73 FLRA No. 93

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 116
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
(Agency)

0-AR-5826

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DECISION

March 16, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator Stephen E. Alpern issued an award finding that he lacked jurisdiction to consider the merits of the Union's two grievances because they concerned a probationary employee's termination. The Union filed nonfact, contrary-to-law, and essence exceptions. For the reasons explained below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

In September 2021, the Agency discovered that a probationary employee (the probationer) made a disparaging remark about a training instructor. The Agency told the probationer to apologize. During an Agency-directed meeting, the probationer asked for the training instructor's forgiveness and apologized. The Agency later terminated the probationer based on his disparaging remark.

The Union filed a grievance alleging the Agency misled the probationer into believing that if he apologized to the instructor, then the Agency would not discipline him. Specifically, the Union alleged that the Agency violated Article 31 of the parties' agreement[1] and Agency policy[2] by deceiving the probationer. As a remedy, the Union requested the probationer's reinstatement and that "no other bargaining[-]unit employees be deceived in this manner."[3] The Agency denied the grievance, and refused a step-one grievance meeting (step-one meeting) with the Union.

Subsequently, the Union filed a second grievance alleging the Agency violated Article 27 of the parties' agreement by not conducting the step-one meeting over the first grievance.[4] The Union alleged that the Agency's failure to conduct the step-one meeting constituted a "refus[al] to consult or negotiate in good faith," in violation of the agreement.[5] As a remedy, the Union requested, as relevant here, that the Agency comply with Article 27 of the parties' agreement by holding a step-one meeting with the Union. The parties consolidated the grievances for arbitration.

The Arbitrator framed the issues as: (1) "Is the termination of the [probationer] during his probationary period a matter subject to the [parties' a]greement?"; and (2) "Are the other issues raised in the consolidated grievances properly before the Arbitrator?"[6]

Before the Arbitrator, the Agency argued that Article 27, setting forth the parties' negotiated grievance procedure, excludes grievances over probationary employees' separations "except as permitted by law or government-wide regulation."[7] Arguing there was "nothing in federal law or regulations that permit[ted]" such grievances, the Agency contended that both of the Union's grievances were excluded from the negotiated grievance procedure.[8] As a result, the Agency asserted that it was not required to hold the step-one meeting over the first grievance.

The Union, on the other hand, claimed that the Agency violated the Federal Service Labor-Management Relations Statute (the Statute) by repudiating an unwritten agreement in which the Agency allegedly promised to not

[1] Article 31, Section 4.A. states, in relevant part, that "Employees and Agency managers shall conduct themselves in a professional and businesslike manner, characterized by mutual courtesy, in their day[-]to[-]day working relationships." Exceptions, Joint Ex. 1, Nat'l Collective-Bargaining Agreement (CBA) at 153.

[2] The Union alleged that the Agency's conduct violated the "Standards of Conduct, Section 7.3, '[I]ntegrity Related Misconduct,' and [Section] 7.4, 'False Statements.'" Award at 4.

[3] Exceptions, Joint Ex. 2, First Grievance (First Grievance) at 2.

[4] Article 27, Section 12 states, in relevant part, that "Absent mutual agreement, the lowest level management official available with the authority to resolve the complaint will, in collaboration with the local Union [c]hapter, schedule and hold the requested meeting within seven (7) days of the date of receipt of the request." CBA at 126.

[5] Exceptions, Joint Ex. 3, Second Grievance (Second Grievance) at 2.

[6] Award at 6.

[7] *Id.* at 8; *see* CBA at 123-30 (Article 27).

[8] Award at 8.

discipline the grievant if he apologized.[9] The Union argued that its grievances were arbitrable because they alleged violations of the Statute. For support, the Union cited *FDIC, Division of Depositor & Asset Services, Oklahoma City, Oklahoma* (*FDIC*),[10] in which the Authority found arbitrable a grievance alleging that the non-renewal of a temporary appointment was an unfair labor practice (ULP).

