

72 FLRA No. 45

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL VETERANS AFFAIRS COUNCIL #53
(Union)

0-AR-5536

DECISION

April 29, 2021

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

I. Statement of the Case

In this case, the Union filed a national grievance alleging that the Agency violated the parties' collective-bargaining agreement (CBA) and various provisions of the Federal Service Labor-Management Relations Statute (Statute)¹ by submitting pre-hearing briefs to arbitrators in advance of arbitration hearings. Arbitrator Gary L. Eder issued an award sustaining the Union's grievance in its entirety. The Agency argues that the award is contrary to law, that it fails to draw its essence from the parties' CBA, and that the Arbitrator was biased. For the reasons discussed below, we find the award so unclear that we are unable to determine whether it is deficient as contrary to law. As a result, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further findings. In light of our decision to remand the award, we find it unnecessary to resolve the Agency's essence and bias exceptions at this time.

II. Background and Arbitrator's Award

The Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Accountability Act)² was signed into law on June 23, 2017. Later codified in part at 38 U.S.C. § 714, the Accountability Act established, among other things, accelerated removal, demotion, and suspension procedures for certain individuals in the Agency.³ Sometime after this new law took effect, the Agency began sending arbitrators, in cases challenging disciplinary action taken under the Act, pre-hearing briefs discussing its interpretation of 38 U.S.C. § 714. The submissions were approximately four pages.⁴ The Union objected to the Agency submitting these pre-hearing briefs "without first consulting with the Union and without such a requirement from the arbitrators" and filed a timely national grievance.⁵ The Union alleged that the Agency violated the parties' CBA and § 7114(a)(4) and § 7116(a)(1) and (5) of the Statute by unilaterally implementing changes to the arbitration procedure and by failing to bargain in good faith over changes to conditions of employment.⁶ The matter proceeded to arbitration.

At arbitration, the stipulated issues were: "1. Whether the Agency's use of the pre-hearing submissions at issue violated Article 44 of the [CBA]; if so, what shall . . . the remedy be?" and "2. Whether the Agency had a duty, under the [CBA] and [f]ederal [l]aw, to notify and bargain with the Union over the use of the pre-hearing submission; if so, what shall the remedy be?"⁷ The Arbitrator noted that Article 44, Section 2 (Article 44) of the parties' CBA states, in part, that "[t]he procedure used to conduct an arbitration hearing shall be determined by the arbitrator."⁸ He concluded that there is no specific language that either permits or denies the act of filing a pre-hearing submission and that Article 44 "[makes] it clear that the process for arbitration [is] for the respective arbitrator to decide."⁹ The Arbitrator found that when an agreement is silent on an issue, one party cannot "create a practice separately" or "simply

² Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, Pub. L. No. 115-41 (codified as amended in scattered sections of Title 38).

³ 38 U.S.C. § 714.

⁴ Exceptions, Attach. 1, National Grievance at 4.

⁵ *Id.* at 2.

⁶ *Id.*; see also 5 U.S.C. § 7114(a)(4) (stating that an agency shall negotiate in good faith); § 7116(a)(1) (stating that it shall be an unfair labor practice "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter"); and § 7116(a)(5) (stating that it shall be an unfair labor practice to "refuse to consult or negotiate in good faith with a labor organization").

⁷ Award at 1.

⁸ *Id.* at 4.

⁹ *Id.* at 7.

¹ 5 U.S.C. §§ 7114(a)(4), 7116(a)(1), (5).

unilaterally implement some action.”¹⁰ He noted that the parties could, if desired, go into mid-term bargaining over the issue. The Arbitrator questioned the need and usefulness of pre-hearing briefs and suggested that the Agency submit information on 38 U.S.C. § 714 in an opening statement or post-hearing brief, which he noted “would be much more beneficial and germane to the issue at hand.”¹¹

The Arbitrator sustained the grievance in its entirety. He ordered the Agency to cease and desist sending pre-hearing briefs to arbitrators in pending and future cases and to rescind briefs previously submitted, but stated that the Agency could resubmit its synopsis during an opening statement, final argument, or post-hearing brief. He stated that the language in Article 44 “remains the[] ‘status quo ante’” and concluded that he could find no opening in the current contract language to allow for a pre-hearing submission “without direction from a procedural determination by the respective arbitrator. Therefore[] making an order of notice and bargaining, in language that is clear to this arbitrator, mute.”¹²

The Agency filed exceptions to the award on August 30, 2019 and the Union filed an opposition to the Agency’s exceptions on September 30, 2019.

