

71 FLRA No. 163

INDEPENDENT UNION
OF PENSION EMPLOYEES
FOR DEMOCRACY AND JUSTICE
(Union)

and

PENSION BENEFIT
GUARANTY CORPORATION
(Agency)

0-AR-5490

DECISION

June 25, 2020

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

I. Statement of the Case

Arbitrator Charles Feigenbaum found that the Union's grievance was not arbitrable because the Union failed to actively pursue the grievance as required by the parties' collective-bargaining agreement. The Union argues that the award should be vacated on contrary-to-law, essence, and exceeds-authority grounds. We find that the Union's exceptions provide no basis on which to find the award deficient, and deny them.

II. Background and Arbitrator's Award

In May 2017, the Union filed, and invoked arbitration over, a grievance concerning a Joint Awards Program (awards grievance). On February 14, 2018,¹ the Arbitrator denied the parties' cross motions for summary judgment, submitted his invoice for his work on the matter up to that date, and offered hearing dates in March and May. On February 26, the Union emailed the Agency regarding only the Agency's responsibility for the invoice. The Agency paid the invoice in April.

On August 20, the Agency notified the Union that the grievance was void because the Union had failed to pursue the awards grievance in the six months following the Arbitrator's February 14 ruling.

Thereafter, the Union contacted the Arbitrator to schedule a hearing for the awards grievance.

The issue before the Arbitrator was whether the awards grievance was procedurally arbitrable. The Arbitrator found that Article 2, Section 3(A)(11) of the parties' agreement (Article 2) controlled. Article 2 provides that when the moving "[p]arty does not, for a period of six (6) months, actively pursue any grievance referred to arbitration," the grievance "shall [be] render[ed] . . . null and void."²

In determining the meaning of "actively pursue" in Article 2, the Arbitrator considered another arbitrator's award (the Youngblood award) that found the Union had failed to actively pursue a grievance.³ But the Arbitrator concluded that "[r]egardless of [the Youngblood award]," he construed the term "actively pursue" in Article 2 to require an "action, not merely a general statement of an intent to take an action[.]" that "moves the grievance toward arbitration."⁴

The Arbitrator found that the last action in the awards grievance occurred on February 14 when he denied the parties' cross motions. He rejected the Union's argument that the six-month period began when the Union sent its February 26 email to the Agency because the email involved only payment of an invoice for his past services.⁵ He also rejected the Union's argument that it could not advance the awards grievance because the Agency delayed paying the invoice, finding that the delay did not impede the Union's ability to pursue the awards grievance.

The Arbitrator also found it irrelevant that the parties disputed the order in which several pending grievances would be heard. And he rejected the Union's argument that the parties had a past practice of considering grievances arbitrable when a party had not communicated about or otherwise pursued a grievance for a six-month period.⁶

Ultimately, the Arbitrator found that the Union failed to pursue the awards grievance during the six-month period from February 14 through August 13.

² Award at 1.

³ *Id.* at 2-3.

⁴ *Id.* at 3.

⁵ *Id.*

⁶ On this point, the Union argued that the Agency had "continued to assert" that a prior grievance filed against the Union was arbitrable, even though the grievance "involved a six months hiatus with no action taken by [the Agency] to bring the grievance to arbitration." Award at 2. The Arbitrator found that the prior grievance "does not serve to weaken the case regarding the non-arbitrability" of the Union's grievance. *Id.*

¹ Unless otherwise noted, all dates referenced hereafter occurred in 2018.

Therefore, he concluded that the awards grievance was not arbitrable and dismissed it.

The Union filed exceptions to the award on April 3, 2019, and the Agency filed an opposition to the Union's exceptions on May 3, 2019.

III. Analysis and Conclusions

A. The award is not contrary to law.⁷

The Union argues that the award is contrary to law because the Arbitrator misapplied “contract law as it relates to interpretation of ambiguous contract language.”⁸ In support of this argument, the Union contends that the Arbitrator failed to consider evidence of the parties’ past practice, and otherwise made no finding regarding the effect of the parties’ past practice, in determining the meaning of the term “actively pursue.”⁹ It further argues that the Arbitrator erred by failing to find that the parties’ past practice “revealed, at a minimum, that [‘]actively pursue[’] did not require any action, to include the scheduling of a hearing or communications.”¹⁰

At the outset, we note that the Arbitrator made no finding that the term “actively pursue” is ambiguous. And contrary to the Union’s assertion, the Arbitrator – in construing the term to require an “action that moves the grievance toward arbitration” – considered the Union’s evidence of a past practice related to Article 2 of their agreement and, based on the record, concluded that it did not affect the arbitrability of the awards grievance.¹¹

Moreover, the Arbitrator did not err in rejecting the Union’s past practice argument. The standard for determining the existence of a past practice is whether the alleged practice is “consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other.”¹²

⁷ In resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo. *U.S. Dep’t of State, Bureau of Consular Affairs, Passport Servs. Directorate*, 70 FLRA 918, 919 (2018) (*Passport*). In applying a de novo standard of review, the Authority assesses whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. *Id.* In making that assessment, the Authority defers to the arbitrator’s underlying factual findings. *Id.*

⁸ Exceptions Br. at 3, *see also id.* at 7-8.

⁹ *Id.* at 7-8.

¹⁰ *Id.* at 8.

¹¹ Award at 2-3.

¹² *Passport*, 70 FLRA at 920 (quoting *U.S. Dep’t of the Interior, U.S. Geological Survey, Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 737 (2015); *U.S. DOL, Office of the Assistant Sec’y for Admin & Mgmt., Dall., Tex.*, 65 FLRA 677, 679 (2011)).

