

73 FLRA No. 135

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1012
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
NEW JERSEY HEALTH CARE SYSTEM
LYONS CAMPUS
LYONS, NEW JERSEY
(Agency)

0-AR-5887

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DECISION

October 19, 2023

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

I. Statement of the Case

Arbitrator Malcolm L. Pritzker denied a grievance alleging the Agency violated the parties' collective-bargaining agreement by failing to: (1) provide bargaining-unit employees (employees) with adequate break rooms and staff lounges (lounges); (2) treat the Union with respect and dignity; and (3) bargain with the Union over the lounges. The Union filed exceptions to the award on essence, bias, and fair-hearing grounds. For the reasons explained below, we partially dismiss the Union's bias and fair-hearing exceptions, and deny the remaining exceptions.

II. Background and Arbitrator's Award

Before the COVID-19 pandemic, the employees could take their breaks in the Agency's patient cafeteria (cafeteria). In 2022, the Agency limited the use of the cafeteria, and prepared two rooms and additional spaces for the employees to use as lounges.

The Union grieved the changes, alleging the Agency violated Article 32, Sections 1-5 (hereafter "Section 1, 2, 3, 4, 5," respectively) and Article 17, Sections 1(f) and 8 (Article 17) of the parties' agreement.¹ The grievance went to arbitration, where the Arbitrator framed the issue as: "Has the Agency violated any of the sections cited in step 1 of the grievance procedure of the master agreement?"²

Section 1 states: "Recognizing that the health and well-being of employees are necessary to the successful accomplishment of the [Agency's] mission, local management will provide staff lounges, break rooms, or other similar space for employee use."³ Section 2 states that "bargaining to implement this provision is appropriate and will include, but not be limited to, arrangements in facilities where there is insufficient space for dedicated lounges," and provides examples of appropriate bargaining topics.⁴ Section 3 states that "[s]taff lounges shall be reasonably accessible to the employees' work areas," and Section 4 states that the lounges "should be of sufficient size to accommodate the number of employees reasonably expected to use the space at any given time."⁵ Section 5 states, in relevant part, that any "past practices shall remain in effect, until and unless changed through bargaining."⁶

As to the Union's argument that the Agency violated Section 1, the Arbitrator found that the Agency "clear[ly]" provided lounges in both buildings, and that the "contract language does not describe what must be in the newly selected lounges[;] only that they must be similar."⁷ Regarding Sections 3 and 4, the Arbitrator determined the parties did not agree to the meaning of either "reasonably accessible" or "sufficient size."⁸ Citing testimony that employees walk between six to seven minutes from their work areas to the lounges, he found that this walking distance was not "unreasonable" under Section 3.⁹ He further found there was "insufficient proof" that Section 4 was violated.¹⁰

Although the Union asserted that the employees' pre-pandemic use of the cafeteria created a past practice by which the cafeteria was a lounge under Article 32, the Arbitrator found no evidence supported that assertion. Therefore, he rejected the Union's argument that the Agency violated Section 5. The Arbitrator further determined that the Agency did not violate Section 2 by failing to bargain before implementing the changes, because the Union "never" requested bargaining.¹¹

¹ Award at 1 (quoting Exceptions, Attach. C, Step 1 Grievance at 1).

² *Id.*

³ Exceptions, Attach. D, Article 32 of parties' collective-bargaining agreement (Article 32); Award at 1 (quoting Article 32).

⁴ Article 32; Award at 1.

⁵ Award at 1.

⁶ *Id.*

⁷ *Id.* at 3.

⁸ *Id.* at 4.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *See id.*

Finally, the Arbitrator found no evidence that the Agency violated Article 17, which requires the parties to treat each other with “respect and dignity.”¹² Consequently, the Arbitrator found that the Agency did not violate the agreement, and he denied the grievance.

On May 15, 2023, the Union filed exceptions to the award. On June 20, 2023, the Agency filed an opposition to the Union’s exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar some of the Union’s arguments.

