

72 FLRA No. 98

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1741
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
MILAN, MICHIGAN
(Agency)

0-AR-5669

DECISION

October 13, 2021

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

I. Statement of the Case

Arbitrator Lynette A. Ross found that the Union’s grievance was not procedurally arbitrable because it lacked the specificity necessary to enable the parties to attempt informal resolution as required under the parties’ collective-bargaining agreement. The Union filed exceptions to the award on essence, exceeds-authority, fair-hearing, and contrary-to-law grounds. Because the Union does not demonstrate that the award is deficient on these grounds, we deny the exceptions.

II. Background and Arbitrator’s Award

In May 2016, the Union notified the warden of the Agency’s facility that it was grieving the Agency’s alleged failure to equitably distribute overtime among bargaining-unit employees, indicated that it was seeking informal resolution of the matter, and attached a draft grievance to its email. About a week later, the warden responded to the informal-resolution request and stated that “[t]he information you have provided us in the proposed grievance lacks specificity and clarity. It does not allow for the Agency to sufficiently investigate,

research, or respond to the issue at hand.”¹ The warden also requested the dates of the violations, the names of affected employees, and an explanation of “specifically what was violated.”²

A few days later, the Union emailed the grievance to the Agency’s regional director and stated that the Union had unsuccessfully attempted informal resolution with the warden. An Agency representative rejected the grievance on grounds that it was filed with the wrong office and lacked specificity.

The Union then invoked arbitration, and it submitted a request for information pertaining to which employees were offered and worked overtime shifts during the time period covered by the grievance. As part of the request, the Union indicated that it needed this information to provide it with a “full and proper understanding of whether the Agency has failed to distribute and rotate equitably among bargaining unit employees when filling overtime assignments.”³

At arbitration, the parties agreed on the merits issue. And in response to several threshold issues raised by the Agency, the Arbitrator framed additional “threshold issues,” including, as relevant here: “Did the Union comply with the ‘Formal Grievance’ form as required by the Master Agreement, which requires specificity of the charge in Block 6? If not, are further proceedings in this matter barred?”⁴

The Arbitrator found that the Union filed the grievance on the proper form, which requires in Block 6 that the grieving party “state, with specificity, how any federal prison system directives, executive orders, or statutes identified in Block 5 were violated.”⁵ She also noted that Article 31, Section b of the parties’ agreement (Article 31) provides that “[t]he parties strongly endorse the concept that grievances should be resolved informally and will always attempt informal resolution at the lowest appropriate level before filing a formal grievance.”⁶

But the Arbitrator found that the Union did not attempt to engage in the informal resolution process required in Article 31. The Arbitrator noted the Union president’s testimony that the Union would not provide specific information concerning the grievance until after it invoked arbitration. And the Arbitrator further noted that instead of providing the information requested by the

¹ Award at 10.

² *Id.*

³ *Id.* at 14.

⁴ *Id.* at 14, 16. The additional identified threshold issues concerned whether the grievance was timely and filed with the appropriate management official.

⁵ *Id.* at 14.

⁶ *Id.* at 5 (quoting Art. 31, § b of the parties’ agreement).

warden to proceed with informal resolution and to correct the grievance's procedural deficiency, the Union filed a formal grievance with the regional director. Based on these findings, the Arbitrator concluded that the Union failed to comply with Article 31 and denied the grievance.⁷

On October 13, 2020, the Union filed exceptions to the award, and on November 12, 2020, the Agency filed an opposition to the Union's exceptions.

III. Analysis and Conclusions

A. The Arbitrator's procedural-arbitrability determination draws its essence from the parties' agreement.

The Union argues that the award fails to draw its essence from the parties' agreement because the Arbitrator's finding that the grievance lacked sufficient specificity does not represent a plausible interpretation of the parties' agreement. The Union contends that the agreement does not contain a specificity requirement.⁸ It further argues that the Arbitrator "ignored record evidence that the Union put the Agency on notice of its repeated violations," and that it provided enough information for the Agency to ascertain the specifics of the grievance.⁹

The Authority will find that an arbitration award is deficient as failing to draw its essence from the 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 obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.¹⁰

To support its argument, the Union relies upon an Authority decision and previous arbitral awards.¹¹ However, the Authority decision cited by the Union does not concern the procedural-arbitrability issues raised in

this case¹² and previous arbitral awards are not binding precedent.¹³ Therefore, those decisions do not demonstrate that the Arbitrator's interpretation of the parties' agreement is deficient.

