

73 FLRA No. 47

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
(Agency)

0-AR-5798

DECISION

September 15, 2022

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

I. Statement of the Case

After selecting Arbitrator Joseph V. Simeri to resolve a Union grievance, the parties failed to schedule a hearing within the time frame required by their collective-bargaining agreement. Following the contractual deadline's expiration, the Agency requested that the Arbitrator dismiss the grievance. The Arbitrator scheduled a conference call with the parties, but the Union failed to participate. Subsequently, the Arbitrator issued an award dismissing the grievance on procedural-arbitrability grounds.

The Union filed exceptions to the award. Because §§ 2425.4(c) and 2429.5 of the Authority's Regulations¹ bar consideration of some Union exceptions, we dismiss those exceptions. Further, because none of the remaining exceptions establish that the Arbitrator's procedural-arbitrability determination is deficient, we deny them.

II. Background and Arbitrator's Award

The Union filed a grievance challenging certain Agency promotion policies, and the Agency denied the grievance. After the Union invoked arbitration, the parties selected the Arbitrator, who received a notice of appointment on March 27, 2020.

On April 20, 2020, the Union requested hearing dates from the Arbitrator. The next day, the Arbitrator emailed the parties asking about their availability, but neither party responded. In July 2020, the Arbitrator again emailed the parties concerning their availability and requested a preliminary meeting to discuss the process for conducting a remote hearing. The Agency agreed to the preliminary meeting, but the Union did not respond. As a result, no meeting occurred.

In April 2021 – more than a year after the parties selected the Arbitrator – the Agency requested that the Arbitrator consider dismissing the grievance pursuant to Article 44 of the parties' agreement. Article 44 provides that "[t]he arbitration hearing date must be scheduled (not held) within six months from the date the arbitrator was selected or the grievance will be considered terminated."²

Also in April 2021, the Arbitrator scheduled a conference call with the parties to discuss how the case should proceed, but the Union failed to appear. On the day of that call, the Arbitrator emailed the Union, requesting that it provide other dates and times when it would be available for a call. Later the same day, the Union attempted to respond with a request that the Arbitrator provide hearing dates in June 2021 but sent its email to the wrong email address. As the Arbitrator did not receive the email, he did not reply.

Subsequently, the Agency filed a motion to dismiss the grievance under Article 44. The Union opposed the Agency's motion to dismiss.³

The Arbitrator issued an award, which framed the issue as "whether the [g]rievance should be dismissed because it was not scheduled for [a] hearing within six months from the date the Arbitrator was selected."⁴

The Arbitrator noted that Article 44 requires the dismissal of a grievance when a hearing is not scheduled within six months of the arbitrator's selection, but provides for exceptions when: (1) the parties agree to extend the deadline; (2) the Agency refuses to participate in

¹ 5 C.F.R. §§ 2425.4(c), 2429.5.

² Opp'n, Attach., Collective-Bargaining Agreement at 234.

³ Although the Union filed its response to the Agency's motion to dismiss after the deadline that the Arbitrator established, the

Arbitrator considered the response "in the interest of arbitral fairness." Award at 2.

⁴ *Id.* at 6.

scheduling; or (3) the arbitrator is unable to provide a hearing date. The Arbitrator determined that the first two exceptions were inapplicable.

Regarding the third exception, the Arbitrator found that he had responded to the Union's April 2020 request for hearing dates, but the Union did not reply with its availability. The Arbitrator then noted that the Union never responded to his requests for a preliminary meeting in July 2020. "Had the Union responded," the Arbitrator stated, "it is likely a date for the arbitration [hearing] would have been selected."⁵ As for the April 2021 conference call, the Arbitrator observed that the Union neither participated nor provided a justification for its absence.

Concerning the Union's misdirected email, the Arbitrator held that, even if he had received it, the Union sent it in April 2021 – "well beyond the six-month time limitation [in Article 44] for scheduling" a hearing.⁶ Additionally, the Arbitrator noted that the Union never followed up after sending that email.

Upon finding that he had been available to schedule a hearing, the Arbitrator dismissed the grievance under Article 44.

The Union filed exceptions on February 28, 2022,⁷ and the Agency filed an opposition on April 20, 2022.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar four of the Union's exceptions.

