73 FLRA No. 163

SPORT AIR TRAFFIC CONTROLLERS ORGANIZATION
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
412 TEST WING
EDWARDS AIR FORCE BASE, CALIFORNIA
(Agency)

0-AR-5929

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DECISION

March 20, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member
(Chairman Grundmann concurring)

I. Statement of the Case

Arbitrator Jonathan S. Monat issued an award finding a Union grievance was not arbitrable. The Union excepted, arguing the award is contrary to law, fails to draw its essence from the parties' 1994 collective-bargaining agreement (the 1994 CBA), and is incomplete, ambiguous, and contradictory, so as to make implementation of the award impossible. The Agency filed an opposition, in which it requests that we grant certain remedies. For the reasons explained below, we deny the Union's exceptions and the Agency's remedial request.

II. Background and Arbitrator's Award

In December 2015, the Agency notified the Union that it wanted to renegotiate the parties' then-current CBA, the 1994 CBA. The parties began bargaining over ground rules for those negotiations. However, in May 2016, the Agency filed an unfair-labor-practice (ULP) charge, and the Federal Labor Relations Authority's (FLRA's) General Counsel issued an amended complaint, alleging the Union unlawfully refused to recognize the Agency's designated bargaining representatives. In *Sport Air Traffic Controllers Organization*, an FLRA Administrative Law Judge found the Union acted unlawfully as alleged, and the Authority subsequently denied the Union's exceptions to the Judge's recommended decision.[1]

In the meantime, on February 22, 2017, the Agency emailed the Union, alleging that the Union waived its right to bargain, and stating that the Agency would unilaterally implement its last, best proposal as the new CBA on May 1, 2017.[2] In response to that email, the Union filed a ULP charge in Case No. SF-CA-17-0305, alleging the Agency failed to bargain in good faith by notifying the Union of its intention to unilaterally implement.[3] After the Agency implemented the new CBA (the 2017 CBA), the Union amended its charge in SF-CA-17-0305 to allege the Agency's unilateral implementation of the 2017 CBA was unlawful.[4] However, the Union later withdrew the amended ULP charge.[5]

The Union also filed a grievance alleging the Agency violated the 1994 CBA by failing to comply with that CBA's official-time provision.[6] The grievance went to arbitration, where an arbitrator found the Agency did not violate the Federal Service Labor-Management Relations Statute (the Statute), Agency regulation, or the parties' agreement by unilaterally implementing the 2017 CBA or by failing to schedule official time in accordance with the 1994 CBA.[7]

The Union filed exceptions with the Authority and, in *Sport Air Traffic Controllers Organization* (*SATCO II*), the Authority found that both the grievance and the previously filed charge in SF-CA-17-0305 involved the same issue: "the unilateral [implementation] of [the 2017] CBA."[8] Because the Union filed the charge in SF-CA-17-0305 before filing the grievance, the Authority found § 7116(d) of the Statute barred the arbitrator from exercising jurisdiction over the grievance.[9] Therefore, the Authority vacated the arbitrator's award.[10]

[1] 70 FLRA 554 (2018), *recons. denied*, 71 FLRA 25 (2019).
[2] *See SPORT Air Traffic Controllers Org.*, 71 FLRA 626, 626 (2020) (Member DuBester dissenting).
[3] *See id.*
[4] *See id.*
[5] *See id.*
[6] *See id.*
[7] *See id.*
[8] *Id.* at 628.
[9] *See id.* (citing 5 U.S.C. § 7116(d)).
[10] *See id.*

The Union filed two more ULP charges,[11] and another grievance, challenging the Agency's implementation of the 2017 CBA. The Union subsequently withdrew the two ULP charges and did not pursue the grievance to arbitration.

Then, in 2020, the Agency notified the Union that it planned to impose a new agreement (the 2020 CBA) to replace the 2017 CBA. The Union filed a new ULP charge in Case No. SF-CA-21-0002, alleging the 1994 CBA was still in effect and the Agency was refusing to comply with it.[12] To resolve that charge, an FLRA Regional Director (the RD) and the Agency reached a settlement agreement, to which the Union was not a party.[13] In the settlement agreement, the Agency agreed to: (1) rescind the 2020 CBA; (2) restore the conditions of employment established by the 2017 CBA and arbitration awards interpreting that CBA; and (3) negotiate with the Union over a new CBA.[14] The Union appealed the settlement agreement to the FLRA's Office of the General Counsel, arguing the 1994 CBA was still in effect.[15] The FLRA's Acting General Counsel (Acting GC) denied the Union's appeal.[16]

