

72 FLRA No. 141

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
TERRE HAUTE, INDIANA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 720
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5707

DECISION

March 22, 2022

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

I. Statement of the Case

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

The Agency assigned a non-bargaining-unit employee to a particular post and, then, removed that post from the roster that bargaining-unit employees use to bid on available assignments. Fifty days later, the Union filed a grievance arguing that the Agency violated the parties' agreement by removing the post from the roster. Arbitrator Dr. Richard D. Kimbel issued an award sustaining the grievance. He found that the grievance was timely because the Agency's alleged violation was ongoing, and sustained the grievance.

The Agency filed an exception arguing that the Arbitrator's timeliness determination failed to draw its essence from the parties' agreement. Because the Arbitrator failed to enforce the explicit deadline for filing a grievance contained in the parties' agreement, we vacate the award.

II. Background and Arbitrator's Award

Before the start of each quarterly rotation, the Agency posts a roster of the available assignments in the Health Services Department (HSD) pursuant to the procedures outlined in Article 18 of the parties' agreement. Bargaining-unit nurses bid on their preferred posts in order of seniority, and the Agency uses these bids to assign nurses to fill the available posts. In addition to employing bargaining-unit employees, the Agency also receives medical services from Public Health Services (PHS) officers. These officers are not bargaining-unit employees and are not covered under the parties' agreement.

On March 17, 2019, the Agency assigned a PHS officer in the HSD to a post listed on the roster used by the bargaining-unit nurses. Simultaneously, the Agency removed the post from the roster, preventing the bargaining-unit nurses from bidding on that post assignment. On May 6, 2019, the Union filed a grievance alleging the Agency violated the parties' agreement by removing the post. When the parties were unable to resolve the dispute, the Union invoked arbitration.

Before addressing the merits, the Arbitrator considered several procedural issues. As relevant here, the Agency argued that the Union's grievance was untimely. Article 31(d) of the parties' agreement provides that "[g]rievances must be filed within forty . . . calendar days of the date of the alleged grievable occurrence."¹ Although the Union filed the grievance more than forty days from the date that the Agency posted the roster, the Arbitrator found that a "new and reoccurring violation" occurred each day the PHS officer remained in the post.² According to the Arbitrator, the violation was ongoing and extended the deadline to file a grievance.³

On the merits, the Arbitrator found that the Agency violated multiple articles of the parties' agreement by unilaterally removing the post from the roster. He directed the Agency to post a new roster that included the post that the Agency had assigned to the PHS officer.⁴

The Agency filed exceptions to the award on February 9, 2021, and, on March 10, 2021, the Union filed an opposition to the Agency's exceptions.

¹ Award at 15.

² *Id.* at 18.

³ *Id.*

⁴ Finding that the Agency's counsel demonstrated a lack of candor in the hearing, the Arbitrator also levied a monetary sanction against the Agency. *Id.* at 21, 32-33.

III. Analysis and Conclusion: The Arbitrator's finding that the Union timely filed the grievance fails to draw its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator disregarded Article 31(d)'s deadline for filing a grievance.⁵ According to the Agency, the Arbitrator used the continuing-violation theory to "create a never-ending right of action for the Union on any roster issue."⁶ 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."⁷

As noted above, Article 31(d) states that "[g]rievances must be filed within forty . . . calendar days of the date of the alleged grievable occurrence."⁸ On the grievance form, the Union identified March 17, 2019, as the date that the Agency posted the roster.⁹ However, the Union did not file the grievance until May 6—fifty calendar days later.¹⁰ The Arbitrator cites no provision in the parties' agreement or any law that supports the award's characterization of the violation as a continuing

violation that created an exception to Article 31(d).¹¹ Accordingly, in the absence of any applicable exception to the forty-day filing deadline, we find that the Arbitrator failed to enforce the plain wording of Article 31(d). Because the Arbitrator's determination

⁵ Exceptions Br. at 15-17. 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); *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017); *U.S. DOD, Def. Cont. Audit Agency, Irving, Tex.*, 60 FLRA 28, 30 (2004) (Member Pope dissenting).

⁶ Exceptions Br. at 15.

⁷ *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)); see also *U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 947, 948-49 (2020) (Pershing) (then-Member DuBester dissenting) (holding that an arbitrator's finding that a continuing violation permitted an untimely invocation of arbitration did not represent a plausible interpretation of the parties' agreement where the agreement contained a clear deadline without exception).

⁸ Award at 15.

⁹ Exceptions, Attach. D, Attach. 2, Grievance Form at 1.

