72 FLRA No. 68

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDREAL CORRECTIONAL INSTITUTION
DUBLIN, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3584
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5589

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DECISION

June 16, 2021

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

I. Statement of the Case

In this case, we once again remind arbitrators that they may not disregard the plain wording of parties' collective-bargaining agreements.

Arbitrator Carol A. Vendrillo issued an award finding, as relevant here, that the Union timely filed its grievance. On the merits, the Arbitrator concluded that the Agency violated Article 18, Section p.(1) of the master agreement (Article 18) by failing to equitably distribute and rotate overtime assignments.

The primary questions before us are: (1) whether the Arbitrator's procedural-arbitrability determination fails to draw its essence from the master agreement; (2) whether the award is contrary to the covered-by doctrine; and (3) whether the award violates management's rights under § 7106(a)(2) of the Federal Service Labor-Management Relations Statute (the Statute).[1] We find that the Arbitrator's procedural-arbitrability determination fails, in part, to draw its essence from the master agreement. Accordingly, we grant that Agency exception, in part, but deny the remaining exceptions.

[1] 5 U.S.C. § 7106(a)(2).

II. Background and Arbitrator's Award

In 2014, the Union filed a grievance alleging that the Agency, a federal prison, violated the master agreement by failing to equitably distribute overtime opportunities in the custody and food-services departments.[2] At the arbitration hearing conducted on August 17, 18, and 19, 2016, witnesses testified that overtime was not rotated consistent with Article 31 in the following non-custody departments: facilities, trust fund, correctional systems, and health services. The Union also presented evidence that the Agency failed to equitably distribute overtime opportunities in the custody and food-services departments.

Arbitrator Linda Klibanow found that the Agency violated the master agreement by failing to maintain overtime records for all departments. Additionally, Arbitrator Klibanow found the Agency failed to equitably distribute overtime in the custody and food-services departments. However, because the Agency did not provide the Union with certain requested overtime records, Arbitrator Klibanow determined that the Union did not have sufficient documentation "to specify any alleged violations in the other departments" regarding the inequitable distribution of overtime.[3] As a result, she did not find such violations in the facilities, trust-fund, correctional-systems, or health-services departments. As a remedy, Arbitrator Klibanow directed the Agency to provide the Union with the overtime records for those departments.[4] The Union received the overtime records on February 28, 2018.

On April 5, 2018, the Union filed the grievance at issue here, alleging that the Agency violated the master agreement by failing to equitably distribute overtime opportunities in eleven departments: UNICOR, facilities, religious services, psychology, trust fund, unit teams, correctional systems, health services, financial management, admin, and computer services. The parties could not resolve the dispute and proceeded to arbitration.

[2] Opp'n, Attach. A, Klibanow Award at 10 (stating that the grievance "recite[d overtime] assignment violations in [the c]ustody and [f]ood[-s]ervice[s departments]"). The Union also alleged that the Agency failed to provide overtime records for all non-custody departments. *Id.*

[3] Award at 3.

[4] The Agency filed exceptions to this award, and a related remedial award. The Authority issued a decision dismissing exceptions to the merits award as untimely and granting, in part, exceptions challenging certain of the awarded remedies. *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 71 FLRA 1172 (2020) (*Dublin*) (then-Member DuBester dissenting in part).

The Arbitrator framed the issues, in relevant part, as "Was the grievance timely filed," and "Did the Agency violate the [m]aster [a]greement by failing to equitably distribute and rotate overtime assignments?"[5]

Before the Arbitrator, the Agency argued that the Union untimely filed its grievance. Article 31, Section d of the master agreement (Article 31) states, that a "grievance must be filed within forty . . . calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence."[6] The Arbitrator found that the Union timely filed its grievance by filing within forty days of February 28, 2018 – when the Union received the Agency's overtime records for the eleven departments.

On the merits, the Arbitrator relied, in part, on the witness testimony provided during the August 2016 arbitration hearing to find that the Agency violated Article 18 by "fail[ing] to equitably distribute and rotate overtime assignments" in the facilities, trust-fund, correctional-systems, and health-services departments.[7] Additionally, she determined that the Agency violated Article 18 by not equitably distributing overtime in six other departments based on new evidence presented at the arbitration hearing.[8] As a remedy, the Arbitrator directed the parties to determine the backpay owed to each affected employee.

