64 FLRA No. 65

UNITED STATES
DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS
NORTHWESTERN DIVISION AND
SEATTLE DISTRICT
(Agency)

and

UNITED POWER TRADES
ORGANIZATION
(Union)

0-AR-4073

DECISION

January 28, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Thomas F. Levak filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and Part 2425 of the Authority's Regulations. The Union filed a motion to dismiss the Agency's exception and an opposition to the Agency's exceptions. The Agency filed an opposition to the Union's motion.

For the reasons that follow, we deny the Union's motion and the Agency's exceptions.

II. Background and Arbitrator's Award

This matter arose in the Seattle District (the District) of the Agency's Northwestern Division (the Division) and concerns the filling of dam Operator positions at two dams. Prior to 2005, no Operator position in the District was filled through a term appointment. When the Agency began contemplating converting the dams to automated operation, it advertised vacancy announcements to fill two dam Operator positions through term appointments. The Union sought to negotiate over the change and filed a grievance. The parties settled the grievance on October 29, 2004 when, in a letter responding to the grievance, the Agency agreed to conduct impact and implementation bargaining. Subsequently, the Agency cancelled the disputed vacancy announcements and filled the positions with reemployed annuitants. Impact and implementation bargaining never occurred.

After the reemployed annuitants left the positions, the Agency again advertised to fill the Operator positions with term appointments. The Union sought to enforce the settlement of its previous grievance by conducting impact and implementation bargaining, which the Agency refused. The Agency contended that the parties had not entered into a settlement agreement to engage in bargaining and that, even if they did, the procedures for term appointments were a permissive subject of bargaining over which the Agency had a right to withdraw from bargaining at any time. The Agency hired term Operators to fill the positions at the dams.

The Union filed a grievance, which contended that: (1) the Agency violated 5 C.F.R. § 316 by using term appointments to fill Operator positions at two dams; (2) the Agency violated Article 21.1.b(2) and (3) of the parties' agreement, as well as § 7106(b)(2) and (3) of the Statute and 5 C.F.R. §§ 316.301 and 335.102, by failing to abide by the terms of a prior settlement agreement; and (3) the Agency's refusal to bargain constituted an unfair labor practice in violation of § 7116(a)(5) of the Statute. [1] When the grievance was not resolved, it was submitted to arbitration.

The Arbitrator framed the issues as follows:

> (1) Did the Agency violate 5 CFR 316 by utilizing term appointments to fill Operator positions at the [dams]; (2) Did the Agency violate Article 21.1.b (2) & (3) of the Agreement and/or 5 USC 7106(b)(2)&(3) and/or [5] CFR 316.301 & 335.102 by failing to abide by the terms of . . . [a] second step grievance settlement in which it agreed to resolve the grievance by engaging in impact bargaining relating to the Agency's decision to hire term operators at the [dams]; and/or (3) did the Agency thereby refuse to bargain and thereby also commit an unfair labor practice in violation of 5 USC 7116(a)(5)? And if so, what is the appropriate remedy?

Award at 2.

1. The agreement sections are set forth in the appendix to this decision. 5 C.F.R. § 316.301 addresses the purpose and duration of term appointments, and 5 C.F.R. § 335.102 addresses agency authority to promote, demote, or reassign.

The Arbitrator found that the earlier grievance response letter was the product of efforts by the Union's Seattle Vice President and the Division's Chief of Operations to settle the earlier grievance. According to the Arbitrator, the Division's Chief of Operations stated what was acceptable to both sides in her grievance response letter, rather than write a settlement document. *See id*. at 5. The Arbitrator concluded that the Agency's failure to abide by the grievance response letter constituted not only a violation of Articles 6 and 21 but the entire agreement. [2] The Arbitrator further concluded that the Agency's violation amounted to a repudiation, which constituted an unfair labor practice. *See id*. at 8.

In support of his conclusions, the Arbitrator found that a mutual settlement of a grievance is binding on the parties and may be enforced in subsequent proceedings. In particular, the Arbitrator concluded that the previous grievance response letter constituted a binding settlement agreement and the Agency's violation of the settlement constituted a violation of Article 6 and the agreement as a whole. According to the Arbitrator, pursuant to the settlement agreement, the Union had an enforceable right to engage in impact and implementation bargaining. The Arbitrator also determined that the Agency's violation of the settlement agreement constituted a repudiation, in violation of § 7116(a)(5) of the Statute as well as Article 21.1.b (2) & (3) of the parties' agreement.

