67 FLRA No. 72

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 479
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
479TH FLYING TRAINING GROUP
NAVAL AIR STATION
PENSACOLA, FLORIDA
(Agency)

0-AR-4902

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DECISION

February 27, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Robert G. Stein found that a consolidated grievance (grievance), which concerned whether the Agency improperly denied the appropriate leave-accrual rate to several employees (the grievants), was non-arbitrable.

The first question before us is whether we should set aside the Arbitrator's arbitrability determination because it fails to draw its essence from the parties' agreement. Because the Arbitrator's determination concerns procedural arbitrability, and that determination cannot be directly challenged on essence grounds, the answer is no.

The second question before us is whether the Arbitrator's arbitrability determination is contrary to law. Because we will not find the Arbitrator's procedural-arbitrability determination to be contrary to law unless it conflicts with statutory procedural requirements that apply to the parties' negotiated grievance procedure – and the Union has not demonstrated that any such conflicting statutory procedural requirements apply here – the answer is no.

II. Background and Arbitrator's Award

The grievants began work with the Agency on varying dates between July 2010 and March 2011. Each grievant received his initial leave and earnings statement (LES) less than one month after beginning work. The last-hired grievant received his initial LES in April 2011. Each grievant's initial LESs stated their leave-accrual rates, which the Agency based on the grievants' respective lengths of prior employment with the federal government.

When the grievants began work with the Agency and received their initial LESs, they were not part of an existing bargaining unit. But the Agency had an instruction governing the procedure for filing administrative grievances, requiring grievances to be filed within fifteen days of receiving notice of any alleged improper action. The grievants did not file grievances under that procedure.

In May 2011, approximately one month after the last-hired grievant received his initial LES, the Union became the exclusive representative of the grievants. Thereafter, the Union negotiated an agreement with the Agency that took effect on December 15, 2011. The parties included a negotiated grievance procedure in their agreement. The Union subsequently filed a grievance under the parties' newly negotiated grievance procedure, alleging that the Agency improperly denied the grievants the appropriate leave-accrual rate because it calculated their length of prior employment with the federal government incorrectly.

When the parties could not resolve the grievance, they proceeded to arbitration. The Arbitrator found the grievance non-arbitrable. In reaching this conclusion, the Arbitrator noted that the grievants failed to timely file grievances under the Agency's administrative grievance procedure. In this regard, he stated that the grievants failed to meet the administrative grievance procedure's fifteen-day deadline, "which began to accrue on an individual basis once they individually received their LES forms indicating their acknowledged leave[-]accrual rate."[1]

Instead of filing grievances under the administrative grievance procedure, the Arbitrator found, the grievants filed the grievance under the negotiated grievance procedure – which became effective well after the grievants became aware of the alleged grievable offenses. Because the parties' agreement was not in effect when the grievable offenses occurred, the Arbitrator found the grievance "not arbitrable pursuant to

[1] Award at 11.

the grievance procedure identified in the [a]greement."[2] The Arbitrator also found that the Union had no authority "to challenge decisions made or actions taken before the grievants became members of the local bargaining unit[,] . . . [and that] [t]he Union may not do that belatedly under the [parties' agreement] subsequently adopted."[3] In essence, the Arbitrator found the grievance untimely under the administrative grievance procedure and also found that the Union lacked authority to file a grievance on the grievants' behalf under the parties' newly negotiated agreement.

The Union filed exceptions to the Arbitrator's award. The Agency filed an opposition to the Union's exceptions.

III. Preliminary Matter: The Authority has jurisdiction to resolve the Union's exceptions.

The Agency contends that the Authority lacks subject-matter jurisdiction to resolve the exceptions because the grievance is not arbitrable.[4] Even where an *arbitrator* may lack jurisdiction, that lack of jurisdiction does not divest the *Authority's* jurisdiction to resolve exceptions to an award.[5] Further, the Agency offers no support for its contention that the Authority lacks jurisdiction to resolve the exceptions in this case. Accordingly, we find that the Authority has jurisdiction to resolve the Union's exceptions.