On February 3, 2020, the Agency filed exceptions to the award, and on March 4, 2020, the Union filed its opposition.

III. Analysis and Conclusions

A. The Arbitrator's procedural-arbitrability determination fails, in part, to draw its essence from the master agreement.

The Agency argues that the Arbitrator's procedural-arbitrability determination fails to draw its essence from Article 31 because the Union did not timely file its grievance.[9] Specifically, the Agency contends that the Arbitrator "ma[de] it quite clear that the Union was aware" of the Agency's alleged violations in August 2016, well before February 28, 2018.[10]

Article 31 states that a "grievance must be filed within forty . . . calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence."[11] The Arbitrator concluded that the Union timely filed its grievance by filing within forty days of February 28, 2018 – when it received the Agency's overtime records.[12] However, in bringing the grievance, the Union relied on evidence from the August 2016 arbitration hearing for the facilities, trust-fund, correctional-systems, and health-services departments[13] – demonstrating that the Union knew, or could reasonably be expected to have known, of the overtime violations prior to February 28, 2018. The Arbitrator's reliance on that 2016 evidence, to hold that the Agency violated the parties' agreement with regard to those departments, further supports this conclusion.[14]

Because the Union filed the grievance on April 5, 2018, more than forty days after the August 2016 hearing, the Arbitrator disregarded Article 31's requirement that the party must file a grievance when it can reasonably be expected to have become aware of the occurrence.[15] Thus, the Arbitrator's

[5] Award at 2.
[6] Exceptions, Attach. B, Master Agreement (MA) at 71.
[7] Award at 23.
[8] Those departments are UNICOR, religious services, psychology, unit teams, financial management, and admin. *See id.* at 17-19. Additionally, the Arbitrator determined that the Agency "failed to [give] bargaining[-]unit employees first consideration for overtime [assignments]" for the facilities, religious-services, psychology, trust-fund, unit-teams, correctional-systems, admin, and computer-services departments. *Id.* at 19-20 (emphasis omitted).
[9] Exceptions Br. at 8-17. The Authority will find that 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. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (then-Member DuBester concurring, in part, and dissenting, in part). 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. *Id.*
[10] Exceptions Br. at 12.
[11] MA at 71.
[12] Award at 17.
[13] *Id.* at 6, 8-11.
[14] *Id.* at 18-19.
[15] *See* MA at 71.

determination that the grievance was timely conflicts with the plain wording of Article 31.[16]

Regarding the remaining departments – UNICOR, religious services, psychology, unit team, financial management, and admin – the Agency does not establish that the Union was aware of violations prior to February 28, 2018.[17] Accordingly, we grant the Agency's essence exception only as it relates to the facilities, trust-fund, correctional-systems, and health-services departments.[18] We set aside the portions of the award associated with those departments,[19] and we also set aside the associated remedies.[20]

B. The award is not contrary to law.

The Agency argues that the award is contrary to law in two respects, which are discussed separately below. When an exception involves an award's consistency with law, the Authority reviews any question of law de novo.[21] In reviewing de novo, the Authority assesses whether an arbitrator's legal conclusions are consistent with the relevant legal standard.[22]

1. The award is not contrary to the covered-by doctrine.

The Agency argues the award violates the covered-by doctrine and improperly limits the Agency's rights under Article 18 of the master agreement.[23] Specifically, the Agency alleges that the award "violates the language of [*Federal BOP v. FLRA* (*BOP I*)[24]] and [its] subsequent progeny"[25] because Article 18 allowed the Agency to "deci[de] not to use overtime[] when filling . . . a vacant post."[26] However, the award does not restrict the Agency's decision *not* to use overtime. Rather, the Arbitrator found that the Agency, *after deciding to offer overtime*, did not comply with Article 18's requirement for the equitable distribution of overtime.[27]

More importantly, the covered-by doctrine is completely inapplicable here. The covered-by doctrine

