73 FLRA No. 168

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS HEALTH ADMINISTRATION
(Agency)

and

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

0-AR-5834

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DECISION

May 6, 2024

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

I. Statement of the Case

The Union filed a grievance alleging the Agency violated a past practice by not allowing employees in firefighter positions to satisfy Agency training and accreditation requirements with state-accredited certification training. Arbitrator A. Martin Herring found the grievance procedurally arbitrable under the parties' collective-bargaining agreement (CBA), and concluded the Agency acted contrary to the past practice in the manner the Union alleged. The Agency filed exceptions on essence, nonfact, and contrary-to-law grounds. For the reasons explained below, we partially dismiss and partially deny some of the exceptions. However, we are unable to determine whether the award is contrary to management's right to assign work under § 7106(a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute).[1] Therefore, we remand this matter to the parties for resubmission to the Arbitrator for further findings, absent settlement.

II. Background and Arbitrator's Award

The Union represents Agency firefighters. In June 2020, the Agency implemented Agency Directive 7718 (the directive). As relevant here, the directive states "all [Agency] fire departments must participate in an accredited certification program."[2] It also requires firefighters to have specific certifications and maintain those certifications through training consistent with standards established by the National Fire Protection Association.[3]

The Union filed a grievance alleging an Agency manager notified firefighters at the Agency's Bath, New York facility (Bath facility) in June 2021 that they could receive training and certifications to satisfy the directive's requirements only from nationally accredited programs (accreditation requirement). The grievance alleged the accreditation requirement violated Agency policy and a past practice whereby the Agency permitted firefighters to satisfy the directive's requirements by receiving training from state-accredited certification programs. The grievance also alleged the Agency violated the CBA and committed an unfair labor practice (ULP) by not providing the Union with notice and an opportunity to bargain before implementing the accreditation requirement. The Agency denied the grievance, and the parties proceeded to arbitration.

The parties did not stipulate to, and the Arbitrator did not frame, any issues. However, the Arbitrator resolved – as threshold matters – two procedural-arbitrability issues. First, he addressed the Agency's argument that the grievance was not timely filed under Article 43, Section 11.A of the CBA (Art. 43(11)(A)).[4] The Arbitrator rejected this argument because the Agency failed to raise it within forty-five days of receipt of the grievance, as required by Article 43, Section 11.B of the CBA,[5] and because he found the grievance – which was "of [a] continuing nature"[6] – was timely filed. Second, the Agency argued that because the Union had failed to prove *any* change in accreditation policy, the grievance could not have been filed timely under Art. 43(11)(A).[7] According to the Arbitrator, the Agency's position "that the grievance [was] not arbitral by reason of it being of a de minimis nature [was] not

[1] 5 U.S.C. § 7106(a)(2)(B).
[2] Exceptions, Ex. 5, Directive at 11.
[3] *Id.* at 12.
[4] This provision requires national-level grievances to be filed within thirty days of the act or occurrence giving rise to the grievance, or the date the party became aware or should have become aware of the act or occurrence. Exceptions, Ex. 2, CBA (CBA) at 233.
[5] As relevant here, this provision requires a "final written decision, including any position on grievability or arbitrability, . . . be rendered by the respondent within [forty-five] days of receipt of the grievance." *Id.* The Agency's decision denying the grievance did not allege that the grievance is not grievable or arbitrable. *See* Exceptions, Ex. 8, Agency Grievance Resp. at 1-4.
[6] Award at 3.
[7] Exceptions, Ex. 12 (Agency Post-Hr'g Br.) at 7-8 (arguing that because the Union had not provided evidence of a change in policy within thirty days of the grievance, the grievance should be found untimely).

supported by convincing evidence."[8] Therefore, the Arbitrator concluded the grievance was arbitrable.

