72 FLRA No. 138

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS
AND BORDER PROTECTION
SAN DIEGO, CALIFORNIA
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 123
(Union)

0-AR-5698

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DECISION

March 15, 2022

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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)

I. Statement of the Case

In this case, we vacate an award finding that a grievance filed after the deadline prescribed by the parties' collective-bargaining agreement was procedurally arbitrable.

When an employee (the grievant) notified the Agency of a medical condition, the Agency temporarily revoked his firearm authorization pending an evaluation of his fitness to perform normal duties. After a period of observation and a reevaluation, the Agency restored his firearm authorization. The Union filed a grievance challenging the basis for the firearm revocation and noting the date the Agency restored the grievant's firearm.

Arbitrator Sara Adler issued an award finding that the grievance was untimely with respect to the Agency's revocation of the grievant's firearm but timely regarding the discrete issue of the restoration.

The Agency filed an essence exception challenging the Arbitrator's finding that the Union timely grieved the restoration issue. Because the Union did not file the grievance by the applicable filing deadline, we grant the Agency's procedural-arbitrability exception and set aside the award.

II. Background and Arbitrator's Award

The grievant was a Customs and Border Protection officer. In early 2015, the grievant suffered severe panic attacks that required his hospitalization. After the second attack, the grievant informed his supervisors that a physician had prescribed him anxiety medication and recommended that he not return to work for three weeks. In July 2015, the Agency informed the grievant that it was revoking his authority to carry a firearm "pending an inquiry into [his] medical condition."[1]

The Agency then initiated a fitness-for-duty examination that included both physical and psychological evaluations. Following the psychological evaluation, the examining psychiatrist recommended that the grievant be placed on restricted duty for at least six months before returning to full duty. In October 2015, the Agency informed the grievant that it was implementing the psychiatrist's recommendation, and, after a six-month observation period, a psychiatrist would reevaluate the grievant to determine whether he could return to full duty. While on restricted duty, the grievant did not have the opportunity to earn collateral pay, including overtime, night differential, or holiday premium payments.

On April 18, 2016, two days before the end of the six-month observation period, the Agency initiated the process for the grievant's psychological reevaluation (the reevaluation). And, on May 5, the Agency informed the grievant that his reevaluation was scheduled for June 6. On June 28, the Agency received the psychiatrist's report clearing the grievant to carry a firearm; the Agency restored the grievant's firearm authorization and returned him to full-duty status the same day.

On July 13, 2016, the Union filed a grievance challenging the Agency's July 7, 2015 revocation of the grievant's firearm. The grievance also noted that the Agency had restored the grievant's firearm authorization on June 28, 2016. When the parties were unable to resolve the grievance, the Union invoked arbitration.

The Arbitrator framed the issues as whether the Union had timely filed the grievance and whether the Agency violated the parties' agreement or any applicable laws, rules or regulations in revoking or restoring the grievant's firearm.

[1] Opp'n, Attach. 4, Notice of Revocation at 1.

Before the Arbitrator, as relevant here, the Agency argued that the grievance was untimely under Article 27 of the parties' agreement, which states that grievances must be filed within "forty-five . . . days of the incident giving rise to the complaint or the date upon which the employee became or should have become aware of the incident."[2] Specifically, the Agency argued that the Union filed its July 13, 2016 grievance over a year after the Agency revoked the grievant's firearm authorization. The Arbitrator agreed, finding the grievance untimely insofar as it challenged the July 2015 revocation.

However, because the grievance included the date on which the Agency restored the grievant's firearm, the Arbitrator found that the Union had raised an issue distinct from the revocation: whether the Agency had properly *restored* the grievant's firearm authorization. And the Arbitrator found that the portion of the grievance challenging the restoration was timely under Article 27 because the Union had filed the grievance within forty-five days of both the reevaluation, on June 6, and "the restoration of [the grievant's] authority to carry a firearm," on June 28.[3]

On the merits of the restoration issue, the Arbitrator found that the Agency violated the parties' agreement by failing to restore the grievant's firearm authorization, and return him to normal duties, on the final day of the observation period.[4]

The Agency filed exceptions to the award on January 20, 2021, and the Union filed an opposition on February 19, 2021.

