64 FLRA No. 125

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Union)

0-AR-4434

DECISION

April 23, 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 Luella E. Nelson 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 an opposition to the exceptions.

The Arbitrator found that the grievance was arbitrable and that the Agency failed to prove one of the charges on which the grievant's three-day suspension was based. Thus, she reduced the suspension to a reprimand. For the reasons that follow, we deny the exceptions.

II. Background and Arbitrator's Award

In 2003, the parties entered into a collective bargaining agreement (the 2003 agreement) that expired in 2005. Award at 7. Later, the parties negotiated over a new agreement, but the Agency declared impasse and submitted its final contract proposal to Congress, as prescribed by 49 U.S.C. § 40122. [1] *Id.* When Congress did not act within sixty days, the Agency implemented its final contract proposal (the 2006 agreement). *Id.* The Union filed several unfair labor practice charges (the ULP charges) with the Authority's regional offices over implementation of the 2006 agreement. *Id.* at 8.

In December 2006, the grievant, an air-traffic controller, had an argument with another employee (the other employee) while on duty. *Id*. at 11, 22-23. As the grievant subsequently spoke with the controller in charge (CIC), the other employee "was laughing loudly, gesturing as if she were sounding a train whistle, and making loud noises of 'hoot, hoot.'" *Id*. at 23. The grievant became angry, complained to the CIC, and asked to be relieved. *Id*. The requested relief was not granted, and the other employee continued her gestures and hooting. *Id*. As this was occurring, the grievant, who was required to answer calls from aircraft, "did not answer a total of nine calls from four different aircraft in non-movement areas[]" — i.e., aircraft that "may move without permission, but [that] usually do call as a matter of courtesy[]" — including one aircraft that had recently de-iced; [he] answered a later call from that particular aircraft less than a minute later." *Id*. at 23.

The grievant was suspended for three days for three charges, including "Inattention to Duty." [2] *Id.* at 26. When the grievance was unresolved, the Union requested expedited arbitration "in accordance with Article 9, Section 1 of the NATCA/FAA Collective Bargaining Agreement." [3] *Id.* at 13.

1. 49 U.S.C. § 40122 provides, in pertinent part:

   (a) In General.—

   (1) Consultation and negotiation. —In developing and making changes to the personnel management system initially implemented by the Administrator of the Federal Aviation Administration on April 1, 1996, the Administrator shall negotiate with the exclusive bargaining representative of employees of the Administration certified under section 7111 of title 5 and consult with other employees of the Administration.

   (2) Mediation. —If the Administrator does not reach an agreement under paragraph (1) with the exclusive bargaining representatives, the services of the Federal Mediation and Conciliation Service shall be used to attempt to reach such agreement. If the services of the Federal Mediation and Conciliation Service do not lead to an agreement, the Administrator's proposed change to the personnel management system shall not take effect until 60 days have elapsed after the Administrator has transmitted the proposed change, along with the objections of the exclusive bargaining representatives to the change, and the reasons for such objections, to Congress.

2. The grievant also was charged with "Engaging in Disruptive and Inappropriate Verbal Altercation While on Duty[]" and "Using Language or Remarks Which Are Insulting, Abusive or Obscene[.]" Award at 26. Those charges are not at issue here.

3. Article 9, Section 1 of both the 2003 and 2006 agreements defines the term "grievance[.]" Award at 2 & 4. As discussed further below, the Arbitrator found that the grievance was unclear as to whether it was filed under the 2003 or the 2006 agreement.

The Agency claimed that the grievance was not arbitrable because it allegedly was filed under the 2003 agreement. However, prior to the arbitration hearings, the parties stipulated, among other things, that "[t]he resolution of [the merits] issue will be the same irrespective of whether the Union's position or the Agency's position on the validity of the [2006 agreement] . . . ultimately prevails." *Id.*

Subsequently, the ULP charges filed over implementation of the 2006 agreement were dismissed by the regional directors in the offices in which the charges had been filed. On the first day of the hearing, the Agency raised the arbitrability issue and contended that when it had agreed to the stipulations, it had not known that the ULP charges would be dismissed, and that the dismissals "made it clear that the [2006 agreement] is the only contract in effect." *Id.* at 14. Nevertheless, the Agency "agreed to proceed on the basis set forth in the stipulations[.]" *Id.* As the testimony could not be completed in one day, the parties arranged for a second hearing.