As to the merits, although the Arbitrator noted elsewhere in the award that the grievance alleged the Agency violated Articles 2, 3, 47, and 49 of the CBA,[9] he did not reference those CBA articles in his merits analysis. Instead, he observed that, as a general matter, "[i]t is an arbitrator's duty . . . to attempt to determine how the parties interpreted the agreement by their behavior."[10] He then determined that a past practice existed whereby the Agency permitted firefighters to satisfy training and certification requirements through state-accredited programs (the past practice).[11]

In finding the past practice, the Arbitrator did not expressly interpret any of the articles cited in the grievance. Rather, he found the parties "openly acknowledged and accepted for [twenty-two] years the practice of accreditation at the Bath [facility]."[12] Additionally, the Arbitrator found "[n]o credible evidence was presented . . . that the state of New York process[,] which is accredited, is not acceptable as a nationally accredited process."[13] Based on these findings, the Arbitrator concluded the past practice was "enforceable,"[14] and he directed the Agency to continue the past practice "to satisfy the training requirement and accreditation requirement in [Agency] directives[] until and unless the parties agree to another mutually acceptable accreditation program."[15] Having reached this conclusion, the Arbitrator further concluded he "need not address" the Union's ULP claim.[16]

On September 7, 2022, the Agency filed exceptions to the award, and on October 5, 2022, the Union filed an opposition to the Agency's exceptions. On September 26, 2023, the Authority issued *Consumer Financial Protection Bureau* (*CFPB*),[17] which revised the test the Authority will apply in cases where parties file management-rights exceptions to arbitration awards finding CBA violations. The Authority allowed the parties to file additional briefs concerning how the *CFPB* test should apply in this case. The Agency filed its supplemental brief on October 25, 2023, and the Union filed its supplemental brief on October 27, 2023.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Agency'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.[18] Citing Article 43, Section 2.A and Article 47, Section 2.A of the CBA (Art. 43(2)(A) and Art. 47(2)(A), respectively), the Agency argues the Arbitrator's finding that the grievance was arbitrable fails to draw its essence from the CBA and is contrary to law.[19] The Agency also argues the award conflicts with management's right to direct employees under § 7106(a)(2)(A) of the Statute.[20]

Before the Arbitrator, the Agency challenged the grievance's arbitrability under several provisions of the CBA,[21] and also argued the award conflicts with management's right to assign work under § 7106(a)(2)(B) of the Statute.[22] However, it did not make arguments concerning Art. 43(2)(A), Art. 47(2)(A), or management's right to direct employees under § 7106(a)(2)(A).[23] Because the Agency could have, but did not, raise Art. 43(2)(A), Art. 47(2)(A), or § 7106(a)(2)(A) before the Arbitrator, it cannot do so now.[24] Therefore, we dismiss those arguments under §§ 2425.4(c) and 2429.5 of the Authority's Regulations.

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[8] Award at 3.

[9] *Id.* at 2. Article 2 states that the parties are governed by applicable laws, rules, and regulations. CBA at 6. Article 3 concerns labor-management cooperation. *Id.* at 9-11. Article 47 addresses mid-term bargaining. *Id.* at 242-44. Article 49 concerns the parties' rights and responsibilities "imposed" by the Statute and the CBA. *Id.* at 250-53.

[10] Award at 3.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at 4.

[16] *Id.* at 3.

[17] 73 FLRA 670 (2023).

[18] 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DHS, 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)).

[19] Exceptions Br. at 7, 9.

[20] *Id.* at 11-13 (citing 5 U.S.C. § 7106(a)(2)(A)); Agency Supp. Br. at 2.

[21] Agency Post-Hr'g Br. at 6-9.

[22] 5 U.S.C. § 7106(a)(2)(B).

[23] Agency Post-Hr'g Br. at 6-9 (arguing grievance was not arbitrable), 15-17 (arguing award conflicts with § 7106(a)(2)(B)).

[24] *U.S. Dep't of the Army, U.S. Army Garrison, Picatinny Arsenal, N.J.*, 73 FLRA 700, 701 (2023) (barring arbitrability challenges because excepting party could have, but did not, raise them to arbitrator); *SSA*, 69 FLRA 208, 209 (2016) (barring argument concerning right to direct employees because excepting party could have, but did not, raise it to arbitrator).

