

71 FLRA No. 141

NATIONAL LABOR RELATIONS BOARD
PROFESSIONAL ASSOCIATION
(Union)

and

NATIONAL LABOR RELATIONS BOARD
(Agency)

0-AR-5461

DECISION

May 7, 2020

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

I. Statement of the Case

The Union filed a grievance over the Agency’s closure of its health unit. Arbitrator Timothy Buckalew found the grievance untimely, and thus not procedurally arbitrable under the parties’ collective-bargaining agreement. The Union challenges the Arbitrator’s procedural-arbitrability determination on contrary-to-law, nonfact, and exceeded-authority grounds. We find that the Union’s exceptions fail to demonstrate that the award is deficient.

II. Background and Arbitrator’s Award

On January 29, 2018,¹ the Agency notified the Union that it would implement various cost-saving measures, including closing the health unit in the Agency’s headquarters. On February 1, the Agency notified the Union that the cost-saving measures had been approved by Agency officials and “will be implemented no later than March 1.”² The Union demanded bargaining, and the parties thereafter discussed dates to meet. On March 6, the Agency sent an email to all employees announcing that the health unit would close completely on March 31.

The next day, the Union filed an institutional grievance alleging violations of the parties’ agreement and § 7116(a)(1) and (5) of the Federal Service Labor-

Management Relations Statute (Statute).³ The grievance referenced the March 6 email, and also stated that “[t]o date, the parties have not begun negotiations over . . . the Agency’s decision to close the [h]ealth [u]nit.”⁴ Additionally, the grievance alleged that the “Agency has treated not only the closure, but its effects on employees, as a fait accompli.”⁵ The Agency denied the grievance and the Union invoked arbitration.

The Agency challenged the grievance’s arbitrability, asserting that it was untimely filed under the parties’ negotiated grievance procedure. The Arbitrator found that Article 11, Section 1.3 of the parties’ agreement (Article 11) required him to decide questions of grievability or arbitrability before the merits of a grievance “on the request of either party.”⁶ Therefore, he framed the issue as whether the “grievance dated March 7, 2018 [is] arbitrable” and conducted a hearing limited to that issue.⁷

Article 10 of the parties’ agreement (Article 10) states that a grievance must be presented to the responsible Agency manager “within ten (10) business days following the date on which the aggrieved party or [Union] representative had knowledge of the facts giving rise to the grievance.”⁸ The Arbitrator found that the Union’s “complaint [is] that the Agency was/is violating the [parties’ agreement] or statute by unilaterally abolishing the health unit.”⁹ And he found that the February 1 communication to the Union was “clear and unambiguous: the decision to eliminate health units . . . had been made,”¹⁰ and the Union’s “attempt to provide some input prior to the Agency decision to adopt the cuts had clearly been rejected.”¹¹

On this basis, the Arbitrator found that the “facts giving rise to the grievance asserting the [Union’s] right to participate in the pre-decision bargaining were settled no later than February 1.”¹² In making this finding, he rejected the Union’s arguments that the March 6 email to employees regarding the health unit’s closure triggered its grievance rights. Applying Article 10, he concluded that the Union’s grievance was not arbitrable because the Union “knew that its claimed right to participate in the decision[-]making finalizing the

¹ Unless otherwise noted, all dates occurred in 2018.

² Award at 4.

³ 5 U.S.C. § 7116(a)(1), (5).

⁴ Exceptions, Attach. 3, Grievance (Grievance) at 240.

⁵ *Id.* at 241 (emphasis omitted).

⁶ Award at 2.

⁷ *Id.* at 1.

⁸ *Id.* at 5.

⁹ *Id.* at 3.

¹⁰ *Id.* at 4.

¹¹ *Id.*

¹² *Id.*

cost cutting measures had been rejected” as of February 1.¹³

On January 7, 2019, the Union filed exceptions to the Arbitrator’s award and on February 5, 2019, the Agency filed an opposition.

