

71 FLRA No. 171

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3307
NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-5459

DECISION

July 27, 2020

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

I. Statement of the Case

In this case, we find that when arbitrators are tasked with resolving a stipulated issue concerning the timeliness of allegations made in a grievance, they should stick to the task at hand.

Following the grievant's arrest for driving while intoxicated (DWI), the Agency assigned the grievant to administrative duty. Eighteen months later, after the grievant was acquitted of the DWI charge, the Agency restored him to his regular duties. Shortly thereafter, the Union filed a grievance alleging that the Agency improperly placed the grievant on administrative duty. Arbitrator Dorothy A. Fallon issued an award finding that the Union timely filed the grievance under the parties' collective-bargaining agreement, and sustaining the grievance on the merits.

The main question before us is whether the Arbitrator exceeded her authority by concluding that the Union timely filed the grievance. Because the Arbitrator failed to resolve the stipulated timeliness issue submitted to arbitration, we find that she exceeded her authority. Accordingly, we set aside the award.

II. Background and Arbitrator's Award

The grievant, a border patrol agent, was arrested for DWI while off duty. Because of that arrest, the Agency placed him on administrative duty on February 19, 2013. Approximately eighteen months later, the grievant was acquitted of the DWI charge, and the Agency returned him to his regular border-patrol-agent duties.

On September 11, 2014, shortly after the Agency returned the grievant to his regular duties, the Union filed the grievance. Specifically, the grievance alleged that there were "insufficient grounds to place [the grievant] on administrative duty";¹ the "decision to place [the grievant] in a non-law enforcement position [was] . . . solely the result of a false belief that employees who are arrested *must* be placed in [such] a position";² and "[t]here was no absolute requirement to have placed [the grievant] in the administrative status."³ Moreover, the Union stated in the grievance that "any claim" that the Agency was required to complete an "administrative investigation" into the grievant's DWI before returning him to full-duty status "is completely without merit and only serves to continue the unjust and ongoing punishment."⁴

The parties were unable to resolve the grievance, and the dispute proceeded to arbitration. As relevant here, the parties stipulated to the following issue on timeliness: "Was the grievance timely filed by the Union on behalf of [the grievant]?"⁵

The Agency claimed that the Union failed to timely file the grievance under the parties' agreement. Article 33, Section E of the parties' agreement (Article 33) states that "grievances must be filed within thirty . . . calendar days after the incident occurs."⁶ The Agency contended that the triggering incident occurred on February 19, 2013, when it placed the grievant on administrative duty.⁷

The Arbitrator disagreed, finding that the Union was not "questioning the right of the Agency to place [the grievant] on administrative duty."⁸ Instead of addressing the grievance's allegations concerning the propriety of "plac[ing]"⁹ the grievant on administrative

¹ Exceptions, Attach. G, Grievance (Grievance) at 22.

² *Id.*

³ *Id.*

⁴ *Id.* at 23.

⁵ Award at 2.

⁶ Exceptions, Attach. F, Collective-Bargaining Agreement (CBA) at 52.

⁷ Award at 4.

⁸ *Id.* at 5.

⁹ Grievance at 22.

duty, the Arbitrator found that during the course of the arbitration proceeding, the Union was contesting “the lack of [an] Agency investigation” into the grievant’s DWI while he was on administrative duty.¹⁰ Because the Union was objecting to the Agency’s alleged failure to investigate, the Arbitrator held that the incident that triggered the contractual thirty-day timeframe for submitting a grievance occurred when the Agency returned the grievant to his regular duties. As the Union had filed the grievance within thirty days of that date, the Arbitrator concluded that the grievance was timely under Article 33.

Turning to the merits, the Arbitrator addressed only the Union’s arguments as raised later – including that the Agency failed to investigate the grievant’s DWI while he was on administrative duty. On the merits of that claim, she found in favor of the Union.

On January 3, 2019, the Agency filed exceptions to the award, and on February 1, 2019, the Union filed an opposition to those exceptions.