The Arbitrator observed that Article 27, Section 3.F. of the parties' agreement states that "[t]he separation of an employee during a probationary . . . period, except as permitted by law or government-wide regulation" is "excluded from the grievance procedure."[11] The Arbitrator found the Union failed to address post-*FDIC* federal court and Authority decisions that specifically concerned probationary employees. Citing one such Authority decision, the Arbitrator found that when an agreement specifically excludes probationary employees' separations from the grievance procedure, "as does the [a]greement at issue in this case," ULP claims relating to the separations "cannot be raised in the grievance procedure."[12] The Arbitrator asserted that "no matter how [a] claim is dressed, if it arises out of the discharge of a probationary employee[, then] it may not be the subject of a grievance."[13]

Applying these principles, the Arbitrator found that even if the first grievance alleged a ULP, all of that grievance's allegations "ar[o]se out of the [probationer]'s termination."[14] The Arbitrator determined that he was precluded from "look[ing] behind management's conduct which led to the [probationer's] discharge."[15] Having found that the first grievance was not subject to the grievance procedure, the Arbitrator held that the Agency "had no obligation[] to meet at [s]tep [one] of the grievance p[rocedure]."[16] Accordingly, the Arbitrator dismissed both grievances.

On July 16, 2022, the Union filed exceptions to the award, and on August 15, 2022, the Agency filed its opposition.

III. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union contends that the award is based on a nonfact because the Arbitrator erroneously referred to the probationer as the grievant even though both grievances stated that the Union was the grievant.[17] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[18]

We agree that the Arbitrator erroneously stated the probationer was the grievant when, in fact, it was the Union.[19] However, the Union does not demonstrate that, but for the alleged error, the Arbitrator would have reached a different result. The Arbitrator dismissed the grievances based on his conclusion that they both arose from the discharge of a probationary employee – a matter not subject to the grievance procedure.[20] As discussed further below, the Union does not demonstrate that the Arbitrator's conclusion is deficient on contrary-to-law or essence grounds. Under these circumstances, the Arbitrator's mischaracterization of the grievant is not central to the award. Accordingly, we deny this exception.[21]

B. The award is not contrary to law.

The Union contends that the award is contrary to law for several reasons.[22] When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.[23] Applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[24] In making that assessment, the Authority defers to the arbitrator's underlying factual filings unless the excepting party establishes that they are nonfacts.[25]

First, the Union contends that its grievances are arbitrable because the Union alleged a violation of the

[9] *See* Exceptions, Attach. B, Union Post-Hr'g Br. at 14.
[10] 49 FLRA 894 (1994) (*FDIC*).
[11] Award at 7 (citing CBA at 123-24).
[12] *Id.* at 12 (citing *NTEU, Chapter 193*, 65 FLRA 281 (2010) (*NTEU 2010*)).
[13] *Id.*
[14] *Id.* at 10.
[15] *Id.* at 12. The Arbitrator repeatedly referred to the probationer as "the grievant." *Id.* at 2-4, 6, 8-10, 12. As discussed further below, the Union, not the probationer, was the grievant.
[16] *Id.* at 12-13.
[17] Exceptions Br. at 16-18.
[18] *AFGE, Loc. 2052, Council of Prison Locs. 33*, 73 FLRA 59, 63 (2022) (*Loc. 2052*) (Chairman DuBester concurring).
[19] *See* First Grievance at 8; Second Grievance at 13.
[20] Award at 12.
[21] *See Loc. 2052*, 73 FLRA at 63 (finding the excepting party failed to demonstrate how the arbitrator's erroneous statements "affect[ed] the [a]rbitrator's conclusion that the [a]gency had no obligation to bargain"); *AFGE, Loc. 1101*, 70 FLRA 644, 646 (2018) (Member DuBester concurring) (finding the excepting party did not establish the arbitrator's alleged misstatement that "the president was 'the grievant'" was a central fact underlying the award, but for which the arbitrator would have reached a different result).
[22] *See* Exceptions Br. at 23-32.
[23] *See U.S. Dep't of the Army, U.S. Army Garrison Redstone Arsenal, Huntsville, Ala.*, 73 FLRA 210, 211 (2022).
[24] *See id.*
[25] *See id.*

Statute.[26] Specifically, the Union claims that the Agency and Union reached an unwritten agreement that if the probationer apologized to the training instructor, then the Agency would not terminate his employment.[27] According to the Union, the Agency "repudiated th[at] collective[-]bargaining agreement when it terminated the [probationer]."[28]

As a general matter, the termination of a probationary employee is not grievable or arbitrable as a matter of law.[29] However, the Authority has held that a probationary employee's termination in violation of the Statute is a ULP that can be pursued through *statutory* procedures.[30]

The Authority has not expressly held that a probationary employee's termination in violation of the Statute can never be pursued through negotiated grievance procedures.[31] Nevertheless, the Authority has at least *implied* as much. In *NTEU*[32] – a negotiability case – the Authority addressed a union proposal that would have permitted the union to grieve and arbitrate probationary employees' terminations that were allegedly in violation of statutes, including the Statute.[33] The Authority found the proposal was inconsistent with 5 C.F.R. § 315.806.[34] Although that regulation concerns appeal rights to the Merit Systems Protection Board – and the Authority did not specifically address the grievability or arbitrability of ULPs under the Statute – most of the Authority's discussion focused on Congress's intent that probationary employees not be permitted to negotiate additional paths, beyond those provided by law or Office of Personnel Management regulations, for challenging their terminations.[35]

