

73 FLRA No. 161

UNITED STATES  
DEPARTMENT OF AGRICULTURE  
FOOD AND NUTRITION SERVICE  
(Agency)

and

NATIONAL TREASURY  
EMPLOYEES UNION  
(Union)

0-AR-5787

DECISION

March 6, 2024

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

**I. Statement of the Case**

After the Agency unilaterally extended several employees' details, Arbitrator M. David Vaughn issued an award finding the Agency violated the parties' agreement and § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute).<sup>1</sup> The

<sup>1</sup> 5 U.S.C. § 7116(a)(1), (5).

<sup>2</sup> Award at 6.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (quoting Art. 13, § 13.01); see Exceptions, Attach. 3, Collective-Bargaining Agreement (CBA) at 42.

<sup>5</sup> Section 13.02 provides, in pertinent part:

(1) Selection for details will be accomplished in a fair and equitable manner.

(2) Details will not be used as discipline and the [Agency] will give reasonable consideration to assertions by an employee that the detail will cause significant personal hardship.

(3) . . . When the [Agency] determines that a detail assignment, lasting more than [thirty] days, is needed to correct a staffing imbalance or because of workload or training needs, and merit promotion competition does not apply; the [Agency] agrees to post the detail using the following procedures:

(a) The [Agency] will identify the position or positions to be detailed.

(b) The [Agency] shall seek volunteers via electronic media (e.g., e-mail) solicitation that shall include pertinent information regarding the detail opportunity such as . . . the expected duration . . .

Agency filed exceptions to the award on essence, nonfact, and contrary-to-law grounds. For the reasons explained below, we partially dismiss and partially deny the exceptions.

**II. Background and Arbitrator's Award**

The Agency posted notices of detail opportunities for employees. The notices stated the details were "not expected to exceed 120 days."<sup>2</sup> After employees applied, the Agency made selections and notified the selectees the details were "not to exceed 120 days."<sup>3</sup> Shortly before the end of the 120-day detail period, the Agency informed several of the employees that it was extending their details for an additional 120 days. The Agency did not post notices of the extensions, solicit volunteers, assess any applicants, or notify the Union of the extensions.

The Union filed a grievance, which went to arbitration. In his award, the Arbitrator acknowledged the Agency's right to detail employees. However, he also noted that Article 13 of the parties' agreement governs the parties' obligations concerning details. For example, Article 13, Section 13.01 of the parties' agreement requires the Agency to "attempt to keep details within the shortest practicable time limits" and to comply with "merit[-]promotion[-]plan" requirements.<sup>4</sup> Additionally, Article 13, Section 13.02 of the agreement provides that details lasting more than thirty days must be posted, and requires the Agency to follow certain procedures in soliciting, considering, and selecting applicants – including stating the details' expected duration.<sup>5</sup>

(c) The [Agency] will solicit volunteers in the following order until the detail is filled . . .

(d) The [Agency] will consider all employees who have indicated an interest in the detail. In determining who will be detailed the [Agency] will consider the following factors: . . .

(iv) Whether the employee has had a detail opportunity in the past twelve months[.] . . .

(4) In cases of emergency, extreme hardship[,] or exigent circumstances, the [Agency] may detail an employee without posting the affected position. Details which were not posted due to these reasons will be posted within 120 days according to the procedure in Section 13.02(3).

(5) The [Agency] agrees to contemporaneously notify . . . local chapter presidents of all detail solicitations at the time of posting and the employees ultimately selected for details that are within their jurisdiction. . . .

CBA at 42-43.

The Agency argued that “since it utilized [Article 13’s] procedure[s] when it created the original details, it could extend them without doing so again.”<sup>6</sup> The Arbitrator disagreed. He determined that, although the agreement allows the Agency to establish a detail’s length, “there is no provision to *extend* such a detail.”<sup>7</sup> The Arbitrator found the Agency’s notices to the detail selectees contained “an express, ‘not[-]to[-]exceed[-]120-day’ limit,” which the Arbitrator interpreted as meaning the details could not be extended beyond 120 days.<sup>8</sup> Accordingly, the Arbitrator concluded that the Agency was required to – but did not – comply with Article 13’s procedural requirements concerning the details affected by the extensions.

