71 FLRA No. 234

UNITED STATES
DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION
NATIONAL WEATHER SERVICE
(Agency)

and

NATIONAL WEATHER SERVICE
EMPLOYEES ORGANIZATION
(Union)

0-AR-5583

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DECISION

December 23, 2020

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

I. Statement of the Case

In this case, we remind the federal labor-relations community that contracts have consequences and that a party cannot avoid a provision's consequences when it agrees to that provision.

The Arbitrator found that the Agency violated the parties' ground rules agreement (the ground rules) by failing to answer the Union's requests for formal declarations of nonnegotiability. As a remedy, he ordered the Agency to make a good-faith attempt to review the Union's requests and to declare any proposals nonnegotiable where appropriate.

The Agency argues that the award is contrary to law and that it fails to draw its essence from the ground rules. We deny the Agency's essence exception because it constitutes mere disagreement with the Arbitrator's findings and it fails to demonstrate that the award does not draw its essence from the ground rules. Furthermore, because the agency fails to demonstrate that the award is contrary to law, we deny this exception. Consequently, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

In December 2016, the parties agreed to the ground rules for negotiating a new collective bargaining agreement. In relevant part, Rule 15 of the ground rules provides that:

> [t]he [p]arties will attempt to resolve negotiability disputes informally during the bargaining sessions. In the event there is a negotiability dispute related to a particular proposal with respect to an [a]rticle and an agreement cannot be reached informally, the parties will table that [a]rticle until conclusion of negotiations on all other [a]rticles. *The Agency will present a formal declaration of non-negotiability upon request*. The [U]nion may appeal the declaration of non-negotiability of an [a]rticle to the Federal Labor Relations Authority (FLRA) . . . .[1]

By April 2019, the parties exchanged proposals and counterproposals for a number of articles. Subsequently, the Union invoked Rule 15 and requested the Agency to make a formal declaration of nonnegotiably (a formal declaration) with regard to one proposal.[2] The Agency responded to the request by stating that it was "not making an assertion of non-negotiability . . . ."[3] Thereafter, the Union again invoked Rule 15 and asked the Agency to make a formal declaration regarding three different proposals. The Agency responded to the second request by stating that it was "not making an allegation of non-negotiability . . . ."[4] The Union then served the Agency with a third request for a formal declaration concerning eight proposals. The Agency again stated that it was not asserting that any of the proposals were nonnegotiable and the Agency's lead negotiator testified that the proposals were "just bad."[5] The Union then grieved the sufficiency of the Agency's responses under Rule 15 and arbitration ensued.

The Arbitrator determined that Rule 15 "place[s] the Union in a position to seek Authority review on the basis of an actual written allegation of non-negotiability . . . rather than to leave the Union . . . having to petition

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[1] Award at 3 (emphasis added).
[2] *Id.* at 9.
[3] *Id.* at 4-7.
[4] *Id.*
[5] *Id*. at 8.

on the basis of a non-response."[6] He also found that the intent of Rule 15 is "to expedite resolution of negotiability disputes by the FLRA by requiring the Agency to take a position upon request, not to engender fact-based disputes . . . ."[7] Consequently, the Arbitrator rejected the Agency's argument that Rule 15 is co-extensive with § 2424.11 of the Authority's Regulations[8] and that it was not required to take a negotiability stance with regard to a particular proposal. The Arbitrator also found that Rule 15 is consistent with the Authority's Regulations.

Because the Agency admitted that it did not make any attempt to review the Union's proposals for nonnegotiability, he found that the Agency violated Rule 15 of the ground rules.[9] Therefore, the Arbitrator ordered the Agency to make a good-faith attempt to review the Union's requests and to declare any proposals nonnegotiable where appropriate.

The Agency filed exceptions to the award on January 9, 2020. The Union filed an opposition to the Agency's exceptions on January 24, 2020.[10]

III. Analysis and Conclusions

A. The Agency fails to demonstrate that the award does not draw its essence from the ground rules.

The Agency argues that the award fails to draw its essence from the ground rules because Rule 15 only applies if there is a negotiability dispute.[11] Therefore, because the Agency never declared that the Union's proposals were nonnegotiable, the Agency argues that it did not have a duty under the ground rules to prepare a formal declaration of nonnegotiability.[12]

The Agency fails to demonstrate that the Arbitrator's interpretation of Rule 15 is implausible, irrational, unfounded in reason, or evidences a manifest disregard for the parties' agreement. It is not enough that the Agency has interpreted Rule 15 *differently*.[13] While the Agency passionately reargues that Rule 15 only applies when there is a negotiability dispute between the parties, it fails to highlight any language in Rule 15 that demonstrates the Arbitrator ignored, irrationally interpreted, or implausibly read the parties' agreement when he concluded that Rule 15 does not require a negotiability dispute to be in existence before a formal

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[6] *Id.* at 16; *see also* 5 C.F.R. § 2424.11(a) ("An exclusive representative may file a petition for review after receiving a written allegation concerning the duty to bargain from the agency. An exclusive representative also may file a petition for review if it requests that the agency provide it with a written allegation concerning the duty to bargain and the agency does not respond to the request within ten (10) days.").