III. Analysis and Conclusions: The Arbitrator’s procedural-arbitrability determination is not deficient.

Put simply, this case – which involves an arbitrator’s determination regarding the timeliness of a grievance – concerns only procedural arbitrability.¹⁴ The Authority has reviewed procedural-arbitrability determinations on contrary-to-law, essence, nonfact, exceeded-authority, and fair-hearing grounds.¹⁵¹⁶

Here, the Arbitrator explained that his authority to decide procedural arbitrability questions derived from Article 11.¹⁷ And, applying the time limit set forth in Article 10, he concluded the grievance was untimely filed

¹⁴ *U.S. Dep’t of the Air Force, Joint Base Elmendorf-Richardson*, 69 FLRA 541, 543 (2016) (Member Pizzella dissenting) (citing *NFFE, Local 479*, 67 FLRA 284, 285 (2014)).

¹⁵ *E.g., SSA*, 71 FLRA 580, 581-82 (2020) (Member DuBester concurring) (essence and nonfact); *Fraternal Order of Police, Lodge No. 168*, 70 FLRA 788, 790 (2018) (*Police*) (contrary to law); *AFGE, Local 3294*, 70 FLRA 432, 434-36 (2018) (Member DuBester concurring) (nonfact, exceeded authority, and fair hearing).

Member DuBester notes that, where the parties have agreed to submit the arbitrability question to an arbitrator, federal courts and the Authority have recognized that an arbitrator’s procedural-arbitrability determination is entitled to deference and is subject to review only on narrow grounds. *See, e.g., First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *Orion Pictures Corp. v. Writers Guild of Am., W., Inc.*, 946 F.2d 722, 725 (9th Cir. 1991) (“Once a party has initially submitted the arbitrability question to the arbitrator, any subsequent judicial review [is] narrowly circumscribed” and a federal court must “enforce that ruling if it represents a ‘plausible interpretation’ of the [collective-bargaining agreement].”) (quoting *George Day Const. Co. v. United Bhd. of Carpenters & Joiners*, 722 F.2d 1471, 1476-77 (9th Cir. 1984)); *see also U.S. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (Member DuBester concurring, in part, and dissenting, in part) (holding that the Authority will review procedural-arbitrability determinations on essence grounds, “[c]onsistent with the Authority’s mandate . . . to review arbitral awards on grounds ‘similar to those applied by [f]ederal courts in private[-]sector labor-management relations’”) (quoting 5 U.S.C. § 7122(a)(2)).

¹⁶ The Chairman and Member Abbott observe that the Authority has clarified the discussion about essence exceptions – and any reliance on private-sector arbitration awards – in the seminal *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 660, 663-664 (2020) (Member Abbott concurring; Member DuBester dissenting). This is the decision that charts the course for this Authority, and for the federal labor-relations community, into the future.

¹⁷ Award at 2. Article 11 states that “[u]pon the request of either party, the arbitrator shall decide questions of grievability or arbitrability, after hearing relevant facts and arguments on such questions, prior to the opening of a hearing on the substantive allegations of the grievance.” Exceptions, Attach. 3, Collective-Bargaining Agreement at 35.

¹³ *Id.* at 5. The Arbitrator stated that he was making “no finding” regarding the Union’s “statutory bargaining rights or its right to challenge changed conditions of employment arising from the abolition of the health units.” *Id.*

because it was “clear” the Union knew of “the facts giving rise to” its institutional grievance no later than February 1, when the Agency notified Union officials that the decision to close the health unit was final.¹⁸

The Union argues that the Arbitrator should have evaluated the timeliness of the grievance based on the Agency’s March 6 email to all employees announcing the health unit’s closure. The Union asserts that this is when it became aware of the implementation of the Agency’s decision to close the unit.¹⁹ The Union’s contrary-to-law,²⁰ nonfact,²¹ and exceeded-authority²² exceptions are based on this argument.²³

A. The award is not contrary to law.

In order for a procedural-arbitrability ruling to be found deficient as contrary to law, the appealing party must establish that the ruling conflicts with statutory procedural requirements that apply to the parties’ negotiated grievance procedure.²⁴ In determining whether an award is contrary to law, “the Authority defers to the arbitrator’s findings of fact unless the excepting party demonstrates that the award is based on a nonfact.”²⁵

