

71 FLRA No. 28

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MALCOLM RANDALL VA MEDICAL CENTER
GAINESVILLE, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2779
(Union)

0-AR-5392

DECISION

May 24, 2019

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

I. Statement of the Case

In this case, the Arbitrator made an error about an undisputed fact. As such, we set aside the portion of the award that flows from that error.

On several occasions, Union officials were unable to locate emails that they had stored in an Agency-provided electronic records system. Arbitrator William H. Mills issued an award finding that the Agency violated multiple provisions of the parties' collective-bargaining agreement by failing to provide the Union with the type of electronic records system described in the parties' agreement.

The question before us is whether the award is based on nonfacts. Because the Agency's first nonfact argument concerns a matter that the parties disputed at arbitration, we deny that exception. However, as the Agency notes in its second nonfact exception, the Arbitrator based one of the contractual violations on an erroneous finding concerning an undisputed fact. Accordingly, we set aside that violation and its associated remedy.

II. Background and Arbitrator's Award

The Agency uses Microsoft Outlook as its email system. Within Outlook, certain users can create and access ".pst" files, which are used to store and organize

selected Outlook emails.¹ Once a user moves an email into a .pst file, it is no longer accessible from its original location within Outlook.

Under Article 49 of the parties' agreement, the Agency must provide the Union with an electronic records system that allows Union officials to "retain[]" emails so that they are "accessible for later reference."² And, under Article 51 of the parties' agreement, the Agency must address any of the Union's issues "relating to the use of" that system.³ Several years ago, the Agency arranged for Union officials to have access to .pst files for Union work. On multiple occasions, certain Union officials were unable to locate emails that they had stored within their respective .pst files. As a result, the Union filed a grievance alleging that the Agency had failed to provide the Union with an electronic records system that complied with the parties' agreement. The parties failed to resolve the dispute, and it proceeded to arbitration.

The Arbitrator framed the issue as: "Did the Agency comply with the collective[-]bargaining agreement[']s requirements with respect to electronic communications and . . . services . . . provided to the Union?"⁴

The Arbitrator found credible the Union officials' allegations that (1) their .pst files, and the emails within them, repeatedly went missing, and (2) the Agency failed to provide the Union with prompt information-technology services related to those issues. The Arbitrator noted that none of the Agency's witnesses provided any explanation as to why the Union experienced "repeated problems and substantial [service] delays."⁵ And although the Agency contended that the Union officials had mismanaged their .pst files, the Arbitrator found no direct evidence to corroborate that claim. Accordingly, the Arbitrator concluded that the Agency violated Articles 49 and 51.

The Arbitrator then noted that, during the arbitration hearing, an Agency witness testified that the Agency's electronic records system "taped over" emails that were older than ninety days.⁶ The Arbitrator stated that the witness's statement "appear[ed] to be an admitted violation"⁷ of Article 49, Section 4(B) (Section 4) – which precludes the Agency from "utiliz[ing]

¹ Award at 4 (the parties failed to establish the meaning of the acronym ".pst").

² *Id.* at 15 (quoting Collective-Bargaining Agreement (CBA) Art. 49, § 4(D)).

³ *Id.* at 21.

⁴ *Id.* at 1.

⁵ *Id.* at 24.

⁶ *Id.* at 26.

⁷ *Id.* at 25.

technological features that allow messages[, such as emails,] to expire.”⁸ Consequently, the Arbitrator concluded that the Agency violated Section 4.

As remedies for the violations of Articles 49 and 51, the Arbitrator directed the Agency to: make an effort to locate the Union’s lost .pst files; explain to the Union the details of, and train Union officials on, the .pst-file system; and apologize for those violations. To remedy the Section 4 violation, the Arbitrator directed the Agency to immediately “stop[]”⁹ and “discontinue”¹⁰ using an electronic records system that allows emails to expire after a certain period of time (the cease-and-desist remedy).

On July 16, 2018, the Agency filed exceptions to the award, and on August 17, 2018, the Union filed an opposition to the Agency’s exceptions.

III. Analysis and Conclusions

- A. The Arbitrator’s finding that the Agency violated Articles 49 and 51 is not based on a nonfact.

