

70 FLRA No. 183

UNITED STATES
DEPARTMENT OF DEFENSE
EDUCATION ACTIVITY
(Agency)

and

FEDERAL EDUCATION ASSOCIATION
(Union)

0-AR-5315

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DECISION

November 2, 2018

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

I. Statement of the Case

In this case, we determine that, where the parties' agreement contains no deadline for challenging the timeliness of a grievance, an arbitrator may not ignore deadlines clearly defined in the agreement. This is particularly true where, as here, the grieving party concedes that it did not file its grievance timely.

The Union filed a grievance alleging that the Agency violated the parties' agreement when it announced that it would no longer approve official time and travel requests to attend Union training. Arbitrator Salvatore J. Arrigo found the Union's grievance arbitrable and sustained the grievance. The Agency filed exceptions to the award, and the Union filed an opposition.

As relevant here, the Agency argues that the award fails to draw its essence from the agreement because, despite finding that the grievance was filed nearly two years after the parties' negotiated filing deadline, the Arbitrator found the grievance arbitrable. Because the Arbitrator's interpretation of the parties' agreement evidences a manifest disregard of the agreement, we grant this exception and vacate the award.

II. Background and Arbitrator's Award

The Union represents teachers in the Agency's primary and secondary educational programs worldwide.

In August 2013, the Agency's Pacific Area Director—overseeing schools in Japan and Korea—issued a memo denying current and future Union requests for official time and travel orders to attend off-site Union trainings. Prior to the memo, Union representatives were regularly granted official time and travel orders for Union trainings.

Two years later, in September 2015, the Union filed a grievance alleging that the Agency violated the agreement by prohibiting the use of official time and permissive travel orders to attend off-site trainings.¹ The Agency denied the Union's grievance, explaining that the Union failed to provide sufficient information regarding its official time claim, did not respond to the Agency's subsequent clarification requests, and that it was within the Agency's sole discretion to grant permissive travel orders for representational activities. The matter was submitted to arbitration.

The parties did not stipulate to the issues at arbitration. The Arbitrator framed the issue as whether the Agency committed "alleged unilateral changes in conditions of employment related" to the agreement.²

The Union argued that the parties' past practice and the agreement provide a clear right for Union officials to use official time for travel and trainings. And, it argued that the Agency violated the agreement when it issued its memo absent a showing of compelling circumstances.

In response, the Agency argued that no such past practice existed, and that the agreement's plain language granted the Agency the discretion to deny or approve travel orders. The Agency also raised a timeliness argument, arguing that the grievance was not arbitrable because it was untimely filed under Article 12 of the agreement. Article 12 requires that grievances be filed within forty-five days of the "triggering event."³

The Arbitrator rejected the Agency's timeliness argument, finding that the Agency "waived or forfeited the right to raise the issue at such a late date."⁴ Specifically, the Arbitrator concluded that the Agency "was well aware that the grievance concerned the [2013 memo] . . . and . . . had ample opportunity to make an objection to the untimeliness of the grievance" more than a year before arbitration.⁵ And, the Arbitrator found that the Agency's attempt to raise the timeliness issue at the conclusion of the Union's case constituted

¹ Award at 3-4, 10.

² *Id.* at 10.

³ *Id.* at 12.

⁴ *Id.* at 13.

⁵ *Id.* at 14.

“an abuse of the grievance/arbitration process and should not be encouraged.”⁶

On the merits, the Arbitrator determined that there was a past practice of approving official time and travel orders for Union representatives.⁷ In rejecting the Agency’s arguments that no past practice existed, the Arbitrator found that the Agency did not fulfill its collective bargaining obligations when it implemented the memo, and violated the agreement when it denied the grievants’ request for official time.

The Agency filed exceptions to the award on September 15, 2017, and the Union filed an opposition to those exceptions on October 3, 2017.

III. Analysis and Conclusion: The award fails to draw its essence from the parties’ agreement.

The Agency claims that the Arbitrator’s failure to dismiss the grievance as untimely⁸ does not draw its essence from the parties’ agreement.⁹ The Agency argues, and we agree, that the Arbitrator improperly disregarded the parties’ forty-five-day time limit to file a grievance.