IV. Analysis and Conclusions

A. The Agency's exceptions do not challenge a separate and independent ground for the Arbitrator's arbitrability ruling.

The Agency argues the Arbitrator's finding that the grievance was timely filed fails to draw its essence from Art. 43(11)(A), and is contrary to law.[25] The Agency also argues the Arbitrator's failure to "enforc[e] the parties' agreed-upon limits on national grievances" fails to draw its essence from Article 47, Section 4.B (Art. 47(4)(B)),[26] and is contrary to law.[27] Specifically, the Agency contends the Arbitrator ignored its arguments that the grievance was improperly filed as a national grievance and that he could not "assume jurisdiction over a grievance's merits when the party invoking arbitration fail[ed] to comply with procedural requirements that are specifically enumerated in [Art. 47(4)(B)]."[28]

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.[29] 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.[30]

The Arbitrator relied on two separate determinations to find the grievance procedurally arbitrable. Specifically, he found that the Union timely filed the grievance, and that the Agency failed to timely raise its arbitrability challenges.[31] The Agency does not challenge the Arbitrator's finding that it untimely raised its arbitrability challenges. That finding alone provides a separate and independent basis for the Arbitrator's arbitrability determination.[32] Although the Arbitrator did not explicitly address the Agency's Art. 47(4)(B) claim that the grievance was inarbitrable because it was improperly filed, that claim is encompassed by his finding that the Agency's arbitrability claims were untimely.[33] Therefore, we do not consider the Agency's remaining challenges to the Arbitrator's arbitrability determination.[34]

B. The award is not based on a nonfact.

The Agency argues the Arbitrator's past-practice finding is based on a nonfact.[35] To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[36] However, disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, does not establish that an award is based on a nonfact.[37]

The Agency argues the Arbitrator's past-practice finding is based on the nonfact that "the parties openly acknowledged and accepted for [twenty-two] years the practice of accreditation at the Bath [facility]."[38] Specifically, the Agency argues that the Arbitrator failed to credit allegedly uncontradicted testimony of an Agency witness demonstrating the Agency did not knowingly acquiesce to the past practice, and that the Union did not present sufficient evidence to the contrary.[39] However, these arguments merely challenge the Arbitrator's evaluation of the evidence and, therefore, do not provide a

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[25] Exceptions Br. at 7-8.
[26] *Id.* at 9. Article 47(4)(B) states, in relevant part, that "[p]roposed changes in personnel policies, practices, or working conditions affecting the interests of two or more local unions within a facility shall require notice to a party designated by the [National Veterans Affairs Council] President with a copy to the affected local unions." CBA at 244.
[27] Exceptions Br. at 8-9.
[28] *Id.* at 9.
[29] *U.S. Dep't of VA*, 73 FLRA 660, 661 (2023) (*VA*) (citing *AFGE, Loc. 2338*, 73 FLRA 510, 513 (2023) (*Local 2338*)).
[30] *Id.* (citing *Local 2338*, 73 FLRA at 513-14).
[31] Award at 3.
[32] *See, e.g.*, *VA*, 73 FLRA at 661-62; *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 625 (2014) (denying exceptions challenging procedural-arbitrability determination where an unchallenged finding of waiver provided a "separate and independent basis" for the determination).
[33] We note the Agency did not assert the Arbitrator exceeded his authority by failing to address an issue.
[34] *VA*, 73 FLRA at 662 (where arbitrator relied on "two separate determinations to find the . . . grievance arbitrable," and exceptions did not successfully challenge one of those determinations, Authority did not address exceptions concerning the other determination).
[35] Exceptions Br. at 13-14.
[36] *AFGE, Loc. 4156*, 73 FLRA 588, 590 (2023) (*Local 4156*) (citing *U.S. Dep't of HHS*, 73 FLRA 95, 96 (2022)).
[37] *Id.* (citing *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 67, 70-71 (2022) (Member Kiko concurring on other grounds)).
[38] Exceptions Br. at 14.
[39] *Id.*

basis for finding the award is based on a nonfact.[40] As such, we deny the Agency's nonfact exception.