The Union appealed the dismissals of the ULP charges to the Authority's Office of the General Counsel, which dismissed the appeals after the first arbitration hearing. Then, the Agency notified the Union that it would "'re-introduce' its arbitrability argument in light of" the dismissals of the appeals. *Id.* A second arbitration hearing was then held, where the Agency again raised arbitrability.

In the award, the Arbitrator stated the issues as follows: (1) "Whether the grievance is arbitrable?"; and (2) "Whether the three-day suspension of [the grievant] was for such cause to promote the efficiency of the service, and if not what shall be the appropriate remedy?" [4] *Id.* at 2.

With regard to arbitrability, the Arbitrator stated that the 2003 and 2006 agreements and the parties' stipulations did not "specifically reserve the right of a party to raise an arbitrability question at any time[.]" *Id.* at 21. The Arbitrator also stated that the Agency's "on-again-off-again approach to [the stipulations] flies in the face of good faith and fair dealing." *Id.* The Arbitrator found that, "[i]n any event, the Agency's arbitrability argument is unsupported by both the contractual language and the history of th[e] grievance." *Id.* In this connection, the Arbitrator stated that both the 2003 and 2006 agreements "contain the same requirements for discipline" and that "neither document, on its face, requires the grieving party to specify the document under which the grievance is being filed." *Id.* The Arbitrator determined that, "[b]ut for [a particular] inquiry during the oral presentation, it would not have been evident that this grievance was filed under" the 2003 agreement. *Id.* The Arbitrator also stated that "[r]elying on one document over the other in response to [the] inquiry made no substantive difference[]" and that "the grievance placed the Agency on notice of each of the items under either grievance procedure." *Id.* at 21, 22. Further, the Arbitrator found that the dismissals of the ULP charges were "irrelevant[]" because they did not invalidate the grievance. *Id.* at 22. In this regard, the Arbitrator stated that, although "it would be desirable to have a definitive decision regarding which document is the operative one[,]" the grievance was not affected by any differences between the two agreements. *Id.* Accordingly, the Arbitrator concluded that the grievance was arbitrable. *Id.*

With respect to the merits, the Arbitrator noted that both the 2003 and 2006 agreements incorporate the same standards for assessing the appropriateness of discipline. *See id.* at 36. In assessing whether the grievant was inattentive to duty as alleged, the Arbitrator stated that the other employee's

> loud and disruptive noises and laughter placed [the g]rievant in a bit of a bind. If he keyed up his mike, those noises would be broadcast, [and] . . . transmissions that suggested the tower controllers were whooping it up instead of attending seriously to their duties had the potential to generate pilot concern. At the same time, a failure to respond to calls from pilots to ground control could generate uncertainty about whether and where to move. [The g]rievant answered each pilot who had to repeat a call within less than a minute from the first call. One flight pushed back when it received no response, but was still within the non-movement area when [the g]rievant responded. On this record, [the g]rievant's work performance deteriorated temporarily as a result of the noise and distraction, but that is a different matter from inattention.

Id. at 38. The Arbitrator concluded that the Agency did not establish that the grievant had been inattentive to duty. *Id.* As the Arbitrator found that the Agency had demonstrated only two of its three charges against the grievant, the Arbitrator reduced the three-day suspension to a reprimand. *Id.* at 43.

4. The Arbitrator framed the first issue in response to an argument that the Agency raised; the parties stipulated to the second issue. *See* Award at 2 n.1.

III. Positions of the Parties

A. Agency Exceptions

The Agency contends that the Arbitrator's exercise of jurisdiction without deciding which agreement governs is contrary to 49 U.S.C. § 40122, which "provided the parties the process to resolve the operative contract." Exceptions at 15. The Agency also contends that the award violates a governing Agency-wide regulation, specifically Agency Order 7110.65 (Order 7110.65). [5] *Id.* at 21. In this connection, the Agency asserts that the 2006 agreement does not address the same matter as that addressed by Order 7110.65, which the Agency contends requires controllers to "[g]ive first priority to separating aircraft and issuing safety alerts[.]" *Id.* According to the Agency, its interpretation of the Order is entitled to deference, and the award is inconsistent with the Order because it "sanctions a controller's substitution of air traffic duties in order to pursue a verbal fight with a co-worker[.]" *Id.* at 22.

