70 FLRA No. 37

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISONS LOCALS, COUNCIL 33
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
(Agency)

0-AR-5243

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DECISION

March 30, 2017

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Before the Authority: Patrick Pizzella, Acting Chairman, and Ernest DuBester, Member

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the parties' master collective-bargaining agreement (master agreement) and a related Memorandum of Understanding (MOU) because the Agency's reviews of local supplemental agreements (local agreements) at the national level (national reviews) were overly broad. Additionally, the Union alleged that the Agency had bargained in bad faith by disapproving provisions that the parties had agreed to at the local level. Arbitrator Nancy Hoffman found that the Agency's national reviews did not violate the master agreement or the MOU, and that the Agency did not bargain in bad faith. There are four substantive questions before us.

The first question is whether the Arbitrator exceeded her authority. Because the Arbitrator's award addresses the stipulated issues as she interpreted them, and we defer to her interpretation, the answer is no.

The remaining three questions are whether the award is contrary to law, is based on a nonfact, or fails to draw its essence from the master agreement. The Union's contrary-to-law and nonfact exceptions, and its first essence argument, essentially challenge the Arbitrator's interpretation of the stipulated issues – as not including issues regarding the merits of individual local-agreement disapprovals – or argue that the Arbitrator erroneously found that the Agency properly disapproved lawful provisions. Because the Union has not shown that the Arbitrator erred in her interpretation of the issues, and because the Arbitrator did *not* find that any individual Agency disapprovals had merit, those exceptions provide no basis for finding the award deficient.

II. Background and Arbitrator's Award

The Agency has multiple facilities throughout the United States, and the master agreement allows individual facilities to negotiate local agreements to address certain conditions specific to those facilities. As relevant here, Article 9 of the master agreement provides that local agreements may not "conflict with, be inconsistent with, amend, modify, alter, paraphrase, detract from, or duplicate" the master agreement.[1] It also provides that, "at the national level," the parties will "independently review the [local] agreement and determine [whether] the proposed [local] agreement complies with the provisions of [the master] agreement and applicable laws and regulations."[2] Article 9 further provides that provisions found to conflict with either the master agreement or law "will be returned to the parties at the local level with explanations."[3] Under Article 9, if a local agreement is returned to the local parties, then the parties can implement the modified local agreement, they can renegotiate disapproved provisions, or the Union can challenge the disapproved provisions according to the procedures in Article 9(c).[4]

Article 9(c) sets forth three different procedures for the Union to challenge disapproved provisions, depending on the nature of the disapproval. First, if the Agency disapproves a provision as violating "solely" the master agreement, then the Union may challenge the disapproval through arbitration.[5] Second, if the Agency disapproves a provision as violating "solely" law or government-wide regulation, then the Union may challenge the disapproval by filing a negotiability appeal with the Authority.[6] And third, if the Agency disapproves a provision as violating *both* the master agreement and law, then the Union may challenge the disapproval first through the arbitration process (for the contract issues), and then by filing a negotiability appeal with the Authority (for the contrary-to-law issues).

After the Agency disapproved some local agreements that had been submitted for national review, the Union filed a grievance alleging that, as to two local agreements, the Agency's disapprovals lacked

[1] Award at 5 (quoting Article 9).
[2] *Id.* at 4 (quoting Article 9(d)(1)).
[3] *Id.*
[4] *Id.*
[5] *Id.* at 8 (quoting Article 9(c)(1)).
[6] *Id.* (quoting Article 9(c)(2)).

specificity about how the disapproved provisions conflicted with the master agreement. The parties resolved that grievance by executing the MOU. The MOU provides that the Agency will review local agreements according to Article 9, but will focus more on provisions that actually conflict with the master agreement and focus less on provisions that merely paraphrase or duplicate wording from the master agreement. Under the MOU, the Agency also agreed to review previously disapproved local agreements a second time, applying the narrower focus.

On its second review of the previously disapproved local agreements, the Agency again disapproved some of the same provisions. In response, the Union filed another grievance, which alleged that: (1) the national reviews violated the master agreement and the MOU, and (2) the Agency bargained in bad faith by disapproving provisions on the basis that the provisions were contrary to law. According to the Union, the parties negotiated those provisions at the local level with guidance from national management, and, therefore, the provisions were binding upon execution at the local level.