However, given the Arbitrator's contract interpretation and the issues presented in this case, we need not definitively resolve that question here. As the Arbitrator observed,[36] the Authority has held that where a negotiated grievance procedure "excludes complaints involving the separation of a probationary employee from the arbitration process," that exclusion may lawfully extend to grievances alleging that such a separation constitutes a ULP.[37] The parties' agreement specifically excludes a grievance concerning "[t]he separation of an employee during a probationary … period, except as permitted by law or government-wide regulation."[38] Thus, if no law authorizes a grievance concerning a probationary employee's termination, then the parties' agreement excludes it.

The Union does not cite any law that specifically permits a grievance concerning a probationary employee's termination. In fact, the Union declares that there is an *absence* of law by stating that neither the Authority nor the courts have addressed whether a probationary employee's termination is arbitrable when it is alleged to constitute a ULP.[39] Therefore, the Union does not establish that these grievances are "permitted by law or government-wide regulation," as the Arbitrator found the agreement requires.[40]

Although the Union cites *FDIC*, that case is distinguishable. *FDIC* concerned the termination of a *temporary* employee who engaged in alleged protected activity.[41] The arbitrator in *FDIC* concluded that an agency's decision not to renew the temporary employee's appointment was a ULP because it was motivated by anti-union animus, and that a grievance alleging such a ULP was grievable.[42] In contrast, this case concerns the termination of a *probationary* employee, and the Arbitrator concluded that the parties' agreement excludes grievances challenging such terminations.[43] Because *FDIC* concerns a different type of employee and a different contractual interpretation, it does not establish

[26] *See* Exceptions Br. at 27-32.
[27] *Id.* at 28.
[28] *Id.*
[29] *NTEU 2010*, 65 FLRA at 284 (citing *GSA, Region 2, N.Y.C, N.Y.*, 58 FLRA 588, 589 (2008) (*GSA*)).
[30] *See id.* (citing *U.S. Dep't of Agric., Food & Nutrition Serv., Alexandria, Va.*, 61 FLRA 16, 22 (2005)).
[31] *See id.* at 285.
[32] 67 FLRA 24 (2012), *aff'd sub nom. NTEU v. FLRA*, 737 F.3d 273 (4th Cir. 2013).
[33] *See id.* at 24 (noting the parties' agreement that the proposal addressed probationary employees' "termination[s]" and that the proposal's reference to "'a statute' refer[red] to any statute, including the [Statute]").
[34] *Id.* at 27.
[35] *See id.* at 26 ("Congress[] inten[ded] that collective bargaining *not* supplement probation[ary employees'] existing procedural protections") (citations omitted)); *id.* ("Congress determined . . . that a single additional forum available to other federal employees [to vindicate their rights] – a negotiated grievance procedure – would remain unavailable to probation[ary employees]." (citations omitted)).
[36] Award at 12 (citing *NTEU 2010*, 65 FLRA 281).
[37] *NTEU 2010*, 65 FLRA at 285.
[38] CBA at 124.
[39] *See* Exceptions Br. at 29 ("[T]his case presents an issue not yet directly addressed by the [Authority] or the courts . . . whether a [union] may grieve an alleged [ULP] violation where . . . one of the requested remedies . . . would be the reinstatement of a probationary employee."); *see also NTEU 2010*, 65 FLRA at 285 (excepting party did not "cite[] to a single case, in either its exceptions or at arbitration, where a probationary employee, otherwise precluded from using the contractual grievance process, was nevertheless permitted to file a ULP utilizing that process" (internal quotation marks omitted)).
[40] *See* CBA at 124.
[41] 49 FLRA at 895-96.
[42] *Id.* at 897.
[43] Award at 12-13.

that the Arbitrator erred in finding the probationer's termination was not grievable.