The Union also filed a ULP charge in Case No. SF-CA-21-0164. In that charge, the Union again argued the 1994 CBA was still in effect.[17] The RD dismissed the charge,[18] the Union appealed, and the Acting GC denied the appeal.[19]

After the Agency implemented the settlement agreement in SF-CA-21-0002, the Union filed a grievance alleging: "The document implemented . . . through the settlement agreement . . . is not a successor agreement between the parties and was never agreed to or executed by [the Union,] and its implementation constitutes a repudiation of the . . . 1994 CBA[,] which remains in full force and effect."[20] The grievance went to arbitration, where the Arbitrator framed the issue, in relevant part, as "[w]hether the issue raised in the . . . [g]rievance . . . is precluded from review in arbitration (non-arbitrable) due to being outside the scope of the [CBA], being untimely . . . , being previously filed [(§ 7116(d) of the Statute)], and/or being res judicata ([*SATCO II*]; . . . SF-CA-21-0002; and . . . SF-CA-21-0164)."[21]

In his award, the Arbitrator found the Union was denying the 2017 CBA's legitimacy because the Union wanted to preserve an official-time provision that was in the 1994 CBA but not in the 2017 CBA.[22] The Arbitrator stated that the Union filed "a string of ULPs in an attempt to achieve this objective," but "[e]ach ULP was denied by [the] FLRA on the grounds that the ULPs were on the same subject as prior ULPs and grievances."[23] In this regard, the Arbitrator determined that, in SF-CA-21-0002, the RD found "the 2017 [CBA] ended the 1994 CBA";[24] the Acting GC "reaffirmed the 2017 [CBA]"; and, "[h]ence, the 2017 CBA is the valid agreement"[25] and "the 1994 CBA is not valid."[26] The Arbitrator concluded that the Union "apparently exhausted all its appeals to the FLRA on this matter,"[27] that "this matter is res judicata,"[28] and, consequently, that he "ha[d] no jurisdiction to hear this dispute."[29] Therefore, the Arbitrator found the grievance was not arbitrable.

On November 13, 2023, the Union filed exceptions to the award, and on December 18, 2023, the Agency filed an opposition.

III. Analysis and Conclusions

A. The award is not contrary to law.

The Union argues the award is contrary to law in several respects.[30] 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.[31] 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.[32] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[33]

[11] Case Nos. SF-CA-20-0265 & SF-CA-20-0273. We note that the parties did not provide copies of these charges or the other ULP charges and related FLRA documents discussed in this decision. However, "[t]he Authority has found it appropriate to take official notice of other FLRA proceedings." *NTEU*, 70 FLRA 100, 101 (2016). We do so here.
[12] SF-CA-21-0002 Charge at 3-4.
[13] Opp'n, Tab 7, Notice of Unilateral Settlement.
[14] Opp'n, Tab 7, Settlement Agreement at 1.
[15] Opp'n, Tab 8 at 1.
[16] *Id.* at 1-2.
[17] SF-CA-21-0164 Charge at 3.
[18] SF-CA-21-0164 Dismissal Letter (Apr. 14, 2021).
[19] SF-CA-21-0164 Letter Denying Appeal (June 21, 2023).
[20] Exceptions, Attach. 1, SATCO Arbitrability Br. at 4, SATCO Grievance Form at 1.
[21] Award at 2.
[22] *Id.* at 4.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at 3.
[29] *Id.* at 4.
[30] Exceptions Form at 4-5.
[31] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mendota, Cal.*, 73 FLRA 788, 790 (2024).
[32] *Id.*
[33] *Id.*

First, the Union contends § 7121(b)(1)(C)(iii) of the Statute entitles the Union to binding arbitration to resolve its grievance.[34] The Union argues that, contrary to the Arbitrator's findings, the Agency's 2023 reimplementation of the 2017 CBA "has not been heard in any forum."[35] According to the Union, "[t]here . . . can be no reliance on" the 2017 CBA's grievance procedures, which "puts the Union in an impossible situation moving forward and denies the Union of its rights,"[36] contrary to the Authority's decision in *U.S. Department of the Air Force, 355th FSS/FSMC Davis-Monthan Air Force Base, Arizona* (*Davis-Monthan*).[37]

Section 7121(b)(1)(C)(iii) of the Statute requires that negotiated grievance procedures "provide that any grievance not satisfactorily settled under [those procedures] . . . be subject to binding arbitration."[38] The Union does not explain how the Arbitrator's award does not constitute "binding arbitration" simply because the Arbitrator found the grievance non-arbitrable. In fact, as the Agency argues,[39] § 7121(a)(1) of the Statute expressly provides that CBAs "shall provide procedures for the settlement of grievances, *including questions of arbitrability*."[40] The Union provides no basis for finding the Arbitrator's determination of non-arbitrability conflicts with § 7121(b)(1)(C)(iii) of the Statute.

