70 FLRA No. 45

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2258
(Union)

and

SOCIAL SECURITY ADMINISTRATION
DALLAS, TEXAS
(Agency)

0-AR-5234

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DECISION

May 1, 2017

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Before the Authority: Patrick Pizzella, Acting Chairman, and Ernest DuBester, Member

I. Statement of the Case

The Union filed exceptions to Arbitrator Raymond L. Britton's award, which denied the Union's grievance alleging that a bargaining-unit employee violated the parties' agreement by acting inappropriately towards the grievant during a workplace dispute. We must decide three substantive questions.

First, we must decide whether the doctrine of collateral estoppel bars the Union from bringing its exceptions and estops the Authority from issuing a decision on this matter because these issues were fully litigated in an unfair-labor-practice (ULP) decision that arose out of the same factual events. Because the issues at question in the ULP decision were distinct from the ones raised in this case, the answer to this question is no.

Second, we must decide whether the award is based on a nonfact because the Arbitrator erred in finding that the employee in question did not act inappropriately during the workplace incident with the grievant. Because this exception challenges the Arbitrator's legal conclusion, and because this matter was disputed extensively between the parties at arbitration, the answer to this question is no.

Third, we must decide whether the Arbitrator exceeded his authority by failing to resolve an issue that was before him. Because the Arbitrator's interpretation of the scope of the issues submitted to arbitration is accorded substantial deference, and because the Union has not shown that the Arbitrator's interpretation of the scope of issues before him is implausible or wholly irrational, the answer to this question is no.

For the foregoing reasons, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The grievant, who is a Union officer, was involved in a verbal dispute with a coworker who is a bargaining-unit employee (the BUE). The dispute occurred outside of the BUE's cubicle. Following the dispute, the grievant sent emails to both management and national Union officials alleging that the BUE had behaved in a rude and abusive manner, and insisting that action be taken against her. The grievant also alleged that the BUE had behaved in a rude and abusive manner towards her coworkers several times in the past.

In response, the BUE denied the grievant's allegations and she filed a ULP charge against the Union alleging that the grievant, in her capacity as a Union officer, had sought to punish the BUE for her criticism of the grievant's Union leadership. The Federal Labor Relations Authority's General Counsel issued a complaint on the BUE's behalf, and Chief Administrative Law Judge Charles R. Center ruled in the BUE's favor, concluding that the Union violated § 7116(b)(1) of the Federal Service Labor-Management Relations Statute (the Statute)[1] for interfering with the BUE's protected right to criticize the Union.[2] The Union appealed this decision to the Authority, and the Authority upheld the Judge's decision.[3]

In the meantime, the Union filed a union grievance alleging that the BUE had violated Article 3, Section 2A of the parties' agreement, which states that all employees must "deal with each other in a professional manner and with courtesy, dignity, and respect," and "should refrain from coercive, intimidating, loud or abusive behavior."[4] The grievance requested that the BUE be reassigned and demanded that the BUE's supervisor be disciplined for failing to take any action following the BUE's confrontation with the

[1] 5 U.S.C. § 7116(b)(1).
[2] *See AFGE, Local 2258, AFL-CIO*, 69 FLRA 494, 497-501 (2016) (*Local 2258*).
[3] *Id.* at 494-496.
[4] Award at 5 (quoting Article 3, Section 2 of the parties' agreement).

grievant. The Agency denied the grievance, and the parties proceeded to arbitration.

As the parties did not stipulate to an issue, the Arbitrator found the grievance was properly before him and framed the issue as "[w]hether or not [Agency] employee … has engaged in inappropriate behavior towards her coworkers in violation of Article 3[,] Section 2A of the [parties' agreement]," and if so, then "[w]hether or not [the BUE's supervisor] facilitated this behavior by not taking any action to stop or prevent it."[5]

The Arbitrator found that there was "insufficient evidence to find wrongdoing on the part of the [BUE] regarding the incident" between the BUE and the grievant, and also found that the BUE's supervisor should not be disciplined for her alleged failure to intervene.[6] Although the Union produced four witness statements asserting that the BUE had a prior history of being rude towards her coworkers, the Arbitrator found that these statements were not probative of the incident between the BUE and the grievant, which the Arbitrator characterized as the "incident [that was] made the basis of this grievance."[7] Accordingly, the Arbitrator found that the Union did not prove that the BUE violated Article 3, Section 2 of the parties' agreement, and denied the Union's grievance.

