66 FLRA No. 112

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
COUNCIL 33
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
(Agency)

0-AR-4747

____

DECISION

April 23, 2012

_____

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 Stephen F. O'Beirne 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 denied a grievance alleging that the manner in which the Agency handled, stored, and transported certain materials violated the parties' collective bargaining agreement (CBA). The grievance also sought hazard pay differential (HPD) for the grievants' work with those materials. But, finding that the Agency violated the CBA by failing or refusing to informally resolve the dispute with the Union, the Arbitrator directed as a remedy that the parties negotiate over the issues in the grievance.

For the reasons that follow, we modify the award to set aside the remedy and deny the Union's remaining exceptions.

II. Background and Arbitrator's Award

The grievants work as lock and security specialists at the Agency's correctional facilities. Award at 4, 17. They work around "stun munitions" on a daily basis.[1] *Id.* at 4, 18. The Union filed a grievance alleging that the Agency improperly stored stun munitions in violation of various government-wide regulations, statutes, and the CBA (stun-munitions claim), and seeking retroactive HPD for the grievants' work with those materials (HPD claim). *Id.* at 14 (quoting grievance).

When the parties could not resolve the grievance, they submitted it to arbitration. The Arbitrator framed three issues: (1) whether the grievance is timely under Article 31 of the CBA[2]; (2) whether the grievants are entitled to HPD in connection with the handling, transporting, or storing of stun munitions; and (3) whether the Agency violated, or continues to violate, the CBA or law by the manner in which it handles, stores, and transports stun munitions. *Id.* at 6.

The Arbitrator found that the grievance was "untimely" in two respects. *Id.* at 17, 25, 30. He found that it was "filed too late" with respect to the HPD claim; and "filed to[o] early" with respect to the stun-munitions claim. *Id.* at 25-26.

The Arbitrator determined that the Union filed its HPD claim on or about February 10, 2009, and that this was not within the CBA's forty-day time limit after "the date the Union could reasonably be expected to have become aware of the grievable occurrence." *Id.* at 17; *see* Article 31(d). Among other things, the Union claimed that it based its awareness of the grievable occurrence on a November 2008 arbitration award concerning stun munitions (the Tucson award), and the Union's subsequent investigation extending at least through the end of December 2008. *See* Award at 17; Exceptions at 9.

The Arbitrator found that the Tucson award "can in no way be fairly seen as the point where the grievance clock started ticking." Award at 17. In the Arbitrator's view, "the Tucson [award] is not the date the Union could reasonably be expected to have become aware of the

---

[1] Stun munitions are devices that, when discharged, briefly halt an aggressor by emitting a bright light and a loud sound. Opp'n at 2.

[2] Article 31 provides, in relevant part:

> *Section d.* Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. If needed, both parties will devote up to ten (10) days of the forty (40) to the informal resolution process. If a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence. . . .

Award at 10-11.

grievable occurrence." *Id.* According to the Arbitrator, the Agency mandated the use of stun munitions at all Agency facilities in 2003. *Id.* at 17-18. He also found that the grievants are "highly-trained professionals" who work around stun munitions on a daily basis, order them from the manufacturer, and inventory them regularly. *Id.* at 18. In addition, the Arbitrator found that the grievants were aware of stun munitions' hazardous nature based on the labels on some of the munitions, the "dangerous/explosives" markings on the vehicles that transport the munitions to prison facilities, instances of munitions blowing up, and material safety data sheets. *Id.* at 18-19. For these reasons, the Arbitrator found it "impossible" to conclude that the Union did not become aware of the stun munitions' hazardous nature until the Tucson award. *Id.* at 19.

The Arbitrator determined that the Union filed its stun-munitions claim "to[o] early" and that the claim was "not ripe for arbitration." *Id.* at 25, 27. The Arbitrator noted that the federal agencies charged with enforcing the relevant regulations had not determined that the Agency's procedures violate the regulations and the parties had not attempted to resolve these issues "short of arbitration." *Id.* at 27, 30. The Arbitrator found that, under Article 27 of the CBA[3], the parties agreed to consult with regulatory enforcement agencies to establish the best practices for health and safety in the federal prison system. *Id.* at 26-27. Because these agencies "have not weighed in" on whether the Agency's practices violate the government-wide regulations cited by the Union, the Arbitrator found the grievance unripe as to this claim. *Id.* at 27.

Despite finding the HPD claim untimely, the Arbitrator proceeded to make findings on the merits. He concluded that the Union failed to prove by a preponderance of the evidence that stun munitions are "unstable and highly sensitive" within the meaning of 5 C.F.R. Appendix A to Part I of Part 500, which he determined is a prerequisite for an award of HPD. *Id.* at 22.

In addition, the Arbitrator found that the Agency violated Article 31 of the CBA[4] by failing and/or refusing to engage in informal resolution of the dispute once the Union brought the dispute to the Agency's attention. *Id.* at 21, 30. As a remedy, the Arbitrator "direct[ed] the parties to negotiate these issues in good faith with the goal of lowering the hazardous conditions associated with stun munitions to the lowest possible level, consistent with . . . the CBA." *Id.* at 30.