Arguing that the Arbitrator's dismissal of the grievance denied the Union an opportunity to represent bargaining-unit employees, the Union alleges that the award is contrary to § 7114(a)(2) of the Federal Service Labor-Management Relations Statute (the Statute) and

fails to draw its essence from Article 1 of the parties' agreement.⁸ The Union also argues that the Arbitrator exceeded his authority⁹ and that he was biased.¹⁰

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.¹¹ Here, the Union did not argue to the Arbitrator that § 7114 or Article 1 required the Arbitrator to hold a hearing, or that he would exceed his authority by failing to consider the grievance's merits. Further, the Union did not argue to the Arbitrator that his conduct demonstrated bias. Because the Union could have raised these arguments to the Arbitrator, we dismiss these exceptions under §§ 2425.4(c) and 2429.5 of the Authority's Regulations.¹²

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.¹³

The Union argues that the award is based on a nonfact because the Arbitrator refused to hear testimony on the grievance's merits before making a procedural-arbitrability determination.¹⁴ Because this exception does not identify a specific factual finding, it does not establish that the award is deficient. Accordingly, we deny it.¹⁵

B. The Arbitrator did not deny the Union a fair hearing.

The Union argues that the Arbitrator denied the Union a fair hearing by "refus[ing]" to provide hearing dates or to hear the grievant's testimony about the

⁵ *Id.* at 9.

⁶ *Id.* at 11.

⁷ The Union requested an expedited, abbreviated decision. Exceptions at 18-19; *see also* 5 C.F.R. § 2425.7 (where "an arbitration matter before the Authority does not involve allegations of unfair labor practices," an excepting party may request an expedited, abbreviated decision and the Authority will consider whether such an abbreviated decision is appropriate). As the Union raised an unfair-labor-practice allegation, we have determined that an expedited, abbreviated decision is not appropriate in this case. Thus, we deny the Union's request. *See AFGE, Nat'l INS Council*, 69 FLRA 549, 550 (2016).

⁸ Exceptions at 13-14.

⁹ *Id.* at 17.

¹⁰ *Id.* at 10.

¹¹ 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOL*, 67 FLRA 287, 288-89 (2014) (*DOL*); *AFGE, Loc. 3448*, 67 FLRA 73, 73-74 (2012).

¹² *See DOL*, 67 FLRA at 288-89 (dismissing essence, nonfact, contrary-to-law, fair-hearing, and exceeded-authority exceptions where the party could have raised them before the arbitrator but failed to do so).

¹³ *U.S. Dep't of HHS*, 73 FLRA 95, 96 (2022); *AFGE, Loc. 2142*, 72 FLRA 764, 765 (2022) (Chairman DuBester concurring).

¹⁴ Exceptions at 13-14.

¹⁵ *See NAIL, Lab. Loc. 5*, 69 FLRA 573, 574 (2016) (denying nonfact exception where excepting party "fail[ed] to identify any factual findings and explain how these findings are clearly erroneous"); *AFGE, Council of Prisons Locs., Council 33*, 68 FLRA 757, 759-60 (2015) (denying nonfact exception concerning witnesses that arbitrator did not permit to testify where excepting party failed to "provide a basis for concluding that the [a]rbitrator made a clear error in a central factual finding").

grievance's merits.¹⁶ An award will be found deficient on the ground that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole.¹⁷

Here, the issue before the Arbitrator was whether to grant the Agency's motion to dismiss.¹⁸ The Union does not identify any pertinent or material evidence that the Arbitrator failed to consider in deciding that issue. Moreover, the Union does not claim, and there is no evidence to suggest, that the grievant's testimony would have related to the scheduling of the arbitration hearing or Article 44.¹⁹

In addition, the record does not support the Union's claim that the Arbitrator "refus[ed]" to provide hearing dates.²⁰ The Arbitrator found that the Union: did not respond to any of the Arbitrator's scheduling emails before the contractual deadline;²¹ failed to attend a scheduling conference call;²² and sent a hearing-date request to the wrong email address "well beyond the six-month time limitation" in Article 44.²³ The record further shows that the Arbitrator was available and willing to provide dates.²⁴ The Union does not challenge any of the above findings as nonfacts, and those findings support a conclusion that the Arbitrator did not deny the Union a fair hearing by refusing to provide hearing dates.

Consequently, we deny this exception.²⁵

C. The award is not contrary to law.

The Union argues that the award is contrary to § 7121(b)(1) of the Statute because the Arbitrator did not hold a hearing on the grievance's merits.²⁶ In support of this argument, the Union cites § 7121(b)(1)'s requirement that negotiated grievance procedures "provide that any grievance not satisfactorily settled . . . shall be subject to binding arbitration."²⁷

Absent statutory or contractual provisions to the contrary, the Authority presumes that arbitrators enjoy substantial latitude to manage procedural issues as they deem appropriate to the circumstances of the matter before them.²⁸ Applying Article 44, the Arbitrator found that the parties did not schedule a hearing before the negotiated deadline expired.²⁹ The Union identifies nothing in § 7121 or Authority precedent that guarantees a hearing on a grievance's merits when a negotiated agreement's procedural requirements have not been satisfied.³⁰ Thus,

¹⁶ Exceptions at 12.

