

**72 FLRA No. 107**

SOCIAL SECURITY ADMINISTRATION  
OFFICE OF THE GENERAL COUNSEL  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
COUNCIL 147  
(Union)

0-AR-5679

DECISION

December 13, 2021

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

**I. Statement of the Case**

Arbitrator Jeff J. Minckler found that the Union's grievance was procedurally arbitrable and issued an award addressing the merits of the grievance. The Agency filed exceptions to the award on essence, fair-hearing, and exceeds-authority grounds. Because the Arbitrator's procedural-arbitrability determination is not a plausible interpretation of the parties' collective-bargaining agreement, we grant the Agency's essence exception and set aside the award.

**II. Background and Arbitrator's Award**

As relevant here, Article 24 of the parties' agreement provides that "a grievance concerning a particular act . . . must be presented . . . within fifteen (15) working days of the action."<sup>1</sup> The provision also states that the grievance must contain "an original signature at filing."<sup>2</sup>

In December 2018, the Agency suspended an

employee for two days, effective in January 2019. The Union timely grieved the suspension, and the Agency acknowledged receipt of the grievance. On January 10, 2019, the Union sent a written presentation to an Agency representative which triggered a deadline of ten business days for the Agency's answer to the grievance (answer).<sup>3</sup> Eight days later, the Agency issued an answer, stating that because "this grievance is excluded from the grievance process and does not have the required wet signature, I deny it and all request[ed] relief."<sup>4</sup> The answer also denied the grievance on the merits. The Union subsequently invoked arbitration.

Before the merits hearing, the parties agreed to bifurcate the issue of arbitrability and submitted briefs to the Arbitrator on that issue. The Agency argued that the grievance was not arbitrable because "the Union failed to comply with the [parties' agreement] by not filing a signed grievance," and because it "never attempted to correct this deficiency."<sup>5</sup> The Agency further argued that because the Union failed to perfect its grievance, it did not file a timely grievance. The Union contended that it timely submitted its grievance in December 2018 and that "[a]ny effect or deficiency related to signature ha[d] been effectively waived and accepted by the Agency."<sup>6</sup>

Regarding the waiver issue, the Arbitrator noted that the Agency accepted the grievance and processed it through the normal steps of the negotiated grievance procedure. However, he also found that the Agency raised the issue of the absence of an original signature in a timely manner under the parties' agreement. And relying on a prior arbitration decision interpreting similar arbitrability issues between the parties, the Arbitrator found that the Agency's actions amounted to a waiver.

In support of this conclusion, the Arbitrator found that "public policy favors processing and resolving grievances rather than disregarding [grievances] due to harmless technicalities"<sup>7</sup> and that the parties' agreement "empowers and requires an arbitrator to ensure the purpose of the grievance procedure is fulfilled."<sup>8</sup> He concluded that "the scales tip in favor of arbitration on the merits."<sup>9</sup> Consequently, he found the grievance

<sup>3</sup> Under Article 24, Section 9 of the parties' agreement "[t]he Step 3 official or designee will as speedily as possible, attempt to resolve the grievance and will within ten (10) workdays after the Step 3 presentation date give a written decision containing the reason for the decision." *Id.* at 163.

<sup>4</sup> Exceptions, Ex. 8, Step 3 Grievance Decision at 2.

<sup>5</sup> Award at 1.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Id.* (citing Art. 25, § 8(A) of the parties' agreement, which states that "the arbitrator shall have the authority to take steps necessary to see that the purpose [of the grievance procedure] is fulfilled").

<sup>9</sup> *Id.*

<sup>1</sup> Exceptions, Ex. 23, Collective-Bargaining Agreement (Agreement) at 160-61.

<sup>2</sup> *Id.* at 167; *see also* Award at 4. Article 24, Section 6 states that if either party declares a grievance "nongrievable or nonarbitrable," then "the original grievance shall be considered amended to include this issue." Agreement at 160. It also states that the parties "agree to raise any questions of grievability or arbitrability of a grievance, prior to the limit for the written answer in the final step of this procedure . . ." *Id.*

arbitrable and proceeded to a hearing on the merits.<sup>10</sup>

The Agency filed exceptions to the award on November 27, 2020. The Union filed an opposition to the Agency's exceptions on December 28, 2020.

