

72 FLRA No. 85

UNITED STATES
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3972
(Union)

0-AR-5537

DECISION

August 27, 2021

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and James T. Abbott, Members¹
(Chairman DuBester dissenting)

I. Statement of the Case

We once again remind arbitrators that they may not disregard the plain wording of parties' collective-bargaining agreements.

Article 52.02 of the parties' agreement (Article 52) specifies that the party invoking arbitration must submit a request for arbitrators "with [a] Notice of

¹ Member Abbott notes that this decision was prepared by Member Kiko for the Authority and notes *once again*, as he previously noted, in *U.S. EPA, Off. of Rsch. & Dev., Ctr. for Env'tl Measuring & Modeling, Gulf Ecosystem Measurement & Modeling Div., Gulf Breeze, Fla.*, 71 FLRA 1199 (2020) (Concurring Opinion of Member Abbott), "far too many matters brought to the Authority for resolution are not being addressed in an effective, efficient, and timely manner." *Id.* at 1203. The Agency filed its exceptions on September 3, 2019 (*see infra* at 4), but the drafting office did not circulate the instant decision for votes by the Members until February 19, 2021 (five months after the Authority's internal goal of issuing a decision within 365 days of receiving exceptions). The dissent was not circulated until May 3, 2021. It is inexcusable that it has taken 18½ months to issue a decision on a simple claim of procedural arbitrability.

² Exceptions, Ex. I, Collective-Bargaining Agreement (CBA), Article 52 at 243.

³ Section 7114(a)(2)(B) of the Federal Service Labor-Management Relations Statute provides that the

exclusive representative of an appropriate unit in an agency shall be given the

Invocation of Arbitration."² Arbitrator Edward B. Valverde issued an award determining that Article 52 was ambiguous. He then relied on the parties' past practice to find that the Union properly invoked arbitration by filing a form with the Federal Mediation and Conciliation Service (FMCS), which FMCS subsequently forwarded to the Agency. On the merits, the Arbitrator concluded that the Agency violated the grievant's *Weingarten* rights,³ and the Agency failed to prove that it had just cause to discipline the grievant for misconduct.

The main question before us is whether the Arbitrator's procedural-arbitrability determination fails to draw its essence from the parties' agreement. We find that the Arbitrator ignored the plain wording of the parties' agreement, and we set aside the award.

II. Background and Arbitrator's Award

In July 2018, the Agency determined that the grievant misused his government computer. Accordingly, the Agency suspended the grievant for three days without pay and terminated his telework agreement. The Union filed a grievance alleging that the Agency violated the grievant's *Weingarten* rights and improperly suspended the grievant for misconduct. The parties could not resolve the dispute.

On August 20, 2018, the Union filed a form with FMCS requesting a panel of arbitrators.⁴ That same day, FMCS notified the Agency that the Union had submitted the request for a panel of arbitrators.⁵ Ten days later, on August 30, 2018, an Agency representative emailed the Union stating that she "did not receive notification of the

opportunity to be represented at . . . any examination of an employee in the unit by a representative of the agency in connection with an investigation if (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation.

⁵ U.S.C. § 7114(a)(2)(B). This provision is similar to the private-sector Supreme Court decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), and, therefore, it is often called the *Weingarten* right. *See U.S. Dep't of the Interior, Bureau of Land Mgmt., Eugene Dist., Portland, Or.*, 68 FLRA 178, 180-81 (2015).

⁴ Award at 4 (stating that "FMCS Form R-43 is the 'Request for Arbitration Panel' form that is completed by the party requesting a panel of arbitrators from FMCS. The form generally requests information from the Company and the Union (representatives, addresses, telephone numbers and emails), the type of industry involved and payment information").

⁵ *Id.* at 3.

