

72 FLRA No. 115

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1822
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEMBER SERVICES
(Agency)

0-AR-5674

DECISION

December 17, 2021

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

I. Statement of the Case

We reaffirm that arbitrators may not amend the plain wording of a collective-bargaining agreement to impose wholly new obligations on the parties.

The parties settled a dispute over how to implement the leave provisions of Executive Order No. 5396 (the executive order).¹ The settlement agreement required several changes to the Agency's absence and leave policy (the policy).

Later, the parties could not agree whether the revised leave provisions in the settlement agreement and the policy entitled disabled-veteran employees to leave for any medical treatment or only to leave related to a military service-connected disability. Arbitrator John G. Sciandra found that there was no service-connected requirement in the settlement agreement or policy, but that the Agency could impose the service-connected requirement because doing so was consistent with external guidance concerning the executive order.

The Union argues on exceptions that the Arbitrator's award fails to draw its essence from the settlement agreement and policy. Because the Arbitrator imposed an obligation that was completely absent from the wording that the parties negotiated, we agree.

II. Background and Arbitrator's Award

In 2015, the Union filed a grievance alleging that the Agency was violating the executive order by requiring disabled-veteran employees who took leave under the order to produce a doctor's note stating that they received treatment for a service-connected disability. The following year, the parties resolved that grievance with the settlement agreement, which stated, in pertinent part:

[I]n order for disabled[-]veteran employees to be entitled to leave under [the executive order], the . . . employee must verbally confirm their status as a disabled veteran to their supervisor and provide verbal notice indicating intention to take annual leave in lieu of sick leave or leave without pay under [the executive order]. The granting of such leave is contingent upon the disabled veteran giving prior notice of definite days and hours of absence required for medical treatment

[T]he disabled[-]veteran employee will provide proof of the medical appointment to his/her supervisor upon return to work. The proof will only need to show that the . . . employee was seen, not the nature of said medical appointment.²

In addition, the settlement agreement required revising the policy. The parties subsequently negotiated the wording of the policy revisions, and, as relevant here, those revisions were materially indistinguishable from the settlement agreement itself.³

Several years later, when a disabled-veteran member of the bargaining unit (the grievant) requested leave for medical treatment, the grievant's supervisor asked whether the leave would be used for treating a service-connected disability. The grievant contended that it was inappropriate for the supervisor to require such an explanation, but the supervisor persisted, asserting that the executive order's coverage was limited to leave for

¹ Special Leaves of Absence to be Given Disabled Veterans in Need of Medical Treatment, Exec. Order No. 5396 (July 17, 1930).

² Exceptions, Attach., Settlement Agreement paras. 1-2.

³ See Exceptions, Attach., Agency's Memo. HRC-08, Absence & Leave Policy (Mar. 2016) para. 4(C)(3)(a).

treatment of service-connected disabilities only. The grievant responded, “That’s fine. [My appointment i]s cancelled.”⁴

Subsequently, the Union filed a grievance alleging that the Agency’s renewed imposition of a service-connection requirement – for leave that disabled veterans requested to seek medical treatment – violated not only the settlement agreement and the policy, but also the parties’ master collective-bargaining agreement (CBA), the VA Handbook, and the Federal Service Labor-Management Relations Statute (the Statute).⁵ When unresolved, the grievance advanced to arbitration. The Arbitrator set forth the issues as follows: “Is the Agency violating the [settlement agreement] reached in 2016 . . . concerning [the executive order,] in addition to the [policy]? If so, what shall be the remedy?”⁶

Examining the settlement agreement and policy, the Arbitrator found that “nowhere” did they “state that a disabled veteran’s medical leave must be for a service-connected disability.”⁷ Further, the settlement agreement “d[id] not state the disabled veteran must confirm that medical treatment is for a service-connected disability when leave is requested.”⁸ The Arbitrator noted that the executive order was also silent about such requirements.⁹

Nevertheless, the Arbitrator determined that, “using the interpretation” of the executive order in “[g]uidance from the Office of Personnel Management (OPM) in case law issued by the Merit System[s]

Protection Board (MSPB) . . . , there was no violation” of the settlement agreement or policy.¹⁰ The Arbitrator concluded that the external guidance authorized the Agency’s imposition of a service-connection requirement for leave under the settlement agreement and policy. Further, the Arbitrator found that, as to the executive order itself, it “shall solely apply to disabled veterans requiring treatment for a service-connected disability.”¹¹ Separately, the Arbitrator determined that the grievant was not denied leave at all because “he canceled his appointment of his own accord.”¹² Thus, the Arbitrator found no merit to the grievance.