The Agency argues that the Arbitrator’s conclusion that it violated Articles 49 and 51 is based on a nonfact.¹¹ 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.¹² But the Authority will not find an award deficient on the basis of an arbitrator’s determination of any factual matter that the parties disputed at arbitration.¹³ In addition, an arbitrator’s conclusion that is based on an interpretation of a collective-bargaining agreement does not constitute a fact that may be successfully challenged as a nonfact.¹⁴

Here, the Agency contends that it did not violate Articles 49 and 51 because it (1) provided the Union with an electronic records system that complied with the parties’ agreement, and (2) serviced that system by restoring some of the Union officials’ missing files.¹⁵ However, even assuming that the challenged finding is

factual,¹⁶ the parties disputed these matters before the Arbitrator.¹⁷ Thus, the Agency’s argument does not provide a basis for finding the award deficient on nonfact grounds, and we deny the exception.¹⁸

- B. The Arbitrator’s finding that the Agency violated Section 4 is based on a nonfact.

The Agency contends that the Arbitrator’s finding that it violated Section 4 is based on a nonfact.¹⁹ As noted above, the Arbitrator found that the Agency violated Section 4 based on a witness’s statement that the Agency’s electronic records system “taped over” emails after ninety days.²⁰ However, the evidence establishes that – in addition to the Outlook email service – the Agency uses a data-backup service to temporarily store copies of Outlook emails.²¹ It is undisputed that the witness was referring to the retention limits of that backup service.²² As the Union did not argue to the Arbitrator – and does not argue now – that emails within the “live” Outlook service expire,²³ the Arbitrator’s conclusion that the Agency violated Section 4 is based on an erroneous factual finding. Therefore, we set aside that violation and the associated cease-and-desist remedy.²⁴

IV. Decision

We deny, in part, and grant, in part, the Agency’s exceptions.

¹⁶ See *Local 3911*, 69 FLRA at 235 (denying nonfact exception because it challenged arbitrator’s conclusion that was based on an interpretation of a collective-bargaining agreement).

¹⁷ Award at 12 (Agency arguing that the .pst files went missing as “a result of [file] mismanagement by Union employees,” and the Union arguing that the .pst files went missing because the Agency failed to provide it with a functional system); see also *id.* (Agency arguing that it corrected the issues with the .pst system); *id.* at 7-8, 12 (Union contending that the Agency failed to “promptly” provide assistance and did not restore all of the missing files).

¹⁸ See *AFGE, Local 3723*, 67 FLRA 149, 150 (2013).

¹⁹ Exceptions Br. at 6-8.

²⁰ Award at 26.

²¹ Exceptions, Ex. C, Tr. at 182-83 (referring to both a “CommVault backup” system and the Microsoft Outlook system).

²² See, e.g., Opp’n at 5 (acknowledging that the witness was referring to “backup copies of emails” being taped over (emphasis added)).

²³ Exceptions Br. at 7 (noting that “in addition to the live” version of an email, there is “a backup [copy] generated”); see also Opp’n at 8 (acknowledging a distinction between an “original Outlook email [and] the . . . 90-day restoration system” that saves copies (emphases added)).

²⁴ See *U.S. DOJ, BOP, Fed. Corr. Inst., Loretta, Pa.*, 55 FLRA 339, 343 & n.5 (1999) (Member Wasserman concurring in part and dissenting in part) (setting aside portion of award where arbitrator’s erroneous factual finding was central to that part of the award).

⁸ *Id.* at 15 (quoting CBA Art. 49, § 4(B)).

⁹ *Id.* at 26.

¹⁰ *Id.* at 28.

¹¹ Exceptions Br. at 8-9.

¹² E.g., *U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010) (citing *NFFE, Local 1984*, 56 FLRA 38, 41 (2000)).

¹³ E.g., *id.*

¹⁴ E.g., *AFGE, Local 3911*, 69 FLRA 233, 235 (2016) (*Local 3911*).

¹⁵ Exceptions Br. at 8-9.