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[16] *See U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 71 FLRA 790, 791 (2020) (then-Member DuBester dissenting) (finding the procedural-arbitrability determination was not a plausible interpretation of the parties' agreement because the grievance was filed beyond the negotiated forty-day time frame). In its opposition, the Union argues that while it regularly received complaints from employees about overtime, it "never received any information . . . that included specific, verifiable instances of overtime[-]assignment violations that could meet the specificity requirements for [filing] a grievance until" February 28, 2018. Opp'n Br. at 13. However, the 2016 arbitration hearing testimonies put the Union on notice of possible violations in the facilities, trust-fund, correctional-systems, and health-services departments. Award at 6, 8-11. Additionally, the Arbitrator acknowledged that the master agreement does not contain a specificity requirement, and "it [wa]s not necessary for the [Union] to include the entirety of . . . [its] case" in a grievance. *Id.* at 15. Therefore, the Union became aware of the overtime-distribution violations for the facilities, trust-fund, correctional-systems, and health-services departments in 2016, but untimely filed its grievance in 2018.

[17] To the extent the Agency alleges that the Union was aware of the alleged overtime violation for these departments before February 28, 2018, the Agency did not provide documents to support this allegation. *See U.S. Dep't of VA, John J. Pershing Veterans Admin.*, 71 FLRA 511, 512 (2020) (denying the essence exception because the excepting party failed to provide the Authority with necessary supporting documents to establish that the grievance was untimely filed).

[18] *See NAGE*, 71 FLRA 775, 777 (2020) (denying the essence exception because the excepting party "d[id] not cite any provision in the parties' agreement that required the [a]rbitrator to rely on the 'effective date' of the suspension rather than the date of the suspension decision to determine whether the grievance was timely under [the agreement]").

[19] The Agency's nonfact exception also challenges the Arbitrator's procedural-arbitrability determination on the basis that the Union was aware of the alleged violations as of the 2016 hearing. Exceptions Br. at 33 (asserting that the August 2016 hearing "is the latest it can possibly be argued that the Union became aware of the issue"). We have already set aside the Arbitrator's procedural-arbitrability determination as to the facilities, trust-fund, correctional-systems, and health-services departments. Because the Agency's nonfact exception fails to establish that the Arbitrator erred as to the remaining departments, and essentially challenges the Arbitrator's contract interpretation, we deny it. *See AFGE, Loc. 2076*, 71 FLRA 1023, 1025 (2020) (then-Member DuBester concurring) (in the absence of evidence demonstrating that the arbitrator's conclusions were clearly erroneous, the Authority denied the nonfact exception); *U.S. Dep't of VA, VA Reg'l Off., St. Petersburg, Fla.*, 70 FLRA 799, 800-01 (2018) (then-Member DuBester concurring, in part, and dissenting, in part) (conclusions based on the arbitrator's interpretation of a collective-bargaining agreement cannot be challenged as nonfacts).

[20] *See U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 769, 771-72 (2020) (then-Member DuBester dissenting) (setting aside those remedies related to vacated portion of award).

[21] *See AFGE, Nat'l Council of Field Lab. Locs.*, 71 FLRA 1180, 1181 (2020).

[22] *Id.* Under this standard, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts. *Id.*

[23] Exceptions Br. at 17-28.

[24] 654 F.3d 91 (D.C. Cir. 2011); *see U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 875 F.3d 667 (D.C. Cir. 2017) (*BOP II*).

[25] Exceptions Br. at 28.

[26] *Id.* at 19.

[27] Award at 17-20; *cf. Dublin*, 71 FLRA at 1177 n.49 (finding, in a related decision involving the same parties, that "the Agency is choosing to assign overtime shifts and the remedial award merely requires it to use the agreed-upon procedures in distributing those assignments").

operates only as a defense to an alleged violation of the statutory duty to bargain, which is not at issue in this case.[28] The Agency's reliance on *BOP I* and its progeny is similarly unfounded because *BOP I* dealt exclusively with the statutory duty to bargain.[29] Thus, the covered-by doctrine provides no basis for finding the award contrary to law, and we deny this exception.[30]

