**70 FLRA No. 27**

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1667
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
BROOKLYN, NEW YORK
(Agency)

0-AR-5213

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DECISION

December 30, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

## I. Statement of the Case

Arbitrator Jacquelin F. Drucker issued an award denying the Union's grievance because the Arbitrator found that the selection process and nonselection of a bargaining-unit employee (the grievant) for a supervisory, non-bargaining-unit position was not arbitrable. The Arbitrator further found that, if the matter were arbitrable, the Agency's actions amounted only to harmless error. The Union filed exceptions to the award.

First, the Union argues that the award fails to draw its essence from the parties' collective-bargaining agreement because the Arbitrator found that the grievance was not substantively arbitrable. Because (1) the parties' agreement's use of the term "grievance" mirrors that of the Federal Service Labor-Management Relations Statute[1] (Statute) – and the statutory definition of "grievance" does not itself include grievances concerning selections and the selection process to non-unit positions – and (2) the Arbitrator found that the parties' agreement does not otherwise include the subject of the grievance in the negotiated grievance procedure, we deny this exception.

Second, the Union raises several exceptions challenging the Arbitrator's findings on the merits of the grievance. Because the Arbitrator found that the grievance was not substantively arbitrable, these exceptions challenge dicta. As dicta cannot form the basis for finding an award deficient, we deny these exceptions.

Third, the Union alleges that the Arbitrator based the award on a nonfact because after the Union requested a transcript of the arbitration hearing, the Arbitrator's assistant stated that the hearing was not recorded. Even were we to consider an alleged statement by the Arbitrator's assistant as a matter that could be challenged as a nonfact, the Union does not demonstrate how, but for this alleged nonfact, the Arbitrator would have reached a different result. Therefore, we deny this exception.

Fourth, the Union contends that the Arbitrator exceeded her authority due to a "lack of due[-]process protections" in the arbitration hearing, because the Arbitrator did not indicate whether she recorded the hearing.[2] Because this argument does not demonstrate how the Arbitrator exceeded her authority, we deny this exception.

Finally, the Union raises several exceptions alleging that the award is deficient because the Arbitrator did not issue an award within sixty days of the arbitration hearing. For the reasons discussed further below, we deny these exceptions.

## II. Background and Arbitrator's Award

The grievant applied for a supervisory, non-bargaining-unit position within the Agency. The Agency assembled a ranking panel that evaluated the applicants, and a different panel that interviewed the applicants. The second panel selected an applicant other than the grievant for the position. The Union filed a grievance. The parties were unable to resolve the grievance, and they submitted the matter to arbitration.

At arbitration, and as relevant here, the Union argued that the Agency had violated the parties' agreement and a local Agency policy in its handling of the promotion process. Specifically, the Union contended that the vacancy announcement contained incorrect information and that the use of a ranking panel violated a local Agency policy.

The Agency argued that, because the position in question was a non-bargaining-unit position, the grievant's nonselection was not grievable. In the alternative, the Agency argued that, even if there were

[1] 5 U.S.C. § 7103(a)(9).

[2] Exceptions at 18.

missteps in the promotion process, any such errors were harmless.

Concerning whether the selection process for the supervisor position was grievable, the Arbitrator stated that "the grievance and arbitration system are limited to rectifying matters in manners consistent with the terms of the [parties' agreement]."[3] Looking at the agreement, the Arbitrator stated that she was "hard pressed to find the authority under the [agreement] to require the [Agency] to undo a decision that was not covered by any aspect of the [agreement]."[4] Ultimately, the Arbitrator found that "[t]he failures in the process as applied in filling a non-unit position . . . do not implicate any specific provision[] of the [agreement] other than those that relate to law and policies generally"[5] and that "the question posed and remedy sought are beyond the reach of the grievance[-]arbitration process."[6]

Additionally, the Arbitrator found that, even if the matter were grievable, any error by the Agency was harmless error because "the Arbitrator cannot conclude by a preponderance of the evidence that the decision[-]making process was tainted by these failings or that it was unjustly tilted against [the g]rievant."[7] The Arbitrator denied the grievance.

The Union filed exceptions to the award, and the Agency filed an opposition to those exceptions.