III. Analysis and Conclusion: The Arbitrator exceeded her authority.

The Agency asserts that the Arbitrator exceeded her authority by “reformulating” the stipulated issue.¹¹ In particular, the Agency argues that if the Arbitrator had resolved the issue as stipulated, she would have found that the triggering incident for filing the grievance occurred on February 19, 2013, when the Agency placed the grievant on administrative duty.¹²

Arbitrators exceed their authority when, as relevant here, they fail to resolve an issue submitted to arbitration or resolve an issue not submitted to arbitration.¹³ In determining whether an arbitrator has exceeded her authority, the Authority accords an arbitrator’s interpretation of a stipulated issue the same deference that it accords an arbitrator’s interpretation and application of parties’ agreements.¹⁴ Despite this

deference, the Authority has consistently held that arbitrators must confine their decisions to those issues submitted to arbitration by the parties and that they “must not dispense their own brand of industrial justice.”¹⁵

Here, the parties stipulated to the following issue: “Was the grievance timely filed by the Union on behalf of [the grievant]?”¹⁶ In other words, the parties specifically limited the stipulated timeliness issue to the *filing of the grievance* itself. The grievance unambiguously challenged the Agency’s placement of the grievant on administrative duty, alleging that there were insufficient grounds “to place” the grievant on administrative duty;¹⁷ the decision “to place” the grievant on administrative duty was improper;¹⁸ and there was no requirement “to have placed” the grievant on administrative duty.¹⁹ The Arbitrator, by ignoring those allegations and considering only the Union’s later-raised arguments, effectively ignored the stipulated issue²⁰ and instead addressed issues beyond the specified stipulated issue. Resolving the necessity or promptness of the myriad of Agency decisions reached after the grievant was placed on administrative leave was not necessary to decide the stipulated issue actually before the Arbitrator, namely, was the grievance timely filed.²¹ Accordingly, the Arbitrator’s interpretation evidences manifest disregard of the very limited nature of the parties’ stipulated issue, which concerned the “timel[iness]” of “the grievance.”²²

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) (Member DuBester concurring, in part, and dissenting, in part).

¹⁵ *U.S. DHS, U.S. CBP*, 64 FLRA 916, 920 (2010) (*CBP*) (quoting *U.S. Dep’t of the Treasury, U.S. Mint, Denver, Colo.*, 60 FLRA 777, 779 (2005) (*U.S. Mint*)).

¹⁶ Award at 2.

¹⁷ Grievance at 22 (emphasis added).

¹⁸ *Id.* (emphasis added).

¹⁹ *Id.* (emphasis added).

²⁰ See *DOI*, 68 FLRA at 998 (Dissenting Opinion of Member Pizzella) (“I recognize that our review of an [a]rbitrator’s interpretation of the stipulated issue is highly deferential, but if that standard means anything, it must apply where it is clear that the [a]rbitrator’s award is nonresponsive to the dispute which the parties submitted to the [a]rbitrator.”).

²¹ See *NTEU*, 64 FLRA 982, 986 (2010).

²² Award at 2 (emphasis added); see, e.g., *U.S. Dep’t of the Treasury, IRS*, 71 FLRA 527, 529 (2020) (Member DuBester dissenting) (finding interpretation that ignored unambiguous wording evidenced a manifest disregard of the parties’ agreement).

¹⁰ Award at 6.

¹¹ Exceptions Br. at 17.

¹² *Id.* at 15-16.

¹³ *U.S. Dep’t of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 307-08 (1995).

¹⁴ E.g., *U.S. Dep’t of the Interior, Bureau of Reclamation, Great Plains Region Colo./Wyo. Area Office*, 68 FLRA 992, 993-94 (2015) (*DOI*) (Member Pizzella dissenting) (applying the essence standard to the arbitrator’s interpretation of the stipulated issue in order to determine whether the arbitrator exceeded her authority). Under the essence standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from a parties’ 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

We recognize that, generally, the scope of a grievance may broaden during arbitration.²³ But, where parties stipulate that the issue for resolution is whether a grievance is filed timely, arbitrators must look to *the grievance* – not to contradictory arguments made later during an arbitration proceeding held years later.²⁴

