

67 FLRA No. 15

UNION OF PENSION EMPLOYEES
(Union)

and

PENSION BENEFIT
GUARANTY CORPORATION
(Agency)

0-AR-4832

DECISION

December 7, 2012

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

The Union filed exceptions to an award of Arbitrator Jonathan E. Kaufmann under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator found that the grievance was not arbitrable because it was precluded by the parties' collective-bargaining agreement (CBA) and § 7121(g) of the Statute. For the reasons set forth below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Agency notified the grievant that her performance was unsatisfactory and that she was being denied a within-grade increase (WIGI). Award at 2. The grievant appealed the WIGI denial to the Merit Systems Protection Board (MSPB) alleging, among other things, that the Agency's action constituted retaliation. *Id.*

Subsequently, the grievant filed a grievance contesting the WIGI denial. *Id.* The grievance was filed pursuant to a memorandum of understanding (MOU), which continued in effect some provisions of the parties' expired CBA, including the negotiated grievance procedure and arbitration clause. *Id.* at 1.

After the grievance was filed, an MSPB administrative judge issued an initial decision,

concluding that the MSPB did not have jurisdiction over the grievant's appeal because the retaliation claim did not constitute a claim of prohibited discrimination, and because the parties' negotiated grievance procedure was the exclusive means of resolving a dispute over a denial of a WIGI. *Id.* at 2-3. The grievant appealed the initial decision to the MSPB. *Id.* at 3. Shortly thereafter, the Union invoked arbitration over the grievance. *Id.* The issue before the Arbitrator at arbitration was "[i]s the grievance filed by the Union . . . arbitrable?" *Id.* at 1.

While the matter was pending before the Arbitrator, the MSPB issued a decision reversing the administrative judge. *Id.* As relevant here, the MSPB found that, although under § 7121(a), the negotiated grievance procedure generally provides the exclusive remedy for WIGI denials when the grievant is covered by a CBA, the expired negotiated grievance procedure did not constitute a CBA and, therefore, the exclusivity provision of § 7121(a) did not apply. Exceptions, Ex. 15 at 4.

Subsequent to the MSPB's decision, the Arbitrator issued the award under review here. The Arbitrator determined that the Union had timely notice of the Agency's intent to challenge the arbitrability of the grievance by virtue of the Agency providing oral notice. Award at 25. The Arbitrator also rejected the Union's claim that oral notice was insufficient under Article 3, Section 3(1)(A)(4) of the parties' agreement.¹ *Id.* at 24-25. According to the Arbitrator, that contract provision applied only to challenges based on procedural arbitrability – not the Agency's claim that the Arbitrator lacked jurisdiction over the substance of the claim. *Id.* at 25-26.

The Arbitrator concluded that Article 21, Section 6(1) of the CBA – requiring an employee with a "potential discrimination claim" to choose one procedure

¹ Article 3, Section 3(1)(A)(4) of the CBA provides:
The Employer will notify the Union in writing of any allegations of non-grievability or non-arbitrability within thirty (30) days after the Union has invoked arbitration or prior to any hearings in expedited arbitration, whichever occurs first. Failure to raise non-grievability or non-arbitrability within this period serves to waive the Employer's rights to raise these issues with the Arbitrator.

Exceptions at 21.

to pursue the claim² – precluded the grievant from pursuing the grievance. *Id.* at 30. The Arbitrator found that, because the grievant chose to pursue her retaliation claim, a potential discrimination claim, in a statutory forum, Article 21, Section 6(1) barred the filing of a subsequent grievance over the same matter. *Id.*

The Arbitrator also determined that § 7121(g) of the Statute precluded him from considering the grievance. *Id.* at 27. In addition, the Arbitrator noted that the issue before him was the same as the issue decided by the MSPB. *Id.* at 26.

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the award fails to draw its essence from the CBA because the Agency did not provide written notice of its allegation of non-arbitrability within thirty days of the Union invoking arbitration and because oral notice is insufficient under Article 3, Section 3(1)(A)(4) of the CBA. Exceptions at 20. The Union claims that the Arbitrator incorrectly found that Article 3, Section 3(1)(A)(4) did not apply to substantive-arbitrability challenges because, according to the Union, that provision does not make a distinction between procedural and substantive arbitrability. *Id.* at 21. However, the Union argues that, even if the provision applies only to procedural-arbitrability issues, the award still fails to draw its essence from the CBA. *Id.* at 21-22. In this regard, the Union asserts that the issue of election of forums concerns procedural arbitrability. *Id.* at 22.

