70 FLRA No. 76

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 12
(Union)

and

UNITED STATES
DEPARTMENT OF LABOR
(Agency)

0-AR-5250

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DECISION

December 27, 2017

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester concurring)

I. Statement of the Case

After limiting the issue to one of substantive arbitrability, Arbitrator William Lowe issued an award denying the Union's grievance. The Arbitrator found that the Agency relied on a properly prepared merit-staffing certificate, which included the use of an Office of Personnel Management (OPM) approved waiver, to make a selection for a job vacancy. Because the selection was made from a properly prepared merit-staffing certificate, two provisions from the parties' agreement barred the grievance as neither grievable nor arbitrable. The Arbitrator then went on to make statements that the evidence, case law, and statutes upon which the Union relied to argue the merits of the grievance provided no basis for granting the grievance. The Union filed its exceptions arguing that the award was contrary to law.

First, the Union argues that the award is contrary to 5 U.S.C. §§ 2301(b)(1)-(3), 2302(b)(1)(A), (B), & (D), and Title VII of the Civil Rights Act of 1964 (Title VII).[1] Because the Union does not show that the award is contrary to 5 U.S.C. §§ 2301(b)(1)-(3), 302(b)(1)(A), (B), & (D), or Title VII, we deny this exception.

Second, the Union argues that the award is contrary to *AFGE, Local 31*[2] by challenging the Arbitrator's finding that the grievance is not arbitrable because the parties' agreement excluded properly prepared merit-staffing certificates from the negotiated grievance procedure. The Union relies on *AFGE, Local 31* for the premise that the Authority has consistently held that issues of preselection may be arbitrated. Because the Union's reliance on *AFGE, Local 31* is misplaced, we deny this exception.

Third, the Union argues that the award is contrary to a series of federal court cases supporting the proposition that the Arbitrator erred by not considering whether the Agency's use of the OPM-approved waiver, which the Union asserts to be preselection, is evidence of pretext under Title VII.[3] Because this argument attacks the Arbitrator's statements as to the merits of the grievance, this exception challenges dicta. As dicta cannot form the basis for finding an award deficient, we deny this exception.

II. Background and Arbitrator's Award

The Agency issued a vacancy announcement for a single contract-specialist position. The vacancy announcement required applicants to meet an educational requirement and an experience requirement. Additionally, the vacancy announcement contained an OPM-approved waiver provision that allowed the senior procurement executive to waive requirements when the applicant possessed significant potential for advancement to levels of greater responsibility and authority.

After the vacancy announcement closed, three candidates were scored. A senior procurement executive granted and documented an OPM-approved waiver for the work experience requirement for one candidate, which contributed to her having the highest overall score. This candidate was selected. The grievant was the second highest-scored candidate.

[1] 42 U.S.C. §§ 2000e to 2000e17.

[2] 49 FLRA 957 (1994).

[3] Exceptions Form at 6; Exceptions Br. at 4 (citing *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 493-94 (D.C. Cir. 2008); *Smith v. Napolitano*, 626 F.Supp.2d 81, 97 (D.D.C. 2009); *Oliver-Simon v. Nicholson*, 384 F.Supp.2d 298, 310 (D.D.C. 2005)).

The Union grieved the selection. The Agency denied the grievance and the parties proceeded to arbitration.

Prior to the arbitration hearing, the Agency requested that the hearing be limited to substantive arbitrability because Article 47 of the parties' agreement excludes certain matters from the negotiated grievance procedure. Specifically, Article 47, Section 5.b.(3) excludes the judgment of a merit-staffing panel or qualifications-rating examiner, while Section 5.b.(4) excludes non-selection from a properly prepared merit-staffing certificate. The Arbitrator granted the request, limiting the hearing to the issue of substantive arbitrability.

After an evidentiary hearing, the Arbitrator issued an award denying the grievance, finding the OPM-approved waiver was properly applied for the selectee, the Agency's merit-staffing certificate was properly prepared, and, as a result, the grievance was neither arbitrable nor grievable under Article 47, Section 5.b.(3) and (4) of the parties' agreement. The Arbitrator explicitly stated that he may have found the Union's arguments persuasive had the waiver provision originated within the Agency. But instead, he found that the origin of the waiver, used in this case for the chosen candidate's work-experience requirement, was OPM itself, and that the waiver was available for use government wide and only for candidates at the GS-13 grade level or higher.

The Union filed exceptions to the award. The Agency filed an opposition.

III. Preliminary Matters: We will not dismiss the Union's exceptions for failure to include a signed copy of the exceptions and a certificate of service, and we will consider all of the Agency's opposition.

