

71 FLRA No. 219

NATIONAL LABOR RELATIONS BOARD
(Agency)

and

NATIONAL LABOR RELATIONS BOARD
PROFESSIONAL ASSOCIATION
(Union)

0-AR-5563

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DECISION

November 24, 2020

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

I. Statement of the Case

The Agency filed a motion to dismiss the Union’s grievance, asserting that the grievance was not substantively arbitrable. Arbitrator Laurence M. Evans found that the grievance alleged a violation of the Federal Service Labor-Management Relations Statute (Statute) and was arbitrable under the parties’ collective-bargaining agreement. The Agency filed exceptions to the award based on contrary-to-law and essence grounds. Because the Agency does not establish that the award is deficient on either ground, we deny the exceptions.

II. Background and Arbitrator’s Award

The Agency is bifurcated into a Board side and a General Counsel (GC) side. The Union is the exclusive representative for bargaining-unit employees on both sides and has negotiated separate collective-bargaining agreements for each.

The Union filed a grievance under the Board-side agreement, alleging that the Agency violated § 7116(a)(1) of the Statute by “illegally surveilling Union officers,” as evident by a management official’s possession of an email exchange between Union officers and the media.¹ The email advised the media that the Union had filed a grievance against the Agency for the “unlawful, unilateral, and premature elimination of the

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¹ Award at 2.

health unit,” and that the Union was “bargaining over that” and other matters.² The Agency denied the grievance and the Union invoked arbitration, requesting that the Arbitrator direct the Agency “to cease and desist from its surveillance of [Union] communications.”³

The Arbitrator framed the issue as whether the grievance was arbitrable on the merits. He noted that the Statute defines a grievance in § 7103(a)(9),⁴ and that Article 10, the only provision of the parties’ agreement relevant to the arbitrability issue, mirrors that statutory provision.⁵

Relying on the language of § 7103(a)(9), the Agency argued that the grievance was not arbitrable. It asserted that the matter involved internal Union business and therefore did “not relate ‘to the employment of any employee’”⁶ or “affect conditions of employment.”⁷ The Union countered that the grievance met the “precise wording” of § 7103(a)(9)(C)(ii) because it constitutes a “claimed violation of [5 U.S.C. §] 7116(a)(1)” which, in turn, is a “law . . . affecting conditions of employment.”⁸ The Arbitrator agreed with the Union, finding that the grievance alleged that the Agency violated § 7116(a)(1).

The Arbitrator also rejected the Agency’s argument that the grievance was not arbitrable because the alleged surveiller was a GC-side management official and not a party to the Board-side agreement. The Arbitrator acknowledged that the Agency was bifurcated in this manner, but he determined that it “makes no difference in the particular and unique circumstances presented by this dispute because the [Union’s] Board-side [agreement], to which the GC is not a party, is not fundamentally involved in this matter – the Statute is.”⁹

On this point, the Arbitrator, noted that “the Statute makes it unlawful for an ‘agency’ ‘to interfere with, restrain, or coerce any employee in the

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² Exceptions, Ex. 4 at 79.

³ Award at 2.

⁴ 5 U.S.C. § 7103(a)(9).

⁵ See Award at 3.

⁶ *Id.* at 4.

⁷ *Id.* at 4, 5 (quoting 5 U.S.C. § 7103(a)(9)(A), (B), (C)) (internal quotation marks omitted).

⁸ *Id.* at 8 (quoting 5 U.S.C. § 7103(a)(9)(C)(ii)) (internal quotation marks omitted).

⁹ *Id.* at 10.

exercise . . . of any right,”¹⁰ and he found that the alleged surveillance “has potential adverse statutory consequences for both sides of the Agency.”¹¹ Moreover, he found that under the Agency’s reasoning, the Agency could engage in “subterfuge”¹² by employing “the services of the GC to engage in questionable statutory conduct” and then “claim, as here, that any related grievance was not arbitrable because the GC is not a party to the Board-side’s [agreement].”¹³ He concluded that a merits proceeding was necessary to “see whether [the alleged surveiller’s] conduct and perhaps that of others on either side of the Agency violated the Statute.”¹⁴

Ultimately, the Arbitrator determined that the grievance was substantively arbitrable because it “satisfies the statutory requirements of a cognizable grievance under the Statute and the Board-side agreement.”¹⁵

The Agency filed exceptions to the award on November 27, 2019, and the Union filed an opposition on December 23, 2019.

