61 FLRA No. 42

UNITED STATES
DEPARTMENT OF LABOR
MINE SAFETY
AND HEALTH ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL
OF FIELD LABOR LOCALS
(Union)

0-AR-3937

DECISION

September 8, 2005

Before the Authority: Dale Cabaniss, Chairman, and
Carol Waller Pope and Tony Armendariz, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator S. Jesse Reuben filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator found that the Agency violated the parties' collective bargaining agreement by discontinuing the Agency's Safety Awards Program (the Program). As a remedy, he ordered the Agency to reinstate the Program and process retroactive safety awards for eligible employees.

For the reasons discussed below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

A. Background

Since the 1970s, the Agency had administered a Safety Awards Program (the Program) under which employees received various monetary and non-monetary awards for working "accident-free." Award at 2. The Program was set forth in the Agency's Administrative Policy and Procedures Manual.

In 1993, pursuant to Executive Order (EO) 12871, "Labor-Management Partnerships," the Agency and the Union formed a joint labor-management committee to update and revise the Program. In June 2000, the Agency informed the Union that the Agency's Assistant Secretary had approved the revised Program and that the Departmental approval process would take approximately two weeks. *See id.* In September 2000, the Union filed a grievance over the Agency's failure to implement the Program as revised. The parties entered into a settlement agreement in which the Agency agreed to immediately begin the processing of safety awards for employees who were eligible and did not receive awards in fiscal years 1999 and 2000.

In February 2001, EO 13203, "Revocation of Executive Order and Presidential Memorandum Concerning Labor-Management Partnerships[,]" revoked EO 12871. In June 2001, the Union met with the Agency's new Assistant Secretary, who told the Union "that the Agency would honor the [settlement] agreement and implement the revised Program immediately." *Id.* at 3.

In May 2002, the parties executed a new collective bargaining agreement, which became effective July 1, 2002. The agreement "shall remain in effect through June 30, 2006, unless extended through mutual agreement." Jt. Ex. 1 at 127. Subsequently, the parties entered into additional settlement agreements regarding the implementation of the revised Program.

On September 11, 2003, the Agency advised the Union that it was discontinuing the Program effective October 1, 2003. Initially, the Union requested to bargain over the proposed termination of the Program. Later, the Union informed the Agency that, since the Program was a policy that was in existence at the time the parties' new agreement became effective, the Program had become part of the new agreement under Article 2, § 1 of that agreement. [*] The Union indicated that, since the Program was covered by the parties' new agreement and there was no showing that "law, Executive Order, higher regulations, judicial decision by a court of appropriate jurisdiction, or higher authority" mandated the termination of the Program, the Union did not wish to reopen the Program and bargain at that time. Award at 4 (quoting Article 2, § 4, Jt. Ex. 1 at 6). Consequently, the Union withdrew its request to bargain over the termination of the Program.

B. Arbitrator's Award

Based on the undisputed facts before him, the Arbitrator found that "a past practice involving the working conditions of unit employees had existed for approximately 30 years of employees receiving safety awards when they ha[d] attained the goals set forth in the Safety Awards Program contained in the Agency's Administrative Policy and Procedures Manual." *Id.* at 8. The Arbitrator further found that the revisions to the Program agreed to by the Agency in 2001 did not eliminate the past practice because "the basic policy of granting employees awards for meeting prescribed safety goals continued as before." *Id.*

In considering the parties' contractual provisions, the Arbitrator initially noted that, as the Program was not expressly included as a provision in the parties' 2002 collective bargaining agreement, Article 2, § 1 did not prelude the Agency "from seeking during the term of the collective bargaining agreement, to modify or eliminate the [Program] after affording the Union prior notice of its intention and providing the Union with the opportunity to bargain." *Id.* at 9. The Arbitrator stated that, in his view, Article 2, § 1 "does not constitute a clear and unequivocal waiver of the Agency's right to effect changes in conditions of employment of unit employees where such conditions of employment are not expressly covered by the parties' collective bargaining agreement." *Id.* Further, the Arbitrator noted that, before making such changes, the Agency has a statutory duty to provide the Union with notice and an opportunity to bargain.

