71 FLRA No. 184

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING
VETERANS ADMINISTRATION MEDICAL CENTER
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

0-AR-5541

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DECISION

September 9, 2020

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

Decision by Member Abbott for the Authority

I. Statement of the Case

With this case, we again remind the federal labor-relations community that procedural deadlines pursuant to a collective-bargaining agreement must be taken seriously.[1] At issue in this case are the procedural requirements for invoking arbitration provided by Article 44 of the parties' agreement.[2] Arbitrator Cary Morgen found that the Agency had waived any timeliness objections by failing to raise them prior to arbitration. He further found that even in the absence of waiver, the fact that the grievance alleged a continuing violation meant the Union could invoke arbitration at any time. The Agency argues that the procedural-arbitrability determination fails to draw its essence from the parties' agreement because it ignores the clear language of Article 44. We agree. Accordingly, we vacate the award.

II. Background and Arbitrator's Award

As relevant here, the Union filed a Step 3 grievance on March 1, 2017,[3] asserting that the Agency violated the parties' agreement when it stopped providing the Union with certain information concerning job postings, including certificates and "referral list[s]."[4] On March 14 the Agency granted the grievance, acknowledging that the parties' agreement provided that "a copy of all referral lists will be forwarded to the selecting official and provided to the [Union]."[5] After the grievance had apparently been resolved in this manner, the Union asserted in additional grievances and information requests that the Agency still was not providing it with copies of certificates or referral lists.[6] On October 9, 2018, the Arbitrator was notified that he had been selected to arbitrate the March 1, 2017 grievance.[7] In an email dated October 26, 2018, the Union notified the Agency that it was invoking arbitration regarding the Agency's failure to comply with the March 14, 2017, "settlement agreement."[8] On November 16, 2018, the Union sent an email asserting that the Agency had repudiated three settlement agreements—including the March 14, 2017 "settlement agreement"— and it stated that it "is invoking Arbitration on all three of these grievances[.]"[9]

The Agency argued that the grievance was not properly before the Arbitrator because the Union failed to invoke arbitration within thirty days, as required by Article 44 of the parties' agreement.[10] The Arbitrator found that the Agency had waived its timeliness objection by failing to raise it "during the grievance procedure prior to arbitration[.]"[11] He explained that the Agency had the

[1] *See U.S DOD, Educ. Activity, Alexandria, Va.*, 71 FLRA 765, 767 (2020) (Member DuBester dissenting) (*DODEA*) (finding the procedural-arbitrability determination failed to draw its essence from the parties' agreement because it ignored the plain language of the parties' agreement); *U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 387 (2019) (*Treasury*) (Member DuBester dissenting in part) (finding the procedural-arbitrability determination failed to draw its essence from the parties' agreement because it did not comply with the plain language of the parties' agreement).
[2] Award at 6, 20.
[3] All dates are 2017 unless otherwise noted.
[4] Award at 4 (quoting Art. 23, § 10 of the parties' agreement).
[5] Exceptions, Attach. 6, Joint Ex. 3, Grievance Response at 1.
[6] Opp'n, Attach. 4, Union Ex. 15 at 3-4 (citing a series of grievances filed by the Union on June 15, 2018, November 20 and 27, 2018, and January 22, 2019, alleging that the Agency had repudiated its March 14, 2017, settlement agreement by refusing to provide the Union with certificates for vacancy announcements).
[7] Award at 9; *see also id.* at 11 n.6.
[8] Opp'n, Attach. 3, Joint Ex. 3 at 1.
[9] Exceptions, Attach. 7, Joint Ex. 4, Invocation of Arbitration at 1.
[10] Award at 18. Article 44, Section 1 provides: "A notice to invoke arbitration shall be made in writing to the opposite party within 30 calendar days after receipt of the written decision rendered in the final step of the grievance procedure." Exceptions, Attach. 1, Collective-Bargaining Agreement (CBA) at 234.
[11] Award at 21.

opportunity to object to the untimely invocation of arbitration when the parties first selected an arbitrator, and subsequently when the Union notified the Agency on November 16, 2018, that it intended to arbitrate the alleged repudiation of three settlement agreements.[12] The Arbitrator further found that, even if the Agency had not waived its timeliness objection, the grievance was procedurally arbitrable "pursuant to the doctrine of continuing violation," and the Union could invoke arbitration at any time.[13]

The Agency filed exceptions to the award on September 11, 2019, and the Union filed an opposition to those exceptions on October 10, 2019.

