66 FLRA No. 34

UNITED STATES
DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOL - EUROPE
(Agency)

and

FEDERAL EDUCATION ASSOCIATION
(Union)

0-AR-4665

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DECISION

September 26, 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 Andree Y. McKissick 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 Back Pay Act (BPA), 5 U.S.C. § 5596, the Debt Collection Act (DCA), 5 U.S.C. § 5514 and 31 U.S.C. § 3716, and the parties' collective bargaining agreement (CBA) by its omissions, delays, and administrative errors regarding the pay and earnings, interest, and Thrift Savings Plan (TSP) matching funds of named grievants. The Arbitrator directed: (1) a stay of collections; (2) an augmented, fourteen-step audit; and (3) specific remedies for individual grievants. For the reasons set forth below, we deny the Agency's exceptions.

II. Background and Arbitrator's Awards

The Union filed a grievance on behalf of several employees, alleging that the Agency had failed to: (1) pay and/or demonstrate correct payment of earnings, interest, and TSP matching funds; and (2) comply with the procedures set forth in §§ 5 and 10 of the DCA, and Article 45 of the CBA.[1] Exceptions, Attach. 2 at 1-2.

[1] Section 5 of the DCA states, in pertinent part:

> (a)(2) . . . [T]o collect any indebtedness of an individual, the head of the agency . . . or his designee, shall [first] provide the individual with --
>
> (A) a minimum of thirty days written notice, informing such individual of the nature and amount of the indebtedness . . ., the intention of the agency to initiate proceedings to collect the debt through deductions from pay, and an explanation of the rights of the individual under this subsection;
>
> (B) an opportunity to inspect and copy Government records relating to the debt;
>
> (C) an opportunity to enter into a written agreement with the agency, under terms agreeable to the head of the agency or his designee, to establish a schedule for the repayment of the debt; and
>
> (D) an opportunity for a hearing on the determination of the agency concerning the existence or the amount of the debt, and in the case of an individual whose repayment schedule is established other than by a written agreement pursuant to subparagraph (C), concerning the terms of the repayment schedule.

5 U.S.C. § 5514.

Section 10 of the DCA states, in pertinent part:

> (a) . . . . The head of the agency may collect [a claim] by administrative offset only after giving the debtor --
>
> (1) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor under this section;
>
> (2) an opportunity to inspect and copy the records of the agency related to the claim;
>
> (3) an opportunity for a review within the agency of the decision of the agency related to the claim; and

When the grievance was not resolved, it was submitted to arbitration, where the Arbitrator summarized the issues submitted by the parties as: (1) whether the Agency violated laws, rules, regulations, past practice, and the CBA "by failing to pay and/or demonstrate payment of correct pay, interest, [TSP] matching funds, and lost earnings, and by failing to comply with the [DCA] and Article 45 of the CBA;" (2) whether the grievance contains a "lack of specificity" or an "inadequacy of information;" and (3) what remedies should be provided if violations are found. Award at 3-4.

As an initial matter, although the grievance originally named nineteen grievants, the Arbitrator noted the Agency's statement that five grievants withdrew prior to the hearing. *Id.* at 9. Also as an initial matter, the Arbitrator found that the grievance was timely filed because ongoing pay problems constitute a "continuing condition which can be grieved at any time" under the CBA. *Id*. at 30. In addition, the Arbitrator disagreed with the Agency's claim that the grievance was deficient because it lacked specificity or inadequate information, finding that the Agency: (1) could have determined the details of the individual grievances from several of its own sources, *id.* at 31; and (2) had ample actual and/or constructive notice of the specifics of each case from certain form letters that had been mailed by each grievant and timely received by the Agency, *id.* at 32.

Turning to the merits, the Arbitrator found that the Agency violated the BPA, §§ 5 and 10 of the DCA, and Article 45 of the CBA by, among other things, failing to follow certain required procedures. *Id.* at 31-32, 40. The Arbitrator also found that the Agency was in noncompliance with earlier arbitration awards that required the Agency to fully meet the terms of a previously directed, fourteen-step audit. The Arbitrator directed the Agency to augment the fourteen-step audit to include more helpful and efficient methods in order to expedite a remedy for each of the affected grievants. *Id.* at 33-35.

In addition, the Arbitrator stated that given the ongoing and systemic pay problems, "consent orders" are a "cost-efficient" method to resolve pay disputes and "must continue [to be used] to remedy these situations." *Id*. at 35. Further, with respect to one of the named grievants (Educator Eleven), the Arbitrator found that the Agency did not present any government-wide regulatory authority precluding it from crediting that grievant's prior experience in determining the grievant's appropriate pay level. Accordingly, the Arbitrator found that the grievant's experience entitled her to have been hired at a higher step, with greater salary and benefits. *Id.* at 36-37.