The Arbitrator also observed that Article 13 requires the Agency to give reasonable consideration to employees’ claims that their details would cause significant personal hardship.<sup>9</sup> The Arbitrator determined that “at least one employee requested not to extend [his] detail, but . . . the Agency directed him to continue without exploring the reasons or giving reasonable consideration to them.”<sup>10</sup>

Further, the Arbitrator determined the agreement requires the Agency to notify the Union of all detail-notice solicitations, reasons for the details, the employees selected, and the details’ durations. The Arbitrator found that the Agency “disregarded” these obligations, thereby violating both the parties’ agreement and the Statute.<sup>11</sup>

The Arbitrator rejected an Agency argument that there was an Agency-wide and government-wide “past practice” of extending details that permitted the Agency’s actions.<sup>12</sup> Specifically, the Arbitrator determined the Agency did not “submit evidence of any such extensions or evidence that the Union was aware of or acquiesced in any such extensions.”<sup>13</sup> While noting Agency testimony that extensions were “common,” the Arbitrator found “the Agency did not submit even a single specific example of details which have been extended, either government-wide or Agency-specific.”<sup>14</sup> The Arbitrator further found “[t]here is no such thing as a government-wide past practice to fill in blanks in a specific collective[-]bargaining agreement, let alone to override language in such [an] agreement.”<sup>15</sup> The Arbitrator

concluded, “The Agency’s general and conclusory assertions are insufficient to constitute even prima facie evidence of the existence of a practice” and, thus, “[t]he Agency failed to meet its burdens.”<sup>16</sup>

The Arbitrator also rejected the Agency’s argument that the “efficiency” it gained in unilaterally extending the details justified bypassing Article 13’s procedures.<sup>17</sup> The Arbitrator noted that Section 13.02 contains a “limited exception” to the posting requirement for emergency, hardship, or exigent circumstances, but he found that “efficiency” did not fall within that exception and that the Agency had not argued the extensions were necessitated by an emergency.<sup>18</sup>

In sum, the Arbitrator concluded the Agency violated Article 13 of the parties’ agreement by: unilaterally extending employees’ details from 120 days to 240 days; failing to give reasonable consideration to one employee’s request to be excused from his detail extension; and failing to give the Union notice and opportunity to consult or bargain regarding the extensions. The Arbitrator also concluded the Agency violated § 7116(a)(1) and (5) of the Statute when it unilaterally extended the details without giving the Union notice and an opportunity to consult or negotiate concerning the changes.

The Agency filed exceptions to the award on December 21, 2021, and the Union filed an opposition on January 20, 2022. Subsequently, the Authority issued an order permitting the parties to file supplemental briefs addressing the Authority’s revised test – set forth in *Consumer Financial Protection Bureau (CFPB)*<sup>19</sup> – for resolving management-rights exceptions to arbitration awards. Both parties filed supplemental briefs on October 27, 2023.

### III. Preliminary Matter: §§ 2425.4(c) and 2429.5 of the Authority Regulations bar part of the Agency’s exceptions.

The Agency argues the award is contrary to the Details Act<sup>20</sup> because that statute gives the Agency the right to extend details beyond 120 days.<sup>21</sup> Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations,

<sup>6</sup> Award at 10.

<sup>7</sup> *Id.* at 12 (emphasis added).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 13; see CBA at 42 (“[T]he [Agency] will give reasonable consideration to assertions by an employee that [a] detail will cause significant personal hardship.”).

<sup>10</sup> Award at 13.

<sup>11</sup> *Id.* at 14.

<sup>12</sup> *Id.* at 12-13.

<sup>13</sup> *Id.* at 12.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 12-13.

<sup>16</sup> *Id.* at 13.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (finding “no assertion, let alone proof, that [emergency] conditions existed in the detail extensions at issue”); see also *id.* (reasoning that “[t]he inclusion of a limited exception for emergencies implies that no further exceptions were intended”).

<sup>19</sup> 73 FLRA 670 (2023).

<sup>20</sup> 5 U.S.C. § 3341.

<sup>21</sup> Exceptions Br. at 3-5.

the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.<sup>22</sup> At arbitration, the parties disputed whether the Agency had authority to extend the details beyond 120 days.<sup>23</sup> Therefore, the Agency could have argued, at arbitration, that the Details Act gave it such authority. There is no record evidence the Agency did so. As such, consistent with §§ 2425.4(c) and 2429.5, we dismiss the exception regarding the Details Act.<sup>24</sup>

#### IV. Analysis and Conclusions

##### A. The award draws its essence from the parties' agreement.

The Agency argues the award fails to draw its essence from the parties' agreement.<sup>25</sup> The Authority will find an award fails to draw its essence from a collective-bargaining agreement when the appealing party establishes 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.<sup>26</sup> Mere disagreement with the arbitrator's interpretation does not establish the award fails to draw its essence from the agreement.<sup>27</sup> Further, exceptions that are based on a misinterpretation of an award do not provide a basis for finding the award deficient on essence grounds.<sup>28</sup>