## III. Preliminary Matters: We will consider one of the Union's supplemental submissions.

After submitting its exceptions, the Union submitted two supplemental submissions. The Union filed its first supplemental submission within the time limit for submitting its exceptions. As such, we will consider this submission as part of the record.[8]

As to the second supplemental submission, § 2429.26(a) of the Authority's Regulations states, in pertinent part, that the "Authority . . . may in [its] discretion grant leave to file other documents as [it] deem[s] appropriate."[9] After the expiration of the time limit for submitting its exceptions, the Union requested leave to file, and did file, its second supplemental submission.[10] Where a party seeks to submit untimely documents that it could have submitted in a previous submission, the Authority ordinarily denies requests to consider those supplemental submissions.[11] Here, the Union – filing outside the time limit for submitting its exceptions – requests leave to file a supplemental submission that was available when the Union filed its exceptions. Because the Union could have filed this second supplemental submission with its exceptions, but did not, we will not consider it.

## IV. Analysis and Conclusions

### A. The award does not fail to draw its essence from the parties' agreement.

The Union alleges that the award fails to draw its essence from the parties' agreement because the Arbitrator erred in her interpretation of the word "grievance" in the agreement.[12]

In reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority ordinarily applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[13] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' 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 collective-bargaining 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.[14] The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained."[15]

The Arbitrator determined that, under the parties' agreement, the term "grievance" did not include grievances alleging errors in the selection process for a non-bargaining-unit position. As such, the Union challenges the Arbitrator's substantive-arbitrability

[3] Award at 8.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 9.
[7] *Id.* at 8.
[8] *See Indep. Union of Pension Emps. for Democracy & Justice*, 68 FLRA 999, 1001 (2015) (*IUPEDJ*).
[9] 5 C.F.R. § 2429.26.
[10] Union Second Supp. Submission at 1 ("If permissible with the Authority . . . [the Union] respectfully request[s] to submit" its second supplemental submission.).
[11] *See AFGE, Local 2002*, 70 FLRA 17, 18 (2016); *U.S. DHS, U.S. CBP*, 68 FLRA 184, 185 (2015); *U.S. Dep't of the Army, Corps of Eng'rs, Portland Dist.*, 61 FLRA 599, 601 (2006).
[12] Exceptions at 15.
[13] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998) (*Council 220*).
[14] *U.S. DOL* (*OSHA*), 34 FLRA 573, 575 (1990).
[15] *Id.* at 576.

determination.[16] An arbitrator's determination regarding substantive arbitrability under the terms of a collective-bargaining agreement is ordinarily subject to the deferential essence standard outlined above.[17] However, in certain situations, the Authority reviews an arbitrator's interpretation of contract provisions de novo. This includes situations where the contract provision's language "mirrors" – is similar or identical to – statutory language, and in addition, where one party asserts, and the other party does not dispute, that the parties intended that the contract provision be interpreted in the same manner as the statutory provision.[18][19]

The Union alleges that the Arbitrator erred when she interpreted the term "grievance" to not include complaints about "failures in the process as applied in filling a non-unit position."[20] Specifically, the Union argues that "[s]ince [a] violation of law is being alleged in this complaint . . . the Union has the absolute right to challenge the fairness of the process" and "arbitrators chosen to hear such cases indeed are empowered by the Statute to rectify complaints."[21] Article 43, Section 2 defines what qualifies as a grievance under the parties' agreement. The Union alleges,[22] and there is no dispute, that this language "is derived from" the language of the Statute.[23] Because of the similarity in wording, and the Union's undisputed claim that the parties intended that the contract provision be interpreted in the same manner as the statutory provision, we review the Arbitrator's interpretation of the term "grievance" in Article 43, Section 2 de novo.[24]

Under Authority case law, an agency's selections and selection procedures for filling non-bargaining-unit positions are not subject to the parties' negotiated grievance procedure unless the agency has elected to agree to their coverage.[25] Therefore, the general grievance language found in Article 43 does not itself indicate that the Agency elected to such coverage, and we must look to other language within the parties' agreement to determine whether the Agency so elected. Because we must look outside language that mirrors the Statute, we defer to the Arbitrator's interpretation of whether the Agency elected to include this matter in the negotiated grievance procedure unless the Union can demonstrate that the Arbitrator's interpretation fails to draw its essence from the parties' agreement.[26]

