68 FLRA No. 105

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

0-AR-5029

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DECISION

May 28, 2015

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

I. Statement of the Case

Arbitrator Jay D. Goldstein denied the Union's grievance, which claimed that the Agency violated Article 42 of the parties' agreement when it did not "spend" all bargaining-unit-employee-awards-pool (awards pool) funds on employee awards. Article 42 of the parties' agreement requires the Agency to "dedicate[]" one percent of bargaining-unit-employee salaries to the awards pool.[1] The Arbitrator concluded that the parties' agreement only required the Agency to set aside funds for an awards pool. He further concluded that the Agency did not act improperly when it did not spend all of the funds on employee awards. This case presents the Authority with two substantive questions.

The first question is whether the Arbitrator exceeded his authority by failing to resolve the issue submitted at arbitration regarding the interpretation of the parties' agreement. Because the Arbitrator resolved the issue to which the parties stipulated, the answer is no.

The second question is whether the award fails to draw its essence from the parties' agreement because the Arbitrator concluded that the parties' agreement did not require the Agency to spend the awards-pool fund. Because the Union does not demonstrate that the Arbitrator's interpretation of the parties' agreement is irrational, unfounded, implausible, or in manifest disregard of its terms, the answer is no.

II. Background and Arbitrator's Award

The Union represents a consolidated, nationwide unit consisting of approximately 24,000 Agency employees, who primarily work as customs and border patrol officers. As pertinent here, Article 42 of the parties' agreement provides that the Agency will "dedicate[]" an amount equal to one percent of bargaining-unit-employee salaries to an awards pool.[2] During the period at issue, the Agency set aside one percent of bargaining-unit employee salaries for the awards pool, but did not spend the entire awards pool on employee awards.

The Union filed a national grievance alleging that the Agency violated Article 42 of the parties' agreement by failing to spend the entire awards pool. The Agency denied the grievance and the matter was submitted to arbitration. The parties stipulated to the issue: "Did the Agency . . . violate Article 42 of the [parties' agreement] by not distributing one percent of the total annual bargaining[-]unit salary [as awards] in fiscal years 2011 and 2012? If so, what is the appropriate remedy?"[3]

The Arbitrator focused on "the parties[']disagree[ment] about whether the language of . . . Article [42] requires the designated [awards-pool] money to be spent."[4] Specifically, the Arbitrator addressed whether the term "dedicate[]," as used in the parties' agreement,[5] required the Agency to spend the entire awards pool.

The Union argued that the agreement's use of the word "dedicate[]" is synonymous with "distribute."[6] And the Union argued further that the Agency violated the parties' agreement when it allotted the correct percentage to the pool, but failed to spend all awards-pool funds.[7]

Conversely, the Agency argued that the word "dedicate[]" only requires the Agency to set aside a specific amount of money for employee awards, and that the term was "never intended to obligate the mandatory expenditure of a set amount of funds."[8]

[1] Award at 11.

[2] *Id.* at 11.
[3] *Id.* at 4.
[4] *Id.* at 8.
[5] *Id.* at 11.
[6] *Id.* at 9.
[7] *Id.*
[8] *Id*. at 10.

The Arbitrator denied the grievance. He found that a mandate "to[] 'spend' the [dedicated] funds . . . is simply not present in the plain meaning of" Article 42.[9] He concluded that the "dedicate" term's meaning was clear and unambiguous. Specifically, he found that "[d]edicate" "amount[s] to something closer to a contingent obligation. The obligation is to earmark or dedicate funds to a specific purpose; yet the terminology of obligation does not extend to a mandatory disbursement of funds."[10] The Arbitrator concluded, therefore, that the Agency did not violate Article 42 of the parties' agreement by not spending all awards-pool funds, and he denied the grievance.

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

III. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Union argues that the Arbitrator exceeded his authority by: (1) failing to resolve an issue submitted at arbitration;[11] and (2) resolving an issue not submitted to arbitration.[12] 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 those not encompassed within the grievance.[13] And the Authority accords an arbitrator's interpretation of a stipulated issue the same substantial deference that it accords an arbitrator's interpretation and application of a collective-bargaining agreement.[14]

First, the Union contends that the Arbitrator exceeded his authority because he did not "address the Union's allegation that the Agency violated Article 42, § 2.B [of the parties' agreement]," [15] which "ensure[s] parity between the non-bargaining unit and bargaining[-]unit[-]awards pools."[16] Article 42, § 2.B of the parties' agreement requires that "the percentage of funds *dedicated* to awards for the bargaining unit . . . will be no less than the percentage of funds *dedicated* to the non-bargaining unit pool."[17] The Union argues that the Arbitrator's failure to address the Agency's alleged Article 42, § 2.B violation leaves the Union "in the untenable position of enforcing [the parties' agreement] where the meaning of *dedicated* in § 2.A has been resolved by the Arbitrator, but the meaning of *dedicated* in § 2.B remains unresolved."[18]

The Union's first exceeds-authority exception does not demonstrate that the award is deficient. The stipulated issue before the Arbitrator was whether the Agency violated Article 42 of the parties' agreement. This encompasses §§ 2.A and 2.B.[19] The Arbitrator specifically determined that the Agency did not violate Article 42 because the term "dedicated" only requires the Agency to set aside, but not spend awards-pool funds.[20] Because the Arbitrator did not restrict the award to Article 42, § 2.A, the award encompasses § 2.B. Therefore, because the award resolves the issue the Union claims the Arbitrator failed to address, the Union's first exceeds-authority exception fails to demonstrate that the award is deficient.