However, the Arbitrator found that the dispositive provision in this case was Article 2, § 6. In this regard, the Arbitrator found that the language of Article 2, § 6 was "unambiguous" and provides that "`any prior working conditions and practices and understandings which are not specifically covered by the Agreement or in conflict with it *shall not be changed unless mutually agreed to by the parties.*'" *Id.* (quoting Article 2, § 6) (original emphasis). The Arbitrator rejected the Agency's assertion that Article 2, § 6 was not applicable in this case and found that "the policies set forth in the Safety Awards Program . . . have a direct effect on the working conditions of unit employees." *Id.* at 9-10. In addition, the Arbitrator found that "such working conditions existed prior to the approval of the parties' 2002 collective bargaining agreement." *Id.* at 10. Since the subject of safety awards "is not covered by . . . or in conflict with" the parties' agreement, the Arbitrator found that, under Article 2, § 6, the Agency could not change or eliminate the Program "unless mutually agreed to by the parties." *Id.* As the Union did not agree to the termination of the Program, the Arbitrator found that the Agency's termination of the Program violated Article 2, § 6 of the parties' agreement.

The Arbitrator further found that the fact that the proposed revisions to the Program were developed under a "partnership regime" established by EO 12871 did not "require a contrary result in this matter." *Id.* at 10 n.4. The Arbitrator found that the revocation of EO 12871 "did not, in [his] view, afford the Agency the right, during the term of the parties' collective bargaining agreement, to revoke the substantive matters agreed to by the parties in connection with the Agency's revision of the Safety Awards Program or to terminate the entire Program without the mutual agreement of the parties." *Id.*

As a remedy, the Arbitrator ordered that the Agency retroactively reinstate the Safety Awards Program and commence processing retroactive safety awards for eligible employees.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award fails to draw its essence from Article 4 of the parties' agreement. According to the Agency, "the Arbitrator failed to address [Article 4] at all." Exceptions at 9. In this regard, the Agency asserts that the Program was "a management policy originating from partnership, not collective bargaining" and that Article 4 "excludes those matters resulting from partnerships as being considered past practices." *Id.* at 8, 11.

In addition, the Agency argues that the Arbitrator's award is "[i]nternally [i]nconsistent." *Id.* at 12. According to the Agency, the Arbitrator correctly found that "the Agency was not precluded by Article 2, [§] 1 from seeking, during the term of the collective bargaining agreement, to modify or eliminate the [Safety Awards Program] after affording the Union prior notice of its intention and providing the Union with the opportunity to bargain." *Id.* at 13 (quoting Award at 9). However, the Agency asserts that "[t]he logical implication" of this finding is that the Union waived its right to bargain over the change when it withdrew its request to bargain. *Id.* at 13. In this connection, the Agency contends that the Arbitrator erred in finding that the Program constituted a past practice because, under Article 4 of the parties' agreement, the parties agreed that, "even if a working condition is otherwise a past practice, if the working condition is the product of a partnership, then it is not a past practice and its continuation is predicated on the voluntary consent of both parties." *Id.* (citation omitted). According to the Agency, under the award, "any management policy touching on a working condition could become a past practice simply by the passage of time" and the Agency "would not be able to exercise its exclusive management rights and set policy without fear that it would be bound to such policy for the indefinite future." *Id.* at 14.

Finally, the Agency asserts that the award "effectively forces [the Agency] to continue a program that is unlawful[.]" *Id.* at 18. The Agency argues that the Program "falls short of a lawful exercise of the Agency's authority to establish a federal employee award program" because it provides employees an incentive not to report work-related injuries that are covered by the Federal Employees' Compensation Act (FECA). The Agency asserts that such a program cannot be "otherwise in the public interest" in accordance with 5 C.F.R. § 541.102. *Id.* at 15 (quoting 5 C.F.R. § 541.102). The Agency further contends that, since the Program awards employees for not reporting work-related injuries, the program lacks authority because there is no "individual or team achievement[,]" a criterion for making an award. *Id.* at 16 (quoting 5 C.F.R. § 541.102).

