

73 FLRA No. 128

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL VETERANS AFFAIRS COUNCIL #53
(Union)

0-AR-5883

ORDER DISMISSING EXCEPTIONS

September 20, 2023

Before the Authority: Susan Tsui Grundmann, Chairman,
and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator Richard Trotter issued an award finding the Union's grievance procedurally arbitrable and granting the grievance on the merits. The Agency filed exceptions to the Arbitrator's arbitrability determination on essence and nonfact grounds, and to one of the awarded remedies on contrary-to-law grounds. For the reasons discussed below, we dismiss, in part, and deny, in part, the Agency's exceptions.

II. Background and Arbitrator's Award

Bargaining-unit employees (unit employees) may be represented by a different local union at each of the Agency's facilities. Each local union has its own dues structure and may vary in its dues withholdings. The Agency processes unit employees' dues withholdings and allotments.

In 2017, the parties executed a settlement agreement to resolve a 2016 grievance concerning improper dues collection and processing. The settlement agreement required the Agency to properly remit dues allotments to the appropriate local union for unit employees transferring between duty stations, and reimburse unit employees who had dues withholdings improperly deducted twice in the same pay period (double

deductions). The settlement agreement also provided that "[e]ither party may bring a claim in the form of a grievance arising from the breach of any term of this [a]greement. However, the parties agree to seek informal resolution of any issues arising from an alleged breach, or discrepancies regarding payments under . . . this [a]greement."¹

In 2019, the Union filed a national grievance (2019 grievance) alleging the Agency violated the parties' collective-bargaining agreement and §§ 7115(a) and 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute)² by failing to properly process dues withholdings. The Union cited, as examples of improper processing, the Agency's withholding double deductions and continuing dues withholding when an employee ceased to be a bargaining-unit member. The Agency denied the 2019 grievance, and the parties proceeded to arbitration.

At arbitration, the Agency asserted the 2019 grievance was not arbitrable. In response, the Union asserted the Agency had waived its arbitrability objections because Article 43, Section 4 and Section 11(B) of the parties' agreement (Section 4 and Section 11B, respectively) require the Agency to raise such objections within set timeframes. The Arbitrator found the Agency waived its arbitrability objections by not asserting them before the Agency's August 2019 "[s]tep 3 decision," as Section 4 required.³

The Arbitrator also rejected the Agency's argument that the Union waived its right to file the 2019 grievance by not meeting the settlement agreement's procedural requirements. He found the Agency's argument that the Union had failed to attempt informal resolution "not supported by the evidence."⁴ The Arbitrator further found the settlement agreement contained an exception to waiver of a grievance "where the Agency has breached the [settlement a]greement."⁵ On this point, the Arbitrator found the 2019 grievance alleged the Agency committed a "continuing violation" of improperly deducting Union dues and "thus a breach of the settlement agreement."⁶ Therefore, the Arbitrator concluded the 2019 grievance was arbitrable.

On the merits, the Arbitrator found that the Agency violated the parties' agreement, the settlement agreement, and the Statute by failing to properly process Union dues withholdings. In relevant part, as a remedy, the Arbitrator directed the Agency to make whole any employees financially harmed by the Agency's violations and "forgo any debt collection or recovery process" from employees.⁷

¹ Exceptions, Hr'g Agency Exs. 2, Settlement Agreement at 3; Award at 42.

² 5 U.S.C. §§ 7115(a), 7116(a)(1).

³ Award at 46.

⁴ *Id.* at 53.

⁵ *Id.* at 46.

⁶ *Id.*

⁷ *Id.* at 55.

The Agency filed exceptions on April 12, 2023, and the Union filed an opposition to the Agency's exceptions on May 11, 2023.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's contrary-to-law exception and part of its essence exception.

The Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.⁸ The Agency alleges that: (1) the Arbitrator's debt-collection and repayment remedies violate 5 U.S.C. § 5584;⁹ and (2) the award fails to draw its essence from the parties' agreement because the Arbitrator erred in applying Section 4 to determine that the Agency waived its arbitrability argument.¹⁰

The Union expressly argued before the Arbitrator that 5 U.S.C. § 5584 authorized waiver of repayment or debt related to dues allotments, and requested such waiver as a remedy.¹¹ The Union also raised the timeliness of the Agency's arbitrability challenges during the hearing,¹² and argued in its post-hearing brief that the Agency's arguments were untimely under both Section 4 and Section 11B.¹³ Thus, the Agency should have known to argue to the Arbitrator that the debt-waiver remedy is contrary to 5 U.S.C. § 5584 and that Section 4's timeline is inapplicable. Both parties filed their respective post-hearing briefs on February 24, 2023. The award issued on March 13, 2023. There is no evidence that the Agency attempted to raise the arguments it makes now to the Arbitrator, even though it could have done so.¹⁴ Therefore, we dismiss the Agency's contrary-to-law exception and part of its essence exception.¹⁵