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that the Arbitrator's finding that the HPD claim is untimely fails to draw its essence from the CBA and is based on nonfacts. Exceptions at 6. As to essence, the Union claims that the Arbitrator based his determination solely on his finding that the grievants must have known more than forty days before the Union filed the grievance that stun munitions were potentially dangerous. *Id.* at 6-8. According to the Union, under Article 31(d), the Arbitrator should have considered when the grievants became aware of the government-wide regulations governing their claim. *Id.* at 6-7. The Union also argues that the Agency's response to the Union's grievance was untimely. To hold the Union to contractual timelines, but not the Agency, the Union asserts, also demonstrates that the award fails to draw its essence from Article 31. *Id.* at 8.

In addition, the Union asserts that the Arbitrator's timeliness determination is based on nonfacts because: the Union filed the grievance four days earlier than the Arbitrator found it did, *id.* at 9; the Arbitrator made contradictory findings regarding when the Union knew it had a grievable claim, *id.*; the Arbitrator erroneously found that the Union did not attempt to share the results of its investigation regarding the Agency's stun-munitions practices until the arbitration hearing, *id.* at 10; and the Arbitrator failed to acknowledge that the CBA violations were continuing and ongoing at the time of the arbitration, *id.* at 10-11.

The Union also contends that the Arbitrator's findings on the merits of the HPD claim are contrary to law and based on nonfacts. The Union asserts that the Arbitrator's finding that stun munitions are not "unstable and highly sensitive" is inconsistent with Authority precedent. *Id.* at 17-18 (citations omitted). The Union also alleges that the Arbitrator's finding is based on nonfacts. The Union objects to the Arbitrator's findings

[3] Article 27, Section b. provides, in relevant part:

> 4. . . . the Occupational Safety and Health Administration (OSHA), Environmental Protection Agency (EPA), Centers for Disease Control (CDC), and other regulatory enforcement agencies that have a primary function of administering the laws, rules, regulations, codes, standards, and executive orders related to health and safety matters are the recognized authorities when issues involving health and safety are raised.

Award at 26.

[4] Article 31, Section b. provides: "The parties strongly endorse the concept that grievances should be resolved informally and will always attempt informal resolution at the lowest possible level before filing a formal grievance. A reasonable and concerted effort must be made by both parties toward informal resolution." Award at 10.

that: the material safety data sheets state that stun munitions are stable, *id.* at 18; stun munitions have not spontaneously exploded, *id.* at 19; and an arbitrator in another case found that stun munitions were not unstable and highly sensitive, *id.*

As to the stun-munitions claim, the Union argues that the award is contrary to government-wide regulations governing the storage of stun munitions because the Arbitrator failed to find that the Agency was bound by these regulations. *Id.* at 11-14. The Union also argues that the Arbitrator exceeded his authority by not resolving the merits of the stun-munitions claim. *Id.* at 14.

Finally, the Union argues that the Arbitrator's remedy is deficient on exceeds-authority, essence, and nonfact grounds. *Id.* at 20-23. As relevant here, the Union asserts that, in finding that the Agency violated Article 31 and directing bargaining, the Arbitrator decided an issue that the Union did not submit to arbitration and that was not part of the Arbitrator's framed issues. *Id.* at 20.

B. Agency's Opposition

The Agency asserts that the Arbitrator's finding that the grievance is untimely constitutes a procedural-arbitrability determination that cannot be directly challenged. Opp'n at 5-6. The Agency contends that the Union's nonfact and essence exceptions challenging this determination should be rejected as direct challenges to the Arbitrator's procedural-arbitrability determination.

As to the HPD claim, the Agency alleges that, because the Arbitrator found this portion of the grievance untimely, his findings regarding the merits of that claim are dicta. *Id.* at 10. Alternatively, the Agency asserts that the Arbitrator's finding on the merits that the grievants are not entitled to HPD is consistent with law. *Id.* at 11-13. In addition, the Agency asserts, the Union's claim that the Arbitrator's merits determination is based on nonfacts should be rejected because the parties disputed the alleged nonfacts before the Arbitrator. *Id.* at 13-14.

As to the stun-munitions claim, the Agency argues that the Arbitrator's findings that certain government-wide regulations regarding the handling, storage, and transportation of stun munitions apply to the Agency are consistent with law. *Id.* at 6-7. The Agency also argues that the Arbitrator did not exceed his authority by failing to resolve the merits of the stun-munitions claim because he specifically resolved the issue and explained how he reached his conclusion. *Id.* at 8-9.

Finally, the Agency agrees that the Authority should find the remedy directing the parties to bargain deficient on exceeds-authority grounds. *Id.* at 16.