As a remedy, the Arbitrator determined that a *status quo ante* remedy was appropriate. Specifically, the Arbitrator ordered the Agency to "terminate the term hirings" and to engage in good faith impact bargaining with the Union prior to any reinstitution of the term hiring process. Award at 10.

III. Preliminary Matter

The Union filed a motion to dismiss the exceptions on the ground that neither the Division nor the District had authority to file exceptions to the Arbitrator's award. According to the Union, only the Department of Defense Civilian Personnel Management Service (CPMS) has authority to file exceptions. The Agency, in its opposition motion, states that the Agency delegated authority to the Division and District to file the exceptions. *See* Opp'n to Mot. at 4. Further, the Department's CPMS was served with all case papers and, therefore, was aware that the exceptions were filed.

Section 2425.1(a) of the Authority's regulations provides that exceptions to an arbitration award may be filed by "either party to arbitration." 5 C.F.R. § 2425.1(a). The United States Department of the Army, Corps of Engineers, Northwestern Division and Seattle District is the named party at arbitration. Moreover, the Agency asserts that its regulation addresses only internal procedures for developing and filing exceptions and does not limit who may represent a party in filing the exception. *See* Opp'n to Motion at 4. The Union does not dispute the Agency's interpretation of the regulation. Thus, pursuant to § 2425.1(a) of the Authority's regulations, the exceptions were properly filed, and we deny the Union's motion to dismiss the exceptions.

IV. Positions of the Parties

A. Agency's Exceptions

The Agency maintains that the award is contrary to law because the Arbitrator improperly determined that the Agency's earlier grievance response letter constituted a settlement agreement. According to the Agency, the Arbitrator's determination is contrary to the Statute and Authority precedent because, according to the Agency, a settlement agreement requires a "meeting of the minds." Exceptions at 11. The Agency asserts that it did not intend the letter to constitute a settlement agreement.

The Agency also maintains that the award is contrary to law because an agency may lawfully implement changes in conditions of employment when, as here, the impact of the change is *de minimis*. In addition, according to the Agency, the award ignores well-established Authority precedent, which holds that a permissive subject of bargaining is negotiable only at the election of the Agency. In this regard, the Agency asserts that the impact and implementation of the disputed term appointments was "outside the required scope of bargaining similar to a permissive matter" under § 7106(b)(1). *See id*. at 13.

Further, the Agency contends that the award is based on a nonfact because there was a past practice of hiring employees on time-limited appointments. According to the Agency, the award improperly distinguished between term and other time-limited appointments. *See id.* at 14.

2. Article 6 of the parties' agreement sets forth the grievance procedure. Article 21 addresses rights of the Agency and is set forth, in pertinent part, in the appendix to this decision.

Finally, the Agency contends that the award fails to draw its essence from Article 28 of the parties' agreement, which requires that the parties negotiate any change to a past practice. [3] In this connection, the Agency maintains that the award ignores the parties' agreement by requiring mandatory bargaining where no such requirement exists. The Agency also argues that the award's determination that the earlier grievance response letter constituted a settlement agreement is contrary to the grievance procedure. *See id.* at 17-18.

B. Union's Opposition

The Union asserts that the award is not contrary to law because the Arbitrator properly determined that the earlier grievance response letter constituted a binding settlement agreement. According to the Union, the Arbitrator's determination is a finding of fact that was disputed below.

Also according to the Union, the award does not involve a permissive subject of bargaining. In this regard, the Union maintains that the award merely enforces the Union's right to impact and implementation bargaining. Further, the Union contends that the Agency has not supported its *de minimis* contention and has not explained how or why the award fails to draw its essence from the agreement.