IV. Analysis and Conclusions: The Arbitrator's procedural-arbitrability determination is not deficient.

The Union contends that the Arbitrator's arbitrability determination is erroneous because it (1) fails to draw its essence from the parties' agreement[6] and (2) is contrary to law.[7] An arbitrator's determination regarding the timeliness of a grievance is a determination regarding the procedural arbitrability of that grievance.[8] Similarly, an arbitrator's determination regarding a party's authority to file a grievance on another's behalf is a procedural-arbitrability determination.[9] 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, which includes a claim that an award fails to draw its essence from the parties' agreement.[10] However, a procedural-arbitrability determination may be directly challenged and found deficient on the ground that it is contrary to law.[11] For a procedural-arbitrability determination to be found deficient as contrary to law, the appealing party must establish that the ruling conflicts with statutory procedural requirements that apply to the parties' negotiated grievance procedure.[12]

A. The award concerns procedural arbitrability and cannot be directly challenged on essence grounds.

The Union argues that the Arbitrator disregarded the negotiated grievance procedure and that, as a result, his determination fails to draw its essence from Article 6(1) of the parties' agreement.[13] Article 6(1) states that "[t]he procedure as stated herein will be the exclusive procedure available . . . for resolving grievances."[14] Here, the Arbitrator found that because the parties' agreement was not in effect at the time of the grievable offenses, the grievance is "not arbitrable pursuant to the grievance procedure identified in the [parties' agreement]."[15] In addition, the Arbitrator found that the Union had no authority "to challenge decisions made or actions taken before the grievants became members of the local bargaining unit" – effectively concluding that the Union had no authority to file the grievance on behalf of the grievants, under the parties' newly negotiated grievance procedure.[16] These findings are procedural-arbitrability determinations.[17] The Union's essence claim directly challenges these determinations. Therefore, consistent with the standards set forth above, it does not provide a basis for finding the award deficient.[18]

B. The award is not contrary to law.

With regard to its contrary-to-law claim, the Union asserts that the award is contrary to § 7121(a)(1) of

[2] *Id.* at 14.
[3] *Id.*
[4] Opp'n at 6.
[5] *U.S. Dep't of VA, Veterans Canteen Serv., Leavenworth, Kan.*, 66 FLRA 1007, 1007-08 (2012) (finding that Authority had jurisdiction to resolve exceptions, but also finding arbitrator lacked jurisdiction over grievance).
[6] Exceptions at 10.
[7] *Id.* at 4.
[8] *AFGE, Council 33*, 66 FLRA 602, 604 (2012) (*AFGE*) (citations omitted).
[9] *U.S. Dep't of the Navy, Naval Air Station, Whiting Field*, 66 FLRA 308, 309 (2011) (*Navy*).
[10] *Id.*
[11] *AFGE*, 66 FLRA at 604; *Navy*, 66 FLRA at 309.
[12] *See U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 122, 124 (2005).
[13] Exceptions at 10.
[14] *Id.*
[15] Award at 14.
[16] *Id.*
[17] *See Navy*, 66 FLRA at 309 (finding authority to file grievance on another's behalf was a procedural-arbitrability determination); *see also AFGE*, 66 FLRA at 604 (finding that grievance was "untimely" because it was "filed too late" was a procedural-arbitrability determination).
[18] *AFGE*, 66 FLRA at 604.

the Federal Service Labor-Management Relations Statute[19] – which states that "any collective[-]bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. . . [and] the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage."[20] Specifically, the Union claims that, contrary to § 7121(a)(1), the Arbitrator erred by not considering the negotiated grievance procedure in the parties' agreement, which it claims represents the exclusive administrative process for resolving grievances.[21] However, the Union does not explain how the Arbitrator's findings that the grievance was not arbitrable conflict with any statutory procedural requirement set forth in § 7121(a)(1).[22] Thus, the exception does not provide a basis for finding the award contrary to law.[23]

V. Decision

We deny the Union's exceptions.

[19] Exceptions at 4.
[20] 5 U.S.C. § 7121(a)(1).
[21] Exceptions at 4.
[22] *AFGE*, 66 FLRA at 604.
[23] *See id.*