

70 FLRA No. 190

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 466
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
ASHEVILLE, NORTH CAROLINA
(Agency)

0-AR-5373

DECISION

December 4, 2018

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

I. Statement of the Case

In this case, we uphold an arbitrator's conclusion that the period to file a grievance began the day the agency took the action grieved, and that the parties' subsequent discussions concerning the matter do not extend the filing deadline. As discussed below, we deny the Union's essence and nonfact exceptions.

II. Background and Arbitrator's Award

The Union requested official time for two union stewards (employees) to attend safety training. On May 4, 2017, the Agency advised the Union that it would approve official time "for the main safety representative" to attend the training.¹ And on May 5, 2017, the Agency again advised the Union that it would only authorize "one" employee to attend the training on official time.² The Union sent both employees, one of which used annual leave to attend.

On July 19, 2017, the Union filed a grievance on behalf of the employee who was denied official time to attend the training. The parties could not resolve the matter and invoked arbitration.

The relevant issue before the Arbitrator was whether the Union filed the grievance in a "timely manner."³

Arbitrator Byron Berry found that the Union failed to timely file the grievance under the parties' agreement.⁴ Article 43, Section 7 (Article 43) requires the Union "to present [a] grievance . . . within [thirty] days of the date that the employee or Union became aware of, or should have become aware of, the act or occurrence; or, anytime if the act or occurrence is of a continuing nature."⁵ The Arbitrator found that the Agency, communicating with the Union president, denied the employee official time on May 4, 2017, and reiterated its position the next day on May 5. Because the Union did not file the grievance until July 19, 2017 – more than thirty days after the Union was aware that the Agency had denied the official time – the Arbitrator found the grievance untimely and therefore not arbitrable.

The Union filed exceptions to the award on May 4, 2018, and the Agency filed an opposition to the Union's exceptions on May 31, 2018.

III. Analysis and Conclusions: The award is not deficient on either essence or nonfact grounds.

The Union argues that the Arbitrator's procedural-arbitrability determination – that the grievance was untimely – fails to draw its essence from the parties' agreement.⁶ The Authority will find that an award is deficient as failing to draw its essence from a collective-bargaining agreement when the excepting 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.⁷

³ *Id.* at 4.

⁴ *Id.* at 5-6.

⁵ Exceptions, Attach. D. at 230.

⁶ Exceptions Br. at 3-4.

⁷ *U.S. Small Bus. Admin.*, 70 FLRA 525, 526-28 (2018).

¹ Award at 2.

² *Id.*

The Union fails to show that the Arbitrator's interpretation of Article 43 is not a plausible interpretation of the parties' agreement. The Union asserts that the award does not draw its essence from Article 43 because the Agency's denial of official time did not occur until the employee "was forced to use annual leave" after attending the training.⁸

Contrary to the Union's argument, the Arbitrator reasonably found that the Union was aware that the Agency's denial of official time was effective on May 4, 2017— when the Agency informed the Union that that it would only authorize official time for one employee to attend training.⁹ Therefore, the Arbitrator reasonably determined that under the contract, the Union was required to file any related grievance within thirty days of that date — which it admittedly did not.¹⁰

The Union also fails to show¹¹ that the award is based on a nonfact.¹² The Union's nonfact exception is premised on the same argument we reject above — that the Arbitrator erroneously determined that the time to file the grievance began when the Agency stated that it would deny one of the employees official time.¹³ Moreover, the parties clearly disputed at arbitration when the time to file the grievance began. So on that basis as well, the Union's nonfact exception does not show that the award is deficient.¹⁴

Accordingly, we find that the Union does not establish that the Arbitrator's procedural-arbitrability determination fails to meet the essence standard award or is based on a nonfact.

IV. Decision

We deny the Union's exceptions.

⁸ Exceptions Br. at 4.

⁹ Award at 5.

¹⁰ In Member Abbott's view, our holding reaffirms our recent decisions in *U.S. DOD, Defense Logistics Agency, Disposition Servs., Battle Creek, Mich.*, 70 FLRA 949 (2018) (Members Abbott and DuBester concurring) and *U.S. DOD, Educ. Activity*, 70 FLRA 654 (2018) (Member DuBester dissenting).

¹¹ Exceptions Br. at 5-6.

¹² See *NAIL, Local 5*, 70 FLRA 439, 439 (2018) (*NAIL*) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593-94 (1993) (award not deficient as based on a nonfact where excepting party either challenges a factual matter that the parties disputed at arbitration or fails to demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result); see also *AFGE, Local 3294*, 70 FLRA 432, 434-35 (2018) (reversing Authority precedent and finding that procedural-arbitrability determinations may be challenged on nonfact grounds).

¹³ Exceptions at 5; see also *AFGE, Local 1101*, 70 FLRA 644, 646 (2018) (parties may not challenge an arbitrator's interpretation of a collective-bargaining agreement on nonfact grounds).

¹⁴ See *NAIL*, 70 FLRA at 439.