66 FLRA No. 78

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1923
(Union)

and

SOCIAL SECURITY ADMINISTRATION
(Agency)

0-AR-4773

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DECISION

January 4, 2012

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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 an exception to an award of Arbitrator Edward J. Gutman 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 exception.

Despite the Agency's failure to raise an arbitrability defense before the arbitration hearing, the Arbitrator addressed that defense and found that the grievance was substantively nonarbitrable because it concerned classification within the meaning of § 7121(c)(5) of the Statute (§ 7121(c)(5)).[1] For the reasons that follow, we deny the Union's exception.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the grievant, who occupied the position of Benefits and Earnings Assistant at the General Schedule (GS)-4 level, was performing the work of a Development Support Examiner, a position classified at the GS-5 level. Award at 1-2. The remedy sought by the grievant in the written grievance, and during each step of the grievance procedure, was an "[a]ccretion of [d]uty [p]romotion" and "[b]ack [p]ay." *Id.* at 1, 6. The grievance was unresolved and submitted to arbitration, *id.* at 6, where the Arbitrator stated that the issue was whether "the grievance concerns the classification of [the grievant's] position[,] and[,] if not[,] whether the evidence confirms the grievant's claim that she worked above classification for which she is entitled to back pay." *Id.* at 2.

Although prior to the arbitration hearing the Agency never raised an arbitrability issue, the Agency stated at the start of the hearing that arbitrability was a potential issue. *Id.* at 2, 4. In response, the Union withdrew its request for a remedy of an "accretion of duty promotion." *Id.* at 6. The arbitrability issue was deferred, and the hearing proceeded on the merits. *Id.* But, at the conclusion of the Union's case, the Agency made a motion to deny the grievance on the ground that, under § 7121(c)(5), it was not arbitrable. *Id.*

Regarding the arbitrability issue, the Arbitrator first acknowledged the Union's argument that the Agency had waived an arbitrability defense under Article 24, Section 6 of the parties' agreement because the Agency had not raised arbitrability during the grievance procedure.[2] *Id.* at 7-8. In this regard, while the Arbitrator agreed that the Agency had not raised arbitrability until the arbitration hearing, he found that he was required to address arbitrability because "a statutory bar to an arbitrator's lack of jurisdiction to rule on a grievance cannot be waived." *Id.* at 8. The Arbitrator then determined that the grievance concerned classification under § 7121(c)(5) and, thus, was statutorily barred from the negotiated grievance procedure. *Id.* at 8-11. Accordingly, he denied the grievance as nonarbitrable. *Id.* at 11.

III. Positions of the Parties

A. Union's Exception

The Union asserts that the award fails to draw its essence from the parties' agreement. Exception at 5. Specifically, the Union states that Article 24, Section 6 of the agreement[3] requires a party to raise arbitrability "prior to the limit for the written answer in the final step of the procedure," which, in this case, was Step 3 of the grievance procedure. *Id.* at 4. The Union contends that the award is contrary to this provision because the Arbitrator resolved the Agency's arbitrability claim, despite the Agency's failure to timely raise that claim.

[1] Section 7121(c)(5) states that negotiated grievance procedures "shall not apply with respect to any grievance concerning -- . . . the classification of any position which does not result in the reduction in grade or pay of an employee."

[2] Article 24, Section 6 of the parties' agreement states, in pertinent part: "The parties agree to raise any questions of . . . arbitrability . . . prior to the limit for the written answer in the final step of this procedure." Exception, Attach., "Relevant Portions of the National Contract."

[3] The Union mistakenly refers to Article 25, Section 6 in its exceptions, but it is clear from its context that the Union intended to refer to Article 24, Section 6, the text of which it attaches to its exceptions.

Id. at 4-5. The Union also states that it is only seeking backpay for the grievant's performance of higher-graded work that was temporarily assigned, not to have the employee reclassified. *Id.* at 5-6.

B. Agency's Opposition

The Agency argues that the Authority should deny the Union's exception because it directly challenges the Arbitrator's procedural-arbitrability determination that the Agency's substantive-arbitrability challenge could be raised at arbitration. Opp'n at 4-5.

IV. Analysis and Conclusions

The Union's essence exception challenges the Arbitrator's decision to address whether the grievance was substantively nonarbitrable under § 7121(c)(5). For support, the Union cites Article 24, Section 6 of the parties' agreement, which states, in pertinent part: "The parties agree to raise any questions of . . . arbitrability . . . prior to the limit for the written answer in the final step of this procedure." Exception, Attach., "Relevant Portions of the National Contract."

The Arbitrator determined that he was required to address the grievance's substantive arbitrability because "a statutory bar to an arbitrator's lack of jurisdiction to rule on a grievance cannot be waived." Award at 8. In effect, the Arbitrator found that Article 24, Section 6 could not bar him from resolving whether the grievance was nonarbitrable under § 7121(c)(5). This finding is consistent with Authority precedent, which holds that parties are not "estopped from contending" that a grievance is substantively nonarbitrable under § 7121(c)(5) merely because they have failed to comply with contract provisions regarding "when arbitrability issues may be raised." *U.S. Dep't of Agric., Food & Consumer Serv., Dallas, Tex.*, 60 FLRA 978, 980-81 (2005) (then-Member Pope dissenting in part on other grounds) (quoting *U.S. EEOC, Memphis Dist. Office, Memphis, Tenn.*, 18 FLRA 88, 89 n.2 (1985)).

In reviewing the Union's essence exception, the Authority applies the deferential standard of review that courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990).

The Union's essence exception provides no basis for finding that it was irrational, unfounded, implausible, or in manifest disregard of the agreement for the Arbitrator to act in accordance with Authority precedent and find that Article 24, Section 6 did not bar him from resolving the grievance's arbitrability under § 7121(c)(5). *See id.* Similarly, the Union's contention that the Arbitrator should have reached a different result on the substantive-arbitrability issue does not challenge the Arbitrator's interpretation of the parties' agreement and therefore does not support the Union's essence exception. Accordingly, we deny the exception.

V. Decision

The Union's exception is denied.