The Agency argues the Arbitrator drew the wrong conclusion from the absence of contract wording about extending details.<sup>29</sup> According to the Agency, it has a legal right to extend details, and the Arbitrator effectively, and incorrectly, found: (1) the Agency "voluntarily relinquished its right to extend details, so that," for the Agency, "extensions no longer exist"; and (2) "unless the [agreement] contains language specifically stating that the Agency has a right to do something that it already has a

legal right to do, that right no longer exists."<sup>30</sup> In the latter regard, the Agency notes Article 2, Section 2.01 of the agreement provides that laws and government-wide regulations govern the agreement's interpretation.<sup>31</sup> The Agency asserts Article 2 required the Arbitrator to rely on the Agency's purported legal right to extend details when interpreting Article 13. Additionally, the Agency asserts Article 13's procedural requirements apply only when the Agency initiates a detail.<sup>32</sup> Because Article 13 "says nothing about extensions," the Agency claims the Arbitrator erred in applying it to the detail extensions at issue.<sup>33</sup>

The Arbitrator did not find the Agency "relinquished" its right to extend details or that "extensions no longer exist."<sup>34</sup> Rather, he found the parties contractually *limited* the Agency's ability to extend details by negotiating Article 13. Enforcing contract provisions requiring the Agency to, for example, give reasonable consideration to employee assertions about the hardship caused by detail extensions,<sup>35</sup> or notify the Union of detail extensions,<sup>36</sup> does not constitute a finding that the Agency *cannot* extend details. Nor did the Arbitrator find that, in order to retain statutory rights, the Agency needed to expressly do so in the agreement. The Agency's contrary arguments misinterpret the award and, as such, do not demonstrate the award fails to draw its essence from the parties' agreement.<sup>37</sup> With regard to the Agency's remaining essence arguments, as summarized in Section II above, the Arbitrator thoroughly discussed the agreement's terms and fully explained why those terms apply to detail extensions. The Agency merely disagrees with the Arbitrator's interpretation, which does not demonstrate the award is deficient.<sup>38</sup> For these reasons, we deny the essence exception.

##### B. The award is not based on a nonfact.

The Agency contends the award is based on a nonfact.<sup>39</sup> To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact

<sup>22</sup> 5 C.F.R. §§ 2425.4(c), 2429.5; *see U.S. Dep't of the Army, U.S. Army Garrison, Picatinny Arsenal, N.J.*, 73 FLRA 700, 701 (2023) (*Picatinny*).

<sup>23</sup> Award at 8-9 (Union argued detail extensions violated the parties' agreement and the Statute); *id.* at 10 (Agency argued it was permitted to extend details without following the contractual procedures).

<sup>24</sup> *See, e.g., Picatinny*, 73 FLRA at 701 (dismissing arguments that excepting party could have raised, but failed to raise, at arbitration).

<sup>25</sup> Exceptions Br. at 7-9.

<sup>26</sup> *AFGE, Loc. 2344*, 73 FLRA 765, 766 (2023).

<sup>27</sup> *Fed. Educ. Ass'n, Stateside Region*, 73 FLRA 747, 749 (2023) (*FEA*).

<sup>28</sup> *SSA*, 70 FLRA 227, 230 (2017) (*SSA*).

<sup>29</sup> Exceptions Br. at 8-9 (citing Award at 12); *see also* Award at 12 (finding that the Agency's contractual right to set the length

of a detail at the outset does not authorize – or mention – detail extensions).

<sup>30</sup> Exceptions Br. at 8.

<sup>31</sup> *Id.* Article 2, Section 2.01 of the parties' agreement provides, in pertinent part: "In the administration of all matters covered by this [a]greement, the Union and the [Agency] will be governed by . . . government-wide rules and regulations and/or Federal law." CBA at 4.

<sup>32</sup> Exceptions Br. at 8-9.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 8.

<sup>35</sup> Award at 13.

<sup>36</sup> *Id.* at 14.

<sup>37</sup> *SSA*, 70 FLRA at 230.

<sup>38</sup> *FEA*, 73 FLRA at 749.

<sup>39</sup> Exceptions Br. at 6-7.

underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.<sup>40</sup> The Authority will not find an award deficient on nonfact grounds based on a party's disagreement with an arbitrator's evaluation of the evidence, including the weight to be accorded such evidence.<sup>41</sup>

The Agency's nonfact exception challenges the Arbitrator's finding that the Agency failed to establish a past practice of detail extensions.<sup>42</sup> According to the Agency: its witness testified that detail extensions are common within the Agency and throughout the federal government; the Arbitrator should have "imputed" knowledge of that practice to the Union; and the Union did not present any evidence to rebut the Agency's argument that the Union had acquiesced to the alleged practice for years.<sup>43</sup>

As discussed in greater detail in Section II above, the Arbitrator found the Agency's evidence of Agency- and government-wide past practices of detail extensions "general and conclusory."<sup>44</sup> The Agency's nonfact exception merely disagrees with the Arbitrator's evaluation of the evidence, including the weight he accorded such evidence. As such, it does not demonstrate the award is deficient,<sup>45</sup> and we deny the nonfact exception.

