

71 FLRA No. 18

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MALCOLM RANDALL VA MEDICAL CENTER
GAINESVILLE, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2779
(Union)

0-AR-5395

DECISION

April 4, 2019

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

I. Statement of the Case

In this case, the Authority holds that the Agency is obligated to provide bargaining unit employees (BUEs) and their Union representatives recordings and transcripts it agreed to provide in the parties' collective-bargaining agreement.

Arbitrator John B. Dorsey found that the Agency violated the parties' collective-bargaining agreement (CBA) by failing to provide employees and the Union certain investigation-related materials. As a remedy, the Arbitrator directed the Agency to provide these materials to employees and the Union. The Agency files essence and exceeded-authority exceptions, and argues that the award is impossible to implement.

We deny the essence exception because the Agency fails to demonstrate that the Arbitrator's interpretation of the parties' agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement. We deny the exceeded-authority exception because it merely reiterates an essence argument that we have rejected. Because the Agency fails to demonstrate that the award is impossible to implement, we also deny that exception.

II. Background and Arbitrator's Award

Beginning in 2016, the Union filed "a series" of complaints and grievances regarding the procedures concerning Administrative Investigation Board (AIB) investigations, which are addressed in several provisions in the parties' CBA.¹

Some of the Union's complaints concerned to whom and under what circumstances the Agency is required to provide recordings and transcripts of AIB investigations and hearings. In this regard, the Agency contracts with a court reporting company to make recordings and transcripts of AIB hearings.

On April 18, 2017, the Union filed a grievance alleging that the Agency violated various sections of the parties' agreement when it failed to provide employees with recordings and transcripts made during AIB hearings. On this point, the Union argued that the Agency failed to comply: (1) with Article 17, Section 4,² which requires the Agency to provide copies of both the recordings and transcripts made during the hearings; and (2) with Article 22, Sections 2(G)³ and (J),⁴ by failing to provide BUEs and the Union with investigation-related materials set out in those provisions.

The Agency argued that it did not violate the CBA because: (1) electronic recordings made during

¹ Award at 1.

² Exceptions, Ex. E, Collective-Bargaining Agreement (CBA) at 61(Providing that "[n]o electronic recording of any conversation between a bargaining unit employee and a Department official may be made without mutual consent except for Inspector General investigations, other law enforcement investigations, ORM/EEO investigations, or duly authorized Boards of Investigation[;] [a]ll electronic recordings will be transcribed[;] [t]he [e]mployee will be given a copy of the recording at the same time they receive the transcript for review[;] [t]he [e]mployee will have the right to review the transcript for accuracy, and may make corrections[;] [t]he [e]mployee will receive a copy of the final corrected transcript[;] [and] [i]nformation obtained in conflict with this Section will not be used as evidence against any employee.").

³ *Id.* at 96. ("Upon request, the subject of the investigation and the local union will be furnished a copy of the complete investigation file (not just the evidence file) and all other relevant and pertinent information . . . which would normally include the Administrative Investigation Board (AIB) report findings.").

⁴ *Id.* ("An employee's representative shall receive a complete copy of all evidence used to support the Department's action. This includes, but is not limited to, copies of all tapes, testimony/transcripts, recommendation and/or findings, and photographs. The Department will make every effort to provide additional information requested by the employee's representative. The Department will provide a written explanation of any denial of information requested in a timely manner.").

AIB hearings belong to the court reporting company, not the Agency; (2) the parties have a practice whereby the Agency only provides a transcript, if requested; (3) the Agency did not fail to provide materials required under Article 22 of the parties' agreement; and (4) Article 22, Section 2(J) is not "controlling" because it conflicts with Article 22, Section 2(G).⁵

The grievance was unresolved, and the parties submitted it to arbitration. The Arbitrator framed the issues as whether the Agency violated Article 17 or Article 22 of the parties' agreement, and, if so, what should be the remedy?

With respect to Article 17, Section 4, the Arbitrator found that the plain wording of the provision left "no doubt" that the provision applies to "all recorded conversations" made during AIB hearings and investigations⁶ and covers "all recorded conversations"⁷ between the Agency and BUEs made during AIB investigations. He also rejected the Agency's arguments that a past practice required an employee to make a "request" in order to receive those items⁸ and that the electronic recordings are a "private work product" of the court reporting company and thus may not be released.⁹

With respect to the Agency's remaining arguments, the Arbitrator found that there is "no conflict" between Sections 2(G) and (J) of Article 22, that they must be read together with Article 17, Section 4, and that the Agency is required to honor the disclosure requirements in both sections whether or not a request was made.¹⁰

As a remedy, the Arbitrator ordered that the Agency "shall" provide employees a copy of any recordings and transcripts made of them.¹¹ The Arbitrator further ordered the Agency to comply with Article 22 "as of the date of this decision," and provide employees and their Union representatives the information set out in Sections 2(G) and (J).¹²

On July 24, 2018, the Agency filed exceptions to the award, and on August 27, 2018, the Union filed an opposition.

III. Analysis and Conclusions

A. The award does not fail to draw its essence from the parties' agreement.¹³

1. The award does not fail to draw its essence from Article 17 of the parties' agreement.

The Agency contends that the award fails to draw its essence from Article 17 of the parties' agreement because Article 22, rather than Article 17 pertains to investigations.¹⁴ Because Article 17, Section 4, plainly refers to "[a]ll electronic recordings" made during AIB investigations,¹⁵ the Agency's argument that the provision does not apply to recordings made by a court reporter is unfounded. To the contrary, Section 4 specifically provides that the BUE "will be given a copy of the recording *at the same time* they receive the transcript for review."¹⁶ Further, we agree with the Arbitrator that the Agency's argument concerning a purported past practice – of providing copies of transcripts only if an employee makes a specific request – is not sufficient to overcome the plain-language requirements of Section 4.¹⁷ Accordingly, we reject the Agency's argument.

