

68 FLRA No. 103

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 953
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
PINE BLUFF ARSENAL
(Agency)

0-AR-4978

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DECISION

May 27, 2015

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

I. Statement of the Case

The Union grieved the Agency's creation of a job description called "Industrial Worker."¹ One of the Union's claims was that Industrial Workers were performing higher-graded duties. Arbitrator Bruce Ponder denied the Union's grievance. First, he determined that the grievance concerned a classification matter over which he had no jurisdiction. Second, he determined that the Union was procedurally barred from raising a temporary-promotion claim because it was not raised during the grievance procedure, as required by the parties' agreement. This case presents the Authority with four questions.

The first question is whether the Arbitrator's determination that the grievance concerns a classification matter over which he has no jurisdiction is based on nonfacts. Because the Union challenges: (1) factual findings that the parties' disputed at arbitration – concerning whether the nature of the grievance involves a classification matter; and (2) the Arbitrator's evaluation of the evidence, the answer is no.

The second question is whether the Arbitrator's determination that the grievance is not arbitrable because it concerns a classification matter is contrary to law. Because the Union fails to show that the Arbitrator

erroneously determined that the grievance concerned a classification matter, and as classification matters are excluded from the parties' negotiated-grievance procedure under § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute),² the answer is no.

The third question is whether the Arbitrator's determination – that the Union's temporary-promotion claim is barred because it was not timely raised – fails to draw its essence from the parties' agreement. Because the Union's essence exception directly challenges the Arbitrator's procedural-arbitrability determination, and such determinations cannot be challenged on essence grounds, the answer is no.

The fourth question is whether the Arbitrator's procedural-arbitrability determination is contrary to law. Because the Union does not demonstrate that the Arbitrator's determination conflicts with a statutory procedural requirement, the answer is no.

II. Background and Arbitrator's Award

In 2006, the Agency created a new job description, "Industrial Worker," which incorporated the job duties of two different positions to give the Agency flexibility in assigning work.³ The Agency is required to operate as a private business providing munitions and defense equipment to the four branches of the military. By incorporating two job positions into one, the Agency believed that it could move employees between job duties with greater ease and less cost, allowing it to better compete with private companies.⁴

Five years later, the Union filed a grievance complaining about the Industrial Worker job title. The grievance alleged that Industrial Workers "have been/are used to perform duties of higher positions," and that "the Agency has no program/process to assist an employee in reviewing and reading classification standards that pertain to their positions."⁵ The grievance also alleged that "[e]mployees are not fully provided with adequate means of securing review of what they consider to be inequities in their existing grade."⁶

In its grievance, the Union asserted that the Agency violated several articles of the parties' agreement. As relevant here, these included Article 27, which requires the Agency to prepare position descriptions in accordance with government-wide regulations. The Union claimed that the Agency violated

² 5 U.S.C. §7121(c)(5).

³ Award at 2.

⁴ *Id.* at 2-3.

⁵ *Id.* at 1.

⁶ *Id.*

¹ Award at 1.

those regulations because the Industrial-Worker-position description did not incorporate the duties Industrial Workers actually performed. As a remedy for the Agency's failure to properly prepare the Industrial-Worker-position description, the Union requested that the Agency rescind the position description and classification changes, and "return [impacted employees] to the position descriptions as they existed before the [A]gency created the Industrial[-] Worker[-]position description."⁷ The Union also requested reimbursement of all pay and benefits that impacted employees would have received had they not been "reclassified"⁸ as Industrial Workers.

The Agency dismissed the grievance, asserting that it involved a classification matter outside the scope of the parties' agreement under § 7103(a)(14)(B) of the Statute and that it was barred by § 7121 of the Statute. The Agency also claimed that the Union's grievance was untimely filed under the parties' agreement. The Union then submitted the grievance to arbitration.

As relevant here, the Arbitrator framed the issues as: (1) whether the "grievance [is] a classification grievance that is barred by . . . 5 U.S.C. [§] 7121(c)(5);" and (2) whether the Union is "barred from raising a complaint under Article 26 of [the parties' agreement]."⁹ Article 26 concerns temporary promotions to higher-graded positions if employees perform duties other than those covered in their position descriptions for more than thirty days.