III. Analysis and Conclusions

A. The award is not contrary to law.

The Agency argues that the Arbitrator’s substantive-arbitrability determination is contrary to law because the grievance does not meet the statutory definition of a grievance.¹⁶ When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by the exception *de novo*.¹⁷ In reviewing *de novo*, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the applicable standard of law.¹⁸ In making that assessment, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party establishes that they are nonfacts.¹⁹

¹⁰ *Id.* (quoting 5 U.S.C. § 7116(a)(1)). The Arbitrator also found that the Agency’s reliance on *NLRB v. FLRA* was misplaced and inapplicable to the “unique circumstance” of this case because that case involved the Union’s effort to consolidate the bargaining units on both sides of the Agency and this matter concerns unlawful surveillance and an alleged ULP that the Agency committed. *Id.* at 11 (citing 613 F.3d 275, 280 (D.C. Cir. 2010)).

¹¹ *Id.* at 11.

¹² *Id.* at 10.

¹³ *Id.*

¹⁴ *Id.* at 12.

¹⁵ *Id.*

¹⁶ Exceptions at 7, 9.

¹⁷ *AFGE, Local 1633*, 71 FLRA 211, 212, n.12 (2019).

¹⁸ *Id.*

¹⁹ *Id.*

In challenging the award as contrary to law, the Agency argues that the grievance is not arbitrable because it involves internal Union business.²⁰ Specifically, the Agency notes that § 7103(a)(9) of the Statute defines a “grievance” to include any complaint “(A) by any employee concerning any matter relating to the employment of the employee; [or] (B) by any labor organization concerning any matter relating to the employment of any employee.”²¹ And it argues that the grievance does not meet the statutory definition of a grievance because the activities allegedly surveilled “involved Union work and activities”²² and therefore do not relate to the “employment of an employee”²³ or concern a “condition of employment.”²⁴

However, 5 U.S.C. § 7103(a)(9)(C)(ii) *also* defines a grievance to include any complaint “by any employee, labor organization, or agency concerning . . . any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.” And here, the Union alleged in its grievance that the Agency violated § 7116(a)(1) of the Statute by “illegally surveilling Union officers.”²⁵

Because the grievance claims that the Agency violated § 7116(a)(1) of the Statute,²⁶ a law that affects conditions of employment,²⁷ the Arbitrator correctly determined that the grievance meets the definition of a grievance contained in § 7103(a)(9)(C)(ii). Thus, the Agency’s arguments do not demonstrate that the alleged violation of § 7116(a)(1) is non-grievable, and we deny the Agency’s contrary-to-law exception.²⁸

²⁰ Exceptions at 8-10.

²¹ 5 U.S.C. § 7103(a)(9)(A), (B).

²² Exceptions at 9-10.

²³ *Id.* at 7-8 (citing 5 U.S.C. § 7103(a)(9)(A), (B)).

²⁴ *Id.* at 10 (citing 5 U.S.C. § 7103(a)(9)(C)(ii)). The Agency itself acknowledges that the Union could have filed an unfair labor practice charge with the Authority containing the same allegations that are set forth in its grievance. *Id.* at 5 n.2, 8.

²⁵ Award at 2; *see also* Exceptions, Ex. 4 at 96.

²⁶ Section 7116(a)(1) of the Statute provides that “it shall be an unfair labor practice for an agency . . . to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter.” 5 U.S.C. § 7116(a)(1).

²⁷ *NTEU*, 61 FLRA 729, 732 (2006) (“the Authority has consistently held that § 7103(a)(9) of the Statute defines the term ‘grievance’ broadly to include any claimed violation of any law, including the Statute”).

²⁸ To the extent that the Agency argues that the conduct challenged in the Union’s grievance does not constitute an unfair labor practice, that is a determination for the Arbitrator at the merits stage of the grievance. *E.g., Newark Air Force Station*, 30 FLRA 616, 635, 638 (1987) (holding that grievance alleging statutory violations arbitrable, distinguishing between arbitrability of the grievance and resolving substantive issues presented by grievance).

