

65 FLRA No. 170

NATIONAL INSTITUTES
OF HEALTH
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2419
(Union)

0-AR-4692

DECISION

May 18, 2011

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 Robert A. Creo 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 did not file an opposition to the Agency's exceptions.

The Arbitrator concluded that the Agency violated the parties' agreement by denying the grievant's request for Union representation during a meeting (the meeting) where he was notified that his employment would be terminated. As a remedy, the Arbitrator ordered the Agency to conduct another meeting with the grievant and his Union representative, and to cease and desist from denying representation to similarly situated probationary employees. For the reasons set forth below, we grant the Agency's exception and set aside the award as contrary to law.

II. Background and Arbitrator's Award

The grievant's supervisor asked the grievant, a probationary employee, to attend a meeting. Award at 2. The grievant asked whether the meeting would be disciplinary and, if so, whether he needed to speak

with a Union representative. *Id.* at 26. The supervisor informed him that a Union representative was not necessary as the sole purpose of the meeting was to "transmit documents." *Id.* At the meeting, the supervisor and a human resources specialist informed the grievant that the Agency had decided to terminate his employment; however, they also presented the grievant with a memorandum of understanding (MOU) that gave him the option of resigning. *Id.* at 2. The grievant was given seven days to consider the MOU. The grievant asked to speak to a Union representative. The supervisor and the specialist denied the grievant's request, but informed him that he could speak to one after the meeting. *Id.* Several days later, the grievant executed the MOU. *Id.* at 7.

The Union presented a grievance concerning the grievant's termination. The matter proceeded to arbitration, and the Arbitrator framed the following issues:

- 1) Is the [g]rievance arbitrable?¹
- 2) Did the Agency violate the [parties'] [a]greement, applicable law² or regulations by its processing of the termination of [the grievant, a] probationary employee . . . ? If yes, what shall the remedy be?

Id. at 10.

As to the alleged contractual violation, the Union asserted that the Agency violated Article 28, Section 2 of the parties' agreement concerning probationary employees.³ Exceptions, Attach. 4, Agency's Closing Brief at 3. The Union requested the grievant's reinstatement. Award at 23-24. The

1. The Agency argued that the grievance was not procedurally arbitrable because the Union did not file the grievance in accordance with filing procedures set forth in the parties' agreement. *See* Award at 24. The Arbitrator rejected this claim, *see id.* at 25, and the Agency does not challenge this conclusion. Accordingly, that issue is not before us.

2. Before the Arbitrator, the Union asserted that the Agency committed an unfair labor practice (ULP) by bypassing the Union when it offered MOUs and settlement agreements to other probationary employees facing termination. *See* Award at 23. Neither party addresses this issue; accordingly, it is not before us.

3. The relevant portions of the parties' agreement are set forth in the attached appendix.

Agency argued that reinstatement was not authorized because the Authority has consistently “held that a grievance concerning the separation of a probationary employee is excluded from the scope of negotiated grievance procedures based on the statutory and regulatory scheme for a probationary period of employment set forth in 5 U.S.C. [§] 3321 and 5 C.F.R. part 315, subpart H.” Exceptions, Attach. 4, Agency’s Closing Brief at 12 (citing *AFGE, Local 2006*, 58 FLRA 297, 298 (2003) (*AFGE*); *Dep’t of Health & Human Servs., SSA*, 14 FLRA 164 (1984)).

The Arbitrator concluded that the Agency violated the parties’ agreement by denying the grievant’s request for representation during the meeting; however, he did not state which contract provision the Agency violated. Award at 25. The Arbitrator acknowledged that he could not review the merits of the grievant’s termination; thus, he could not reinstate the grievant. *Id.* at 27. However, the Arbitrator ordered the Agency to hold a meeting with the grievant and a Union representative to discuss the grievant’s termination. The Arbitrator stated that, although he could not mandate that the Agency reverse its decision to terminate the grievant, the Agency would not be permitted to convert the resignation into a termination. *Id.* The Arbitrator further ordered the Agency to cease and desist from “denying Union representation to probationary employees during meetings where they are issued discipline, including a notice of termination, which results in them being removed from the premises or otherwise suspended from reporting for their regular duty assignment.” *Id.* at 28.

III. Agency’s Exceptions

The Agency avers that the award is contrary to law for two reasons.

