71 FLRA No. 164

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL FACILITIES ENGINEERING COMMAND
WASHINGTON, D.C.
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1923
(Union)

0-AR-5423

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DECISION

June 29, 2020

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

I. Statement of the Case

In this case, we remind the federal labor-relations community that arbitrators may not disregard the plain wording of parties' collective-bargaining agreements.

The Union filed a grievance alleging that the Agency's overtime-distribution practices violated the parties' master collective-bargaining agreement. Arbitrator Joseph M. Sharnoff issued an award finding that the Union improperly filed a step-three institutional grievance instead of a step-one group grievance. Rather than dismissing the grievance, the Arbitrator remanded the matter with instructions to settle the grievance. If settlement efforts did not resolve the dispute, the Arbitrator granted the Union the right to refile the grievance at any time, without regard for the procedural requirements of the parties' agreement.

The main question before us is whether the award – addressing the Union's failure to properly file the grievance by granting the Union the right to refile at any time – fails to draw its essence from the parties' agreement. Because the award conflicts with the plain wording of the parties' agreement, we find that it cannot be rationally derived from the agreement. Accordingly, we set aside the award.

II. Background and Arbitrator's Award

The Union filed a step-three grievance, on behalf of five employees, alleging that the Agency's overtime-distribution practices violated the parties' agreement, and requesting that the Agency make whole the affected employees. The dispute proceeded to arbitration.

At arbitration, the parties contested only the question of whether the Union properly filed the grievance. Accordingly, the Arbitrator did not frame an issue, and he addressed only that procedural matter.

The Arbitrator observed that the parties' agreement contains different filing procedures for certain types of grievances. Specifically, Article 9, Section 1(d) states that "[g]rievances (including group grievances) filed by the Union on behalf of individual employees should be filed under the procedures set forth in [Article 9,] Section 9."[1] In contrast, "institutional grievances"– grievances on behalf of the Union as an institution – "should be filed under the procedures . . . in [Article 9,] Section 8."[2] Section 8, in turn, requires that institutional grievances "be submitted . . . to the [s]tep [three] official"[3] whereas, under Section 9, individual and group grievances "are to be filed at [s]tep [one]."[4]

Applying these "clear and unambiguous" provisions, the Arbitrator determined that the Union improperly filed the grievance as a step-three institutional grievance because it was filed "on behalf of . . . [a] group of employees . . . [and] seeks individual remedies on behalf of these . . . employees."[5] He went on to find that, in its grievance, the Union failed to identify any institutional interests, and did not seek any remedial relief for alleged harm to its institutional interests. Accordingly, the Arbitrator determined that the Union improperly filed the grievance at step three, noting that it was a "special . . . procedure expressly reserved for . . . 'institutional' claims."[6]

Next, the Arbitrator remanded the grievance and instructed the parties to try to resolve it on the merits. The Arbitrator noted that the parties' agreement requires termination of a grievance if the Union fails to comply

[1] Award at 9.
[2] *Id.*
[3] *Id.* at 10-11.
[4] *Id.* at 10.
[5] *Id.* at 11 (emphasis omitted).
[6] *Id.*

with the time limits contained in the agreement.[7] Although the Arbitrator issued the award about two years after the filing of the grievance, he granted the Union the right to "submit the grievance at [s]tep [one] of the [g]rievance [p]rocedure, as if th[e] grievance timely had been filed at that [s]tep," at any time after the receipt of the award.[8] In support, the Arbitrator noted that the parties' agreement does not contain an express provision requiring dismissal of improperly filed grievances.