[7] Award at 14.

[8] 5 C.F.R. § 2424.11(a).

[9] Award at 17.

[10] As a preliminary matter, the Union argues that the Agency did not present its contrary-to-law exception to the Arbitrator. Opp'n Br. at 1-3. However, based on the Arbitrator's decision, the Agency presented several arguments asserting that Rule 15 was meant to be co-extensive with the Authority's regulations. Award at 8, 13. Because the Arbitrator explicitly rejected this argument and found that Rule 15 is not co-extensive with the Authority's regulations, Award at 16, we will consider the Agency's contrary-to-law exception. 5 C.F.R. §§ 2425.4(c), 2429.5.

[11] Exceptions at 9. 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. *SSA*, 71 FLRA 580, 581 n.9 (2020) (*SSA*) (Member DuBester concurring).

Member DuBester notes that, in considering the Agency's essence exception, he 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).

[12] Exceptions at 9-10.

[13] *U.S. Dep't of HHS, Substance Abuse & Mental Health Servs. Admin.*, 65 FLRA 568, 571 (2011) (finding that a different interpretation of a particular article does not automatically render the arbitrator's interpretation implausible).

declaration of nonnegotiability could be requested.[14] Furthermore, the Agency fails to challenge the Arbitrator's finding that the ground rules do not require the Agency to make any oral assertions of nonnegotiability for Rule 15 to be applicable.[15]

The Arbitrator also premised his award on the Agency's concession that it never considered the negotiability of the disputed proposals.[16] As the Authority has previously held, disagreement with an arbitrator's interpretation and application of a collective bargaining agreement does not provide a basis for finding an award deficient.[17] Consequently, we deny this exception because the Agency has failed to demonstrate that any of the above findings are not a plausible interpretation of the ground rules.[18]

B. The award is not contrary to law.

The Agency argues that the award is contrary to the Authority's Regulations and the Federal Service Labor-Management Relations Statute because it deprives the Agency of its "prerogative" to not declare any proposals nonnegotiable.[19] While the Regulations specify that a union "may file a petition for review if it requests that the agency provide it with a written allegation concerning the duty to bargain and the agency does not respond to the request within ten (10) days,"[20] we find nothing in the Regulations which prevent an agency from obligating itself through an agreement to making formal declarations of nonnegotiability upon request.[21] Accordingly, the Agency's contrary-to-law exception similarly fails.[22] Therefore, we deny this exception.

IV. Decision

We deny the Agency's exceptions.

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[14] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Tallahassee, Fla.*, 71 FLRA 622, 624 (2020) (Member DuBester concurring) (denying the agency's essence exception because it did not "establish that the award fails to draw its essence from the agreement"); *U.S. Dep't of State, Passport Servs.*, 71 FLRA 362, 364 (2019) (Member DuBester concurring; Chairman Kiko dissenting) (finding that the agency "fails to demonstrate how the [a]rbitrator's" award fails to draw its essence from the parties' agreement). The dissent claims that "[n]othing in the plain wording of Rule 15 requires the Agency to review the negotiability of the Union's proposals upon request." Dissent at 8-9. However, the dissent ignores the plain wording of Rule 15, which states that "[t]he Agency will present a formal declaration of non-negotiability . . . upon request." Award at 3. Furthermore, the dissent's claim that Rule 15 only applies when there is a negotiability dispute is similarly unfounded. Dissent at 8-9. Rule 15 only states that the consideration of a proposal will be tabled until the completion of negotiations if there is a negotiability dispute with regard to the proposal. Award at 3. Therefore, the dissent does not highlight any language in Rule 15 that demonstrates the Arbitrator erred in his interpretation of the ground rules.

[15] Award at 12 ("Conversely, the Arbitrator finds nothing in Ground Rule 15 that requires the Agency to make an oral assertion of non-negotiability as a predicate to the Union's request for a formal declaration. There are no words or phrases in the rule itself that require such an oral assertion prior to a request by the Union for a formal declaration of non-negotiability. Such words simply are not present in the provision.").

[16] *Id.* at 17.