The Union argues that the Arbitrator erred by failing to apply the same standards to its grievance as an administrative law judge would apply when resolving an unfair-labor-practice (ULP) charge.²⁶ The Union does not allege, however, that any statutory procedural requirement applies to the parties’ negotiated grievance procedure. Moreover, the Arbitrator expressly stated that

he made no findings regarding the merits of the grievance.²⁷

Consequently, the Union’s arguments do not establish that the Arbitrator’s procedural-arbitrability determination is contrary to law, and we deny this exception.²⁸

The Union also argues that the award is contrary to the Fifth Amendment of the U.S. Constitution²⁹ because it deprived the Union of its right to a hearing on the ULP claims in its grievance.³⁰ The Union acknowledges, however, that it failed to raise this argument to the Arbitrator during the hearing conducted to determine whether its grievance should be dismissed as untimely.³¹ Under these circumstances – where the Union was aware that dismissal of its grievance would deprive it of any further adjudication of its ULP claims – we dismiss the Union’s argument on grounds that it could have, but did not, raise this argument below.³²

B. The award is not based on a nonfact and the Arbitrator did not exceed his authority.

The Union contends that the Arbitrator based his procedural-arbitrability determination on a nonfact,³³ and that he exceeded his authority.³⁴ On this point, the Union asserts that the Arbitrator incorrectly construed the grievance to allege that the Agency committed a ULP by

¹⁸ Award at 3, 4.

¹⁹ Exceptions at 4-5.

²⁰ *Id.* at 4 (citing 5 U.S.C. § 7118).

²¹ *Id.* at 8.

²² *Id.* at 7-8.

²³ The Union also alleges that “any interpretation of either the grievance or the agreements that led to such a finding” “that the grievance did not allege a unilateral change” would be “irrational, implausible, and/or unfounded.” *Id.* at 8. To the extent that the Union is raising an essence exception, the Union makes no argument beyond this vague and conclusory statement. Consequently, we deny the Union’s essence exception as unsupported. 5 C.F.R. § 2425.6(e)(1) (stating that an exception “may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground” listed in § 2425.6(a)-(c)); see, e.g., *Fraternal Order of Police, Lodge No. 168*, 70 FLRA 338, 340-41 (2017).

²⁴ *Police*, 70 FLRA at 790 (citing *NFFE, Local 479*, 67 FLRA 284, 285 (2014)).

²⁵ *U.S. DOJ, Fed. BOP*, 68 FLRA 728, 731 (2015) (stating that in ULP cases, the Authority also defers to the arbitrator’s factual findings).

²⁶ Exceptions at 4-5.

²⁷ Award at 5 (“I make no finding regarding the [Union’s] statutory bargaining rights or its right to challenge changed conditions of employment arising from the abolition of the health units.”).

²⁸ See *AFGE, Local 2054*, 63 FLRA 169, 173 & n.3 (2009) (judge’s finding that ULP was properly before him as part of the grievance was a procedural-arbitrability finding distinct from his findings on the merits of the ULP); *AFGE, Local 2459*, 51 FLRA 1602, 1607 (1996) (noting that cases denied on procedural arbitrability grounds are disposed of “procedurally and not on the merits”).

²⁹ U.S. Const. amend. V.

³⁰ Exceptions at 8-9.

³¹ *Id.* at 8 n.42.

³² See 5 C.F.R. §§ 2425.4(c), 2429.5.

³³ 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. *SSA, Office of Hearing Operations*, 71 FLRA 177, 178 (2019) (citing *U.S. DOD, Def. Logistics Agency, Disposition Servs., Battle Creek, Mich.*, 70 FLRA 949, 950 (2018)).

³⁴ As relevant here, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration or resolve an issue not submitted to arbitration. *AFGE, Local 3254*, 70 FLRA 577, 578 (2018) (*Local 3254*) (citing *U.S. DOJ, Fed. BOP, Metro. Det. Ctr. Guaynabo, P.R.*, 68 FLRA 960, 966 (2015); *SSA, Office of Disability Adjudication & Review, Springfield, Mass.*, 68 FLRA 803, 806 (2015)).

failing to bargain with the Union over the *decision* to eliminate the health unit, rather than by unilaterally implementing that decision on March 6.³⁵ The Union argues that the Arbitrator erred because the “grievance plainly alleged a unilateral implementation,” and that “[b]oth parties acknowledged that the grievance alleged a unilateral change.”³⁶