Although the Union argues the Agency's 2023 reimplementation of the 2017 CBA "has not been heard in any forum,"[41] that is not the case: It was the subject of the ULP charge, the settlement agreement, and the subsequent appeal to the Acting GC in SF-CA-21-0002. As a result of that legal process, the conditions of employment established by the 2017 CBA (and arbitration awards applying that CBA) are in effect, and the parties *can* rely on the 2017 CBA's negotiated grievance procedures for the time being.

As for the Union's reliance on *Davis-Monthan*, in that decision, the Authority stated that once a CBA expires, the CBA's negotiated grievance and arbitration procedures "continue to the maximum extent possible absent either an express agreement to the contrary or the modification of those conditions . . . consistent with the Statute."[42] To the extent the Union is arguing the 1994 CBA is still in effect, the Arbitrator found prior FLRA proceedings demonstrated that it is not. The Union's arguments provide no basis for concluding the Arbitrator erred in that regard. Therefore, the Union's reliance on *Davis-Monthan* is misplaced.

Second, the Union contends the 1994 CBA contains a continuance clause stating, "If negotiations are not completed prior to the expiration date, this agreement shall remain in full force and effect until a new agreement is reached."[43] According to the Union, the parties have not negotiated a successor agreement to the 1994 CBA, so that CBA is still in effect – and the 2017 CBA is not.[44] The Union argues that, by reimposing the 2017 CBA in 2023, the Agency repudiated the 1994 CBA and unilaterally changed conditions of employment, in violation of § 7116(a)(1) and (5) of the Statute.[45] Further, the Union argues the Arbitrator's award conflicts with the U.S. Court of Appeals for the D.C. Circuit's decision in *NTEU v. FLRA* (*NTEU*).[46]

The Union's arguments attempt to litigate the merits of the Agency's 2023 reimposition of the 2017 CBA. Again, that issue was resolved by the ULP charge, settlement agreement, and subsequent appeal to the Acting GC in SF-CA-21-0002. The Arbitrator found prior FLRA proceedings resolved the issue of whether the 1994 CBA is still in effect, and the Union provides no basis for finding the Arbitrator erred in that regard. As for *NTEU*, that decision stands for the proposition that, as a *general* matter, a party's invocation of a CBA's continuance clause results in the CBA remaining in effect until the parties negotiate a successor CBA.[47] However, *NTEU* did not hold that a continuance clause extends an existing CBA indefinitely, regardless of subsequent events. In this case, as described in detail above, subsequent events – including litigation – have demonstrated the 1994 CBA is no longer in effect. Thus, the Union's reliance on *NTEU* is misplaced.

For the above reasons, we deny the contrary-to-law exceptions.

B. The award is not deficient on essence grounds.

The Union argues the award fails to draw its essence from the 1994 CBA.[48] When reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority will find that an arbitration award is deficient as failing to draw its essence from the agreement when the appealing party establishes that the

[34] Exceptions Form at 4-5.
[35] *Id.* at 5.
[36] *Id.*
[37] 70 FLRA 876 (2018) (Member DuBester dissenting).
[38] 5 U.S.C. § 7121(b)(1)(C)(iii).
[39] Opp'n Form at 4; Opp'n Br. at 6.
[40] 5 U.S.C. § 7121(a)(1) (emphasis added).
[41] Exceptions Form at 5.
[42] 70 FLRA at 877.
[43] Exceptions Form at 4.
[44] *Id.*
[45] *Id.*
[46] 45 F.4th 121 (D.C. Cir. 2022).
[47] *Id.* at 126-27.
[48] Exceptions Form at 6-7.

award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[49]

In its essence exception, the Union again cites the 1994 CBA's continuance clause,[50] argues the 1994 CBA remains in effect,[51] and repeats its other contrary-to-law arguments.[52] As discussed above, those arguments lack merit. Therefore, for the same reasons, we deny the Union's essence exception.[53]