The Union filed exceptions to the Arbitrator's award, and the Agency filed an opposition.[8]

III. Preliminary Matter: The Agency's opposition is timely.

On October 12, 2016, the Union e-filed its exceptions to the Arbitrator's award. The Union's statement of service indicates that the Union served its exceptions on the Agency, by email, on October 7, 2016.[9] If served on that day, any opposition to the Union's exceptions had to be filed by November 7, 2016.[10]

However, the Agency did not e-file its opposition to the Union's exceptions until November 16, 2016. In its opposition, the Agency states that the Union did not serve its exceptions on the Agency until October 17, 2016.[11] The Agency also states that it did not receive the Union's attachments until October 24, 2016.[12] Based on this record, any opposition to the Union's exceptions had to be filed by November 16, 2016, thirty days after the Union served its exceptions to the Agency on October 17, 2016.[13]

As the Agency filed its opposition on November 16, 2016, we find that it was timely filed and we will consider it.

IV. Analysis and Conclusions

A. The doctrine of collateral estoppel does not bar the Union's exceptions.

In its opposition to the Union's exceptions, the Agency argues that the doctrine of collateral estoppel bars the Union from raising both of its exceptions.[14]

Collateral estoppel (also known as "issue preclusion") prevents a second litigation of the same issues of fact or law even in connection with a different claim or cause of action.[15] The doctrine applies to bar subsequent litigation when: (1) the same issue was involved in an earlier proceeding; (2) the issue was actually litigated in that proceeding; (3) the resolution of the issue was necessary to the decision in the first case; (4) the decision in the first case – on the issue to be precluded – was final; and (5) the party attempting to re-raise the issue was fully represented in the first case.[16]

The Agency argues that the Union's exceptions are barred, and that the Authority is estopped from issuing a decision on this matter, because the issues raised here were already fully litigated during the ULP case between the BUE and the Union.[17] However, although this case shares a common factual event with the ULP – the workplace dispute outside the cubicle between the grievant and the BUE – the

[5] *Id.* at 1.
[6] *Id.* at 8.
[7] *Id.* at 8-9.
[8] The Authority notes that neither party excepted to the Arbitrator's determination that the grievance was properly before him; therefore, this matter will not be discussed further.
[9] Exceptions at 14-15.
[10] *See* 5 C.F.R. §§ 2429.21, 2429.22.
[11] Opp'n Br. at 4.
[12] *Id.*
[13] 5 C.F.R. §§ 2429.21, 2429.22; *cf. NTEU, Chapter 26*, 22 FLRA 314, 314-15 (1986) (finding negotiability petition timely filed where attachments were submitted "within the time limits normally afforded . . . to correct procedural deficiencies").
[14] Opp'n Br. at 11-18.
[15] *AFGE, Council of Prison Locals, Local 4052*, 68 FLRA 38, 41 (2014) (*Local 4052*) (then-Member Pizzella dissenting on different grounds) (citing *Nat'l Mediation Bd.*, 54 FLRA 1474, 1478 (1998); *U.S. Dep't of the Air Force, Scott Air Force Base, Ill.*, 35 FLRA 978, 982 (1990) (*Scott AFB*)).
[16] *Id.* (citing *U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 11 (2000); *Scott AFB*, 36 FLRA at 982).
[17] Opp'n Br. at 12 (citing *Scott AFB*, 35 FLRA at 982).

issue litigated in the ULP decision is not the same as the one that is before us here.[18]

In the ULP decision, the central issue was whether *the Union* violated § 7116(b) of the Statute when it sought to have the Agency discipline the BUE for protected activity – criticism of the Union officer's effectiveness.[19] Here, in contrast, the central issue is whether *the BUE* herself violated Article 3, Section 2A of the parties' agreement by engaging in discourteous behavior towards her coworkers. The Authority has previously treated two concurrent issues – discrimination against an employee for protected activity, and whether or not that employee committed misconduct while exercising that protected activity – as distinct questions that may be addressed separately.[20]

Accordingly, because the issue before the Authority in this case was not fully litigated in the ULP decision, and because the resolution of the issues in the ULP decision was not necessary to the decision in this case, the elements of the doctrine of collateral estoppel are not satisfied.[21] We therefore deny the Agency's argument that the Union's exceptions are barred and that the Authority is estopped from issuing a decision on this matter.

