70 FLRA No. 69

HAWAII FEDERAL
EMPLOYEES METAL TRADES COUNCIL
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
PEARL HARBOR NAVAL SHIPYARD AND
INTERMEDIATE MAINTENANCE FACILITY
(Agency)

0-AR-5279

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DECISION

October 25, 2017

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

I. Statement of the Case

The Agency hired contract employees to perform work at its naval facility. An employee doing the same work as some of the contract employees filed a grievance. The grievance alleged that, as relevant here, the Agency misused the contract employees to perform "[i]nherently [g]overnmental work," in violation of a government-wide regulation and an Office of Management and Budget (OMB) policy statement.[1] Arbitrator Michael A. Marr denied the grievance. We must decide three substantive questions.

The first question before us is whether the Arbitrator exceeded his authority by failing to resolve an issue that was before him. Because the award is directly responsive to the issue before the Arbitrator, the answer is no.

The second question before us is whether the award is contrary to law because the Arbitrator did not address one of the Union's arguments. Because the Union does not identify any legal requirement that the Arbitrator address the Union's argument, and we are not otherwise aware of one, the answer is no.

The third question before us is whether the award is incomplete, ambiguous, or contradictory as to make implementation of the award impossible, or whether the award is deficient on other grounds not listed in the Authority's Regulations. Because the Union fails to support these exceptions, the answer is no.

II. Background and Arbitrator's Award

The Agency hires contractors for shipbuilding and repair at its naval facility. The grievant is a technical advisory report (TAR) analyst. He prepares TARs, which estimate costs for work proposed by these contractors. The TARs help the Agency's contracting specialists develop a position on the reasonable amount of these costs when negotiating contracts with contractors.

When the Agency decided to use contract employees to prepare TARs, the grievant filed a grievance. The grievance alleged that the Agency's use of contract employees to prepare TARs violated a government-wide regulation and an OMB policy statement prohibiting the use of contract employees to perform "[i]nherently [g]overnmental work."[2]

When the parties could not resolve the matter, they invoked arbitration. At arbitration, the Arbitrator framed the issue, in relevant part, as: "did the Agency misuse contract employees . . . to perform inherently governmental work in violation of [various government-wide regulations and an OMB policy statement]? If so, what is the appropriate remedy?"[3]

The Arbitrator concluded that the Union failed to demonstrate that the Agency used contract employees to perform "inherently governmental functions."[4] The Arbitrator found that TARs only assist in determining if proposed costs are fair and reasonable, and that the Agency's own employees – its contracting specialists – actually make this determination. Moreover, he found that TAR analysts have no decision-making authority to contractually bind the government, but rather are in support roles that aid Agency contracting specialists, who bind the government. Therefore, the Arbitrator denied the grievance.

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

[1] Award at 3 (quoting grievance).

[2] 48 C.F.R. pt. 7, subpt. 7.5; *see also* OMB, Office of Federal Procurement Policy, Policy Letter 11-01, Performance of Inherently Governmental & Critical Functions, 76 Fed. Reg. 56227-01 (Sept. 12, 2011); Award at 3.

[3] Award at 3.

[4] *Id.* at 22.

III. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Union contends that the Arbitrator improperly "fail[ed] to address all the issues presented at the hearing."[5] This states a claim that the Arbitrator exceeded his authority.[6] As relevant here, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration.[7] 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.[8] The Authority and the federal courts accord an arbitrator's formulation of the issues to be decided the same substantial deference that the Authority and the federal courts accord the arbitrator's interpretation of a collective-bargaining agreement.[9] And where a party claims that an arbitrator exceeded his or her authority by failing to resolve an issue submitted to arbitration, the Authority examines whether the award is directly responsive to the issue before the arbitrator.[10] Moreover, arbitrators are not required to address every argument raised by the parties.[11]