V. Analysis and Conclusions

A. The award is not contrary to law.

When a party's exceptions challenge an award's consistency with law, the Authority reviews the exceptions *de novo*. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a standard of *de novo* review, the Authority evaluates whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that evaluation, the Authority defers to the arbitrator's underlying factual findings. *Id.*

The Authority has expressly held that grievance settlements are binding on the parties and enforceable. *See, e.g., U.S. Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 413, 415 (2003) (arbitrator found that parties intended settlement agreement to provide promotion for grievant); *U.S. Dep't of Def. Dependents Sch.*, 55 FLRA 1108, 1111 (1999); *NTEU, Chapter 243*, 37 FLRA 470 (1990) (agency violated settlement agreement by failing to provide grievant a bona fide opportunity to demonstrate acceptable performance). The Authority also has expressly held that the question of the existence of a collective bargaining agreement is a question of fact, not a question of law. *See IRS, N. Fla., Tampa Field Branch, Tampa, Fla.*, 55 FLRA 222 (1999)*; see also U.S. Dep't of Transp., Fed. Aviation Admin., Standiford Air Traffic Control Tower, Louisville, Ky.*, 53 FLRA 312, 318 n.5 (1997) (*FAA*). In ruling that the question of the existence of a collective bargaining agreement is a question of fact, the Authority specifically relied on the approach of the National Labor Relations Board and the federal courts. *See, e.g., Bobbie Brooks, Inc. v. Int'l Ladies Garment Workers Union*, 835 F.2d 1164 (6th Cir. 1987) (*Bobbie Brooks*)*; Arco Electric Co. v. NLRB*, 618 F.2d 698, 699 (10th Cir. 1980) *enforcing* 237 NLRB 708 (1978). As explained by the court in *Bobbie Brooks*, the principles controlling a determination of whether a collective bargaining agreement exists are well established. "A meeting of the minds of the parties must occur before a labor contract is created." 835 F.2d at 1168 (citing *Interprint Co.*, 273 NLRB 1863 (1985)); *accord FAA*, 53 FLRA at 317. "[I]t can be shown by conduct manifesting an intention to abide by agreed-upon terms." 835 F.2d at 1168.

As the Arbitrator's determination of the existence of a collective bargaining agreement is a factual finding to which we defer, the Agency's contrary-to-law arguments generally provide no basis for finding the award deficient. In this regard, the Agency claims that the award is contrary to law because the Arbitrator improperly found that the earlier grievance response letter issued by the Division's Chief of Operations constitutes a settlement agreement. However, the Arbitrator found that the earlier grievance response letter was the product of the Union Vice President's and the Division's Chief of Operation's joint efforts to resolve the earlier grievance. *See* Award at 5. Based on the record, the Arbitrator made a "specific finding of fact" to conclude that the earlier grievance response letter was intended to constitute the settlement agreement for that grievance and that it was binding on the parties for future similar disputes, as here. *See id.* at 9. In these circumstances, the Agency has not established that, by finding that the

3. Article 28, Section 28.4 provides:

> Laws, government wide regulations and this Agreement take precedence over past practices. Existing and future working conditions, which are not inconsistent with this Agreement or law and are established through past practice, will be treated for all purposes as if they are incorporated into this Agreement and may only be modified or terminated through the exercise of the collective bargaining process.

Exceptions, Tab 1.

grievance response letter constitutes a settlement agreement, the award is contrary to law. [4] As discussed above, in evaluating an exception alleging that an arbitration award is contrary to law, the Authority defers to the arbitrator's underlying factual findings. *See U.S. Dep't of Commerce, Patent & Trademark Office, Arlington, Va.*, 60 FLRA 869, 880 (2005) (citing *AFGE, Nat'l Council of HUD Locals 222*, 54 FLRA 1267, 1275-76 (1998)).

Further, the Agency claims that the Division's Chief of Operations had authority to "settle specific disputes" but "does not have authority to settle for the entire bargaining unit." Exceptions at 18. We reject this contention. Based on the Agency's admission, the Division's Chief of Operations had authority to settle the grievance and the Agency has offered no evidence that the Division's Chief of Operations' authority to settle the grievance was otherwise limited.

The Agency also argues that its decision to use term employees to fill the dam Operator positions constitutes a matter that is negotiable only at the election of the Agency under § 7106(b)(1) of the Statute. According to the Agency, because the substance of its decision to use term employees is negotiable only at the election of the Agency, any duty to bargain over the impact and implementation of its decision is likewise negotiable only at the election of the Agency. Contrary to the Agency's claim, however, it is well established that, even though an agency's exercise of its § 7106(b)(1) right is permissive, impact and implementation bargaining over the exercise of that right is mandatory. *See, e.g., Soc. Sec. Admin.*, 16 FLRA 56 (1984); *IRS (Dist., Region & Nat'l Office Unit & Serv. Ctr. Unit)*, 10 FLRA 326 (1982).