Where, as here, an arbitrator exceeds her authority, and we can modify the award to correct that deficiency, we will do so.²⁵ The record evidence permits us to resolve the parties' stipulated issue: whether the Union timely filed the grievance.²⁶ Under Article 33, the Union was required to submit the grievance "within thirty . . . calendar days after the [challenged] incident occur[red]."²⁷ Because the grievance unambiguously challenged the Agency's *placement* of the

grievant on administrative duty,²⁸ Article 33 required the Union to submit the grievance within thirty days of February 19, 2013 – when the Agency placed the grievant on administrative duty.²⁹ It is undisputed that the Union did not file the grievance within thirty calendar days of that date.³⁰ Accordingly, we conclude that the Union failed to timely file the grievance,³¹ and we set aside the award.³²

IV. Decision

We set aside the award.

²³ See *AFGE, Local 2145*, 70 FLRA 873, 874 n.20 (2018) (considering, as properly raised before the arbitrator – and therefore the Authority – an argument that was raised at arbitration but not during the pre-arbitration grievance process).

²⁴ See *AFGE, Local 1547*, 65 FLRA 91, 95 (2010) (arbitrator exceeded authority by failing to resolve stipulated issue); *U.S. DOD, Def. Contract Audit Agency, Cent. Region, Irving, Tex.*, 60 FLRA 28, 30 (2004) (same); see also *U.S. Mint*, 60 FLRA at 780 (finding that the arbitrator exceeded his authority by deciding an issue that was not submitted to arbitration). But see *CBP*, 64 FLRA at 920 ("[W]hen the record demonstrates the mutual understanding of the parties as to the stipulated issue, an arbitrator's award must be consistent with the stipulation as understood by the parties."). We agree with the dissent that "the Arbitrator could not have resolved the timeliness issue . . . without determining what incident was being grieved." Dissent at 8. That is why any resolution of that stipulated issue necessarily required consideration of the allegations made *in the grievance*. See *DOI*, 68 FLRA at 998 (Dissenting Opinion of Member Pizzella) ("I recognize that our review of an [a]rbitrator's interpretation of the stipulated issue is highly deferential, but if that standard means anything, it must apply where it is clear that the [a]rbitrator's award is nonresponsive to the dispute which the parties submitted to the [a]rbitrator."). As acknowledged by the dissent, the Arbitrator looked to a merits issue to determine "what incident was being grieved." Dissent at 8. A merits issue, stipulated 52 months after the filing of a grievance, is not direct evidence of the incident being grieved. In this case, direct evidence existed in the Union's grievance. Yet, there is no indication that the Arbitrator considered the grievance in attempting to resolve the question of whether the grievance was timely. Had the Arbitrator done so, she would have discovered that the grievance unmistakably: (1) challenged the *placement* of the grievance on administrative duty and (2) rejected any claim that the Agency failed to investigate whether the grievant should have been returned to regular duty before his acquittal on the DWI charge. See *Grievance at 22-23*. In ignoring the grievance's allegations, the Arbitrator, with the dissent's approval, dispensed her own notion of industrial justice.

²⁵ See, e.g., *U.S. DHS, U.S. CBP*, 62 FLRA 59, 62 (2007).

²⁶ Award at 2.

²⁷ CBA at 52.

²⁸ See *Grievance at 22-23*.

²⁹ Award at 3.

³⁰ *Id.* (noting that the Union filed the grievance on September 11, 2014, approximately eighteen months after the Agency placed him on administrative duty).

³¹ The dissent concludes that the grievable incident related to the Agency's alleged failure to investigate whether the grievant should have been returned to regular duty before his acquittal on the DWI charge. Dissent at 8. Just like the Arbitrator, the dissent ignores the grievance where the Union specifically disclaimed "any" allegation that the Agency was required to complete an "administrative investigation" into the grievant's DWI before returning him to full-duty status. *Grievance at 23*. The Union even asserted in the grievance that any such claim would be "completely without merit." *Id.*

³² Because we set aside the award, we do not address the Agency's remaining exceptions. See *U.S. DOD, Def. Logistics Agency Aviation, Richmond, Va.*, 70 FLRA 206, 207 (2017).