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.¹³ The Union argues the Arbitrator was biased because he engaged in ex-parte communication with the Agency.¹⁴ Specifically, the Union asserts “there is evidence of possible correspondence between the Agency and the Arbitrator” that did not include the Union.¹⁵ The Union also argues the Arbitrator denied it a fair hearing because he allowed Agency managers into the arbitration hearing to “interject on testimony and discussion,” but did not allow Union witnesses into the hearing until it was their time to testify.¹⁶

The record demonstrates that before the hearing occurred, the Arbitrator and an Agency representative exchanged emails confirming the receipt of exhibits, discussing an agreement on the date and time of the hearing, and addressing certain hearing procedures.¹⁷ The record also shows that the Arbitrator contemporaneously forwarded the emails to the Union.¹⁸ Thus, the Union knew of these communications when the Arbitrator forwarded it the emails, but there is no record evidence that it raised any concerns to the Arbitrator. Similarly, the Union knew that Agency managers were present at the hearing, but there is no record evidence that the Union objected. As the Union could have, but did not, raise these arguments before the Arbitrator, it cannot do so now.¹⁹

Therefore, we dismiss these arguments.²⁰

IV. Analysis and Conclusions

A. The Union does not demonstrate that the award fails to draw its essence from the parties’ agreement.

The Union argues the award fails to draw its essence from the agreement for several reasons.²¹ The Authority will find that an award fails 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 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.²²

The Union asserts the award conflicts with Section 1’s plain language because the Agency converted a “locker room with a bathroom” into a lounge, which is not a “similar space” as Section 1 contemplates.²³ The Union also argues that it is not “in the best health and well-being of the employees to eat lunch in the direct space where people change and use the toilets.”²⁴ As noted above, Section 1 states that, for the “health and well-being of employees,” the Agency must provide “lounges, break rooms, or other similar space” for employee use.²⁵ As the Arbitrator found, Section 1 “does not describe what must be in the newly selected lounges,”²⁶ and does not limit the type of spaces that may be converted into lounges. The Union’s assertion provides no basis for finding the Arbitrator’s interpretation of Section 1 is deficient.²⁷

The Union also asserts that the Arbitrator failed to thoroughly examine Section 4 because he did not assess whether the newly-provided lounges were sufficiently large to accommodate the number of employees “reasonably expected” to be on breaks at the same time.²⁸ Contrary to the Union’s assertion, the Arbitrator acknowledged this requirement.²⁹ However, because he found the parties did not agree on the meaning of

¹² *Id.* at 1, 4.

¹³ *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 73 FLRA 82, 83-84 (2022) (citing 5 C.F.R. §§ 2425.4(c), 2429.5; *AFGE, Loc. 3627*, 70 FLRA 627, 627 (2018)).

¹⁴ Exceptions Br. at 6.

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 7.

¹⁷ See Exceptions, Attach. R, Additional Emails at 1.

¹⁸ *Id.*

¹⁹ See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mendota, Cal.*, 73 FLRA 474, 475-76 (2023) (barring arguments the excepting party could have made to the arbitrator at – or after – the arbitration hearing where there was no evidence that the excepting party did so).

²⁰ *IFPTE, Loc. 4*, 73 FLRA 484, 486 (2023).

²¹ Exceptions Br. at 4-5.

²² *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 73 FLRA 620, 622 (2023) (*BOP Yazoo*) (citing *NTEU, Chapter 149*, 73 FLRA 413, 416 (2023)).

²³ Exceptions Br. at 4.

²⁴ *Id.*

²⁵ Article 32 at 1; see also Award at 1.

²⁶ Award at 3-4.

²⁷ See *BOP Yazoo*, 73 FLRA at 622.

²⁸ Exceptions Br. at 5.

²⁹ Award at 4.

