

71 FLRA No. 151

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES (Union)

and

UNITED STATES DEPARTMENT OF DEFENSE DEFENSE COMMISSARY AGENCY (Agency)

0-AR-5496

DECISION

June 3, 2020

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

I. Statement of the Case

Arbitrator John Paul Simpkins found that the Union’s grievance was untimely filed and, therefore, withdrawn in accordance with the parties’ collective-bargaining agreement. The Union filed exceptions to the award on contrary-to-Agency-regulation, essence, nonfact, and fair-hearing grounds. Because the Union does not establish that the award is deficient on any of these grounds, we deny the Union’s exceptions.

II. Background and Arbitrator’s Award

The Agency notified the Union and the grievant of its decision to suspend the grievant on May 21, 2018 (the suspension decision).<sup>1</sup> The Union filed a grievance on the grievant’s behalf on June 28. The grievance alleged that the Agency violated Agency policy and the grievant’s “ability to use the established grievance

procedure” in Article 43 of the parties’ agreement (Article 43) when it issued the suspension.<sup>2</sup>

The parties were unable to resolve the grievance and invoked arbitration. The issue before the Arbitrator was whether the grievance was untimely and therefore withdrawn under Article 43.<sup>3</sup>

In relevant part, Article 43 provides that it “shall be the exclusive procedure for resolving grievances,” and that “for a grievance to be considered timely . . . it must be filed within fourteen (14) days after the alleged violation or incident occurred, or of becoming aware of the alleged violation or incident.”<sup>4</sup> Article 43 also provides that the “[f]ailure on the part of an employee or grieving PARTY to meet stated time limits shall constitute[] withdrawal of the grievance.”<sup>5</sup>

The Arbitrator found that the grievance was untimely because the Union failed to file the grievance within fourteen days after being notified of the suspension decision. In making this finding, he rejected the Union’s argument that the filing deadline did not begin to run until the effective date of the suspension. Consequently, he found that the grievance was withdrawn and not arbitrable.

The Union filed exceptions to the award on April 10, 2019, and the Agency filed an opposition to the Union’s exceptions on June 20, 2019.

III. Analysis and Conclusions

A. The award is not contrary to Agency regulations.

The Union argues that the award is contrary to Agency regulation DeCA Directive 50-4, Appendix D, Section (D)(7)(b) (the directive).<sup>6</sup> When an exception involves an award’s consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo.<sup>7</sup> In applying the standard of de novo review, the Authority assesses whether the arbitrator’s legal conclusions are consistent with the applicable standard of law.<sup>8</sup> In making that assessment, the Authority defers to the

<sup>1</sup> All dates hereafter occurred in 2018, unless otherwise noted. The Arbitrator referred to May 21 as the date “that the grievant and the Union were issued notice of the proposed suspension” but also referred to this action as “management’s decision on the proposed suspension.” Award at 3. The record demonstrates that the Agency’s decision on the suspension issued on May 21. See Opp’n, Attach. 4 at 9-10. Therefore, it is clear that the Arbitrator was referring to the Agency’s decision on the suspension, notwithstanding his reference to it as the “proposed suspension” throughout the award. Award at 3.

<sup>2</sup> Award at 1; see also Exceptions, Attach. 1, Collective-Bargaining Agreement (CBA) at 61-65.

<sup>3</sup> Award at 2.

<sup>4</sup> Id. at 1-2.

<sup>5</sup> Id. at 2.

<sup>6</sup> Exceptions at 4-5.

<sup>7</sup> U.S. Dep’t of VA, Gulf Coast Med. Ctr., Biloxi, Miss., 70 FLRA 175, 177 (2017) (VA); U.S. Dep’t of the Treasury, IRS, 68 FLRA 145, 147 (2014) (IRS).