III. Analysis and Conclusions: We cannot determine whether the award is contrary to law.

The Agency argues that the award is contrary to law¹³ “because the Arbitrator appears to have found that the filing of pre-hearing submissions is a practice over which bargaining is required.”¹⁴ The Agency asserts that

pre-hearing submissions are simply a “litigation strategy or decision made by a legal representative during litigation” and that the award would impermissibly “require the Agency to bargain over a matter that is not a condition of employment” and not otherwise subject to a bargaining obligation.¹⁵

We are unable to decipher the Arbitrator’s factual findings and legal conclusions in order to determine whether the award is contrary to law. Here, although the Arbitrator notes the Agency’s argument that it did not have a duty to bargain over the pre-hearing briefs because they do not relate to a condition of employment,¹⁶ he simply relays the Agency’s position and the testimony at the hearing, and does not analyze the issue any further, as far as we can interpret.¹⁷ The only mention the Arbitrator makes of bargaining in his analysis is to say that “the parties may if desired; go into, ‘Mid-Term,’ bargaining for any enhancement either party can extract via bargaining!”¹⁸ This is not a conclusion as to whether or not the Agency had a duty under federal law to notify and bargain with the Union over the pre-hearing submissions.¹⁹ The Arbitrator’s statement that he could find no opening in the current contract language to allow for a pre-hearing brief “without direction from a procedural determination by the respective arbitrator[,] [t]herefore[] making an order of notice and bargaining, in language that is clear to this arbitrator, mute”²⁰ is similarly unclear and does not answer the second stipulated issue in this case. Our only basis for inferring that the Arbitrator found that the Agency violated federal law by failing to bargain over the pre-hearing submissions is that he sustained the grievance in its entirety. However, there are no factual findings or other conclusions in the award to support this presumed

the [CBA], and that the Agency was required to bargain prior to making the pre-hearing submissions.” *Id.* at 6.

¹⁰ *Id.* at 9.

¹¹ *Id.* at 11.

¹² *Id.* at 13.

¹³ When an exception involves an award’s consistency with law, rule, or regulation, the Authority reviews any questions of law raised by the exception and the award *de novo*; in doing so, it determines whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. But the Authority defers to the arbitrator’s underlying factual findings, unless the excepting party establishes that they are nonfacts. *U.S. DOD, Educ. Activity*, 71 FLRA 373, 375 (2019) (then-Member DuBester concurring in part and dissenting in part) (citing *U.S. Dep’t of State, Bureau of Consular Affs., Passport Serv. Directorate*, 70 FLRA 918, 919 (2018)).

¹⁴ Exceptions at 8 (internal quotation omitted). The Agency notes that “[a]t no point in the decision did the Arbitrator state that the pre-hearing letters violated the [CBA], or that the Agency had a duty to bargain before making the pre-hearing submissions” but that “[b]y ordering the Agency to stop submitting the pre-hearing letters, the Agency must presume that the Arbitrator found the pre-hearing submission violated

the [CBA], and that the Agency was required to bargain prior to making the pre-hearing submissions.” *Id.* at 6.

¹⁵ *Id.* at 7.

¹⁶ Award at 9-10.

¹⁷ We do not agree with the Union that “[t]he Arbitrator explicitly considered the Department’s argument that pre-hearing briefs did not relate to a condition of employment and implicitly rejected it by finding that the parties did agree in Article 44 . . . to giving the arbitrator ‘wide open latitude’ to determine whether he or she wanted a pre-hearing brief from the parties.” Opp’n at 5 (citing Award at 10). We see no connection between the Agency’s argument and the Arbitrator’s subsequent statement, which to us appears to go to the issue of whether the Agency’s use of the pre-hearing submissions at issue violated Article 44.

