

73 FLRA No. 10

NATIONAL LABOR RELATIONS BOARD
PROFESSIONAL ASSOCIATION
(Union)

and

NATIONAL LABOR RELATIONS BOARD
(Agency)

0-AR-5651

DECISION

June 2, 2022

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

I. Statement of the Case

If a collective-bargaining agreement defines a “grievance” using wording that mirrors the Federal Service Labor-Management Relations Statute (the Statute),¹ then an arbitrability award under that agreement must be consistent with case law interpreting the pertinent wording of the Statute.

The parties disputed the arbitrability of a Union grievance that alleged, in part, that the Agency committed unfair labor practices (ULPs) by implementing an executive order. Under a provision in the parties’ agreement, a “grievance” encompasses “any complaint . . . concerning . . . any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment”² – which mirrors the wording of § 7103(a)(9)(C)(ii) of the Statute.³

Arbitrator Roger P. Kaplan issued an award finding that (1) the grievance’s “requested remed[ies]” included “a declaration that the [executive order] was

contrary to law,”⁴ and (2) the agreement “does not include the ability to file a grievance over . . . the legality of the” executive order.⁵ Thus, the Arbitrator dismissed the grievance as not arbitrable. The Union filed exceptions. We find that, because the agreement mirrored § 7103(a)(9)(C)(ii) of the Statute, and that section authorizes grievances over “claimed violation[s] . . . of any law”⁶ – such as ULPs – it was contrary to law for the Arbitrator to find the Union’s grievance was not arbitrable.

II. Background and Arbitrator’s Award

After the conclusion of an appeal concerning challenges to Executive Order No. 13,837 (the executive order),⁷ the Agency notified the Union that the Agency was immediately implementing the executive order by limiting official time.⁸ The Union filed a grievance alleging that the Agency committed ULPs and violated the parties’ agreement by implementing the executive order. The requested remedies included the rescission of policies that implemented the executive order, and a declaration that the order was contrary to law and of no force or effect.

The Agency denied the grievance, which proceeded to arbitration. The agreement requires an arbitrator to decide arbitrability questions before a hearing on the grievance’s substantive allegations, so the Arbitrator agreed to issue a preliminary award limited to the question of whether the grievance was arbitrable.

The Arbitrator recognized that the operative definition of a “grievance” under the agreement is “any complaint . . . concerning . . . any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.”⁹ But he found that this agreement wording did “not include the ability to file a grievance over the legality . . . of” the executive order.¹⁰ Further, the Arbitrator emphasized the agreement’s “acknowledg[ment] that officials and employees are governed by existing or future laws and regulations,”¹¹ which the Arbitrator found to include the executive order and related Office of Personnel Management (OPM) guidance.¹² Similarly, the Arbitrator underscored that the agreement makes arbitration awards “subject to the provisions of existing laws, executive orders, regulations[,], and policies,”¹³ which the

¹ 5 U.S.C. §§ 7101-35.

² Award at 3-4 (quoting Collective-Bargaining Agreement (CBA) Art. 10, § 10.1(c)(2)).

³ 5 U.S.C. § 7103(a)(9)(C)(ii).

⁴ Award at 7.

⁵ *Id.* at 10.

⁶ 5 U.S.C. § 7103(a)(9)(C)(ii).

⁷ Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use, Exec. Order No. 13,837 (May 25, 2018), 83 Fed. Reg. 25,335 (June 1, 2018), *revoked by*

Protecting the Federal Workforce, Exec. Order No. 14,003, § 3(b), 86 Fed. Reg. 7,231, 7,231 (Jan. 22, 2021).

⁸ Award at 5.

⁹ *Id.* at 3-4 (quoting CBA Art. 10, § 10.1(c)(2)); *see id.* at 9-10 (same).

¹⁰ *Id.* at 10.

¹¹ *Id.* at 9 (citing CBA Art. 3, § 3.1).

