72 FLRA No. 64

INDEPENDENT UNION OF PENSION EMPLOYEES
FOR DEMOCRACY AND JUSTICE
(Union)

and

UNITED STATES
PENSION BENEFIT GUARANTY CORPORATION
(Agency)

0-AR-5596

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DECISION

June 3, 2021

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and James T. Abbott, Members

I. Statement of the Case

Arbitrator Charles Allen Foster dismissed the Union's grievance as untimely. The Union filed an exception challenging the Arbitrator's procedural-arbitrability determination on contrary-to-law grounds. Because the Union's exception fails to demonstrate that the award is contrary to law, we deny it.

II. Background and Arbitrator's Award

For decades, the Agency has contracted out certain administrative functions. In October 2016, the Union requested information regarding an Agency decision to contract out the administrative work performed by Employee Benefit Law Specialists (specialists).[1] The Agency confirmed that it was contracting out the work and provided the statement of work used to solicit the contractor and the contract itself.

At a meeting with the specialists in November 2017, the Agency announced that it would transition all remaining administrative duties to a contractor. The Union's secretary attended in her capacity as a specialist. Subsequently, the Agency held frequent meetings with the specialists and sent emails concerning the transition of the work to the contractor. In March 2018, the Agency completed the transition of administrative work to the contractors and, as of April 26, 2018, the specialists could no longer change information in a particular computer system after their access was restricted to "read only."

On May 17, 2018, the Union filed an institutional grievance concerning the decision to contract out the specialists' remaining administrative duties. The parties advanced the grievance to arbitration.

As an initial matter, the Arbitrator considered whether the grievance was timely filed under the parties' collective-bargaining agreement. Article 19 of the parties' agreement (Article 19) states that a party has "twenty-one (21) days, from either the date of the action that gave rise to the grievance or the date it learned of such action, to file an institutional grievance."[2] The Arbitrator interpreted this provision to mean that the grievance's timeliness was based on when the Union "'learned of' the action."[3] On this basis, the Arbitrator found that the grievance filing period begins when a party has "knowledge, or ought to have knowledge, of an action either through official notice or through the knowledge of a responsible officer of a party."[4]

The Arbitrator determined that the Union received "official notice" of the contract at issue in the grievance no later than October 2016 by virtue of the Agency's response to its information request.[5] He also found that the Union "learned of" the decision to contract out the remaining administrative duties of the specialists no later than the November 2017 meeting through the Union secretary's attendance.[6] The Arbitrator also found that the Agency did not conceal the transfer of the administrative duties and held frequent meetings and exchanged correspondence regarding the contracting. Therefore, he determined that the Union "should have known" of the contracting out before the specialists were denied computer system access on April 26, 2018.[7] Consequently, the Arbitrator dismissed the grievance because it was untimely filed.[8]

On February 21, 2020, the Union filed exceptions to the award, and on March 23, 2020, the Agency filed an opposition to the Union's exceptions.

[1] Award at 5-6.

[2] *Id.* at 13. Though the award references "Article 21," the quoted portion of parties' agreement appears in Article 19. Exceptions, Ex. 2, Collective-Bargaining Agreement at 44.

[3] Award at 13.

[4] *Id.*

[5] *Id.* at 12. In further support of this finding, the Arbitrator noted that the Union had questioned the Agency's migration of duties to contractors beginning in 2013, and that it had received from the Agency "correspondence on the subject dated August 12, 2013 and September 4, 2013." *Id.* at 13.

[6] *Id.* at 13.

[7] *Id.* at 14.

[8] Despite dismissing the grievance as untimely, the Arbitrator made additional findings on the merits of the grievance.

III. Analysis and Conclusion: The Arbitrator's procedural-arbitrability determination is not contrary to law.

The Union argues that the Arbitrator's finding that the grievance was untimely is contrary to law.[9] An arbitrator's determination regarding the timeliness of a grievance is a determination regarding the procedural arbitrability of that grievance.[10] In order for a procedural-arbitrability ruling 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.[11] In determining whether an award is contrary to law, the Authority defers to the arbitrator's factual findings unless the excepting party demonstrates that the award is based on a nonfact.[12]

The Union contends that it did not learn of the actions giving rise to the grievance in "its official capacity" until April 26, 2018 because the Union secretary's "attendance at a meeting in [her] capacity as an employee did not constitute official notice to the Union."[13] However, the Arbitrator found that Article 19's filing period begins when the Union "learns of" the action either by "official notice" or by "knowledge of a responsible officer."[14] And the Union does not demonstrate that the Arbitrator was required, as a matter of law, to interpret Article 19 differently.[15]

Applying his interpretation of Article 19, the Arbitrator found that the Union had official notice no later than October 2016.[16] He also found that the Union learned of the action through knowledge of a responsible officer – the Union's secretary – no later than November 2017.[17] Because the Union does not challenge these findings as nonfacts, we defer to them.

Therefore, the Union's argument provides no basis for finding that the Arbitrator's procedural-arbitrability determination is contrary to law, and we deny this exception.[18]

IV. Decision

We deny the Union's exception.

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[9] Exceptions at 5-7.

[10] *NLRB Pro. Ass'n*, 71 FLRA 737, 738 (2020) ("Put simply, this case – which involves an arbitrator's determination regarding the timeliness of a grievance – concerns only procedural arbitrability."), *pet. for rev. denied sub nom. NLRB Pro. Ass'n v. FLRA*, No. 20-1233, 2021 WL 2010674 (D.C. Cir. 2021).

[11] *Id.* at 739.

[12] *NTEU*, 72 FLRA 182, 186 (2021).

[13] Exceptions Br. at 6-7.

[14] Award at 12-13.

[15] *See* Exceptions at 6-7 (citing *U.S. DOL, Wash. D.C.*, 30 FLRA 572 (1987); *Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan Air Force Base, Cal.*, 29 FLRA 594 (1987); *Dep't of the Army, Harry Diamond Laboratories, Adelphi, Md.*, 9 FLRA 575 (1982)). The cases cited by the Union concern the timeliness of an unfair labor practice charge and do not demonstrate that the Arbitrator was required to apply those timeliness standards to a grievance filed under the parties' negotiated grievance procedure. Accordingly, this precedent provides no basis for finding that the Arbitrator's procedural-arbitrability determination is contrary to law. *See NLRB Pro. Ass'n*, 68 FLRA 552, 556 (2015) ("the Authority has rejected, as misplaced, contrary-to-law exceptions that challenge an arbitrator's interpretation of the parties' agreement" (internal quotation marks omitted) (citing *AFGE, Loc. 779*, 64 FLRA 672, 674 (2010); *Pro. Airways Sys. Specialists*, 56 FLRA 124, 125 (2000))).

[16] Award at 12.

[17] *Id.* at 13.

[18] The Union also challenges the Arbitrator's findings on the merits of the grievance on exceeded-authority and essence grounds. Exceptions Br. at 7-8. However, because the Arbitrator dismissed the grievance as untimely, his findings on the merits of the grievance are dicta. Therefore, those findings cannot form the basis for finding an award deficient. *AFGE, Loc. 1667*, 70 FLRA 155, 158 (2016) (citing *NAIL, Loc. 17*, 68 FLRA 97, 100 (2014)). Consequently, we deny these exceptions.