Interpreting the parties' agreement, the Arbitrator found that the agreement does not cover the process of promotions to non-bargaining-unit positions "by any aspect" and that the Union's grievance "[did] not implicate any specific provision[] of the" agreement.[27] Although the Union argues that the Arbitrator erred "with her assertion that the failures [by the Agency] . . . do not implicate . . . specific provision[s] of the" agreement, the Union does not challenge the Arbitrator's interpretation other than her interpretation of the general definition of

[16] *NTEU, Chapter 26*, 66 FLRA 650, 653 (2012).
[17] *Council 220*, 54 FLRA at 159.
[18] *Ass'n of Civilian Technicians, Show-Me Army Chapter*, 58 FLRA 154, 155 (2002) (*Show-Me Army Chapter*). *But see AFGE, Local 2128*, 66 FLRA 801, 802-03 (2012) (*Local 2128*) (where an arbitrator has found that a contract provision did not mirror, or was not intended to be interpreted in the same manner as, the provision of law and regulation involved, the Authority has not applied statutory standards).
[19] Member Pizzella does not agree with majority's assertion that the Authority requires more than language that mirrors a statute in order to conduct a de novo review of language in the parties' agreement that mirrors a statute. Although Member Pizzella agrees that the suggestion by one party, with the acquiescence of the other, that the language mirrors a statute may be sufficient for a de novo review by the Authority, it is not necessary. The Authority itself has analyzed whether language of an agreement mirrors a statute without the suggestion of any party and independent of any arbitrator finding. *Local 2128*, 66 FLRA at 803 ("Moreover, the wording of Articles 37 and 38 of the parties' agreement does not mirror 5 U.S.C. § 6101 and 5 C.F.R. § 610.121."); *AFGE, Local 1164*, 64 FLRA 599, 600 (2010) (applying de novo review where sections of parties' agreement are "virtually identical" to the Statute). Where, as here, the words of the parties' agreement uses the exact language of a statute – also known as mirroring a statute – Authority precedent does not require anything further in order to apply a de novo review of that language.
[20] Exceptions at 15 (quoting Award at 8).
[21] *Id.* at 16.
[22] *Id.*
[23] *Compare* Union's Exceptions, Attach. 4 at 1 ("A grievance means any complaint by an employee(s) or the Union concerning any matter relating to employment, any complaint by an employee, the Union, or the [Agency] concerning the interpretation or application of this [a]greement and any supplements or any claimed violation, misinterpretation[,] or misapplication of law, rule, or regulation affecting conditions of employment. The Union may file a grievance on its own behalf, or on behalf of some or all of its covered employees.") *with* 5 U.S.C. § 7103(a)(9) ("'grievance' means any complaint . . . by any employee . . . [or] by any labor organization concerning any matter relating to the employment of any employee[] or . . . by any employee, labor organization, or agency concerning . . . the effect or interpretation, or a claim of breach, of a collective[-]bargaining agreement[] or any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.").
[24] *Show-Me Army Chapter*, 58 FLRA at 155.
[25] *AFGE, Local 200*, 68 FLRA 549, 550 (2015) (citing *NAGE, Local R1-109*, 61 FLRA 588, 590-91 (2006); *NTEU*, 25 FLRA 1067, 1079 (1987), *aff'd as to other matters*, 848 F.2d 1273 (D.C. Cir. 1988)).
[26] *Show-Me Army Chapter*, 58 FLRA at 155; *Council 220*, 54 FLRA at 159.
[27] Award at 8.

"grievance" set forth in Article 43.[28] Therefore, the Union provides no basis for finding that the Arbitrator's interpretation – that the Agency did not elect to include the selections and selection procedures for filling non-bargaining-unit positions within the scope of the negotiated grievance procedure – fails to draw its essence from the parties' agreement.[29] Consequently, we deny this exception.

