

**73 FLRA No. 6**

FEDERAL EDUCATION ASSOCIATION  
STATESIDE REGION  
(Union)

and

UNITED STATES  
DEPARTMENT OF DEFENSE  
EDUCATION ACTIVITY  
DOMESTIC DEPENDENT ELEMENTARY AND  
SECONDARY SCHOOLS  
(Agency)

0-AR-5656

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DECISION

May 26, 2022

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Before the Authority: Ernest DuBester, Chairman, and  
Colleen Duffy Kiko and Susan Tsui Grundmann,  
Members

**I. Statement of the Case**

The Union grieved the Agency's decision to change certain positions in the excepted service to the competitive service when it filled vacancies or new positions. Arbitrator Kurt Saunders found that the grievance was procedurally, but not substantively, arbitrable. The Agency challenges the Arbitrator's procedural-arbitrability determination on essence grounds. Because the Agency does not demonstrate that the Arbitrator's procedural-arbitrability determination fails to draw its essence from the parties' collective-bargaining agreement, we deny the Agency's essence exception.

The Union challenges the Arbitrator's substantive arbitrability determination on contrary-to-law grounds. Because the Arbitrator's substantive-arbitrability determination is contrary to Authority precedent, we grant the Union's exception. Therefore, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for a

decision on the merits of the grievance. And because we remand the award, we find it unnecessary to resolve the Agency's exceeded-authority exception and the Union's remaining contrary-to-law exception at this time.

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

On July 31, 2017, the Agency notified the Union that it would change certain professional positions previously designated as "[e]xcepted [s]ervice" to "[c]ompetitive [s]ervice."<sup>1</sup> In its notice, the Agency stated that for those positions, it would fill vacancies using "the hiring authorities/options under Title 5 (Competitive Service) as the appropriate source," but that employees who currently encumbered any affected position would remain in the excepted service.<sup>2</sup> In response, the Union filed an institutional grievance alleging that the Agency did not have the authority to implement the change and that filling bargaining-unit vacancies is "covered by" the parties' agreement.<sup>3</sup> The Agency denied the grievance and the Union advanced it to arbitration.

The Arbitrator framed four issues:

1. Are the Union's claimed contractual violations procedurally barred based on the language in Article 27 § 3 or Article 27 § 5a?
2. If not, is the Union's challenge to the Agency's decision to change positions from the Excepted Service to the Competitive Service a grievable issue?
3. Did the Agency provide the Union with appropriate notice as required by Article 7 § 2a of the anticipated adverse effects of such change on Article 22 § 3.d of the contract? If not, what is the remedy?
4. If arbitrable on the merits, did the Agency violate Article 22 and/or 10 [U.S.C. §] 2164 when it changed specified positions in the bargaining unit from Excepted Service to Competitive Service? If so, what is the appropriate remedy?<sup>4</sup>

On the first issue, the Arbitrator found that the Union's claimed violation of Article 22 was not procedurally barred by Article 27, Section 3 (Section 3).<sup>5</sup>

<sup>1</sup> Award at 6.

<sup>2</sup> *Id.* at 7.

<sup>3</sup> *Id.* at 7-8.

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

<sup>5</sup> Section 3 states that if the parties do not stipulate to the issue, "the arbitrator shall determine the issue or issues to be heard. Issues not raised during the grievance process, including timeliness, shall not be raised nor considered by the arbitrator during the arbitration process." Union Exceptions, Attach. 7, Master Labor Agreement (Agreement) at 96.

Article 22, Section 3.d provides that “[i]n selecting a source of recruitment from which to fill a position, the selecting Agency official will first consider permanent [Domestic Dependent Elementary Secondary Schools] employees for the position.”<sup>6</sup> Where the grievance referred to “the filling of vacancies” being “covered by” the parties’ agreement, the Arbitrator concluded that this “[could] only be viewed as a reference to Article 22.”<sup>7</sup> In reaching this conclusion, the Arbitrator found it “significant” that the Agency inferred, and rejected, a claimed violation of Article 22 in its grievance response.<sup>8</sup> The Arbitrator also rejected the Agency’s argument that the Union’s notice of witness testimony was contrary to Article 27, Section 5.a (Section 5a) and therefore, the grievance should be dismissed.<sup>9</sup> On this point, the Arbitrator noted that Section 5a did not require notice of “actual” testimony, and that, even “assuming” the Union’s witness notice failed to comply with Section 5a, that provision did not require dismissal of the grievance as a remedy.<sup>10</sup>

On the second issue, as relevant here, the Arbitrator stated that because “filling positions and hiring” are “exclusive” management rights under § 7106 of the Federal Service Labor-Management Relations Statute (the Statute), the choice of “service platforms under which these processes play out to complete hiring must also be held to be exclusive management rights.”<sup>11</sup> And he concluded that “subjects that are exclusive management rights are not grievable.”<sup>12</sup> Therefore, the Arbitrator did not address the merits of the Union’s claims that the Agency violated 5 U.S.C. § 2164 or Article 22 of the parties’ agreement.