The Agency argues that the exceptions were not properly served because the Union provided only an unsigned Microsoft Word version of its exceptions and no certificate of service, instead of a signed version of the exceptions with a certificate of service[4] as required by § 2429.27 of the Authority's Regulations.[5]

The Authority has declined to dismiss filings on the basis of minor deficiencies where the deficiencies did not harm or impede the opposing party's ability to respond.[6] Here, while the Union served the Agency's representative of record with an unsigned version of the exceptions and without a certificate of service, the Agency timely filed an opposition to the Union's exceptions. Further, the Agency does not argue or claim that it was harmed or impeded by the unsigned version of the exceptions and lack of a certificate of service. Indeed, the Agency's opposition was thorough. Because the Agency's ability to file an opposition was neither harmed nor impeded by the Union's failure to provide a certificate of service and signed exceptions, we decline to dismiss the Union's exceptions.

Finally, the Authority notes that in response to the second question listed on Part II of the (optional) Opposition to Exceptions to Arbitration Award form, "[d]oes the excepting party argue that the award is contrary to law or government-wide regulation, including management's rights under 5 U.S.C. § 7106," the Agency indicated "[n]o."[7] Yet, the Agency attached a multipage brief in which the Agency very clearly opposed the Union's contrary-to-law exceptions with arguments and supporting case law.[8] We decline to require a party to proceed with mathematical precision before the Authority will consider an argument and so, we will consider the Agency's opposition.[9]

IV. Analysis and Conclusions

The Union argues that the award is contrary to law. When an exception involves an award's

[4] Opp'n Br. at 5-6.
[5] 5 C.F.R. § 2429.27.

[6] *NTEU*, 69 FLRA 614, 616 (2016) (declining to dismiss exceptions where the opposing party did not show any harm after timely responding to exceptions); *U.S. Dep't of the Air Force, Joint Base Elmendorf-Richardson*, 69 FLRA 541, 543 (2016) (declining to dismiss exceptions that were not served on the proper representative when the deficiency did not impede the opposing party's ability to respond); *AFGE, Local 2006*, 52 FLRA 380, 384 (1996) (declining to dismiss exceptions where the exceptions were not dated and the certificate of service was not signed or dated, and incorrectly specified the manner of service).
[7] Opp'n Form at 2.
[8] *Id.* at 5-8.
[9] *See U.S. DOD Educ. Activity, U.S. DOD Dependents Sch.*, 70 FLRA 84, 90 (2016) (Dissenting Opinion of Member Pizzella) ("technical trapfall"); *AFGE, Nat'l Border Patrol Council, Local 2455*, 69 FLRA 171, 174 (2016) (Concurring Opinion of Member Pizzella); *U.S. Dep't of the Treasury, IRS*, 68 FLRA 1027, 1037-38 (2015) (Dissenting Opinion of Member Pizzella); *U.S. DHS, U.S. CBP, U.S. Border Patrol, Yuma Sector*, 68 FLRA 189, 196-97 (2015) (Dissenting Opinion of Member Pizzella).

consistency with law, the Authority reviews any question of law raised by the exception de novo.[10]

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.[11] In making this assessment, the Authority defers to the arbitrator's underlying factual findings.[12] Because the Union excepts to the arbitrability determination as contrary to law, we shall conduct a de novo review.

A. The award is not contrary to 5 U.S.C. §§ 2301(b)(1)-(3), 2302(b)(1)(A), (B), & (D), or Title VII.

The Union argues that the award violates three statutes: 5 U.S.C. §§ 2301(b)(1)-(3), 2302(b)(1)(A), (B), & (D), and Title VII.[13] The Union argues that the Arbitrator's arbitrability determination violated these statutes after he failed to find facts and to consider in detail the Agency's use of the waiver provision for the selected candidate. The Union contends broadly that the Agency's sheer use of the waiver constitutes preselection of the selectee.[14]

The Union's restatement of its arguments presented before the Arbitrator does not demonstrate here that his conclusions violated any of the statutes cited. The Arbitrator explicitly stated that he may have found the Union's arguments persuasive had the waiver provision originated within the Agency.[15] But instead, he found that the origin of the waiver, used in this case for the chosen candidate's work-experience requirement, was OPM itself, and that the waiver was available for use government wide and only for candidates at the GS-13 grade level or higher.[16] From these factual findings, to which we defer, the Arbitrator concluded that the waiver was properly invoked and documented, then, that the merits-staffing certificate was properly prepared and that the parties' agreement excluded grievances as to properly prepared merit-staffing certificates from the negotiated grievance procedure.[17] The Union's re-argument of its factual case here fails to demonstrate that the Arbitrator's legal conclusion violates any of the federal statutes invoked. Consequently, the Union does not demonstrate that the award is contrary to 5 U.S.C. §§ 2301(b)(1)-(3), 2302(b)(1)(A), (B), & (D), or Title VII, and we deny this exception.