The Union filed exceptions to the award on November 2, 2020.¹³

III. Analysis and Conclusions

A. The Arbitrator did not exceed his authority by framing the issues that he addressed.

As relevant here, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration.¹⁴ The Union argues that the Arbitrator “inappropriately framed the issue(s) solely as” pertaining to the settlement agreement and the policy.¹⁵ According to the Union, the Arbitrator exceeded his authority by failing to resolve whether the Agency: (1) violated the CBA or the VA Handbook; and (2) committed unfair labor practices (ULP) under the Statute.¹⁶ However, if the parties did not stipulate the issues, then the Arbitrator had the authority to frame them.¹⁷

The award does not state that the parties stipulated the issues,¹⁸ and the arbitration documents that

⁴ Award at 4 (quoting Skype Recording).

⁵ 5 U.S.C. §§ 7101-35.

⁶ Award at 2.

⁷ *Id.* at 9.

⁸ *Id.*

⁹ The executive order states:

With respect to medical treatment of disabled veterans who are employed in the executive civil service of the United States, it is hereby ordered that, upon the presentation of an official statement from duly constituted medical authority that medical treatment is required, such annual or sick leave as may be permitted by law and such leave without pay as may be necessary shall be granted by the proper supervisory officer to a disabled veteran in order that the veteran may receive such treatment

The granting of such leave is contingent upon the veteran’s giving prior notice of definite days and hours of absence required for medical treatment

¹⁰ Award at 9.

¹¹ *Id.* at 11.

¹² *Id.*; *see also id.* at 10 (same determination).

¹³ The Agency filed an untimely opposition on December 17, 2020, and attached a motion asking the Authority to consider the opposition despite its untimeliness. The motion states that, because the Agency’s counsel had only “intermittent[ly]” checked office mail since March 2020, counsel was unaware that the exceptions were filed until December 15, 2020. Mot. at 1. The motion fails to establish the “extraordinary circumstances” necessary to waive the expired filing deadline. 5 C.F.R. § 2429.23(b); *see also id.* § 2429.23(c). Accordingly, we do not consider the opposition. *See, e.g., U.S. DHS, ICE*, 66 FLRA 880, 883 (2012) (being out of office due to work and illness did not show “extraordinary circumstances”).

¹⁴ *U.S. DOD, Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996).

¹⁵ Exceptions Br. at 2.

¹⁶ *Id.* at 2-4.

¹⁷ *U.S. Dep’t of the Army, Corps of Eng’rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997) (*Army*).

¹⁸ *See* Award at 2.

the Union submitted with its exceptions contain varying issue formulations depending on the document.¹⁹ As such, the record does not establish that the parties stipulated the issues in this case,²⁰ and the Arbitrator had the power to frame them.²¹ Further, the Union does not dispute that alleged violations of the settlement agreement and policy were before the Arbitrator. Thus, we defer to the Arbitrator's framing of the issues to include only those potential violations and any remedy.²² Accordingly, the Arbitrator was not obligated to address other violations or ULP claims,²³ and we deny the Union's exceeded-authority exception arguing to the contrary.

B. The Arbitrator's imposition of a service-connection requirement fails to draw its essence from the settlement agreement and the policy.²⁴

The Union argues that the award fails to draw its essence from the settlement agreement and the policy²⁵ because the Arbitrator recognized that they were "silen[t]" about any service-connection requirement for taking leave, but the Arbitrator "created a new contract term" to impose that requirement.²⁶ The Authority has found that when an arbitrator interprets contractual silence to impose new obligations that are inconsistent

¹⁹ See Exceptions Br. at 2 ("At the beginning of the hear[ing], the Union was allowed to read [its] statement of the issue. The Agency did the same." (citation omitted)). Compare Exceptions, Attach., Union's Statement of Issues at 1 (single-page document formulating at least five questions, only some of which are numbered), with Exceptions, Attach., Union's Post-Hr'g Br. at 2 (identifying four numbered paragraphs as issue statements, none of which corresponds to formulations in single-page document).

²⁰ Although the Union checked a "yes" box to indicate that the parties stipulated issues, Exceptions Form at 44, the Union's subsequent narrative explanation contradicts that response. *Id.* ("[T]he Union read and gave a copy of the Union[']s statement to the Arbitrator and the Agency" (emphasis added)).

²¹ *Army*, 52 FLRA at 924.

²² *Id.*

²³ See, e.g., *AFGE, Council 215*, 66 FLRA 771, 774 (2012) ("In the absence of a stipulation that includes a [ULP] issue, an arbitrator is not obligated to address and resolve such an issue.").

