

**66 FLRA No. 31**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 3428  
(Union)

and

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 1  
NEW ENGLAND OFFICE  
BOSTON, MASSACHUSETTS  
(Agency)

0-AR-4426

DECISION

September 22, 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 Sharon Henderson-Ellis 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 the Agency did not violate the parties' collective bargaining agreement (CBA) or the Statute by failing to notify the Union about an employee's complaint and the Agency's interviews of the employee and her co-workers in connection with that complaint. For the reasons that follow, we deny the Union's exceptions.

**II. Background and Arbitrator's Award**

An employee complained to her second-line supervisor about the manner in which she was being treated by her immediate supervisor. Award at 2. The Agency investigated the complaint and interviewed the employee and several of her co-workers. Based on the investigation, the Agency advised the employee that the evidence did not support her allegations. *Id.*

The Agency did not notify the Union of either the employee's complaint or the Agency's interviews of

the employee and her co-workers. When the Union became aware of the complaint and the interviews, the Union filed a grievance alleging that the Agency violated the CBA<sup>1</sup> and the Statute by failing to "inform [the Union] and permit [the Union] to sit in on any interviews or discussions regarding the complaint." *Id.* The grievance was unresolved and submitted to arbitration, where the Arbitrator framed the issues as whether the Agency's actions in response to the employee's complaint violated the CBA or §§ 7116(a)(1) and (8) and 7121 of the Statute.<sup>2</sup> *Id.* at 1.

Before the Arbitrator, the Union argued that the employee's complaint constituted a "grievance" within the meaning of the CBA, and that this entitled the Union to be notified of the complaint and provided a copy. *Id.* at 11. The Union also argued that the Agency's interviews of the employee and her co-workers constituted "formal discussions" within the meaning of the CBA and § 7114(a)(2)(A) of the Statute,<sup>3</sup> and that

<sup>1</sup> The Union cited Article 38, Section 2, which defines "grievance" to include any complaint by "any bargaining unit employee concerning any matter relating to the employment of the employee," and Article 38, Section 5, which provides, in pertinent part:

If an employee chooses to represent him/herself, the Agency will: (1) provide the Union with a copy of the grievance . . . ; (2) provide the Union with the advance notice of each meeting between the grievant and the Agency; (3) afford the Union the right to be present at all stages of the process; and (4) provide the Union with copies of Agency written grievance responses . . . .

Award at 5 (quoting the CBA). The Union also cited Article 5, Section 8, which provides that the Union "shall be given the opportunity to be represented at any formal discussion between one or more representatives of the Agency and one or more employees in the unit . . . concerning any grievance or any personnel policy or practices or other general conditions of employment." *Id.*

<sup>2</sup> Section 7116(a) provides, in pertinent part, that it is an unfair labor practice for an agency "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Statute]," or "to otherwise fail or refuse to comply with any provision of [the Statute]." 5 U.S.C. § 7116(a)(1), (8). The pertinent wording of § 7121 of the Statute is noted below.

<sup>3</sup> Section 7114(a)(2)(A) of the Statute provides, in pertinent part:

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--  
(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment . . . .

this entitled the Union to notice and an opportunity to attend the interviews. *Id.* at 12.

As to the employee's complaint, the Arbitrator acknowledged that Article 38, Section 2 of the CBA defines "grievance" broadly, but concluded that the employee's complaint did not concern a "grievance" within the meaning of the CBA so as to entitle the Union to be represented at discussions concerning the complaint. *Id.* at 14. In this regard, the Arbitrator emphasized that the employee's complaint "was entirely personal . . . and did not involve or affect anyone outside of herself and her immediate supervisor." *Id.* The Arbitrator also emphasized that the complaint did not present a matter that clearly involved the interpretation or application of the CBA. *Id.* Consequently, the Arbitrator concluded that the Agency's failure to notify the Union about the employee's complaint and the interviews of the employee and co-workers did not violate the CBA or the Statute. *Id.* at 15.

The Arbitrator further found that "there are two additional rationales for concluding that the Union has not met its burden of proving that [the Agency's] failure to notify the Union in this case violated the [CBA] or the [Statute]." *Id.* First, the Arbitrator found the Authority's decision in *Department of Health & Human Services, Social Security Administration*, 18 FLRA 42 (1985) (SSA), to "contain facts that are nearly 'on all fours' with the facts in this case."<sup>4</sup> *Id.* Thus, for the same reasons that the Authority concluded that the respondent in SSA did not violate the Statute, the Arbitrator concluded that the Agency did not violate the CBA or the Statute. *Id.* at 15-16. Second, the Arbitrator determined that "there was no real harm suffered by the Union." *Id.* at 16. In this regard, the Arbitrator noted that the Union had learned of the employee's complaint in time to file a grievance on her behalf, but did not do so. *Id.*

"For all of the above-stated reasons," the Arbitrator denied the grievance. *Id.*

### III. Positions of the Parties

#### A. Union's Exceptions

The Union contends that the award is contrary to §§ 7103(a)(9) and 7121(b) of the Statute.<sup>5</sup> Exceptions at 3. As to § 7103(a)(9), the Union asserts that the employee's complaint is a "grievance" within the

meaning of that statutory section, and that the Arbitrator's "rationale" for denying the grievance -- specifically, her finding that the complaint was entirely personal -- is contrary to that statutory section. *Id.* at 4. As to § 7121, the Union claims that the Arbitrator's rationale is deficient because it "limit[s] individual participation in the grievance process." *Id.* at 5.