### III. Analysis and Conclusion: The Arbitrator's procedural-arbitrability determination fails to draw its essence from the parties' agreement.

The Agency argues that the Arbitrator's waiver determination is not a plausible interpretation of Article 24, Sections 6 and 14 of the parties' agreement.<sup>11</sup> It further argues that the Arbitrator showed a manifest disregard for the parties' agreement when he relied on a presumption of arbitrability to ignore the requirement for an original signature in the parties' agreement.<sup>12</sup> 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.<sup>13</sup>

As noted, Article 24 provides that the Agency must raise arbitrability issues "prior to the limit for the written answer in the final step of this procedure."<sup>14</sup> The Arbitrator found that the Agency complied with this provision.<sup>15</sup> Moreover, it is undisputed that the Union neither complied with Article 24's requirement that the grievance contain an original signature nor attempted to cure the grievance's procedural deficiency.<sup>16</sup>

<sup>10</sup> On the merits, the Arbitrator found that Agency violated the parties' agreement when it suspended the grievant for two days and ordered a make whole remedy, including backpay and expungement of materials related to the suspension from the grievant's personnel file. Exceptions, Ex. 22, Final Award Decision.

<sup>11</sup> Exceptions Br. at 11-17.

<sup>12</sup> *Id.* at 15.

<sup>13</sup> *AFGE, Loc. 17*, 72 FLRA 162, 164 (2021) (citing *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014)).

<sup>14</sup> Agreement at 160 (Art. 24, § 6).

<sup>15</sup> Award at 2.

<sup>16</sup> Further, as the Agency argues, the Union could have timely cured the procedural deficiency after the Agency rejected the grievance on that basis, but chose not to do so. Upon receipt of the Agency's answer, the Union had seven calendar days to resubmit its grievance with an original signature. The Agency asserts, and the Union does not dispute, that under Art. 24, § 7 of the parties' agreement, the grievance deadline was January 25, 2019, fifteen working days after the effective dates of the suspension. Exceptions Br. at 8.

Although he found that the Agency raised the procedural-arbitrability issue in a timely manner,<sup>17</sup> the Arbitrator relied on an earlier arbitration award to find that the Agency waived its right to raise a procedural-arbitrability objection because it did not reject the grievance.<sup>18</sup> However, the Arbitrator did not explain how the Agency's actions amounted to a waiver when it had met the contractual deadline to raise the arbitrability issue. Moreover, while an arbitrator may consider prior arbitration awards, such awards are not precedential.<sup>19</sup> Because the Arbitrator's waiver finding conflicts with the plain wording of the parties' agreement, and is not based on any findings that the Agency subsequently abandoned its objections to the grievance's arbitrability, we conclude that his waiver finding is not a plausible interpretation of the parties' agreement.<sup>20</sup> And because there is no dispute that the Union's grievance did not comply with Article 24 of the parties' agreement, we grant the Agency's essence exception and set aside the award.<sup>21, 22</sup>

### IV. Decision

We set aside the award.

<sup>17</sup> Award at 2 ("The Employer first raised the absence of an original signature on January 18, 2019 when it responded at Step 3 of the grievance procedure, which the [parties' agreement] deems timely.") (citing Art. 24, § 6 of the parties' agreement).

<sup>18</sup> *Id.* at 4-5.

<sup>19</sup> *AFGE, Loc. 1273*, 44 FLRA 707, 712 (1992).

<sup>20</sup> *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 71 FLRA 1013 (2020) (then-Member DuBester concurring; Member Abbott concurring).

<sup>21</sup> The Agency also challenges the merits award on exceeds-authority, Exceptions Br. at 27, fair-hearing, *id.* at 19-20, 25-26, and essence grounds, *id.* at 21-24. Because we set aside the award, we do not address these additional exceptions. See *U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 574 n.18 (2018) (finding it unnecessary to address remaining arguments when an award has been set aside).

<sup>22</sup> Member Abbott notes that this case perfectly exemplifies why the Authority should limit deference to an arbitrator's interpretation of a collective-bargaining agreement, and he continues to stress his belief in the importance of the ideas and principles expressed in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Miami, Florida*, 71 FLRA 660, 663-68 (2020) (Member Abbott concurring; then-Member DuBester dissenting), *pet. for review dismissed sub nom. AFGE, Loc. 3690 v. FLRA*, 3 F.4th 384 (D.C. Cir. 2021).