B. The award is not contrary to *AFGE, Local 31*.

Second, the Union argues that the award is contrary to Authority case law.[18] The Union relies upon *AFGE, Local 31* for the premise that the Authority has consistently held that issues of preselection may be arbitrated; however, the Union's reliance on the cited decision is misplaced. In *AFGE, Local 31*, the Authority set aside an arbitration award that ordered a grievant to be placed in a position, even though the arbitrator specifically determined that the union's evidence of discrimination and preselection was not sufficient to support the claim.[19] Because the Union's reliance on the cited Authority decision is misplaced, we deny this exception.

C. The award is not contrary to federal court case precedent.

The Union argues that the award is contrary to a series of federal court cases supporting the proposition that the Arbitrator erred in not considering whether the Agency's waiver, which the Union asserts to be preselection, is evidence of pretext under Title VII.[20]

The Arbitrator determined that the Union's grievance was neither grievable nor arbitrable because there was a properly prepared merit-staffing certificate, the OPM-approved waiver was proper, and Article 47, Section 5.b.(3) and (4) of the parties' agreement barred grievances about properly prepared merit-staffing certificates.[21] However, after reaching his conclusion that the grievance was not arbitrable, the Arbitrator made statements opining about the persuasiveness of the Union's evidence, case law, and statutes concerning the merits of the grievance.[22]

[10] *Fraternal Order of Police Lodge No. 158*, 66 FLRA 420, 423 (2011).
[11] *Overseas Private Inv. Corp.*, 68 FLRA 982, 984 (2015) (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[12] *Id.* at 984-85.
[13] Exceptions Form at 4-5.
[14] Exceptions Br. at 3.
[15] Award at 8.
[16] *Id.*
[17] *Id.* at 9-10.
[18] Exceptions Br. at 4.
[19] 49 FLRA at 963-64 (setting aside an award for being contrary to management's right to select).
[20] Exceptions Form at 6; Exceptions Br. at 4 (citing *Brady*, 520 F.3d at 493-94; *Smith*, 626 F.Supp.2d at 97; *Oliver-Simon*, 384 F.Supp.2d at 310).
[21] Award at 8-11.
[22] *Id.*

Since the award was limited to whether the grievance was arbitrable, the Arbitrator's statements are dicta. When an arbitrator finds a matter not arbitrable, any comments he or she makes concerning the merits of that matter are dicta and cannot form the basis for finding an award deficient.[23] Because this exception challenges dicta, we deny it.

V. Decision

We deny the Union's contrary-to-law exception.

[23] *AFGE, Local 1667*, 70 FLRA 155, 158 (2016); *AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009).

Member DuBester, concurring:

I concur in the decision to deny the Union's contrary-to-law exceptions to the Arbitrator's substantive-arbitrability finding. However, regarding the Union's exceptions that the decision discusses in Sections IV.A. and B., I would deny them based on different rationale.

The award is not contrary to the statutes and related case law the Union cites. The Union argues that the award violates three statutes: 5 U.S.C. §§ 2301(b)(1) (3), 2302(b)(1)(A), (B), & (D), and Title VII; and related case law.[1] These statutes address, generally, merit system principles, prohibited personnel practices, and prohibitions on employment discrimination. The Union argues that the Arbitrator's arbitrability determination violates these statutes because the Arbitrator "fail[ed] to analyze the facts and discuss the application[] of those facts to the law"[2] to determine whether the successful candidate was preselected for the position.

The Union's exceptions do not demonstrate that the Arbitrator's substantive-arbitrability determination is deficient. The Union's argument faults the Arbitrator for not resolving the grievance on its merits, under applicable law. But the Union's argument does not challenge the Arbitrator's determination, based on his interpretation and application of the parties' agreement, that the grievance's merits are not arbitrable.

Specifically, the Union does not challenge the Arbitrator's determination that Article 47, Section 5.b.(3) and (4) of the parties' agreement controls the issue of the grievance's arbitrability. Nor does the Union claim that the statutes it cites address contract-interpretation issues, or apply to the Arbitrator's interpretation and application of these arbitrability provisions. Further, the Union does not challenge the Arbitrator's determination that the selection action followed applicable procedures.[3] And finally, the Union does not take issue with the Arbitrator's determination that the waiver provision the Agency used – a waiver provision approved by OPM for government-wide use – "is a viable tool to enable the promotion of demonstrated highly capable applicants with significant potential for advancement."[4] Based on these determinations, and interpreting and applying the parties' agreement, the Arbitrator concluded that the grievance concerns "the judgment of a merit-staffing panel or qualifications-rating examiner" and "non-selection from a properly prepared merit-staffing certificate"[5] under Article 47, Section 5.b.(3) and (4).

Accordingly, because none of the authorities the Union cites in its exceptions address the Arbitrator's interpretation and application of the arbitrability provision of the parties' agreement to find the grievance not substantively arbitrable, I would find that those exceptions do not demonstrate that the Arbitrator's award is deficient.

[1] Exceptions Form at 4-6.
[2] Exceptions Br. at 4.
[3] *See* Award at 9.
[4] *Id.*
[5] *Id.* at 7; *see id.* at 11.