

72 FLRA No. 153

INTERNATIONAL BROTHERHOOD  
OF BOILERMAKERS  
LOCAL 290  
(Union)

and

UNITED STATES  
DEPARTMENT OF THE NAVY  
PUGET SOUND NAVAL SHIPYARD AND  
INTERMEDIATE MAINTENANCE FACILITY  
BREMERTON, WASHINGTON  
(Agency)

0-AR-5753

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DECISION

May 6, 2022  
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Before the Authority: Ernest DuBester, Chairman, and  
Colleen Duffy Kiko and James T. Abbott, Members  
(Member Kiko concurring)

**I. Statement of the Case**

Arbitrator David M. Gaba issued an award finding a grievance not arbitrable because it was untimely under the parties’ collective-bargaining agreement. The Union filed exceptions on essence and exceeded-authority grounds. Because the Union’s exceptions fail to demonstrate that the award is deficient, we deny them.

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

On October 7, 2020, the Union requested a copy of an investigation and other information concerning an employee (the October request). That same day, the Agency denied the request. In its denial, the Agency stated that the requested records were not in a “system of records” as required by Article 3, Section 0304(a) (Article 3)<sup>1</sup> of the parties’ agreement.

<sup>1</sup> Article 3 provides in relevant part: “Upon request, [e]mployees will be permitted to review their [o]fficial [p]ersonnel [f]older (OPF), and any other records identifiable to the [e]mployee which are contained in a system of records maintained by the [e]mployer (including e-mails). An [e]mployee’s representative when authorized by the [e]mployee in writing will be permitted to review the [e]mployee’s records.” Award at 3.

The parties communicated over the matter until October 13, but failed to resolve the matter. There was no further communication on the matter until January 21, 2021, when the Union sent the Agency a request for information (the January request), which was identical to the October request. The Agency denied the January request for the same reason it had denied the October request. On January 22, 2021, the Union filed a grievance over the Agency’s denial.

The parties could not resolve the matter and proceeded to arbitration. The parties stipulated to the issues as whether the grievance was timely filed in accordance with Article 30, Section 3005(a)(3) (Article 30)<sup>2</sup> of the parties’ agreement and whether the time period to file a grievance can be reset under that article “for denial of a request for information by submitting a second request for the same information at a later date.”<sup>3</sup>

The Arbitrator determined that the parties’ agreement did not place any limit on the number of times the Union could request the documents at issue. However, the Arbitrator found that the October and January requests were identical. Therefore, the Arbitrator concluded that “the Union first became ‘aware’ of the issue on October 7.”<sup>4</sup> The Arbitrator further found that the Union filed the grievance on January 22, 2021, well beyond the fifteen-working day deadline to file the grievance under the parties’ agreement. Therefore, the Arbitrator dismissed the grievance as untimely.

The Union filed exceptions to the award on August 12, 2021, and the Agency filed an opposition on September 13, 2021.

**III. Analysis and Conclusions: The Union’s exceptions do not establish that the award is deficient.**

The Union asserts that the award fails to draw its essence from the parties’ agreement because the Arbitrator modified Article 3 by “constructively” limiting a request for information to one request and then finding the grievance untimely.<sup>5</sup> 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

<sup>2</sup> Article 30 provides, in relevant part, that “grievances must be initiated with [in] . . . [fifteen] working days from the occurrence of the matter out of which the grievance arose or the time the aggrieved party or [e]mployee became aware of, or should reasonably be aware of, being aggrieved.” *Id.* at 4.

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.* at 20 (quoting Article 30).

<sup>5</sup> Exceptions at 6.

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>6</sup>

Contrary to the Union's assertion, the Arbitrator did not find that the agreement limited the number of times the Union could request the information at issue.<sup>7</sup> Rather, the Arbitrator found that the October and January requests were identical and, therefore, the Union was aware of the denial – as the grievable event – on October 7, 2020.<sup>8</sup> Applying this finding to the language of Article 30, the Arbitrator concluded that the grievance was untimely because it was filed more than fifteen working days after the date the Union became aware of the denial.<sup>9</sup> The Union fails to establish that this determination is unreasonable or implausible and consequently does not demonstrate that the award fails to draw its essence from the parties' agreement. Accordingly, we deny the essence exception.

Restating the same arguments it raised in its essence exception, the Union also asserts that the award is deficient on exceeded-authority grounds.<sup>10</sup> Because we have rejected those arguments, this exception provides no basis for finding the award deficient and we deny it.<sup>11</sup>

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<sup>6</sup> *Indep. Union of Pension Emps. for Democracy & Just.*, 71 FLRA 822, 824 n.17 (2020) (*IUPEDJ*) (citing *U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 103, 104 & n.13 (2019); *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017)).

<sup>7</sup> Award at 19-20.

<sup>8</sup> *Id.* at 20.

<sup>9</sup> *Id.* at 4, 20-22.

<sup>10</sup> Exceptions at 6-7 (arguing that the Arbitrator modified the terms of the agreement by constructively limiting an employee to one information request).

