65 FLRA No. 60

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 193
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
SAN JUAN, PUERTO RICO
(Agency)

0-AR-4606

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DECISION

November 30, 2010

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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 M. David Vaughn 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, although a probationary employee may bring a grievance challenging his removal from his position under certain circumstances, the provisions of the parties' collective bargaining agreement (parties' agreement) precluded the grievant from pursuing an unfair labor practice (ULP) complaint at arbitration. For the reasons set forth below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The grievant, a member of the bargaining unit, was terminated during his probationary period for excessive absences. Award at 7, 16. After his removal, the grievant filed a grievance alleging that he was removed from his position because he engaged in protected union activity. *Id.* at 17. The matter was unresolved and was submitted to arbitration. *See id.*

Prior to the hearing, the Arbitrator issued an initial decision and order, addressing an information request filed by the Union. Exceptions, Attach. 3 at 1, 2. The Agency then filed a motion for reconsideration, alleging that "the underlying grievance [was] not grievable or arbitrable because [the] [g]rievant [was] a probationary employee and the [a]greement, by its terms, makes the negotiated grievance procedure inapplicable to such employees." *Id.* at 1. In his second decision and order, the Arbitrator refused to address the arbitrability of the parties' dispute and ordered the hearing to proceed as scheduled. *Id.* at 3. The Arbitrator found that, although he was compelled to address the issue of arbitrability in advance of deciding the merits of the parties' dispute, he was not compelled to do so in advance of the hearing. *Id.* at 2-3.

At arbitration, the parties stipulated to the following issues:

> 1. [Does the Arbitrator] have jurisdiction to hear [the] [g]rievant's challenge to his termination during his probationary period?
>
> 2. If so, was [the] [g]rievant's termination motivated by his protected union activity and, if so, what shall be the remedy?

Award at 3.

The Arbitrator found that the Agency properly raised the issue of arbitrability. *Id.* at 35. The Arbitrator stated that he agreed with the Union's contention that, under Authority precedent, a probationary employee may challenge his removal if it was motivated by his engagement in protected activity.[1] *Id.* The Arbitrator also determined that a union is permitted "in lieu of filing a ULP with the

1. Although the Arbitrator was convinced by the Union's contention, he noted that the Agency cited to a series of cases where the Authority "rejected as non-negotiable a union's contractual proposal that would have allowed terminated probationary employees access to the negotiated grievance process in situations where the grievance would allege discrimination." Award at 36 (citing *NTEU*, 39 FLRA 848, 852-53 (1991) & *NTEU*, 25 FLRA 1067, 1078 (1987)). According to the Arbitrator, "[t]hose cases suggest that the Union's attempt to arbitrate might not survive a challenge, even if the . . . [a]greement were deemed to allow it." *Id.*

Authority, to allege in a grievance that an agency committed a ULP, unless the parties have excluded [ULP] grievances from the scope of their grievance procedure." *Id.* (citing *U.S. Dep't of Health & Human Servs., Region V*, 45 FLRA 737, 743 (1992) & *FDIC, Div. of Depositor & Asset Servs., Oklahoma City, Okla.*, 49 FLRA 894, 901 (1994) (*FDIC*)). The Arbitrator found that Article 41, Section 1 of the parties' agreement specifically excludes the issue of separation of probationary employees from the contractual grievance process. *Id.* at 36. The Arbitrator explained that

> while probationary employees are permitted to file ULP challenges with [the] FLRA (and [the] [g]rievant could have done so) and while non-probationary employees are in certain cases permitted to elect between the FLRA and their negotiated grievance procedure in contesting ULPs, the specific language [in Article 41, Section 1 of the parties' agreement] excluding the separation of probationary employees from the grievance procedure precludes [the] [g]rievant from pursuing his ULP complaint through the grievance arbitration process.[2]

Id. Further, the Arbitrator rejected the Union's contention that he ruled against the Agency's arbitrability claim in his second decision and order. *Id.* at 36-37. The Arbitrator noted that, in his second decision and order, he merely decided that he was not required to determine the arbitrability of the Union's grievance in advance of the hearing and that he specifically allowed the Agency to raise the issue of "arbitrability in its post-hearing brief." *Id.* at 37.