The Arbitrator first addressed the Agency's argument that the grievance concerned a classification matter. Finding that the grievance concerned a classification matter, the Arbitrator relied on "key language in the grievance" stating that "employees have been and were still being used" to perform duties of a higher-graded job description.¹⁰ And he found that the "context of the entire paragraph describing the factual allegations of the grievance" supported his conclusion that the "substance of the grievance" concerned a classification matter – employees "performing work outside their classification."¹¹ In so doing, he rejected the Union's argument that the grievance concerned only a position-description dispute under Article 27 of the parties' agreement. Therefore, the Arbitrator concluded, the grievance was not arbitrable because the substance of the grievance concerned a classification matter over which he had no jurisdiction.¹²

The Arbitrator next considered the Agency's argument that he was precluded from considering the Union's temporary-promotion claim based on Article 26 of the parties' agreement because that claim was not raised during the grievance procedure. Although the Union argued that "the [A]gency was put on notice by virtue of the grievance language,"¹³ and that it was not required to include citations to specific contract provisions, the Arbitrator found that the Union's position is "belied by its failure to include [Article 26] in the same section where[] it claimed violations of four other articles of the agreement[.]"¹⁴ The Arbitrator concluded that the temporary-promotion claim was not properly before him and was not arbitrable.

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

III. Analysis and Conclusions: The Arbitrator's arbitrability determinations are not deficient.

The Union challenges two arbitrability determinations made by the Arbitrator: (1) that the grievance concerns a classification matter; and (2) that the Article 26 temporary-promotion claim had not been properly raised during the grievance procedure.¹⁵ Substantive arbitrability involves questions of whether the subject matter of a dispute is arbitrable, while procedural arbitrability involves questions of whether the procedural conditions for arbitrability have been met.¹⁶ Thus, the Arbitrator made a substantive-arbitrability determination when he found that he lacked jurisdiction over the grievance because it concerns a classification matter.¹⁷ And his determination that the Union was barred from raising its Article 26 temporary-promotion claim because it was not raised during the grievance procedure is a procedural-arbitrability determination.¹⁸ We address each determination separately below.

⁷ *Id.*

⁸ *Id.* at 1-2.

⁹ *Id.* at 4.

¹⁰ *Id.* at 9.

¹¹ *Id.* at 9-10.

¹² *Id.*

¹³ *Id.* at 11.

¹⁴ *Id.* at 15.

¹⁵ Exceptions at 4, 14.

¹⁶ *AFGE, Local 3615*, 65 FLRA 647, 649 (2011) (*Local 3615*).

¹⁷ *See id.*; *see also AFGE, Local 2145*, 64 FLRA 946, 948 (2010).

¹⁸ *Local 3615*, 65 FLRA at 649.

- A. The Arbitrator's determination that the grievance is not substantively arbitrable because it concerns a classification matter is not deficient.
1. The Arbitrator's determination that the grievance concerns a classification matter is not based on nonfacts.

The Union argues that the Arbitrator's determination that the grievance concerns a classification matter barred by § 7121(c)(5) and the parties' agreement¹⁹ is based on nonfacts.²⁰ First, the Union contends that the Arbitrator's finding that the substance of the grievance concerns a position-classification and not a position-description dispute "is in complete contradiction to the evidence presented" at arbitration.²¹ Second, the Union argues that "it is impossible to determine how the Arbitrator analyzed" certain witness testimony because a portion of the Arbitrator's analysis of this evidence "was assum[edly] cut-off."²² The Union refers in this connection to the Arbitrator's description of a Union witness's testimony that ends midsentence.²³

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.²⁴ The Authority will not find that an award is based on a nonfact when the factual matter at issue was disputed at arbitration.²⁵ Moreover, the Authority has long held that disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be accorded such evidence, provides no basis for finding the award deficient.²⁶

