72 FLRA No. 26

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
(Agency)

0-AR-5439

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DECISION

March 10, 2021

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

Decision by Member Abbott for the Authority

I. Statement of the Case

This case is a reminder to the federal labor-relations community that proper review and application of relevant cases and regulations is key to resolving disputes.

The Union filed a grievance against the Agency for the alleged breach of a settlement agreement. The Arbitrator ruled that the matter was not arbitrable because the alleged breach should have been addressed through the Authority's General Counsel's (GC) office. We find that the award is contrary to law because no caselaw or Authority Regulation took subject matter jurisdiction away from the Arbitrator. Therefore, we vacate the award and remand the matter to the parties for resubmission to arbitration.

II. Background and Arbitrator's Award

The parties engaged in negotiations to draft an updated collective-bargaining agreement (CBA). During negotiations, the Union prioritized official time – which was included in the parties' CBA as Article 2, Union Rights and Responsibilities – and, ultimately, the Union withdrew from negotiations. In July 2017, the Agency filed an unfair-labor-practice (ULP) charge against the Union, alleging failure to bargain in good faith during the CBA negotiations. To resolve the ULP, the parties signed a settlement agreement, with some assistance from the GC's Office. The Settlement Agreement provided that the parties could submit no more than four articles for renegotiation and the opposing party could strike one of the other party's articles from renegotiation. The Settlement Agreement was signed by the Agency and Union on January 31, 2018 and incorporated into the parties' ground rules. The next day, the GC's Office approved the Agency's request to withdraw its charge and closed the case.

Subsequently, the parties identified articles for negotiation. The Agency submitted three articles which had previously been in the CBA, including Article 2, and a new fourth item, Article XX: Official Time, which was not contained in the original CBA, for negotiation. Because both Article 2 and Article XX concern official time, the Union argued that Article XX impermissibly covered the same subject matter as Article 2. The Union struck Article 2 from negotiation and filed a grievance on April 27, 2018, asserting that the Agency's introduction of Article XX repudiated the Settlement Agreement by attempting to force the Union to negotiate over official time.

The Agency and Union disagreed regarding whether the Settlement Agreement was between the parties or if the GC was party to the Settlement Agreement. The Agency asserted that the GC was a party and the matter was not grievable or arbitrable through the negotiated grievance procedure because the Authority "recognizes that a ULP settlement agreement must conform to the requirements established by the Regional Director, and therefore, is not wholly a product of negotiations between the parties' collective[-]bargaining process"[1] mirroring language in the Authority's decision in *FAA, Aviation Standards National Field Office, Mike Monroney Aeronautical Center, Oklahoma City, Oklahoma* (*FAA*).[2] The Agency also argued that the Union's claims "should have been raised with the [Authority] and not through the parties' negotiated grievance process because the right to institute any further proceedings related to the settlement agreement is granted only to the [Authority]."[3] The Union argued that the GC was not a party to the Settlement Agreement, the CBA permitted grievances over alleged violations of supplemental agreements, and the matter was arbitrable.

[1] Exceptions, Attach. 3, Agency Post-Hr'g Br. (Agency Post-Hr'g Br.) at 2-3.
[2] 43 FLRA 1221, 1231-32 (1992).
[3] Agency Post-Hr'g Br. at 4; *see also id.* at 3 (citing 5 C.F.R. § 2423.12).

The Arbitrator framed the issue as whether the matter was arbitrable through the negotiated grievance procedure and if so, whether the Agency breached or repudiated the settlement agreement in an unfair labor practice case by proposing an article, Article XX, relating to official time. In his October 31, 2018, award, the Arbitrator cited *FAA* and found the Settlement Agreement was "not wholly a product of negotiations between the parties."[4] He then denied the grievance, finding he did not have jurisdiction.[5]

On November 20, 2018, the Union filed an exception to the award, and the Agency filed an opposition on December 3, 2018.

III. Analysis and Conclusion: The award is contrary to law.

The Union asserts that the award is contrary to law because the Arbitrator's determination that he lacked jurisdiction was based on the mistaken premise that addressing an alleged breach of the parties' Settlement Agreement would require use of the ULP process, not the negotiated grievance process.[6] The Union asserts that the award demonstrates the Arbitrator misread *FAA*.[7] We agree.[8]

Here, the Arbitrator relied on *FAA* to conclude that he did not have jurisdiction to hear a grievance filed by the *charged* party[9] that alleged the charg*ing* party[10] breached the settlement agreement. But, that is not what *FAA* held. *FAA* did not address whether a charged party could allege a breach of a settlement agreement by the charging party through the parties' grievance procedure. Instead, *FAA* addressed breaches by the charged party where the GC was a signatory to the settlement. In those circumstances, we determined a violation of a settlement agreement would not be a violation of sections 7116(a)(5) or 7116(b)(5) of the Federal Service Labor-Management Relations Statute (the Statute).[11]

Even in the furthest dicta of *FAA*, we did not opine on the appropriate forum for a grievance filed by the charg*ed* party. Quite the opposite, we discussed that there are regulations that provide for the Regional Director, and then the GC, to proceed with the adjudication of the charg*ing* party's underlying unfair labor practice charge, or complaint, should the settlement agreement have been breached by the charg*ed* party.[12] Both *FAA*, and our current regulation, 5 C.F.R. § 2423.12(a), are silent as to the appropriate forum when the charg*ed* party alleges the charg*ing* party failed to abide by the settlement agreement. Moreover, both *FAA* and § 2423.12(a) of the Authority's Regulations concern the violation of a settlement agreement that has been "approved by" a Regional Director of the Office of the GC.[13] Here, there is no record evidence that the Regional Director either approved, or was a party to, the parties' settlement agreement.[14] Thus, *FAA* and § 2423.12 are entirely inapplicable and cannot possibly have deprived the Arbitrator of jurisdiction.

