70 FLRA No. 112

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 5
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE LOGISTICS AGENCY
DISTRIBUTION DEPOT
RED RIVER, TEXAS
(Agency)

0-AR-5303

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DECISION

May 8, 2018

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

Decision by Member Abbott for the Authority

I. Statement of the Case

Arbitrator Stephen D. Owens found that the Union's grievance was not procedurally arbitrable because it was untimely filed. There are four questions before us.

The first question is whether the award's procedural-arbitrability determination fails to draw its essence from Article 30 of the parties' collective-bargaining agreement (agreement). Because the Union does not demonstrate that the Arbitrator's interpretation of Article 30 is irrational, unfounded, implausible, or in manifest disregard of the agreement, the answer is no.

The second question is whether the award is based on a nonfact because the Arbitrator did not find a continuing violation. Because the Union's nonfact exception challenges a legal conclusion, the answer is no.

The third question is whether the award is contrary to Authority precedent regarding continuing violations in pay disputes. Because the Union does not demonstrate how the award is contrary to law, the answer is no.

The fourth question is whether the Union's remaining exceptions demonstrate that the award is contrary to public policy, or show that the Arbitrator exceeded his authority. Because the Union fails to support these exceptions, the answer is no.

II. Background and Arbitrator's Award

The grievant is a wood worker in the container fabrication and receipt station at the Agency's Red River Distribution Center. The grievant was assigned to the position at the Wage Grade (WG)-07 level in October 2012. Over three years later, the Agency transferred the grievant to a different position in another area of the same shop. In its April 2016 grievance, the Union argues that the Agency violated Article 25, § 8 of the agreement when it did not temporarily promote the grievant to WG-08 beginning in October 2012. The Agency denied the grievance, which went to arbitration.

Before the Arbitrator, the Agency filed a motion to dismiss the grievance as untimely. The Union argued that the Agency's failure to temporarily promote the grievant rendered every pay period a violation and, thus, was a continuing violation. The Arbitrator denied the motion to dismiss because the motion contained questions of procedural and substantive arbitrability. A full hearing was held. The Arbitrator issued his award on July 13, 2017.

The Arbitrator framed the issues as: (1) is the grievance timely; and (2) "[d]id the Agency violate Article 25, [§] 8 when it failed to temporarily promote the [g]rievant to a WG-08 [w]ood [w]orker position?"[1]

The Arbitrator concluded that the grievance was untimely filed because Article 30, § 9 of the agreement requires "[a] grievance . . . [to] be filed within fifteen calendar days of the incident or learning of the incident being grieved except for extenuating circumstances such as the unavoidable or an authorized absence of the aggrieved."[2] The Arbitrator found that the grievance was untimely because, based on the grievant's own testimony, the grievant knew that he had been performing at the higher WG-08 level since 2015, yet did not file the grievance until April of 2016.

[1] Award at 3.
[2] *Id.* at 6.

The Arbitrator considered the Union's arguments that the Agency's alleged failures to properly pay the grievant constituted a continuing violation because they "manifest[ed] themselves at each pay period and 'continue[d] to affect employees on a recurring basis.'"[3] The Arbitrator rejected those arguments. According to the Arbitrator, the alleged violation concerned the Agency's purported failure to temporarily promote the grievant, who believed that he had been performing higher graded work since 2015. Accordingly, the Arbitrator dismissed the grievance as untimely filed.

The Union filed exceptions on August 14, 2017, and the Agency filed an opposition on September 5, 2017.

III. Analysis and Conclusions

A. The award draws its essence from the agreement.

The Union argues that the award fails to draw its essence from Article 30, § 9 of the agreement because the Arbitrator erroneously failed to find a continuing violation.[4]

Procedural-arbitrability determinations involve questions of whether a grievance satisfies a collective-bargaining agreement's procedural conditions.[5] Historically, the Authority has not found an arbitrator's procedural-arbitrability determination deficient on grounds that directly challenge the determination itself, including a claim that an award fails to draw its essence from a collective-bargaining agreement.[6] However, our recent decision in *U.S. Small Business Administration* reexamined that precedent and held that the Authority's previous interpretations of the U.S. Supreme Court's decision in *John Wiley & Sons, Inc. v. Livingston* were incorrect.[7] Thus, consistent with the Authority's mandate to review arbitral awards on grounds similar to those applied in the federal courts in private-sector labor-management relations, we held that parties may directly challenge arbitrators' procedural-arbitrability determinations on essence grounds.[8]

Here, the Arbitrator considered, but rejected, the Union's continuing-violation allegation, and found the grievance untimely because the grievant was aware, one year before filing the grievance, that he was performing higher-graded work. The Union does not dispute the Arbitrator's finding regarding the timing of the grievant's awareness. Further, the Union does not cite any other language in the agreement that required the Arbitrator to find a continuing violation under these circumstances.

Accordingly, we find that the Union has not demonstrated that the Arbitrator's interpretation of Article 30 is irrational, unfounded, implausible, or in manifest disregard of the agreement. Therefore, the award draws its essence from the agreement, and we deny this exception.[9]

B. The award is not based on a nonfact.

To establish that an award is based on nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[10]

The Union contends that the Arbitrator's conclusion that the continuing-violation "principle" did not apply to the facts of this grievance is a nonfact.[11] According to the Union, there was sufficient evidence to support a continuing violation finding because a new violation occurred every time the grievant was paid at the WG-07 level, rather than the WG-08 level, despite apparently performing higher-graded duties.[12]

However, the Arbitrator made a legal conclusion that the continuing-violation legal theory did not apply to the facts of this case.[13] The Authority has long held that neither legal conclusions nor conclusions based on the interpretation of the collective-bargaining agreement may be challenged as nonfact.[14] As the Authority will not find an award deficient for nonfact based on an arbitrator's legal conclusion,[15] we deny this exception.