Article 12, Section 5.C of the agreement states that a grievance “must be filed within forty-five (45) calendar days after the incident or occurrence giving rise to the grievance.”¹⁰ The Union concedes that it did not meet this forty-five-day deadline.¹¹ The Arbitrator, however, ignored the plain words of the agreement, and found that the Agency “waived or forfeited the argument of untimeliness” by raising the arbitrability issue only after the Union had rested its case.¹²

As we explained in *U.S. Department of the Treasury, Internal Revenue Service*, when parties agree to a filing deadline—with no mention of any applicable exception—the parties intend to be bound by that deadline.¹³ Here, applying Article 12, Section 5.C. of the agreement, the Union had forty-five days to file a grievance challenging the Agency’s August 2013 memo. But, the Union did not file its grievance until September 2015—two years after the parties’ filing deadline.

The Arbitrator cited no authority or contractual language allowing him to disregard the parties’ explicit forty-five-day limitation.¹⁴ As the Agency points out,¹⁵ Article 12 contains no deadline for raising challenges to the timeliness of a grievance. Moreover, the Arbitrator’s summary explanation that the Agency’s conduct “constitutes an abuse of the grievance/arbitration process” is also without support or merit.¹⁶ The Arbitrator does not explain how the Agency’s decision to raise its timeliness issue at arbitration prejudiced the Union, is contrary to the parties’ negotiated grievance procedure, or is otherwise barred.¹⁷

Consequently, because the Arbitrator failed to enforce the plain language of the parties’ agreed-to filing deadline, the award manifests a disregard of the parties’ agreement. Therefore, we grant the Agency’s essence exception and vacate the award.¹⁸

IV. Decision

We set aside the award.

⁶ *Id.* at 15.

⁷ *Id.* at 12.

⁸ Exceptions Br. at 7-8.

⁹ *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (*OSHA*) (1990) (The Authority will find that an arbitration award is deficient as failing to draw its essence from the 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.); *see U.S. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (*SBA*) (Member DuBester concurring, in part, and dissenting, in part) (Parties may directly challenge procedural-arbitrability determinations on essence grounds.).

¹⁰ Opp’n, Joint Ex. 1 at 33 (Article 12, Section 5.C of the agreement).

¹¹ Award at 13.

¹² *Id.* at 15.

¹³ 70 FLRA 806, 808 (2018) (Member DuBester dissenting).

¹⁴ Award at 15; *see also id.* at 12 (Agency argued at arbitration that the parties’ agreement imposed no deadline for challenges to the timeliness of a grievance).

¹⁵ Exceptions Br. at 7 (“Article 12 is silent with respect to challenging arbitrability. It contains no provision stating that challenges to arbitrability must be raised by a certain point in the process or be deemed waived.”).

¹⁶ Award at 15.

¹⁷ *See SBA*, 70 FLRA at 527-28 (rejecting an arbitrator’s unsupported waiver determination that had no basis in the parties’ agreement).

¹⁸ Because we vacate the award, it is unnecessary for us to address the Agency’s remaining exceptions. *E.g.*, *U.S. DOD, Def. Logistics Agency Aviation, Richmond, Va.*, 70 FLRA 206, 207 (2017) (citation omitted); *see Exceptions Br.* at 5-6 (arguing that Arbitrator exceeded his authority); *id.* at 8-11 (arguing that award fails to draw its essence because no past practices were established); *id.* at 11-12 (arguing that award is based on nonfacts); *id.* at 13-14 (arguing that award is contrary to law).

Member DuBester, dissenting:

The majority limits the issues in this case, strictly, to contractual timeliness questions. I disagree.

This case raises more fundamental issues concerning the binding force of agreements when parties jointly decide to arbitrate a dispute, as well as the nature of the authority parties give arbitrators to apply and enforce those agreements. And more specifically, this case focuses on an arbitrator's authority to enforce decisions the parties made when they framed the boundaries of the arbitration, to determine whether a party waived its right to expand the scope of the proceeding the parties agreed to.

The facts are not in dispute: After the Union filed its grievance in September 2015, it was not until April 2017 that the parties took the matter to arbitration. Significantly, the parties continued to communicate with each other during this time span. But at no point did the Agency ever argue that the grievance was untimely. And the Agency could have done so. It is undisputed that, as the Arbitrator found, the Agency "clearly" knew in "mid-2016" what the grievance concerned, and "had ample opportunity to make an objection to the untimeliness of the grievance" at any point thereafter.¹

But the Agency did not raise a timeliness issue. Instead, when the parties decided to arbitrate the case, they submitted only merits issues to the Arbitrator.²

Not until the close of the Union's case on the merits, and after a two-week recess granted by the Arbitrator to permit the Agency to prepare its own case on the merits, did the Agency claim for the first time that the grievance was "defective" because it was untimely.³ It was now May 2017, well over a year and a half after the Union filed its grievance, and over a year after the Agency was aware of the timeliness issue.