Here, the record does not demonstrate that the parties had a past practice of ignoring Article 2’s requirements, as both parties regularly contested arbitrability based on the other party’s alleged failure to actively pursue grievances.¹³ And to the extent that the Union is challenging the Arbitrator’s failure to cite all the evidence upon which he relied in making his findings, such an argument does not demonstrate that the award is deficient.¹⁴

Additionally, the Union contends that the award is inconsistent with the “prevention doctrine,” which excuses a party’s failure to perform a contractual obligation if such performance is hindered, prevented or made impossible by the actions of the other party.¹⁵ On this point, the Union contends the Arbitrator erred by failing to conclude that the Agency’s delay in paying the Arbitrator’s invoice, and its insistence that another grievance be heard first, prevented the Union from actively pursuing the awards grievance.¹⁶ However, the Arbitrator found that neither Agency action prevented the Union from acting on the grievance, and the Union does not challenge those findings as nonfacts. Therefore, we reject this argument.

Accordingly, the Union’s arguments do not demonstrate that the award is contrary to law.

¹³ *See* Exceptions, Ex. 8 at 3; Exceptions, Ex. 10 at 10-11, 16-17; Opp’n at 15 (citing Agency Resp. at 49-59). Chairman Kiko notes that the Authority has held that arbitrators “may not modify the plain and unambiguous provisions of an agreement based on parties’ past practices.” *Passport*, 70 FLRA at 920 (quoting *U.S. Small Bus. Admin.*, 70 FLRA 525, 528 (2018) (Member DuBester dissenting)). Article 2 is not ambiguous, and, thus, the Arbitrator would have erred if he had interpreted “actively pursue” to mean “do nothing” based on an alleged past practice.

¹⁴ *See Army Materials & Mechs. Research Ctr.*, 32 FLRA 1156, 1158 (1988) (citing *U.S. Int’l Trade Comm’n, Wash., D.C.*, 13 FLRA 440 (1983)).

¹⁵ *E.g., Collins v. Pension Benefit Guar. Corp.*, 881 F.3d 69, 73 (D.C. Cir. 2018) (citing *Williston on Contracts* 4th, § 39.3).

¹⁶ Exceptions Br. at 9-10.

- B. The award draws its essence from the parties' agreement.¹⁷

The Union argues that the award fails to draw its essence from the parties' agreement because the Arbitrator: (1) did not consider the parties' past practice when interpreting the term "actively pursue;" (2) disregarded the agreement's restriction on giving precedential authority to prior awards; and (3) excluded steps from the parties' arbitration process, including the payment of invoices, from the agreement's "definition of 'actively pursue.'"¹⁸ As discussed previously, the Arbitrator rejected the Union's contention regarding the parties' past practice, and the record supports that finding. Consequently, the Union's past-practice argument does not demonstrate that the award fails to draw its essence from the parties' agreement.¹⁹

Regarding the Union's second argument, the Arbitrator discussed the Youngblood award but expressly stated that he did not rely on that award to resolve the awards grievance.²⁰ As to the Union's third argument, the Union fails to cite any wording in the parties' agreement defining "actively pursue" or otherwise supporting its contention that this term is intended to include the payment of invoices.²¹ Accordingly, neither of these

arguments demonstrate that the award fails to draw its essence from the parties' agreement.²²

Consequently, we deny the Union's essence exception.

- C. The Arbitrator did not exceed his authority.

Restating its essence arguments, the Union argues that the Arbitrator exceeded his authority because he modified the parties' agreement by: (1) disregarding the parties' past practice when interpreting the term "actively pursue" and (2) giving precedential authority to a prior arbitration award.²³ Because we have previously rejected these contentions, we find that they provide no basis upon which to find that the Arbitrator exceeded his authority,²⁴ and we deny the Union's exception.

IV. Decision

We deny the Union's exceptions.

¹⁷ When reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority will find that an arbitration award is deficient as failing to draw its essence from the 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 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. *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017); *see also U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 103, 104 & n.13 (2019).

In considering the Union's essence exception, Member DuBester continues to believe that the Authority should apply the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 660, 672-76 (2020) (Dissenting Opinion of Member DuBester).

¹⁸ Exceptions Br. at 11-13 (citing Art. 2, § 3(A)(8)).

¹⁹ *AFGE, Local 836*, 69 FLRA 502, 506 (2016) (rejecting essence exception that restates fair-hearing exception for same reasons that fair-hearing exception had been denied).

²⁰ Award at 2-3.

²¹ 5 C.F.R. § 2425.6(e)(1) (exceptions are subject to denial if they fail to support arguments that raise recognized grounds for review); *e.g., U.S. Dep't of VA, Gulf Coast Veterans Health Care Sys.*, 69 FLRA 608, 610 (2016) (citing *NAGE, Local R3-10, SEIU*, 69 FLRA 510, 510 n.11 (2016)).

²² Chairman Kiko and Member Abbott observe that *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 660, 662-64 (2020) (Member Abbott concurring; Member DuBester dissenting), "clarifie[s] the discussion about essence exceptions – and any reliance on private-sector arbitration awards" and "charts the course for this Authority, and for the federal labor-relations community, into the future." *NLRB Prof'l Ass'n*, 71 FLRA 737, 738 n.16 (2020).

²³ Exceptions Br. at 10.

²⁴ *See, e.g., U.S. Dep't of the Army White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 623 (2014) (party failed to show arbitrator exceeded her authority by improperly modifying parties' agreement where exception restated rejected essence exception).