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[3] *Id.* at 11.
[4] Exceptions Br. at 6.
[5] *U.S. DHS, U.S. CBP, Border Patrol, San Diego Sector, San Diego, Cal.*, 68 FLRA 128, 131 (2014) (*CBP*) (citing *AFGE, Local 2041*, 67 FLRA 651, 652 & n.22 (2014) (*Local 2041*)).
[6] *Id.*
[7] *U.S. Small Bus. Admin.*, 70 FLRA 525, 526-27 (2018) (citing 376 U.S. 543 (1964) (parties may directly challenge procedural-arbitrability determinations on essence grounds)).
[8] 5 U.S.C. § 7122(a)(2); *see also* H.R. Rep. No. 95-1717, at 153 (1978) (Conf. Rep.) ("The Authority will only be authorized to review the award of the arbitrator on very narrow grounds similar to the scope of judicial review of an arbitrator's award in the private sector.").
[9] *CBP*, 68 FLRA at 131 (citing *Local 2041*, 67 FLRA at 652 & n.22).
[10] *AFGE, Local 953*, 68 FLRA 644, 646 (2015) (citing *AFGE, Local 2382*, 66 FLRA 664, 667 (2012)).
[11] Award at 11; Exceptions Br. at 10-11.
[12] Exceptions Br. at 11.
[13] *See IFPTE, Local 386*, 66 FLRA 26, 31-32 (2011) (continuing violation is a legal conclusion based on factual findings).
[14] *NTEU*, 69 FLRA 614, 619 (2016) (citing *AFGE, Local 3974*, 67 FLRA 306, 308 (2014)).
[15] *AFGE, Local 2258*, 70 FLRA 210, 213 (2017) (citing *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 626, 628 (2012)); *see also AFGE, Local 3723*, 67 FLRA 149, 150 (2013).

C. The award is not contrary to law.

The Union argues that the award is contrary to law.[16] The Authority reviews any question of law de novo.[17] In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[18]

To support its exception, the Union quotes another arbitrator's award – exceptions to which the Authority later denied[19] – that summarized case law involving continuing violations.[20] However, the Union does not explain how that arbitration award, or the case law that it cited, legally required the Arbitrator in this case to find that, *under the parties' agreement*, a continuing violation occurred. In this regard, the Arbitrator did not frame or resolve any issues regarding whether the Agency complied with time limits established in *law*; he resolved only whether the grievance was timely under the terms of the *agreement*. For these reasons, the Union's argument provides no basis for finding the award contrary to law, and we deny this exception.

D. The Union fails to support its two remaining exceptions.

The Union also argues that the award is contrary to public policy and that the Arbitrator exceeded his authority.[21] Specifically, the Union argues that the award is contrary to a recognized public policy against continuing violations in employment pay disputes as set out in the Lilly Ledbetter Fair Pay Act of 2009,[22] and that the Arbitrator exceeded his authority by disregarding specific limitations contained in the agreement.[23]

Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground" for review listed in § 2425.6(a)-(c).[24] Consistent with § 2425.6(e)(1), when a party does not provide any arguments to support its exception, the Authority will deny the exception.[25]

Here, the Union fails to sufficiently support its arguments on each point. First, though the Union references the Lilly Ledbetter Fair Pay Act of 2009 by its title, the Union fails to identify or demonstrate that this law creates a recognized public policy, or how the award violates that policy.[26] Second, the Union fails to identify any provision of the agreement which limits the Arbitrator's authority or how the Arbitrator supposedly disregarded any specific limitations on his authority.[27]

Accordingly, we deny these exceptions as unsupported under § 2425.6(e)(1) of the Authority's Regulations.[28]

IV. Decision

We deny the Union's exceptions.

[16] Exceptions Br. at 11-12.
[17] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bennettsville, S.C.*, 70 FLRA 342, 344 (2017) (citing *AFGE, Local 342*, 69 FLRA 278, 278 (2016)).
[18] *Id.*
[19] *See USDA, Food Safety & Inspection Serv.*, 65 FLRA 417 (2011).
[20] Exceptions Br. at 11-12.
[21] *Id.* at 10-12.
[22] *Id.* at 11 (citing Pub. L. No. 111-2, 123 Stat. 5).
[23] *Id.* at 10.
[24] 5 C.F.R. § 2425.6(e)(1).
[25] *NTEU, Chapter 67*, 67 FLRA 630, 630-31 (2014) (citing *AFGE, Nat'l Border Patrol Council, Local 2595*, 67 FLRA 361, 366 (2014)).
[26] *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 179 (2017) (public policy in question "must be 'explicit,' 'well defined,' and 'dominant,' and a violation of the policy 'must be clearly shown'").
[27] *NTEU*, 70 FLRA 57, 60 (2016) (arbitrator exceeds his or her authority when the arbitrator disregards specific limitations on his or her authority).
[28] 5 C.F.R. § 24256(e)(1); *see U.S. Dep't of VA, Gulf Coast Veterans Health Care System*, 69 FLRA 608, 610 (2016) (citing *NAGE, Local R3-10, SEIU*, 69 FLRA 510, 510 n.11 (2016)).

Member DuBester, concurring:

I concur in the result. Because we deny the Union's essence challenge to the Arbitrator's determination that the grievance is untimely, which includes the Arbitrator's finding that the continuing violation principle has no bearing on his reading of the parties' agreement, I would not reach the Union's remaining exceptions.