Union invoking arbitration” in accordance with Article 52, but acknowledging that she received the FMCS form.⁶

Later that day, another Agency representative denied a related later-filed Union grievance because he found its claims overlapped those in the already pending grievance. In the email denying the later grievance, the Agency representative stated that the Union “did invoke” arbitration on the earlier grievance, indicating that he considered the FMCS form, forwarded by FMCS on August 20, 2018, to be the notice of invocation of arbitration.⁷

The grievance proceeded to arbitration. Before the Arbitrator, the issue, as relevant here, was “[w]hether the Union’s invocation of arbitration . . . compli[ed] with Article 52.”⁸ Article 52 states that the party invoking arbitration “shall notify the other party of its submission of a matter to arbitration by giving written notice.”⁹ Article 52 requires that this “notice shall identify the specific grievance, suspension of [fourteen] days or less, adverse action or unacceptable performance action involved and the designated representative(s) who shall handle the case.”¹⁰ It further states that the “party[] invoking arbitration shall submit the request for arbitrators to FMCS or another mutually agreed upon source of arbitrators with the Notice of Invocation of Arbitration.”¹¹

The Arbitrator noted that Article 52 “provide[d] a name for the document . . . [used] to provide [written] notice[:] ‘Notice of Invocation [of] Arbitration.’”¹² According to the Arbitrator, “this suggests that a form was to be created,” but he found that there was nothing in the agreement about “who [wa]s responsible for creating that form/document” and no evidence of such a form in the record.¹³ The Arbitrator then determined that Article 52 was ambiguous because it “d[id] not contain a ‘Notice of Invocation [of] Arbitration’ form.”¹⁴ Additionally, he concluded that Article 52’s “ambiguity [wa]s further illustrated” by the Agency’s representatives having contrasting views on whether the FMCS form

requesting a panel of arbitrators constituted the “Notice of Invocation [of] Arbitration” referred to in Article 52.¹⁵

Because he found Article 52 ambiguous, the Arbitrator considered the parties’ past practice. He concluded that the Union’s invocation of arbitration “w[as] consistent with [the past practice]” of the Agency accepting the FMCS form as the written notice of invocation of arbitration.¹⁶ As a result, the Arbitrator concluded that the Union properly invoked arbitration under Article 52.

On the merits, the Arbitrator found that the Agency violated the grievant’s *Weingarten* rights and failed to prove by a preponderance of the evidence that the grievant committed misconduct. As a remedy, he directed the Agency to reinstate the grievant’s telework agreement and make the grievant whole.

On September 3, 2019, the Agency filed exceptions to the award, and on October 1, 2019, the Union filed its opposition.

III. Analysis and Conclusion: The award fails to draw its essence from Article 52 of the parties’ agreement.

The Agency argues that the award fails to draw its essence from Article 52 of the parties’ agreement.¹⁷ Specifically, the Agency contends that the Arbitrator disregarded the plain wording of Article 52 by finding that the Union properly invoked arbitration.¹⁸ The Authority has found that an award fails to draw its essence from a collective-bargaining agreement where the award conflicts with the agreement’s plain wording.¹⁹

The plain wording of Article 52 requires the party invoking arbitration to complete two tasks in order to “notify the other party of its submission of a matter to arbitration by giving written notice”: (1) “submit [a] request for arbitrators to FMCS or another mutually agreed upon source of arbitrators,” and (2) include a “Notice of

⁶ *Id.* at 4.

⁷ Opp’n, Ex. 3, Union’s Pre-Hr’g Br. Ex. at 54; *see* Award at 4.

⁸ Award at 2.

⁹ CBA at 243.

¹⁰ *Id.*

¹¹ *Id.*

¹² Award at 6.

¹³ *Id.*

¹⁴ *Id.* at 7.

¹⁵ *Id.* Specifically, the Arbitrator noted that “the [Agency representative]’s reference in his August 30, 2018[,] email that the Agency received notice of invocation on [August] 20, 2018, refer[red] to . . . [the] receipt” of the FMCS form. *Id.* at 7 n.6. The Arbitrator also acknowledged that correspondence was regarding a different grievance filed on August 27, 2018, that was denied by the Agency on August 30, 2018. *Id.* at 4.

¹⁶ *Id.* at 7.

¹⁷ Exceptions Br. at 3-5. The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the excepting 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. *U.S. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (*SBA*) (then-Member DuBester concurring, in part, and dissenting, in part).