III. Analysis and Conclusions: The award fails to draws its essence from the parties' agreement.

The Agency argues that the Arbitrator's determination that the grievance was timely concerning the restoration fails to draw its essence from Article 27 of the parties' agreement.[5] The Authority has held that "when parties agree to a filing deadline—with no mention of any applicable exception—the parties intend to be bound by that deadline."[6]

As noted above, Article 27 provides that grievances must be raised within "forty-five . . . days of the incident giving rise to the complaint or the date upon which the employee became or should have become aware of the incident."[7] The Union alleged that the Agency was obligated to restore the grievant's firearm by April 20, 2016—the final day of the observation period.[8] On April 20, the grievant knew that the Agency had not restored his firearm. But the Union did not file a grievance over that matter until July 13, 2016—eighty-four days after the end of the observation period. The Arbitrator cited no contractual wording that permitted the Union to file a grievance outside the parties' explicit forty-five-day time frame.[9] Thus, the Arbitrator's finding that this portion of the grievance was procedurally

[2] Exceptions, Attach. 13, Collective-Bargaining Agreement (CBA) at 112 ("To increase the ability to resolve problems expeditiously, [a] grievance should initially be raised as soon as practical, but no later than forty-five (45) days of the incident giving rise to the complaint or the date upon which the employee became or should have become aware of the incident . . .").

[3] Award at 5.

[4] *Id.* (finding the Union "persuasive" in its argument that the Agency should have "started [the reevaluation process] earlier to allow the [reevaluation] to occur at the end of the observation period").

[5] Exceptions Br. at 6-9. For an award to be found deficient as failing to draw its essence from the parties' agreement, the excepting party must establish 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 parties' agreement as to manifest infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard for the agreement. *AFGE, Loc. 1594*, 71 FLRA 878, 879 (2020). The Authority has held that a procedural-arbitrability determination does not represent a plausible interpretation of the parties' agreement when the arbitrator fails to enforce the plain language of the agreement. *U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 947, 948 (2020) (then-Member DuBester dissenting).

[6] *U.S. DOD Educ. Activity*, 70 FLRA 937, 938 (2018) (*DODEA*) (then-Member DuBester dissenting) (citing *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (then-Member DuBester dissenting)). The Union argues in its opposition that it timely filed the grievance because "[t]he restoration of the firearm marked the end of a continuing violation." Opp'n Br. at 12-13. Under §§ 2429.5 and 2425.4(c) of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to an arbitrator. 5 C.F.R. §§ 2429.5, 2425.4(c). Nothing in the record indicates that the Union argued to the Arbitrator that the grievance was timely because it challenged a continuing violation. Thus, we do not consider that argument. *See U.S. Dep't of the Air Force, Okla. Air Logistics Ctr., Tinker Air Force Base, Okla.*, 58 FLRA 760, 761 (2003) (not considering questions of timeliness because "[a]rguments related to the procedural arbitrability of the grievance should have been [first] presented to the [a]rbitrator").

[7] CBA at 112.

[8] Award at 5.

[9] *Id.*

arbitrable does not represent a plausible interpretation of Article 27.[10]

Additionally, to the extent that the grievance alleged that the Agency improperly delayed the reevaluation, the evidence establishes that the grievant was aware, on May 5, that the reevaluation would not occur until June 6.[11] Because the Union filed the grievance on July 13—more than forty-five days after May 5—the portion of the grievance related to the timing of the reevaluation is also untimely. In finding otherwise, the award fails to draw its essence from Article 27.[12]

Consequently, we grant the Agency's essence exception and set aside the award.[13]

IV. Decision

We set aside the award.

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[10] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 71 FLRA 790, 791 (2020) (*Coleman*) (then-Member DuBester dissenting) (granting essence exception where arbitrator found that a grievance filed more than twenty days after the deadline in the parties' agreement was procedurally arbitrable). Moreover, to the extent the Arbitrator based his timeliness determination on the date the Agency restored the grievant's firearm, we note that the Agency restoring the grievant's ability to earn collateral pay cannot logically be the "incident giving rise to the complaint" for purposes of Article 27. CBA at 112.

[11] Exceptions, Attach. 10, Notice of Reevaluation Appointment at 1.