As to the first nonfact claim, the record shows, and the Union acknowledges, that the parties each presented evidence at the hearing concerning whether the grievance challenged the accuracy of the position description for the "Industrial Worker" position or whether the grievance concerned a position classification.²⁷ As the Authority will not find that an award is based on a nonfact when the pertinent factual matters were disputed at arbitration, this claim does not

provide a basis for finding that the award is based on a nonfact.²⁸

As to the second nonfact claim, the Union argues that it was unable to analyze the Arbitrator's evaluation of certain witness testimony because a sentence in the award describing the testimony was "cut-off."²⁹ But the Union does not contend, and the record does not indicate, that the Union asked the Arbitrator to issue a corrected award. The Union also does not claim, and the Arbitrator did not find, that it was precluded from doing so. Furthermore, even if the Union had received it, and was able to completely analyze the Arbitrator's evaluation of the testimony, this contention still challenges the Arbitrator's evaluation of the evidence. As a disagreement with the Arbitrator's evaluation of the evidence provides no basis for finding the award deficient, this claim also does not establish that the award is based on a nonfact.³⁰

Accordingly, we find that the Union does not demonstrate that the Arbitrator's determination that the grievance is not arbitrable because it involves a classification matter is based on nonfacts, and we deny this exception.

2. The Arbitrator's determination that the grievance is not arbitrable because it concerns a classification matter is not contrary to law.

The Union argues that the Arbitrator's determination that the grievance concerns a classification matter, and is therefore not substantively arbitrable, is contrary to law and the Office of Personnel Management (OPM) regulations governing position descriptions.³¹ Specifically, the Union asserts that an alleged violation of the parties' agreement is not a classification matter barred by § 7121(c)(5), and that OPM regulations require the parties to resolve disputes concerning the accuracy of a position description through the negotiated grievance procedure.³²

The Authority has held that where an arbitrator's substantive-arbitrability determination is based on law, the Authority reviews that determination de novo.³³ In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.³⁴ In

¹⁹ Award at 8-10, 16.

²⁰ Exceptions at 4, 8-10, 12-13.

²¹ *Id.* at 10; *see also id.* at 9, 12-13.

²² *Id.* at 13-14.

²³ Award at 10.

²⁴ *AFGE, Local 2382*, 66 FLRA 664, 667 (2012) (*Local 2382*).

²⁵ *AFGE, Local 3723*, 67 FLRA 149, 150 (2013) (*Local 3723*); *Local 2382*, 66 FLRA at 668.

²⁶ *Local 2382*, 66 FLRA at 668.

²⁷ Award at 6-10; Exceptions at 8-10, 12-13.

²⁸ *Local 3723*, 67 FLRA at 150.

²⁹ Exceptions at 13.

³⁰ *Local 2382*, 66 FLRA at 668.

³¹ Exceptions at 4-5.

³² *Id.*

³³ *NAGE, Local R4-17*, 67 FLRA 4, 6 (2012) (*Local R4-17*).

³⁴ *Id.*

making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.³⁵

The Arbitrator found that the grievance is not arbitrable because it concerns a classification matter under § 7121(c)(5).³⁶ Section 7121(c)(5) provides that a grievance concerning "the classification of any position which does not result in the reduction in grade or pay of an employee" is excluded from the coverage of negotiated grievance procedures.³⁷ The Authority has construed the term "classification" in § 7121(c)(5) as involving "the analysis and identification of a position and placing it in a class under the position-classification plan established by [OPM] under chapter 51 of title 5, United States Code."³⁸ When the essential nature of a grievance is integrally related to the accuracy of the classification of the grievant's position, the grievance concerns a classification matter within the meaning of § 7121(c)(5).³⁹ However, when the substance of the grievance is limited to the accuracy of a job description, the grievance does not concern the classification of a position within the meaning of § 7121(c)(5).⁴⁰

The Union recognizes that a grievance challenging the classification and grading of a position is not substantively arbitrable,⁴¹ but argues that the grievance here challenges a position description.⁴² The Arbitrator found, however, that "key language in the grievance," and the underlying factual allegations supported a finding that the "substance of the grievance" concerned a classification matter – employees "performing work outside their classification."⁴³ To the extent that the Arbitrator's conclusion is based on factual findings, the Union has not shown that those factual findings are nonfacts. Moreover, the Union does not address the deference accorded the Arbitrator regarding his interpretation of the issues before him.⁴⁴ Therefore, the Union's arguments provide no basis for finding that the Arbitrator erred, as a matter of law, in determining

that he did not have jurisdiction over this matter. Accordingly, the Arbitrator's substantive-arbitrability determination is not contrary to law, and we deny this exception.