On October 19, 2018, the Agency filed exceptions to the award, and on November 20, 2018, the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusion: The award fails to draw its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement.[9] Specifically, the Agency argues that allowing the Union to refile the grievance as a step-one group grievance conflicts with the plain wording of Article 9 of the parties' agreement.[10]

The Authority will find that an award fails to draw its essence[11] from a collective-bargaining agreement where, as relevant here, the award conflicts with the agreement's plain wording.[12] The Authority has also held that when parties agree to a procedural deadline – with no mention of any applicable exception – the parties intend to be bound by that deadline.[13] Article 9, Section 5(c)(1) requires step-one grievances to be filed within thirty days,[14] and the Arbitrator acknowledged that Article 9, Section 10 specifically states that untimely filed Union grievances "shall be terminated."[15]

The award, which finds that the Union violated Article 9 when it improperly filed its grievance, and then grants the Union "the right" to refile a now two-years late grievance "*as if* [it] timely had been filed," is incompatible with the plain wording of Article 9, Section 5(c)(1).[16] The Arbitrator found that the Union's grievance should have been filed at step one instead of step three.[17] In crafting an illusory "right" to refile, the Arbitrator emphasized that the parties' agreement does not contain an express provision addressing how to handle an improperly filed grievance.[18] However, the absence of such a provision did not permit the Arbitrator to create an exception to an existing provision and direct one party to act inconsistently with Article 9's filing requirements.[19]

Based on the above, we find that the Arbitrator's award effectively created a brand new contract provision that entitled the Union to refile an improperly filed, and now untimely, grievance.[20] Accordingly, we conclude that the award cannot be rationally derived from the parties' agreement because it is incompatible with the plain wording of the parties' agreement.[21] Accordingly,

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[7] *Id.* at 4 ("Should the Union fail to comply with the time limits herein, then the grievance shall be terminated." (citing Collective-Bargaining Agreement, Art. 9, § 10)).
[8] *Id.* at 15.
[9] Exceptions Br. at 10.
[10] *Id.* at 11-15.
[11] 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. *AFGE, Local 1738*, 71 FLRA 505, 506 n.11 (2019) (Member DuBester concurring).
[12] *See U.S. Dep't of VA, Med. Ctr., Asheville, N.C.*, 70 FLRA 547, 548 (2018) (Member DuBester dissenting) (finding that an award failed to draw its essence from an agreement where the award conflicted with the plain wording of the agreement); *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993) (finding that an award showed a manifest disregard of an agreement where the arbitrator's interpretation was not compatible with the plain wording of that agreement).
[13] *U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 179, 180 (2019) (Member DuBester dissenting) (citations omitted).
[14] Exceptions, Ex. 3, Collective-Bargaining Agreement at 23.
[15] Award at 4.
[16] *Id.* 14-15 (emphasis added).
[17] *Id.* at 11.
[18] *Id.* at 12, 14.
[19] The Arbitrator also raised the question of whether the Agency waived its right to raise its procedural-arbitrability argument pursuant to Article 9, Section 4 of the agreement. However, this section clearly and unambiguously states that "the question of . . . arbitrability may not be waived." Award at 13 (emphasis omitted); *see also U.S. Small Bus. Admin.*, 70 FLRA 525, 527-28 (2018) (Member DuBester concurring, in part, and dissenting, in part) (finding that an award failed to draw its essence from the parties' agreement where the arbitrator found a waiver of a procedural-arbitrability argument and nothing in the parties' agreement provided for waiver).
[20] *See U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 755-56 (2018) (Member DuBester dissenting) (holding that an agreement's silence on a matter does not authorize an arbitrator to modify the parties' agreement to create "a brand new contract provision").
[21] *See U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (Member DuBester dissenting) (award that "render[ed] plain language of the agreement meaningless" failed to draw its essence from the agreement); *see also U.S. Small Bus. Admin.*, 55 FLRA 179, 182 (1999) (award was deficient because the arbitrator's interpretation of the agreement was incompatible with the agreement's plain wording).

we find that the award fails to draw its essence from the agreement.[22]

IV. Decision

We grant the Agency's essence exception and set aside the award.

[22] Because we grant the Agency's essence exception, we find it unnecessary to address its other exception. *E.g.*, *U.S. DHS, Citizenship & Immigration Servs., Dist. 18*, 71 FLRA 167, 168 n.10 (2019) (Member DuBester dissenting).

Member DuBester, dissenting:

I disagree with the majority's conclusion that the award fails to draw its essence from the parties' collective-bargaining agreement. Accordingly, I dissent from its decision to set aside the award.