- B. The award does not fail to draw its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the Board-side agreement because the Arbitrator "failed to consider the plain language of Article 37 that identifies the two-parties governed by the agreement: the Board and Board-side bargaining unit employees."²⁹ More specifically, the Agency claims that the Arbitrator erred by finding that the "[g]rievance was arbitrable" because the management official who is alleged by the Union to have engaged in the unlawful surveillance is "a GC-management official and not a party to the [Board-side] agreement."³⁰

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.³¹

Here, the Arbitrator rejected the Agency's argument on this point because the statutory provision upon which the grievance is based makes it unlawful for an "agency" to interfere with the Union's protected rights.³² And based upon the plain language of the Union's grievance – which alleged that the "Agency is illegally surveilling Union officers,"³³ he concluded that a merits proceeding was necessary to determine "whether [the alleged surveiller's] conduct and perhaps that of others on either side of the Agency violated the Statute."³⁴

The Agency has failed to demonstrate how the Arbitrator's findings – which specifically addressed the bifurcation of the Agency reflected in Article 37 in finding the grievance arbitrable – fails to draw its essence from the parties' agreement. Accordingly, we deny the Agency's essence exception.

IV. Decision

We deny the Agency's exceptions.

²⁹ Exceptions at 11.

³⁰ *Id.*

³¹ *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).

³² Award at 10.

³³ *Id.* at 2, 9.

³⁴ *Id.* at 12.

Chairman Kiko, concurring:

The theory underlying the Union's grievance requires several generous inferences. Based solely on a management employee of the General Counsel (GC) having in her possession a single email sent by a Union official (representing Board-side employees) to a media outlet, the Union surmises that it "can only conclude that the Agency is illegally surveilling Union officers," or, as a fallback, "creat[ing] the impression of surveillance."¹ The Union's attempt to get around the division, for bargaining-unit purposes, between GC-side and Board-side employees² by theorizing that this GC manager committed "subterfuge"³ also requires a leap of logic.

Nonetheless, the sole issue before the Arbitrator, and before the Authority, is whether the Union's grievance is arbitrable—not whether it will be meritorious. The Arbitrator specifically reserved the latter question, stating that "Nothing herein is intended to suggest any outcome one way or the other on the merits of the [Union]'s grievance."⁴ On the bare arbitrability question, § 7103(a)(9) of the Federal Service Labor-Management Relations Statute (the Statute) defines a grievance to include "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment."⁵ Here, the Union alleges unlawful surveillance in violation of § 7116(a)(1) of the Statute. The Statute is undoubtedly a "law . . . affecting conditions of employment,"⁶ and the Union alleges (however tenuously) a violation of it. Therefore, we are constrained to find the grievance is arbitrable—no matter how unfounded, dubious, or just plain silly it may turn out to be.

¹ Award at 2.

² See *NLRB v. FLRA*, 613 F. 3d. 275, 280 (D.C. Cir. 2010).

³ Award at 10

⁴ *Id.* at 14.

⁵ 5 U.S.C. § 7103(a)(9).

⁶ *Id.*

Member Abbott, dissenting:

Yet, once again, we have before us a case that brings us to the outer edge of our Statute.¹

First, the grievance does not meet the statutory definition of “grievance.”² The Arbitrator fails to address the fact that the grievance did not allege a contractual violation or that the contract had expired. He does not believe the dispute over alleged surveillance is an internal union matter and he found “no statutory or contractual basis to conclude that the Union’s grievance is not arbitrable.”³ Instead, he addresses the closure of health units and conditions of employment⁴ – two items which were *not* on his proverbial plate.

The Arbitrator’s repeated references to aspects of the merits in this case, i.e., health care units and conditions of employment, demonstrate that the focus was not the case before him, but *the case he wanted it to be*. The Arbitrator is missing the purpose of his arbitrability review – a review of the preliminary and threshold requirements in order to determine if the merits should even be addressed. The grievance did not allege any contractual violations and is purely focused on the activities of Board employees as ‘Union officers’—not employees.⁵ The grievance complains about the alleged surveillance of the Union’s email communications with a

¹ See *U.S. DOJ, Fed. BOP, Fed. Med. Ctr. Carswell, Fort Worth, Tex.*, 70 FLRA 890, 890 (2018) (Member DuBester dissenting) (citing *AFGE, Local 1547*, 67 FLRA 523 (2014), *rev’d sub nom. U.S. Dep’t of the Air Force, Luke Air Force Base, Ariz. v. FLRA*, 844 F.3d 957 (D.C. Cir. 2016)); see also *U.S. Dep’t of VA, Veterans Benefit Admin., Nashville Reg’l Office*, 71 FLRA 322, 324 (2019) (Member Abbott concurring; Member DuBester dissenting) (Concurring Opinion of Member Abbott) (stating that the “Statute does have its limitations”).