¹⁰ *Id.*

¹¹ Award at 17. Generally, a cause of action must be filed within the applicable filing period, whether that filing period is statutory, regulatory, or contractual. However, the judicial doctrine of continuing violation is an exception to that rule. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114-15 (2002). Under this doctrine, a claim is preserved when: (1) a series of events that alone may not be unlawful combine to create a cause of action, and (2) some, but not all, of the events occurred outside of the statutory deadline. *Id.* at 116-17. However, the United States Court of Appeals for the District of Columbia Circuit has clarified that the "mere failure to right a wrong . . . cannot be a continuing wrong . . . for that is the purpose of any [cause of action] and the exception would obliterate the rule." *Earle v. District of Columbia*, 707 F.3d 299, 306 (D.C. Cir. 2012) (quoting *Fitzgerald v. Seamans*, 553 F.2d 220, 230 (D.C. Cir. 1977)); *Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007) (holding that a "lingering effect of an unlawful act is not itself an unlawful act" (quoting *Guerra v. Cuomo*, 176 F.3d 547, 551 (D.C. Cir. 1999))). Here, the Union argued that the Agency began a "continuing" violation of Article 18 of the parties' agreement on March 17, 2019, when the Agency removed the post assigned to the non-Union officer from the roster. Award at 16. But, the record does not demonstrate, and the Arbitrator did not find, that the nature of the alleged violation required consideration of a history of acts over time or that the Union was prevented from filing its grievance on time. Rather, the Arbitrator concluded that, after the Agency posted the new roster, each day that the Agency did not return to the previous roster was effectively a new violation. *Id.* at 17. Therefore, the continuing violation doctrine does not preserve the Union's untimely grievance.

that the grievance was timely fails to draw its essence from the agreement,¹² we vacate the award.¹³

IV. Decision

We vacate the award.

¹² The dissent's argument concerning an agreement's "silence" is not supported by our precedent. Dissent at 6 n.12 (noting that "an agreement's silence on a matter does not demonstrate that the award fails to draw its essence from the agreement" (quoting *Pershing*, 71 FLRA at 950 (Dissenting Opinion of then-Member DuBester))). To the contrary, silence is precisely what the Authority looks for in this type of case because "when parties agree to a filing deadline—with *no mention* of any applicable exception—the parties intend to be bound by that deadline." *DODEA*, 70 FLRA at 938 (emphasis added). Here, no "applicable exception" to the forty-day filing deadline contained in Article 31(d) is found in the plain wording of that provision, or any other provision. *Id.* Therefore, the award fails to draw its essence from the parties' agreement because the Arbitrator added an exception to Article 31(d) that is not specified, generally or specifically, in the agreement. *See U.S. DOD, Domestic Elementary & Secondary Schs.*, 71 FLRA 236, 237 (2019) (Member Abbott concurring; then-Member DuBester dissenting) ("Because the [a]rbitrator cited no authority or contractual wording allowing him to disregard Article 27's explicit twenty-day timeframe for invoking arbitration, we find that the [a]rbitrator's procedural-arbitrability determination evidences a manifest disregard, and does not represent a plausible interpretation, of the parties' agreement."); *DODEA*, 70 FLRA at 938 ("The [a]rbitrator cited no authority or contractual language allowing him to disregard the parties' explicit forty-five-day limitation."); *see also U.S. Dep't of the Army, 93rd Signal Brigade, Fort Eustis, Va.*, 70 FLRA 733, 734 (2018) (then-Member DuBester dissenting) (noting that the relevant contract provision did not contain any wording that excused non-compliance with the procedural requirement of the parties' agreement).

¹³ While we do not address the merits of the Agency's management-rights argument, we note that the Authority recently addressed, and granted, a similar exception regarding Article 18 of the parties' agreement. *U.S. DOJ, Fed. BOP*, 70 FLRA 398, 406 (2018) (then-Member DuBester dissenting) (award prohibiting agency from reserving certain posts for PHS officers excessively interfered with management's right to assign employees and work).

Chairman DuBester, dissenting:

I disagree with the majority's conclusion that the Arbitrator's procedural-arbitrability determination does not represent a plausible interpretation of the parties' collective-bargaining agreement. Applying the deferential standard for reviewing essence exceptions to such determinations, I would affirm the Arbitrator's finding that the grievance was timely because the Agency's violation was ongoing.

On March 17, 2019, the Agency assigned a Public Health Services (PHS) officer in its Health Services Department to a post listed on the quarterly roster schedule of bargaining-unit nurses.¹ On that same day, the Agency unilaterally removed the post from the roster, thereby depriving the nurses the ability to use their seniority to bid on the post.² On May 6, 2019, the Union filed a grievance alleging—as a continuing violation—that the Agency violated the parties' agreement by removing the post on or about March 17, 2019.³

The Agency argued that the Union's grievance was untimely because it was not filed within forty calendar days from the date of the alleged violation, as required by Article 31(d) of the parties' agreement.⁴ Addressing this argument, the Arbitrator first noted that Article 31(e) of the parties' agreement provides that “[i]f a grievance is filed after the applicable deadline, the arbitrator will decide the timeliness if raised as a threshold issue.”⁵

