66 FLRA No. 2

UNITED STATES
DEPARTMENT OF THE AIR FORCE
NAS JOINT RESERVE BASE (NASJRB)
FORT WORTH, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1364
(Union)

0-AR-4694

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DECISION

August 9, 2011

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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 John B. Barnard 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 Agency also filed a motion to defer implementation of the award.[1] The Union filed an opposition to the motion and the exceptions.

The Arbitrator found that the parties' expired collective bargaining agreement (the agreement) remained in effect during contract negotiations. The agreement provided bargaining unit Air Reserve Technicians (ARTs) with the option to wear or not wear military uniforms while on duty in civilian status. The Arbitrator found that an Agency order requiring the ARTs to wear the uniform violated the agreement, and he directed the Agency to rescind the order.

For the reasons discussed below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

A. Background

Although the Arbitrator did not discuss the case's background in detail, certain undisputed matters are apparent from the award and the parties' filings. The Union represents a bargaining unit of Air Force Reserve (AFR) ARTs. *See* Exceptions at 3-4; *id.*, Attachs. 2 and 3. As part of the effort to achieve "Total Force Integration," the Department of the Air Force's Air Force Reserve Command (AFRC) changed its uniform requirements for AFR employees. Exceptions, Attach 2. Specifically, in August 2007, the AFRC issued a memorandum advising all AFR ARTs to wear military uniforms when performing their duties while in civilian status (the military uniform order). Award at 3. However, recognizing that it had a bargaining obligation with regard to bargaining unit ARTs, AFRC encouraged, but did not require, bargaining unit ARTs to wear their uniforms when performing their duties while in civilian status. *Id*.

In May 2008, the Agency notified the Union of its intent to open the agreement for renegotiation. The Agency's primary purpose was to modify the agreement to apply the military uniform order to bargaining unit ARTs. Exceptions at 4-5. In July 2008, the parties agreed to ground rules and began contract negotiations that continued on and off through 2008 and 2009. Award at 4-5.

In December 2009, the Agency informed the Union of its intent to implement the military uniform order for bargaining unit ARTs. *Id*. at 4. Thereafter, the Union filed a request with the Federal Service Impasses Panel (FSIP) for a cease and desist order concerning the implementation of the military uniform order. The Union also requested that the Agency engage in impact and implementation bargaining. *Id*. The Agency responded that the request was untimely but that it would conditionally agree to post-implementation bargaining if the Union withdrew its FSIP request with prejudice. *Id*. The Union refused. *Id.* at 6.

In January 2010, the Agency implemented the military uniform order for bargaining unit ARTs. *Id.* at 4-5. Alleging that the military uniform order constituted "a change in working conditions that adversely affected bargaining unit employees[,]" the Union filed a grievance. *Id.* at 5. When the parties could not resolve the grievance, the matter was submitted to arbitration. *Id.*

[1] The Authority's Regulations do not authorize stays of arbitrators' awards during the pendency of exceptions. *U.S. Dep't of the Navy, Navy Inventory Control Point, Mechanicsburg, Pa.*, 59 FLRA 698, 698 n.1 (2004). However, it is only after the Authority has ruled on the exceptions and the award has become final and binding that a party must take actions required by an award. *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 59 FLRA 282, 287-88 (2003). Accordingly, we deny the Agency's motion.

B. Arbitrator's Award

The parties did not agree on the issues to be submitted to arbitration. *Id.* at 2. The Agency framed the issue as "[w]hether management engaged, or attempted to engage, in appropriate arrangements (impact and implementation) negotiations prior to implementing [ART] wear of the military uniform?" *Id.* The Union submitted several issues. They were: "1. Was the Union's request to bargain appropriate arrangements timely filed? 2. Are contract negotiations and bargaining appropriate arrangements for a change in working conditions separate issues? 3. Does the Agency's implementation of the ART uniform wear policy directly violate the existing [agreement]?" *Id.*