B. The Agency has not demonstrated that the Authority should consider whether the filing of exceptions violates the Authority's final order in the ULP proceeding.

The Agency argues that the filing of these exceptions by the Union violates the Authority's final order in the ULP decision.[22] In that decision, the Authority ordered the Union to cease and desist from "[c]ausing or attempting to cause the [A]gency to discriminate against bargaining-unit employees by requesting that employees be disciplined after they engage in protected activity" or "[i]n any like or related manner, interfering with, restraining, or coercing bargaining-unit employees in the exercise of the rights assured by the Statute."[23]

Allegations of noncompliance with ULP orders are more appropriately brought to the General Counsel,[24] who is authorized to consider and take action regarding those issues. Such allegations may also be processed through the parties' own negotiated grievance procedure.[25] The Agency has not demonstrated that we should review an allegation of noncompliance with a ULP order that is brought for the first time to the Authority through an opposition to exceptions to an arbitration award; therefore, we decline to address this argument.

C. The award is not based on a nonfact.

The Union argues that the award is based on a nonfact.[26] To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[27] The Authority will not find an award deficient based on the arbitrator's determination of any factual

[18] Acting Chairman Pizzella notes that this case differs from previous decisions where he found that the excepting party's grievance should be barred by 5 U.S.C. § 7116(d). *See U.S. Dep't of VA, Waco Reg'l Office, Waco, Tex.*, 70 FLRA 92, 95 (2016) (*VA Waco*) (Concurring Opinion of then-Member Pizzella); *U.S. DOD, Def. Commissary Agency*, 69 FLRA 379, 384-85 (2016) (Dissenting Opinion of then-Member Pizzella); *AFGE, Local 919*, 68 FLRA 573, 577-79 (2015) (*Local 919*) (Dissenting Opinion of then-Member Pizzella); *U.S. Dep't of the Navy, Marine Corps Combat Dev. Command, Marine Corps Base, Quantico, Va.*, 67 FLRA 542, 550-51 (Dissenting Opinion of then-Member Pizzella); *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 451-54 (2014) (Dissenting Opinion of then-Member Pizzella). In those cases, Acting Chairman Pizzella objected to attempts made by the *same party* to pursue a grievance in two different forums. Here, conversely, the grieving party – the Union – in the case before us is different from the charging party – the BUE – in the underlying ULP. Accordingly, the "Pizzella standard" regarding §7116(d) of the Statute does not apply here as it did in the above-cited cases. *See VA Waco*, 70 FLRA at 95 (citing *Local 919*, 68 FLRA at 578).

[19] *See Local 2258*, 69 FLRA at 497-499 (citing 5 U.S.C. § 7116(b)(1)-(2)).

[20] *See Wildberger v. FLRA*, 132 F.3d 784, 794-95 (D.C. Cir. 1998) (remanding a protected-activity-discrimination allegation for a decision on the merits, where affected employee separately contested misconduct charges in another forum), *decided on remand, U.S. Small Bus. Admin., Wash., D.C.*, 54 FLRA 837, 851-52 (1995) (resolving discrimination complaint on the merits).

[21] *See Local 4052*, 58 FLRA at 41.

[22] Opp'n Br. at 11-18; *see generally* 5 CFR § 2423.41(e).

[23] *Local 2258*, 69 FLRA at 495.

[24] *See* 5 C.F.R. § 2423.41(e); *see generally FLRA v. U.S. DOJ, INS, U.S. Border Patrol, San Diego, Cal.*, 994 F. 2d 868 (D.C. Cir. 1993) (denying enforcement petition); *U.S. Dept. of HHS v. FLRA*, 976 F. 2d 1409 (D.C. Cir 1992) (granting enforcement petition).

[25] *See* 5 U.S.C. § 7103(a)(9) (defining "grievance"); *id.* § 7121 (providing for grievance procedures); *FDIC, Div. of Depositor & Asset Servs., Okla. City, Okla.*, 49 FLRA 894, 900 (1994) (interpreting § 7103(a)(9)(C)(ii) to allow employee or union to allege in grievance that agency violated Statute).

[26] Exceptions at 8-9.