Accordingly, we are persuaded that the award is contrary to law,[15] and we vacate the award.

IV. Order

We vacate the award and remand this matter to the parties for resubmission to arbitration.

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[4] Award at 6 (quoting *FAA*, 43 FLRA at 1231-32).
[5] *Id.*
[6] Exceptions Br. at 3-6.
[7] *Id.* at 4.
[8] When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo. *NAGE*, 71 FLRA 775 (2020); *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017); *U.S. Dep't of the Treasury*, *IRS*, 68 FLRA 145, 147 (2014). The Authority defers to the arbitrator's underlying factual findings unless the excepting party successfully establishes that they are nonfacts. *AFGE, Loc. 2145*, 71 FLRA 818, 819 (2020); *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014).
[9] The "charged party" is the party that allegedly committed the unfair labor practice.
[10] The "charging party" is the party that files the complaint with the Authority.
[11] *FAA*, 43 FLRA at 1231. We note the 1992 decision cited 5 C.F.R. § 2423.11(b)(1) of the Authority's Regulations. That section is found currently at 5 C.F.R. § 2423.12(a) and it provides no relief for any charg*ed* party who claims the charg*ing* party has failed to perform its obligations under the approved informal settlement agreement. 5 C.F.R. § 2423.12(a) ("If the *Charged* Party fails to perform its obligations under the approved informal settlement agreement, the Regional Director may institute further proceedings." (emphasis added)).
[12] *FAA*, 43 FLRA at 1231-32 (discussing the procedure if a complaint had been issued (citing 5 C.F.R. § 2423.11(c) (current version at 5 C.F.R. § 2423.25))). *See generally U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 2015 WL 1879928, *13 (March 13, 2015) (non-precedential Administrative Law Judge decision) (discussing the processing of a settlement agreement after the charg*ing* party has alleged a breach). The Arbitrator apparently recognized that our regulations refer specifically to the GC's ability to pursue proceedings regarding only a *respondent's* breach of a settlement agreement. *See* Award at 6-7. This makes his misreading of *FAA* even more confounding.
[13] *FAA*, 43 FLRA at 1231; 5 C.F.R. § 2423.12.
[14] *See* Exceptions, Attach. 6, Settlement Agreement at 1.
[15] The Union also makes a contractual argument but because we have resolved this matter on another point we will not analyze this exception. *See U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 573 n.18 (2018) (then-Member DuBester dissenting).

Chairman DuBester, concurring:

I agree that the Arbitrator erred by concluding that he did not have jurisdiction to hear the grievance. And I agree that the award should be remanded to the Arbitrator.

Notwithstanding the majority's belabored analysis, however, I do not agree that the outcome of this case is in any way contingent upon the absence of any reference in § 2423.12(a) of the Authority's Regulations to actions that may be taken by the Regional Director "when [a] charg*ed* party alleges that the charg*ing* party failed to abide by [a] settlement agreement" entered into under this provision.[1] Instead, applying the plain language of this provision, I would conclude that it has no bearing on the outcome of this dispute, for the simple reason that the Regional Director neither approved, nor was a party to, the parties' settlement agreement.[2] And, under these circumstances, I would find that the Arbitrator had jurisdiction over the Union's grievance pursuant to the terms of the settlement agreement and the parties' negotiated grievance procedure.

[1] Majority at 4.

[2] *See* 5 C.F.R. § 2423.12(a) ("Before issuing a complaint, the Regional Director may give the Charging Party and the Charged Party a reasonable period of time to enter into an informal settlement agreement *to be approved by the Regional Director*." (emphasis added)); *see also* Exceptions, Attach. 6, Settlement Agreement at 1.

Member Abbott, concurring:

I agree that the Award is contrary to law.

I write separately, however to note that the Settlement Agreement does not speculate or articulate what forum *should be* empowered to address any alleged breach by the *charging party*.

We recently held that an unfair labor practice (ULP) may be raised in a grievance procedure or under Statute, "but not under both procedures."[1] To determine whether the issues in a ULP charge and a grievance procedure may preclude the other, we consider whether: (1) the ULP charge arose from the *same set of factual circumstances* as the grievance; and (2) the *theories* advanced in support of the ULP charge and the grievance were *substantially similar*.[2]

Here, even if the ULP charge and grievance arose from the "same set of circumstances," the theories advanced in each are not "substantially similar." Specifically, the Agency's earlier-filed ULP charge alleged that the Union was not bargaining in good faith. The Union's later-filed grievance asserts a breach of the Settlement Agreement. Therefore, the language of the Settlement Agreement must be considered in order to resolve the questions of whether a charged party may grieve breach of a settlement agreement and in what forum such a charge is raised.

Once again, it is obvious that agreements, of any sort, have consequences.[3]

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[1] *NLRB*, 72 FLRA 80, 81 (2021) (Member Abbott dissenting); *AFGE, Loc. 1770*, 72 FLRA 74, 75 (2021) (Chairman DuBester dissenting); 5 U.S.C. § 7116(d).

[2] *See Sport Air Traffic Controllers Org.*, 71 FLRA 626, 627 (2020) (then-Member DuBester dissenting).

[3] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 1262, 1263 (2020) (then-Member DuBester concurring); *see also U.S. Dep't of Transp., FAA*, 71 FLRA 694, 698 (2020) (Concurring Opinion of Member Abbott) (noting that the wording that parties agree to in "contracts have consequences," and "we do not allow agencies 'to wriggle out of a poorly thought out and constructed contract provision[s]'" (quoting *U.S. Dep't of Transp., FAA*, 68 FLRA 402, 405 n.40 (2015))).