Member DuBester, dissenting:

In what has become a troubling pattern,¹ the majority's decision sets aside the Arbitrator's award based upon an analysis that omits material facts. Upon reviewing the record of the case – which includes *both* of the issues the parties agreed to submit to the Arbitrator – I would find that the Arbitrator did not exceed her authority in finding the Union's grievance timely.

The majority concludes that the Arbitrator exceeded her authority by “effectively ignor[ing]” the issue before her as stipulated by the parties, which concerned whether “the grievance [was] timely filed by the Union on behalf of [the grievant].”² In reaching this conclusion, the majority notes that the Union's grievance challenged the Agency's placement of the grievant on administrative duty, but the Arbitrator “consider[ed] . . . the Union's later[-]raised arguments,”³ including whether the Agency “failed to investigate the grievant's DWI while he was on administrative duty.”⁴ And the majority reasons that, because the Arbitrator's consideration of these matters “was not necessary to decide the stipulated issue actually before the Arbitrator,” her “interpretation [of the stipulated issue] evidences manifest disregard of [its] very limited nature.”⁵

Ironically, it is the *majority* that is “effectively ignor[ing]” the parties' stipulated issues.⁶ In reality, the parties agreed to submit *two* issues to the Arbitrator. The first issue presented the question of whether the grievance was timely filed. But the parties also agreed to a second issue which defined the substantive matter to be resolved by the Arbitrator –

specifically, whether the grievant was “entitled to recover back pay for all or part of the time that the Agency placed *and kept him on* administrative duties following his DWI arrest on or about February 17, 2013.”⁷

Recognizing that the Union's backpay claim was for administratively uncontrollable overtime (AUO), and that the grievant had been kept on administrative leave through August 27, 2014, the Arbitrator restated the stipulated issue in her award as whether the grievant was “entitled to recover AUO pay for all or part of the time that the Agency placed and kept him on administrative duties, from February 19, 2013 through August 27, 2014.” The Agency did not specifically object to this reasonable modification in its exceptions.

Regarding the timeliness question, the Arbitrator applied Article 33, Section E of the parties' collective-bargaining agreement that requires grievances to be filed “within thirty . . . calendar days after the incident occurs.”⁸ And recognizing that application of this provision required her to determine what “incident” was being grieved, the Arbitrator found that the Union's claim for AUO was based upon the Agency's failure to investigate whether the grievant should have been returned to regular duty before his acquittal on the DWI charge. The Arbitrator based this finding upon the record developed at the hearing, which “ma[de] clear the Union objection is for the lack of Agency investigation and the length of time that [the grievant] was held on administrative duty and denied the opportunity to enjoy the benefits of his regular position.”⁹

The Arbitrator then determined that the Union had “good and sufficient reason” to withhold filing the grievance until the grievant's DWI case was adjudicated, because the Agency had demonstrated a past willingness “to await the external law enforcement agency's findings [regarding the DWI charge] before taking its own actions.”¹⁰ And she found that the grievant's acquittal provided “the basis for the [Union's] claim that the Agency had taken an unwarranted personnel action.”¹¹ On these grounds, she concluded that the Union timely filed its grievance within thirty days of the grievant's return to regular duty.

Unlike the majority, I would find that the Arbitrator did not exceed her authority by concluding that the Union timely filed its grievance. To reach its contrary conclusion, the majority focuses solely on the

¹ See, e.g., *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 71 FLRA 790, 792 (2020) (Dissenting Opinion of Member DuBester) (noting majority's failure to mention numerous material facts); *U.S. Dep't of VA*, 71 FLRA 785, 787-88 (2020) (Dissenting Opinion of Member DuBester) (noting majority's failure to mention legal theories upon which union based its grievance or the legal grounds upon which the Arbitrator based his decision); *SSA*, 71 FLRA 205, 210 (2019) (Dissenting Opinion of Member DuBester) (noting majority's failure to mention union's reliance on contract provision explicitly governing temporary promotions); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence, Colo.*, 70 FLRA 748, 750-51 (2018) (Dissenting Opinion of Member DuBester) (noting majority's failure to mention arbitrator's past-practice finding); *U.S. Dep't of Navy, Military Sealift Command*, 70 FLRA 671, 675 (2018) (Dissenting Opinion of Member DuBester) (discussing inconsistencies in agency's argument not mentioned by the majority that were relevant to the arbitrator's findings).