<sup>11</sup> *E.g.*, *IUPEDJ*, 71 FLRA at 824 (citing *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 623 (2014)) (denying exceeds-authority exception that restated rejected essence arguments). We note that the Arbitrator declined to address the Agency's argument that an earlier-filed unfair labor practice (ULP) charge barred the grievance because it was not included in the parties' stipulated issues. Award at 3. Although the Agency did not file exceptions to the award, in its opposition, it renews its assertion that the grievance is barred by 5 U.S.C. § 7116(d). Opp'n Br. at 4. The record indicates that the ULP charge concerned a request made on July 8, 2020. Award at 14; Opp'n, Attach. 4 at 35-38, Joint Ex. 7 (ULP Charge) at 3. However, the Agency has not provided the July request that is the basis for the ULP charge to support its argument, as required by § 2425.5 of the Authority's regulations. 5 C.F.R. § 2425.5 (an opposing party "must provide copies of any documents upon which [it relies]"); *cf.* 5 C.F.R. § 2425.6(e)(1) (exceptions are subject to dismissal where "[t]he excepting party fails to . . . support a ground as required in paragraphs (a) through (c) of

#### IV. Decision

We deny the Union's exceptions.

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this section"); *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 71 FLRA 240, 242 (2019) (then Member DuBester concurring) (denying exception where party failed to provide any document "substantiating [its] assertions"). Accordingly, we find that the Agency failed to support its argument that the grievance is barred by the ULP charge.

**Member Kiko, concurring:**

I concur in denying the Union's exceptions, but I write separately to highlight the Arbitrator's disturbing lack of neutrality in this case. Although the Arbitrator reached the correct result in finding the grievance untimely, the award is replete with statements that betray the Arbitrator's partiality towards the Union.

The Arbitrator repeatedly and inappropriately expressed discomfort with granting the Agency's timeliness objection. In the introduction, the Arbitrator noted, "I *very much* would like to address the Union's underlying issue."<sup>1</sup> Then, throughout the award, the Arbitrator wrote that it was unfortunate or regrettable that the Union's grievance would not proceed: (1) "unfortunately, the Agency [was] correct" about untimeliness;<sup>2</sup> (2) "regrettably, the Union did not propose" as an arbitration issue "whether the Union [was] entitled to the documents it ha[d] requested";<sup>3</sup> (3) "unfortunately," the Arbitrator had "no power to address the [merits] issue";<sup>4</sup> (4) "[u]nfortunately," the Arbitrator "could not find an exception to the general rule" on contractual deadlines "that would allow the Union to prevail";<sup>5</sup> and (5) "regrettably, the record establishe[d] that the [g]rievance was filed too late."<sup>6</sup> From my perspective, the most unfortunate aspect of this case was the absence of an impartial arbitrator.

Even worse, the Arbitrator was not content to disclose a sense of mere uneasiness with finding in favor of the Agency. Rather, the Arbitrator announced a steadfast desire to rule for the Union. It is astonishing to find a single statement to that effect in an arbitration award, but here, we have *five* such statements: (1) "[w]hile it *pains me*, I have to follow the guidance" of the Authority and find the grievance untimely;<sup>7</sup> (2) "[n]ot wanting to rule in the Agency's favor[,] I have looked at a number of exceptions" that might have allowed the grievance to proceed;<sup>8</sup> (3) "*I wish I could rule in [the Union's] favor*";<sup>9</sup> (4) "I truly sympathize with the Union for the outcome in this case";<sup>10</sup> and (5) "I am not happy with the decision I must make."<sup>11</sup> Thankfully, the

possibility of Authority review appears to have prevented the Arbitrator from succumbing to a strong desire to prejudice the outcome of this dispute.<sup>12</sup>

And yet, the Arbitrator could not resist the opportunity to coach the Union on how to win future disputes, even though the Arbitrator felt constrained to rule against the Union in this case. Although the parties agreed to forgo a hearing here, the Arbitrator suggested that the Union should have pursued a hearing so that "the Union could have asked [an Agency official] probing questions (while under oath)" about how information requests were processed.<sup>13</sup> According to the Arbitrator, "[g]oing forward, the Union must be careful about what it stipulates to."<sup>14</sup> And the Arbitrator returned to this advice later, writing, "[I]f the Union suspects that a 'fact' isn't true[,] they need to call witnesses and ask them questions under oath to disprove the alleged fact."<sup>15</sup> Stipulations save the parties valuable time and resources, and the Arbitrator should not have presumed – simply because of a craving for evidence that would support a ruling in accordance with the Arbitrator's personal preferences – that the parties entered into stipulations without thoughtful consideration.

The U.S. Supreme Court has recognized that, in order to function properly, systems of arbitration depend on "competent, conscientious, and impartial arbitrators."<sup>16</sup> And the arbitration provisions of the Federal Service Labor-Management Relations Statute certainly require the same. To protect the affected parties from a great disservice, anyone who is unable or unwilling to curb strong personal feelings in order to conscientiously render an impartial decision should refrain from arbitrating disputes.

<sup>1</sup> Award at 3.

<sup>2</sup> *Id.* at 20.

<sup>3</sup> *Id.* at 21 n.26.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 22.

<sup>6</sup> *Id.* at 23.

<sup>7</sup> *Id.* at 22 (emphasis added).

<sup>8</sup> *Id.* (emphasis added) ("Not wanting to rule in the Agency's favor[,] I have looked at a number of exceptions to the general rule that grievance timelines are to be enforced.").

<sup>9</sup> *Id.* at 23 (emphasis added).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., *id.* at 17 (noting that "the [Authority] has held that procedural deadlines must be taken seriously"); *id.* at 22 ("While it pains me, I have to follow the guidance of the [Authority] that the *timing* of the Union's awareness prevents me from finding that the [g]rievance was timely filed.").

<sup>13</sup> *Id.* at 21 n.26.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 23 n.30.

<sup>16</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985).