The Union also argues that the award fails to draw its essence from the CBA because the Arbitrator erroneously found that Article 21, Section 6(1) of the CBA applied to the choice between the negotiated grievance procedure and MSPB appeal procedures. *Id.* at 18. According to the Union, Article 21, Section 6(1) of the CBA concerns elections between the negotiated grievance procedure and the Equal Employment Opportunity (EEO) process, not MSPB appeal procedures. *Id.* at 19.

² Article 21, Section 6(1) of the CBA provides:

An employee who has a potential discrimination claim against the Employer must choose to pursue that claim as a grievance or as an [Equal Employment Opportunity] complaint; an employee cannot choose to pursue a claim using both processes. Once an employee chooses to proceed in one forum, the employee cannot switch to the other forum.

Exceptions at 19.

Moreover, the Union contends that the Arbitrator's award is contrary to several provisions of law. According to the Union, the award is contrary to § 7121(a) of the Statute, which makes the negotiated grievance procedure the exclusive procedure for challenging the denial of a WIGI. *Id.* at 12. The Union also claims that the award is contrary to § 7121(d) and § 7121(g) because those provisions are inapplicable to employees of government corporations, such as the Agency. According to the Union, § 7121(d) and (g) refer to discrimination claims under 5 U.S.C. § 2302(b)(1), but § 2302 (a)(2)(c)(i) excludes government corporations from the definition of agency for purposes of § 2302(b)(1). *Id.* at 14-16.

According to the Union, the Arbitrator's decision that the same matter cannot be adjudicated in two forums is also contrary to law. *Id.* at 23. The Union claims that EEO regulations provide that an employee may pursue a grievance and a claim of discrimination separately because employees of government corporations, such as the Agency, are not subject to § 7121(d). *Id.*

Finally, the Union contends that the award is based on a nonfact because the Arbitrator erroneously found that the MSPB appeal included a claim of discrimination. *Id.* at 18.

B. Agency's Opposition

The Agency argues that the award does not fail to draw its essence from the CBA. Opp'n at 20. The Agency also claims that the award is not contrary to law, *id.* at 11, or based on a nonfact, *id.* at 17.

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union argues that the Arbitrator's conclusion – that the grievant's MSPB appeal contained a claim of discrimination – was based on a nonfact. Exceptions at 18. 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. *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).

The Union argues that the grievant's MSPB appeal did not include a claim of discrimination. Exceptions at 18 (citing Exceptions, Ex. 5, MSPB Appeal). To the extent that the Union is arguing that the Arbitrator erred in finding that the grievant's claim of retaliation constituted a claim of discrimination, the Union does not argue that the Arbitrator's award is contrary to law on that basis. Further, the determination

that retaliation is prohibited discrimination is a legal conclusion and cannot be challenged as a nonfact. *See AFGE, Local 801, Council of Prison Locals 33*, 58 FLRA 455, 456-57 (2003) (finding that an arbitrator's legal conclusions cannot be challenged as nonfacts).

In addition, to the extent that the Union argues as a factual matter that the MSPB appeal did not include a claim of discrimination, retaliation or otherwise, the record reflects that the grievant amended her MSPB appeal to include a claim of retaliation. Exceptions, Ex. 13, Initial Decision at 4-5. Therefore, the Union has failed to establish that the Arbitrator made a clearly erroneous factual determination. *See U.S. DOD, Def. Logistics Agency, Sharpe Depot, Lathrop, Cal.*, 47 FLRA 854, 860 (1993) (denying nonfact exception where the union did not demonstrate that the fact was clearly erroneous). Accordingly, we deny this exception. *See id.*

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

In 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. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). 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 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 U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

The Union contends that the award fails to draw its essence from Article 3, Section 3(1)(a)(4) of the CBA because the Agency did not challenge arbitrability within thirty days as required by the CBA. Exceptions at 21. The Arbitrator's finding that the Agency timely raised a claim regarding the grievant's election of a forum is a procedural-arbitrability determination. *See AFGE, Local 2823*, 64 FLRA 1144, 1146 (2010) (*Local 2823*) (finding the award to involve a procedural-arbitrability issue because it involved whether the procedural conditions necessary to determine the substantive arbitrability of the grievance had been met). 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. *See, e.g., AFGE, Local 3882*, 59 FLRA 469, 470 (2003) (*Local 3882*). The Union's first essence exception directly challenges

the Arbitrator's procedural-arbitrability determination and, therefore, does not provide a basis for finding the award deficient. Accordingly, we deny this exception. *See Local 2823*, 64 FLRA at 1146.