Relying on this authority, the Arbitrator then determined that the roster at issue covered the nurses' schedule from March 17, 2019 to June 18, 2019.⁶ He further found that because the Agency “comingled” the nurses' quarterly roster schedules with the PHS employees' weekly schedule during this time period, the nurses were not allowed to use their seniority to bid on the post in violation of the agreement.⁷ And based on these findings, he concluded that the grievance was timely filed because a new violation occurred each day the PHS employee held the post.⁸

Unlike the majority, I would uphold this determination. As I have stated before, where parties have agreed to submit a procedural-arbitrability question to an arbitrator, the arbitrator's determination is subject to review only on narrow grounds.⁹ Here, acting within his explicit authority to decide the timeliness of the grievance, the Arbitrator reasonably determined that the grievance was timely because the Agency continued to violate the parties' agreement within the forty-day period set forth in their negotiated grievance procedure.

Notably, in concluding that the Arbitrator's determination conflicts with the plain wording of Article 31(d), the majority does not contend that the Arbitrator failed to apply this contractual provision. Rather, it concludes that the Arbitrator's timeliness finding does not draw its essence from the parties' agreement because the Union “identified March 17, 2019, as the date that the Agency posted the roster.”¹⁰

¹ Award at 17.

² *Id.*

³ *Id.*

⁴ Exceptions Br. at 13-14.

⁵ Award at 16.

⁶ *Id.*

⁷ *Id.* at 17.

⁸ *Id.*

⁹ See *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 71 FLRA 790, 792 (2020) (Dissenting Opinion of then-Member DuBester).

¹⁰ Majority at 3.

But this conclusion ignores that the Union, in the same form, listed “March 17, 2019 *and continuing (ongoing violation)*” where it was specifically asked to identify the “[d]ate(s) of [the] violation.”¹¹ Equally important, the majority ignores the findings upon which the Arbitrator concluded that the grievance was timely filed. Moreover, it entirely disregards the provision in the parties’ agreement explicitly conferring upon the arbitrator the authority to decide the timeliness of a grievance.¹²

Applying the well-established deference owed to arbitrators in resolving essence exceptions,¹³ I would find that the Arbitrator’s procedural-arbitrability determination constitutes a plausible interpretation of the parties’ agreement. I would therefore deny the Agency’s essence exception.

¹¹ Exceptions, Attach. D, Attach. 2, Grievance Form at 1 (emphasis added).

¹² The majority relies on several federal court decisions to conclude that the “judicial doctrine of continuing violation” cannot be applied to preserve the Union’s grievance. Majority at 4 n.10. But these decisions construe the continuing violation doctrine as applied to *statutory* statutes of limitations. Notably, in applying the *same* doctrine to negotiated grievance procedures, the D.C. Circuit Court of Appeals has held that “a labor arbitrator is not confined to the express provisions of the contract, but may also look to other sources—including the industrial common law—for help in construing the agreement.” *Nat’l Postal Mail Handlers Union v. Am. Postal Workers Union*, 589 F.3d 437, 443 (D.C. Cir. 2009) (*NPMHU*) (internal quotations omitted) (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581–82 (1960)) (upholding arbitrator’s award finding grievance timely filed under continuing-violations doctrine); *see also Brown & Pipkins, LLC v. SEIU*, 846 F.3d 716, 725-27 (4th Cir. 2017) (upholding arbitrator’s award that “looked beyond the express provisions in the [g]rievance and [a]rbitration [p]rocedure and applied the continuing violation doctrine to find grievance timely”). Indeed, the court has expressly held that application of the continuing violation doctrine in the arbitral context is “not outside traditional juridical and interpretive bounds.” *NPMHU*, 589 F.3d at 443 (citing *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2001)).

The majority also concludes that the award fails to draw its essence from the parties’ agreement because the Arbitrator “cites no provision in the parties’ agreement or any law that supports the award’s characterization of the violation as a continuing violation that created an exception to Article 31(d).” Majority at 3-4. But this conclusion ignores the “well-established principle[] . . . [that] ‘an agreement’s silence on a matter does not demonstrate that the award fails to draw its essence from the agreement.’” *U.S. Dep’t of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 947, 950 (2020) (Dissenting Opinion of then-Member DuBester) (quoting *U.S. Dep’t of the Treasury, Off. of the Comptroller of the Currency*, 71 FLRA 387, 392 n.9 (2019) (Dissenting Opinion of then-Member DuBester)). And this principle is supported by the above federal precedent applying grievances filed under the negotiated grievance procedures.

¹³ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Phoenix, Ariz.*, 70 FLRA 1028, 1031 (2018) (Dissenting Opinion of then-Member DuBester) (the Authority should not substitute its own interpretation of the parties’ agreement in place of the arbitrator’s in resolving an essence exception); *see also Nat’l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875, 881 (D.C. Cir. 2020) (in resolving an essence exception to an arbitral award, the Authority’s “sole inquiry” should be “whether the Arbitrator was ‘even arguably construing or applying the [CBA]’”) (quoting *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).