Although the Arbitrator did not frame the issue before him, the Arbitrator addressed whether the Agency's implementation of the military uniform order violated the agreement. *Id.* at 2, 8. In resolving this issue, the Arbitrator considered Articles XXIII and XXXVIII of the agreement. Article XXIII grants bargaining unit ARTs the right to choose whether to wear their military uniforms when performing their duties while in civilian status.[2] Article XXXVIII provides that, during contract negotiations, the agreement remains in effect as long as the parties are negotiating in good faith.[3] *Id.* at 2–3. The Arbitrator also considered items 23 and 24 of the parties' negotiated ground rules. Item 23 prevented implementation of a change in working conditions until all legal avenues had been exhausted and item 24 provided for the assistance of FSIP if mediation did not resolve an impasse.[4] *Id.* at 5, 8.

In addition, the Arbitrator considered FSIP's decision regarding the Union's request for a cease and desist order. The FSIP decision found that "it [wa]s unclear whether the parties [were] at impass[e]." *Id.* at 6-7. The Arbitrator also noted an Agency witness' testimony that the agreement, including Article XXIII, remained in effect and was legally binding. *Id.* at 7. Considering the FSIP decision and Article XXXVIII's reference to the agreement being in effect as long as the parties continue to negotiate in good faith, the Arbitrator found that "there has been no showing by the Agency that good faith bargaining is not present." *Id.* Therefore, the Arbitrator concluded, the agreement was "in full force and effect at this time, as outlined in Article XXXVIII." *Id.* at 8. "With the present agreement in place," the Arbitrator found, "Article XXIII, being a part of the agreement, [wa]s also in full force [and] in effect," as were the negotiated ground rules, items 23 and 24. *Id.* at 8. Accordingly, the Arbitrator determined that the Agency was bound by the agreement and directed the Agency to rescind the military uniform order. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the Arbitrator exceeded his authority and that the award is based on a nonfact. Exceptions at 7, 8. In its exceeded authority exception, the Agency argues that the Arbitrator erred when he declared that the "agreement is considered to be in full force and effect at this time, as outlined in Article XXXVIII." *Id.* at 7 (internal quotation marks omitted). Pointing out that the agreement does not include the words "in full force and effect," the Agency contends that the Arbitrator improperly added language to the agreement that was not bargained for by the parties. *Id.* at 8. According to the Agency, this erroneously "expanded the agreement" and gave "viability" to Article XXIII, which provides ARTs with the option to wear or not wear the military uniform while in civilian status. *Id.*

In its second exception, the Agency contends that the award is based on a nonfact because the Arbitrator erroneously found that the parties were still "negotiating in good faith" at the time the Agency implemented the military uniform order. *Id.* at 8-9. In this regard, the Agency claims that the negotiations ended in October 2009 when the parties completed negotiations on all other matters and the Union withdrew its proposals concerning the impact and implementation of eliminating Article XXIII's option for ARTs to wear or not wear the military uniform while in civilian status. *Id.* at 9, 11. The Agency also argues that the Arbitrator erroneously relied on the "imprecise" testimony of an Agency witness, who testified that the parties were "in the midst of negotiations" and that "the present contract is in

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[2] Article XXIII Air Resource Technicians

> Section 1 [I]t is understood and agreed that all Air Force Technicians (ARTs) shall have the right to exercise their individual option as to whether they wear the military uniform while in a civilian status. . . .

Award at 2-3.

[3] Article XXXVIII Duration of the Agreement

> Section 2 [O]nce negotiations have begun, the parties agree that the agreement shall remain in effect as provided by law an[d] regulation as long as the parties are negotiating in good faith.

Award at 3.

[4] Negotiated ground rules items 23 and 24 are as follows:

> 23. Implementation. Both parties agree that implementation cannot occur until such time as bargaining any required procedures such as the use of [the Federal Mediation and Conciliation Service (FMCS)], FLRA, FSIP and any other legal procedures have been finalized.
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> 24. If the assistance of the FMCS does not result in resolution of the impass[e], either party, after the FMCS has officially released the parties, may request FSIP to settle the impass[e] in accordance with 5 [USC § 7119].

