

**73 FLRA No. 34**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 3627  
(Union)

and

UNITED STATES  
DEPARTMENT OF  
HEALTH AND HUMAN SERVICES  
SOCIAL SECURITY ADMINISTRATION  
OFFICE OF HEARINGS OPERATIONS  
(Agency)

0-AR-5803

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DECISION

August 9, 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**

Arbitrator Mark M. Grossman found a grievance challenging the Agency's nonselection of the grievants untimely, and thus not procedurally arbitrable under the parties' collective-bargaining agreement. The Union challenges that award on essence grounds, but fails to demonstrate the Arbitrator's procedural-arbitrability determination is an irrational, unfounded, or implausible interpretation of the parties' agreement. Therefore, we deny the Union's essence exception.

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

The Union filed two grievances concerning two grievants' non-selection for two vacancies within a certain position. On January 12, 2021,<sup>1</sup> the Union submitted the grievances under Article 24, Section 9 of the parties' agreement (Section 9). On January 26, the Agency denied the grievances on the basis that the

grievants' non-selection was proper. Three days later, the Union requested, and the Agency approved, an extension of time for the Union to file a step-three grievance appealing the Agency's denial.<sup>2</sup> The parties agreed to a deadline of February 12. On that day, the Union submitted its step-three grievances by email. Citing Article 24, Section 14 of the parties' agreement (Section 14), which states that "a grievance . . . transmitted via e-mail [is] considered received on the first workday after the day of transmission of the email,"<sup>3</sup> the Agency denied the step-three grievances as untimely because it did not receive them until February 16, the first workday after the Union emailed them.

The parties consolidated the grievances (the grievance) and the dispute proceeded to arbitration. The issue before the Arbitrator was whether the Union had timely filed the grievance at step three. Before the Arbitrator, the Union argued it had submitted the grievance by the agreed-upon extended deadline. The Arbitrator disagreed, concluding that the grievance was untimely.

In reaching this conclusion, the Arbitrator found that the Agency had agreed to extend the deadline for receiving the grievance, as set forth in Section 9, until February 12. But the Arbitrator found that the Union did not request to modify Section 14, which determines when a grievance transmitted via email is considered to be received.<sup>4</sup> And, applying Section 14, the Arbitrator determined the Union's Friday, February 12 email submission was untimely because it was "received" by the Agency on the next workday, February 16.

The Union filed an exception to the award on March 31, 2022, and the Agency filed an opposition on April 28, 2022.

**III. Analysis and Conclusion: The award draws its essence from the parties' agreement.**

The Union argues the Arbitrator's determination that it untimely filed the grievance fails to draw its essence from the parties' agreement.<sup>5</sup> The Authority has held that a party "may directly challenge arbitrators' procedural-arbitrability determinations on essence grounds."<sup>6</sup> The Authority will find an award deficient as failing to draw its essence from a collective-bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the

<sup>1</sup> Unless otherwise noted, all dates hereafter occurred in 2021.

<sup>2</sup> Section 9 states that "[t]he grievance may be appealed to the Step 3 official within five . . . workdays after receipt of the Step 2 decision." Exception, Attach. 3, Article 24 (Art. 24) at 5.

<sup>3</sup> Award at 7.

<sup>4</sup> The Arbitrator found that, unlike Section 9, Section 14 "does not speak directly to deadlines," but "specifies" how the parties handle "an email submission." *Id.* at 8.

<sup>5</sup> Exception at 5-6.

<sup>6</sup> *U.S. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (then-Member DuBester concurring, in part, and dissenting, in part).

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>7</sup>

In its exception,<sup>8</sup> the Union argues that the award fails to draw its essence from Article 24, Section 7.C of the parties' agreement (Section 7.C), which provides that "[a]ll the time limits in this article may be extended by mutual consent."<sup>9</sup> According to the Union, Section 7.C allows the parties, as they did here, to mutually agree to extend the timeframe for when a grievance is considered received under Section 14.<sup>10</sup>

As noted previously, however, Section 14 states that "a grievance... transmitted via e-mail will be considered received on the first workday after the day of transmission of the email."<sup>11</sup> Interpreting this provision, the Arbitrator found that it "does not speak directly to deadlines," but "specifies" how the parties handle "an email submission."<sup>12</sup> And the Arbitrator further found that although the Union requested to modify the deadline under Section 9, it did not request to modify when an emailed grievance is deemed to have been received under Section 14.<sup>13</sup>

Based on these findings, which the Union did not challenge as nonfacts, we find no basis upon which to grant the Union's essence exception. There is nothing in the plain language of Section 7.C that is inconsistent with the Arbitrator's findings. Moreover, we conclude that the Arbitrator's application of Section 14 to determine that the grievance was untimely because the Agency did not receive the Union's February 12 email submission until February 16 is consistent with that provision's plain language.

Accordingly, we deny the essence exception.<sup>14</sup>

#### **IV. Decision**

We deny the Union's exception.

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<sup>7</sup> *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 67, 69 (2022) (Member Kiko concurring) (citing *SSA, Off. of the Gen. Couns.*, 72 FLRA 554, 555 (2021)).

<sup>8</sup> Exception at 5-6.

<sup>9</sup> Art. 24 at 4.

<sup>10</sup> Exception at 5.

<sup>11</sup> Art. 24 at 9.

<sup>12</sup> Award at 8.

<sup>13</sup> *Id.* at 9.

<sup>14</sup> *NTEU*, 72 FLRA 182, 184-85 (2021) (denying essence exception where award was consistent with plain language of parties' agreement); *see also AFGE, Loc. 3707*, 72 FLRA 666, 667 (2022) (Chairman DuBester concurring) (denying essence exception challenging arbitrator's finding that grievance was untimely filed).