B. Union's Opposition

The Union asserts that the Arbitrator correctly found that the Program was a past practice and that, under Article 2 of the parties' agreement, the Agency could not unilaterally terminate the Program.

The Union also argues that the issue stipulated to by the parties did not include whether the Agency violated Article 4, and, as such, the Agency cannot raise arguments with regard to Article 4 on exceptions. *See* Opposition at 3.

With regard to the merits of the Agency's Article 4 arguments, the Union asserts that Article 4 "deals with forums or processes" and "not the products of these forums or processes." *Id.* at 1. The Union further asserts that nothing in Article 4 states that the product of voluntary, collaborative dealings between the parties cannot be past practices. *See id.* at 2. The Union contends that the Program has been in existence for over 30 years and was in existence even prior to the creation and revocation of the partnership.

IV. Analysis and Conclusions

A. Preliminary Matter

Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues or evidence that could have been, but were "not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5. However, where an issue arises from the issuance of the award and could not have been presented to the arbitrator, it is not precluded by § 2429.5. *See, e.g., United States Dep't of the Navy, Supervisor of Shipbuilding Conversion & Repair, Pascagoula, Miss.*, 57 FLRA 744, 745 (2002).

1. The Agency's exception relating to Article 4 is not barred by § 2429.5 of the Authority's Regulations.

In its opposition, the Union contends that the Agency's argument that the award fails to draw its essence from the portion of Article 4 of the parties' agreement dealing with past practices is not properly before the Authority because it was not raised below.

This contention is without merit. The record reflects that an Agency witness testified with regard to Article 4 at the hearing. *See* Exceptions, Attachment D (Hearing Transcript) at 168-69; 178-79. As such, the Agency offered evidence regarding Article 4 below and its claims with regard to Article 4 are not barred by § 2429.5.

Accordingly, we will consider the Agency's exception with regard to Article 4.

2. The Agency's contrary to law exception is barred by § 2429.5 of the Authority's Regulations.

To the extent the Agency asserts that the Arbitrator's remedy ordering the reinstatement of the Safety Awards Program is illegal, we find that this argument is barred from consideration by § 2429.5 of the Authority's Regulations.

There is no evidence in the award or the record that the Agency ever argued to the Arbitrator that granting the Union's grievance and awarding the remedy sought by the Union -- reinstatement of the Program -- would violate law or regulation. Such an argument could have been made to the Arbitrator, but was not. As such, we find that consideration of the Agency's contrary to law claims are barred by § 2429.5 of the Authority's Regulations. *See, e.g., United States Dep't of the Treasury, Internal Revenue Serv., Kansas City Field Compliance Serv.*, 60 FLRA 401, 403 (2004) (Authority did not consider the agency's contrary to law claim where the agency could have raised below, but did not, that interpreting the parties' agreement in a particular manner would violate the agency's rights under § 7106 of the Statute); *AFGE, Local 507*, 58 FLRA 378, 379-80 (2003) (Chairman Cabaniss dissenting as to another matter) (Authority dismissed the union's contrary to law exception where the union did not make arguments regarding § 6101 and § 7114 before the arbitrator, but could have done so); *United States Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.,* 56 FLRA 498, 502 (2000) (§ 2429.5 barred the Authority from considering the agency's argument that the arbitrator's order to implement a memorandum of understanding was contrary to law where the issue could have been, but was not, presented to the arbitrator).

Accordingly, we dismiss the Agency's contrary to law claim.

