

63 FLRA No. 167

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Union)

and

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

0-AR-4514

ORDER DISMISSING EXCEPTION

August 6, 2009

Before the Authority: Carol Waller Pope, Chairman
and Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator Joshua M. Javits filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exception.

The Arbitrator denied the grievance over the 3-day suspension of the grievant. For the reasons that follow, we dismiss the Union's exception as moot.

II. Background and Arbitrator's Award

The parties submitted to arbitration the issue of whether the grievant's 3-day suspension violated the parties' collective bargaining agreement. As a threshold matter, the Agency contended that the grievance was not arbitrable "because it was improperly filed by the Union under the expired 2003 Collective Bargaining Agreement." Award at 10. The Agency claimed that, at the time the grievance was filed, it "had implemented the new 2006 Collective Bargaining Agreement." *Id.* The Union contended that the grievance was properly filed under the 2003 agreement because it "has always taken the position that the 2003 contract is the only valid contract between the parties." *Id.* at 15. The Union

claimed that, until the litigation over the legitimacy of the 2006 agreement is finally resolved, "the 2006 contract is neither final nor binding as a matter of law[.]" *Id.* at 17. The Arbitrator concluded that the grievance was arbitrable. He found that because litigation regarding the 2006 agreement was ongoing, the filing of the grievance under the 2003 agreement was "permissible." *Id.* at 23. However, he concluded that the merits of the grievance "must be considered under the terms of the contract that was in effect at the time of its filing[.]" *Id.* at 24.

On the merits, the Arbitrator concluded that the grievant had engaged in the misconduct alleged by the Agency and that the 3-day suspension was commensurate with the nature of the misconduct. Accordingly, the Arbitrator denied the grievance. *Id.* at 29.

III. Positions of the Parties**A. Union's Exception**

The Union contends that "the Arbitrator's determination that the [2006 agreement] is legally in effect is contrary to law." Exception at 5. The Union maintains that the question of which collective bargaining agreement is in effect is still the subject of pending litigation.* *Id.* at 8. Consequently, the Union argues that the Arbitrator was precluded by law from determining that the 2006 agreement is in effect or is binding. *Id.* at 9. However, the Union states that it "is not challenging the Arbitrator's overall determination that the grievance is arbitrable" and that it is not "challenging the Arbitrator's denial of the grievance on the merits." *Id.* at 3. In addition, the Union notes that, regardless of which agreement applies, the Agency was still obligated "to prove the discipline was taken for the efficiency of the service." *Id.* at 4. Consequently, the Union concedes that which agreement "is controlling is not necessary to make a decision." *Id.*

B. Agency's Opposition

The Agency contends that the award is consistent with law and the 2006 agreement.

IV. Analysis and Conclusions

An arbitration matter becomes moot when the parties no longer have a cognizable interest in the

* The pending litigation to which the Union refers is *NATCA, AFL-CIO v. FSIP*, No. 08-5479 (D.C. Cir. filed Nov. 10, 2008).

dispute. *E.g.*, *IAM District Lodge 776*, 63 FLRA 93, 94 (2009). Stated otherwise, “a case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *City of Erie v. Pap’s A. M.*, 529 U.S. 277, 287 (2000) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). Under the facts of this case, we need not resolve the Union’s exception. The Arbitrator determined that the grievance was arbitrable, but that it was to be resolved under the 2006 agreement. On the merits, the Arbitrator denied the grievance. The Union disputes the Arbitrator’s application of 2006 agreement. However, the Union disavows any challenge to the Arbitrator’s arbitrability ruling or the Arbitrator’s resolution of the grievance on the merits. The Union also concedes that the Agency’s contractual obligation was the same under both agreements and that, consequently, it is unnecessary to decide which agreement is controlling. In these circumstances, the Union fails to present any legally cognizable interest in the outcome of the award, and its exception is moot. *See IAM District Lodge 776*, 63 FLRA at 94. Accordingly, we dismiss the exception.

V. Order

The Union’s exception is dismissed.