

71 FLRA No. 166

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1594
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
ST. PETERSBURG REGIONAL OFFICE
(Agency)

0-AR-5500

DECISION

July 8, 2020

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

I. Statement of the Case

Arbitrator Vicki Peterson Cohen sustained an Agency grievance alleging that the Union violated the parties' national-level settlement agreement (the settlement agreement) by not paying for half the cost of the arbitrator's copy of a transcript in an earlier case. The Union filed exceptions to the award based on essence, exceeds-authority, and nonfact grounds. Because the Union does not establish that the award is deficient on any of these grounds, we deny the exceptions.

II. Background and Arbitrator's Award

Article 44, Section 2D of the parties' master collective-bargaining agreement (Article 44) provides that "[t]he arbitrator's fees and expenses shall be borne equally by the parties. If either party requests a transcript, the party will bear the entire cost of such transcript."¹

In 2016, the parties entered the settlement agreement. As relevant here, the settlement agreement interpreted Article 44 to clarify the parties' obligations regarding transcript costs. The settlement agreement provides that "[s]hould the arbitrator want a copy of the transcript, the parties will equally bear the costs of the

arbitrator's copy as part of the 'arbitrator's fees and expenses.'"²

Subsequently, a dispute arose in a case where the Agency had unilaterally ordered the transcript and the arbitrator requested a copy. The Union refused to pay for half of the arbitrator's copy. The Agency filed a grievance, alleging that the Union's refusal to pay its share of the arbitrator's copy violated the settlement agreement. The parties were unable to resolve the grievance and the Agency invoked arbitration.

The Arbitrator framed the issue as whether "the Union violate[d] Article 44 . . . and the . . . settlement agreement . . . when it refused to pay half the cost of the arbitrator[s] copy of the transcript."³

The Arbitrator found that the settlement agreement requires the parties to pay equally for the arbitrator's copy of the transcript, "*should* the arbitrator request a copy."⁴ Addressing the Union's argument that the use of the word "should" in the agreement "implies that the provision is permissive [and] not mandatory"⁵ with respect to the parties' payment obligations, she determined that this "simply provides the arbitrator with the option to request a copy of the transcript" and does not relieve the non-requesting party "from its obligation to pay [for] one-half" of the arbitrator's copy.⁶ She concluded that the Union violated the parties' agreements by refusing to reimburse the Agency for the Union's share.

The Union filed exceptions to the award on April 22, 2019, and the Agency filed an opposition to the Union's exceptions on May 22, 2019.

III. Analysis and Conclusions

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

The Union argues that the award fails to draw its essence from the parties' agreements. Specifically, the Union argues that the term "should" does not create a mandatory duty to pay for an arbitrator's copy of the transcript.⁷ It also argues that it should not be obligated to share in this cost because the process by which the Union would pay these costs "is not clearly defined" in the agreements.⁸

² *Id.* at 4.

³ *Id.* at 3.

⁴ *Id.* at 9.

⁵ *Id.* at 8.

⁶ *Id.* at 9.

⁷ Exceptions Br. at 5.

⁸ *Id.*

¹ Award at 3.

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.⁹

As discussed, the Arbitrator found that the term “should” merely gives *an arbitrator* the option to request a copy of the transcript, and that once an arbitrator exercises that option, the settlement agreement requires the parties to each pay half the cost of the arbitrator’s copy.¹⁰ In other words, the term “should” does not render the provision permissive, but instead only defines the conditions under which the parties’ payment obligations arise. The Union’s disagreement with the Arbitrator’s interpretation does not explain how the Arbitrator’s interpretation of the settlement agreement is implausible, irrational, or in manifest disregard of the agreement.

The Union’s argument regarding the agreements’ lack of clarity with respect to the process for how payments are to be made is also unavailing.¹¹ The Union contends that it should not be obligated under the agreement to share the cost of the arbitrator’s copy because it is not a party to the contract between the Agency and the court reporting firm.¹² It also argues that it should not be required to reimburse the Agency for the Union’s share of the costs unless “proof of payment” is “first submitted.”¹³

Addressing these arguments, the Arbitrator found that the parties’ agreements instruct the parties on how to pay for the costs of the arbitrator’s copy, and that neither agreement “binds the parties to any particular practice or procedure for ordering arbitration transcripts.”¹⁴ She also concluded that it was “appropriate and reasonable” under these agreements “for the party requesting the transcription service to submit

⁹ *U.S. Dep’t of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017) (citing *U.S. DOD, Def. Contract Audit Agency, Cent. Region, Irving, Tex.*, 60 FLRA 28, 30 (2004)); see also *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (citing 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998)) (“When reviewing an arbitrator’s award, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.”).

¹⁰ Award at 9-10.

¹¹ Exceptions Br. at 5.