<sup>8</sup> VA, 70 FLRA at 177.

arbitrator's underlying factual findings, unless the appealing party establishes they are nonfacts.<sup>9</sup>

The directive states that “[a] grievance filed under the [Agency’s] procedure must be filed within [fifteen] calendar days after the effective date of the suspension.”<sup>10</sup> Noting that the grievance was filed within fifteen days of the suspension’s effective date, the Union alleges that the Arbitrator should have applied this provision to find that the grievance was timely filed.<sup>11</sup>

There is no dispute, however, that the directive expressly applies to grievances brought under the Agency’s administrative grievance procedure, while the Union’s grievance was filed under the parties’ negotiated grievance procedure.<sup>12</sup> Moreover, even if the directive could be interpreted to apply to grievances brought under the parties’ negotiated grievance procedure, it is well-established that collective-bargaining agreements, rather than agency regulations, govern matters to which they both apply.<sup>13</sup> Therefore, the Union has not demonstrated that the Arbitrator erred by not applying the directive’s timeliness requirement to the grievance.<sup>14</sup>

Accordingly, we deny this exception.

B. The award draws its essence from the parties’ agreement.

The Union argues that the award fails to draw its essence from Article 43.<sup>15</sup> Specifically, the Union contends the Arbitrator should have found that the fourteen-day period for filing the grievance commenced on the effective date of the grievant’s suspension, rather than on the date when the Agency issued the suspension decision.<sup>16</sup>

The Authority has held that, “[c]onsistent with [its] mandate . . . to review arbitral awards on grounds ‘similar to those applied by [f]ederal courts in private[-]sector labor-management relations,’” a party “may directly challenge arbitrators’ procedural-arbitrability determinations on essence grounds.”<sup>17</sup> The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining 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 collective-bargaining 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.<sup>18</sup>

<sup>9</sup> *Id.*

<sup>10</sup> Exceptions, Attach. 3, Directive (Directive) at D-3.

<sup>11</sup> Exceptions at 5.

<sup>12</sup> Directive at D-3; *see also* CBA at 61 (Article 43, Section 2(a) defines a grievance as any complaint “[b]y an employee concerning any matter relating to the employment of the employee.”).

<sup>13</sup> VA, 70 FLRA at 177 (citations omitted); *see also* AFGE, *Local 200*, 68 FLRA 549, 550 (2015) (*Local 200*) (where agency regulation and parties’ agreement both apply, the parties’ agreement governs the dispute); IRS, 68 FLRA at 147 (finding that where agency negotiates agreement that conflicts with internal regulation, agency is bound by the agreement). The Union acknowledges that the directive applies when it does not conflict with the parties’ agreement or the agreement is silent on the matter. Exceptions at 5.

<sup>14</sup> VA, 70 FLRA at 177; AFGE *Local 3254*, 70 FLRA 577, 581 (2018) (*Local 3254*); *Local 200*, 68 FLRA at 550; IRS, 68 FLRA at 147.

<sup>15</sup> Exceptions at 10-11. The Union also cites Article 42 of the parties’ agreement, but provides no explanation as to how the Arbitrator allegedly misinterpreted Article 42 and there is no indication that the Union made any arguments regarding Article 42 before the Arbitrator. *Id.* at 10. Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority will not consider any arguments that “could have been, but were not, presented to the arbitrator.” *U.S. Dep’t of VA, John J. Pershing Veterans Admin.*, 71 FLRA 511, 511-12 (2020) (citing 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. Dep’t of Commerce, Nat’l Oceanic & Atmospheric Admin., Nat’l Weather Serv.*, 67 FLRA 356, 357 (2014)); *see also* *U.S. Dep’t of Energy, W. Area Power Admin., Lakewood, Colo.*, 67 FLRA 376, 377 (2014) (barring essence claim where no indication in record that agency raised it at arbitration). Accordingly, we do not consider the Union’s argument regarding Article 42.

<sup>16</sup> Exceptions at 10.

<sup>17</sup> *U.S. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (Member DuBester concurring, in part, and dissenting, in part) (quoting 5 U.S.C. § 7122(a)(2)).

<sup>18</sup> VA, 70 FLRA at 177

To support its argument, the Union relies upon a decision by the Merit Systems Protection Board and a dictionary definition for “effective date.”<sup>19</sup> But the Union does not cite any provision in the parties’ agreement that required the Arbitrator to rely on the “effective date” of the suspension rather than the date of the suspension decision to determine whether the grievance was timely under Article 43.