Finally, the Agency asserts that, even if it was required to bargain over the impact and implementation of its decision to use term appointments to fill the dam Operator positions, the matter was *de minimis*. Although the Agency repeatedly contends that the matter is *de minimis*, the Agency offers no arguments or other support for its contention. Accordingly, the Agency's contention constitutes a bare assertion. The Agency's bare assertion fails to support its contention that it has no duty to bargain. *See, e.g., Soc. Sec. Admin., Balt., Md.*, 57 FLRA 181, 183 n.3 (2001).

In sum, the Agency fails to establish that the award is contrary to law, and we deny the exception.

B. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must demonstrate that the central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993). The Authority will not find an award deficient on the grounds of nonfact on the basis of an arbitrator's determination on any factual matter that was disputed at arbitration. *See, e.g., NFFE Local 1442*, 59 FLRA 849, 852 (2004) (Chairman Cabaniss concurring).

The Agency asserts that the award is based on a nonfact because there was a past practice of hiring employees on time-limited appointments. [5] *See* Exceptions at 16. At arbitration, the parties disputed the matter of whether there was a past practice in this regard. *See* Award at 8 (Agency argued that "the District's past practice throughout the division has been to fill Operator positions with other than permanent Operators[]"); *id.* at 7 (Union argued that "this case is the first in which the District has utilized term Operators to fill vacancies[]"). As this factual matter was disputed at arbitration, the Agency's assertion provides no basis for finding the award deficient. *See NFFE Local 1442*, 59 FLRA at 852. Accordingly, we deny the exception.

4. We note that, with respect to the Arbitrator's finding that the Agency repudiated the parties' agreement, the Agency does not argue that, even if there is a contract violation, that violation is not clear and/or patent and does not go to the heart of the agreement. *See Dep't of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.*, 51 FLRA 858, 862 (1996).

5. Issues concerning past practice arise in a variety of contexts. In an arbitration setting, the Authority has evaluated the issue of whether in fact a past practice exists as one involving nonfact. *See, e.g., PASS*, 56 FLRA 124, 125 (2000). Where the issue concerns whether the arbitrator failed to properly interpret a past practice in connection with a particular matter, the Authority considers the issue one of contract interpretation subject to the essence test. *See, e.g., U.S. Dep't of Veterans Affairs, Med. & Reg'l Ctr., Togus, Me.*, 55 FLRA 1189, 1192-93 (1999) (arbitrator found past practice incorporated into parties' agreement and exception to arbitrator's interpretation of that practice raised essence issue); *Def. Language Inst., Foreign Language Ctr.*, 7 FLRA 559, 561 (1982) (contention that arbitrator failed to give proper consideration to a past practice raises issues concerning the arbitrator's interpretation of parties' agreement). As the Agency herein questions the Arbitrator's finding that a past practice existed, and not his interpretation of that practice, the Agency's exception raises an issue of nonfact. *See AFGE, Local 2128*, 58 FLRA 519, 522 n.9 (2003).

C. The award does not fail to draw its essence from the agreement.

To demonstrate that an award fails to draw its essence from a collective bargaining agreement, a party must show that the award: (1) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; or (2) does not represent a plausible interpretation of the agreement; or (3) cannot in any rational way be derived from the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990).

As explained above, the Arbitrator found that the earlier grievance response letter constitutes a binding and enforceable settlement agreement. Pursuant to that settlement agreement, the Agency agreed to, and is required to, bargain over the impact and implementation of its use of term appointments for the dam Operator positions. The Agency does not argue or explain how the Arbitrator's interpretation of the settlement agreement is unfounded in reason or so unconnected with the wording and purposes of the agreement, or manifests disregard of the parties' agreement. Thus, the Agency's exception does not demonstrate that the award fails to draw its essence from the parties' agreement. *See, e.g.*, *AFGE, Local 919*, 61 FLRA 625, 627 (2006). Accordingly, we deny the exception.

VI. Decision

The exceptions are denied.

APPENDIX

ARTICLE 21 RIGHTS OF THE EMPLOYER

21.1 The Employer retains its rights as described in Title 5 USC Section 7106.

. . . .

b. Nothing in this section shall preclude an Agency and any labor organization from negotiation -

> (1) at the election of the agency, on the numbers, types and grades of employees or positions assigned to any organizational subdivision, work project or tour of duty, or on the technology, methods and means of performing work; or
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

Award at 4.