

71 FLRA No. 108

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1164
(Union)

0-AR-5531

DECISION

February 20, 2020

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

Decision by Member Abbott
for the Authority

I. Statement of the Case

In this case, we remind the parties that mere disagreement with an arbitrator's interpretation of a collective-bargaining agreement as to the procedural arbitrability of the grievance is not grounds for finding an award deficient.¹

The sole issue in this case is whether the grievance is procedurally arbitrable. Arbitrator William T. S. Butler found that the grievance was arbitrable because the parties "mutual[ly] consent[ed]" to an extension of the deadline for arbitration contained in the parties' agreement.² The Agency argues that the award is based on a nonfact and fails to draw its essence from the parties' agreement. We find that the Agency failed to demonstrate that the award was deficient, because its exceptions are merely disagreements with the Arbitrator's interpretation of the parties' agreement.

II. Background and Arbitrator's Award

The Union filed a grievance and invoked arbitration on February 24, 2016. There was no

¹ See SSA, 71 FLRA 352, 353 (2019) (SSA II) (Member DuBester concurring); SSA, 70 FLRA 227, 230 (2017) (SSA I).

² Award at 15.

communication between either party until May 14, 2018, when the Union contacted the Agency to find out who was assigned to handle the grievance. The parties then allowed more than a month to pass before the Union emailed the Agency on June 25, 2018, providing the Arbitrator's information. Then, on July 11, 2018, the Agency contacted the Arbitrator and the Union seeking "mutual agreement" to bifurcate the grievance into one hearing on the procedural issue and one hearing on the merits.³ The next day the Agency proposed four dates for the hearing—August 21, 22, 23, and 24. The Union rejected the proposed hearing dates. On August 24, 2018, the Agency informed the Union that "th[e] arbitration [of the grievance] sunsets today . . . [and the Agency] does not agree to extend the sunset date."⁴ On September 14, 2018, the Union submitted a motion for an extension to the Arbitrator. The parties agreed to have a hearing on the "sunset" issue.⁵

As relevant here, Article 25, Section 5 of the parties' agreement provides the following:

All cases invoked on or after the effective date of this agreement must be heard within [two and one half] years from the date of invocation. The following exceptions will be applicable to all of the above cases: A six[-]month extension will be granted based on (a) postponement by the mutual consent of the parties; (b) motion of one party that is granted by the arbitrator; (c) withdrawal or termination of the arbitrator by the Panel; (d) illness or death of the arbitrator; [or] (e) inclement weather event.⁶

The Arbitrator found that despite the "hard deadlines by which a grievance must be heard . . . to satisfy the 'sundown' deadlines, additional time to hear [the grievance was] afforded otherwise under . . . Article 25."⁷ Specifically, the Arbitrator found that Article 25, Section 5(a) applied, and that the parties mutually consented to a six-month extension.

In support of his conclusion of mutual consent, the Arbitrator pointed to the Agency's July 11, 2018 request to bifurcate the proceedings—which the Union did not oppose—as implicit consent for a six-month extension beyond the August 24, 2018 deadline. The Arbitrator reasoned that the "mutually agreed to"

³ *Id.* at 4.

⁴ *Id.* at 5.

⁵ *Id.* at 5-6.

⁶ Exceptions, Attach. 1, Collective-Bargaining Agreement (CBA) at 169.

⁷ Award at 14.

bifurcation request, forty-four days before the sunset date, meant that the parties mutually agreed that additional time was necessary to fully resolve the grievance.⁸ Therefore, the Arbitrator concluded that the parties agreed to a six-month extension, making the deadline for hearing the remaining issues involved in the grievance February 24, 2019. In his award, dated July 15, 2019, the Arbitrator subsequently granted another six-month extension due to his own unexpected temporary incapacitation, making the final deadline for hearing the grievance even later in 2019.

On August 14, 2019, the Agency filed exceptions to the Arbitrator's award. The Union did not file an opposition to the Agency's exceptions.

III. Analysis and Conclusion

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

The Agency argues the award fails to draw its essence from the parties' agreement.⁹ First, the Agency argues that the award is not a plausible interpretation of Article 25, Section 5(a), because the Arbitrator could not interpret the Agency's bifurcation request and the Union's silence to satisfy the "mutual consent" exception.¹⁰

The Authority has held that disagreement with an arbitrator's interpretation and application of a collective bargaining agreement does not provide a basis for finding an award deficient.¹¹ Here, the Arbitrator found that the Agency's July 11, 2018 request to bifurcate the proceedings—which the Union did not oppose—was implicit consent for a six-month extension beyond the August 24, 2018 deadline.¹² The Arbitrator reasoned that the "mutually agreed to" bifurcation request, forty-four days from the sunset date, meant that the parties mutually agreed that additional time was necessary to fully resolve the grievance.¹³ The parties' agreement, Article 25, Section 5(a), does not define what constitutes "mutual consent," and the Agency here has failed to demonstrate how the Arbitrator's interpretation of "mutual consent" is implausible.¹⁴ Instead, the Agency's argument is merely disagreement with the Arbitrator's conclusion and is not grounds for finding the award deficient.