¹² *Id.*

¹³ *Id.* at 11 (citing CBA Art. 11, § 11.2(a)).

Arbitrator interpreted as a “require[ment] . . . to follow the existing [executive order].”¹⁴

Considering the foregoing agreement provisions and the grievance’s request for a remedial declaration that the executive order was contrary to law, the Arbitrator found that there was “nothing the Union can achieve through the grievance.”¹⁵ As for the Arbitrator’s own authority, “[i]n the absence of being able to declare the [executive order] unlawful, there [was] no basis to uphold the Union’s grievance.”¹⁶

In a footnote, the Arbitrator noted that the “Union also argued that the Agency misinterpreted what the [executive order] required,” but the Arbitrator found that the executive order was “clear” and that “the Agency did not misinterpret” it.¹⁷ Rather, the Arbitrator concluded that the Agency “followed what it was directed to do by the [executive order] and the OPM guidance.”¹⁸

Ultimately, the Arbitrator “dismissed” the grievance as “not grievable or arbitrable.”¹⁹

The Union filed exceptions to the award on June 29, 2020, and the Agency filed an opposition on July 28, 2020.

III. Analysis and Conclusion: The award is contrary to § 7103(a)(9)(C)(ii) of the Statute.

The Union argues that the definition of a grievance under the agreement is a “word-for-word” reproduction of § 7103(a)(9)(C)(ii) of the Statute, because

of which the Arbitrator should have interpreted the agreement in a manner consistent with the Authority’s case law interpreting § 7103(a)(9)(C)(ii).²⁰ According to the Union, § 7103(a)(9)(C)(ii) authorizes the arbitration of ULP allegations in a “grievance” – as the Statute defines that term – so the agreement’s wording that mirrors the Statute must also authorize arbitrating ULP allegations.²¹ Consequently, the Union asserts that the Arbitrator’s contrary finding is inconsistent with the Statute.²²

The Authority applies statutory standards to assess the application of contract provisions that mirror, or are intended to be interpreted the same as, the Statute.²³ And the Authority has confirmed the use of this approach to review substantive-arbitrability determinations in particular.²⁴ The Union correctly observes that the pertinent wording of the agreement tracks the Statute word for word.²⁵ Nevertheless, the Agency contends that the Authority should not apply statutory standards to review the Arbitrator’s arbitrability determination because he relied on three provisions of the agreement²⁶ – not merely the provision that defines a “grievance.”²⁷

The Agency fails to cite any authority for the proposition that the Arbitrator’s application of multiple contract provisions insulates any one of those provisions from review using statutory standards when the pertinent contract wording mirrors the Statute. Notably, only one provision of the agreement defines a “grievance,” and that provision mirrors § 7103(a)(9)(C)(ii).²⁸ The other contract provisions that the Arbitrator referenced state that “officials and employees are governed by existing or

¹⁴ *Id.* at 11-12.

¹⁵ *Id.* at 11.

¹⁶ *Id.* at 12.

¹⁷ *Id.* at 9 n.3.

¹⁸ *Id.* at 12.

¹⁹ *Id.* at 13.

²⁰ Exceptions Br. at 13.

²¹ *Id.* at 11-13. Although the Arbitrator framed the question before him as whether the grievance was “grievable and[/]or arbitrable,” Award at 3, and found the grievance “not grievable or arbitrable,” *id.* at 13, there has been no suggestion that this dispute could be grievable but not arbitrable. Thus, our analysis of arbitrability applies equally to grievability. See 5 U.S.C. § 7121(a)(1) (requiring that negotiated “procedures for the settlement of grievances[] includ[e] questions of arbitrability”), (b)(1)(C)(iii) (requiring that any negotiated grievance procedure “provide that any grievance not satisfactorily settled . . . shall be subject to binding arbitration”).