¹⁸ Exceptions Br. at 5.

¹⁹ *SBA*, 70 FLRA at 527.

Invocation of Arbitration” “with” that request.²⁰ Article 52 sets a deadline for giving the other party written notice of the invocation of arbitration, and it specifies certain information that must be included in the written notice.²¹

The Union requested a panel of arbitrators by submitting a form to FMCS, and an Agency representative acknowledged that she received the FMCS form.²² However, as the Union admits, it did not include “document[ation] independent of the [FMCS] form to serve as ‘Notice of Invocation of Arbitration.’”²³ Although one of the Agency representatives “reference[d] . . . [the] receipt” of the FMCS form as the requisite notice,²⁴ that Agency representative was denying a different Union grievance when he characterized the FMCS form in that manner.²⁵ Moreover, it is undisputed that the Union did not submit a separate “Notice of Invocation of Arbitration” “with” the FMCS form, as required by Article 52.²⁶ As Article 52 does not contain any language excusing the Union’s noncompliance,²⁷ we find that the award conflicts with the plain wording of Article 52.²⁸

We further conclude that the Arbitrator erred by relying on an alleged past practice.²⁹ The Authority has found that arbitrators may not look beyond a

collective-bargaining agreement – to extraneous considerations such as past practice – to modify an agreement’s clear and unambiguous terms.³⁰ Although the Arbitrator determined that Article 52 was ambiguous,³¹ he created this so-called ambiguity by finding that Article 52’s reference to a “Notice of Invocation [of] Arbitration” could only be interpreted as requiring the creation of a form.³² But Article 52 makes no reference to a form. It simply states that the party invoking arbitration must give “written notice,” and it specifies the requirements necessary for that notice.³³ Therefore, the Arbitrator erred in relying on past practice to modify³⁴ Article 52’s clear and unambiguous terms.³⁵

Based on the above, we find that the award fails to draw its essence from Article 52 of the parties’ agreement.³⁶

IV. Decision

We set aside the award.

²⁰ CBA at 243.

²¹ *Id.* (requiring written notice within twenty-five days of a grievance denial or final decision, and stating that “[s]uch notice shall identify the specific grievance, suspension of [fourteen] days or less, adverse action or unacceptable performance action involved and the designated representative(s) who shall handle the case”).

²² Award at 3.

²³ Opp’n Br. at 13. The Union notes in its opposition that “there [wa]s no opportunity to attach additional documentation to [its] request for arbitrators.” *Id.* However, the Union could have easily provided written Notice of Invocation of Arbitration with the FMCS form through any method of written communication to the Agency – including email. *See* CBA at 243.

²⁴ Award at 7 n.6.

²⁵ *Id.* at 4. In the email at issue, the Agency representative denied the August 27, 2018, grievance because it raised issues already addressed in the first grievance. *Id.*

²⁶ *See* CBA at 243. Throughout arbitration, the Union argued that submitting the FMCS form “constitute[d] proper invocation of arbitration.” Opp’n, Ex. 3, Union’s Pre-Hr’g Br. at 37.

²⁷ *See U.S. Dep’t of the Army, 93rd Signal Brigade, Fort Eustis, Va., 70 FLRA 733, 734 (2018) (Fort Eustis)* (then-Member DuBester dissenting) (setting aside the arbitrator’s procedural-arbitrability determination because nothing “excuse[d] the [u]nion’s non-compliance with the negotiated grievance procedure”). Additionally, the FMCS form did not include the specific information required for written notice, and thus does not meet Article 52’s requirement for a written “Notice of Invocation of Arbitration.” *See* CBA at 243 (stating that “notice shall identify the specific grievance, suspension of [fourteen] days or less, adverse action or unacceptable performance action involved and the designated

representative(s) who shall handle the case”); Opp’n, Ex. 3, Union’s Pre-Hr’g Ex. at 53.