The Agency also contends that the award "ignores the public policy requiring hyper-vigilance by air traffic controllers[.]" *Id.* at 18. Citing Order 7110.65, the Agency contends that controllers must maintain "situational awareness" at all times, and that "with aircraft moving at the speeds they travel in the congested airspace in which they now move, even a few seconds' inattention by a controller can result in the death of hundreds, possibly thousands, of persons." *Id.* at 19 (footnote omitted). The Agency asserts that the grievant failed to respond to nine calls from pilots, and that there was testimony that the grievant was required to provide such responses "above *any* other task in which he might be engaged[.]" *Id.* (emphasis in original). For support, the Agency cites *Daley v. United States*, 792 F.2d 1081 (11th Cir. 1986) (*Daley*). *See* Exceptions at 20.

In addition, the Agency argues that the Arbitrator exceeded her authority by declining to determine which agreement governed the dispute. *Id.* at 9-10. The Agency also asserts that, contrary to a statement in the cover sheet of the award – specifically the statement, "In Arbitration Proceedings *Pursuant to Agreement* between the Parties" – there was no agreement between the parties with regard to the contract under which the grievance was filed. *Id.* at 11. In addition, the Agency argues that the dismissal of the ULP appeals demonstrates that a "final" decision has been made that the 2006 agreement governs. *Id.* at 12.

Further, the Agency argues that the award fails to draw its essence from Article 9, Sections 12 and 15 of the 2006 agreement, which the Agency asserts provide "the limited and the only authority an arbitrator has to hear and issue a ruling in a third party review between" the parties. [6] *Id.* at 13-14. The Agency acknowledges that "there are similar provisions in" the 2003 agreement, but states that only the 2006 agreement would allow the Arbitrator to arbitrate, and that the 2006 agreement "would require exhausting two additional steps . . . prior to [the Union's] appeal to arbitration," and these steps were "never pursued." *Id.* at 14 (citing Article 9, Section 7 of the 2006 agreement). [7]

Finally, the Agency asserts that the award is based on a nonfact because the central fact underlying the award was the application of the 2006 agreement to the grievance, which the Agency claims is defective because the grievant and the Union "failed to pursue steps 2 & 3" of the 2006 agreement's grievance procedure. *Id.* at 15.

B. Union Opposition

The Union concedes that Order 7110.65 applies here, but argues that the award is not contrary to that

5. The pertinent wording of Order 7110.65 is set forth *infra*.

6. Article 9, Section 12 of the 2006 agreement states: "The arbitrator shall confine himself/herself to the precise issue(s) submitted for arbitration and shall have no authority to determine any other issue(s) not so submitted to him/her[.]" Exceptions at 13. Article 9, Section 15 states: "Questions as to whether or not a grievance is on a matter subject to the grievance procedure in this Agreement or is subject to arbitration shall be submitted to the arbitrator for decision[.]" *Id.* at 13.

7. Article 9, Section 7 of the 2006 agreement states provides, in pertinent part:

> Step 1. An aggrieved employee's grievance shall be submitted . . . to his/her immediate supervisor . . . . If requested . . ., the Agency shall . . . arrange for a meeting . . . . [The] deciding official shall answer the grievance in writing . . . . A grievance filed pursuant to Article 10 . . . may be initiated at Step 2.
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> Step 2. If the employee or the Union is not satisfied with the Step 1 answer, the grievance may be submitted to the Air Traffic Manager, Hub Manager or Traffic Management Officer (TMO), as appropriate . . . . In disciplinary/adverse action cases, the Agency Step 2 deciding official shall answer the grievance . . . within seven . . . days following the meeting, or within seven . . . days following the submission of the grievance if no meeting is requested. . . .
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> Step 3. If the Union is not satisfied with the Step 2 decision, the Union may . . . advise . . . that it desires the matter to be reviewed. The Union, at the Regional level, will be notified . . . of the regional decision. . . . The Union at the National level may . . . notify the Director, Office of Labor and Employee Relations, that it desires the matter to be submitted to arbitration.

Award at 4-5.

regulation. *See* Opp'n at 18. Specifically, the Union asserts that "[t]he grievant's decision to immediately respond to certain calls that were in movement areas, while deciding to briefly delay responding to other calls that were not in movement areas could not have heightened the risk of a crash or collision as the Agency implies, nor does it represent a lack of prioritization." *Id.* at 20.

The Union also argues that the award is not contrary to public policy. *Id.* at 16. In this connection, the Union asserts that, unlike *Daley*, in this case "there was no danger to any person or aircraft as a result of the grievant's actions[]" because the grievant was not separating aircraft, he gave immediate responses to all aircraft in movement areas, and the only aircraft to which he delayed his response – for less than one minute – were in non-movement areas and, thus "there could have been no risk of collision." *Id.* at 16, 17.