C. The Agency does not demonstrate the award is contrary to law.

The Agency argues the award is contrary to law.<sup>46</sup> When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.<sup>47</sup> Applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.<sup>48</sup> In making that assessment, the Authority defers to the arbitrator's underlying factual

findings unless the excepting party establishes that they are nonfacts.<sup>49</sup>

First, the Agency asserts the award is contrary to the Office of Personnel Management's Guide to Processing Personnel Actions (OPM Guide).<sup>50</sup> According to the Agency, the OPM Guide requires agencies to use not-to-exceed dates in detail appointments, and includes a code that agencies must use for detail extensions.<sup>51</sup> The Agency asserts that, by using not-to-exceed dates in the employees' initial detail notices, the Agency was "simply using the standard wording prescribed to it by" the Office of Personnel Management – not guaranteeing that the details would not be extended.<sup>52</sup>

Although the Arbitrator relied on the "not[-]to[-]exceed" wording from the initial detail notices,<sup>53</sup> he did not find that evidence, standing alone, precluded the Agency from extending the employees' details. Rather, he interpreted the parties' agreement and found the Agency could not extend details beyond 120 days without following certain procedures.<sup>54</sup> The Agency's arguments regarding the OPM Guide do not undercut that conclusion or provide a basis for finding the award conflicts with that Guide. Therefore, we deny the exception regarding the OPM Guide.

Additionally, in its exceptions, the Agency asserts the Arbitrator's interpretation of the parties' agreement is contrary to law because limiting the Agency's ability to extend details conflicts with Authority precedent regarding management's right to assign employees under § 7106(a)(2)(A) of the Statute.<sup>55</sup> As noted above, the Authority gave the parties an opportunity to file supplemental briefs addressing the Authority's revised management-rights test set forth in *CFPB*. In its supplemental brief, the Agency states: "If the Arbitrator had been correct in his view that the [parties' agreement] required detail extensions to be presented to employees as if they were new details, *there would be no violation of*

<sup>40</sup> *Fraternal Ord. of Police, DC Lodge 1*, 73 FLRA 408, 410 (2023).

<sup>41</sup> *NTEU, Chapter 46*, 73 FLRA 654, 656 (2023) (*Chapter 46*).

<sup>42</sup> Exceptions Br. at 6-7.

<sup>43</sup> *Id.*

<sup>44</sup> Award at 13; *see id.* at 12 (acknowledging testimony that detail extensions are "common," but noting that "the Agency did not submit even a specific example of details which have been extended, either government-wide or Agency-specific").

<sup>45</sup> *Chapter 46*, 73 FLRA at 656.

<sup>46</sup> Exceptions Br. at 3-6.

<sup>47</sup> *U.S. Dep't of the Navy, Naval Med. Ctr. Camp Lejeune, Jacksonville, N.C.*, 73 FLRA 137, 140 (2022).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Exceptions Br. at 3-5.

<sup>51</sup> *Id.* at 4. The OPM Guide instructs agencies to use a particular code for "Ext Detail NTE (Date)." OPM, *The Guide to Processing Personnel Actions*, Chapter 14 - Promotions, Changes to Lower Grade, Reassignments, Position Changes and Details 16-18 (Mar. 2017), <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/personnel-documentation/processing-personnel-actions/gppa14.pdf>.

<sup>52</sup> Exceptions Br. at 5.

<sup>53</sup> Award at 6 (finding that detail notices indicated the details were "not expected to exceed 120 days," and that the Agency informed selected employees their details were "not to exceed 120 days"); *id.* at 11 (finding "the Agency set the length of the details to not exceed 120 days").

<sup>54</sup> *See id.* at 11-14 (finding that the Agency has the right to detail employees, but disputing that it may "unilaterally" do so while "ignoring the negotiated procedure[s]").

<sup>55</sup> Exceptions Br. at 5-6.

*management rights.*”<sup>56</sup> In this regard, the Agency notes that, under *CFPB*, challenges to an arbitrator’s contract interpretation must “be made under the heading of an [essence] exception” – which the Agency notes it has done.<sup>57</sup>

We read the Agency’s claims as conceding that, if the Authority finds the Arbitrator’s contract interpretation is not deficient, then the award does not conflict with management rights. As discussed above, we have denied the Agency’s essence exception. Therefore, the Agency has not demonstrated the Arbitrator’s contract interpretation is deficient, and we find the Agency has now conceded the award does not conflict with management rights. As a result, further application of the *CFPB* test is unnecessary, and we deny the management-rights exception.

Accordingly, we deny the contrary-to-law exceptions.

#### **V. Decision**

We partially dismiss and partially deny the Agency’s exceptions.

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<sup>56</sup> Agency’s Supp. Br. at 3 (emphasis added).

<sup>57</sup> *Id.*