² To constitute a grievance under § 7103(a)(9)(C)(ii), a complaint must involve “any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.” The alleged violation here (i.e., § 7116(a)(1)) did not affect conditions of employment as defined in § 7103(a)(14); and, therefore, the grievance does not meet the statutory definition of a grievance.

³ Award at 9, 13.

⁴ The Arbitrator thinks removal of the health care units affects conditions of employment and working conditions, despite being well aware that the determination regarding whether it is a condition of employment or working condition was before the Authority – the body entrusted with making such determinations. See *Id.* at 11-12 n.15.

⁵ Under the heading “Contractual, Statutory, and/or Regulatory Provisions Violated,” the Grievance alleged violations of “[a]ny other applicable statutes, rules, and/or regulations.” Notwithstanding the Union’s identification of 5 U.S.C. § 7116(a)(1), the Grievance contains nothing but bare allegations that fail to meet the statutory definition of “grievance” under § 7103(a)(9).

Politico reporter. Ms. Tursell’s alleged surveillance or impression of surveillance of Union emails – the alleged basis of the violation of law in this grievance – does not affect conditions of employment because the employees’ activities involved Union work and activities.⁶ This is clearly an internal union matter and does not concern conditions of employment, and the Arbitrator’s award is contrary to law in this regard.

Second, the Arbitrator’s award fails to draw its essence from the collective bargaining agreement (CBA). Instead, the award focuses on the agency as a whole, regardless of the statutory and structural distinctions established to separate the Board side from the General Counsel (GC) side. A review of the establishing statute and subsequent cases demonstrate separation. The Award, and subsequently the majority opinion, ignore the fact that the Board and the GC are distinct in their functions, operations, bargaining units and contracts.⁷

The National Labor Relations Act (the Act) “specifically mandates a separation of authority over agency employees. Under the Act, the GC shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to the Board members) and over the officers and employees in the regional offices.”⁸ Yet, despite the distinction between operation and function, and acknowledgment of the same, the Arbitrator holds one side potentially accountable for the other, going so far as to say, “the PA [Professional Association]-Board-side is not outcome-determinative on arbitrability, despite bifurcation of the Agency. As the PA notes, it is for a merits proceeding to determine whether there was a relationship or understanding between Tursell and the Board-side regarding Union surveillance.”⁹ Tursell, a GC-side employee, is *not* a party to the Board-side agreement.

⁶ Exceptions at 13.

⁷ As a result of the Agency’s bifurcation of its statutory functions, and to ensure the separation of the General Counsel and Board operations, the Agency has two separate bargaining units and two contracts: Board-side and General Counsel-side. *NLRB v. FLRA*, 613 F.3d. 275, 280 (D.C. Cir. 2010); see also Exceptions at 3.

⁸ *NLRB*, 613 F.3d. at 278 (citing 29 U.S.C. § 153(d)).

⁹ Award at 10.

In sum, I agree with the Agency that the Board-side CBA cannot be used to file a grievance against a GC-side management official. The distinction between the two “sides” is a matter that has been the subject of far too many disputes and we may not now simply turn a blind eye to that distinction.¹⁰ The Arbitrator’s award on this point is not a plausible interpretation of the CBA. Therefore, I would grant the Agency’s exceptions as the Arbitrator’s interpretation is contrary to law and fails to draw its essence from the expired and inapplicable Board-side CBA.

¹⁰ The grievance also fails to address what should be an obvious – but ignored – question concerning whether it is appropriate for any part of this Agency to take sides as “management” or “the union.” Put more precisely, is it appropriate for the Agency whose sole mission is to resolve labor disputes between employers, unions, and employees to establish bargaining units which then further divides the Agency not just by Board side and GC side but by Board management and union and GC management and union? It leaves the public with the impression that the Agency’s employees are predisposed to one side or the other. And the fact – that the Agency tasked with these responsibilities is itself unable to effectively resolve its own disputes (and step out of their own “sides”) and must seek resolution before the Authority – does not engender confidence in the Agency’s ability to effectively and impartially resolve disputes between other employers and unions. *See* 5 U.S.C. § 7112(c) (“Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization — (1) which represents other individuals to whom such provision applies; or (2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.”); *see also* 5 U.S.C. § 7112(b)(4) (“A unit shall not be determined to be appropriate . . . if it includes . . . [a]ny employee who is engaged in administering the provisions of [the Federal Service Labor-Management Relations Statute].”).