In addition, the Union contends that the Arbitrator did not exceed her authority because she resolved the issues presented and was not specifically asked to determine the validity of the 2006 agreement. *Id.* at 5-6. According to the Union, it was reasonable for the Arbitrator not to resolve that issue because she found that she had jurisdiction under either agreement. *Id.* at 6.

Finally, the Union disputes the Agency's essence exception. *Id.* at 10. According to the Union, the Arbitrator did not apply the 2003 agreement, and the Agency is incorrect in stating that the 2006 agreement's grievance procedure required the Union to take additional steps that it failed to take. *Id.* at 13. In the latter connection, the Union asserts that both the 2003 and 2006 agreements provide that "disciplinary actions, such as suspensions, can proceed through the expedited process." *Id.*

IV. Analysis and Conclusions

A. The award is not contrary to law.

When an exception challenges an award's consistency with law, the Authority reviews the question of law *de novo*. *See NFFE, Local 1437*, 53 FLRA 1703, 1709 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. Section 40122

As noted previously, § 40122 sets forth the process by which the Agency may implement proposed changes to its personnel management system. According to the Agency, it followed that process in implementing the 2006 agreement, and the award is contrary to § 40122 because it ignores the fact that the Agency followed that process. However, as the Arbitrator found it unnecessary to resolve whether the 2006 agreement was the operative agreement, the Arbitrator did not find that the Agency failed to follow the process set forth in § 40122. As such, the Agency's exception provides no basis for finding the award contrary to § 40122, and we deny the exception.

2. Order 7110.65

For purposes of determining whether an award is contrary to law, rule, or regulation under § 7122(a)(1) of the Statute, the term "regulation" includes governing agency regulations. *See U.S. Dep't of Agric., Farm Serv. Agency*, 63 FLRA 658, 659 (2009) (*Farm Serv. Agency*). There is no dispute that Order 7110.65 is a governing Agency regulation.

The Agency asserts that its interpretation of Order 7110.65 is entitled to deference. An agency's interpretation of its own regulations is controlling "unless it is 'plainly erroneous or inconsistent' with the language of the regulation." *U.S. Dep't of Transp., FAA*, 64 FLRA 513, 514 (2010) (citation omitted). However, for an agency's interpretation to be entitled to deference, the interpretation "must have been publicly articulated prior to 'litigation[.]'" *Id.* (citation omitted).

The Agency does not assert or provide any evidence that its interpretation of Order 7110.65 was publicly articulated prior to this case. Accordingly, consistent with the foregoing, it is necessary to determine, *de novo*, whether the award is inconsistent with the terms of the Order. *See, e.g., Farm Serv. Agency*, 63 FLRA at 659 (Authority assessed, *de novo*, terms of agency regulation and whether award was inconsistent with it).

Order 7110.65 provides, in pertinent part, that: (1) air-traffic controllers must "[g]ive first priority to separating aircraft and issuing safety alerts as required in" the Order; (2) "[g]ood judgment shall be used in prioritizing all other provisions of [the Order] based on the requirements of the situation at hand[;]" and (3) "the primary purpose of the [air traffic control] system is to prevent a collision between aircraft operating in the system and to organize and expedite the flow of traffic[.]" Exceptions at 21-22.

The Arbitrator found that the aircraft to which the grievant did not immediately respond were in non-movement areas and that the grievant's responses were delayed for less than one minute. In addition, there is no claim that the grievant was engaged in separating air-

craft or that he failed to timely respond to aircraft that were in movement areas. Thus, there is no basis for finding that the grievant failed to: (1) separate aircraft or issue safety alerts; (2) exercise good judgment based on the requirements of the situation at hand; or (3) prevent a collision and organize and expedite the flow of traffic. Accordingly, there is no basis for concluding that the award, by setting aside the charge of inattention to duty, is inconsistent with Order 7110.65. For these reasons, we deny the exception.

