70 FLRA No. 146

UNITED STATES
DEPARTMENT OF THE ARMY
93RD SIGNAL BRIGADE
FORT EUSTIS, VIRGINIA
(Agency)

and

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 11
(Union)

0-AR-5292

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DECISION

July 19, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, we determine that an Arbitrator may not assume jurisdiction over the merits of a grievance when the party invoking arbitration fails to comply with procedural requirements specifically enumerated in the parties' negotiated grievance procedure.

In particular, the parties' agreement specifies that any invocation of arbitration must be sent to the Brigade Commander within ten days after receiving the Agency's final decision on the grievance. Despite this clear provision, the Union delivered its invocation of arbitration to the Civilian Personnel Advisory Council (CPAC) rather than the Brigade Commander.

The Arbitrator determined that the Union did not comply with that provision and thus violated the parties' agreement. Nonetheless, the Arbitrator proceeded to review and make a determination on the merits of the grievance. We set aside the award because it does not draw its essence from the parties' agreement.

II. Background and Arbitrator's Award

An intern successfully completed an Agency intern program and was placed in a general schedule position.[1] The Union filed a grievance challenging the Agency's noncompetitive placement of the intern. The parties were unable to resolve the grievance. On September 23, 2016, the Union invoked arbitration and delivered its invocation to the CPAC. The invocation did not reach the Brigade Commander until October 27, 2016.

Before the Arbitrator, the Agency argued that the grievance was not arbitrable because the Union failed to deliver its "request" to the Brigade Commander within ten working days, as required by Article 45 of the parties' agreement.[2] As pertinent here, Article 45 provides:

> The request to invoke arbitration must be in writing and *must be received by the Brigade Commander . . .* within ten (10) work days of the date of receipt of the final grievance decision or conclusion of the grievance mediation.[3]

The Arbitrator issued her award on May 17, 2017. The Arbitrator found that it was undisputed that the Union delivered its "request" to the CPAC, instead of the Brigade Commander, on September 23, 2016.[4] The Arbitrator noted that Article 45 required such requests to be received by the Brigade Commander within ten working days. Thus, the Arbitrator concluded that "delivery to CPAC was non[-]compliant."[5] However, the Arbitrator also noted that the Union argued that it was the normal course of business to not deliver these requests directly to the Brigade Commander, and that no evidence was supplied to contradict the Union. Therefore, the Arbitrator proceeded to address the merits of the grievance.

On the merits, the Arbitrator found that the Agency violated the parties' agreement by noncompetitively placing the intern into a position that was not yet vacant.

The Agency filed exceptions on June 19, 2017,

[1] Because of our disposition of this case, it is unnecessary to address the specifics of the underlying grievance in any great detail.
[2] Award at 20.
[3] Exceptions, Attach. C, Arbitration Procedure Collective-Bargaining Agreement (CBA) at 3 (emphasis added).
[4] Award at 20.
[5] *Id.* at 20.

and the Union filed an opposition on June 29, 2017.

III. Analysis and Conclusion: The procedural-arbitrability determination fails to draw its essence from the parties' agreement.

The Agency asserts that the Arbitrator's procedural-arbitrability determination fails to draw its essence from the parties' agreement.[6] Specifically, the Agency argues that Article 45 of the agreement establishes that the Brigade Commander is the sole designee to receive these requests, and the Union failed to deliver its request to the Brigade Commander within the required ten working days.[7]

Article 45 clearly and unambiguously requires that arbitration requests "*must be received by the Brigade Commander* . . . within ten (10) work days of the date of receipt of the final grievance or conclusion of the grievance mediation."[8] Article 45 does not contain any language that either allows the CPAC to receive arbitration requests, or excuses the Union's non-compliance with the negotiated grievance procedure. Rather, Article 45 establishes that the Brigade Commander is the exclusive Agency representative to receive arbitration requests.

The Arbitrator's determination that the grievance was arbitrable is incompatible with the plain wording of Article 45.[9] Further, as the Authority recently held, "arbitrators may not look beyond a collective-bargaining agreement – to extraneous considerations such as past practice – to modify an agreement's clear and unambiguous terms."[10] Thus, the Arbitrator could not rely on the parties' alleged' "normal course of business"[11] to modify Article 45's plain wording. For these reasons, the Arbitrator's procedural-arbitrability determination fails to draw its essence from the parties' agreement.[12] Accordingly, we set aside the award, and find it unnecessary to address[13] the Agency's remaining exceptions.[14]

IV. Decision

We set aside the award.