C. We partially deny the Agency's contrary-to-law exception, but remand the award for further findings.

The Agency argues the award is contrary to law for several reasons.[41] When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.[42] Applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[43] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[44] An exception based on a misunderstanding of an arbitrator's award does not demonstrate the award is contrary to law.[45]

First, the Agency argues the Arbitrator erred, as a matter of law, in finding there was more than a de minimis change in a condition of employment requiring the Agency to bargain.[46] The Agency misunderstands the award. At arbitration, the Agency argued that the grievance was untimely because the Union failed to provide sufficient evidence that any change took place within thirty days of the grievance's filing.[47] In determining the grievance's *arbitrability*, the Arbitrator rejected the Agency's argument that "the grievance is not arbitral by reason of it being of a de minimis nature" because he found the evidence did not support that argument.[48] The Arbitrator's determination was not made in the context of addressing the Agency's duty to bargain. Indeed, the Arbitrator found it unnecessary to resolve whether there was a change to a condition of employment that triggered the Agency's duty to bargain, nor did he direct the parties to bargain.[49] Because the Agency misunderstands the award, this argument provides no basis for finding the award contrary to law.[50]

The Agency also disputes the Arbitrator's finding of whether a past practice exists.[51] The Authority views an exception to an arbitrator's finding of whether a past practice exists as raising a nonfact claim.[52] As this contrary-to-law argument reiterates the Agency's nonfact argument, which we have rejected, we also deny this argument.[53]

The Agency further argues the award conflicts with management's right to assign work under § 7106(a)(2)(B) of the Statute.[54] In *CFPB*, the Authority "emphasize[d]" that the management-rights test it established in that decision "will apply *only* in cases where an arbitrator is enforcing a CBA provision."[55] Here, the Arbitrator explained that it was not his duty "to guess or put his interpretation of the language of the CBA agreement but rather to attempt to determine how the parties interpreted the agreement by their behavior."[56] However, in finding a past practice, he did not discuss any of the CBA provisions cited in the grievance, expressly find that the Agency violated the CBA, or state that the past practice was evidence of how the parties "interpreted" any CBA provision.[57] Further, the Arbitrator directed the Agency to continue the past practice of permitting the state accreditation "to satisfy the training requirement and accreditation requirement" set forth in the *directive*.[58]

The Agency asserts the Arbitrator failed to find a contract violation,[59] and *CFPB* is therefore inapplicable.[60] The Union, on the other hand, argues the past practice was "negotiated by the parties" as an "enforceable appropriate arrangement."[61] The Union asserts the directive is "the law, rule, or regulation serving as the basis of the

[40] *Local 4156*, 73 FLRA at 590 (citing *AFGE, Loc. 2142*, 72 FLRA 764, 765-66 (2022) (Chairman DuBester concurring)).
[41] Exceptions Br. at 10-13.
[42] *AFGE, Council 222*, 73 FLRA 54, 55 (2022) (citing *U.S. Dep't of the Interior, Bureau of Land Mgmt., Eugene Dist., Portland, Ore.*, 68 FLRA 178, 180 (2015) (*Interior*)).
[43] *Id.*
[44] *Id.* (citing *Interior*, 68 FLRA at 180-81).
[45] *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 220, 221 (2022) (*Interior II*) (citing *GSA, E. Distrib. Ctr., Burlington, N.J.*, 68 FLRA 70, 73 (2014) (Member Pizzella dissenting on other grounds)).
[46] Exceptions Br. at 10-11
[47] Agency Post-Hr'g Br. at 7-8.
[48] Award at 3. As discussed previously, the Arbitrator also found the Agency's arbitrability arguments were untimely, which provides a separate and independent basis for his arbitrability determination.
[49] *Id.* To the extent the Agency also argues the Arbitrator failed to recognize that its de minimis argument pertained to its duty to bargain over a change to a condition of employment, Exceptions Br. at 10 n.1, we note the Agency did not assert the Arbitrator exceeded his authority by failing to address this issue.
[50] *Interior II*, 73 FLRA at 221.
[51] Exceptions Br. at 12.
[52] *U.S. Dep't of Transp., FAA*, 65 FLRA 171, 172 n.3 (2010) (citing *U.S. Dep't of the Army, Corps of Eng'rs, Nw. Div. & Seattle Dist.*, 64 FLRA 405, 408 n.5 (2010)).
[53] *See, e.g.*, *AFGE, Loc. 2052, Council of Prison Locs. 33*, 73 FLRA 59, 61 n.20 (2022) (denying contrary-to-law exception based on the same arguments as rejected essence exception (citing *U.S. Dep't of VA, Denver Reg'l Off.*, 70 FLRA 870, 871 n.16 (2018) (Member DuBester concurring))).
[54] Exceptions Br. at 11-13; Agency Supp. Br. at 2.
[55] *CFPB,* 73 FLRA at 676 (emphasis added).
[56] Award at 3.
[57] *Id.*
[58] *Id.* at 4.
[59] Exceptions Br. at 12; Agency Supp. Br. at 2.
[60] Agency Supp. Br. at 2.
[61] Union Supp. Br. at 9; Opp'n Br. at 15.

