

72 FLRA No. 102

U.S. DEPARTMENT OF
HEALTH AND HUMAN SERVICES
(Agency)

and

NATIONAL TREASURY EMPLOYEES UNION
(Union)

0-AR-5687

December 10, 2021

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

Decision by Member Abbott for the Authority

I. Statement of the Case

The Union filed a grievance alleging that the Agency was violating the parties' collective-bargaining agreement (CBA) and the Federal Service Labor-Management Relations Statute (Statute)¹ by failing to promptly start and stop dues withholding. Arbitrator David P. Clark agreed with the Union, and ordered the Agency to refund a certain former bargaining-unit employee for dues improperly withheld, remit to the Union dues that were not properly withheld, and grant those affected bargaining-unit employees a waiver from reimbursing the Agency for dues payments not properly withheld.

The Agency filed exceptions, arguing that the award was contrary to law, that the Arbitrator exceeded his authority, and that the award failed to draw its essence from the CBA. For the reasons that follow, we deny and dismiss the Agency's exceptions, in part, and remand the award for further findings.

II. Background

The Union filed a national grievance alleging that the Agency was violating the parties' CBA and §§ 7115(a) and (b) and 7116 of the Statute² by failing to

promptly start and stop dues withholding. Specifically, the Union alleged that the Agency failed to timely begin dues withholding for five particular bargaining-unit employees and that it was continuing to withhold dues "from employees who ha[d] been promoted out of the bargaining unit."³ The parties requested expedited arbitration, and the Arbitrator issued a verbal decision at the close of an expedited hearing. The Arbitrator first found that the Agency violated the parties' CBA and the Statute by failing to timely stop dues withholding for one particular former bargaining-unit employee (employee X) when he left the unit. The Arbitrator ordered the Agency to refund that employee \$280.70, the amount of dues payments improperly withheld. The Arbitrator also found that the Agency violated the CBA and the Statute by failing to promptly start dues withholding for the five bargaining-unit employees named in the grievance, in an amount totaling \$1,815.10 for all five employees. In consideration of the Union's requested remedy, the Arbitrator asked the parties to submit position statements explaining the Arbitrator's authority to order the Agency to pay the Union the outstanding dues money and to waive the five employees' repayment obligation to the Agency. The Arbitrator also agreed to then draft a short-form explanation of the decision.

In the short-form award, the Arbitrator found that § 7115 of the Statute "imposes an absolute duty to remit regular and periodic dues deducted from the salaries of bargaining[-]unit employees" and that the Statute authorized him "to order the Agency to remit to the Union dues that were not properly withheld."⁴ The Arbitrator also found that Article 23 of the CBA, which concerns waiver of overpayment, authorized him to "order that the affected bargaining employees be granted waivers of liability for those same dues payments."⁵ Thus, the Arbitrator ordered the Agency to pay employee

employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment shall be made at no cost to the exclusive representative or the employee. Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year.

(b) An allotment under subsection (a) of this section for the deduction of dues with respect to any employee shall terminate when—

(1) the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee; or

(2) the employee is suspended or expelled from membership in the exclusive representative.

5 U.S.C. § 7115(a), (b).

³ Exceptions, Attach. 3, National Grievance (Grievance) at 2.

⁴ Award at 2.

⁵ *Id.*

¹ 5 U.S.C. § 7101.

² Section 7115 of the Statute provides in part that:

(a) If an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the

X \$280.70; to pay the Union \$1,1815.10, which should have been withheld from the five bargaining-unit employees; and to grant those five employees a waiver from reimbursing the Agency for those same dues payments that should have been withheld.

The Agency filed exceptions to the award on December 11, 2020, and the Union filed an opposition to the exceptions on January 8, 2021.

III. Analysis and Conclusions

A. The Agency has failed to establish that the award is contrary to law.

The Agency contends that the award is contrary to § 7115(a) of the Statute.⁶ It argues only that the Statute does not “provide that an [a]gency utilize taxpayer’s funds to pay dues withholding allotments on behalf of a requesting bargaining unit employee.”⁷ Although the Agency argues that the Statute does not direct an agency to reimburse a union for dues that were not properly withheld, the Agency does explain how such a remedy is *contrary* to the Statute.⁸ Further, the Authority has held that a proper remedy for the failure to comply with § 7115(a) is an order requiring the agency to reimburse the union “for the dues it would have received but did not as a result of the unlawful conduct.”⁹ Thus, the Agency has not established that the award is contrary to § 7115(a) of the Statute and we deny its exception.¹⁰

⁶ When considering contrary-to-law claims, the Authority reviews the questions of law raised by the award and the party’s exceptions de novo. *NLRB*, 72 FLRA 334, 338 (2021) (citing *NTEU*, Chapter 24, 50 FLRA 330, 332 (1995)). In applying a de novo standard of review, the Authority assesses whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. *Id.* (citing *NFFE*, Loc. 1437, 53 FLRA 1703, 1710 (1998)). In making that assessment, the Authority defers to the arbitrator’s underlying factual findings, unless the excepting party establishes that they are nonfacts. *Id.* (citing *U.S. DHS*, *U.S. CBP*, *Brownsville, Tex.*, 67 FLRA 688, 690 (2014)).