Award at 5.

effect" and "is legal and binding" "at this present time." *Id*. at 14-15. Consequently, the Agency contends, the award is based on a nonfact and should be set aside. *Id*. at 17.

B. Union's Opposition

The Union asserts that the Arbitrator did not exceed his authority because nothing in the award indicates that the Arbitrator added language to the agreement. Opp'n at 1. Rather, the Union argues, the Arbitrator appropriately relied on the pertinent agreement provision, Article XXXVIII. *Id.*

With respect to the Agency's nonfact exception, the Union claims that whether the parties were negotiating in good faith was disputed at the arbitration hearing. *Id*. at 1-2. According to the Union, testimony indicated that the Agency never notified the Union that it was negotiating in bad faith, and the Agency admitted that it would take "a third party agency" to make that determination. *Id*. at 2.

IV. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Agency asserts that the Arbitrator exceeded his authority when he "expanded the agreement." Exceptions at 8. Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to persons who are not encompassed within the grievance. *See U.S. Dep't of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 307-08 (1995) (*Dep't of the Navy*).

The Agency claims that the Arbitrator exceeded his authority when he found the agreement "in full force and effect." Exceptions at 7-8. In so finding, the Agency argues, the Arbitrator added language to the agreement that altered the terms of the agreement. However, the Agency concedes, "there is no specific limitation in the [agreement]" on the Arbitrator's authority. Exceptions at 7. In addition, the Arbitrator's finding that the agreement was fully binding on the parties is clearly responsive to the issues that the parties submitted. Those issues included the question of the relationship between the Agency's military uniform order and the agreement's provisions. The Arbitrator's conclusions, that "the present agreement is in effect," and that "Article XXIII, being a part of the agreement, is also in full force [and] effect[,]" Award at 8, resolve that question. Therefore, the Agency fails to support its exceeds authority exception. Accordingly, we deny this exception.

B. The award is not based on a nonfact.

The Agency contends that the award is based on a nonfact because the Arbitrator found that the parties were negotiating in good faith when in fact the negotiations had ended. Exceptions at 8-9. 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 NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, 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.* Moreover, where the party in opposition contends that a matter alleged to be a nonfact was disputed before the arbitrator, and the excepting party does not argue to the contrary, the Authority has found no basis for finding the award deficient as based on a nonfact. *U.S. Dep't of the Air Force, Air Force Materiel Command*, 65 FLRA 395, 398 (2010) (*AFMC*) (citing *U.S. Dep't of Energy, Nat'l Energy Tech. Lab.*, 64 FLRA 1174, 1175 (2010)). In addition, the Authority has long held that disagreement with an arbitrator's evaluation of evidence and testimony, including the determination of the weight to be accorded such evidence, provides no basis for finding the award deficient. *NTEU, Chapter 67*, 64 FLRA 65, 68 (2009) (citing, *AFGE, Local 3295*, 51 FLRA 27, 32 (1995) (*AFGE*)).

The Union contends that whether the parties were negotiating in good faith was disputed at arbitration. *See* Opp'n at 1-2. The Agency does not argue to the contrary. Accordingly, consistent with *AFMC*, 65 FLRA at 398, we deny this aspect of the Agency's nonfact exception.

As to whether the evidence supports the Arbitrator's findings, the Agency alleges that the award is based on a nonfact because the Arbitrator misconstrued the testimony of an Agency witness. Exceptions at 14-16. This argument represents a disagreement with the Arbitrator's evaluation of the evidence and the weight to be accorded such evidence. Consistent with Authority precedent, such a claim also does not establish that an award is based on a nonfact. *See AFGE*, 51 FLRA at 32. Accordingly, we deny the Agency's nonfact exception.

V. Decision

The Agency's exceptions are denied.