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[6] When 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. The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." 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 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. *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (citing 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

[7] *U.S. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (*SBA*) (parties may directly challenge procedural-arbitrability determinations on essence grounds).

[8] CBA at 3 (emphasis added).

[9] *SSA*, 70 FLRA 227, 229 (2017) (citing *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993) (finding award deficient because the arbitrator's interpretation of the parties' agreement was incompatible with its plain wording)).

[10] *SBA*, 70 FLRA at 528.

[11] Award at 20.

[12] *SSA*, 70 FLRA at 229-30.

[13] *See U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 66 FLRA 300, 304 (2011) (setting aside the award in connection with an exceeded-authority exception and finding it unnecessary to address remaining exceptions).

[14] Exceptions Form at 4-6 (alleging that the award is contrary to law and government-wide regulation); *id.* at 6-7 (alleging that the award is contrary to agency-wide regulation); *id.* at 8-10 (alleging that the award is contrary to public policy); *id.* at 11-12 (alleging that the award is based on nonfacts); *id.* at 13-15 (alleging that Arbitrator exceeded her authority by disregarding the evidence and law, and awarding attorney fees).

Member DuBester, dissenting:

For the same reasons expressed in my dissent in *U.S. Small Business Administration* (*SBA*),[1] I find that the majority's decision to set aside the Arbitrator's award in this case is contrary to well-settled legal principles and rests on a misapplication of law. The majority mistakenly concludes that the Arbitrator's contract interpretation, finding the grievance procedurally arbitrable, fails to draw its essence from the parties' agreement. As in *SBA*, "the majority erroneously overturns long-standing Authority past-practice precedent despite established arbitral practice and the predominant view of the courts holding that past practices may modify even the express terms of an agreement."[2]

Addressing the Agency's claim that the Union failed to timely invoke arbitration under the parties' agreement, the Arbitrator relies on the parties' *past practice* to find the Union's grievance procedurally arbitrable under Article 45, Section 1, of the parties' agreement.[3] Article 45, Section 1 provides: "The request to invoke arbitration must be in writing and must be received by the Brigade Commander . . . within ten (10) work days of the date of receipt of the final grievance decision."[4]

The Union followed the parties' established past practice. The Union explained that "the normal course of business between the parties" is to send the notice of arbitration to the Civilian Personnel Advisory Council (CPAC) instead of the Brigade Commander.[5] And the Arbitrator found, [6] as the majority acknowledges,[7] that the Agency did not dispute the Union's argument. Based on the parties' undisputed past practice of sending the notice of arbitration to CPAC, and the Union's timely compliance with that practice, the Arbitrator properly concludes that the Union invoked arbitration within the contract's ten-day time limit.[8]

As in *SBA*, the majority here erroneously rejects the Arbitrator's reliance on the parties' past practice. As in *SBA*, I disagree. The majority's decisions, here and in *SBA*, erroneously "reverse[] the Authority's past practice precedent and conflict[]with the clear weight of other authority that has addressed the subject."[9] Contrary to the majority, I agree with the predominant view of the courts and arbitrators, the Authority's well established precedent, and *Elkouri & Elkouri* that "[a]n arbitrator's award that appears contrary to the express terms of the agreement may nevertheless be valid if it is premised upon reliable evidence of the parties' intent."[10]

Here, there is an *undisputed* past practice modifying the express terms of Article 45, Section 1. Thus, I would deny the Agency's procedural-arbitrability exception and reach the Agency's remaining exceptions.

Because the majority gives no weight to the parties' past practice, I dissent.

[1] 70 FLRA 525, 529-32 (2018) (Dissenting Opinion of Member DuBester).
[2] *Id.* at 529-30.
[3] Award at 20-21.
[4] *Id.*
[5] *Id.* at 20.
[6] *Id.*
[7] Majority at 2.
[8] Award at 20.
[9] *SBA*, 70 FLRA at 531 (Dissenting Opinion of Member DuBester).
[10] *Id.* (citing *Elkouri & Elkouri, How Arbitration Works*, 12-28 (Kenneth May ed., 8th ed. 2016)).