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the award is contrary to law because the Arbitrator's arbitrability determination was based solely on the result of the alleged ULP, the grievant's separation. Exceptions at 8-9. The Union claims that, if the Agency had suspended the grievant or used any other sort of discipline, the case would have been arbitrable under the award. *Id.* at 9. Additionally, the Union contends that "[t]o allow arbitration in one case and not [in] another for the exact same action on the part of the Agency is inconsistent as the outcome of the ULP does not change whether or not a ULP occurred." *Id.*

Also, the Union claims that the award is contrary to law because the Arbitrator erroneously concluded that the parties' agreement "precludes challenges to the removal of probationary employees on the basis that the removal was motivated by protected activity." *Id.* (emphasis omitted). The Union asserts that, under the parties' agreement, the dispute is arbitrable. *Id.* at 9-11. The Union claims that, "while [the Arbitrator] recognized that the Union . . . could file ULP grievances[,] the Arbitrator brushed that aside and relied upon the statutory exclusion which is mirrored in the agreement prohibiting probationary employees from grieving their separation based on the merits of their performance or their misconduct." *Id.* at 10. The Union also argues that, in finding that the parties' agreement does not allow the grievant to arbitrate his removal, "the Arbitrator re-casts the dispute from a ULP challenge to one involving a garden variety contest over the grievant's performance or conduct." *Id.* Moreover, the Union claims that, based on Authority precedent, the grievance is arbitrable. *Id.* at 11. The Union notes that the Authority has found that "probationary employees are 'employees,' within the meaning of the [S]tatute and they have every right to pursue ULP charges before the Authority or through a negotiated grievance procedure unless the [parties' agreement] prohibits the grieving of ULP charges." *Id.* at 12.

B. Agency's Opposition

The Agency argues that the award is not contrary to law. Opp'n at 3. The Agency contends that "the Union oversteps when it argues that[,] because probationary employees may have their union file a grievance alleging a ULP, all such grievances must be arbitrable, as a matter of law." *Id.* Moreover, the Agency argues that the Arbitrator properly found that the grievance was not arbitrable because the agreement specifically prohibits probationary employees from utilizing the contractual grievance process in order to challenge their separations. *See id.*

2. Article 41 of the parties' agreement addresses the employee grievance procedure; Article 41, Section 1 provides that "[t]he grievance procedures of this Article shall not apply to the following: . . . 8. the separation of a probationary employee . . . ." Award at 5. Article 41, Section 2 defines a "grievance" as "any complaint . . . by an employee concerning any matter relating to the employment of the employee . . . [or] by an employee or the Union concerning . . . any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." *Id.* at 5-6.

Also, the Agency contends that the award does not fail to draw its essence from the parties' agreement. *Id.* at 3-7. Although the Union only argues that the award is contrary to law in its exceptions, the Agency contends that "the Authority should construe the Union's argument that . . . [the] Arbitrator incorrectly read the contract language in this case as precluding the grievance as a contention that the Award fails to draw its essence from the parties' agreement." *Id.* at 5. According to the Agency, the instant action clearly differs from *FDIC* because the language in the parties' agreement plainly states that the grievance procedures do not apply to the separation of a probationary employee. *Id.* at 6-7 (citing *FDIC*, 49 FLRA at 901). Also, the Agency argues that, after considering the parties arguments, "the Arbitrator [correctly] determined that the lack of qualifying language meant that the parties had agreed to exclude *all* probationary separations from the contractual grievance procedure." *Id.* at 6 (emphasis in original). The Agency contends that "the parties got what they bargained for, the [A]rbitrator's construction of their agreement." *Id.* at 7. Furthermore, the Agency argues that the Arbitrator's award cannot be a manifest disregard of the parties' agreement because it gives the plainest meaning to the exclusion contained in Article 41, Section 1. *Id.*

IV. Preliminary Matter: Order to Show Cause

The Authority issued an Order to Show Cause (Order), directing the Union to demonstrate why it should not dismiss the Union's exceptions for lack of jurisdiction under § 7121(f) of the Statute. Order at 1-2.