[17] *SSA*, 71 FLRA at 581 (finding that "the [a]gency's argument is merely disagreement with the Arbitrator's conclusion and is not grounds for finding the award deficient").

[18] *See U.S. Dep't of the Navy, U.S. Marine Corps, Fin. Ctr., Kan. City, Mo.*, 38 FLRA 221, 228 (1990) (denying essence exception where it amounts only to disagreement with arbitrator's interpretation and application of parties' agreement).

[19] Exceptions at 7.

[20] 5 C.F.R. § 2424.11(a).

[21] *See id.*

[22] While Member Abbott notes that the Agency agreed to a regrettable provision, a party "should not . . . attempt to use its exceptions to wriggle out of a poorly thought out and constructed contract provision." *U.S. Dep't of Transp., FAA*, 68 FLRA 402, 405 n.40 (2015).

Member Abbott, concurring:

While I agree that the Agency's exceptions are properly denied, I write separately to discuss several concerning aspects of the provision from which this grievance arises.

The provision, insofar as it requires the Agency to "present a formal declaration of non-negotiability upon request [of the Union]," runs counter to the negotiability framework established in the Federal Service Labor-Management Relations Statute and our Regulations.[1] Under that framework, each party has options from which to choose. An agency may declare—through a written allegation of nonnegotiability—that a proposal is nonnegotiable and thereby seek a negotiability review.[2] However, the Union has its own options. When the Union believes a certain proposal is negotiable it may request a written allegation of nonnegotiability from the agency.[3] If the agency fails to provide a response, then it may submit its own petition for review in order to trigger a negotiability review.

The provision at issue, to which the Agency inexplicably agreed and is thus bound, however, seemingly forces the Agency to declare a provision to be non-negotiable simply when the Union requests such a statement. The Federal Service Impasses Panel has previously rejected a proposal that contains a similar requirement.[4] Because the provision runs so far afield of the statutory framework for negotiability disputes, it did nothing to more effectively resolve the disputes that arose between the Agency and the Union at the bargaining table. Instead of making efforts to negotiate, mediate, or send the dispute to the Authority for resolution, the parties have spent the past year fighting over the interpretation of a silly, meaningless provision that should never have made its way into the parties' agreement.

Thus, the Arbitrator was left to interpret this counter-productive and counter-intuitive proposal. Although I may not agree entirely with the Arbitrator's take, I cannot conclude that his interpretation is implausible. I can say for certain, however, that the year-long fight over the interpretation of this odd provision did nothing to "facilitate[] and encourage[] the amicable settlements of [the] disputes" arising out of these negotiations.[5]

[1] 5 C.F.R. § 2424.11.

[2] *See id.* ("An exclusive representative also may file a petition for review if it requests that the agency provide it with a written allegation concerning the duty to bargain and the agency does not respond to the request within ten (10) days.").

[3] *See AFGE, Local 1502*, 71 FLRA 468, 469 (2019) ("Per the Authority's Regulations, the [u]nion had to wait for the ten-day period to lapse from its unfulfilled demand for a declaration of non-negotiability to file its petition for review, or wait until the [a]gency responded with a written allegation declaring the proposal nonnegotiable.").

[4] *DOD Educ. Activity*, 19 FSIP 001, 16 (2019) ("[The agency] will present a formal declaration of non-negotiability to the Association upon request.").

[5] 5 U.S.C. § 7101(a)(1)(C).

Chairman Kiko, dissenting:

In resolving any essence exception, we must begin with the contractual wording at issue.[1] Here, Rule 15 of the parties' ground rules pertinently provides that it applies "[*i*]*n the event* there is a negotiability dispute."[2] Thus, the plain wording of Rule 15 imposes an unambiguous condition precedent – the existence of a negotiability dispute – to the Agency's obligation to "present a formal declaration of non-negotiability upon request" from the Union.[3]

Despite this unambiguous wording, the Arbitrator interpreted Rule 15 in a manner that effectively excised the entire condition precedent. In doing so, the Arbitrator modified Rule 15, adding a requirement that the Agency *review* the negotiability of a proposal, and mandating that the Agency conduct that review *whenever* the Union makes such a request.[4] Not only is this modification to the parties' agreement impermissible under recently reaffirmed Authority precedent,[5] it also contravenes Authority decisions holding that an award fails to draw its essence from an agreement where the award conflicts with the agreement's plain wording.[6]