First, the Agency asserts that the award impermissibly expands the procedural protections afforded to probationary employees under Office of Personnel Management (OPM) Regulations. Exceptions at 8. The Agency avers that, under OPM Regulations, a probationary employee facing termination does not have the right to explain or defend himself/herself. *Id.* (citing *NTEU*, 39 FLRA 848 (1991) (*NTEU*)). The Agency further contends that collective bargaining agreements cannot be used to expand OPM’s procedural protections. *Id.* Thus, according to the Agency, the award is contrary to “statutory and regulatory scheme for probationary

periods of employment set forth in 5 C.F.R. part 315, subpart H.” *Id.* (citing *AFGE*, 58 FLRA at 297).

Second, the Agency argues that the Arbitrator incorrectly concluded that the grievant was entitled to Union representation during the meeting. *Id.* at 5-6. The Agency claims that, under § 7114(a)(2)(B) of the Statute, the grievant did not have a right to representation because the meeting involved the notification of discipline, rather than the imposition of discipline. *Id.* at 6.

IV. Analysis and Conclusion: the award is contrary to law.

The Authority reviews questions of law 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 a standard of de novo review, the Authority determines whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator’s underlying factual findings. See *id.*

The Authority has held that a grievance concerning the termination of a probationary employee is excluded from the scope of negotiated grievance procedures based on the statutory and regulatory scheme for a probationary period of employment set forth in 5 U.S.C. § 3321 and 5 C.F.R. part 315, subpart H. *E.g.*, *GSA, Region 2, N.Y.C., N.Y.*, 58 FLRA 588, 589 (2003) (*GSA*) (finding that grievance concerning agency’s failure to abide by certain contractual provisions when it terminated grievant probationary employee was not substantively arbitrable) (citations omitted); *U.S. Dep’t of the Air Force, Nellis Air Force Base, Las Vegas, Nev.*, 46 FLRA 1323, 1326-27 (1993) (*NAFB*) (same). In so holding, the Authority has consistently noted that parties may not use the collective bargaining process to provide procedural protections for probationary employees facing termination. *E.g.*, *AFGE*, 58 FLRA at 298 (citation omitted); *NAFB*, 46 FLRA at 1326-27 (citations omitted). Of particular relevance, the Authority has found contrary to law a bargaining proposal requiring, among other things, that an agency provide a probationary employee with the option to request union representation during a meeting in which he or she faces termination. See *NTEU*, 39 FLRA at 852-53.

The award is contrary to law. The Union grieved whether the Agency processed the termination of a

probationary employee in accordance with the parties' agreement when it denied the grievant's request for Union representation. *See* Award at 10. That portion of the grievance, therefore, concerned the termination of a probationary employee. *See, e.g., GSA, 58 FLRA at 589* (grievance claiming that agency failed to follow contractual procedures when it terminated probationary employee concerned termination of probationary employee); *AFGE, 58 FLRA at 298* (same). Such grievances are not substantively arbitrable. *See id.* Indeed, as noted above, contract provisions requiring that an agency provide a probationary employee with the option to request union representation during a meeting in which he or she faces termination are contrary to law.⁴ *See NTEU, 39 FLRA at 852-53.* Accordingly, we find that the portion of the grievance concerning whether the Agency violated the parties' agreement was not substantively arbitrable; because the Arbitrator based his award on that portion, we set aside the award as contrary to law.⁵ *See, e.g., GSA, 58 FLRA at 589* (Authority set aside award after arbitrator erroneously concluded that a grievance concerning the termination of a probationary employee was substantively arbitrable).

V. Decision

The award is set aside.

APPENDIX

Article 28, Section 2 provides:

- A. The purpose of this Section is to clarify certain rights of probationary employees where those rights may not be clear elsewhere in this Agreement.
- B. The Agency agrees to provide probationary employees a reasonable and fair opportunity to improve job performance.
- C. The Agency agrees to evaluate the performance of probationary employees during the probationary period and to counsel the employee concerning performance deficiencies. The Agency will give the employees the results of any interim review.
- D. Probationary employees will usually be given a one-pay period's notice of their separation. This will not preclude the Agency [from] taking any action it deems appropriate for disciplinary and/or performance reasons in accordance with government-wide rules and regulations.

Award at 10-11.

4. We note that none of the contract provisions cited in the award mirrors rights set forth in the Statute.

5. As stated above, the issue concerning whether the Agency committed a ULP by bypassing the Union when it offered MOUs and settlement agreements to other probationary employees facing termination is not before us. We, therefore, do not address whether issue is substantively arbitrable. Furthermore, based on our decision, it is unnecessary to address the Agency's remaining exception.