²² When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Dep’t of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the applicable standard of law. *U.S. DOD, Dep’t of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

²³ *AFGE, Loc. 1164*, 64 FLRA 599 (2010) (citing *U.S. Dep’t of the Treasury, U.S. Customs Serv., Port of N.Y. & Newark*, 57 FLRA 718, 721 (2002), *pet. for review denied sub nom. NTEU, Chapter 161 v. FLRA*, 64 F. App’x 245, 245 (D.C. Cir. 2003) (per curiam) (unpublished)). “In these circumstances, ‘the Authority will “exercise care to ensure that the interpretation is consistent with the Statute, as well as the parties’ agreement.”” *AFGE, Loc. 1045*, 64 FLRA 520, 521 (2010) (*Loc. 1045*) (quoting *NFFE, Loc. 2010*, 55 FLRA 533, 534 (1999) (*NFFE*) (quoting *U.S. DOD, Def. Mapping Agency, Aerospace Ctr., St. Louis, Mo.*, 43 FLRA 147, 153 (1991))).

²⁴ *Loc. 1045*, 64 FLRA at 521.

²⁵ Compare Award at 3-4 (quoting CBA Art. 10, § 10.1(c)(2)), with 5 U.S.C. § 7103(a)(9)(C)(ii).

²⁶ Opp’n Br. at 6-10.

²⁷ Award at 3-4 (quoting CBA Art. 10, § 10.1(c)(2)).

²⁸ *Id.* (quoting CBA Art. 10, § 10.1(c)(2)).

future laws and regulations,”²⁹ and arbitration awards are “subject to the provisions of existing laws, executive orders, regulations[,] and policies.”³⁰ But neither of those provisions directly addresses arbitrability, and, as such, the Arbitrator primarily referred to them in connection with the grievance’s *merits* or available *remedies*.³¹ Thus, we reject the Agency’s argument that statutory standards do not govern our review of the substantive-arbitrability determination here.³²

The Authority’s case law on § 7103(a)(9)(C)(ii) is unequivocal that unions may grieve ULP allegations,³³ and the Arbitrator found that the grievance here alleged ULPs, as well as contract violations.³⁴ Further, the Statute requires that any unsettled “grievance . . . shall be subject to binding arbitration.”³⁵ Thus, under both § 7103(a)(9)(C)(ii) and the provision of the parties’ agreement that mirrors that section, the grievance was arbitrable. As the Arbitrator’s finding otherwise was contrary to law, we set it aside.

The Union also challenges the Arbitrator’s findings that the Agency (1) “did not misinterpret” the executive order³⁶ and (2) “followed what it was directed to do by the [executive order] and the OPM guidance.”³⁷ Where the issue before an arbitrator is limited to arbitrability, and the Authority sets aside the arbitrator’s legally erroneous finding that a grievance was not substantively arbitrable, all of the arbitrator’s statements on the merits of that grievance are dicta that do not provide a basis for finding an award deficient.³⁸ Here, the Arbitrator recognized that the only question was whether the grievance was arbitrable,³⁹ and we have set aside his answer to that question. Therefore, the remaining statements in the award on the case’s merits are not

binding, and we do not address the Union’s challenges to them.⁴⁰

In addition, the Union requests that we decide the merits of its grievance in the first instance, rather than remanding the case.⁴¹ But the Union fails to cite any authority for such an approach in a case, like this one, where the award under review was limited to non-merits issues. Thus, we deny this request and, instead, remand the case to the parties.

²⁹ *Id.* at 9 (citing CBA Art. 3, § 3.1).

³⁰ *Id.* at 11 (citing CBA Art. 11, § 11.2(a)).

³¹ *E.g., id.* (finding that “there [wa]s nothing the Union can achieve through the grievance” because the Agency was “constrained by the [executive order] and the OPM guidance”); *id.* at 12 (finding that, because “award [wa]s subject to the provisions of existing laws, executive orders, regulations[,] and policies,” there was “no basis to uphold the Union’s grievance,” and Arbitrator could not grant requested remedy of declaring executive order unlawful (emphasis added)).

