*, 68 FLRA at 838.
[44] Exceptions Form at 23.
[45] *Id.* at 24.
[46] *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).
[47] *See U.S Dep't of the Treasury, IRS*, 68 FLRA 1027, 1030 (2015).
[48] *U.S. Dep't of Transp., FAA*, 64 FLRA 612, 613 (2010) (*FAA*).
[49] Award at 1.
[50] *Id.* at 12.
[51] *Id.* at 13.

Resolving the stipulated issue, the Arbitrator found that the Agency did not violate Article 8, Sections 1 and 4(B) of the parties' agreement. In this regard, the Arbitrator found that the Union failed to even assert "that the Agency applied [the travel manual's p]olicy in a discriminatory fashion based on the protected elements [in Article 8 of the parties' agreement]."[52] Thus, the Arbitrator interpreted the second stipulated issue as whether the Agency applied the new policy in a discriminatory fashion as described in Article 8. As discussed above, the Authority gives arbitrators substantial deference in determining what issues were submitted to arbitration,[53] and the Union does not show that the Arbitrator's interpretation of the stipulated issue was irrational, unfounded, implausible, or in manifest disregard of the agreement. As the award is directly responsive to the stipulated issue, we deny the Union's first exceeds-authority claim.

Regarding the second exceeds-authority claim, the Arbitrator did not exceed his authority by failing to address whether employees are treated "unfairly and inequitably" under Article 8 of the parties' agreement.[54] The Arbitrator addressed that argument by finding that the Agency had not discriminated against employees "based on the protected elements [in Article 8]." This included Article 8's "protected element" that employees be treated "fairly and equitably."[55] Therefore, because the Union's second exceeds-authority claim is based on a misinterpretation of the award, the claim does not demonstrate that the award is deficient.

Finally, to support its second exceeds-authority claim, the Union relies on the faulty premise that the Arbitrator applied "[Title VII] to address [the stipulated issue]."[56] But we reject that faulty premise in Section III.A. above. Thus, for the reasons stated above, we deny the Union's second exceeds-authority claim.

IV. Decision

We deny the Union's exceptions.

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[52] *Id.*
[53] *FAA*, 64 FLRA at 613.
[54] Exceptions Form at 24.
[55] Award at 12-13 (quoting Art. 8 of the parties' agreement).
[56] Exceptions Form at 24.