¹⁷ *NTEU*, 66 FLRA 835, 836 (2012) (citing *AFGE, Loc. 1668*, 50 FLRA 124, 126 (1995)).

¹⁸ Award at 6 ("The issue is whether the [g]rievance should be dismissed because it was not scheduled for [a] hearing within six months from the date the Arbitrator was selected.").

¹⁹ To the extent that the Union alleges that the grievant's testimony would have shown that the "issue [was] an ongoing occurrence of arbitrability," Exceptions at 12, §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar that allegation because the Union did not present it to the Arbitrator.

²⁰ Exceptions at 12.

²¹ Award at 13.

²² *Id.* at 9-10.

²³ *Id.* at 11.

²⁴ *Id.* at 9 (listing emails the Arbitrator sent to the parties to schedule a hearing), 12 (noting the Arbitrator's attempts to hold a scheduling meeting in August 2020 and a conference call in April 2021), 13 (stating that the Arbitrator "had the ability to provide the parties with arbitration dates within the required time frame[,] but the parties . . . were unable or unwilling to work with me").

²⁵ See *AFGE, Loc. 2338*, 72 FLRA 743, 747-48 (2022) (denying fair-hearing exception where the arbitrator did not conduct a

hearing because excepting party had opportunity to submit briefs and evidence and, thus, the arbitrator did not fail to consider any pertinent evidence); *Nat'l Nurses United*, 70 FLRA 166, 167-68 (2017) (denying fair-hearing exception where excepting party did not establish that the arbitrator refused to hear or consider pertinent evidence or otherwise conducted the proceeding in a manner that so prejudiced the excepting party as to affect the fairness of the proceeding as a whole).

²⁶ Exceptions at 4 (citing 5 U.S.C. § 7121(b)(1)).

²⁷ 5 U.S.C. § 7121(b)(1).

²⁸ *AFGE, Loc. 2052, Council of Prison Locs. 33*, 73 FLRA 59, 60 (2022) (Chairman DuBester concurring); *NAGE, Fed. Union of Scientists & Eng'rs Loc. R12-198*, 63 FLRA 7, 7 n.a.1 (2008).

²⁹ Award at 7-8 (finding that the parties did not agree to extend the deadline and that the Agency did not refuse to participate in scheduling), 8-10 (describing Arbitrator's unsuccessful efforts to schedule a hearing), 16 ("[An] arbitration [hearing] was not scheduled within six months from the date of my selection to serve as the Arbitrator as required by the [parties' agreement].").

³⁰ *Cf.* 5 U.S.C. § 7121(a)(1) (stating that "collective[-]bargaining agreement[s] shall provide procedures for the settlement of grievances, including questions of arbitrability" (emphasis added)).

the Union has not established that the award is contrary to law.³¹

Accordingly, we deny this exception.³²

V. Decision

We dismiss, in part, and deny, in part, the Union's exceptions.

³¹ The Union also alleges that the Agency committed an unfair labor practice by denying the Union access to equipment, resources, and official time. Exceptions at 6-7 ("Had the [A]rbitrator allowed testimony, he would have learned [that] the [A]gency removed all of the [U]nion's equipment, resources[,] and official time."). However, the Union does not argue here – and did not argue before the Arbitrator – that an alleged violation of the Statute prevented the scheduling of a hearing. Absent evidence that the Agency prevented the Union from communicating with the Arbitrator about scheduling, this allegation provides no basis for finding the Arbitrator's procedural-arbitrability determination deficient. *See Dep't of the Air Force, Civilian Pers. Branch, Carswell Air Force Base, Tex.*, 5 FLRA 40, 43 (1981) (denying union exception alleging agency misconduct in its arbitration tactics – including a potential unfair labor practice – because the exception did not "concern the question before the Authority of whether the [a]rbitrator's award [wa]s deficient").

³² *See NTEU*, 72 FLRA 537, 539 (2021) (Chairman DuBester concurring) (denying contrary-to-law exception where excepting party fails to establish that award is contrary to the law upon which the excepting party relied); *Pro. Airways Sys. Specialists, Dist. No. 1, MEBA/NMU (AFL-CIO)*, 48 FLRA 764, 769 (1993) (same).