

72 FLRA No. 10

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 66
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
KANSAS CITY SERVICE CENTER
KANSAS CITY, MISSOURI
(Agency)

0-AR-5599

DECISION

January 26, 2021

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

I. Statement of the Case

In this case, we remind the federal labor-management community that arbitrators do not exceed their authority by directly responding to the issues framed in the absence of stipulated issues.

The Union filed a grievance alleging that the Agency violated the parties' national collective-bargaining agreement by failing to provide employees (the grievants) a higher rate of pay for a portion of time that they were detailed to a higher-graded position. Arbitrator Michael D. Gordon issued an award finding that under the national agreement, the grievants were not entitled to General Schedule (GS)-8 pay for the first two weeks of the detail, because the Union president and Agency management agreed to a different payment timeline.

The main questions before us are: (1) whether the Arbitrator exceeded his authority, and (2) whether the award fails to draw its essence from the national agreement. The Arbitrator framed the issue because the

parties failed to stipulate to an issue for resolution at arbitration, and the award responds directly to the framed issue. Further, the Arbitrator's resolution of the grievance does not conflict with the national agreement, and the Union's essence exception simply reiterates the exceeds-authority argument. Thus, the award neither exceeds the Arbitrator's authority nor fails to draw its essence from the national agreement. Accordingly, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The grievants are GS-7 Tax Examining Technicians. The Agency offered the grievants a detail to a higher-graded GS-8 position, with "[c]lassroom training" beginning on November 13, 2017, and the higher pay rate beginning two weeks later, on November 26, 2017.¹ The grievants accepted the offer, began classroom training on November 13, and received the higher pay rate starting on November 26.

After the detail ended, the Union filed a grievance alleging that the Agency violated the national agreement by failing to pay the grievants at the GS-8 level for the first two weeks of the detail, from November 13 to 25.

The parties were unable to resolve the grievance, and the dispute proceeded to arbitration. At arbitration, the parties did not stipulate to an issue. As a result, the Arbitrator framed the issue as: "Under the [national agreement and other applicable standards, were [the grievants entitled to GS-8 pay from November 13 to 25, 2017; and, if so, what is the proper remedy?]"²

Before the Arbitrator, the Union contended that the Agency violated Article 16 of the national agreement (Article 16), which provides, in relevant part, that "[a]n employee who is detailed to a position of higher grade . . . will be temporarily promoted . . . and receive the rate of pay for the position to which temporarily promoted."³ The Arbitrator disregarded that contention, focusing instead on a "mutual understanding" between the Union president and Agency management.⁴ Specifically, the Arbitrator found that before the Agency offered the detail, the Union and the Agency agreed that "the GS-8 rate would not be paid [during] the first two training weeks" of the detail (the parties' arrangement).⁵ While the Union argued that any such arrangement was invalid because it changed the terms of the national agreement, the Arbitrator disagreed. According to the Arbitrator, the parties' arrangement – to not provide the GS-8 pay rate until November 26 – was an "adjustment much like a grievance settlement," and "[f]act specific, limited adjustments to discrete situations are

¹ Award at 10. Unless otherwise noted, all subsequent references to dates occurred in 2017.

² *Id.* at 2.

³ *Id.* at 3-4 (quoting Nat'l Agreement Art. 16, § 2).

⁴ *Id.* at 19.

⁵ *Id.* at 10, 19.

contemplated in the [national a]greement[.]”⁶ Thus, the Arbitrator denied the grievance, holding that “[u]nder the [national a]greement and other applicable standards, [the g]rievants were not entitled to GS-8 pay from November 13 to 25.”⁷

The Union filed exceptions to the award on February 24, 2020, and the Agency filed an opposition to the exceptions on March 25, 2020.

III. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Union asserts that the Arbitrator exceeded his authority.⁸ As relevant here, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, or disregard specific limitations on their authority.⁹ Where the parties fail to stipulate to an issue, the arbitrator may formulate the issue on the basis of the subject matter before him or her.¹⁰ In those circumstances, the Authority examines whether the award is directly responsive to the issue that the arbitrator framed.¹¹

The Union contends that the Arbitrator exceeded his authority by failing to apply Article 16 to resolve the dispute and, instead, relying on the parties’ arrangement.¹² Because the parties did not stipulate to an issue for resolution, the Arbitrator framed the issue, in relevant part, as: “Under the [national a]greement and other applicable standards, were [the g]rievants entitled to GS-8 pay from November 13 to 25[?]”¹³ That issue does not specifically require the Arbitrator to apply Article 16. Moreover, the Arbitrator’s conclusion that the grievants were not entitled to GS-8 pay from November 13 to 25¹⁴ is directly

responsive to the framed issue. Although the Arbitrator relied on the parties’ arrangement instead of Article 16, he applied the national agreement – as required by the framed issue¹⁵ – finding that “[f]act specific, limited adjustments to discrete situations[, like the parties’ arrangement,] *are contemplated in the [national a]greement[.]*”¹⁶ And, in concluding that the grievants were not entitled to GS-8 pay for the relevant time period, the Arbitrator explicitly stated that he considered the national “[a]greement and other applicable standards.”¹⁷

Consequently, we find that the Union has not demonstrated that the Arbitrator exceeded his authority, and we deny this exception.¹⁸

B. The award draws its essence from the national agreement.

The Union contends that the award fails to draw its essence from the national agreement because the Arbitrator resolved the dispute by applying the parties’ arrangement instead of Article 16.¹⁹ As relevant here, the Authority has found that an award fails to draw its essence from a collective-bargaining agreement where the award conflicts with the agreement’s plain wording.²⁰

Here, the Union fails to cite any article in the national agreement that required the Arbitrator to resolve the grievance by applying Article 16. In addition, the Union has not demonstrated that the Arbitrator’s reliance on the parties’ arrangement conflicts with the national agreement. Finally, to the extent that the Union’s essence exception reiterates its exceeded-authority exception,²¹ we deny it for the reasons explained above.²² Accordingly, we deny the Union’s essence exception.

⁶ *Id.* at 21.

⁷ *Id.* at 22.

⁸ Exceptions Br. at 10, 15.

⁹ *NTEU*, 70 FLRA 57, 60 (2016).

¹⁰ *Id.*

¹¹ *Id.*

¹² Exceptions Br. at 15.

¹³ Award at 2.

¹⁴ *Id.* at 22.

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 21 (emphasis added).

¹⁷ *Id.* at 22.

¹⁸ See *NAGE, SEIU, Local 551*, 68 FLRA 285, 287 (2015) (finding that where “the parties did not stipulate to [a] matter . . . the [a]rbitrator was not obligated to specifically address [it]”); *U.S. Dep’t of VA, Med. Ctr., Richmond, Va.*, 63 FLRA 553, 557 (2009) (*VA Med. Ctr.*) (finding arbitrator did not exceed authority by failing to apply a contractual provision because framed issues did not require provision’s application).

¹⁹ Exceptions Br. at 12.

²⁰ *AFGE, Council 215*, 66 FLRA 771, 773 (2012) (*AFGE*). The Authority will also 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 agreement as to manifest an infidelity to the obligations of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *Id.*

²¹ Compare Exceptions Br. at 10 (arguing that award fails to draw its essence from the national agreement because Arbitrator “completely failed to analyze Article 16”), with *id.* at 16 (arguing that the Arbitrator exceeded his authority by “disregarding the very contract language at the crux of this case”).

²² See *VA Med. Ctr.*, 63 FLRA at 557 (argument that arbitrator failed to find contractual violations does not raise essence exception where arbitrator did not interpret or apply the cited provisions); see also *AFGE*, 66 FLRA at 774 (denying exceeds-authority exception that essentially reiterated essence exception).

IV. Decision

We deny the Union's exceptions.

Chairman DuBester, concurring:

I agree with the majority's Decision to deny the Union's exceptions.

Member Abbott, dissenting:

This case should turn on whether, and to what extent, a union representative may waive an entitlement for employees who will accept a detail even where, as here, it is not clear who agreed to the oral “arrangement.”¹ Unlike the majority, I would conclude that the Arbitrator exceeded his authority and that the award does not draw its essence from the collective-bargaining agreement (CBA).