²⁸ *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Talladega, Ala., 71 FLRA 1145, 1146-47 (2020) (Talladega)* (then-Member DuBester dissenting) (setting aside the award because the plain wording of the parties’ agreement did not allow the arbitrator to excuse the union’s improperly filed grievance). The dissent notes that the parties’ agreement does not contain language that would “result in cancellation of a grievance” if the Union failed to abide by the agreed-upon procedures. Dissent at 8. However, the Authority has never required the parties’ agreement to have a cancellation provision in order to find a grievance procedurally inarbitrable. *See Talladega, 71 FLRA at 1147 n.15; e.g., Fort Eustis, 70 FLRA at 734.*

²⁹ Award at 7; *see* CBA at 243.

³⁰ *SBA, 70 FLRA at 528.*

³¹ Award at 7 (“[T]he arbitrator finds the language in this [parties’] agreement . . . ambiguous . . . [because] it d[id] not contain a ‘Notice of Invocation [of] Arbitration’ form . . .”).

³² *Id.* at 6.

³³ *See* CBA at 243.

³⁴ Award at 7 (modifying the parties’ agreement by finding the FMCS form satisfied all of Article 52’s requirements).

³⁵ *See U.S. Dep’t of the Treasury, Off. of the Comptroller of the Currency, 71 FLRA 179, 180 (2019) (then-Member DuBester dissenting)* (finding the arbitrator’s procedural-arbitrability determination failed to draw its essence from the parties’ agreement because the arbitrator improperly relied on past practice to modify the parties’ agreed-to filing timeline).

³⁶ Because we set aside the award on essence grounds, we find it unnecessary to address the Agency’s remaining exceptions. *See Fort Eustis, 70 FLRA at 734.*

Chairman DuBester, dissenting:

I disagree with the majority's conclusion that the Arbitrator's procedural-arbitrability determination fails to draw its essence from Article 52 of the parties' collective-bargaining agreement (Article 52). In my view, the Arbitrator's finding that the Union properly provided notice of its invocation of arbitration constitutes a plausible interpretation of the parties' agreement.

In reaching this finding, the Arbitrator relied upon an affidavit from the Union's former President indicating that, "in his [twenty-two] years as Local president he invoked arbitration approximately [sixty-five] times and did so by going to the [Federal Mediation and Conciliation Service (FMCS)] website to complete the FMCS form and pay the required fee."¹ The former President further attested that the Agency had never before questioned this method for invoking arbitration or indicated that it did not comply with the parties' agreement.²

The Arbitrator also credited the Union's assertion that the language in Article 52 governing its invocation of arbitration has remained "unchanged through several contracts."³ And, noting that "[o]nly the Union provided evidence on what it has done in the past to invoke arbitration,"⁴ he denied the Agency's request to dismiss the grievance because "it is clear the Union's actions were consistent with what it has done in the past and what the Agency had previously accepted."⁵

The majority takes no issue with these findings. Nor were they challenged by the Agency in its exceptions. Instead, relying on the Authority's decision in *Small Business Administration (SBA)*,⁶ the majority concludes that the Arbitrator erred by relying upon the parties' decades-long practice of applying Article 52 because it conflicts with the provision's plain language. This conclusion is wrong for several reasons.

As I explained in my dissenting opinion, *SBA*'s reversal of the Authority's past-practice precedent improperly discards the fundamental role played by the parties' practices to clarify the parties' mutual understanding regarding how their agreement should be applied.⁷ But even applying the *SBA* standard, I believe the Arbitrator correctly concluded that the operative language of Article 52 is sufficiently ambiguous to warrant consideration of the parties' established past practice.

First, it bears noting that the majority premised its decision in *SBA* upon language in the bargaining agreement at issue that not only required the procedures for invoking arbitration to be "strictly observed," but also specifically provided that a party's failure to abide by the procedures "shall result in cancellation of the grievance."⁸ As the Union notes in its opposition to the Agency's exceptions, that language is not present in Article 52.⁹

But more importantly, the Arbitrator's conclusion that Article 52 is ambiguous is amply supported by the evidentiary record. On this point, the Arbitrator noted that Article 52 "provides a name for the document that purportedly is to provide the notice,"¹⁰ but found that "neither party provided evidence" of a "Notice of Invocation [of] Arbitration" form or that a particular form of notice "had been used by the parties to provide notice of invocation of arbitration."¹¹ And he found that Article 52's ambiguity is "illustrated" by the fact that, while the Agency's human-resource specialist did not accept the Union's FMCS notice as complying with the provision's requirement, one of the Agency's labor-relations specialists "fully recognized the Agency had received notice of invocation when [the Agency] received notice from FMCS."¹²

In other words, even the Agency's *own representatives* disagreed on how Article 52 should be applied to the Union's invocation of arbitration in the

¹ Award at 3.