Second, the Union argues that the Arbitrator exceeded his authority by resolving an issue not submitted to arbitration.[21] Specifically, the Union alleges that the Arbitrator erred when he found that the Agency could exercise its discretion not to "dedicate" awards-pool funds due to "budgetary considerations."[22] The Union argues that this finding violates the parties' agreement because Article 42, § 2.A does not leave such a determination to the Agency's sole discretion.[23] The Union relies on language in Article 42, § 2.A stating, "in the event [that] the Agency (at the national level) *determines its budget will not permit the dedication of this amount to the awards pool*, it will notify and provide [the Union] the opportunity to bargain."[24]

The Union's second exceeds-authority exception does not demonstrate that the award is deficient, because the Union misreads the award. As discussed above, the Arbitrator concluded – contrary to the Union – that the term "dedicate" is not synonymous with "spend."[25] Here, the Union argues that the Arbitrator exceeded his authority when he found that the Agency could unilaterally decide not to "dedicat[e]" awards-pool funds without providing the Union the opportunity to bargain.[26] However, the Arbitrator did not make this finding. Using the term "disburse" rather than "dedicate," the Arbitrator found that the Agency had a duty to set aside awards-pool funds,[27] but that the "*disbursement* of Article 42 funds is

[9] *Id.* at 15.
[10] *Id.* at 15-16.
[11] Exceptions at 11.
[12] *Id.* at 16-17 n.11.
[13] *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).
[14] *U.S. DHS, U.S. ICE*, 65 FLRA 529, 532 (2011).
[15] Exceptions at 11.
[16] *Id.* at 16.
[17] *Id.*, Joint Ex. 1 at 227 (emphasis added).
[18] *Id.* at 16 (emphasis added).
[19] Award at 4.
[20] *Id.* at 20.
[21] Exceptions at 16 n.11.
[22] *Id.* at 16-17 n.11 (internal quotation marks omitted).
[23] *Id.* at 17 n.11.
[24] *Id.* (internal quotation marks omitted).
[25] Award at 15-16.
[26] Exceptions at 17 n.11.
[27] Award at 20.

within the discretionary power of the Agency."[28] Therefore, because the Union misreads the award, we deny the Union's second exceeds-authority exception.

Accordingly, we deny the Union's exceeds-authority exceptions.

B. The award does not fail to draw its essence from the parties' agreement.

The Union argues that the award fails to draw its essence from Article 42 of the parties' agreement on two grounds.[29] In reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[30] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' 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.[31] The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained."[32]

The Union's first essence exception argues that the award fails to draw its essence from Article 42 of the parties' agreement because the Arbitrator improperly relied on parol evidence – the parties' bargaining history – to interpret the term "dedicated."[33] Specifically, the Union argues that parol evidence can only be used to interpret *ambiguous* terms.[34] And, the Union claims, the Arbitrator erred when he used parol evidence – which both parties submitted at arbitration – in his interpretation because he concluded that the term "dedicate[]" was *unambiguous*.[35]

We find the Union's arguments unpersuasive for two reasons. First, the Union has not shown that the parties' agreement bars the use of parol evidence in this circumstance. Second, the Arbitrator determined, without having to consider parol evidence, that the term "dedicated" was "[c]lear and [u]nambiguous."[36] He found that "[b]eyond the simple distinction that 'dedicated' does not mean 'spend[,]' . . . the Union['s] argument[, that 'dedicate' means 'spend,'] is illogical at best, and over reaching."[37] Therefore, as the record reflects that consideration of the parties' bargaining history was unnecessary to resolve the stipulated issue, we deny the Union's first essence exception.

The Union's second essence exception argues that the Arbitrator did not "abide by the tenets of . . . contra proferentem,"[38] which provides that ambiguous contractual terms should be interpreted against the drafter. Specifically, the Union alleges that the Arbitrator erred when he did not construe the term "dedicate" against the Agency because the Agency proposed the term.[39] Therefore, the Union contends, the award is so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the Arbitrator.[40]

As the Union concedes, the general principle of contra proferentem only applies to *ambiguous* contractual terms.[41] As discussed above, the Arbitrator found that the term "dedicated" was *unambiguous*.[42] Therefore, the principle of contra proferentem, as advanced by the Union, is inapplicable in this case. We therefore deny the Union's second essence exception.

IV. Decision

We deny the Union's exceptions.

[28] *Id.* at 16 (emphasis added).
[29] Exceptions at 21-28.
[30] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[31] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[32] *Id.* at 576.
[33] Exceptions at 21.
[34] *Id.* at 21-22.
[35] *Id.* at 26.
[36] Award at 16.
[37] *Id.*
[38] Exceptions at 21 (emphasis omitted).
[39] *Id.* at 27.
[40] *Id.* at 26-28.
[41] *Id.* at 26.
[42] Award at 16.