Member Abbott, dissenting:

No matter how the nonfact standard is applied, I would deny the Agency's exceptions here because it is not the role of the Authority to save parties from poor choices they make at the bargaining table. Accordingly, I dissent.

Here, the Agency negotiated a provision – Article 49, Section 4(B) – which is unnecessarily and inexplicably broad and which the Arbitrator characterized as “unusual”¹ and “onerous.”² Specifically, Article 49, Section 4(B) provides that the Agency “will not utilize technological features that *allow messages to expire*.”³

During 2015-2016, some Union messages and documents were “lost for reference and retrieval after a short period of time.”⁴ Although the explanations of why this occurred varied from witness to witness, it is undisputed that the “technological features” of the Agency's system allowed messages and documents to “expire.”⁵ Therefore, the Arbitrator reasonably concluded that the Agency “admitted [to a] violation of”⁶ the “substantial affirmative responsibilities placed on the Agency”⁷ by Article 49, Section 4(B). Therefore, it is quite irrelevant which messages and documents (“backup” or others) were “taped over.”⁸

As I have noted several times, it is imperative that the Authority bring clarity to our decisions and to ensure that they are written in such a manner that is clear and will be understood by the federal labor-management relations community.⁹ Yet, how the majority has rendered this hair-splitting decision here – finding nonfact while assuredly not re-evaluating the evidence as if we were a second arbitrator presiding over a second factual hearing¹⁰ – is beyond me. What is obviously needed is a reevaluation of the most troublesome aspect of our nonfact standard – the “disputed below” prong.

The nonfact exception must be more than sheer factual error by the Arbitrator; of that much I am certain we can all agree. What distinguishes nonfact from complained-about mistakes is that the error must be a fact

(not a contract interpretation,¹¹ not a credibility determination,¹² and not a weighing of the evidence¹³) that is so “central” that “but for which” the arbitrator would have reached a different result.¹⁴ And yet we have added a prong of “disputed below” - where else would the parties dispute a fact if not before the arbitrator or they risk dismissal before us - that has been applied with undefined, inconsistent elasticity. Instead, we should give more weight to, and put the burden on the excepting party to demonstrate, the prongs that the fact must be “central” such that “but for which” the Arbitrator would have reached a different result.

Former Member Patrick Pizzella's seminal dissent in *U.S. Department of Veterans Affairs, Board of Veterans Appeals*, provides guidance.¹⁵

In recent years, the Authority has so conflated its application of the nonfact exception that now the exception is precluded whenever the Authority declares that the exception involves a matter that was “disputed” before the arbitrator, with no regard for how inconsistent, outrageous, or wrong is the finding, and with no consideration of how significant, or insignificant, is that finding to the arbitrator's ultimate conclusion.

Thus, I would deny the Agency's exceptions and sustain the Arbitrator's award in its entirety.

¹ Award at 19.

² *Id.* at 25.

³ *Id.* at 14 (quoting Collective-Bargaining Agreement Art. 49, § 4(B)).

⁴ *Id.* at 26.

⁵ *Id.* at 25.

⁶ *Id.*

⁷ *Id.* at 19.

⁸ Majority at 4.

⁹ *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 623, 625 (2018) (Concurring Opinion of Member Abbott); *NTEU*, 70 FLRA 701, 701 n.4 (2018).

¹⁰ Majority at 3.

¹¹ See *NLRB Prof'l Ass'n*, 68 FLRA 552, 554 (2015).

¹² See *AFGE, Local 648, Nat'l Council of Field Labor Locals*, 65 FLRA 704, 712 (2011) (citing *U.S. Dep't of the Treasury, IRS, Kan. City, Field Compliance Serv.*, 60 FLRA 401, 403 (2004)).

¹³ *U.S. Dep't of VA, Med. Ctr., Perry Point, Md.*, 68 FLRA 83, 87 (2014).

¹⁴ See *U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010).

¹⁵ 68 FLRA 170, 175-76 (2015) (Dissenting Opinion of Member Pizzella); see also *U.S. Dep't of the Interior, Bureau of Land Mgmt., Eugene Dist., Portland, Or.*, 68 FLRA 178, 183 n.73 (2015) (excepting party failed to demonstrate the but-for-which prong).