⁷ Exceptions at 5.

⁸ Under the Authority’s Regulations, “[a]n exception may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground” for review listed in § 2425.6(a)-(c). 5 C.F.R. § 2425.6(e)(1); see *U.S. Dep’t of VA*, *Gulf Coast Med. Ctr.*, *Biloxi, Miss.*, 70 FLRA 175, 176-77 (2017) (denying a contrary-to-law exception as unsupported where the agency failed to support its exception with any arguments).

⁹ *Dep’t of the Navy*, *Naval Underwater Sys. Ctr.*, *Newport, R.I.*, 16 FLRA 1124, 1127 (1984); see also, e.g., *U.S. Dep’t of the Treasury*, *U.S. Mint*, 35 FLRA 1095, 1100 (1990).

¹⁰ The Agency also alleges that the award is contrary to 5 U.S.C. § 5946. However, there is no record evidence that the Agency raised that argument to the Arbitrator. Exceptions at 5 (stating that the Agency only raised its argument regarding § 7115 to the Arbitrator); Exceptions, Attach. 8, Agency Rebuttal Resp. (Rebuttal Resp.) (no discussion of 5 U.S.C. § 5946). Under

B. The Agency has failed to establish that the Arbitrator exceeded his authority.

The Agency argues that the Arbitrator exceeded his authority¹¹ by resolving an issue that was not submitted to arbitration.¹² Specifically, the Agency asserts that the matters of Article 23 of the CBA, concerning waiver of overpayment, and 5 U.S.C. § 5584 (the Debt Collection Act), which covers the same, “were not raised in the grievance complaint[] [and] were not introduced until the hearing.”¹³ The parties discussed Article 23 and 5 U.S.C. § 5584 in their post-hearing position statements regarding whether the Arbitrator could order the Agency to pay the Union the outstanding dues money and to waive the five employees’ repayment obligation.¹⁴ Contrary to the Agency’s assertion that these matters were not submitted to arbitration, the Union’s grievance specifically requested as a remedy that the Agency “reimburse the [U]nion, at no cost to employees, for dues not withheld in violation of the CBA.”¹⁵ Thus, the Arbitrator’s consideration of Article 23 and 5 U.S.C. § 5584 in the context of ruling on the remedy the Union requested in its grievance was not outside the scope of the grievance.¹⁶ Moreover, as the Agency fails to provide any further explanation of its

§§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority will not consider any arguments that could have been, but were not presented to the Arbitrator. 5 C.F.R. §§ 2425.4, 2429.5. Thus, consistent with our Regulations, we dismiss the Agency’s exception as it relates to 5 U.S.C. § 5946.

¹¹ An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration or resolves an issue not submitted to arbitration. *U.S. Small Bus. Admin.*, 71 FLRA 655, 656 n.13 (2020) (then-Member DuBester dissenting) (citing *Int’l Bhd. of Elec. Workers*, Loc. 121, 71 FLRA 161, 162 n.13 (2019) (then-Member DuBester concurring)).

¹² Exceptions at 11. Although the Agency included this argument under the heading titled “Other Grounds/Outside the Scope of the Grievance,” its argument is that the Arbitrator exceeded his authority and it cites exceeds-authority precedent throughout its exception. *Id.*

¹³ *Id.*

¹⁴ Exceptions, Attach. 7, Union Br. on Remedy at 2; Rebuttal Resp. at 3-4.

¹⁵ Grievance at 2 (emphasis added).

¹⁶ See *U.S. Dep’t of VA*, *Med. Ctr.*, *Richmond, Va.*, 70 FLRA 900, 901 (2018) (then-Member DuBester concurring) (denying an exceeds exception because the agency was on notice that the issue of a certain remedy was before the arbitrator where that remedy was presented in the union’s second-step and third-step grievances submitted for arbitration).

argument beyond this brief assertion,¹⁷ we find that the Arbitrator did not exceed his authority by resolving an issue not submitted to arbitration and we deny the Agency's exception.¹⁸

- C. We remand the award for further findings concerning one of the Agency's essence exceptions.

The Agency argues that the award fails to draw its essence¹⁹ from Article 45, Section 6 of the CBA, which states in part that a grievance shall include the "[i]dentification of the employees(s) covered by the grievance."²⁰ Specifically, the Agency argues that the award contradicts the express terms of Article 45, Section 6 because the Arbitrator awarded relief to a former bargaining-unit employee – employee X – who was not

¹⁷ Member Abbott notes that the Arbitrator's remedy orders the Agency to grant a waiver of the employees' obligation to reimburse the Agency for the dues paid to the Union. Member Abbott notes that the Agency's obligation to reimburse the Union is a question entirely different from whether the employee or the Agency is ultimately responsible to pay those dues after the fact. We do not address that question today because it is not raised in the Agency's exceptions.