³² *Loc. 1045*, 64 FLRA at 521; *NFFE*, 55 FLRA at 534; *see AFGE*, 59 FLRA 767, 767, 769-71 (2004) (Chairman Cabaniss concurring on other grounds) (Member Pope dissenting on other grounds) (although arbitrator interpreted Articles 2, 3, and 30 of parties’ agreement, Authority used statutory standards to review interpretation of only Article 2 because it mirrored § 7116(a)(1) of the Statute); *U.S. Dep’t of Energy, Rocky Flat Field Off., Golden, Col.*, 59 FLRA 159, 163-64 (2003) (Chairman Cabaniss concurring on other grounds) (reviewing arbitrator’s interpretation of Articles 4 and 21 of parties’ agreement using statutory standards, even though award also relied on Article 10).

³³ *E.g., NTEU*, 61 FLRA 729, 732 (2006) (“[Section] 7103(a)(9) . . . defines the term ‘grievance’ broadly to include any claimed violation of any law [affecting conditions of employment], including the Statute . . . [, so] an employee or union may allege in a grievance that an agency committed [a ULP]”); *U.S. Dep’t of HHS, Region V*, 45 FLRA 737, 743 (1992) (under § 7103(a)(9)(C)(ii), “an employee or union may allege in a grievance that an agency violated any law [affecting conditions of employment], including the Statute”). Although parties may agree to exclude ULPs from the scope of their negotiated grievance procedure, *AFGE, Loc. 3529*, 57 FLRA 464, 465-66 (2001), neither the Arbitrator, nor the parties in this case, identified such an exclusion.

³⁴ Award at 7.

³⁵ 5 U.S.C. § 7121(b)(1)(C)(iii).

³⁶ Award at 9 n.3.

³⁷ *Id.* at 12.

³⁸ *AFGE, Nat’l Border Patrol Council, Loc. 1929*, 63 FLRA 465, 467-68 (2009) (*Loc. 1929*).

³⁹ Award at 3.

⁴⁰ *Loc. 1929*, 63 FLRA at 467-68.

⁴¹ Award at 17.

Finally, the Union asks that, on remand, the parties be permitted to submit the dispute to any arbitrator of their choosing.⁴² The Agency's opposition does not address or dispute this particular point from the exceptions. Accordingly, we grant the Union's request.⁴³

IV. Decision

We grant the Union's contrary-to-law exception, in part; set aside the award;⁴⁴ and remand this matter to the parties for submission, absent settlement, to an arbitrator of their choice for further proceedings consistent with this decision.

⁴² Exceptions Br. at 39 (asking Authority to "remand this case to the parties to resubmit to a new arbitrator").

⁴³ See *Loc. 1045*, 64 FLRA at 522 ("The [u]nion requests that the Authority remand this matter to the parties for submission, absent settlement, to an arbitrator of their choice. The [a]gency does not address or dispute the [u]nion's request. As such, we remand this matter to the parties for submission, absent settlement, to an arbitrator of their choice . . ."). The Authority has held that, where the merits of a grievance have not been addressed, there is no compelling reason for depriving the parties of their choice of arbitrator on remand. *Id.* at 522 n.6 (citing *AFGE, Loc. 1757*, 58 FLRA 575, 576-77 (2003) (Chairman Cabaniss concurring in pertinent part and dissenting as to other matters)).

⁴⁴ Because we have set aside the award as contrary to § 7103(a)(9)(C)(ii) of the Statute, we need not address the Union's other arguments. Exceptions Br. at 14-16 (arguing award violates rationale of appeals court's decision), 18-35 (other contrary-to-law arguments), 35-37 (essence argument), 37-39 (exceeded-authority argument); see *U.S. Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 67 FLRA 382, 383 (2014) (after setting aside award based on one argument, Authority found it unnecessary to address others).