There was some asynchronous and second-hand testimony that the Union president “agreed to the timeline and pay consequences at the center of this controversy.”² Notably, however, the Union president made no appearance and gave no input on his role or any hint as to what the purpose, intent, and terms of the oral “arrangement” were. The Arbitrator simplistically concluded that “[r]ather, their accord was a mutual adjustment much like a grievance settlement or a decision to file or withdraw a grievance. It was a response to a one-time, inadvertent management mistake in its initial detail selection process and [personnel action request] application.”³ His conclusion on this point also does nothing to resolve the issue as defined by the Arbitrator himself – whether the grievants are entitled to GS-08 pay under the national agreement for the entire duration of their detail. Furthermore, the Arbitrator’s analogies to decisions to file or not file a grievance and to enter into a grievance settlement are similarly flawed. Typically, even those matters are written and do not affect an entitlement that employees are granted in their CBA.

I would conclude, therefore, that the Arbitrator exceeded his authority.

The issue here, as defined by the Arbitrator, concerns the application of the national agreement.⁴ The Agency asserts that the award does not draw its essence from the CBA because the Arbitrator failed to apply Article 16. I find it surprising, then, that the majority asserts that resolution of the issue “does not *specifically* require the Arbitrator to apply Article 16” when the *only* section of the CBA that could pertain to the dispute in this case is Article 16 – Details and Non-Competitive Temporary Promotions.⁵ The fact that the Arbitrator failed to address, let alone apply, Article 16, further

demonstrates that the Arbitrator exceeded his authority because the award is not responsive to the framed issue. It also demonstrates that the award does not draw its essence from the parties’ national agreement.

It is odd, therefore, that the majority criticizes the Union for “fail[ing] to cite any article . . . that required the Arbitrator to . . . apply[] Article 16.”⁶ It seems self-evident that because Article 16 alone establishes the entitlement to higher pay for employees on detail to a higher-graded position, and this dispute concerns that entitlement, the award cannot draw its essence from the national agreement when the Arbitrator does not address or apply Article 16.

Looming in the Agency’s essence exception is an important question that we have addressed in other contexts.⁷ Here, the issue of a bargaining-unit employees’ (BUEs) right to self-determination surfaces because the Union purportedly waived an entitlement to higher-graded pay for those BUEs who accepted the detail, an entitlement negotiated into the CBA. The purported oral arrangement, however, effectively waived those BUEs’ entitlement to two weeks of higher-graded pay without any consultation, or agreement of, the affected employees. BUEs likely had an expectation, based on the CBA, that they would receive the pay, yet this Union President, through an oral agreement, undercut their reasonable expectation. As I have noted before, a bargaining unit is not a monolithic entity unto itself. It is made up of BUEs, some of whom choose to join the union and others who choose not to join. Union representatives, by oral fiat, may not simply redefine an entitlement that is codified in the parties’ CBA. In such matters, each BUE should be able to determine for themselves whether or not to accept a detail that waives their entitlement under Article 16 to the higher-graded pay for the entire detail.

For the reasons discussed, I would conclude that the Arbitrator exceeded his authority and that his award does not draw its essence from the parties’ national agreement.

¹ The Arbitrator believes he knows who agreed, but the record does not clearly establish who did and no witness testified that they made the oral arrangement.

² Award at 19. Notably, neither party called Union President Jones to testify.

³ *Id.* at 21. “Fact specific, limited adjustments to discrete situations are contemplated in the [a]greement’s grievance procedure and are frequent.” *Id.*

⁴ The parties were unable to jointly agree to the issue, so the Arbitrator framed the issue as, “[u]nder the [national a]greement

and other applicable standards, were [the g]rievants entitled to GS-8 pay from November 13 to 25, 2017; and, if so, what is the proper remedy?” *Id.* at 2.

⁵ Majority at 3.

⁶ *Id.* at 4.

⁷ See *Exp.-Imp. Bank of the U.S.*, 70 FLRA 907 (2018) (then-Member DuBester concurring); see also *Dep’t of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 70 FLRA 995 (2018) (then-Member DuBester dissenting).