[12] *Coleman*, 71 FLRA at 791. Member Kiko notes that, while the Union's grievance explicitly challenged the *revocation* of the grievant's firearm authorization, the grievance contained no specific allegation related to the *restoration* of the grievant's firearm authorization. Instead, the grievance merely provided the date that the Agency restored the grievant's authorization. Grievance at 1. Under Article 27, Section 8(B) of the parties' agreement, "[i]ssues not raised and actions not requested in the initial filing of the . . . grievance form . . . may not be introduced at arbitration absent mutual agreement." CBA at 111. The Arbitrator found that "the Union filed a grievance objecting to the revocation of [the g]rievant's permit to carry a firearm [and] seeking lost collateral pay." Award at 3. However, the Arbitrator then concluded—without explanation—that the Union *also* properly raised the issue of the Agency delaying restoration of the grievant's firearm as a discrete violation. *Id.* at 4. Member Kiko does not believe that including the date of the restoration within the grievance form was sufficient to properly raise the restoration issue. Thus, she would also have granted the Agency's essence exception arguing that the Arbitrator considered an issue that the Union failed to properly raise in its grievance, as required by Article 27. *See* Exceptions Br. at 7.

[13] *See DODEA*, 70 FLRA at 938 (vacating award where arbitrator considered grievance despite union not filing within the forty-five-day timeframe from the triggering event as required by the parties' agreement). As we are setting aside the award on procedural-arbitrability grounds, we do not consider the Agency's other exceptions. *U.S. DOD, Def. Logistics Agency, Aviation, Richmond, Va.*, 70 FLRA 206, 207 (2017) (not considering remaining exceptions where the Authority vacated award on other grounds) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 66 FLRA 300, 304 (2011)).

Member Abbott, concurring:

For purposes of avoiding an impasse, I agree that the grievance is untimely. I write separately, however, to address an overarching issue that arises far too frequently and is rarely addressed by the Authority.

I have noted in prior cases that certain matters cannot be addressed through a negotiated grievance procedure and thus cannot be addressed through arbitral review. In some cases, it is a matter of statutory or regulatory preclusion[1] and in other cases another avenue of redress is better suited because of the expertise of the adjudicating body.[2] But questions concerning when or how an agency authorizes an employee to carry a firearm, or when or how it revokes that authority are matters that directly implicate internal security.[3] Section 7106(a)(1) provides that "*nothing in this chapter* shall affect the authority of . . . any agency to determine the . . . internal security practices of the agency."[4] The term "nothing in this chapter" most certainly includes the grievance procedures set forth in § 7121 of the Statute.[5]

Therefore, any question concerning authorization to carry a firearm in an official capacity is a matter of internal security and is left to the sole discretion of the agency. Arbitrators are not in a position to second-guess whether the authorization to carry a firearm is or is not warranted, whether a revocation is or is not warranted, or when, after revocation, the authority to carry a firearm should be restored. And we are not any more qualified than are arbitrators to address those questions.

Because the central issue in this case concerns the revocation and restoration of the grievant's authorization to carry a firearm and when that authorization should have been restored, the matter is neither grievable nor arbitrable. The Agency is best positioned to assess the circumstances surrounding both the revocation and subsequent restoration of the grievant's privilege to carry a firearm. As such, its decisions regarding the grievant's authorization to carry should not be subject to grievance or arbitral review.

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[1] *See NTEU*, 72 FLRA 469, 472 (2021) (Concurring Opinion of Member Abbott); *U.S. Dep't of the Treasury, IRS*, 72 FLRA 308, 313 (2021) (*IRS*) (Concurring Opinion of Member Abbott); *U.S. Dep't of VA*, 71 FLRA 992, 995 (2020) (Dissenting Opinion of Member Abbott); *U.S. DOD, Educ. Activity*, 71 FLRA 900, 903-04 (2020) (Concurring Opinion of Member Abbott); *U.S. Dep't of VA, Veterans Benefit Admin., Nashville Reg'l Office*, 71 FLRA 322, 324-25 (2019) (Concurring Opinion of Member Abbott).