The second grievance went to arbitration. At arbitration, the parties stipulated the issues, in pertinent part, as whether: (1) the Agency's reviews violated the master agreement, "statute, policy[,] or other law"; and (2) the Agency bargained in bad faith regarding the local agreements.[7]

The Arbitrator focused on whether the scope of the national reviews complied with the master agreement and the MOU. The Arbitrator found that she was not tasked with determining whether individual disapprovals of local agreements had merit, because the Union could use the procedures in Article 9(c) – described above – to resolve any dispute over the merits of any individual disapproval. She also noted that some of the Agency's individual disapprovals could be found to lack merit if they were subjected to the dispute-resolution procedures in Article 9(c) and rejected the Union's argument that the *scope* of the national reviews was overly broad. Specifically, the Arbitrator found that the Agency's disapprovals were based on types of rationales that are permitted by Article 9. Additionally, the Arbitrator found that the MOU did not "eliminate or otherwise compromise" the Article 9 language permitting disapprovals based on law, rule, regulation, or policy.[8] Instead, she found that the MOU's purpose was to clarify what the Agency's focus would be for disapprovals based on conflicts with the master agreement. Thus, the Arbitrator concluded that the scope of the national reviews did not violate the master agreement or the MOU.

With regard to the Union's allegation that the Agency engaged in bad-faith bargaining, the Arbitrator rejected the Union's argument that local agreements are final and binding upon local execution. The Arbitrator found that, while the Agency provided guidance to the local bargaining teams during negotiations that led to local agreements, that guidance did not abrogate the national-review procedures in Article 9. Instead, she found, no local agreement was final until the parties completed the national-review procedures in Article 9. Therefore, the Arbitrator concluded that the Agency did not engage in bad-faith bargaining by disapproving provisions that had been agreed to at the local level.

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

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Union's arguments.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations,[9] the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[10] Repeatedly throughout its exceptions, the Union argues that the Arbitrator erred by not following a prior arbitration award (the Meyers award).[11]

However, the Union does not cite any evidence that, before the Arbitrator, it cited the Meyers award or argued that the Arbitrator was required to follow that award. Moreover, there is no indication in the Arbitrator's award that the Union raised the Meyers award to the Arbitrator, and our review of the parties' post-hearing briefs, transcript, and grievance has revealed no evidence that the Union raised the Meyers award at arbitration. Accordingly, we find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar the Union's arguments that rely on the Meyers award, and we dismiss the portions of the exceptions that rely on those arguments.[12]

[7] *Id.* at 4.
[8] *Id.* at 10.
[9] 5 C.F.R. §§ 2425.4(c), 2429.5.
[10] *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 176 (2017) (citing 5 C.F.R. §§ 2425.4(c), 2429.5; *AFGE, Local 3571*, 67 FLRA 218, 219 (2014)).
[11] Exceptions at 9, 11, 15, 21.
[12] *E.g., U.S. DOJ, Fed. BOP, Wash., D.C.*, 64 FLRA 1148, 1152 (2010).

IV. Analysis and Conclusions

A. The Arbitrator did not exceed her authority.

The Union argues that the Arbitrator exceeded her authority because she did not rule on two issues, discussed in detail below.[13] Arbitrators exceed their authority when, as relevant here, they fail to resolve an issue submitted to arbitration.[14] In determining whether an arbitrator has exceeded his or her authority, 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.[15] Additionally, the Authority has held that an arbitrator does not exceed his or her authority by failing to address an argument that the parties did not include in their stipulation.[16]

First, the Union argues that the Arbitrator failed to address whether the Agency's alleged failure to complete national reviews within a particular time limit violated the master agreement.[17] But the Arbitrator found that there was no question of "timeliness" before her.[18] Moreover, the stipulated issues specifically do not include an issue regarding the timeliness of the Agency's reviews, and the Union provides no basis for finding that the stipulated issues necessarily encompassed a timeliness issue. Therefore, the Arbitrator did not exceed her authority by not addressing that issue.[19]

Second, the Union argues that the Arbitrator exceeded her authority by failing to adjudicate the validity of individual local-agreement disapprovals that the Union submitted into evidence at arbitration.[20] However, as stated previously, the Arbitrator interpreted the stipulated issues as not requiring her to resolve whether individual disapprovals had merit.[21] The Union has not demonstrated that this interpretation is irrational, unfounded, implausible, or in manifest disregard of the stipulation, so we defer to her interpretation.[22] Thus, we find that the Union has not demonstrated that she exceeded her authority in this regard.

For the above reasons, we deny the Union's exceeded-authority exception.