IV. Analysis and Conclusions: The remaining exceptions do not demonstrate that the award is deficient.

In its remaining exceptions, the Agency relies on the settlement agreement to challenge the Arbitrator's arbitrability determination on two grounds. First, the Agency argues the arbitrability determination fails to draw its essence from the settlement agreement because the Union waived its right to file the 2019 grievance by not complying with the settlement agreement's requirement of attempting to "informally resolve" the claims underlying the 2019 grievance.¹⁶ Second, the Agency argues the arbitrability determination is based on the nonfact that the 2019 grievance alleged a breach of the settlement agreement and therefore was not waived by the settlement agreement.¹⁷

The Authority has repeatedly held that when an arbitrator bases an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient before the Authority will set the award aside.¹⁸ If the excepting party does not demonstrate that the award is deficient on a ground the arbitrator relied on, and the award would stand on that ground alone, then it is unnecessary to address exceptions to the other grounds.¹⁹

The Arbitrator relied on two separate determinations to find the 2019 grievance arbitrable. As discussed, the Arbitrator determined that the 2019 grievance was arbitrable because the Agency waived its arbitrability challenges,²⁰ and we have dismissed the Agency's exception to that finding.²¹ That finding alone provides a separate and independent basis for the Arbitrator's arbitrability determination.²² Because the Agency has not successfully challenged that finding, we need not address the Agency's exceptions concerning the settlement agreement's procedural requirements.

⁸ 5 C.F.R. §§ 2425.4(c), 2429.5; *AFGE, Loc. 3627*, 70 FLRA 627, 627 (2018); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bennettsville, S.C.*, 70 FLRA 342, 343 (2017).

⁹ Exceptions Br. at 3-7.

¹⁰ *Id.* at 8 n.4.

¹¹ Exceptions, Ex. 6, Union Post-Hr'g Br. (Union Br.) at 15, 32.

¹² Exceptions, Ex. 2, Tr. at 22-23.

¹³ Union Br. at 17.

¹⁴ *IFPTE, Loc. 4*, 73 FLRA 484, 485 (2023) (concluding that excepting party could have, but failed to, present argument to arbitrator where post-hearing briefs were due on the same date, and there was no evidence excepting party raised argument to arbitrator before award subsequently issued).

¹⁵ *Id.*; see also *AFGE, Loc. 2338*, 71 FLRA 1039, 1040 (2020) (dismissing contrary-to-law argument); *U.S. Dep't of Energy, W. Area Power Admin., Lakewood, Colo.*, 67 FLRA 376, 377 (2014) (dismissing contrary-to-law and essence arguments).

¹⁶ Exceptions Br. at 7-8.

¹⁷ *Id.* at 8-9.

¹⁸ *AFGE, Loc. 2338*, 73 FLRA 510, 513 (2023) (*Local 2338*) (citing *Fraternal Ord. of Police, DC Lodge 1*, 73 FLRA 408, 412 (2023) (*Police*)).

¹⁹ *Id.* at 513-14 (citing *AFGE, Council of Prison Locs. 33, Loc. 3690*, 69 FLRA 127, 132 (2015)).

²⁰ Award at 46.

²¹ See *supra* section III (applying 5 C.F.R. §§ 2425.4(c), 2429.5 to dismiss argument that Arbitrator's waiver determination failed to draw its essence from the parties' agreement).

²² See, e.g., *AFGE, Loc. 3438*, 65 FLRA 2, 4 (2010) (finding that "timeliness determination constitute[d] a separate and independent basis" for award).

Accordingly, we do not consider the Agency's remaining essence and nonfact arguments.²³

V. Order

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

²³ *Police*, 73 FLRA at 412 (declining to consider exceptions where separate and independent grounds supported award and excepting party had not demonstrated award was deficient on those grounds); *see also Local 2338*, 73 FLRA at 514 (finding it unnecessary to resolve exceptions to merits determination where award was based on separate and independent procedural-arbitrability determination); *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 625 (finding it unnecessary to resolve exceptions to procedural-arbitrability determination that was based on separate and independent ground).