¹⁸ Award at 10.

¹⁹ Although the Union argues that “[t]he Arbitrator’s conclusion that the Agency erred in failing to negotiate prior to unilaterally implementing pre-hearing briefs is a factual determination consistent with law,” we do not see such a finding in the award and the Union fails to point us to where the Arbitrator specifically states as much. Opp’n at 6.

²⁰ Award at 13.

determination. Consequently, because the Arbitrator failed to explain his findings regarding the Agency's duty to bargain over the pre-hearing briefs, and because it is unclear what the findings even are, it is impossible for us to determine whether the award is contrary to law.²¹

The Authority has held that where an award is unclear and the arbitrator has not made sufficient findings for the Authority to determine whether the award is deficient, the Authority will remand the award.²² Here, on remand, the Arbitrator should, consistent with this decision, explain whether or not the Agency had a duty under federal law to notify and bargain with the Union over the pre-hearing briefs; apply the relevant legal standards; and support his conclusions with factual findings.

Although the Agency also argues that the award fails to draw its essence from the parties' agreement and that the Arbitrator failed to serve as an impartial decision maker,²³ given our decision to remand this case, we find it unnecessary to resolve the Agency's remaining arguments at this time.²⁴

IV. Decision

We remand the award for action consistent with this decision.²⁵

²¹ *U.S. Small Bus. Admin.*, 70 FLRA 649, 652 (2018) (*SBA*) (then-Member DuBester dissenting) (remanding the award to the parties for resubmission to the arbitrator for clarification because the arbitrator's conclusions were so unclear and unsupported that the Authority could not determine whether the award was deficient on the grounds raised in the agency's exceptions).

²² *AFGE, Loc. 3408*, 70 FLRA 638, 639 (2018) (then-Member DuBester concurring) (citing *AFGE, Loc. 3506*, 64 FLRA 583, 584 (2010); *AFGE, Loc. 2054*, 63 FLRA 169, 172 (2009)); see also *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 68 FLRA 272, 275 (2015) (*DHS*) (remanding the case for resubmission to the arbitrator because the Authority was unable to determine whether the award was contrary to law).

²³ Exceptions at 2, 11-14.

²⁴ *DHS*, 68 FLRA at 275 (remanding an award for further findings on a contrary-to-law claim and stating that it was premature to resolve a remaining essence exception at that time); *AFGE, Loc. 3529*, 57 FLRA 464, 467 n.4 (2001) (finding it unnecessary to resolve the union's remaining arguments in view of the Authority's decision to remand the case).

²⁵ We note that nothing in this decision precludes the parties from mutually agreeing to select a different arbitrator upon remand. *E.g.*, *SBA*, 70 FLRA at 652 n.52.

Chairman DuBester, concurring in part:

I agree with the majority's decision to remand the award to allow the Arbitrator to explain his findings regarding the parties' second stipulated issue, which concerned whether the Agency had a statutory duty to bargain with the Union over its use of pre-hearing submissions. But I do not agree that remanding the case renders it "unnecessary to resolve the Agency's remaining arguments at this time."¹

On this point, I would note that the parties stipulated to an *additional* issue before the Arbitrator – namely, whether the Agency's use of the pre-hearing submissions violated Article 44 of the parties' collective-bargaining agreement (CBA). In my view, the Arbitrator resolved this issue by concluding that the Agency's submission of pre-hearing briefs violated the CBA.² And the Agency's essence exception relates to the Arbitrator's resolution of this issue.

Accordingly, before remanding the award for clarification regarding the second stipulated issue, I would resolve the Agency's exceptions with respect to the first issue. I believe this is particularly appropriate because it is unclear whether the relief granted by the Arbitrator was based upon his findings pertaining to one or both of the stipulated issues. In my view, this approach would promote a more efficient means of bringing finality to this dispute.

¹ Majority at 5.

² Award at 7-9, 13.