Despite finding the grievance not arbitrable, the Arbitrator addressed the third issue, stating that a question remained as to whether the “the Agency provided appropriate notice to the Union of a change in working conditions affecting Article 22.”<sup>13</sup> On this issue, he found that bargaining-unit employees were adversely affected by the change because those employees whose positions remained in the excepted service were not given first consideration for positions, as required by Article 22, Section 3.d, and were instead deemed ineligible to apply for positions that were changed to the competitive service.

The Arbitrator concluded that when this adverse effect became apparent, the Agency had a contractual obligation to advise the Union of this change in working conditions but did not do so. As a remedy, the Arbitrator directed the Agency to give the Union an opportunity to submit impact and implementation proposals regarding employees adversely affected by the change.

On July 20, 2020, both the Union and the Agency filed exceptions to the award. On August 19, 2020, each party filed an opposition to the other’s exceptions.

### III. Analysis and Conclusions

#### A. The Arbitrator’s procedural-arbitrability determination draws its essence from the parties’ agreement.

The Agency argues that the Arbitrator’s determination that the grievance is procedurally arbitrable fails to draw its essence from Sections 3 and Section 5a.<sup>14</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>15</sup>

The Agency first argues that the award fails to draw its essence from Section 3 because the Arbitrator found that the Union had alleged a violation of Article 22 before arbitration by relying on a “presumption of arbitrability.”<sup>16</sup> Contrary to the Agency’s assertion, the Arbitrator did not rely only on a “presumption”<sup>17</sup> to find that Section 3 did not bar the grievance.<sup>18</sup> Rather, he found that the grievance’s reference to the parties’ agreement, in context, “can only be viewed as a reference to Article 22,” and that it was “significant” that the Agency relied on Article 22 in its grievance response.<sup>19</sup> Therefore, he concluded that Article 22 was raised before arbitration, as required by Section 3. The Agency’s disagreement with

<sup>6</sup> Award at 4 (quoting Art. 22).

<sup>7</sup> *Id.* at 12.

<sup>8</sup> *Id.* Unlike the Article 22 claim, the Arbitrator found that the Union’s claim that the Agency violated Article 4, Section 1.a was barred by Section 3 because the Union failed to raise that provision in the grievance. *Id.* at 13-14.

<sup>9</sup> Section 5a states, in relevant part: “Each party may recommend witnesses by providing the full name, address, and a statement setting forth the expected testimony. The parties will exchange witness lists at least one (1) day before the hearing.” Agreement at 96.

<sup>10</sup> Award at 13.

<sup>11</sup> *Id.* at 15.

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

<sup>13</sup> *Id.* at 15-16.

<sup>14</sup> Agency Exceptions at 5-7.

<sup>15</sup> *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 71 FLRA 997, 998 (2020) (citing *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014)).

<sup>16</sup> Agency Exceptions at 5-6.

<sup>17</sup> *Id.* at 5.

<sup>18</sup> *See* Award at 12-13.

<sup>19</sup> *Id.*

this conclusion does not demonstrate that the award is irrational, implausible, or in manifest disregard of the agreement.<sup>20</sup>

Next, the Agency asserts that the award fails to draw its essence from Section 5a because the Arbitrator denied the Agency's request to dismiss the grievance based on the Union's alleged failure to identify before arbitration that a witness would testify regarding arbitrability.<sup>21</sup> On this point, the Arbitrator found that Section 5a does not require the Union's witness list to identify "actual" testimony and also does not require dismissal of a grievance, even "assuming" that the Union had failed to comply with it.<sup>22</sup> Although the Agency takes issue with the Arbitrator's discussion, it does not identify any wording in Section 5a that is contrary to the Arbitrator's findings. Therefore, the Agency has not demonstrated that the award fails to draw its essence from Section 5a.<sup>23</sup>

Accordingly, we deny the Agency's essence exceptions.<sup>24</sup>

B. The Arbitrator's substantive-arbitrability determination is contrary to law.

The Union argues that the Arbitrator's conclusion that the grievance is not substantively arbitrable because it concerns management's right to hire under § 7106(a)(2)(A) of the Statute<sup>25</sup> is contrary to law.<sup>26</sup> The Authority has repeatedly held that the management rights provisions of § 7106 do not provide a basis for finding a grievance non-arbitrable.<sup>27</sup> Therefore, the Arbitrator erred by finding that the grievance was not arbitrable based on § 7106(a).<sup>28</sup> Accordingly, we grant the Union's contrary-to-law exception, and set aside the Arbitrator's finding that the grievance was not substantively arbitrable.