Arbitrator's [past practice] determination,"[62] but also refers to the directive as the "agreement" the parties modified by past practice.[63] Upon reviewing the award, we cannot determine whether the Arbitrator was enforcing a CBA provision, the directive, or something else. To the extent the Arbitrator was enforcing the directive, he did not address whether the parties negotiated the directive.[64] For these reasons, we are unable to resolve the Agency's contrary-to-law exception, including determining whether the *CFPB* test applies here.[65]

Where an arbitrator's findings are insufficient for the Authority to determine whether the award is deficient on the grounds raised by a party's exceptions, the Authority will remand the award.[66] Accordingly, we remand the award to the parties for resubmission to arbitration, absent settlement, for further findings. Consistent with this decision, the resulting award should explain the bases – contractual or otherwise – for directing the parties to continue the past practice; explain any applications or interpretations of the parties' agreement; and provide adequate factual findings.

V. Decision

We partially dismiss and partially deny the Agency's exceptions, and we remand this case for action consistent with this decision.

[62] Opp'n Br. at 15; *see* Agency's Supp. Br. at 2 (arguing revised management-rights test in *CFPB* inapplicable where "the Union argued [the directive], not the parties' CBA, was 'the law, rule, or regulation serving as the basis of the Arbitrator's determination" (quoting Opp'n Br. at 15)).

[63] Union Supp. Br. at 13.

[64] *See CFPB*, 73 FLRA at 676 n.85 (interpreting "CBA provision" in a broad sense "to include agency rules and regulations that were *negotiated* with unions" (emphasis added)).

[65] The Union asserts that the *CFPB* test conflicts with the Authority's Regulations because it shifts the burden to the opposing party to demonstrate that one of the subsections of § 7106(b) applies. Union Supp. Br. at 5-8. Because we are remanding for clarification of the award's basis, and it is currently unclear whether *CFPB* even applies in this case, we find it would be premature to address the Union's argument at this time. *See, e.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mendota, Cal.*, 73 FLRA 788, 791 (2024) (finding it premature to address arguments when remanding award); *Fed. Educ. Ass'n, Stateside Region*, 73 FLRA 32, 35 (2022) (declining to address certain arguments when remanding award (citing *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 68 FLRA 272, 275 (2015); *AFGE, Loc. 3529*, 57 FLRA 464, 467 n.4 (2001))).

[66] *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., San Diego, Cal.*, 73 FLRA 495, 497 (2023) (where the arbitrator failed to explain or support conclusions, remanding because the Authority was unable to determine whether the award was deficient on grounds raised by exceptions (citing *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 72 FLRA 146, 148 (2021) (Chairman DuBester dissenting in part on other grounds); *U.S. Dep't of HHS*, 72 FLRA 522, 524 (2021) (Chairman DuBester concurring))).