²⁴ Where an agency rule is the product of collective bargaining, the Authority assesses arguments that an award conflicts with that rule using the essence standard that governs challenges to arbitral interpretations of collective-bargaining agreements. E.g., *U.S. Dep't of Educ., Wash., D.C.*, 61 FLRA 307, 310-11 (2005) (Authority would not treat collectively bargained document as agency rule requiring de novo review of alleged conflicts with arbitration award); see note 25 below (essence standard). Here: (1) the settlement agreement required revising the policy, Award at 3; (2) the pertinent portion of the revised policy was collectively bargained, see Exceptions, Attach., Agency's Post-Hr'g Br. at 4 n.4 (stating that the policy revisions "reflect[] [p]aragraphs 1 and 2 of the [settlement] agreement"); and (3) the relevant provisions of the settlement agreement and policy are materially indistinguishable, see *id.* (calling separate claims under the settlement agreement and policy "effectively a distinction without a difference"). Thus, we conduct a single essence analysis of the Union's arguments that the Arbitrator added to the plain wording of the settlement agreement and the policy.

²⁵ 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. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

²⁶ Exceptions Br. at 2-3 (citing *U.S. DHS, U.S. CBP*, 71 FLRA 744, 745 (2020) (*CBP*) (Member Abbott concurring; then-Member DuBester dissenting) (where ground rules specified each party's responsibility for union travel and per-diem expenses from 2013 through 2015, but arbitrator interpreted ground rules' silence as creating a new contract term that required agency to pay such expenses after 2015, award failed to draw its essence from ground rules)); see *id.* at 6, 12 (expanding essence arguments concerning agreement and policy).

with a contract's plain wording, then the award evidences a manifest disregard of the contract.²⁷

Here, the Arbitrator's own analysis emphasized that a service-connection requirement was "nowhere" in the settlement agreement or policy.²⁸ Nevertheless, the Arbitrator found that the Agency did not violate the settlement agreement and policy by requiring a service connection as a condition for leave approval for disabled-veteran employees seeking medical treatment.²⁹ The Arbitrator's justification for this contradictory result was that OPM guidance and MSPB decisions stated that obtaining leave under the executive order required that treatment be for a service-connected disability.³⁰

Significantly, in another recent case concerning the executive order, the Authority held that the order's leave entitlements are a "floor and not a ceiling"³¹ because parties may negotiate more generous leave protections for disabled-veteran employees than the order might require.³² Thus, *regardless* of whether the order provides leave only for medical treatment of service-connected disabilities, the parties could negotiate greater leave entitlements in the settlement agreement and policy. And, as the Arbitrator recognized, neither the settlement agreement nor the policy requires disabled-veteran employees to satisfy a service-connection requirement in order to be entitled to leave for medical treatment.³³ *If* the terms of the

settlement agreement and policy are more generous than the executive order itself – an issue that we need not decide³⁴ – then that greater benefit to disabled veterans still could not have authorized the Arbitrator to "fabricate a new contractual obligation."³⁵ For these reasons, the award evidences a manifest disregard of the settlement agreement and policy by imposing a service-connection requirement that is inconsistent with the plain wording of the settlement agreement and policy.³⁶

Therefore, the Arbitrator's conclusion that the Agency could impose a service-connection requirement on disabled-veteran employees who take leave for medical treatment fails to draw its essence from the settlement agreement and policy,³⁷ and we set aside that portion of the award.³⁸

³⁴ After arbitrators have resolved all of the stipulated or framed issues before them, any additional statements that they make concerning other issues are dicta that do not provide a basis for finding an award deficient. *E.g., SSA Headquarters, Balt., Md.*, 57 FLRA 459, 461 (2001) (SSA) ("[T]he matter of whether the [u]nion waived its bargaining right was not at issue. As a result, the [a]rbitrator's finding regarding this issue constitutes dicta and does not provide a basis for finding the award deficient."). The Union challenges the Arbitrator's statement that the executive order itself "shall solely apply to disabled veterans requiring treatment for a service-connected disability." Award at 11. But the issues before the Arbitrator were limited to the settlement agreement and policy, *id.* at 2, so the Arbitrator's additional statements concerning the requirements of the executive order are nonbinding dicta that do not provide a basis for finding a deficiency in the award, *SSA*, 57 FLRA at 461.

³⁵ *CBP*, 71 FLRA at 745; *see also VA*, 72 FLRA at 373 & n.20 (finding that the executive order does not prohibit parties from negotiating more generous leave entitlements for disabled-veteran employees).