“sufficient size,”³⁰ the Arbitrator used the dictionary meaning of “sufficient” to interpret Section 4.³¹ Relying on that definition, as well as testimony that all of the employees do not use the lounges at the same time, the Arbitrator concluded that the Union did not demonstrate the provided spaces were insufficient.³² The Union’s disagreement with that conclusion does not demonstrate the Arbitrator disregarded any wording of Section 4.³³

The Union further argues the award is deficient because the Arbitrator failed to find the Agency violated Section 2 when it changed the employees’ lounges without notifying the Union and providing it with an opportunity to bargain.³⁴ Although the Arbitrator found the Agency did not violate Section 2 because the Union “never asked to bargain,”³⁵ the Union asserts that it “could not demand to bargain an action that ha[d] already occurred.”³⁶ Section 2 states that implementation of Article 32 is appropriate for local bargaining, and provides examples of suitable topics.³⁷ However, it does not establish any notice requirements or preclude post-implementation bargaining.³⁸ The Union’s argument provides no basis for finding the Arbitrator’s interpretation of Section 2 is deficient.³⁹

Additionally, the Union asserts the Arbitrator erred by determining there was no past practice, within the meaning of Section 5, concerning the employees’ use of the cafeteria as their lounge.⁴⁰ However, the Authority has explained that “[i]n arbitration cases, the Authority addresses issues as to whether a past practice exists under the nonfact framework.”⁴¹ As the Union did not file a nonfact exception to the Arbitrator’s determination that there was no past practice, its argument provides no basis for finding the award deficient.⁴²

Accordingly, we deny the Union’s essence exception.

B. The Union fails to establish that the Arbitrator was biased.

The Union argues that the Arbitrator was biased because he “did not consider” or “give any weight” to its witnesses’ testimony that they had been using the patient cafeteria for many years before the change occurred.⁴³ The Union also asserts that the Arbitrator “ignored the fact that the Union was unable to bargain” because the Agency provided no notice before making the changes to the lounges.⁴⁴

To establish that an arbitrator was biased, a party must demonstrate that the award was procured improperly, the arbitrator was partial or corrupt, or that the arbitrator engaged in misconduct that prejudiced a party’s rights.⁴⁵ A party’s assertion that an arbitrator’s findings were adverse to that party, without more, does not demonstrate that an arbitrator was biased.⁴⁶ A party’s disagreement with an arbitrator’s evaluation of the evidence and conclusions also is insufficient to establish bias.⁴⁷

Contrary to the Union’s assertion, the Arbitrator acknowledged the testimony of Union witnesses regarding their use of the patient cafeteria, but nevertheless concluded there was no past practice regarding its use.⁴⁸ The Union’s disagreement with the Arbitrator’s evaluation of the evidence and conclusions is insufficient to establish bias.⁴⁹ Further, as discussed previously, the Arbitrator found that Section 2 does not mandate pre-implementation bargaining, and we have denied the Union’s essence exception challenging that interpretation.⁵⁰ The mere fact that the Arbitrator’s interpretation was adverse to the

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 3-4.

³³ See *Ass’n of Admin. L. Judges, IFPTE*, 72 FLRA 302, 304 (2021) (Member Abbott concurring on other grounds) (denying essence exception based on argument that arbitrator ignored wording in parties’ agreement where award demonstrated that arbitrator considered the cited wording).

³⁴ Exceptions Br. at 4.

³⁵ Award at 4.

³⁶ Exceptions Br. at 4.

³⁷ Article 32 at 1; see also Award at 1.

³⁸ See Article 32 at 1.

³⁹ See *NTEU*, 72 FLRA 182, 185 (2021) (denying essence exception challenging arbitral finding that agency’s notice of a change was sufficient where cited provision of the parties’ agreement did not establish specific notice requirements).

⁴⁰ Exceptions Br. at 5.

⁴¹ *AFGE, Loc. 801*, 64 FLRA 791, 792 (2010) (quoting *NTEU, Chapter 66*, 63 FLRA 512, 514 n.3 (2009)).

⁴² See *U.S. Dep’t of VA, Nashville Reg’l Off., VA Benefits Admin.*, 72 FLRA 371, 374 (2021) (Member Abbott concurring on other

grounds) (explaining that even if the excepting party had raised a proper nonfact challenge to the arbitrator’s past-practice finding, the Authority would not find the award deficient on a nonfact basis where the parties disputed the existence of the alleged past practice before the arbitrator (citing *U.S. Dep’t of the Treasury, IRS, Greensboro, N.C.*, 61 FLRA 103, 105 (2005); *SSA, Off. of Hearings & Appeals*, 58 FLRA 405, 407 (2003))).