- B. The Arbitrator's determination that the Union's Article 26 temporary-promotion claim is not arbitrable is not deficient.

The Union argues that the Arbitrator's determination, that its Article 26 temporary-promotion claim is not arbitrable, fails to draw its essence from the parties' agreement and is contrary to law.⁴⁵ As discussed above, the Arbitrator made a procedural-arbitrability determination when he found that the Union's Article 26 claim is not arbitrable.⁴⁶

The Arbitrator decided that the Article 26 claim was not properly before him because the Union did not timely raise it, as required by the parties' agreement.⁴⁷ He, therefore, concluded that this claim is not arbitrable. The Union asserts that the Arbitrator's procedural-arbitrability determination fails to draw its essence from the parties' agreement because it does not "represent a plausible interpretation" of the parties' agreement.⁴⁸

Where the Authority considers a challenge to an arbitrator's procedural-arbitrability determination, the Authority will not find the determination deficient on grounds that directly challenge the determination itself – including essence challenges.⁴⁹ The Union's essence exception directly challenges the Arbitrator's procedural-arbitrability determination; it challenges the Arbitrator's interpretation of the parties' agreement concerning whether the Union timely raised its Article 26 claim. Therefore, consistent with Authority precedent, we find that the Union provides no basis for finding the award deficient on this ground.

Although the Authority defers to an arbitrator's procedural-arbitrability determination, the Authority has held that a procedural-arbitrability determination may be challenged on contrary-to-law grounds.⁵⁰ The Authority will grant such an exception where the challenging party

³⁵ *U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 22 (2012); *Local R4-17*, 67 FLRA at 6.

³⁶ 5 U.S.C. § 7121(c)(5).

³⁷ *Local R4-17*, 67 FLRA at 6 (internal quotation marks omitted).

³⁸ *Id.* (internal quotation marks omitted); *U.S. Dep't of Transp., FAA, Atlanta, Ga.*, 62 FLRA 519, 521 (2008).

³⁹ *U.S. DOD, Marine Corps Logistics Base, Albany, Ga.*, 57 FLRA 275, 277 (2001).

⁴⁰ *Id.* at 277.

⁴¹ Exceptions at 5.

⁴² *Id.* at 4-5, 6, 8.

⁴³ Award at 9-10.

⁴⁴ *Cf. U.S. Dep't of Transp., FAA*, 64 FLRA 612, 613 (2010) (Authority gives arbitrator's interpretation of stipulated issues same substantial deference as arbitrator's interpretation of collective-bargaining agreement).

⁴⁵ Exceptions at 14, 16-17.

⁴⁶ See Section III, *infra*.

⁴⁷ Award at 11, 15.

⁴⁸ Exceptions at 14, 17.

⁴⁹ *Union of Pension Emps.*, 67 FLRA 63, 65 (2012); see *NFFE, Council of Consol. Locals*, 52 FLRA 137, 138-39 (1996) (finding arbitrator accorded same deference regarding mootness of grievance as he or she is regarding procedural-arbitrability determinations).

⁵⁰ *U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 122, 124 (2005).

demonstrates that the determination is contrary to procedural requirements, established by statute, that apply to the parties' negotiated grievance procedure.⁵¹ This approach recognizes that a statute could establish a filing period that may apply to such procedures.⁵²

The Union argues that the Arbitrator's procedural-arbitrability determination is contrary to law because the Arbitrator failed to recognize that the Union properly raised an Article 26 claim under the parties' agreement.⁵³ But the Union does not assert that this determination is inconsistent with any statute establishing procedural requirements applicable to the parties' negotiated grievance procedure. Therefore, the Union does not establish that the Arbitrator's arbitrability determination, in this regard, is contrary to law.

Accordingly, we deny the Union's essence and contrary-to-law exceptions challenging the Arbitrator's determination that the Union's Article 26 claim is not arbitrable.

IV. Decision

We deny the Union's exceptions.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Exceptions at 14, 17.