

66 FLRA No. 49

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS 33
LOCAL 3976
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ESTILL, SOUTH CAROLINA
(Agency)

0-AR-4755

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DECISION

October 20, 2011

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Before the Authority: Carol Waller Pope, Chairman, and
Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

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

The Arbitrator denied the grievance, finding that it was procedurally deficient under the parties' master agreement (agreement). For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Agency barred the grievant from returning to work until he presented a medical certificate clearing him for unrestricted duty. Award at 3 n.1; Exceptions at 1-2. The Union filed a grievance, which was unresolved and submitted to arbitration. Award at 3. The Arbitrator bifurcated the arbitration proceedings in order to first determine whether the grievance was arbitrable. *Id.* The Arbitrator found that the Union had failed to comply with the agreement's "unequivocal" requirement to state in writing, in its "Notice of Intent to Arbitrate"

(arbitration notice), the issue to be litigated. *Id.* at 7. Consequently, the Arbitrator found that the grievance was not arbitrable, and he denied the grievance. *Id.* at 7-8.

III. Positions of the Parties**A. Union's Exceptions**

The Union asserts that the award is based on a nonfact because, in its view, it provided in the arbitration notice a statement of the issue to be litigated. Exceptions at 4-5; 7-8. The Union also asserts that the award is "deficient based in law." *Id.* at 9. In this regard, the Union contends that the Agency lacks legal discretion "to refuse or reject medical certification." *Id.* at 8 (citing 29 C.F.R. § 825.307, 5 C.F.R. § 630.1207, and Department of Justice (DOJ) Order 1630.1B).*

B. Agency's Opposition

The Agency argues that the award is not based on a nonfact and is not contrary to law. *Opp'n* at 3-6. According to the Agency, the exceptions directly challenge the Arbitrator's procedural-arbitrability determination, and, thus, do not provide a basis for finding the award deficient.

* We note that the Union incorrectly cites 29 C.F.R. § 630.1207 at this point in its exceptions, but it properly cites 5 C.F.R. § 630.1207(c) and (d), at another point in its exceptions. *See* Exceptions at 8, 7.

5 C.F.R. § 630.1207(c) provides, in pertinent part:

If an employee submits a completed medical certification signed by the health care provider, the agency may not request new information from the . . . provider. However, a health care provider representing the agency . . . may contact the health care provider who completed the medical certification, with the employee's permission, for purposes of clarifying the medical certification.

5 C.F.R. § 630.1207(d) provides, in pertinent part: "If the agency doubts the validity of the original certification provided . . . , the agency may require, at the agency's expense, that the employee obtain the opinion of a second health care provider . . ."

29 C.F.R. § 825.307 provides, in pertinent part: "If an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider. However, the employer may contact the . . . provider for purposes of clarification . . . of the medical certification . . ."

DOJ Order 1630.1B, Chapter 4, entitled "Sick Leave," describes the Agency's rules regarding sick leave. *See* Exceptions, Attach. E.

IV. Analysis and Conclusions

The Union argues that the Arbitrator's finding that the Union failed to comply with the procedural requirements of the agreement is based on a nonfact and is contrary to law. A finding that a party has failed to comply with the procedural requirements of a collective bargaining agreement constitutes a procedural-arbitrability finding. *See AFGE, Local 3615*, 65 FLRA 647, 649 (2011).

The Authority generally will not find an arbitrator's ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the procedural-arbitrability ruling itself. *U.S. Dep't of Veterans Affairs, Reg'l Office, Winston-Salem, N.C.*, 66 FLRA 34, 37 (2011). However, a procedural-arbitrability determination may be directly challenged and found deficient on the ground that it is contrary to law. *See U.S. Dep't of the Navy, Naval Air Station, Pensacola, Fla.*, 65 FLRA 1004, 1006 (2011) (*Navy*). In order for a procedural-arbitrability determination to be found deficient as contrary to law, the appealing party must establish that the determination is contrary to procedural requirements established by statute that apply to the parties' negotiated grievance procedure. *Id.* at 1006-07. In addition, the Authority has stated that a procedural-arbitrability determination may be found deficient on grounds that do not directly challenge the determination itself, which include claims that an arbitrator was biased or that the arbitrator exceeded his or her authority. *See U.S. Dep't of Def., Dependents Sch. – Eur.*, 66 FLRA 181, 183 (2011).

Here, the Union's nonfact exception directly challenges the Arbitrator's procedural-arbitrability ruling; it does not contend that the ruling is deficient for reasons that do not directly challenge the determination itself. Accordingly, the exception provides no basis for finding the ruling deficient, and we deny this exception.

With regard to the Union's contrary to law exception, the Union has not identified any procedural requirements established by statute that apply to the parties' negotiated grievance procedure, with which the Arbitrator's procedural-arbitrability determination conflicts. Therefore, the Union's contention provides no basis for finding that determination deficient. *See Navy*, 65 FLRA at 1007. Accordingly, we deny this exception.

V. Decision

The Union's exceptions are denied.