⁴³ Exceptions Br. at 5.

⁴⁴ *Id.* at 5-6.

⁴⁵ *AFGE, Loc. 3911, AFL-CIO*, 68 FLRA 564, 570 (2015) (*Local 3911*) (citing *AFGE, Loc. 3438*, 65 FLRA 2, 3 (2010)).

⁴⁶ *Id.* (citing *AFGE, Loc. 3354*, 64 FLRA 330, 332 (2009)).

⁴⁷ *Id.* at 571 (citing *U.S. Small Bus. Admin., Charlotte Dist. Off., Charlotte, N.C.*, 49 FLRA 1656, 1663 (1994) (*SBA Charlotte*)).

⁴⁸ See Award at 3-4.

⁴⁹ *Local 3911*, 68 FLRA at 571 (citing *SBA Charlotte*, 49 FLRA at 1663).

⁵⁰ *Supra* section IV.A; see also *U.S. Dep’t of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 498, 504 (2023) (*VA Pershing*).

Union's position does not demonstrate bias.⁵¹ Moreover, the Union does not allege that the award was procured by improper means, there was partiality or corruption on the Arbitrator's part, or the Arbitrator engaged in misconduct that prejudiced the Union's rights.

Thus, we deny the exception.⁵²

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

The Union argues that the Arbitrator denied it a fair hearing because the award states "that there were two witnesses for the Union and one witness for the Agency" but the Union "is not sure who that witness was."⁵³ The Union also claims that it was denied a fair hearing because the Arbitrator gave no weight to its witnesses' testimonies.⁵⁴

An award will be found deficient on the ground that an arbitrator failed to provide a fair hearing where the excepting 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.⁵⁵ However, mere disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded to it, provides no basis for finding an award deficient on fair-hearing grounds.⁵⁶

The Union does not explain how its confusion about the identity of the witnesses demonstrates that the Arbitrator denied it a fair hearing.⁵⁷ Therefore, we reject this argument as unsupported.⁵⁸ Further, the Union's argument that the Arbitrator improperly *weighed* evidence does not demonstrate that the Arbitrator refused to *hear or consider* evidence and, thus, does not demonstrate that the Arbitrator denied the Union a fair hearing.⁵⁹

V. Decision

We partially dismiss, and partially deny, the Union's exceptions.

⁵¹ *VA Pershing*, 73 FLRA at 504 (citing *AFGE, Loc. 2052, Council of Prison Locs. 33*, 73 FLRA 59, 61 (2022) (Chairman DuBester concurring); *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, 70 FLRA 924, 929 (2018) (Member DuBester concurring, in part, and dissenting, in part, on other grounds)).

⁵² *Id.*

⁵³ Exceptions Br. at 6.

⁵⁴ *Id.* at 7.

⁵⁵ *AFGE, Loc. 2338*, 73 FLRA 229, 231 (2022) (citing *NTEU*, 66 FLRA 835, 836 (2012)).

⁵⁶ *AFGE, Loc. 1938*, 66 FLRA 741, 743 (2012) (disagreement with an arbitrator's evaluation of evidence, provides no basis for

finding an award deficient on fair-hearing grounds (citing *U.S. Dep't of VA, VA Med. Ctr., Louisville, Ky.*, 64 FLRA 70, 72 (2009))).

⁵⁷ See Exceptions Br. at 6-7.

⁵⁸ 5 C.F.R. § 2425.6(e)(1) (an exception "may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground as required in" 5 C.F.R. § 2425.6(b)); see, e.g., *BOP Yazoo*, 73 FLRA at 622-23 ("Consistent with § 2425.6(e)(1), when a party does not provide any arguments to support its exception, the Authority will deny the exception." (citing *NTEU*, 70 FLRA 57, 60 (2016))).

⁵⁹ See, e.g., *U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 57 FLRA 72, 74 (2001).