B. The award is not contrary to public policy.

The Authority will find an award deficient as contrary to public policy. *See AFGE, Local 507*, 61 FLRA 88, 91 (2005). However, this ground is "extremely narrow." *Id.* (citation omitted). In order to find the award deficient, the public policy must be explicit, well-defined, and dominant. *Id.* In addition, the excepting party must identify the policy "by reference to the laws and legal precedents[,] and not from general considerations of supposed public interests." *Id.* (citation omitted). In order to prevail, the excepting party must clearly show that the award violates the asserted public policy. *See id.*

The Agency asserts that the award is inconsistent with public policies set forth in Order 7110.65 and discussed in *Daley*, 792 F.2d 1081. As we have found that the award is not contrary to Order 7110.65, we deny the public-policy exception insofar as it relies on Order 7110.65.

With regard to *Daley*, that decision involved a suit for wrongful death under the Federal Tort Claims Act, alleging that air-traffic controller negligence was the proximate cause of a fatal airplane crash. In that decision, the court discussed "the duty of due care which air traffic controllers owe pilots and their passengers[.]" 792 F.2d at 1085. Even assuming that this constitutes an explicit, well-defined, and dominant public policy, the Agency does not "clearly show" that the award violates the policy. In this connection, as the Arbitrator found, the planes to which the grievant did not immediately respond were in non-movement areas, and the grievant did respond to all of them within one minute. The Agency has not explained how, in these circumstances, there was a danger of a collision similar to that involved in *Daley*, and has provided no basis for finding that the grievant violated a duty of due care within the meaning of that decision.

For the foregoing reasons, we deny the public-policy exception.

C. The Arbitrator did not exceed her authority.

An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to persons who are not encompassed by the grievance. *See U.S. DOD, Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996).

The issues before the Arbitrator were: (1) "Whether the grievance is arbitrable?"; and (2) "Whether the three-day suspension of [the grievant] was for such cause to promote the efficiency of the service, and if not what shall be the appropriate remedy?" Award at 2. The Arbitrator resolved both of these issues and, in doing so, found it unnecessary to determine which agreement applied. In addition, the issues before the Arbitrator did not include an issue regarding which agreement applied. Thus, the Agency does not demonstrate that the Arbitrator failed to resolve an issue submitted to arbitration. Further, the Agency does not assert that the Arbitrator resolved an issue that was not submitted, disregarded specific limitations on her authority, or awarded relief to persons who are not encompassed by the grievance. Accordingly, the Agency does not demonstrate that the Arbitrator exceeded her authority, and we deny the exception.

D. The essence exception does not provide a basis for finding the award deficient.

In effect, the Agency's essence exception challenges whether the grievance was properly before the Arbitrator. The Authority has stated that procedural arbitrability involves questions of whether the procedural conditions to arbitrability have been met or excused, while substantive arbitrability involves questions of whether the subject matter of a dispute is arbitrable. *See, e.g., AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009). Here, the Arbitrator found, and the Agency does not dispute, that both the 2003 and 2006 agreements cover the subject matter that was grieved and set forth the same substantive standards with respect to the imposition of discipline. Consequently, the exceptions do not challenge a substantive-arbitrability determination. Instead, the exceptions challenge the Arbitrator's determination that neither agreement "requires the grieving party to specify the document under which the grievance is being filed." Award at 21. This is a procedural-arbitrability determination because it finds that the grievance met the procedural conditions to resolution on the merits. *See id.*

The Authority generally will not find that an arbitrator's ruling on the procedural arbitrability of a grievance is deficient on grounds that directly challenge the procedural arbitrability ruling itself. *U.S. DOD Educ. Activity*, 60 FLRA 254, 255-56 (2004). Grounds for challenging procedural-arbitrability rulings include a showing that there was bias on the part of the arbitrator, that the arbitrator exceeded his or her authority, or that the ruling was contrary to law. *See id.*

Here, the Agency's essence exception directly challenges the Arbitrator's procedural-arbitrability determination and, as such, does not demonstrate that the award is deficient. *See id.* at 256. Further, as discussed above, we have denied the Agency's contrary-to-law and exceeded-authority exceptions. Thus, we deny the essence exception.

E. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See U.S. DHS, Customs & Border Prot. Agency, N.Y., N.Y.*, 60 FLRA 813, 816 (2005). The Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.*

The Agency's nonfact exception alleges that the central fact underlying the award is the Arbitrator's application of the 2006 agreement to a grievance filed under the 2003 agreement. However, the Arbitrator found it unnecessary to determine which agreement applied. Thus, contrary to the Agency's exception, the alleged application of the 2006 agreement is not a central fact underlying the award, and the premise of the exception is incorrect. Accordingly, we deny the exception.

V. Decision

The exceptions are denied.