² *Id.* at 3-4.

³ *Id.* at 6.

⁴ *Id.*

⁵ *Id.* at 7.

⁶ 70 FLRA 525 (2018) (then-Member DuBester concurring, in part, and dissenting, in part).

⁷ *Id.* at 531 (Dissenting Opinion of then-Member DuBester).

⁸ *SBA*, 70 FLRA at 527 (quoting CBA Art. 39, § 6.a.1).

⁹ The majority does not dispute that it explicitly relied upon the presence of a cancellation provision to conclude that the award at issue in *SBA* "conflict[ed] with the plain wording of the parties' agreement." *Id.* at 527. Instead, the majority merely contends that the Authority "has never required the parties' agreement to have a cancellation provision to find a grievance procedurally

in arbitrable." Majority at 5 n.29. However, both of the decisions which the majority cites for this assertion relied upon its ill-founded decision in *SBA*.

¹⁰ Award at 6.

¹¹ *Id.*

¹² *Id.* at 7. The Arbitrator's finding is based upon an August 20, 2018 email in which the labor-relations specialist denied a subsequently-filed grievance because the issues raised in the grievance were already being addressed in the grievance at issue in this case. The specialist based this conclusion upon his finding that the Union "did invoke arbitration [on the instant grievance] and the notice was received by [the Employee and Labor Relations Division] on August 20, 2018." Opp'n, Ex.3, Union's Pre-Hr'g Br. Ex. at 54.

dispute before the Arbitrator.¹³ Moreover, one of its representatives interpreted the provision in precisely the same manner as the Union. It is hard to imagine more persuasive evidence regarding this provision's ambiguity as applied to the Union's grievance.

By discarding these undisputed findings, the majority once again ignores the deference owed to arbitrators in resolving essence exceptions.¹⁴ And the majority compounds its error by replacing the Arbitrator's well-reasoned conclusion with its own interpretation of the parties' agreement.¹⁵ Applying the standards properly applied to the Arbitrator's procedural-arbitrability determination, I would deny the Agency's essence exception.

Accordingly, I dissent.

¹³ The majority simply disregards the Arbitrator's reliance on this email on grounds that the labor-relations specialist "was denying a different Union grievance when he characterized the FMCS form in that manner." Majority at 4. While this might be true, it does not diminish the fact that the Agency's own representatives harbored contradictory interpretations of how Article 52 applied to the Union's grievance.

¹⁴ *AFGE, Loc. 933*, 70 FLRA 508, 511 (2018) ("In the absence of a successful nonfact exception, we defer to the [a]rbitrator's factual findings.") (citing *AFGE, Loc. 1164*, 66 FLRA 74, 78 (2011); *AFGE, Loc. 3354*, 64 FLRA 330, 333 (2009)).

¹⁵ *U.S. DOD, Educ. Activity, Alexandria, Va.*, 71 FLRA 765, 768 (Dissenting Opinion of then-Member DuBester) (citing *U.S.*

DOD, Def. Contract Mgmt. Agency, 59 FLRA 396, 403 (2003)); *see also U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Phoenix, Ariz.*, 70 FLRA 1028, 1031 (2018) (Dissenting Opinion of then-Member DuBester) (the Authority should not substitute its own interpretation of the parties' agreement in place of the arbitrator's in resolving an essence exception); *U.S. Dep't of HUD, Denver, Colo.*, 53 FLRA 1301, 1314 (1998) ("the standard for determining whether an award fails to draw its essence from an agreement involves an inquiry into the rationality or plausibility of the award—not whether the Authority agrees with, or otherwise would reach, that interpretation").