Rejecting the Agency's timeliness claim, the Arbitrator concluded that by failing to raise its procedural-arbitrability objection prior to arbitration, despite having "ample opportunity," the Agency waived its right to do so.⁴ Further, the Arbitrator found that to entertain such an objection in these circumstances would

¹ Award at 14 (The Agency does not challenge the Arbitrator's factual finding that "the Agency clearly knew by mid-2016 that [the Agency]'s emails of August 2013 were the actions the Union was grieving.").

² See *id.* at 8.

³ *Id.* at 12-13.

⁴ *Id.* at 14.

be "an abuse of the grievance/arbitration process" that "should not be encouraged."⁵

Whether a party waives its right to raise timeliness in these types of circumstances is a question arbitrators are responsible for resolving.⁶ And such determinations do not necessarily depend on specific contract language. Rather, such determinations are within an arbitrator's authority and responsibility to apply and enforce the parties' agreement to arbitrate a dispute.

The courts and treatises agree. "Arbitrators have frequently recognized that parties may waive or otherwise be estopped from asserting rights granted under the collective[-]bargaining agreement."⁷ When "the parties allow a grievance to move from step to step in the procedure without making objections to untimeliness, the right to object may be deemed to have been waived."⁸ "Failure to challenge arbitrability in a timely fashion and participating in the arbitration proceeding . . . will result in waiver of the right to object."⁹ And so, for example, an arbitrator may decide not to hold a grievance untimely if an employer's conduct makes it "unjust or unreasonable" to do so.¹⁰ The Arbitrator's determination that the Agency waived its right to object to the grievance as untimely is consistent with these principles.

Further, the majority's objection that the Arbitrator "cited no . . . contractual language" for his determination has no merit.¹¹ "[T]hat [an] agreement is

⁵ *Id.* at 15.

⁶ See, e.g., *Peco Foods Inc. v. Retail Wholesale & Dep't Store Union Mid-South Council*, 727 Fed. Appx. 604, 608 (11th Cir. 2018) (*Peco*) (citing *Shopmen's Local 538 of the Int'l Ass'n. of Bridge, Structural and Ornamental Iron Workers v. Mosher Steel Co.*, 796 F.2d 1361, 1364 (11th Cir. 1986) (upholding arbitrator's determination that employer waived timeliness issue by waiting until arbitration to raise the issue)); see also *U.S. SBA*, 70 FLRA 525, 529-30 (2018) (Dissenting Opinion of Member DuBester) (discussing arbitrator's waiver determination).

⁷ *Peco*, 727 Fed. Appx. at 609 (quoting *Drummond Coal Co. v. United Mine Workers of Am., Dist. 20*, 748 F.2d 1495, 1498 (11th Cir. 1984)).

⁸ *Elkouri & Elkouri*, *How Arbitration Works*, 5-32 (Kenneth May ed., 8th ed. 2016).

⁹ *Oakwood Mobile Homes, Inc. v. Stevens*, 204 F. Supp. 2d 947, 952 (S.D. W. Va. 2002) (quoting *Int'l Longshoreman's Ass'n, AFL-CIO v. W. Gulf Maritime Ass'n.*, 594 F. Supp 670 (S.D.N.Y. 1984)); see also *id.* ("An objection to the arbitrability of a claim must be made on a timely basis, or it is waived.") (quoting *Fortune, Alsweet & Eldridge, Inc. v. Daniel*, 724 F.2d 1355, 1357 (9th Cir. 1983)).

¹⁰ *Fairweather's Practice & Procedure in Labor Arbitration*, 130 (Ray J. Schoonhoven ed., 4th ed. 1999).

¹¹ Majority at 4.

silent on [a] matter does not demonstrate that the award fails to draw its essence from the agreement.”¹²

Accordingly, I would deny the Agency’s essence challenge to the Arbitrator’s waiver finding. And I would deny the Agency’s other exceptions.

¹² *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (citing *U.S. Dep’t of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 413, 414 (2003)); see also *Gunn v. VA Med. Ctr, Birmingham, Ala.*, 892 F.2d 1036, 1038 (Fed. Cir. 1990) (finding that an agency waived its right to object to a grievance’s arbitrability, despite a lack of contractual language authorizing waiver).