B. The award draws its essence from Article 4 of the parties' agreement.

In order for an award to be found deficient as failing to draw its essence from the parties' collective bargaining agreement, it must be established 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. *See United States Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*). The Authority defers to the arbitrator in this context because it is the arbitrator's construction of the agreement for which the parties have bargained. *Id.* at 576.

In our view, the Agency misconstrues Article 4. The Agency interprets Article 4 to mean that, "if [a] working condition is the product of a partnership, . . . then it is not a past practice and its continuation is predicated on the voluntary consent of both parties." Exceptions at 13. However, as relevant here, Article 4, "Labor-Management Cooperation[,]" provides that:

forums or processes for Union or employee involvement in Management's deliberative processes which exist at the time this Collective Bargaining Agreement goes into effect may voluntarily continue. Such cooperative dealings remain voluntary to both Management and Labor and do not constitute past practices under this Agreement.

Jt. Ex. 1 at 14. Read in context, this provision applies only to the "forums and processes for Union or employee involvement in Management's deliberative processes" and

provides that "[s]uch cooperative dealings" remain voluntary. This provision does not provide that a working condition which is "the product of a partnership" cannot constitute a past practice. Exceptions at 13.

Moreover, the Agency's argument assumes that the Program itself was "the product of a partnership[.]" *Id.* However, the Arbitrator specifically found that the Program had been in existence at the Agency for over 30 years and prior to the establishment of EO 12871 requiring partnerships. The Arbitrator further found that "[t]he fact that the partnership regime established under executive Order 12,871 was utilized by the parties in developing the proposed revisions to the Safety Awards Program" does not establish that the Agency did not violate Article 2, § 6 of the parties' agreement. Award at 10 n.4. In this regard, the Arbitrator found that the revocation of EO 12871 requiring partnerships did not "revoke the substantive matters agreed to by the parties in connection with the Agency's revision of the Safety Awards Program[,]" nor did it allow the Agency to terminate the entire Program "without the mutual agreement of the parties[,]" as set forth in Article 2, § 6. *Id.*

Based on the foregoing, the Agency's exception does not establish that the Arbitrator's interpretation of the parties' agreement is irrational, implausible, or otherwise deficient under the essence standard set forth above. Accordingly, we deny the Agency's exception.

C. The Agency's assertion that the award is internally inconsistent provides no basis for finding that the award is deficient.

We construe the Agency's assertion that the award is internally inconsistent as challenging both the Arbitrator's finding that a past practice existed and his interpretation of the past practice. The Authority analyzes an exception challenging an arbitrator's finding of a past practice as a nonfact exception, while an exception challenging an arbitrator's interpretation of a past practice is analyzed as an essence exception. *See AFGE, Local 2128*, 58 FLRA 519, 522 n.9 (2003). Here, as we construe the Agency's exception as challenging both the Arbitrator's finding that a past practice existed in the circumstances of this case, and his findings as to the significance of that practice, we treat the Agency's exception as raising issues of both nonfact and essence.

1. The award is not based on a nonfact.

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. *See, e.g., Soc. Sec. Admin., Office of Hearings & Appeals*, 58 FLRA 405, 407 (2003) (SSA). The Authority will not find an award deficient on the basis of the arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.* In addition, an arbitrator's interpretation of a collective bargaining agreement is not subject to challenge as a nonfact. *See id.*

Based on the facts before him, the Arbitrator found that "a past practice involving the working conditions of unit employees has existed for approximately 30 years of employees receiving safety awards when they have attained the goals set forth in the Safety Awards Program[.]" Award at 8. The Arbitrator further found that the 2001 revisions to the Program did not eliminate the past practice. *See id.*

Before the Arbitrator, the parties disputed whether the Program constituted a past practice. *See* Award at 4-5; 6-7. Consequently, the Agency's exception challenging as a nonfact the Arbitrator's finding that the Program constituted a past practice does not demonstrate that the award is deficient. *See, e.g., SSA*, 58 FLRA at 407.

2. The award draws its essence from the parties' agreement.

Consistent with the foregoing, we examine the Agency's claim regarding the Arbitrator's interpretation of the past practice under the essence standard set forth previously.