[27] *U.S. Dep't of VA, Med. Ctr., Wash., D.C.*, 67 FLRA 194, 196 (2014) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).

matter that the parties disputed at arbitration.[28] Additionally, challenges to an arbitrator's legal conclusions do not provide a basis for finding an award deficient as based on nonfacts.[29]

The Union argues that the award is based on a nonfact because the Arbitrator erred in finding that the BUE did not act inappropriately during her interaction with the grievant.[30] However, the Arbitrator's conclusion that there was not sufficient evidence to find wrongdoing on the part of the BUE is a legal conclusion, and therefore cannot be challenged as a nonfact.[31] Further, to the extent that this exception challenges a factual finding, the parties disputed extensively before the Arbitrator whether or not the BUE acted inappropriately during her interaction with the grievant.[32] As explained above, the Authority will not find an award deficient based on an arbitrator's determination of any factual matter that the parties disputed at arbitration.[33]

Accordingly, we deny this exception.

D. The Arbitrator did not exceed his authority.

The Union argues that the Arbitrator exceeded his authority because he failed to address all of the issues before him.[34] Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.[35] Where the parties fail to stipulate the issue, the arbitrator may formulate the issue on the basis of the subject matter before him or her.[36] The Authority and the federal courts accord an arbitrator's formulation of the issues to be decided – including the arbitrator's interpretation of the scope of issues submitted – the same substantial deference that the Authority and the federal courts accord the arbitrator's interpretation of a collective-bargaining agreement.[37]

The Union argues that the Arbitrator exceeded his authority by failing to resolve whether or not the BUE's behavior towards her coworkers prior to the workplace incident was in violation of Article 3, Section 2A of the parties' agreement.[38] The Union notes that, in framing the issue before him, the Arbitrator did not explicitly specify that the issue was limited solely to the interaction between the BUE and the grievant.[39] Accordingly, the Union asserts that the question of the BUE's past behavior was necessarily before the Arbitrator, and that the Arbitrator exceeded his authority by failing to resolve it.

However, as stated above, the arbitrator's interpretation of the scope of issues before him is entitled to substantial deference.[40] Although the Arbitrator did not expressly limit his statement of the issue to the interaction between the BUE and the grievant, he clearly interpreted the issue as being constrained to that event. For example, the Arbitrator found that that incident was "the basis of this grievance."[41] He also considered the evidence presented by the Union regarding the BUE's past behavior, but concluded that it "cannot rightly be considered as persuasive evidence that establishes she acted in an unprofessional manner . . . in violation of Article 3, Section 2A of the [parties' agreement]."[42]

Accordingly, we find that the Union's argument does not provide a basis for setting aside the award, and we deny this exception.

V. Decision

We deny the Union's exceptions.

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[28] *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 626, 628 (2012) (*DHS Laredo*) (citing *NAGE, SEIU, Local R4-45*, 64 FLRA 245, 246 (2009) (*Local R4-45*)).

[29] *AFGE, Local 3652*, 68 FLRA 394, 397 (2015) (*Local 3652*) (citing *U.S. DHS, CBP*, 68 FLRA 157, 160 (2015); *AFGE, Nat'l Joint Council of Food Inspection Locals*, 64 FLRA 1116, 1118 (2010); *AFGE, Local 801, Council of Prison Locals 33*, 58 FLRA 455, 456-57 (2003); *Union of Pension Emps.*, 67 FLRA 63, 64-65 (2012)).

[30] Exceptions at 8-9.

[31] *Local 3652*, 68 FLRA at 397.

[32] *See* Award at 8-9.

[33] *DHS Laredo*, 66 FLRA at 628 (citing *Local R4-45*, 64 FLRA at 246).

[34] Exceptions at 11-12.

[35] *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Lexington, Ky.*, 68 FLRA 932, 942 (2015) (then-Member Pizzella dissenting, in part, on other grounds) (citing *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996); *USDA, Animal & Plant Health Inspection Serv. Plant Prot. & Quarantine*, 51 FLRA 1210, 1218 (1996)).

[36] *Id.* (citing *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 887, 891 (2000)).

[37] *Id.* (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Terminal Island, Cal.*, 68 FLRA 537, 541 (2015) (*BOP Terminal Island*) (then-Member Pizzella dissenting)).

[38] Exceptions at 11-12.

[39] *Id.* at 11 (citing Award at 1).

[40] *See BOP Terminal Island*, 68 FLRA at 541 (citing *Sheet Metal Workers Int'l Ass'n Local Union No. 359 v. Madison Indus., Inc., of Ariz.*, 84 F.3d 1186, 1190 (9th Cir. 1996); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 58 FLRA 137, 139 (2002)).

[41] Award at 8.

[42] *Id.* at 9.