2. The award is not contrary to management's rights.

The Agency also argues that the award is contrary to management's rights to assign work and to assign employees under § 7106(a)(2)(B) of the Statute.[31] Specifically, the Agency claims that the Arbitrator (1) improperly directed the Agency "to always offer overtime to uni[on] employees prior to offering the [vacant] spot to a supervisor or other employee,"[32] and (2) prohibited the Agency from "mak[ing] basic managerial decisions regarding staffing resources and staff allocation."[33] However, the Arbitrator simply found that, under the particular circumstances of *this case*, the Agency violated Article 18 by "fail[ing] to [give] bargaining[-]unit employees first consideration for overtime [assignments]"[34] and "fail[ing] to equitably distribute and rotate overtime assignments."[35] Contrary to the Agency's claims, the Arbitrator did not award any prospective relief. Thus, the Agency's contrary-to-law arguments are based on findings that the Arbitrator did not make and provide no basis for concluding that the award is deficient.[36] Consequently, we deny this exception.[37]

IV. Decision

We grant the Agency's essence exception in part, and we deny the Agency's remaining exceptions.

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[28] *See U.S. Dep't of HUD*, 66 FLRA 106, 109 (2011) (*HUD*).
[29] *BOP I*, 654 F.3d at 94-95; *see BOP II*, 875 F.3d at 669.
[30] *See HUD*, 66 FLRA at 109 (finding the covered-by doctrine did not apply because "the [a]rbitrator's finding of a contractual violation d[id] not conflict with the doctrine").
[31] 5 U.S.C. § 7106(a)(2)(B); Exceptions Br. at 28-32.
[32] Exceptions Br. at 30.
[33] *Id.* at 31.
[34] Award at 19.
[35] *Id.* at 23.
[36] *See Bremerton Metal Trades Council, Int'l Bhd. of Boilermakers, Loc. 290*, 71 FLRA 1033, 1035 (2020) (denying the union's contrary-to-law exception because the "argument [wa]s based on a finding that the [a]rbitrator did not make").
[37] *See id.*

Member Abbott, concurring:

I join the decision and order because it sufficiently demonstrates that we must reject the Agency's only merits-based exception to the Arbitrator's decision. I write separately to emphasize the key onus of the parties to not sleep on their rights and to safeguard their own interests. This is the impetus and reason for this policy decision: that parties become aware of their *own* rights and interests.

The question regarding timeliness is not just whether the Union was actually aware but also *when they reasonably should or could have become aware* of the occurrence that it grieves, but the question also raises, the duty owed by the parties to consider all of its constituents and protect against their harm. The grievances of any employee at the hands of the Agency must not be treated unequally. The Federal Service Labor-Management Relations Statute[1] prohibits this unequal treatment and is intended to preserve and protect the rights and interests of employees. Simply put, grievance procedures must not be used to cut and paste into separate parts, what is in every meaningful respect the exact same class claim.

Therefore, the Union had sufficient information to make them aware of the grievable occurrence, thereby requiring them to give due regard toward safeguarding all unit employees equally from potential harm. The Union should have pursued the claims of each aggrieved employee at the same time in a single grievance or, at the very least, through multiple grievances. Because it is self-evident that the Union had the information it needed, it should have been aware of the violations here, and it failed to live up to its principal duty. There is no excuse justifying the Union's ignorance or willful disregard in this case. That is why the entire matter should be dismissed including for the same reasons articulated in the first part of the decision

[1] *See* 5 U.S.C. §§ 7102, 7106(a)(2).

Chairman DuBester, dissenting in part:

I agree that the Agency's contrary-to-law exceptions should be denied. However, I do not agree with the majority's determination that the Arbitrator erred by finding that the Union's grievance was timely filed.

To understand the flaws in the majority's conclusion, it is important to fully understand the context in which the Union filed the grievance. As explained by the Arbitrator, the Union filed a grievance in 2014 alleging that the Agency failed to properly rotate overtime assignments in the custody and food-services departments,[1] and failed to maintain adequate overtime records "in all other non-[c]ustody departments."[2] In resolving that grievance, an arbitrator found that the Agency, in violation of the parties' bargaining agreement, had failed to maintain adequate overtime records in "all departments."[3] To remedy this violation, that arbitrator ordered the Agency to provide the Union access to all overtime records and, more specifically, to provide the Union with the records it had already requested for departments other than custody and food services.[4] And upon receiving those records on February 28, 2018, the Union filed the grievance in the case before us on April 5, 2018.