Moreover, while the Union disputes the Arbitrator's conclusion that it failed to comply with Article 31 because it asserts that it provided sufficiently specific information to be able to resolve the grievance,¹⁴ this argument merely disagrees with the Arbitrator's evaluation of the evidence. Specifically, the Arbitrator found that the Union refused to provide the warden with requested information about the alleged violations before arbitration and, therefore, the Union failed to engage in the informal resolution process as required by Article 31.¹⁵ The Union's argument to the contrary does not demonstrate that the Arbitrator interpreted Article 31 in a way that is irrational, implausible, or in manifest disregard of that provision.¹⁶

Therefore, we deny the Union's essence exception.¹⁷

B. The Arbitrator did not exceed her authority.

The Union claims that the Arbitrator exceeded her authority by addressing threshold issues regarding procedural arbitrability.¹⁸ As relevant here, arbitrators exceed their authority when they resolve issues not

⁷ *Id.* at 16-17.

⁸ Exceptions Br. at 6, 16-18; *see id.* at 18 (arguing that "[n]either the Master Agreement nor Block 6 of the Formal Grievance form required the Union to provide every name, date, time, or circumstances surrounding each alleged violation").

⁹ *Id.* at 19.

¹⁰ *AFGE, Loc. 17*, 72 FLRA 162, 164 (2021) (citing *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014)).

¹¹ Exceptions Br. at 16 (citing *AFGE, Loc. 2823*, 64 FLRA 1144, 1147 (2010) (*Local 2823*)).

¹² *Local 2823*, 64 FLRA at 1147 (finding that arbitrator's substantive arbitrability determinations, which were based on the dismissal of a related unfair-labor-practice charge and a bargaining-obligation issue, were contrary to law).

¹³ *AFGE, Loc. 3342*, 72 FLRA 91, 93 (2021) (*Local 3342*) (citing *AFGE, Council of Prison Locs. C-33, Loc. 720*, 67 FLRA 157, 159 (2013)); *see also AFGE, Loc. 2382*, 66 FLRA 664, 667 (2012) ("an arbitrator is not bound to follow previous arbitration awards, even if they involve issues similar to those before the arbitrator" (citing *AFGE, Loc. 916*, 46 FLRA 1316, 1320 (1993))).

¹⁴ Exceptions Br. at 17-18.

¹⁵ Award at 16-17.

¹⁶ *Local 3342*, 72 FLRA at 92 (citing *AFGE, Loc. 3354*, 64 FLRA 330, 333 (2009)).

¹⁷ The Union also challenges the Arbitrator's findings regarding whether the grievance was untimely or filed with the wrong Agency official. Exceptions Br. at 20-25. However, because the Arbitrator denied the grievance due to its lack of specificity, any comments regarding the additional threshold issues are dicta and cannot form the basis for finding the award deficient. *AFGE, Loc. 1667*, 70 FLRA 155, 158 (2016) (citing *NAIL, Loc. 17*, 68 FLRA 97, 100 (2014)); *see also* Exceptions Br. at 6 n.3 (addressing these issues out of "caution," but conceding that the Arbitrator's determinations on these issues are "dicta and not the bases for [the Arbitrator's] opinion"). Consequently, we deny these exceptions.

¹⁸ Exceptions Br. at 11-13.

submitted to arbitration.¹⁹ Where the parties fail to stipulate the issue, the arbitrator may formulate the issue on the basis of the grievance's subject matter, and this formulation is accorded substantial deference.²⁰ In those circumstances, the Authority examines whether the award is directly responsive to the issue the arbitrator framed.²¹

In this case, the parties stipulated a merits issue to be resolved by the Arbitrator, but did not stipulate to any threshold issues.²² The Authority has found that where parties have not stipulated to threshold issues, arbitrators do not exceed their authority by identifying and resolving such issues.²³ Here, the Agency expressly placed the issue of whether the grievance was procedurally arbitrable based on its alleged lack of specificity before the Arbitrator.²⁴ Therefore, she did not exceed her authority by framing, and resolving, that issue.²⁵

Accordingly, we deny the Union's exceeds-authority exception.