The Union also contends that the Arbitrator's rationale fails to draw its essence from the CBA because the CBA "does not in any way limit in scope individual rights to file a grievance." *Id.* Finally, the Union contends that the Arbitrator's rationale is based on "an error of fact." *Id.* at 7. In this connection, the Union asserts that the central fact underlying the award is that the employee's complaint is not a grievance because it did not "involve or affect general terms and conditions of employment," *id.*, and "[b]ut for this error of fact regarding the definition of a grievance, the Arbitrator would not have denied the [grievance]," *id.* at 8.

#### B. Agency's Opposition

The Agency contends that the Union fails to establish that the award is contrary to the Statute. In this regard, the Agency acknowledges that the statutory definition of grievance is broad and has been interpreted broadly by the Authority, but claims that the definition asserted by the Union "goes beyond even the Authority's broad definition." *Opp'n* at 7. As to essence, the Agency contends that the Union's disagreement with the Arbitrator's interpretation and application of the CBA provides no basis for finding the award deficient. *Id.* at 6. Finally, the Agency contends that the Union fails to demonstrate that the award is based on a nonfact because the asserted nonfact is a matter that the parties disputed at arbitration. *Id.* at 4.

### IV. Analysis and Conclusions

The Authority has recognized that, when an arbitrator bases the award on separate and independent grounds, a party who files exceptions to only one of the grounds cannot affect the overall disposition. *See U.S. Dep't of Labor, Wash., D.C.*, 55 FLRA 1019, 1023 (1999) (Chairman Cabaniss dissenting). In this regard, the Authority has explained that, in such circumstances, the other grounds remain undisputed, and the award would stand regardless of whether the disputed ground is deficient. *See U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000). In short, in such circumstances, the appealing party has failed to provide a basis for finding that the arbitrator would have reached a different result. *See AFGE, Local 1395*, 64 FLRA 622, 625-26 (2010). Accordingly, the Authority has consistently required an appealing party to establish that all of the grounds on which the arbitrator relied are deficient when the arbitrator bases an award on

<sup>4</sup> SSA is discussed further below.

<sup>5</sup> Section 7103(a)(9) defines "grievance" to include "any complaint by any employee concerning any matter relating to the employment of the employee." As for § 7121(b), the Union cites § 7121(b)(1)(C)(ii), which assures "an employee the right to present a grievance on the employee's own behalf."

separate and independent grounds. *E.g.*, *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 435 (2010). Otherwise, the Authority denies the exceptions because they cannot provide a basis for finding the award deficient. *See id.*

Here, all of the Union's exceptions challenge the Arbitrator's finding that the employee's complaint was not a "grievance" within the meaning of the CBA or the Statute. However, after making that finding, the Arbitrator expressly found that "there are two additional rationales for concluding that the Union has not met its burden of proving that [the Agency's] failure to notify the Union in this case violated the [CBA] or the [Statute]." Award at 15. It is not disputed that these two additional rationales do not concern the Arbitrator's view of the definition of "grievance." Instead, the Arbitrator's first additional rationale found the circumstances of this case similar to those presented in *SSA*, where the Authority found that there were no unlawful formal discussions when employees were examined in connection with an investigation. *SSA*, 18 FLRA at 46. The Arbitrator's second additional rationale was that the Union suffered no harm. Moreover, the Arbitrator reiterated that the award was based on multiple grounds when she summarized that she denied the grievance "[f]or all of the above-stated reasons." *Id.* at 16.

As the Union disputes only the Arbitrator's "rationale" concerning the definition of "grievance," Exceptions at 3, 5, 7, it does not challenge the Arbitrator's additional rationales for denying the grievance. These rationales provide separate and independent grounds for the award. As the Union does not challenge these grounds, we conclude that the Union provides no basis for finding the award deficient.<sup>6</sup> Accordingly, we deny the Union's exceptions.

## V. Decision

The Union exceptions are denied.

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<sup>6</sup> In denying the Union's exceptions, based on the application of the "separate and independent grounds" standard, we express no view as to the merits of any of the grounds relied upon by the Arbitrator in denying the grievance. We also note that this case is distinguishable from the U.S. Court of Appeals for the D.C. Circuit's recent decision in *Federal Bureau of Prisons v. FLRA*, No. 10-1089, 2011 WL 2652437 (D.C. Cir. July 8, 2011) granting petition for review of *United States Department of Justice, Federal Bureau of Prisons, Washington, D.C.*, 64 FLRA 559 (2010) (*BOP*). In that decision, the court rejected the Authority's conclusion that an award was based on separate and independent grounds, finding that the award made no distinction between "the purportedly 'separate' statutory and contractual grounds for the award." *BOP* at \*6. In contrast, in this case, the Arbitrator clearly distinguished the three separate rationales on which she based the denial of the grievance.