Based on his finding that the Program constituted a past practice, the Arbitrator found that, under Article 2, § 6 of the parties' agreement, the past practice "could not be changed or eliminated as was done in this case, `unless mutually agreed to by the parties.'" Award at 10 (quoting Article 2, § 6). Nothing in the Agency's claim regarding the Arbitrator's finding as to the significance of the finding of a past practice demonstrates that the award is so unfounded, implausible, irrational, or in disregard of the agreement as to fail to draw its essence from the agreement. *See, e.g., United States Dep't of Homeland Sec., Customs & Border Prot., San Diego, Cal.*, 61 FLRA 136, 138 (2005). Accordingly, we deny the Agency's exception.

V. Decision

The Agency's exceptions are denied.

APPENDIX

Article 1, "Coverage and Recognition[,]" § 1, "Recognition," provides in pertinent part:

C. Management agrees that in regard to the NCFLL bargaining unit, it will not enter into any other agreement, understanding, or contract with any other organization, association, or union that shall contravene or violate this Contract except as required by law, higher regulation, or Executive Order. Management agrees that in regard to the NCFLL bargaining unit, it will not do anything by custom or practice that shall contravene or violate this Contract except as required by law, higher regulation, or Executive Order.

Jt. Ex. 1 at 1.

Article 2, "Governing Laws and Regulations[,]" provides in pertinent part:

Section 4 - Mandated Changes of Agreement or Regulation
A. Management agrees to issue no regulation which alters the terms or conditions of this Agreement without being mandated by law, Executive Order, higher regulation, judicial decision by a court of appropriate jurisdiction, or other higher authority.

. . . .

Section 6 - Past Practices
It is agreed and understood that any prior working conditions and practices and understandings which are not specifically covered by the Agreement or in conflict with it shall not be changed unless mutually agreed to by the parties.

Id. at 4, 6.

Article 4, "Labor-Management Cooperation[,]" provides:

In the spirit of labor-management cooperation, Union and Management mutually recognize and endorse the involvement of affected employees and their representatives as early as possible. To this end, the parties agree that forums or processes for Union or employee involvement in Management's deliberative processes which exist at the time this Collective Bargaining Agreement goes into effect may voluntarily continue. Such cooperative dealings remain voluntary to both Management and Labor and do not constitute past practices under this Agreement. At any time during the life of this Agreement, either party may unilaterally terminate such voluntary forums or processes and no bargaining obligation will incur. It is understood that the NCFLL, in agreeing to the continuation of such forums or processes, does not waive any statutory or contractual rights including, but not limited to, formal discussions, notifications of Management changes which impact on working conditions of bargaining unit employees, and the right to bargain, consistent with the Federal Service Labor-Management Relations Statute, in regard to the impact and implementation of such Management changes.
No later than four months after the effective date of this Agreement, the parties will exchange information and compile a single definitive list of all such forums or processes at all levels of the Department which existed at the time the previous Agreement expired and which both Union and Management desire to continue. At any time during the life of the Agreement, when either party elects to terminate such arrangement, it will notify the other party through the existing channels of labor-management communication. The parties may by mutual agreement develop new arrangements of this type during the life of the Agreement. All such new arrangements must be approved by the Union and Management at the national level.

Id. at 14-15.

Footnote * for 61 FLRA No. 42 - Authority's Decision

Article 2, "Governing Laws and Regulations[,]" § 1, "Precedence of Laws and Regulations[,]" states in pertinent part:

In the administration of all matters covered by this Agreement, officials and employees are governed by existing or future laws and regulations of appropriate authorities; by published Department and/or Agency policies and regulations in existence at the time this Agreement was approved; and by subsequently published Department and/or Agency policies and regulations required by law or by the regulations of appropriate authorities.

Jt. Ex. 1 at 4. Other relevant portions of the parties' agreement are set forth in the attached Appendix.