B. The award is not contrary to law.

The Union argues that the award is contrary to §§ 7114(c) and 7106(b) of the Federal Service Labor-Management Relations Statute (the Statute).[23] The Union states that § 7114(c) permits the parties to establish procedures for national reviews of local agreements, and provides that the Agency must permit the local agreements "to go into effect" unless they are unlawful.[24] According to the Union, the Arbitrator improperly found that the Agency's disapprovals of such provisions are valid.[25]

As discussed previously, the Arbitrator found that Article 9 established the procedures and scope for the national reviews[26] and that the types of rationales that the Agency gave for its disapprovals were permitted by Article 9.[27] However, the Arbitrator found that she was not tasked with resolving whether any individual Agency disapprovals had merit.[28] As a result, she did not find that the Agency could disapprove lawful provisions. Therefore, the Union's contrary-to-law arguments provide no basis for finding the award deficient, and we deny this exception.

C. The award is not based on a nonfact.

The Union argues that the award is based on a nonfact because the Arbitrator found that the issue before her did not include resolving the merits of individual disapprovals.[29] According to the Union, the parties submitted numerous local agreements for the Arbitrator's consideration, and "[t]he intent of th[e] submission[s] was to make clear that the Union was looking for a ruling . . . to correct" the local agreements that were submitted, as well as "future" local agreements.[30]

To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[31]

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[13] Exceptions at 11-12.
[14] *NAGE, SEIU, Local 551*, 68 FLRA 285, 286 (2015) (citing *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996)).
[15] *Fraternal Order of Police, Lodge 12*, 68 FLRA 616, 618 (2015) (*Lodge 12*); *see also U.S. Dep't of the Interior, Bureau of Reclamation, Great Plains Region, Colo./Wyo. Area Office*, 68 FLRA 992, 994 (2015).
[16] *AFGE, Local 836*, 69 FLRA 502, 505-06 (2016) (*Local 836*) (citing *GSA, E. Distrib. Ctr., Burlington, N.J.*, 68 FLRA 70, 72 (2014)).
[17] Exceptions at 11-12.
[18] Award at 7 n.3.
[19] *E.g., Local 836*, 69 FLRA at 505-06.
[20] Exceptions at 12, 15.
[21] Award at 11.
[22] *Lodge 12*, 68 FLRA at 618.
[23] Exceptions at 8 (citing 5 U.S.C. §§ 7114(c), 7106(b)).
[24] *Id.* (citing 5 U.S.C. § 7114(c)(2)).
[25] *Id.*
[26] Award at 8.
[27] *Id.* at 8, 13.
[28] *Id.* at 11.
[29] Exceptions at 10.
[30] *Id.*
[31] *NLRB Prof'l Ass'n*, 68 FLRA 552, 554 (2015).

Further, the Authority has found that an arbitrator's interpretation of the scope of the issues before him or her is not a matter that can be challenged on nonfact grounds.[32]

Here, the Union's nonfact argument essentially restates its challenge to the Arbitrator's interpretation of the stipulated issue before her, which cannot be challenged as a nonfact. Therefore, we deny this exception.

D. The award does not fail to draw its essence from the master agreement.

The Union argues that the award fails to draw its essence from Articles 3 and 4, which state, in pertinent part, that the master agreement is subject to, and that the parties will negotiate in accordance with, applicable law.[33] According to the Union, the Arbitrator erroneously failed to find that the national reviews violated the master agreement and § 7114 of the Statute, a "higher government-wide law."[34]

When 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.[35] 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."[36] 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 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.[37]

Despite the Union's proffer of Agency-disapproved provisions that purportedly fell "outside [the Agency's] authority to disapprove,"[38] the Arbitrator found that the types of rationales that the Agency gave for its disapprovals were rationales that Article 9 permitted. The Arbitrator also found, however, that the merits of individual disapprovals were not before her. Therefore, there was no basis for the Arbitrator to find – and she did not find – that any individual Agency disapprovals were valid on their merits. The Union does not cite any language in Articles 3 and 4 that conflicts with the Arbitrator's findings or otherwise demonstrates that the award is irrational, unfounded, implausible, or in manifest disregard of the master agreement.

Accordingly, the Union has not demonstrated that the award fails to draw its essence from the master agreement, and we deny this exception.

V. Decision

We deny the Union's exceptions.

[32] *See NAIL, Local 17*, 68 FLRA 97, 99 (2014) (arbitrator's interpretation of the scope of an issue cannot be challenged as a nonfact) (citing *AFGE, Council Local 2128*, 59 FLRA 406, 408 (2003) (arbitrator's interpretation of the scope of a grievance cannot be challenged as a nonfact)); *U.S. DOD, Def. Contract Mgmt. Agency*, 59 FLRA 396, 403 (2003) (citation omitted).

[33] Exceptions at 18-19.

[34] *Id.* at 19-20.

[35] *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (citing 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998) (*Council 220*)).

[36] *Id.* (quoting *Council 220*, 54 FLRA at 159).

[37] *Id.* (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

[38] Exceptions at 20.