¹⁸ See *AFGE, Loc. 1667*, 70 FLRA 155, 158 (2016) (denying an exceeds-authority exception where the union's argument did not demonstrate that the arbitrator exceeded her authority); *AFGE, Loc. 1770*, 67 FLRA 372, 373 (2014) (rejecting argument that the arbitrator's reference to a statute indicated he decided an issue not before him).

¹⁹ When reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority will find that an arbitration award is deficient as failing to draw its essence from the 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. *Ass'n of Admin. Law Judges, IFPTE*, 72 FLRA 302, 304 (2021) (Member Abbott concurring) (citing *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017)).

²⁰ Exceptions at 7; Exceptions, Attach. 2, Article 45 of the CBA at 192. The Agency also contends that the award fails to draw its essence from Article 8, Section 7 of the CBA, which states that "[t]he Union shall promptly remit any erroneous payment it receives for which it has not provided an employee reasonable services, e.g., the payment due another union." Exceptions at 8; Exceptions, Attach. 4, Art. 8 of the CBA at 33. The Agency asserts only that the Arbitrator "disregarded the plain language of the negotiated agreement." Exceptions at 8. Because the Agency fails to provide any explanation as to how or why the Arbitrator disregarded this provision of the CBA, or how the award is otherwise deficient under the essence standard noted above, we deny the Agency's exception as unsupported. 5 C.F.R. § 2425.6(e)(1); see, e.g., *USDA, U.S. Forest Serv., Law Enf't & Investigations, Region 8*, 68 FLRA 90, 93-94 (2014) (denying an essence exception for failure to support).

named in the grievance.²¹ In the grievance, the Union stated that the Agency was continuing to withhold dues "from employees who ha[d] been promoted out of the bargaining unit."²² It mentioned one employee by name, but not employee X.²³ In the short-form award, the Arbitrator simply restated the verbal conclusion at the expedited hearing that "the Union proved that the Agency violated Article 8 of the [p]arties' CBA and the Statute by failing to timely stop dues withholding for a former bargaining unit employee, [employee X], when he left the bargaining unit" and that "the Union proved that the amount of dues that was improperly withheld was \$280.70."²⁴ The Arbitrator did not discuss how or why he came to the conclusion at the hearing that employee X was included in the grievance and entitled to reimbursement. The Arbitrator simply did not articulate any of his factual findings, conclusions, or contractual interpretations in this regard. As a result, we are unable to determine whether his contractual interpretation was irrational, unfounded, implausible, or in manifest disregard of the agreement.²⁵

Where, as here, the arbitrator's findings are insufficient for the Authority to determine whether the award is deficient on the grounds raised by a party's exceptions, the Authority will remand the award.²⁶ Accordingly, we remand the award to the parties for resubmission to arbitration, absent settlement, for further findings regarding *only* employee X – the former bargaining-unit employee identified in the award.²⁷ Consistent with this decision, the resulting award should

²¹ Exceptions at 7.

²² Grievance at 2.

²³ *Id.*

²⁴ Award at 1.

²⁵ See *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 72 FLRA 146, 148 (2021) (*DHS*) (Chairman DuBester dissenting in part) (where arbitrator failed to explain or support conclusions, Authority was unable to determine whether the award drew its essence from the agreement and thus remanded for further findings).

²⁶ *Id.* (citing *AFGE, Loc. 3506*, 64 FLRA 583, 584 (2010)).

²⁷ Member Abbott notes that although Authority precedent requires us to remand this award, continuing to litigate over \$280.70, when the Agency does not even appear to contest that there was a dues withholding error with this particular former bargaining-unit employee, would not be an effective or efficient use of government resources. See *AFGE, Loc. 3408*, 70 FLRA 638, 639 (2018) (then-Member DuBester concurring) ("The Authority has held that where . . . the arbitrator has not made sufficient findings for the Authority to determine whether the award is deficient, the Authority will remand the award."); see also *Rebuttal Resp.* at 3 ("Although there were discussions regarding [employee X] between the [p]arties, the matter involving him was never raised in any grievance. Instead the matter was raised in an email exchange"); 5 U.S.C. § 7101(b) (noting the Authority's mandate to interpret the Statute "in a manner consistent with the requirement of an effective and efficient Government").

explain the contractual bases for any conclusions; explain any interpretations of the parties' agreement; and provide adequate factual findings.²⁸

IV. Decision

We deny the Agency's exceptions, in part, dismiss, in part, and remand the case for action consistent with this decision.

Chairman DuBester, concurring:

I agree with the Decision to dismiss the Agency's exceptions in part, deny them in part, and remand in part.

²⁸ See *DHS*, 72 FLRA at 149. The Agency also argues that the Arbitrator exceeded his authority by awarding relief to the former bargaining-unit employee who was not specifically named in the grievance. Exceptions at 10. In light of our decision to remand on this issue, we find it unnecessary to address the Agency's other exceeds-authority exception at this time. *DHS*, 72 FLRA at 149 n.36 (finding it unnecessary to address the remaining exceptions after remanding the award for further action); see also *AFGE, Nat'l Border Patrol Council, Loc. 1929*, 63 FLRA 465, 468 n.3 (2009) (same).