Based on the foregoing, the Arbitrator directed that the Agency: (1) stay collections as to each grievant; (2) conduct augmented audits within sixty days of the award; and (3) provide proof within ninety days that the affected grievants were made whole. *Id.* at 37, 40. The Arbitrator retained jurisdiction to: (1) ensure full compliance with the DCA's procedural safeguards; (2) remedy the systemic problems relative to the Voluntary Leave Transfer Program as it pertained to one of the named grievants; and (3) entertain a motion for attorney fees. *Id*. at 37-38.[2]

III. Positions of the Parties

A. Agency's Exceptions

The Agency claims that the Arbitrator exceeded her authority by affording a remedy to nineteen grievants even though five grievants had withdrawn prior to the hearing. Exceptions at 2-3. In addition, the Agency claims that, if the Arbitrator intended to require the Agency to sign consent orders "admitting liability," then the Arbitrator also exceeded her authority in this respect. *Id*. at 10.

Further, the Agency contends that the portion of the award finding that the Agency violated the DCA and the CBA by failing to provide the grievants various procedural protections is contrary to law. *Id.* at 3. In this connection, the Agency argues that it was not required to follow the procedural protections of § 5 of the DCA and the CBA in regard to the recovery of overpayments for living quarter allowances (LQAs). Instead, the Agency

> (4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.

31 U.S.C. § 3716.

Article 45 of the CBA, entitled "Debt Collection Act Procedures," states, in pertinent part:

> Section 1 – Unit employees shall be entitled to an oral hearing . . . . Further, unit employees shall have the right of reasonable pre-hearing discovery and the opportunity to question material government witnesses concerning their calculations and conclusions of indebtedness, . . . [;] Section 3 – All hearings held pursuant to the [DCA] will take place at the overseas work site . . . [;] Section 5 – In the event the Agency violates the [DCA] or the provisions of this Article, a grievance may immediately be filed. . . .

Exceptions, Attach. 8.

[2] Although the Arbitrator did not have a motion for attorney fees before her, she opined that the Union is the prevailing party. Award at 38.

contends that it properly followed the less stringent requirements of § 10 of the DCA. For support, the Agency cites *United States Department of Defense Dependents Schools*, 53 FLRA 196 (1997) (*DODDS*). Exceptions at 5-6.

Moreover, the Agency argues that the Arbitrator's findings with regard to Educator Eleven are contrary to the Agency's Educator Applicant Evaluation Guide (Guide). Specifically, the Agency contends that the Arbitrator's determination that Educator Eleven's experience entitled her to a higher step for pay purposes conflicts with the Guide, which constitutes a "rule" that governs whether and when prior experience may be credited. *Id*. at 6-8.

Finally, the Agency claims that the award fails to draw its essence from Article 12 of the CBA[3] because the Arbitrator failed to find that matters that were raised for the first time at the hearing or that had not been raised earlier in the grievance process were "beyond the scope of this particular arbitration." *Id.* at 8-9.[4]

B. Union's Opposition

The Union argues that the Arbitrator did not exceed her authority because she did not award relief to all nineteen of the named grievants, Opp'n at 9, or by endorsing "consent orders," *id.* at 33-35. The Union also argues that the award is not contrary to law. *Id.* at 9-18. In this regard, the Union claims that the Agency failed to make its argument regarding the Guide to the Arbitrator and that, even if the Agency had done so, the exception should be denied because: (1) under the CBA, personnel matters are governed by laws and government-wide regulations that cannot be superseded by any non-government wide regulations, *id*. at 19; (2) the Guide is not a "rule," *id*. at 19-20; (3) the Agency failed to produce any statutory or government-wide regulatory authority that precludes crediting Educator Eleven's experience, *id.* at 25-26; and (4) the Arbitrator's factual findings are consistent with the applicable standard of law, *id.* at 26-27. Finally, the Union argues that the award does not fail to draw its essence from the CBA. *Id.* at 27-33.

IV. Analysis and Conclusions

A. The Arbitrator's procedural-arbitrability finding is not deficient.

The Agency argues that the Arbitrator's procedural-arbitrability determinations -- that the grievance was timely and properly filed under the CBA -- fail to draw their essence from the CBA. 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, the Authority has stated that a procedural-arbitrability determination may be found deficient on the ground that it is contrary to law. *Id.* 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. *Id.*

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

B. The award is not contrary to law, rule, or regulation.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (*DoD).* In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

[3] The pertinent provisions of Article 12 are Sections 1, 6, and 7.B. Section 1 provides, in pertinent part: "It is the intent of the parties to resolve grievances informally at the earliest possible time and at the lowest possible level." Award at 5. Section 7.B. provides, in pertinent part: "Those grievances resulting from continuing conditions may be presented at any time." Exceptions, Attach. 3 at 7. For the sake of brevity, we paraphrase the pertinent part of Section 6, which essentially provides that either the Agency or the Union may proceed to arbitration if dissatisfied with the final decision in a grievance by submitting the appropriate form to the other party within sixty calendar days after the date of the receipt of the grievance case file. *See* Award at 7.

[4] In addition, although the Agency acknowledges that the issue of attorney fees is premature, the Agency states for the record that it disagrees with the Arbitrator's statements regarding this issue in the award. Exceptions at 11-12. As the Union agrees that the matter is premature because attorney fees have not been awarded, we will not address that issue further.