The Union filed a response, asserting that, although the Authority "has no jurisdiction to review an arbitrator's award if it simply involves Chapter 75 misconduct or Chapter 43 performance based agency removals[,]" it "does have jurisdiction and has consistently exercised that jurisdiction to entertain challenges to an employee's removal if based on an underlying ULP claim." Union Response at 5, 4. In opposition to the Union's response, the Agency contends that, because the main issue is the grievant's separation, the Authority does not have jurisdiction to resolve the Union's exceptions. Agency Response at 3.

Based on applicable precedent, the Authority has jurisdiction to resolve the Union's exceptions to the award. *See Dep't of Def., Dependents Schs.*, 10 FLRA 312, 312 n.* (1982) (finding that the case was properly before the Authority to review because the removal of a probationary employee does not relate to any of the matters described in § 7121(f) of the Statute); *Dep't of HHS, SSA*, 32 FLRA 79, 83 (1988) (noting that, for purposes of § 7512, an employee is defined as "an individual in the competitive service who is not serving a probationary or trial period under an initial appointment . . ."). [3] Accordingly, we address the exceptions.

V. Analysis and Conclusions

A. The award does not fail to draw its essence from the parties' agreement.

The Union alleges that the Arbitrator's interpretation of the parties' agreement is improper because he found that Article 41, Section 1 excluded all grievances involving the separation of a probationary employee regardless of the reasons for the employee's separation. Exceptions at 9. According to the Union, the language of Article 41, Section 1 simply mirrors "the statutory exclusion which . . . prohibit[s] probationary employees from grieving their separation based on the merits of their performance or their misconduct." *Id.* at 10. We construe this argument as a contention that the award fails to draw its essence from the parties' agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal

3. We note that, to the extent that the Union is arguing in its exceptions, as it did before the Arbitrator, that the Arbitrator reversed his determination on the arbitrability of the dispute, such assertion is without merit. Exceptions at 7 (noting that, although the Arbitrator initially found that the matter was arbitrable in his second decision and order, he later determined, in his award, that the dispute was not arbitrable because the parties' agreement excludes a probationary employee from grieving and arbitrating his separation). Nothing in the record indicates that the Arbitrator ruled on arbitrability in his second decision and order. *See AFGE, Local 2172*, 57 FLRA 625, 628 (2001). Although the Arbitrator summarized the arguments made by the Union in his second decision and order, he ultimately determined that he was not compelled to address the issue of arbitrability in advance of the hearing. Exceptions, Attach. 3 at 2-3. Also, in his award issued to the parties, the Arbitrator made clear that, in his second decision and order, he "did not rule on the issue of arbitrability" and later "allowed the Agency to raise arbitrability in its post-hearing brief." Award at 37. Furthermore, the Union presented no evidence that the parties had agreed to a bifurcated procedure, with separate awards on arbitrability and the merits of the grievance. *See AFGE, Local 2171*, 57 FLRA at 628.

courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the 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 collective bargaining 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. *See U.S. Dep't of Labor* (*OSHA*), 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context because it is the arbitrator's construction of the agreement for which the parties have bargained. *Id.* at 576.

The Arbitrator determined that "the specific language [in Article 41, Section 1] excluding the separation of probationary employees from the grievance procedure precludes [the] [g]rievant from pursuing his ULP complaint through the grievance arbitration process." Award at 36. Contrary to the Union's argument, the Arbitrator's interpretation is not implausible or irrational. The Arbitrator's interpretation of the parties' agreement "gives the plainest meaning to the exclusionary phrase" contained in Article 41, Section 1. Opp'n at 7. The clear absence of qualifying language in Article 41, Section 1 also makes the Arbitrator's interpretation of the parties' agreement plausible. *See* Award at 5 (citing to the relevant provision in Article 41, Section 1, containing no qualifying language).