³⁶ *See, e.g., Tinker*, 48 FLRA at 348 (finding that an award evidenced manifest disregard of an agreement because the arbitrator's interpretation was "not compatible with" the "plain wording" of that agreement).

³⁷ In light of this disposition, we need not address the Union's other arguments that challenge the Arbitrator's approval of a service-connection requirement for disabled-veteran employees taking leave under the settlement agreement and policy. Exceptions Br. at 2-3 (essence argument concerning CBA), 3-4 (alleged conflict with the Statute), 6 (public policy), 8 (alleged repudiation ULP), 9-11 (nonfact claim), 18-28 (alleged conflicts with VA Handbook, 5 U.S.C. § 2108, and Health Insurance Portability and Accountability Act of 1996), 32-33 (past-practice arguments, unilateral-change-ULP claim, and alleged inconsistency with statutory-construction rule); *see U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1170 n.45 (2020) (then-Member DuBester concurring) (after setting aside portion of award, Authority found it unnecessary to address other arguments challenging that same portion of the award).

³⁸ We note, however, that we are not setting aside the award in its entirety. The Arbitrator found that the grievant cancelled his appointment of "his own accord" and that, consequently, he was not denied leave. Award at 11. As none of the exceptions challenge that finding, it remains undisturbed.

²⁷ *CBP*, 71 FLRA at 745 (citing *U.S. Dep't of VA, Med. Ctr., Asheville, N.C.*, 70 FLRA 547, 548 (2018) (then-Member DuBester dissenting) (citing *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993) (*Tinker*) (finding that an award evidenced manifest disregard of an agreement where the arbitrator's interpretation was "not compatible with" the "plain wording" of that agreement))).

²⁸ Award at 9.

²⁹ *Id.*

³⁰ *See id.*

³¹ *U.S. Dep't of VA, Nashville Reg'l Off., VA Benefits Admin*, 72 FLRA 371, 373 & n.20 (2021) (*VA*) (Member Abbott concurring on other grounds) (quoting *United Am. Nurses, D.C. Nurses Ass'n & United Am. Nurses Loc. 203*, 64 FLRA 879, 882 (2010)) (citing *U.S. Dep't of Com., Pat. & Trademark Off.*, 65 FLRA 817, 819 (2011)).

³² *Compare id.* at 373 ("The [a]gency identifies no wording in the [executive order] that . . . prohibits the [a]gency from granting [leave without pay] to disabled veterans without medical documentation . . ."), with Exec. Order No. 5396 para. 1 ("[I]t is hereby ordered that, upon the presentation of an official statement from duly constituted medical authority that medical treatment is required, . . . such leave without pay as may be necessary shall be granted . . .") (emphasis added).

³³ Award at 9. Moreover, none of the OPM guidance or MSPB decisions to which the Arbitrator referred concerned the settlement agreement and policy, and alleged violations of the settlement agreement and policy were the only non-remedial issues that the Arbitrator framed.

IV. Decision

We deny the Union's exceeded-authority exception, grant its essence exception to the extent described in part III.B., and modify the award in the manner previously explained.

Chairman DuBester, concurring:

I agree that the Arbitrator did not exceed his authority by framing the issue to include only whether the Agency violated the parties' settlement agreement and the Agency's absence and leave policy. I also agree that the award fails to draw its essence from the settlement agreement and the policy.

However, I disagree with the majority's rationale for granting the Union's essence exception – namely, that the imposition of a service-connection requirement conflicts with the plain wording of the settlement agreement and policy. Rather, as the majority notes, both are silent as to whether a service-connected disability is a prerequisite for leave under Executive Order No. 5396 (the executive order).¹ And, as I have stated before, where an agreement is silent on a matter, an arbitrator's interpretation of the agreement as it applies to that matter “must ‘ultimately depend[] on the intent of the contracting parties.’”²

Here, it is clear from the context in which the parties negotiated the settlement agreement, and from the manner in which the Agency amended the policy as a consequence of that agreement, that the parties intended to clarify that a service-connected disability was *not* a requirement for approving leave under the executive order. And it is on this basis that I find that the Arbitrator's contrary interpretation fails to draw its essence from the settlement agreement and policy.

¹ Special Leaves of Absence to be Given Disabled Veterans in Need of Medical Treatment, Exec. Order No. 5396 (July 17, 1930).

² *U.S. DHS, U.S. CBP*, 71 FLRA 744, 749 (2020) (Dissenting Opinion of then-Member DuBester) (quoting *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 757 (2018) (Dissenting Opinion of then-Member DuBester) (quoting *IRS, Wash., D.C.*, 47 FLRA 1091, 1110 (1993))).