Addressing the Agency's argument that the grievance was untimely filed, the Arbitrator found that it was "not until [the arbitrator in the earlier grievance] issued multiple remedial orders did the Union finally receive the overtime records showing that, contrary to [the Agency's] prior assertions, substantial amounts of overtime had been assigned in [the UNICOR, facilities, religious services, psychology, trust fund, unit teams, correctional systems, health services, financial management, admin, and computer services] departments."[5] And on this basis, the Arbitrator concluded that the grievance was timely filed under the parties' agreement because the Union filed the grievance within "[forty] days of receipt from the Agency of the requested documentation."[6]

Notably, in concluding that the Arbitrator's determination conflicts with the plain wording of Article 31 of the parties' agreement, the majority does not contend that the Arbitrator failed to apply this contractual provision. Instead, the majority concludes that the Arbitrator's timeliness finding does not draw its essence from the parties' agreement based on its own finding that the Union "relied on evidence from the August 2016 arbitration hearing for the [four departments]" and, therefore, the Union "knew, or could reasonably be expected to have known, of the overtime violations prior to February 28, 2018."[7]

In reaching this conclusion, however, the majority simply ignores the specific findings upon which the Arbitrator concluded that the grievance was timely filed. It certainly has not disturbed these findings on grounds that they were nonfacts, as the Agency alleged in its exceptions.[8]

By supplanting the Arbitrator's findings with findings of its own, the majority ignores the well-established deference owed to arbitrators in resolving essence exceptions.[38] Applying the standard properly applied to the Arbitrator's procedural-arbitrability determination, I would find that her determination constitutes a plausible interpretation of

[1] Award at 3, 17, 26; Opp'n, Attach. A, Klibanow Award (Klibanow Award) at 10, 21; *see U.S. Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 71 FLRA 1172, 1172 (2020) (then-Member DuBester dissenting in part).

[2] Klibanow Award at 4, 10, 30; *see also* Award at 3, 17.

[3] Klibanow Award at 30.

[4] *Id.* at 26; *see also id.* at 32, 36-42 (listing Union's information requests for overtime records in correctional systems, business office, computer services, psychology, recreation, religious services, safety, trust fund, UNICOR, and unit team departments).

[5] Award at 17; *see also id.* at 14.

[6] *Id.* at 17.

[7] Majority at 4

[8] *See* Exceptions Br. at 32-35; Majority at 5 n.19 (finding it unnecessary to address the Agency's nonfact exception to the Arbitrator's findings regarding the timeliness of the grievance because "[w]e have already set aside [on essence grounds] the Arbitrator's procedural-arbitrability determination as to the facilities, trust-fund, correctional-systems, and health-service departments").

[38] *AFGE, Loc. 933*, 70 FLRA 508, 511 (2018) ("In the absence of a successful nonfact exception, we defer to the [a]rbitrator's factual findings." (citing *AFGE, Loc. 1164*, 66 FLRA 74, 78 (2011); *AFGE, Loc. 3354*, 64 FLRA 330, 333 (2009))); *see also U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 72 FLRA 47, 48-49 & n.19 (2021) (then-Member DuBester dissenting in part on other grounds; then-Chairman Kiko dissenting) (deferring to arbitrator's unchallenged factual finding in resolving essence exception concerning same contractual provision at issue in the instant case).

the parties' agreement, and would therefore deny the Agency's essence exception.[9]

[9] *U.S. DOD, Educ. Activity, Alexandria, Va.*, 71 FLRA 765, 768 (Dissenting Opinion of then-Member DuBester) (citing *U.S. DOD, Def. Cont. Mgmt. Agency*, 59 FLRA 396, 403 (2003)); *see also U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Phoenix, Ariz.*, 70 FLRA 1028, 1031 (2018) (Dissenting Opinion of then-Member DuBester) (the Authority should not substitute its own interpretation of the parties' agreement in place of the arbitrator's in resolving an essence exception); *U.S. Dep't of HUD, Denver, Colo.*, 53 FLRA 1301, 1314 (1998) ("the standard for determining whether an award fails to draw its essence from an agreement involves an inquiry into the rationality or plausibility of the award—not whether the Authority agrees with, or otherwise would reach, that interpretation").