As the Authority and federal courts have recognized, an Arbitrator’s procedural-arbitrability determination is entitled to deference and is subject to review only on narrow grounds.<sup>20</sup> Applying that deferential standard, we find that the Union has failed to demonstrate that the Arbitrator’s interpretation of Article 43 did not draw its essence from the parties’ agreement.<sup>21</sup>

The Union also argues that the award fails to draw its essence from the parties’ agreement because the Arbitrator disregarded the directive.<sup>22</sup> However, because we have already found that the directive does not apply, we reject that argument.<sup>23</sup>

Accordingly, we deny the Union’s essence exceptions.

C. The award is not based on a nonfact.

The Union argues that the award is based on a nonfact because the Arbitrator “defined the terms ‘date of violation’ and ‘effective date’ incorrectly.”<sup>24</sup> To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.<sup>25</sup> However, a challenge to an arbitrator’s interpretation of the parties’ agreement cannot be challenged as a nonfact.<sup>26</sup>

Here, the Union’s nonfact exception challenges the Arbitrator’s interpretation of the parties’ agreement, and is based upon arguments that we have already rejected. Therefore, we deny this exception.<sup>27</sup>

D. The Union was not denied a fair hearing.

The Union argues that the Arbitrator failed to conduct a fair hearing by incorrectly determining that the grievance was not arbitrable and thereby preventing the Union from presenting facts and having the case determined on the merits.<sup>28</sup> The Authority will find that an arbitrator failed to conduct a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that the arbitrator conducted the proceedings in a manner that so prejudiced a party as to affect the fairness of the proceeding as a whole.<sup>29</sup>

<sup>19</sup> Exceptions at 11 (citing *Lioudakis v. Dep’t of the Navy*, No. SF-0752-17-0414-I-1, 2017 WL 2501655 (M.S.P.B. June 6, 2017) (noting that the effective date for a removal action triggered the filing deadlines for an appeal)). The Union also alleges that Black’s Law Dictionary defines “effective date” as “[t]he date on which a statute, contract, insurance policy, or other such instrument becomes enforceable or otherwise takes effect. This date sometimes differs from the date on which the instrument was enacted or signed.” *Id.*

<sup>20</sup> *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) (quoting *George Day Const. Co. v. United Bhd. of Carpenters & Joiners*, 722 F.2d 1471, 1476-77 (9th Cir. 1984) (“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].”)

<sup>21</sup> *U.S. Dep’t of VA Med. Ctr., Detroit, Mich.*, 60 FLRA 306, 308 (2004) (finding agency did not demonstrate that award failed to draw essence from parties’ agreement where agency did not cite any provision defining the disputed term and did not otherwise demonstrate that arbitrator’s determination is irrational, unfounded, implausible, or in manifest disregard of the agreement).

<sup>22</sup> Exceptions at 11.

<sup>23</sup> *AFGE, Local 836*, 69 FLRA 502, 506 (2016) (*Local 836*) (rejecting essence exception that restates fair-hearing exception for same reasons that fair-hearing exception had been denied).

<sup>24</sup> Exceptions at 9.

<sup>25</sup> *Local 3254*, 70 FLRA at 580; *NAGE, SEIU, Local 551*, 68 FLRA 285, 288 (2015) (*NAGE*).

<sup>26</sup> *NAGE*, 68 FLRA at 288.

<sup>27</sup> *Id.*; see also *Local 836*, 69 FLRA at 506 (rejecting essence exception that restates fair-hearing exception previously denied); *Indep. Union of Pension Emps. for Democracy & Justice*, 68 FLRA 999, 1010 (2015) (denying exceptions that are premised on arguments previously denied).

<sup>28</sup> Exceptions at 7-8.

<sup>29</sup> *Nat’l Nurses United*, 70 FLRA 166, 167 (2017) (citing *AFGE, Local 2152*, 69 FLRA 149, 152 (2015)).

The Union has not alleged that the Arbitrator refused to consider pertinent evidence concerning the timeliness of the grievance or that he conducted the hearing in a manner that so prejudiced the Union as to affect the fairness of the proceeding as a whole. And because we have found that the Arbitrator did not err in determining that the grievance was untimely and withdrawn, we similarly conclude that he did not deny the Union a fair hearing by not conducting a hearing on the merits of the grievance. Accordingly, we deny the Union's fair-hearing exception.

**V. Decision**

We deny the Union's exceptions.