1. The Guide

The Union argues that the Authority should not consider the Agency's arguments regarding the Guide -- including the argument that the Guide is a "rule" -- because the Agency did not make those arguments before the Arbitrator. Opp'n at 20. Even assuming that the arguments were properly raised below, and that the Guide is an Agency-wide "rule," the Authority has held that when a collective bargaining agreement and an agency-wide rule both apply to a matter, the CBA governs the matter's disposition. *See U.S. Dep't of Agric. Forest Serv., Monongahela Nat'l Forest*, 64 FLRA 1126, 1129 (2010). Here, the Arbitrator effectively interpreted the CBA as requiring the Agency to produce a government-wide regulatory authority in order to preclude crediting the grievant's prior experience for a higher pay level.[5] *See* Award at 35-36. In these circumstances, the CBA, not the Guide, governs. Consequently, the Agency's reliance on the Guide does not provide a basis for finding the award deficient, and we deny the exception.

2. LQAs and the DCA

The Agency claims that the award is contrary to law because, with regard to recouping overpayments of LQA advances, the Agency was required to follow the procedures set forth in § 10 of the DCA, not those set forth in § 5 of the DCA. In *DODDS*, the Authority held that, when the Agency recoups overpayments of LQA advances, it may apply its "own procedures, which are substantively the same as the procedures set forth in [§] 10 of the DCA." 53 FLRA at 205. Section 10 of the DCA requires agencies to provide: (1) a meaningful written notice of the type and amount of an LQA overpayment claim; (2) a meaningful opportunity to inspect, copy, and review records relating to the claim; and (3) the debtor with an opportunity to make a written agreement with the head of the agency to repay the amount of the claim. *See supra*, note 1. In effect, these requirements presuppose accurate, existing records.

The Arbitrator credited the grievants' version of events, *see* Award at 32, which resulted in her finding that: (1) some debt letters failed to fully apprise grievants of rights, *id.* at 26; and (2) there were missing or incorrect records with regard to LQA amounts, *id*. at 26, 27, 29. In addition, the Arbitrator found that the Agency supplied incorrect and incomplete records with regard to other grievants' pay/debt issues or did not supply some records at all. *Id*. at 26-30, 40. In conducting a de novo review of the Agency's contrary to law exception, we defer to these factual findings. *See DoD*, 55 FLRA at 40. In turn, these factual findings of incomplete debt letters, and missing and incomplete records support the Arbitrator's legal conclusion that the Agency failed to satisfy § 10 of the DCA with regard to LQA claims. Award at 40. Accordingly, we deny the exception.[6]

C. The Arbitrator did not exceed her authority with regard to remedies.

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. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996) (*AFGE*). Further, although an arbitrator may not award relief to non-grievants, the mere fact that an arbitrator's remedy affects non-grievants does not demonstrate that the arbitrator exceeded his or her authority. *See SSA, Louisville, Ky.*, 65 FLRA 787, 790 (2011).

The Agency's claim that the Arbitrator exceeded her authority by affording a remedy to nineteen grievants is unsupported. The Arbitrator acknowledged that five grievants withdrew prior to the hearing. *See* Award at 9, 26-30 (listing findings of fact of current pay deficiencies regarding fourteen of the original nineteen grievants).[7] Moreover, the Arbitrator's remedies are specifically limited to the fourteen grievants who had not withdrawn from the grievance. *See id.* at 36-40. Thus, the Arbitrator did not exceed her authority by awarding relief to those not encompassed within the grievance, and we deny this exception. *See AFGE*, 51 FLRA at 1647.

In addition, the Agency also contends that the Arbitrator exceeded her authority if she intended to require the Agency to sign "consent orders" in this case in order to admit its liability. Exceptions at 10. In this connection, the Arbitrator agreed generally with the Union that consent orders "must continue to remedy these situations expeditiously" as a cost-efficient way to

[5] The Union asserts, and there is no dispute, that Section 2 of the CBA states that the administration of all matters covered by the CBA shall be governed by laws and regulations in effect on September 18, 1989, and that the CBA supersedes any non-government-wide regulations or directives pertaining to personnel policy or practices that are in conflict with the CBA. Opp'n at 19.

[6] We note that the Arbitrator addressed the pay problems of grievants with regard to not only LQA issues, but also issues such as backpay, interest, and the TSP. As for those grievants, the Agency does not allege that the Arbitrator erred by finding that the Agency violated § 5 of the DCA. Further, to the extent that the Agency may be arguing that the Arbitrator found violations of § 5 in connection with LQA issues, there is no basis in the award for concluding that the Arbitrator did so.

[7] Although the Arbitrator titled this part of her award "Findings of Fact of Current Deficiencies of Nineteen Educators," Award at 26, this error was harmless because she proceeded to discuss only the fourteen remaining grievants.

remedy ongoing and systemic pay problems. Award at 35. However, she did not specifically order this device as an admission of liability with regard to any of the named grievants as part of the remedy. *See id.* at 35-37, 40. Thus, the Agency's contention provides no basis for finding that the Arbitrator exceeded her authority. Therefore, we deny this exception.

V. Decision

The Agency's exceptions are denied.