64 FLRA No. 86

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1045
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
BILOXI, MISSISSIPPI
(Agency)

0-AR-4386

DECISION

February 25, 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 Roberta J. Bahakel filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator concluded that the grievance was not arbitrable. For the reasons that follow, we set aside the award and remand this matter to the parties for submission, absent settlement, to an arbitrator of their choice to resolve the merits of the grievance.

II. Background and Arbitrator's Award

The Union filed a grievance on behalf of an individual bargaining-unit employee and similarly situated unit employees claiming that management was following a policy or practice that allows unit employees' private medical information to be obtained by people having no legitimate need for the information. Award at 2. In the grievance, as relevant here, the Union alleged that the policy or practice violates Article 16 of the parties' agreement, [1] the Privacy Act, 5 U.S.C. §552a, and 29 C.F.R. § 1630.13-14, which implements provisions of the Americans with Disabilities Act (ADA). [2] *Id.* at 13, 17. The grievance was not resolved and was submitted to arbitration.

At arbitration, the Agency alleged that the grievance was not substantively arbitrable, and the Arbitrator stated the issue to be whether the grievance is arbitrable. *Id.* at 4, 21. In this regard, the Agency asserted that the grievance was not arbitrable because it: (1) concerns access to the Agency's medical records system and, thus, implicates management's rights to determine internal security practices, assign work, and determine the personnel by which agency operations will be conducted under § 7106(a) of the Statute; and (2) cites laws that do not affect unit employees' conditions of employment. *Id.* at 22. The Union asserted that the grievance was arbitrable under both § 7103(a)(9) of the Statute and Article 42, Section 2 of the agreement, which the Union noted "mirrors" § 7103(a)(9). [3] *Id.* at 13.

The Arbitrator found that, although Article 42 allows grievances "over a broad spectrum of disputes[,]" grievances are arbitrable only if they relate to employees' employment and do not involve "rights which are reserved to [m]anagement." *Id.* at 21-22. She found that the grievance did not relate to employees' employment because it raises issues that could be raised by any person — including a non-employee — who has a medical record with the Agency. *Id.* at 22. Consequently, she determined that the grievance did not allege "a violation, misinterpretation or misapplication of any law, rule or regulation affecting conditions of employ-

1. Article 16 provides, in pertinent part, that "employees will also be afforded proper regard for and protection of their privacy[.]" Exceptions at 6.

2. The grievance also alleged a violation of the Health Insurance Portability and Accountability Act, but the Union withdrew that allegation at the arbitration hearing. At arbitration, the Union additionally alleged that the policy or practice violated 42 U.S.C. § 12112(d)(4), which is the portion of the ADA implemented by 29 C.F.R. § 1630.13-14. Union's Post-hearing Brief at 3. These provisions are set forth in the appendix to this decision.

3. Article 42, Section 2 defines "grievance" as "any complaint by an employee(s) or the Union concerning any matter relating to employment, any complaint of an employee, the Union, or Management concerning the implementation or interpretation or application of this agreement and any supplements or any claimed violation, misinterpretation, or misapplication of law, rule, or regulation affecting conditions of employment." Award at 5-6. Section 7103(a)(9) defines, in pertinent part, "grievance" as any complaint:

> (C) by any employee, labor organization, or agency concerning—
>
> (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
>
> (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

ment." *Id.* at 23. In addition, she found that "the administration of the [medical records system] is a reserved function of [m]anagement[.]" *Id.* Based on the foregoing, the Arbitrator determined that the grievance was not arbitrable. [4] *Id.*

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the award is contrary to law because, under Authority precedent: (1) by alleging violations of the Privacy Act, the ADA, and the ADA's implementing regulations, the grievance alleges violations of laws affecting conditions of employment; and (2) management rights set forth in § 7106(a) cannot provide a basis on which to find a grievance nonarbitrable. Exceptions at 10-11. The Union also contends that the award is based on a nonfact because the Arbitrator erred in finding that the grievance alleged only violations of law. The Union requests that the Authority set aside the award and remand the matter to the parties for submission, absent settlement, to an arbitrator of their choice.

B. Agency's Opposition

The Agency contends that the Arbitrator correctly concluded that the grievance was not arbitrable. Opp'n at 3-4. According to the Agency, alleged violations of the Privacy Act are not grievable because: (1) the Privacy Act provides an exclusive remedy for violations thereof; (2) rights set forth in the Privacy Act are personal and cannot be asserted derivatively by a labor organization, *id.* at 6 (citing *Parks v. U.S. Internal Revenue Serv.*, 618 F.2d 677 (10th Cir. 1980) (*Parks v. IRS*)); and (3) the Privacy Act was not issued for the purpose of affecting working conditions of unit employees, *id.* at 8 (citing *U.S. Dep't of the Treasury v. FLRA*, 43 F.3d 682 (D.C. Cir. 1994)). In addition, the Agency asserts that the Arbitrator correctly rejected the Union's reliance on the ADA because the grievance failed to allege any discrimination. *Id.* at 10.

IV. Analysis and Conclusions

The Union contends that the award is contrary to law. 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*. *E.g.*, *AFGE Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 466 (2009) (*Local 1929*). When an arbitrator's substantive arbitrability determination is based on a collective bargaining agreement, the award does not normally raise a question of law, and the Authority reviews the award under the deferential essence standard. *See AFGE Local 12*, 61 FLRA 456, 457 (2006). However, the Authority does not apply the essence standard when the agreement provision on which the arbitrator relies "reiterates" or "parallels" a provision of the Statute. *See NFFE Local 2010*, 55 FLRA 533, 534 (1999). Instead, in these circumstances, "the Authority will 'exercise care to ensure that the interpretation is consistent with the Statute, as well as the parties' agreement.'" *Id.* (quoting *U.S. Dep't of Def., Def. Mapping Agency, Aerospace Ctr., St. Louis Mo.*, 43 FLRA 147, 153 (1991)). For example, in *NFFE Local 2010*, the Authority reviewed the award to determine whether the grievance was excluded as concerning an appointment within the meaning of § 7121(c)(4) where the agreement provision on which the arbitrator relied paralleled § 7121(c)(4). The Authority concluded that the grievance was deficient because the arbitrator improperly determined that the grievance concerned an appointment. *Id.* at 535.