[2] *See U.S. DOJ, Fed. BOP, Fed. Corr. Ctr., Petersburg, Va.*, 72 FLRA 477, 482 (2021) (Concurring Opinion of Member Abbott); *IRS*, 72 FLRA at 313; *U.S. DHS, U.S. CBP, U.S. Border Patrol, Laredo, Tex.*, 71 FLRA 106, 108 (2019) (Member Abbott writes, "That is not a matter which is covered by our Statute or the parties' CBA or falls within our colleague's or the [a]rbitrator's expertise. And, the determination of whether an employee's outside activities create an apparent conflict of interest is a matter left to the discretion of the [a]gency's ethics officer.").

[3] 5 U.S.C. § 7106(a)(1) ("Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency . . . to determine the . . . internal security practices of the agency").

[4] *Id.* (emphasis added).

[5] 5 U.S.C § 7121.

Chairman DuBester, dissenting:

I disagree with the majority's decision to vacate the award on the basis that it fails to draw its essence from the parties' collective-bargaining agreement. As I have stated before, federal courts and the Authority have recognized that an arbitrator's procedural-arbitrability determination is entitled to deference and is subject to review only on narrow grounds.[1]

Here, the Arbitrator carefully considered the issue of whether the Union filed its grievance challenging the revocation and restoration of the grievant's firearm in a timely manner. In determining the issue of timeliness, she found that the revocation of the grievant's firearm was a separate and distinct issue from the evaluation process necessary to restore the grievant's firearm and return him to full duty. And the Arbitrator found that, in addition to contesting the revocation of the grievant's firearm, the Union's grievance raised the issue of the Agency's delay in restoring the grievant to full duty.

The Arbitrator's finding that the grievance separately raised the issue of the firearm restoration process is supported by the record. The majority suggests that the Arbitrator arrived at this conclusion merely "because the grievance included the date on which the Agency restored the grievant's firearm."[2] But the grievance was more precise on this point. When asked to identify the "circumstance giving rise to the grievance," the Union specifically referenced the Agency's restoration of the grievant's firearm on June 28. And in addition to this reference, the Union explicitly alleged that the Agency violated "[p]olicies regarding revocation and *reinstatement* issues [and the] Firearms *Reinstatement* Review Process."[3]

After finding that the Union properly raised the issue of the restoration of the grievant's firearm, the Arbitrator considered whether the Union had timely filed the grievance regarding the restoration. Applying Article 27 of the parties' agreement,[4] and noting that the grievance was filed within forty-five days of the Agency's June 28 restoration of the grievant's firearm, the Arbitrator concluded that the grievance was filed "within the timelines spelled out in the [parties' agreement]."[5]

In my view, the Arbitrator's determination that the Agency's June 28 restoration of the grievant's firearm was the incident giving rise to the grievance is an entirely plausible interpretation of the parties' agreement. This is particularly true insofar as the grievance, as noted, specifically referenced the June 28 restoration as a circumstance "giving rise to the grievance," and alleged that the Agency had violated its policies governing firearm restoration. Accordingly, I would deny the Agency's essence exception concerning this determination.[6]

[1] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Aliceville, Ala.*, 72 FLRA 497, 500 (2021) (Dissenting Opinion of Chairman DuBester).

[2] Majority at 3. Similarly, my colleague contends that "the grievance contained no specific allegation related to the restoration of the grievant's firearm authorization." *Id.* at 5 n.12.

[3] Exceptions Br. at 7; Exceptions, Attach. 4, NTEU Step II Grievance at 1-2 (emphasis added).

[4] Article 27 states, in relevant part that a grievance "should initially be raised as soon as practical, but no later than forty-five (45) days of the incident giving rise to the complaint or the date upon which the employee became or should have become aware of the incident." Exceptions Br., Attach. 13, Collective-Bargaining Agreement at 112.

[5] Award at 5.

[6] *Nat'l Weather Serv. Emps. Org. v. FLRA*, 966, F.3d 875, 882 (D.C. Cir. 2020) (emphasizing that "the Authority's sole inquiry under the proper standard of review should have been whether the [a]rbitrator was 'even arguably construing or applying the [CBA]'") (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 848 U.S. 29, 38 (1987)); *see also U.S. Dep't of Transp., FAA*, 65 FLRA 171, 173 n.4 (2010) (noting that "it is not the Authority's job to second-guess arbitrators by choosing the best among several interpretations of contract language and that, if an arbitrator's interpretation is plausible, then the Authority's inquiry ends").