To the extent that the Union is arguing that the Arbitrator’s formulation of the issue was unreasonable and is a nonfact, we reject those contentions. The Union is correct that the grievance alleged that the Agency “violated . . . § 7116(a)(1) [and] (5)” by closing the health unit.³⁷ However, the grievance neither explicitly alleges nor explains how the Agency violated these provisions by “unilaterally implementing” this closure.³⁸ Moreover, the portion of the hearing transcript upon which the Union relies to argue that “both parties acknowledged that the grievance alleged a unilateral change”³⁹ does not demonstrate that the parties had a “mutual understanding” regarding this issue.⁴⁰

Further, as the grievance was filed as an institutional grievance, the Arbitrator did not err by relying on the Union’s institutional knowledge that the Agency had made the decision to close the health unit – rather than the Agency’s email informing employees of this decision – to determine when the Union knew the facts giving rise to the grievance.⁴¹ Thus, the Union’s disagreement with the Arbitrator’s interpretation of the grievance provides no basis for finding his determination deficient as a nonfact.⁴²

The Union has also failed to demonstrate that the Arbitrator exceeded his authority. Where the parties fail to stipulate the issue for resolution, arbitrators may formulate the issue on the basis of the subject matter before them, and the Authority accords substantial deference to this formulation.⁴³ Here, the Arbitrator’s findings are directly responsive to the issue before him – namely, whether the grievance was arbitrable. Accordingly, we deny the Union’s nonfact and exceeded-authority exceptions.

IV. Decision

We deny, in part, and dismiss, in part, the Union’s exceptions.

³⁵ Exceptions at 7-8. The Arbitrator found, based on the grievance and the evidence adduced at arbitration, that the action challenged by the grievance was the Agency’s unilateral decision to close the health unit. Award at 3-4, 5.

³⁶ Exceptions at 7.

³⁷ Grievance at 240.

³⁸ *See id.* at 240-42.

³⁹ Exceptions at 7 & n.40 (citing Tr. at 16, 19).

⁴⁰ *U.S. DHS, U.S. CBP*, 64 FLRA 916, 920 (2010) (explaining that “[w]hen the record demonstrates the mutual understanding of the parties as to the stipulated issue, an arbitrator’s award must be consistent with the stipulation as understood by the parties”).

⁴¹ *NLRB Prof’l Ass’n*, 68 FLRA 552, 555 (2015) (citing *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 836, 842 (2000)) (nonfact exception rejected when party fails to establish that arbitrator’s determination is clearly erroneous).

⁴² *NAIL, Local 17*, 68 FLRA 97, 99 (2014) (citing *AFGE, Council Local 2128*, 59 FLRA 406, 408 (2003)) (rejecting nonfact exception challenging arbitrator’s finding regarding issues encompassed by the grievance); *U.S. DOD, Def. Contract Mgmt. Agency*, 59 FLRA 396, 403 (2003) (citing *NTEU, Chapter 45*, 52 FLRA 1458, 1466 (1997)) (rejecting nonfact exception challenging manner in which the arbitrator “construed the grievance”); *see also Police*, 70 FLRA at 790 (rejecting nonfact exception challenging arbitrator’s evaluation of the evidence); *United Power Trades Org.*, 67 FLRA 311, 315

(2014) (arbitrator’s interpretation of a settlement agreement does not provide basis for finding award is based on a nonfact).

⁴³ *NTEU*, 70 FLRA 57, 60 (2016) (citing *AFGE, Council of Prison Locals #33, Local 0922*, 69 FLRA 351, 352 (2016); *see also NTEU*, 63 FLRA 198, 200 (2009) (*NTEU*) (Authority accords the arbitrator’s formulation of the issue to be decided the same substantial deference that the Authority accords an arbitrator’s interpretation and application of a collective-bargaining agreement). Where the parties fail to stipulate the issue, arbitrators may formulate the issue based on the subject matter before them, and the formulation is accorded substantial deference. *NTEU*, 63 FLRA at 200 (citations omitted). In such circumstances, the Authority examines whether the award is directly responsive to the issue that the arbitrator framed. *Local 3254*, 70 FLRA at 578.