As noted above, and not disputed by the Agency, Article 42, on which the Arbitrator based her determination that the grievance was not substantively arbitrable, parallels the definition of "grievance" in § 7103(a)(9) of the Statute. Consequently, we review the award to determine whether the grievance in this case is excluded from coverage of the grievance procedure by § 7103(a)(9). *See id.* at 534. If the grievance is not excluded by § 7103(a)(9), then the award is deficient as contrary to the Statute. *Id.* at 535.

As for the Arbitrator's finding that alleged violations of the Privacy Act are not grievable, the Authority has specifically held to the contrary. *U.S. Dep't of Veterans Affairs Med. Ctr., Charleston, S.C.*, 58 FLRA 706, 709 (2003) (Chairman Cabaniss concurring) (*VAMC*). In doing so, the Authority specifically rejected arguments — raised by the Agency in its opposition in this case — that the Privacy Act provides the exclusive remedy for alleged violations thereof and that it was not issued for the purpose of affecting working conditions of unit employees. No basis to reverse *VAMC* is demonstrated. Accordingly, we reject these arguments here.

In addition, the Agency's contention that rights set forth in the Privacy Act are personal and cannot be asserted derivatively by a labor organization is misplaced. Although the Agency cites *Parks v. IRS*, 618 F.2d 677, that decision is inapposite because it did not involve grievability under the Statute; it resolved the issue of whether the labor organization met the requisites for associational standing before a federal court.

4. The Arbitrator also stated: "The entire dispute at issue here deals solely with alleged violations of the various federal acts cited by the Union." *Id.* at 22.

See id. at 684-85. Moreover, as noted, § 7103(a)(9)(C) defines "grievance" to include any complaint "by any employee, labor organization, or agency concerning . . . any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[,]" and Article 42 parallels this by providing that such grievances may be filed by "an employee, the Union, or Management[.]"

Based on the foregoing, we conclude that the award is deficient insofar as the Arbitrator determined that the alleged violation of the Privacy Act is not arbitrable.

As to the ADA, § 12112(d)(4) and 29 C.F.R. part 1630 (part 1630) prescribe requirements with respect to medical records that are similar to provisions of the Privacy Act. *See App., infra.* Consequently, for the same reasons that the Authority concluded that the Privacy Act affects federal employee conditions of employment, we similarly conclude that § 12112(d)(4) and part 1630 also are, respectively, a law and a regulation affecting conditions of employment within the meaning of § 7103(a)(9)(C)(ii). In this regard, we note that the ADA imposes obligations, similar to the obligations of the Privacy Act, on employers in the maintenance and protection of information regarding the medical condition or history of their employees. Further, the ADA provisions apply to the Agency and unit employees through the Rehabilitation Act. As explained by the Authority, although the United States is not an employer within the meaning of the ADA, Congress has specifically adopted the standards of the ADA for determining violations of the Rehabilitation Act. 29 U.S.C. § 791(g); *Office of Personnel Mgmt.*, 61 FLRA 358, 361 (2005) (then-Member Pope dissenting as to other matters). This adoption specifically includes the medical records provisions of § 12112(d)(4). *Leach v. Mansfield*, 2009 WL 3190463 (S.D. Tex.). Accordingly, we conclude that the award is deficient insofar as the Arbitrator determined that the alleged violations of the ADA and implementing regulations are not arbitrable.

With regard to § 7106(a) of the Statute, the Authority has repeatedly held that the management rights provisions of § 7106 of the Statute do not provide a basis for determining that a grievance is not arbitrable. *Local 1929*, 63 FLRA at 466 (and cited cases). Consequently, we conclude that the Arbitrator erred by finding, based on § 7106(a), that the grievance was not arbitrable.

For the foregoing reasons, we set aside the award, in which the Arbitrator concluded that the grievance was not arbitrable. [5]

The Union requests that the Authority remand this matter to the parties for submission, absent settlement, to an arbitrator of their choice. The Agency does not address or dispute the Union's request. As such, we remand this matter to the parties for submission, absent settlement, to an arbitrator of their choice to resolve the merits of the grievance. [6]

V. Decision

The award is set aside, and this matter is remanded to the parties for submission, absent settlement, to an arbitrator of their choice to resolve the merits of the grievance.

5. As we have set aside the award, it is not necessary to resolve the Union's nonfact exception.

6. In this regard, we note that the Authority has held that, when the merits of the grievance have not been addressed, there is no compelling reason for depriving the parties of their choice of arbitrator on remand. *AFGE Local 1757*, 58 FLRA 575, 576-77 (2003) (Chairman Cabaniss concurring in pertinent part and dissenting as to other matters).

Appendix

42 U.S.C. § 12112(d)(4) provides, in pertinent part:

> (B) Acceptable examinations and inquiries
>
> A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.
>
> (C) Requirement
>
> Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

Section 12112(d)(3)(B) and (C) provides:

> (B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential record . . . ; and
>
> (C) the results of such examination are used only in accordance with this subchapter.

29 C.F.R. § 1630.14 provides, in pertinent part:

> (c) *Examination of employees*. A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions.
>
> > (1) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record . . . .