Based on the foregoing, the Agency has failed to demonstrate that the award fails to draw its essence from Article 17 of the parties' agreement. Accordingly, we deny this exception.

2. The award does not fail to draw its essence from Article 22 of the parties' agreement.

The Agency argues that the Arbitrator erred in finding that there is "no conflict" between Article 22, Sections 2(G) and (J).¹⁸ While these provisions are different, the Arbitrator plausibly found that the provisions do not contradict each other or otherwise

⁵ Award at 7.

⁶ *Id.*

⁷ *Id.* at 6-7.

⁸ *Id.* at 6.

⁹ *Id.*

¹⁰ *Id.* at 7-8.

¹¹ *Id.* at 9.

¹² *Id.* at 9-10.

¹³ The Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' agreement only when the appealing party establishes that the award is irrational, implausible, or in manifest disregard of the parties' agreement. *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017).

¹⁴ See Exceptions Br. at 5-6.

¹⁵ CBA at 61.

¹⁶ Award at 2 (emphasis added).

¹⁷ *U.S. Small Bus. Admin.*, 70 FLRA 525 (2018) (*SBA*) (Member DuBester concurring, in part, and dissenting, in part) (arbitrators may not modify the plain and unambiguous provisions of an agreement based on parties' past practices).

¹⁸ Award at 7.

conflict.¹⁹ Article 22, Section 2(G) provides that, upon request, the subject of the investigation and the local union will be furnished a copy of the complete investigation file and all other relevant and pertinent information, which typically includes the findings of an AIB investigation. Section 2(J), on the other hand, provides that the representative of a BUE subject to an Agency action “shall receive a complete copy of all evidence” used to support the Agency’s action, including recordings and transcripts, and also requires the Agency to explain in writing if any information is withheld.²⁰

Based on the foregoing, the Agency has failed to demonstrate that the Arbitrator’s interpretation of Article 22, Sections 2(G) and (J) is implausible or otherwise fails to draw its essence from the parties’ agreement. Accordingly, we deny this exception.

3. The Arbitrator’s remedy does not fail to draw its essence from the parties’ agreement.

The Agency contends that the Arbitrator’s remedy fails to draw its essence from the parties’ agreement because the Arbitrator improperly “combine[d]” the requirements of Sections 2(G) and 2(J) and requires the Agency to provide materials to which some BUEs are not entitled.²¹ In particular, the Agency argues that, under the award, “an employee who is being disciplined based on information discovered during an AIB [investigation] would be afforded the entire AIB file, even if he or she was not the subject of the investigation.”²² However, the Agency misinterprets the remedy. The Arbitrator did *not* require the Agency to provide an employee subject to discipline with “the entire AIB file” of the investigation of a separate employee.²³ Rather, the Arbitrator simply directed the Agency to comply with each section of Article 22, including Section 2(J)’s requirement that the Agency disclose any evidence upon which it relies to support a disciplinary action.²⁴ As the Agency’s argument is premised on a misinterpretation of the award, it is without merit.²⁵

B. The Arbitrator did not exceed his authority.²⁶

The Agency raises two exceeded-authority exceptions. The first merely reiterates the same argument – that the Arbitrator erred when he “combined” Article 22, Sections 2(G) and 2(J)²⁷ – which it made in its essence exceptions that we denied above. And the second is premised upon the same misinterpretation of the remedy²⁸ that we rejected when denying the Agency’s essence exceptions. Accordingly, we deny the Agency’s exceeded-authority exceptions.²⁹

- C. The award is not incomplete, ambiguous, or contradictory as to make it impossible to implement.³⁰

The Agency argues that it is impossible to implement the award because it is unclear whether it is meant to apply retroactively or prospectively. We do not agree.

As remedies for the Agency’s various CBA violations, the Arbitrator ordered: (1) “[a]ny bargaining unit employee subject to electronic recording” by the Agency “shall” receive a copy of the transcript of that recording for review; (2) the recording “shall be retained and be made available” to the employee; and (3) “[a]s of the date of this decision,” the Agency “will” assure it is in full compliance with the specific requirements of Article 22.³¹ This language is clearly prospective in nature and is thus not ambiguous or impossible to implement.

Accordingly, we deny this exception.

IV. Decision

We deny the Agency’s exceptions.

¹⁹ *Id.* at 7-8.

²⁰ *Id.* at 3-4.

²¹ Exceptions Br. at 7.

²² *Id.*

²³ *Id.*

²⁴ Award at 9; *see also* Opp’n Br. at 9-10.

²⁵ *E.g.*, SSA, 69 FLRA 208, 210 (2016) (exception based on misreading of award provides no basis for finding award fails to draw its essence from the parties’ agreement).

²⁶ An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to persons who are not encompassed within the grievance. *AFGE, Local 3627*, 64 FLRA 547, 549 (2010).

²⁷ Exceptions Br. at 8.

²⁸ *Id.* (arguing that the remedy requires “the Agency to provide to an employee who is being disciplined based on information discovered during an AIB [investigation] the entire AIB file, whether or not it is relevant to him or her.”).

²⁹ *E.g.*, SSA, *Office of Disability Adjudication & Review, Springfield, Mass.*, 68 FLRA 803, 806 (2015) (denying exceeded-authority exception based on same premise as previously rejected essence exception).

³⁰ For an award to be found deficient as incomplete, ambiguous, or contradictory, the excepting party must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain. *AFGE, Local 2152*, 69 FLRA 149, 153 (2015).

³¹ Award at 9.