The Union claims that "[t]he phrase absent legal requirements [in the *FDIC* agreement] is synonymous with language in Article 2 of the parties' agreement essentially requiring that the instant agreement be administered according to law and legal requirements[.]" Union Response at 7 n.2. Its contention is without merit. In *FDIC*, the collective bargaining agreement excluded grievances over the separation of temporary employees "absent legal requirements to the contrary." 49 FLRA at 901. The Authority found that, because the exclusion contained the phrase "absent legal requirements to the contrary[,]" the Arbitrator's determination – that the quoted phrase meant that temporary employees could not be terminated as a result of engaging in protected activity and that a grievance alleging such a termination was grievable – did not fail to draw its essence from the collective bargaining agreement. *Id.* Because the exclusion in Article 41, Section 1 contains no qualifying language, the parties' agreement is distinguishable from the agreement in *FDIC*. Consequently, the Union has not demonstrated that the Arbitrator's interpretation of the parties' agreement is irrational, implausible, unfounded, or in manifest disregard of the agreement. *See U.S. Dep't of Transp., FAA*, 63 FLRA 15, 18 (2008).

Accordingly, we deny the Union's exception.

B. The award is not 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*. *See 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 the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Union claims that that the award is contrary to law because the Arbitrator's arbitrability determination was based solely on the result of the alleged ULP – i.e., the grievant's separation. Exceptions at 8-9. Also, the Union asserts that "[t]o allow arbitration in one case and not [in] another for the exact same action on the part of the Agency is inconsistent as the outcome of the ULP does not change whether or not a ULP occurred." *Id.* at 9. Finally, the Union alleges that the award is contrary to law because, based on Authority precedent, the grievance is arbitrable. *Id.* at 9-12. The Union claims that the Arbitrator wrongfully recasts the parties' dispute as "a garden variety contest over the grievant's performance or conduct" and that "probationary employees . . . have every right to pursue ULP charges before the Authority or through a negotiated grievance procedure unless the [parties' agreement] prohibits the grieving of ULP charges." *Id.* at 10, 11-12.

As a general matter, the termination of a probationary employee is not grievable or arbitrable as a matter of law. *See, e.g., GSA, Region 2, N.Y.C., N.Y.*, 58 FLRA 588, 589 (2008). The Authority has held that the termination of a probationary employee in violation of the Statute is a ULP. *See U.S. Dep't of Agric., Food & Nutrition Serv., Alexandria, Va.*,

61 FLRA 16, 22 (2005). The Authority has not addressed, however, whether the termination of a probationary employee is grievable and arbitrable when it is alleged to constitute a ULP. Even assuming that terminated, probationary employees are entitled to access the negotiated grievance procedure in such situations, the Arbitrator here found that the parties' agreement, as noted above, excludes complaints involving the separation of a probationary employee from the arbitration process, including those alleging a ULP. Award at 5, 36, 37; *see FDIC*, 49 FLRA at 900 (finding that a temporary employee may pursue a ULP complaint through the negotiated grievance procedure unless the parties agree to exclude his ability to do so in their agreement). The Authority has found that parties may agree to exclude any matter from the scope of their negotiated grievance procedure. *See, e.g., FDIC*, 49 FLRA at 900-01 (citing *U.S. Dep't of the Treasury, Customs Serv., Se. Region*, 43 FLRA 921, 925 (1992) (determining that, under the Statute, parties may choose to exclude any matter from the scope of negotiated grievance procedures)); *U.S. Naval Air Station, Kingsville, Tex.*, 35 FLRA 841, 842 (1990) (citation omitted) (finding that the parties may agree to exclude any matter, including disputes concerning contracting out, from the scope of their negotiated grievance procedure).

Although the Union claims that the award is unfair because it prevents only separated, probationary employees from using the negotiated grievance procedures, the parties themselves created this result when they limited the exclusion to complaints involving the separation of a probationary employee. Exceptions at 8-9. Moreover, the Union has not cited to a single case, in either its exceptions or at arbitration, "where a probationary employee, otherwise precluded from using the contractual grievance process, was nevertheless permitted to file a ULP utilizing that process." Award at 36. Consequently, the Union's contention – that the award is contrary to law because the Arbitrator failed to find that the grievant could pursue his ULP complaint through the negotiated grievance procedure – is without merit.[4]

Accordingly, we deny the Union's exceptions.

VI. Decision

The Union's exceptions are denied.

4. As the Arbitrator noted, the grievant here was not without recourse. Award at 36. As a probationary employee, he was entitled to pursue his ULP claim by filing a ULP charge with a regional office of the Authority. *Id.*