When an arbitrator incorrectly concludes that a grievance is not substantively arbitrable, the Authority has consistently remanded the award to the parties for resubmission to the arbitrator, absent settlement, for a decision on the merits.<sup>29</sup> Although the Union and the Agency challenge the Arbitrator's resolution of the third issue on contrary-to-law<sup>30</sup> and exceeded-authority grounds,<sup>31</sup> respectively, the Arbitrator's discussion on that issue is non-binding dicta because he found that the

<sup>20</sup> See, e.g., *U.S. Dep't of the Treasury, IRS, Agency-Wide Shared Servs., Florence, Ky.*, 63 FLRA 574, 578 (2009) (deferring to arbitrator's factual finding, based on the agency's grievance response, that grievance raised a specific contract provision).

<sup>21</sup> Agency Exceptions at 6.

<sup>22</sup> Award at 13.

<sup>23</sup> E.g., *U.S. Dep't of HHS, FDA, San Antonio, Tex.*, 72 FLRA 179, 180 (2021) (Chairman DuBester concurring) (denying essence exception that "fail[ed] to identify any language that demonstrates the [a]rbitrator ignored, irrationally interpreted, or implausibly read the parties' agreement").

<sup>24</sup> The Agency also asserts that the award fails to draw its essence from Article 27, Section 8, which requires the Arbitrator to make decisions that are consistent with the parties' agreement. However, this argument is premised on the Agency's arguments regarding Sections 3 and 5a. Agency Exceptions at 6-7 ("As the Arbitrator disregarded the express terms of both Article 27, Sections 3 and 5a, . . . the [a]ward also fails to draw its essence from Article 27, Section 8 . . ."). Because we deny the Agency's essence exceptions as to Sections 3 and 5a, we find that this argument does not demonstrate that the award is deficient.

<sup>25</sup> 5 U.S.C. § 7106(a)(2)(A).

<sup>26</sup> Union Exceptions Form at 4-6; Union Exceptions Br. at 9-11. When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo. *U.S. Dep't of State, Bureau of Consular Affs., Passport Servs. Directorate*, 70 FLRA 918, 919 (2018) (citing *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014) (NOAA)). In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.* (citing NOAA, 67 FLRA at 358). In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the appealing party establishes that those findings are nonfacts. *Id.* (citing *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (Member Pizzella concurring)).

<sup>27</sup> *SSA, Off. of Hearings Operations*, 72 FLRA 108, 110 (2021) (Chairman DuBester dissenting in part on other grounds) (citing *SSA, Off. of Hearings Operations*, 71 FLRA 646, 649 (2020) (then-Member DuBester dissenting on other grounds); *AFGE, Nat'l Border Patrol Council, Loc. 1929*, 63 FLRA 465, 466 (2009) (*Local 1929*); *U.S. DHS, CBP, N.Y.C., N.Y.*, 61 FLRA 72, 75 (2005) (Member Pope concurring)).

<sup>28</sup> *AFGE, Loc. 1045*, 64 FLRA 520, 522 (2010) (citing *Local 1929*, 63 FLRA at 466).

<sup>29</sup> E.g., *AFGE, Loc. 1401*, 67 FLRA 34, 38 (2012) (citations omitted); *Local 1929*, 63 FLRA at 467 (citations omitted).

<sup>30</sup> Union Exceptions Form at 5-6; Union Exceptions Br. at 11-13.

<sup>31</sup> Agency Exceptions at 7-10.

grievance was not arbitrable.<sup>32</sup> Accordingly, and in light of our decision to remand this case, we do not address the parties' arguments on this issue.<sup>33</sup>

#### IV. Decision

We deny the Agency's essence exceptions, grant the Union's contrary-to-law exceptions, in part, and remand this matter to the parties for submission, absent settlement, to the Arbitrator to resolve the merits of the grievance.

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<sup>32</sup> *NAIL, Loc. 17*, 68 FLRA 97, 100 (2014) (then-Member DuBester concurring on other grounds) (citations omitted) ("Where, as here, an arbitrator finds a matter not arbitrable, any comments he or she makes concerning the merits of that matter are dicta, and cannot form the basis for finding an award deficient."); *AFGE, Council of Prison Locs., Council 33*, 66 FLRA 602, 605 (2012) (where an arbitrator finds a grievance not procedurally arbitrable, any comments he or she makes concerning the merits of the grievance are non-binding dicta, and do not provide a basis for finding the award deficient).

<sup>33</sup> *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 68 FLRA 272, 275 (remanding an award for further findings on a contrary-to-law claim and stating that it was premature to resolve a remaining essence exception at that time); *AFGE, Loc. 3529*, 57 FLRA 464, 467 n.4 (2001) (finding it unnecessary to resolve the union's remaining arguments in view of the Authority's decision to remand the case).