III. Analysis and Conclusion: The Arbitrator's procedural arbitrability determinations fail to draw their essence from the parties' agreement.

The Agency argues that the Arbitrator's procedural-arbitrability determinations— that the Agency waived its timeliness argument by waiting to raise it at the hearing,[14] and that the thirty-day requirement did not apply because the grievance involved a continuing violation[15]—fail to draw their essence[16] from the parties' agreement because they are not a plausible interpretation of Article 44 of the parties' agreement, which provides a clear deadline without exceptions.[17]

First, the Authority has held that where an agreement does not provide a timeframe to raise a timeliness challenge, an arbitrator's determination that a party waived the argument was not a plausible interpretation of the agreement.[18] The parties' agreement does not contain any requirement concerning when a party must raise an issue during the arbitration process.[19] By finding that the Agency waived its right to raise the timeliness requirement, the Arbitrator added a new provision to the agreement which neither party agreed to. Because the Arbitrator added a requirement to the parties' agreement, his finding that the Agency waived its procedural-arbitrability argument is not a plausible interpretation of the parties' agreement.[20]

The Authority has held that a procedural-arbitrability determination does not represent a plausible determination when the Arbitrator fails to enforce the plain language of the agreement.[21] Article 44, Section 1 provides: "A notice to invoke arbitration shall be made in writing to the opposite party within [thirty] calendar days after receipt of the written decision rendered in the final step of the grievance procedure."[22] The language of the parties' agreement is clear – arbitration must be invoked within thirty calendar days after receipt of the final response to the grievance. The Agency responded on March 14, 2017,[23] and the Union did not invoke arbitration until October 26, 2018.[24] And the Union apparently conceded that it invoked arbitration "beyond the 30 days required in Article 44, Section 1."[25] Furthermore, the Arbitrator's reliance on

[12] *Id.* at 21-22.
[13] *Id.* at 22.
[14] *Id.* at 21.
[15] *Id.* at 22.
[16] 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. *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 660, 661 n.11 (2020) (Member DuBester dissenting) (citing *U.S. Dep't of Treasury, IRS, Office of Chief Counsel*, 70 FLRA 783, 785 n.31 (2018) (Member DuBester dissenting); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).
[17] Exceptions at 9-10.
[18] *Treasury*, 71 FLRA at 388-89 n.16 (stating that the Arbitrator's finding of waiver was adding a new requirement to the agreement that the parties never negotiated); *see also U.S. DHS, U.S. CBP*, 71 FLRA 744, 745 (2020) (Member Abbott concurring; Member DuBester dissenting) (finding that the arbitrator "impermissibly created a new contract term"); *Keebler Co. v. Milk Drivers & Dairy Empls. Union, Local No. 471*, 80 F.3d 284, 288 (8th Cir. 1996) (award failed to draw its essence from the parties' agreement where "the arbitrator was not construing an ambiguous contract term, but rather was imposing a new obligation upon [the employer] thereby amending the collective[-]bargaining agreement").
[19] CBA at 234-35.
[20] *See Treasury*, 71 FLRA at 388-89.
[21] *DODEA*, 71 FLRA at 767; *see also U.S. DOD, Educ. Activity*, 70 FLRA 937, 938 (2018) (Member DuBester dissenting).
[22] CBA at 234.
[23] Exceptions, Attach. 6, Joint Ex. 3, Grievance Response at 1.
[24] Opp'n, Attach. 3, Joint Ex. 3 at 1. Because it does not affect the outcome of this analysis, we have chosen to use the date on which the Union emailed the Agency about arbitration. However, it is arguable that the invocation required by the parties' agreement did not occur until November 16, 2018. *See* Exceptions, Attach. 7, Joint Ex. 4, Invocation of Arbitration at 1.
[25] Award at 16.

"the doctrine of continuing violation"[26] to find that the Union can invoke arbitration at any time is nonsensical. The parties' agreement provides that if the violation is of the continuing nature, the Union may file a *grievance* at any time, not *invoke arbitration* at any time.[27] Because the Arbitrator refused to enforce the plain language of Article 44, the procedural-arbitrability determination is not a plausible interpretation of the parties' agreement.[28]

Therefore, we grant the Agency's essence exceptions and vacate the award.

IV. Order

We vacate the award.