For the reasons above, we reject the Union's argument that its purported ULP allegation establishes that the Arbitrator erred as a matter of law by dismissing the grievances. However, nothing in our decision today should be read as holding that the probationer or the Union was precluded from filing a ULP charge with a Federal Labor Relations Authority regional office, instead of a grievance.[44]

Next, the Union alleges that the award is contrary to law because Article 27's definition of "grievance" mirrors the definition of grievance in § 7103(a)(9) of the Statute, and, therefore, the Arbitrator should have interpreted the parties' agreement consistent with the Authority's case law interpreting § 7103(a)(9).[45] According to the Union, because its first grievance alleged contractual and Agency-policy violations, it constituted a grievance under § 7103(a)(9)(B)[46] and § 7103(a)(9)(C)(i).[47] The Union also argues that its grievance was arbitrable under the Statute because Article 27, Section 3 does not exclude contractual and Agency-policy violations from the negotiated grievance procedure.[48]

However, the Authority has consistently held that a grievance claiming an agency failed to follow contractual procedures in terminating a probationary employee concerns the probationary employee's termination.[49] Moreover, the Authority has found that the Statute's general wording – including the definition of "grievance" in § 7103(a)(9) – provided no basis for reversing an arbitrator's conclusion that a probationer's grievance was inarbitrable.[50]

As discussed above, the Arbitrator found that the parties' agreement does not permit grievances over probationary employees' terminations, unless permitted by law or government-wide regulation, and the Union does not cite any law or government-wide regulation that specifically permits such grievances. Consequently, the above precedent supports the Arbitrator's conclusion that the Union's grievances, which allege the Agency failed to follow certain memorialized procedures related to the probationer's termination, are not arbitrable.[51]

Although the Union claims that it did not grieve the probationer's separation,[52] the Union requested the probationer's reinstatement as a remedy.[53] In addition, while the Union contends that the Agency's conduct at the September 2021 meeting is "extricable" from the probationer's termination,[54] the Article 31 and Agency-policy violations alleged in the first grievance arose from the probationer's termination.[55] Further, it is self-evident that the second grievance's allegations flow directly from the first grievance.[56] Therefore, all of the Union's allegations "arise out of the [probationer's]

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[44] *See NTEU 2010*, 65 FLRA at 285 n.4; *U.S. Dep't of HHS, SSA, Balt., Md. & SSA, Detroit Teleservice Ctr., Detroit, Mich.*, 42 FLRA 22, 23 (1991) (finding the Authority has jurisdiction under the ULP procedures of the Statute over a complaint alleging that the retaliatory termination of a probationary employee constituted a ULP).

[45] *See* Exceptions Br. at 23-27 (citing 5 U.S.C. § 7103(a)(9)).

[46] 5 U.S.C. § 7103(a)(9)(B) (defining "grievance" to include "any complaint . . . by any labor organization concerning any matter relating to the employment of any employee").

[47] *Id.* § 7103(a)(9)(C)(i) (defining "grievance" to include "any complaint . . . by any . . . labor organization . . . concerning . . . the effect or interpretation, or a claim of breach, of a collective[-]bargaining agreement"); *see* Exceptions Br. at 24-27; *see also* First Grievance at 2.

[48] Exceptions Br. at 25.

[49] *See NIH*, 65 FLRA 823, 824-25 (2011) (*NIH*); *GSA*, 58 FLRA at 589.

[50] *U.S. Dep't of the Air Force, Nellis Air Force Base, Las Vegas, Nev.*, 46 FLRA 1323, 1327 (1993) (*Nellis Air Force Base*) (noting the issue of whether probationers could grieve their separations cannot be resolved by reliance on general provisions of the Statute, including § 7103(a) (citing *U.S. DOJ, INS v. FLRA*, 709 F.2d 724, 729 n.22 (D.C. Cir. 1983) ("[W]e reject FLRA's assertion that because Congress did not exclude probationary employees from the broad definitions of 'employee,' [in] . . . 5 U.S.C. § 7103(a)(2) . . . , and 'grievance,' [in] . . . § 7103(a)(9), it must have intended to permit negotiation over termination of probationary employees. Determination of negotiability issues cannot be resolved by mere reference to the broad definitional provisions in the [S]tatute.")).

[51] *See AFGE, Loc. 2006*, 58 FLRA 297, 298 (2003) ("[N]ot only are the merits of a probationary employee removal not subject to review in arbitration, but parties also cannot provide procedural protections for probationary employees through the collective[-]bargaining process."). The Union also argues that the Arbitrator's conclusion that the grievances were not arbitrable is contrary to § 7121(b)(1)(C)(iii) of the Statute because "grievances remaining unsettled at the conclusion of the negotiated grievance procedure shall be subject to binding arbitration." Exceptions Br. at 27 n.14. However, the Authority has found that the general wording of § 7121 did not provide a basis for reversing an arbitrator's conclusion that a probationer's grievance was not arbitrable. *See Nellis Air Force Base*, 46 FLRA at 1327.