² Majority at 4 (quoting Award at 2).

³ *Id.*

⁴ *Id.* at 3.

⁵ *Id.* at 4.

⁶ *Id.*

⁷ Exceptions, Attach. E, Tr. at 39 (emphasis added).

⁸ Exceptions, Attach. F, Collective-Bargaining Agreement at 52.

⁹ Award at 6.

¹⁰ *Id.* at 5.

¹¹ *Id.*

first issue stipulated by the parties – whether the grievance was timely filed – and then faults the Arbitrator for looking beyond the wording of the Union’s grievance to resolve this question.

But the Arbitrator *could not have resolved* the timeliness issue, which concerned whether the Union filed the grievance within thirty days of when “the incident” being grieved occurred, without determining *what incident was being grieved*. And she properly made this determination by considering the record developed at the hearing, along with the parties’ second stipulation, which defined the scope of the Union’s grievance. This fell within the scope of her authority to determine the second stipulated issue, which challenged the Agency’s decision to “keep” him on leave.¹²

The Arbitrator’s failure to cite to the grievance itself does not indicate that she did not consider it.¹³ Moreover, her recitation of the Union’s position includes arguments raised in the grievance and explained in the Union’s post-hearing brief, both of which challenged the Agency’s “continued placement”¹⁴ of the grievant on administrative duties and its violation of the arrest directive by failing to return the grievant to regular duty.¹⁵

¹² *U.S. Dep’t of the Interior, Bureau of Reclamation, Great Plains Region Colo./Wyo. Area Office*, 68 FLRA 992, 994 (2015) (DOI) (Member Pizzella dissenting) (“when the Authority determines whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator’s interpretation of a stipulated issue the same substantial deference that it accords an arbitrator’s interpretation and application of a collective-bargaining agreement”).

¹³ *E.g.*, *SSA*, 69 FLRA 363, 365 (2016) (“the Authority has held that a judge’s failure to cite evidence does not establish that the judge did not consider it”); *SPORT Air Traffic Controllers Org.*, 66 FLRA 547, 549 (2012) (an arbitrator’s “failure to mention particular testimony or evidence does not establish that the [a]rbitrator failed to consider it”).

¹⁴ *Exceptions*, Attach. G, Grievance at 6; *see also id.* at 5 (arguing that “there are no indications that a review and evaluation were conducted to determine the nexus between the arrest and a threat to the safety of the employees or others” such that the grievant was required to be assigned to administrative duties.).

¹⁵ *Id.* at 8. The Union explained its arguments in greater detail in its post-hearing brief. *See Exceptions*, Attach. D, Union’s Post-Hr’g Br. at 10-11. Specifically, the Union stated that the Agency failed to explain the “nexus between the employee[’]s conduct and the threat to the safety of the employee or others, or liability to the Agency” and asserted that because that the Agency “never cited a safety issue which prevented returning [the grievant] to full duty status immediately following his arrest,” his “placement *and retention* on administrative duties was in violation of the directive and required notifications were not provided, thereby resulting in an unwarranted and/or unjustified personnel action which resulted

Accordingly, I disagree with the majority’s conclusion that the Arbitrator exceeded her authority by “address[ing] other issues beyond the stipulated issue.”¹⁵ Because the Arbitrator’s interpretation of the *two* stipulated issues before her is not “irrational, unfounded, or implausible,” I would deny the Agency’s exceeds-authority exception.¹⁶

in substantial financial loss to [the grievant].” *Id.* at 11 (emphasis added).

¹⁵ Majority at 4.

¹⁶ *DOI*, 68 FLRA at 994 (further holding that “when the Authority determines whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator’s interpretation of a stipulated issue the same substantial deference that it accords an arbitrator’s interpretation and application of a collective-bargaining agreement”).