¹² *Id.*

¹³ *Id.*

¹⁴ Award at 10.

the court reporting service bill to the other party for payment of its contractual share.”¹⁵

We find no basis upon which to conclude that the Arbitrator’s conclusions fail to draw its essence from the parties’ agreements.¹⁶ Accordingly, we deny the Union’s essence exception.¹⁷

B. The Arbitrator did not exceed her authority.

The Union argues that the Arbitrator exceeded her authority because she “issued an additional decision regarding the arbitration of removal of official time” which was not before her.¹⁸ As relevant here, arbitrators exceed their authority when they resolve an issue not submitted to arbitration.¹⁹

As the Union acknowledges, at arbitration the Arbitrator specifically stated that “[official time] is not an issue before me and I’m not going to decide this case on that issue.”²⁰ And the Union fails to point to any portion of her award which addresses or decides this issue. Consequently, the Union’s argument does not demonstrate that the Arbitrator exceeded her authority, and we deny the Union’s exception.²¹

C. The award is not based on nonfacts.

The Union makes three arguments in support of its claim that the award is based on a nonfact.²² Specifically, the Union argues that: (1) the Arbitrator failed to rule on the arbitrability of the grievance; (2) the

¹⁵ *Id.*

¹⁶ See, e.g., *SSA, Balt., Md.*, 66 FLRA 569, 571-72 (2012) (denying essence exception where agency disagreed with arbitrator’s interpretation of agreement and factual finding).

¹⁷ Chairman Kiko and Member Abbott join their colleague in denying this exception and note that *U.S. DOJ, Federal BOP, Federal Correctional Institution, Miami, Florida*, 71 FLRA 660, 662-64 (2020) (Member Abbott concurring; Member DuBester dissenting) recently clarified the degree to which deference is extended to arbitral awards in our review of essence exceptions.

¹⁸ Exceptions Br. at 5. The Union also asserts that the Arbitrator “based her opinion on non-fact,” but provides no additional argument in either its exceeded-authority exception or its nonfact exception. *Id.* Consequently, we find this assertion unsupported and do not consider it further. See 5 C.F.R. § 2425.6(e)(1).

¹⁹ *AFGE, Local 3254*, 70 FLRA 577, 578 (2018) (citing *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 68 FLRA 960, 966 (2015)).

²⁰ Exceptions Br. at 6.

²¹ E.g., *U.S. DOD, Def. Logistics Agency, Def. Distribution Ctr., Distribution Depot Red River, Texarkana, Tex.*, 56 FLRA 690, 695 (2000) (denying exceeds-authority exception where arbitrator did not resolve issue not before him).

²² Exceptions Br. at 2-4.

parties had no past practice regarding the process for payment of an arbitrator's copy of a transcript; and (3) the Agency failed "to meet within [ten] days of the award to discuss the ordering of transcripts."²³ 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.²⁴ The Authority also rejects nonfact exceptions that challenge alleged findings that an arbitrator did not actually make.²⁵

None of the Union's assertions establishes that the award is based on a nonfact. As to the Union's first assertion, the Arbitrator found that "parties agreed that the case is properly before the arbitrator."²⁶ The Union does not demonstrate that this finding is clearly erroneous.²⁷ As to its second assertion, the Union concedes that the Arbitrator made no finding regarding a past practice.²⁸ And, to the extent that the Union's third allegation can be construed to allege a non-fact exception, the award is devoid of any requirement that the parties meet to discuss ordering transcripts.

Accordingly, we deny the Union's nonfact exception.

V. Decision

We deny the Union's exceptions.

²³ *Id.*

²⁴ *U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010) (citing *NFFE, Local 1984*, 56 FLRA 38, 41 (2000)).

²⁵ *SSA, Office of Hearing Operations*, 71 FLRA 177, 178 (2019) (*SSA*) (citing *NLRB Prof'l Ass'n*, 68 FLRA 552, 554 (2015) (*NLRB*); *U.S. Dep't of the Army, White Sands Missile Range, N.M.*, 67 FLRA 619, 623 (2014) (*White Sands*)).

²⁶ Award at 2; *see also id.* at 3. To the extent that the Union is asserting that the Arbitrator failed to address an issue that was raised in the grievance or at arbitration, the Union did not assert that the Arbitrator exceeded her authority by failing to address the arbitrability of the grievance. Moreover, the Union stated in its exceeded-authority exception that "[t]he only issue submitted for arbitration was the issue of payment of transcripts." Exceptions Br. at 5.

²⁷ Although the Union states in its exceptions that it "declared the grievance to be non-arbitrable" because it was untimely and the Agency "failed to follow proper procedures when invoking arbitration," the transcript excerpt reproduced in its exceptions does not show that the Union raised these arguments to the Arbitrator. Exceptions Br. at 3. Moreover, the Union did not submit a copy of the hearing transcript or its grievance with its exceptions. Therefore, we find the Union's argument is unsupported, and we do not consider it. *See* 5 C.F.R. § 2425.6(e)(1); *see also id.* § 2425.4(c) ("an exception may not rely on any evidence, factual assertions, . . . that could have been, but were not, presented to the arbitrator").

²⁸ Exceptions Br. at 3-4; *see SSA*, 71 FLRA at 178 (citing *NLRB*, 68 FLRA at 554; *White Sands*, 67 FLRA at 623-24) (findings arbitrator did not make provide no basis for finding award deficient based on nonfact).