Nothing in the plain wording of Rule 15 requires the Agency to *review* the negotiability of the Union's proposals upon request. Further, nothing in the record suggests that the Agency alleged nonnegotiability, thereby triggering Rule 15's requirement that it formalize such an allegation in writing. Rather, the Agency said "[w]e are not making an allegation of non-negotiability" clearly and repeatedly.[7] The Authority's Regulations define a "[n]egotiability dispute" as "a disagreement . . . [over] the legality of a proposal or provision."[8] And in proceedings before the Authority, where an agency expressly disavows that it is alleging nonnegotiability, the Authority will find that no negotiability dispute exists.[9] Although the Agency asserted that the proposals at issue were disagreeable, nothing in the record establishes that the parties disputed the legality of any of the Union's proposals.[10] In the absence of a negotiability dispute, Rule 15 did not oblige the Agency to provide a "formal declaration" of nonnegotiability when the Union requested.[11] For this reason, I would grant the Agency's essence exception and set aside the award as conflicting with the plain wording of the parties' agreement.

Lastly, I agree with the majority's statement that "contracts have consequences," and parties should not be able to "avoid" those consequences.[12] But for contracts to have consequences, arbitrators and the Authority must enforce the plain wording of contractual provisions. By altogether disregarding an entire clause in Rule 15, the majority undermines itself, and its statement regarding consequences rings hollow.[13]

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[1] *E.g.*, *U.S. DOD*, *Educ. Activity*, 70 FLRA 937, 938 (2018) (*DODEA*) (Member DuBester dissenting) (award failed to draw its essence because the "[a]rbitrator failed to enforce the plain language of the parties' agreed-to filing deadline").

[2] Award at 3 (emphasis added).

[3] *Id.* (emphasis omitted). As the Arbitrator noted, "the evident purpose of . . . Rule 15 is to facilitate and expedite resolution of negotiability disputes[.]" *Id.* at 12. That statement, like Rule 15, presupposes that there is a negotiability dispute in the first place.

[4] *See, e.g.*, *id.* at 16 (finding that Rule 15 cannot require the Agency to declare a proposal nonnegotiable if the Agency does not believe the proposal is nonnegotiable, but interpreting Rule 15 to require the Agency to conduct a negotiability review of any proposal upon request).

[5] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Talladega, Ala.*, 71 FLRA 1145, 1146 (2020) (Member DuBester dissenting in part) (setting aside award where arbitrator "impermissibly modified the parties' agreement"); *U.S. Dep't of the Treasury, IRS, Kansas City, Mo.*, 71 FLRA 1007, 1011 (2020) (Member DuBester dissenting) ("an award does not draw its essence from the parties' agreement when an arbitrator modifies, rather than interprets, a [collective-bargaining agreement] by imposing additional terms to the plain wording of a bargained contract provision"); *id.* at 1007 ("The role of the arbitrator is to interpret not to modify.").

[6] *E.g.*, *U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 179, 180 (2019) (Member DuBester dissenting); *DODEA*, 70 FLRA at 938.

[7] Award at 5-7.

[8] 5 C.F.R. § 2424.2(c).

[9] *E.g.*, *AFGE Council 53, Nat'l VA Council*, 71 FLRA 1124, 1125 (2020) (Member Abbott dissenting only as to whether the dismissal should be with or without prejudice).

[10] The Authority has repeatedly recognized the difference between disagreeability and nonnegotiability. *Cf. AFGE Nat'l Council of EEOC Locals No. 216*, 71 FLRA 603, 609 n.74 (2020) (Member DuBester dissenting in part) ("[W]e note that requiring negotiations over a proposal does not require agreement to the proposal."); *NTEU*, 64 FLRA 395, 397 n.5 (2010) (Member Beck dissenting) (disagreements over the merits of a proposal should be resolved by the parties "either bilaterally or, if necessary, with the assistance of the Federal Service Impasses Panel").

[11] The Arbitrator emphasized that neither Rule 15 nor the Authority's Regulations expressly require an *oral* assertion of non-negotiability prior to a union request for a written allegation of non-negotiability. Award at 13. This focus on form over substance is misguided. Regardless of the method by which an allegation of nonnegotiability is communicated, the Authority's regulations – and the wording of Rule 15 – require *the existence of a negotiability dispute*.

[12] Majority at 1.

[13] *See id.* at 4 n.14 (failing to understand that the "review [of] the negotiability of" a proposal is distinct from "present[ing] a formal declaration of non-negotiability"; the former concerns an *examination* as to whether a negotiability dispute exists, and the latter acknowledges that such a dispute *already* exists); *id.* (conceding that the plain wording of Rule 15 requires the Agency to present a formal declaration of nonnegotiability only when "there is a negotiability dispute with regard to the proposal" and the "proposal [was] tabled until the completion of negotiations").