[52] *See* Exceptions Br. at 30 ("[T]he Union simply does not grieve the separation of a probationary employee.").

[53] *See* First Grievance at 2.

[54] *See* Exceptions Br. at 26.

[55] *See* First Grievance at 2; *see also* Award at 12-13.

[56] *See* Second Grievance at 2 (alleging that the Agency violated Article 27 by refusing to hold a meeting on the first grievance).

termination," and we reject the Union's contention that it did not grieve the probationer's separation.[57]

For the foregoing reasons, we deny the Union's contrary-to-law exceptions.

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

The Union argues the award fails to draw its essence from the parties' agreement in several respects.[58] The Authority will find that an award fails to draw its essence from an 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 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.[59]

The Union first alleges that, under Article 27, Section 12.A.,[60] the parties were required to have a grievance meeting over the first grievance.[61] Because that provision states management "will" schedule and hold a grievance meeting, the Union contends the Arbitrator modified the parties' agreement in concluding that the Agency did not violate Article 27, Section 12.A.[62] However, as the Arbitrator observed, other sections of the parties' agreement precluded the Union from grieving the probationer's termination.[63] As already discussed, the Arbitrator quoted Article 27, Section 3.F.,[64] examined Authority and federal-court precedent, and determined that the parties' agreement excluded both of the Union's grievances because they concerned a probationary employee's termination.[65] Because the grievances were not subject to the grievance procedure, the Arbitrator concluded that the Agency did not violate Article 27, Section 12.A. by failing to hold a grievance meeting.[66] The Union has not demonstrated that the Arbitrator's conclusion fails to draw its essence from the parties' agreement.[67]

Next, the Union argues that Article 27, Section 2's definition of grievance[68] allows the Union to grieve violations of Article 31, Section 4.A. and Agency policy that affect conditions of employment.[69] However, Article 27, Section 2 "exclude[s]" from the grievance procedure matters discussed in Section 3—and Section 3.F. excludes from the grievance procedure an employee's separation during a probationary period.[70] As the Arbitrator determined that the Union's consolidated grievances were rooted in the probationer's termination, he dismissed the grievances under Section 3.[71] The plain wording of Article 27, Section 3.F.[72] and Authority case law supports that dismissal.[73] Therefore, we reject this argument.

Accordingly, we deny the Union's essence exceptions.

IV. Decision

We deny the exceptions.

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[57] Award at 10; *see id.* at 12 (finding the union's grievances "arise out of complaints regarding the treatment of the [probationer] leading to his termination during the probationary period"); *see also id.* ("[T]he Union is asking the Arbitrator to look behind management's conduct which led to the [probationer]'s discharge.").

[58] Exceptions Br. at 13-16, 20-23.

[59] *Bremerton Metal Trades Council*, 73 FLRA 212, 213 (2022).

[60] Article 27, Section 12.A. states, in relevant part, that "Absent mutual agreement, the lowest level management official available with the authority to resolve the complaint will, in collaboration with the local Union Chapter, schedule and hold the requested meeting within seven (7) days of the date of receipt of the request." CBA at 126.

[61] Exceptions Br. at 15-16.

[62] *Id.* (citing CBA at 126).

[63] *See* Award at 7, 12.

[64] *See id.* at 7.

[65] *Id.* at 12-13.

[66] *See id.* ("[The Agency] had no obligation[] to meet at [s]tep [one] of the grievance p[rocedure] . . . ."); *id.* at 12 (reasoning that "[t]o conduct a grievance meeting over a matter not subject to the grievance procedure would be a futile exercise," and therefore the Agency did not violate the agreement by refusing to hold the meeting).

[67] *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 1262, 1264 (2020) (Member DuBester concurring) (denying an essence exception because it disagreed with the arbitrator's interpretation and application of the parties' agreement without providing a basis for finding the interpretation or application irrational, unfounded, implausible, or in manifest disregard of the agreement).

[68] Article 27, Section 2 states, in relevant part, that "Except as excluded pursuant to Section 3 below, . . . grievance means any complaint . . . [b]y . . . the Union . . . concerning: (1) The effect or interpretation, or a claim of breach, of a collective[-]bargaining agreement; or (2) Any claimed violation . . . of any law, rule, or regulation affecting conditions of employment . . . ." CBA at 123.

[69] Exceptions Br. at 18-23.

[70] CBA at 123-24.

[71] *See* Award at 12.

[72] *See* CBA at 123-24.

[73] *See NIH*, 65 FLRA at 824-25.