The Union appears to contend that the Arbitrator's conclusion – that Article 21, Section 6(1) of the CBA precluded the grievant from electing the negotiated grievance procedure after pursuing an MSPB appeal – is both a procedural-arbitrability determination and a substantive-arbitrability determination. *Compare* Exceptions at 22 (arguing that the choice of forums is a procedural-arbitrability determination), *with id.* at 19 (arguing that the Arbitrator's application of Article 21, Section 6(1) failed to draw its essence from the CBA). However, we do not need to decide whether the conclusion was procedural or substantive because, in either event, the Union's argument is without merit.

As stated above, a direct challenge to an arbitrator's procedural-arbitrability ruling does not provide a basis for finding the award deficient. *See Local 3882*, 59 FLRA at 470. If the Union is correct that the Arbitrator made a procedural-arbitrability determination based on Article 21, Section 6(1), then its essence exception would constitute a direct challenge to that determination and, as a result, would fail. *See U.S. Dep't of the Treasury, IRS, Austin, Tex.*, 60 FLRA 360, 361-62 (2004) (denying an essence exception because the excepting party challenged the arbitrator's interpretation and application of a procedural provision of the parties' agreement).

On the other hand, even if the Arbitrator made a substantive-arbitrability determination, the Union's argument also would fail. The Union argues that the award fails to draw its essence from the CBA because Article 21, Section 6(1) concerns elections between the negotiated grievance procedure and the EEO process, rather than MSPB appeal procedures. Exceptions at 19. As stated above, Article 21, Section 6(1) provides that an employee with a potential discrimination claim must pursue it either as a grievance or an EEO complaint, but not both. Award at 29; *supra* note 2. The Arbitrator interpreted this provision as prohibiting the grievant from filing a grievance over a matter containing a potential discrimination claim after the grievant chose to pursue that claim in a statutory forum. Award at 30.

The Authority has held that, where the parties' agreement does not preclude an arbitrator's interpretation, the award does not fail to draw its essence from the agreement. *See U.S. Dep't of the Air Force, Ogden Air Logistics Ctr., Hill Air Force Base, Utah*, 35 FLRA 1267, 1271 (1990). Article 21, Section 6(1) specifically addresses "potential discrimination claim[s]" and requires a choice between pursuing those claims as a grievance or as an "EEO complaint." Exceptions at 19.

The provision does not require a choice between the grievance procedure and the process for resolving discrimination claims established by the Equal Employment Opportunity Commission. As discussed above, the Arbitrator found that the grievant raised discrimination allegations before the MSPB. In addition, nothing in the provision precludes the Arbitrator's application of it to the grievance. That is, it was not irrational for the Arbitrator to interpret Article 21, Section 6(1) as requiring a grievant with a discrimination claim to choose between the grievance procedure and *any* statutory forum, including the MSPB. Accordingly, because the Union has not established that the CBA precludes the Arbitrator's application of the election requirement in Article 21, Section 6(1) to the grievance, we find that the Union has not shown that the Arbitrator's interpretation of the CBA is irrational, unfounded, implausible, or in manifest disregard of the agreement. Thus, we deny this exception. *See NAIL, Local 5*, 65 FLRA 502, 504-05 (2011) (denying an essence exception where the union did not show that the arbitrator's application of a provision of the parties' agreement was irrational).

C. The award is not deficient on any other grounds.

The Union also contends that the award is contrary to law on several grounds. Exceptions at 12-18, 23-24. The Authority has held that where an arbitrator bases his or her award on separate and independent grounds, an excepting party must establish that all of the grounds are deficient in order to demonstrate that the award is deficient. *See, e.g., U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000). If the excepting party does not demonstrate that one of the separate and independent grounds for the award is deficient, then it is unnecessary for the Authority to resolve exceptions concerning the other separate and independent ground(s). *See id.*

Here, the Arbitrator determined that the grievance was not arbitrable under both Article 21, Section 6(1) of the CBA and § 7121(g). Award at 31. These determinations constitute separate and independent grounds for the Arbitrator's award. *See U.S. Dep't of VA, Med. Ctr., Hampton, Va.*, 65 FLRA 125, 129 (2010) (finding that, where an arbitrator based an award on two different contract provisions, they constituted separate and independent grounds for the award). As discussed above, we have denied the Union's essence exception. Because the Union has not established that the Arbitrator's non-arbitrability finding fails to draw its essence from the CBA, and that finding is a separate and independent ground for the award, it is unnecessary to resolve the Union's other exceptions. *See NFFE, Local 1001*, 66 FLRA 647, 649 (2012). Therefore, as the

Arbitrator's finding pursuant to the CBA constitutes a separate and independent ground for his award, we find that the Union's other exceptions provide no basis for setting aside the award and deny these exceptions. *See Broad. Bd. of Governors*, 66 FLRA 380, 385-86 (2011).

V. **Decision**

We deny the Union's exceptions.