C. The award is not incomplete, ambiguous, or contradictory, so as to make implementation impossible.

The Union argues the award is incomplete, ambiguous, or contradictory as to make implementation of the award impossible.[54] In order to prevail on this ground, the appealing party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain.[55]

According to the Union, it is "impossible" for the 2017 CBA to be in effect because it expressly states that it "is effective for a period of three . . . years from the date of *execution* by the [p]arties," and the parties never agreed to, or executed, it.[56] The Union does not explain how the Arbitrator's award – which merely found the Union's grievance non-arbitrable – is impossible to implement. Therefore, we deny this exception.[57]

D. We deny the Agency's remedial request.

In its opposition, the Agency argues the Union's failure to comply with the settlement agreement (and the Acting GC's denial of the appeal) in SF-CA-21-0002 is a ULP.[58] Therefore, the Agency asks the Authority to exercise its remedial authority under § 7118(a)(7) of the Statute[59] and § 2429.16 of the Authority's Regulations[60] and order the Union to: (1) comply with the settlement agreement in SF-CA-21-0002; and (2) cease and desist from filing future challenges to the validity of the 2017 CBA "in any forum overseen by the Authority."[61]

Section 7118(a)(7) of the Statute pertinently provides that "if the Authority . . . determines after any hearing on a complaint" that a party committed a ULP, then the individual conducting the hearing "shall issue . . . an order" directing certain actions.[62] The Arbitrator did not find the Union committed a ULP, and that issue has not been litigated before us. Consequently, there is no basis for us to issue ULP remedies against the Union, and we deny the Agency's remedial request.[63]

IV. Decision

We deny the Union's exceptions and the Agency's remedial request.

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[49] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 73 FLRA 620, 622 (2023) (citing *NTEU, Chapter 149*, 73 FLRA 413, 416 (2023)).
[50] Exceptions Form at 6.
[51] *Id.*
[52] *Id.* at 6-7.
[53] *U.S. DOJ, Fed. BOP, Fed. Corr. Ctr., Petersburg, Va.*, 72 FLRA 477, 480 n.30 (2021) (Chairman DuBester concurring; Member Abbott concurring) (denying essence exception because it was based on the same argument as a contrary-to-law exception that was denied).
[54] Exceptions Form at 5.
[55] *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 498, 502 (2023).
[56] Exceptions Form at 5 (emphasis added).
[57] *AFGE, Loc. 2516*, 72 FLRA 567, 570 (2021).
[58] Opp'n Br. at 8.
[59] 5 U.S.C. § 7118(a)(7).
[60] 5 C.F.R. § 2429.16 ("The Authority shall take any actions which are necessary and appropriate to administer effectively the provisions of [the Statute].").
[61] Opp'n Br. at 1; *id.* at 8-9.
[62] 5 U.S.C. § 7118(a)(7).
[63] *See NTEU, Chapter 168*, 55 FLRA 237, 242 (1999) (remedy under § 7118(a)(7) not appropriate where arbitrator did not find a violation of § 7116 of the Statute).

Chairman Grundmann, concurring:

I agree with the decision in all respects. I write separately to note that I was not a Member when the Authority issued *Sport Air Traffic Controllers Organization* (*SATCO II*)[1] and *U.S. Department of the Air Force, 355th FSS/FSMC Davis-Monthan Air Force Base, Arizona* (*Davis-Monthan*)[2] and, thus, I did not participate in those cases. I am open to revisiting those decisions in a future, appropriate case. With particular regard to *SATCO II*, I question whether it is ever appropriate for the Authority to raise, sua sponte, questions regarding an *arbitrator's* jurisdiction – as distinct from our *own* jurisdiction.[3] However, we need not resolve that issue in this case. Further, for the reasons stated in the decision, I agree that *Davis-Monthan* does not support the Union's position here.

Therefore, I concur.

[1] 71 FLRA 626 (2020) (Member DuBester concurring).
[2] 70 FLRA 876 (2018) (Member DuBester dissenting).
[3] *Cf. U.S. Small Bus. Admin., Wash., D.C.*, 51 FLRA 413, 423 n.9 (1995) (noting "the Authority may question, sua sponte, whether *it* has subject[-]matter jurisdiction to consider the merits of a dispute") (emphasis added).