The Agency also argues that the Arbitrator's conclusion that the grievance was arbitrable manifests a disregard of the parties' agreement. The Agency points to one portion of the award where the Arbitrator states that "[Article 25, Section 5] does not completely invalidate the long-held and well[-]established presumption of arbitrability."¹⁵ This statement by the Arbitrator is dicta because it is not used by the Arbitrator to support his conclusion that the grievance is arbitrable.¹⁶ The Authority has held that statements that are not essential to the Arbitrator's decision are dicta, and dicta does not provide a basis for finding an award

⁸ *Id.* at 15.

⁹ The Authority will find an arbitration 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. *Library of Cong.*, 60 FLRA 715, 717 (2005) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*)).

¹⁰ Exceptions Br. at 8-10. The Agency relies on *U.S. Small Business Administration*, 70 FLRA 525, 527-528 (2018) (*SBA*) (Member DuBester concurring, in part, and dissenting, in part), *recons. denied*, 70 FLRA 988 (2018), to support its argument that "[a]n arbitrator cannot interpret a contractual requirement for 'mutual consent' as being satisfied where there is no evidence of such consent." *Id.* at 8. However, in *SBA*, that arbitrator relied on the parties' past practice and alleged waiver to disregard the specific language of the parties' agreement. Here, the Arbitrator relied on the specific language of the parties' agreement, and his findings of fact as derived from the parties' conduct and communications, to conclude that a six-month extension was allowed "by the mutual consent of the parties." Award at 15 (citing CBA at 169).

¹¹ *SSA II*, 71 FLRA at 353 (citing *OSHA*, 34 FLRA at 575-576); *see also SSA I*, 70 FLRA at 230 (finding that an agency's attempt to relitigate its interpretation of the agreement and the evidentiary weight given by the arbitrator fails to demonstrate that the award is deficient).

¹² Award at 15.

¹³ *Id.*

¹⁴ CBA at 169; Exceptions Br. at 8-10. *But see U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 387, 388-89 (2019) (Member DuBester dissenting in part) (finding that a procedural-arbitrability determination that relied on alleged past practice to *create an exception* to the clear procedural deadline in the parties' agreement was not a plausible interpretation of the parties' agreement (emphasis added)).

¹⁵ Award at 12; Exceptions Br. at 10. *See generally Fraternal Order of Police, Lodge No. 168*, 70 FLRA 788, 790 (2018) (finding that the Supreme Court found there is a "rebuttable presumption of *substantive* arbitrability" not *procedural* arbitrability).

¹⁶ Award at 15 (finding the parties mutually consented to a six-month extension based on their actions).

deficient.¹⁷ Therefore, we deny the Agency's exception alleging that the Arbitrator's conclusion manifests a disregard of the parties' agreement.¹⁸

B. The award is not based on a nonfact.

The Agency argues that the award is based on a nonfact. Specifically, the Agency argues that the Arbitrator based the award on his finding that the parties "mutually consented to postponing the arbitration until after the deadline."¹⁹ The Agency does not dispute the underlying facts that led the Arbitrator to conclude that the parties mutually consented to an extension—the Agency's bifurcation request or the Union's silence²⁰—but instead argues that the Arbitrator incorrectly interpreted the "mutual consent" exception to the procedural deadline to be satisfied by those facts.²¹ Simply put, the Agency's nonfact exception challenges the Arbitrator's interpretation of the parties' agreement. The Authority has held that an arbitrator's contractual interpretations cannot be challenged as nonfacts.²² Therefore, we deny the Agency's nonfact exception.

IV. Order

We deny the Agency's exceptions.

Member DuBester, concurring:

I agree with the Order denying the Agency's exceptions.

¹⁷ *AFGE, Council of Prison Locals 33, Local 3690*, 69 FLRA 127, 131 (2015) (citing *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Coleman II, Fla.*, 68 FLRA 52, 56 (2014); *Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 891-92 (2010); *NFFE, Local 1827*, 52 FLRA 1378, 1385 (1997)).

¹⁸ *But see U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 179, 180 (2019) (Member DuBester dissenting) (finding that a procedural-arbitrability determination that relied on alleged past practice to *create an exception* to the plain language of a parties' agreement manifested a disregard for the parties' agreement (emphasis added)).

¹⁹ Exceptions Br. at 11.

²⁰ Award at 15.

²¹ Exceptions Br. at 15 ("AFGE never . . . agreed to [SSA's] July 2018 bifurcation request . . . [i]nstead it only stated that SSA had 'initiated' bifurcation."); *id.* ("[N]either party has alleged mutual consent to the July 2018 bifurcation request regarding the grievance's timeliness.").

²² *NTEU*, 69 FLRA 614, 619 (2016) ("[L]egal conclusions and contractual interpretations may not be challenged as nonfacts.").