The Union claims that the Arbitrator exceeded his authority by failing to address whether the Agency misused contract employees to perform personal services contracts, in violation of government-wide regulations.[12] But the award is directly responsive to the issue the Arbitrator framed. The issue the Arbitrator framed asked explicitly whether the "Agency misuse[d] contract [personnel] . . . to perform inherently governmental work."[13] Resolving the issue that he framed, the Arbitrator found that the contract employees "do not perform inherently governmental functions."[14] In these circumstances, and as the Arbitrator was not required to address the Union's personal-services-contract argument, the Union's claim does not provide any basis for finding that the Arbitrator exceeded his authority, and we deny the exception.[15]

B. The award is not contrary to law.

The Union also contends that the award is contrary to law.[16] 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.[17] 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.[18] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[19]

The Union claims that the award is contrary to law because the Arbitrator failed to address the personal-services-contract issue that the Union raised.[20] But the Union does not identify any legal requirement that the Arbitrator address this issue, and we are not otherwise aware of one. And as indicated previously, arbitrators are not required to address every argument raised by the parties. Accordingly, the Union's claim does not provide any basis for finding that the award is contrary to law, and we deny the exception.

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

Section 2425.6(e)(1) of the Authority's Regulations[21] provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground" listed in § 2425.6(a)-(c).[22] Consistent with § 2425.6(e)(1), when a party does not provide any arguments to support its exception, the Authority will deny the exception.[23]

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[5] Exceptions Br. at 10; *see id.* at 8-10.
[6] *See, e.g.*, *AFGE, Local 3627*, 65 FLRA 1049, 1050-51 & n.2 (2011) (*AFGE*) (finding that the claim that the arbitrator "failed to resolve the issues submitted to arbitration" raised an exceeds-authority exception).
[7] *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)).
[8] *Id.* (citing *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 887, 891 (2000)).
[9] *Id.* (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Terminal Island, Cal.*, 68 FLRA 537, 541 (2015) (then-Member Pizzella dissenting)).
[10] *See U.S. DHS, Fed. Emergency Mgmt. Agency*, 69 FLRA 444, 445 (2016); *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 68 FLRA 960, 966 (2015).
[11] *See U.S. DHS, CBP Agency, N.Y.C., N.Y.*, 60 FLRA 813, 816 (2005).
[12] Exceptions Br. at 8.
[13] Opp'n, Attach. 2, Amended Discovery Order at 4; *see* Award at 3.
[14] Award at 22.
[15] *AFGE*, 65 FLRA at 1050.
[16] Exceptions Br. at 8-9; *see* Exceptions Form at 4.
[17] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995).
[18] *AFGE, Local 3506*, 65 FLRA 121, 123 (2010) (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[19] *U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010) (citation omitted).
[20] Exceptions Br. at 8-9.
[21] 5 C.F.R. § 2425.6(e)(1).
[22] *NTEU*, 70 FLRA 57, 60 (2016) (quoting 5 C.F.R. § 2425.6(e)(1)).
[23] *Id.* (citing *NTEU, Chapter 67*, 67 FLRA 630, 630-31 (2014)).

The Union contends that the award is incomplete, ambiguous, or contradictory as to make implementation of the award impossible,[24] and that the award is deficient on other grounds not listed in the Authority's Regulations.[25] However, the Union fails to support these exceptions with any arguments. Accordingly, we deny these exceptions as unsupported under § 2425.6(e)(1)[26] of the Authority's Regulations.[27]

IV. Decision

We deny the Union's exceptions.

[24] Exceptions Form at 5.
[25] *Id.* at 11.
[26] 5 C.F.R. § 2425.6(e)(1); *see NAGE, Local R3-10, SEIU*, 69 FLRA 510, 510 n.11 (2016) (exceptions are subject to denial under § 2425.6(e)(1) of the Authority's Regulations if they fail to support arguments that raise recognized grounds for review) (citing *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 450 (2014); *Fraternal Order of Police, Pentagon Police Labor Comm.*, 65 FLRA 781, 784-85 (2011)).
[27] The Union requested leave to file a supplemental submission to address arguments raised in the Agency's opposition and to clarify the record. We do not find the submission appropriate and deny the request. 5 C.F.R. § 2429.26(a); *see also AFGE, Local 3652*, 68 FLRA 394, 396 (2015).