[26] *Id.* at 22.
[27] *Compare* CBA at 230 ("An employee and/or the Union shall present the grievance to the immediate or acting supervisor, in writing, within 30 calendar days of the date that the employee or Union became aware, or should have become aware, of the act or occurrence; or, anytime if the act or occurrence is of a continuing nature."), *with* CBA at 234 ("A notice to invoke arbitration shall be made in writing to the opposite party within [thirty] calendar days after receipt of the written decision rendered in the final step of the grievance procedure.").
[28] *See DODEA*, 71 FLRA at 766-67.

Member DuBester dissenting:

I disagree with the majority's conclusion that the Arbitrator's procedural-arbitrability determination does not represent a plausible interpretation of the parties' collective-bargaining agreement. Applying the deferential standard for reviewing essence exceptions to such determinations, I would affirm the Arbitrator's finding that the Agency waived its right to challenge the grievance's arbitrability.

On March 1, 2017, the Union filed a Step 3 grievance asserting that the Agency violated the parties' agreement by not supplying certifications and/or referrals to the Union.[1] On March 14, 2017, the Agency *granted* the Union's grievance, and agreed to forward the requested referral lists to the selecting official and Union.[2] However, the Agency subsequently failed to comply with the settlement agreement that it had signed to resolve the grievance. Therefore, the Union notified the Agency on October 26, 2018 that it had invoked arbitration to enforce the settlement agreement.[3]

The Agency asserted at arbitration that the grievance was not arbitrable because the Union had failed to invoke arbitration within thirty days after the Agency's Step 3 grievance response pursuant to Article 44, Section 1 of the parties' agreement. The Arbitrator rejected the Agency's argument, finding that it had waived its timeliness objection by failing to raise it during the grievance process.

On this point, the Arbitrator noted that he was appointed to hear the grievance on October 9, 2018. And because the Agency neither objected to his appointment nor argued that his appointment "was made unilaterally,"[4] he "deduce[d] that both parties participated in the arbitrator selection procedure in Article 44, Section 2, paragraph A."[5] He further found that the Agency "offered no evidence that at the time [he] was selected it objected to participating in the selection process on the grounds that the Union failed to properly invoke arbitration and/or that it was invoked."[6]

The Arbitrator therefore found that the Agency had not contested the timeliness of the arbitration invocation despite having "at least two opportunities to [do so]: first, when the parties were actively going through the process of selecting an arbitrator to hear the instant [g]rievance and, second, when the Agency received" notification from the Union that it intended to consolidate several grievances for the arbitration.[7] And based upon these findings, he concluded that the Agency had waived its timeliness objection because it failed to raise the objection during the grievance procedure.[8]

The majority discards the Arbitrator's well-supported conclusion because "[t]he parties' agreement does not contain any requirement concerning when a party must raise an issue during the arbitration process."[9] But as I have previously noted, "[w]hether a party waives its right to raise timeliness . . . is a question arbitrators are responsible for resolving," and "such determinations do not necessarily depend on specific contract language."[10] Rather, "such determinations are within an arbitrator's authority and responsibility to apply and enforce the parties' agreement to arbitrate a dispute."[11] Moreover, under the well-established principles governing essence exceptions, "an agreement's silence on a matter 'does not demonstrate that the award fails to draw its essence from the agreement.'"[12]

Applying these principles, and noting that the Agency has not contested the findings upon which the Arbitrator reached his conclusion, I would deny the Agency's essence exception to the Arbitrator's procedural-arbitrability finding. Accordingly, I dissent from the majority's decision to vacate the award.

[1] Award at 8.
[2] *Id.* at 8-9.
[3] Opp'n, Attach. 3, Joint Ex. 3 at 1.
[4] Award at 21.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 21-22.
[8] *Id.* at 21 ("It is widely accepted among arbitrators that an employer has waived timeliness if the employer had not raised the objection during the grievance procedure prior to arbitration unless for good cause.")
[9] Majority at 3-4.
[10] *U.S. DOD Educ. Activity*, 70 FLRA 937, 939 (2018) (*DODEA*) (Dissenting Opinion of Member DuBester) (citing *Peco Foods Inc. v. Retail Wholesale & Dep't Store Union Mid-South Council*, 727 Fed. Appx. 604, 608 (11th Cir. 2018)).
[11] *Id.*
[12] *U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 387, 392 n.9 (2019) (Dissenting Opinion of Member DuBester (quoting *DODEA*, 70 FLRA at 939-40)).