B. The Arbitrator's statements that constitute dicta cannot form the basis of finding the award deficient.

The Union raises additional exceptions alleging that the Arbitrator's findings on the merits of the grievance are contrary to law,[30] contrary to an Agency-wide regulation,[31] based on a nonfact,[32] and failed to draw its essence from the parties' agreement;[33] and that the Arbitrator exceeded her authority.[34]

These exceptions all allege errors concerning the Arbitrator's determination on the merits of the grievance. However, the Arbitrator made these findings on the merits despite finding that "the question posed and the remedy sought are beyond the reach of the grievance[-]arbitration process."[35] Where, as here, an arbitrator finds a matter not arbitrable, any comments he or she makes concerning the merits of that matter are dicta and cannot form the basis for finding an award deficient.[36] Because these exceptions challenge dicta, we deny them.

C. The award is not based on a nonfact.

The Union contends that the award is based on a nonfact.[37] To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[38]

The Union alleges that the award is based on a nonfact because, following the Union's efforts to obtain a transcript of the arbitration hearing, the Arbitrator's assistant stated that no recording was made of the hearing "despite an observation by the Union and [the] grievant of a recording device placed on the table."[39] However, even were we to consider an alleged statement by the Arbitrator's assistant as a matter that could be challenged as a nonfact, the Union does not argue that the Arbitrator would have reached a different result absent this alleged nonfact. Consequently, the Union fails to demonstrate that the award is based on a nonfact, and we deny this exception.

D. The Arbitrator did not exceed her authority.

The Union argues that the Arbitrator exceeded her authority.[40] Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.[41]

The Union alleges that the Arbitrator exceeded her authority because of a "lack of due[-]process protections" in the hearing, specifically when she failed "to indicate in the [a]ward whether the proceedings were audio taped."[42] However, the Union does not provide any further explanation how, even if this allegation were true, the Arbitrator failed to resolve an issue submitted to arbitration, resolved an issue not submitted to arbitration, disregarded specific limitations on her authority, or awarded relief to those not encompassed within the grievance. As such, this argument does not demonstrate that the Arbitrator exceeded her authority, and we deny this exception.

[28] Exceptions at 9.
[29] *See NTEU, Chapter 67*, 68 FLRA 868, 870 (2015).
[30] Exceptions at 4-5 (alleging that the Arbitrator's finding that the Agency only committed harmless error was contrary to 5 U.S.C. § 2301).
[31] *Id.* at 5-10 (alleging that the award is contrary to local Agency policy #05-42 because the Agency did not follow this policy in the promotion process).
[32] *Id.* at 13 (alleging that it was a nonfact that the Arbitrator discussed Art. 23 concerning the promotion process).
[33] *Id.* at 14 (alleging that the award failed to draw its essence from the parties' agreement because the Agency violated "Agency regulations, Merit System Principles, and other irregularities" during the promotion process).
[34] *Id.* at 17 (alleging that the Arbitrator exceeded her authority when she failed to address a proposed remedy); *id.* at 18-19 (alleging that the Arbitrator exceeded her authority by not granting remedy).
[35] Award at 9.
[36] *NAIL, Local 17*, 68 FLRA 97, 100 (2014) (citing *AFGE, Council of Prison Locals, Council 33*, 66 FLRA 602, 605 (2012); *AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009)).
[37] Exceptions at 13.
[38] *U.S. Dep't of VA, Bd. of Veterans Appeals*, 68 FLRA 170, 172-73 (2015) (Member Pizzella dissenting); *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).
[39] Exceptions at 13.
[40] *Id.* at 17.
[41] *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996) (*Local 1617*).
[42] Exceptions at 18.

E. The Union does not demonstrate that the Arbitrator's failure to issue the award within sixty days renders the award deficient.

The Union raises several exceptions arguing that the award is deficient because the Arbitrator failed to issue the award within sixty days of the arbitration hearing. These include claims that the award failed to draw its essence from the parties' agreement,[43] that the award is contrary to law,[44] and that the Arbitrator exceeded her authority.[45]

Turning to the first of these allegations, the Union contends that the award fails to draw its essence from the parties' agreement because the Arbitrator did not issue an award within sixty days as provided by Article 44 of the parties' agreement.[46] Article 44 states that "[t]he arbitrator will be requested to render a decision within [sixty] days."[47]