C. The Union was not denied a fair hearing.

The Union argues that the Arbitrator failed to conduct a fair hearing by denying it an opportunity to respond to the Agency's procedural-arbitrability arguments,²⁶ which the Union alleges were raised for the first time in the Agency's post-hearing brief.²⁷ The Authority will find that an arbitrator failed to conduct a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that the arbitrator conducted the proceedings in a manner that so prejudiced a party as to affect the fairness of the proceeding as a whole.²⁸

Here, the record does not support the Union's claim that the Agency raised its procedural-arbitrability claims for the first time in its post-hearing brief. Rather,

¹⁹ *AFGE, Loc. 1594*, 71 FLRA 878, 879 (2020) (citing *AFGE, Loc. 3254*, 70 FLRA 577, 578 (2018)).

²⁰ *NTEU*, 70 FLRA 57, 60 (2016) (citing *AFGE, Council of Prison Locs. #33, Loc. 0922*, 69 FLRA 351, 352 (2016)).

²¹ *Id.*

²² Award at 2.

²³ *U.S. Dep't of the Air Force, Okla. City Air Logistics Ctr., Tinker Air Force Base*, 43 FLRA 963, 965 (1992) (*Tinker*).

²⁴ Award at 2.

²⁵ See *Tinker*, 43 FLRA at 965 (where parties stipulated only the "merits" issue, arbitrator properly resolved "threshold" procedural-arbitrability issue); see also *NAIL, Loc. 10*, 71 FLRA 513, 515 (2020) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Or.*, 66 FLRA 388, 391 (2011)).

²⁶ Exceptions Br. at 25-27.

²⁷ *Id.* at 26. (contending that the Arbitrator erred by denying its motion to file a response to the Agency's post-hearing brief).

²⁸ *AFGE, Loc. 3294*, 70 FLRA 432, 435 (2018).

the hearing transcript reveals that the Agency raised these claims during the hearing, and that the Union was provided the opportunity to question its witnesses regarding the claims.²⁹ Therefore, the Union has not demonstrated that the Arbitrator's refusal to accept its reply brief prejudiced its ability to fully and completely present its position before the Arbitrator.³⁰

Consequently, we deny the Union's fair-hearing exception.

D. The award is not contrary to law.

The Union asserts that the award is contrary to law because the Arbitrator failed to conclude that the Agency had waived its procedural-arbitrability arguments.³¹ On this point, the Union argues that the Agency waived any procedural-arbitrability claims both before and during the hearing³² and is therefore estopped from later raising these defenses.³³ However, the Union's argument merely challenges the statements upon which the Arbitrator relied in concluding that the Agency raised procedural-arbitrability arguments.³⁴ Absent a successful nonfact exception, challenges to an arbitrator's factual findings or evaluation of the evidence, including the weight to be accorded such evidence, do not establish that an award is contrary to law.³⁵ Moreover, the Union has not demonstrated that the Arbitrator was required, as a matter of law, to find that the Agency had waived its

²⁹ Exceptions, Ex. D, Arbitration - Vol. 1 (July 27, 2017), Tr. at 36 ("[W]e may need to ask for a little bit of leniency because now that we understand the Agency is raising specificity, we will probably need to ask our first witness some questions."); see also Award at 10; Opp'n, Attach. B, Formal Grievance Response at 2-3.

³⁰ *AFGE, Loc. 3369*, 72 FLRA 158, 160 (2021) (citing *AFGE, Loc. 2923*, 69 FLRA 286, 291 (2016); *U.S. Dep't of Com., Pat. & Trademark Off., Arlington, Va.*, 60 FLRA 869, 879 (2005)).

³¹ Exceptions Br. at 14-16.

³² *Id.* at 15 (quoting Ex. D, Arbitration - Vol. 1 (July 27, 2017), Tr. at 32 ("I'm not asking the arbitrator to make a decision based on procedural issues[.]")).