The majority is correct that the Arbitrator found that the Union should have filed its grievance at Step 1 of the parties' negotiated grievance procedure. What the majority fails to mention, however, is that the Arbitrator also found that the Agency failed to comply with the grievance procedure, in two significant respects.

First, the Arbitrator found that the Agency failed to "respond at all" to the Step 3 grievance, despite its obligation to do so within fourteen days after receiving the grievance.[1] And more significantly, the Arbitrator found that the Agency failed to comply with its obligations under Section 4(b) of the grievance procedure. This provision states that, "[t]o the extent that grievability/arbitrability has been questioned, the party raising the question should provide an explanation of the issue by the time a panel of arbitrators is requested from the Federal Mediation and Conciliation Service (FMCS), or selection of an arbitrator from a permanent panel."[2] Thus, in addition to not responding at all to the Step 3 grievance, the Agency did not raise any issue regarding arbitrability of the grievance until after the Union had invoked arbitration, completed mediation, and agreed on a date for the hearing.[3]

Based on these findings, the Arbitrator concluded that *both* parties had failed to "follow strictly the express terms of Article 9 for processing grievances and arbitrability claims."[4] And he found that, if the Agency had complied with these procedures by informing the Union of its position that the grievance was misfiled at Step 3, the Union could have submitted the grievance to the appropriate Agency official at Step 1, and the grievance could have been processed from that

[1] Award at 12. Article 9, Section 5(c)(3) of the parties' agreement requires the Step 3 official to "render a written decision" within fourteen calendar days after receipt of the grievance. Exceptions, Ex. 3, Collective-Bargaining Agreement at 23.

[2] Award at 13 (quoting Art. 9, § 4(b) of the parties' agreement).

[3] *Id.* at 13-14. The Arbitrator also considered the Union's evidence that the Agency had processed similar grievances at Step 3 of the parties' grievance procedure. While he rejected the Union's argument that any such "non-conforming practice is controlling over [the grievance procedure's] express terms," he also concluded that, if the Agency "elected to resume reliance on the express terms," it "properly should have so informed the Union when the grievance was filed at Step 3." *Id.* at 12 (emphasis omitted).

[4] *Id.* at 14.

point forward in accordance with the parties' agreement.[5] He therefore directed the parties to "return[] to the status quo ante," which included the ability of the Union to refile the grievance at Step 1.[6]

I would find that the Arbitrator's resolution falls well within his remedial authority. In rejecting the Agency's argument that he was required to dismiss the grievance, the Arbitrator correctly noted that nothing in the parties' agreement "expressly requires a result as harsh as the complete forfeiture of the underlying grievance if it is filed at the wrong step."[7] And he found that returning the parties to the status quo ante was appropriate based on the Agency's failure to comply with procedures in the parties' agreement that are *expressly designed* to address, and resolve, the arbitrability issue that was before him.

I disagree with the majority that the Arbitrator's award "effectively created a brand new contract provision."[8] Rather, the Arbitrator simply directed *both* parties to process the Union's grievance in accordance with the terms of the parties' agreement. As nothing in the parties' agreement precluded the Arbitrator from issuing such direction, I cannot agree that the award fails to draw its essence from the agreement.[9] I would therefore deny the Agency's essence exception and consider the other exceptions raised by the Agency.[10]

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[5] *Id.* at 12-13.

[6] *Id.* at 14.

[7] *Id.* at 12.

[8] Majority at 4.

[9] *See, e.g., AFGE, Local 1738*, 71 FLRA 505, 506 (2019) (Member DuBester concurring) (denying an essence exception because the union did not demonstrate that the contract required the arbitrator to award a particular remedy); *see also United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (arbitrators bring their "informed judgment to bear in order to reach a fair solution to a problem [which] is especially true when it comes to formulating remedies [where] the need is for flexibility in meeting a wide variety of situations").

[10] *U.S. DOD Educ. Activity*, 70 FLRA 937, 940 (2018) (Dissenting Opinion of Member DuBester).