IV. Analysis and Conclusions

A. The Arbitrator's timeliness and merits determinations are not deficient.

The Union asserts that the Arbitrator's finding that the HPD claim is untimely fails to draw its essence from the CBA and is based on nonfacts.[5] Exceptions at 6. The Union also alleges that the Arbitrator exceeded his authority by failing to address the merits of the stun-munitions claim. *Id.* at 14. And the Union contends that the Arbitrator's findings on the merits of the HPD claim are contrary to law and based on nonfacts. *Id.* at 17-22.

An arbitrator's determination regarding the timeliness of a grievance constitutes a determination regarding the procedural arbitrability of that grievance. *See, e.g., U.S. Dep't of Transp., FAA, Wash., D.C.*, 65 FLRA 950, 953 (2011) (*FAA*); *United Power Trades Org.*, 63 FLRA 208, 209 (2009) (*Power Trades*).

The Authority generally will not find an arbitrator's ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the procedural-arbitrability ruling itself. *See, e.g., AFGE, Local 3882*, 59 FLRA 469, 470 (2003). However, Authority case law holds that a procedural-arbitrability determination may be found deficient on the ground that it is contrary to law. *See id.* (citing *AFGE, Local 933*, 58 FLRA 480, 481 (2003)). For a procedural-arbitrability determination to be found deficient as contrary to law, the appealing party must establish that the determination is contrary to procedural requirements established by statute that apply to the parties' negotiated grievance procedure. *See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 122, 124 (2005). Authority case law also holds that a procedural-arbitrability determination may be found deficient on grounds that do not directly challenge the determination itself, which include claims that an arbitrator was biased or exceeded his or her authority. *U.S. Dep't of Veterans Affairs, Reg'l Office, Winston-Salem, N.C.*, 66 FLRA 34, 37 (2011).

[5] The Union does not challenge the Arbitrator's finding that the stun-munitions claim is "untimely" because it was "filed to[o] early." Award at 25. The Union asserts in its exceptions that the Arbitrator erred in finding that the grievance was filed too late, but all of these assertions go to whether the Arbitrator erred in finding that the HDP claim was untimely and do not challenge his finding that the stun-munitions claim was not ripe. *See* Exceptions at 6-11.

As to the HPD claim, the Arbitrator found that the grievance was "untimely" because it was "filed too late." Award at 25. This finding constitutes a procedural-arbitrability determination. *FAA*, 65 FLRA at 953; *Power Trades*, 63 FLRA at 209. As the Union's essence and nonfact exceptions directly challenge this procedural-arbitrability determination, we deny the Union's essence and nonfact exceptions.

Where an arbitrator finds that a grievance is untimely, any comments he or she makes concerning the merits of the grievance are non-binding dicta, and do not provide a basis for finding the award deficient. *See Power Trades*, 63 FLRA at 209 (finding no basis to review merits of claim that arbitrator exceeded his authority by failing to address an issue where arbitrator found grievance untimely); *AFGE, Local 2172*, 57 FLRA 625, 629 (2001) (*Local 2172*) (arbitrator's conclusion as to merits of union's grievance constituted non-binding dicta and provided no basis for finding award deficient where arbitrator determined that grievance was untimely).

Although the Union asserts that the Arbitrator exceeded his authority by failing to address the merits of the stun-munitions claim, it does not challenge the Arbitrator's determination that the stun-munitions claim was "untimely" because it was "filed to[o] early."[6] Award at 25. As the Union does not challenge the Arbitrator's determination that the stun-munitions grievance was untimely, the Authority has no basis for finding that the Arbitrator exceeded his authority by failing to address the merits of that claim. *See Power Trades*, 63 FLRA at 209. Accordingly, we deny the Union's exceeds-authority claim.

In addition, the Arbitrator's findings as to the merits of the Union's claims constitute non-binding dicta. *Local 2172*, 57 FLRA at 629. As such, the Union's claims that the Arbitrator's merits determinations are contrary to law and based on nonfacts do not establish that the award is deficient. Accordingly, we deny the Union's nonfact and contrary-to-law exceptions.

B. The remedy is deficient.

The Agency agrees with the Union that the Arbitrator's remedy directing the parties to negotiate over the issues raised in the grievance is deficient on exceeds-authority grounds. Exceptions at 20-23; Opp'n at 15-16.

Where an opposing party concedes that a remedy is deficient, the Authority modifies the award to set aside the deficient remedy. *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Tucson, Ariz.*, 66 FLRA 355, 356 (2011) (modifying award to exclude relief to non-affected employees where union conceded that it was deficient); *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 244 (2011) (finding arbitrator's granting of thirty days to file petition for attorney fees deficient where union conceded that arbitrator exceeded his authority); *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 300 (2000) (finding that arbitrator's award of punitive damages was deficient after union conceded it was contrary to law). Consistent with this precedent, as the Agency concedes that the remedy is deficient, we modify the award to set aside the remedy.

V. Decision

We modify the award to set aside the remedy and deny the Union's remaining exceptions.

[6] *See supra* note 5.