³³ *Id.* at 16.

³⁴ *Id.* at 15 (citing Award at 16) (arguing that the Arbitrator took the Agency representative's statements regarding arbitrability out of "context").

³⁵ *U.S. DHS, U.S. CBP, El Paso, Tex.*, 72 FLRA 293, 295 (2021) (Member Kiko concurring; Member Abbott concurring) (citing *AFGE, Loc. 331*, 67 FLRA 295, 296 (2014)).

arbitrability arguments.³⁶ And, insofar as the Union incorporates the arguments raised in its exceeds-authority and fair-hearing exceptions to assert that the award is contrary to law,³⁷ we reject those arguments on the same basis that we rejected those exceptions.

Therefore, we deny the Union's contrary-to-law exception.

IV. Decision

We deny the Union's exceptions.

³⁶ *NLRB Pro. Ass'n*, 71 FLRA 737, 739 (2020) (citing *Fraternal Ord. of Police, Lodge No. 168*, 70 FLRA 788, 790 (2018)) (“In order for a procedural-arbitrability ruling to be found deficient as contrary to law, the appealing party must establish that the ruling conflicts with statutory procedural requirements that apply to the parties’ negotiated grievance procedure.”); *see also, e.g., Indep. Union of Pension Emps. for Democracy & Just.*, 72 FLRA 328, 329 (2021) (denying contrary-to-law exception to procedural arbitrability ruling).

³⁷ Exceptions Br. at 14-16.

Member Abbott, dissenting:

I do not agree that the Union's grievance lacks the specificity required to permit it to be adjudicated on its merits.

Article 31 concerns the parties' grievance procedure. It specifies the intent of the grievance procedure,¹ that the parties "endorse the concept" of informal resolution at the lowest possible level,² when a grievance must be filed (within forty days of alleged violation but with ten days dedicated to informal resolution),³ what form must be used to file a grievance,⁴ to whom the grievance must be submitted,⁵ and how long the responding party has to respond to the grievance.⁶ Article 31, however, does not include a requirement that defines any threshold for determining when a grievance is or is not specific enough. Thus, to the extent the Arbitrator concludes that the grievance can be dismissed because it lacks specificity, that finding adds a procedural requirement to, and does not represent a plausible interpretation of, the parties' agreement.

A more reasonable interpretation of Article 31 is that additional, specific details concerning the grievance could occur during the ten days the parties agreed to devote to informal resolution. In its grievance, the Union argues that on a continuing basis the Agency has failed to distribute and rotate overtime as required by the parties' agreement, particularly in how it informs employees by telephone, which has deprived bargaining unit members of overtime in violation of the Back Pay Act. The Union's description of the grievance most certainly is not a model of clarity and more detail would facilitate resolution, but the parties' agreement *does not require* that. And to the extent the Agency requires more specificity, that is a matter that could be addressed during the ten days devoted to informal resolution, a step *that is required* of both parties.

Furthermore, it is not an uncommon occurrence that grievances filed on behalf of groups of employees concerning continuing violations on any number of matters do not require and are not filed with the same degree of specificity as is required of individual grievances. This is particularly true in matters concerning overtime distribution or Fair Labor Standards Act violations. The Authority has endorsed grievances

which are no more specific than the grievance at issue here.⁷

Accordingly, I would vacate the Arbitrator's award to the extent that it dismisses the Union's grievance for lacking specificity.

¹ Exceptions, Ex. A, Master Agreement at 71 (citing Art. 31, § a).

² *Id.* (citing Art. 31, § b).

³ *Id.* (citing Art. 31, § d).

⁴ *Id.* at 72 (citing Art. 31, § f).

⁵ *Id.* (citing Art. 31, § f(1)).

⁶ *Id.* at 73 (citing Art. 31, § g).

⁷ *U.S. Dep't of the Army, Nat'l Training Ctr. & Fort Irwin, Cal.*, 71 FLRA 522 (2019) (then-Member DuBester dissenting) (upholding the arbitrator's arbitrability determination even though the group grievance lacked "the names of affected employees, the dates of the wrongs, and the demand for corrective action").