The Authority, following the approach of federal courts reviewing private-sector arbitration awards, has held that an arbitrator's failure to issue an award within an applicable time limit does not render the award deficient if the excepting party did not object to the delay before the award's issuance or unless the objecting party demonstrates that the delay caused actual harm.[48] This rule acts to discourage "post[-]award technical objections by a losing party as a means of avoiding an adverse arbitration decision."[49] Although the record demonstrates that there were many inquiries to the Arbitrator as to the timeline of issuing an award, the first indication that the Union objected to the delay came after the issuance of the award.[50] Furthermore, the Union does not allege that the delay caused any actual harm. Consequently, this argument does not demonstrate that the award is deficient.[51]

Regarding the allegation that the award is contrary to law because the Arbitrator did not issue an award within sixty days, the Union alleges[52] that the award is contrary to the Federal Mediation and Conciliation Service (FMCS) ethics rule found in 29 C.F.R. § 1404.14(a). This rule states that "[a]rbitrators shall make awards no later than [sixty] days from the date of the closing of the record."[53] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[54] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[55] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[56]

As the Authority has noted previously, "the only consequence for an arbitrator of not following the FMCS's regulations or the Code of Professional Responsibility is possible removal from the FMCS roster. Therefore, the cited FMCS regulations do not constitute a general restriction on [an] arbitrator['s] authority and discretion with respect to arbitration proceedings."[57] Consequently, even if the Arbitrator violated FMCS ethics rules, that violation is not a basis for finding the award deficient.[58] As a result, this argument does not demonstrate that the award is deficient.

Regarding the final allegation concerning the issuance of the award – that the Arbitrator exceeded her authority by not issuing an award within sixty days[59] – it is unclear from the exceptions whether the Union bases this exception on the sixty-day requirement found in Article 44 of the parties' agreement or the sixty-day requirement found in 29 C.F.R § 1404(a). Regardless – and as noted above – neither the statutory nor the contractual time limits provides a basis for finding the award deficient under these circumstances.[60] Furthermore, the Union does not argue that, by delaying issuance of the award, the Arbitrator failed to resolve an issue submitted to arbitration, resolved an issue not

[43] *Id.* at 16.
[44] *Id.* at 5.
[45] *Id.* at 18.
[46] *Id.* at 16.
[47] *Id.*, Attach. 5 at 2.
[48] *SSA*, 69 FLRA 208, 212 (2016) (*SSA*) (relying on *W. Rock Lodge No. 2120, IAMAW, AFL-CIO v. Geometric Tool Co.*, 406 F.2d 284 (2nd Cir. 1968)).
[49] *W. Rock Lodge No. 2120*, 406 F.2d at 286.
[50] *Compare* Exceptions, Attach. 8 at 1 (email sent on July 26, 2016, from Federal Mediation & Conciliation Service referencing complaint by the Union about delay) *with* Exceptions, Attach. 6 at 12 (email sent July 19, 2016, with award attached) *and* Award at 9 (dated July 15, 2016).
[51] Member Pizzella notes, as he did in *SSA*, that an arbitrator's failure to issue a timely award may constitute a sufficient basis to find that award deficient. *SSA*, 69 FLRA at 212 n.69. Member Pizzella iterates that the Authority's review of the timeliness of an arbitration award should not be limited only to circumstances where a party objects prior to the issuance of an award or where a party demonstrates actual harm. *Id.* Here, however, the Union has not demonstrated that the award is deficient in this manner.
[52] Exceptions at 5.
[53] 29 C.F.R. § 1404.14(a).
[54] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995).
[55] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[56] *Id.*
[57] *IUPEDJ*, 68 FLRA at 1006 (citing *U.S. DOT, FAA*, 65 FLRA 806, 807 (2011) (*FAA*)).
[58] *IUPEDJ*, 68 FLRA at 1006 (citing *FAA*, 65 FLRA at 807).
[59] Exceptions at 18.
[60] *SSA*, 69 FLRA at 212; *IUPEDJ*, 68 FLRA at 1006; *see also* 29 C.F.R. § 1404.14(a) ("failure to meet the [sixty-]day deadline will not invalidate the process or award").

submitted to arbitration, disregarded specific limitations on her authority, or awarded relief to those not encompassed within the grievance. Consequently, the Union's allegation does not demonstrate that the Arbitrator exceeded her authority.[61]

Consequently, we deny these exceptions.

## V. Decision

We deny the Union's exceptions.

[61] *Local 1617*, 51 FLRA at 1647.