71 FLRA No. 189

INDEPENDENT UNION
OF PENSION EMPLOYEES
FOR DEMOCRACY AND JUSTICE
(Union)

and

PENSION BENEFIT
GUARANTY CORPORATION
(Agency)

0-AR-5571

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DECISION

September 21, 2020

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

I. Statement of the Case

Arbitrator Charles Feigenbaum found that the Union's grievance was not arbitrable because the Union failed to actively pursue the grievance as required by the parties' collective-bargaining agreement. The Union argues that the award should be vacated on nonfact, contrary-to-law, essence, and exceeds-authority grounds. We find that the Union's exceptions provide no basis on which to find the award deficient and deny them.

II. Background and Arbitrator's Award

The Union filed a grievance on behalf of an employee (Porter grievance) on January 16, 2018.[1] The Agency denied the grievance on February 22, and the Union invoked arbitration on February 28. On October 18, the Agency notified the Union that the Porter grievance was void because the Union had failed to "actively pursue"[2] the grievance within six months as required by Article 2, Section 3(A)(11) (Article 2) of the parties' agreement.

The issue before the Arbitrator was whether the Porter grievance was procedurally arbitrable. He found that Article 2 controlled. Article 2 provides that when the moving "[p]arty does not, for a period of six (6) months, *actively pursue* any grievance referred to arbitration," the grievance "shall [be] render[ed] . . . null and void."[3] Reiterating his finding from a previous case involving the same parties and issue (the awards grievance), the Arbitrator found that the term "actively pursue" in Article 2 requires "an *action*, not merely a general statement of an intent to take action," that "moves the grievance toward arbitration."[4]

The Arbitrator found that the relevant time period for determining whether the Union actively pursued the Porter grievance began on February 28, when the Union invoked arbitration, and ended on August 28, six months later.[5]

Considering this time period, the Arbitrator rejected the Union's argument that emails between the parties in August established that the Union advanced the Porter grievance toward arbitration. He determined that an August 1 email was a "statement of intent . . . not action," because it stated that "[a]s of today, the Union INTENDS to move forward in all of its current arbitrations."[6] As to two August 20 emails, he found that "[n]either of these emails mention" the Porter grievance and both were "exclusively concerned with the [awards] grievance."[7] And he found that an August 21 email attempting to schedule a conference call was "exclusively concerned" with the awards grievance.[8]

The Arbitrator also rejected the Union's argument that the parties had a past practice of considering grievances arbitrable when a party had not communicated about or otherwise pursued a grievance for a six-month period.[9] He found unconvincing the Union's argument that the Agency's insistence on arbitrating another grievance first prevented the Union

[1] Unless otherwise noted, all dates referenced hereafter occurred in 2018.
[2] Award at 1.
[3] *Id.* at 2 (emphasis added).
[4] Award at 12; *see also Indep. Union of Pension Emps. for Democracy & Justice*, 71 FLRA 822 (2020) (*IUPEDJ*) (denying Union's contrary-to-law, essence, and exceeded-authority exceptions challenging the Arbitrator's findings that it failed to "actively pursue" the awards grievance for six months).
[5] Award at 14. He further found that any action that occurred after August 28 had "no impact" on the grievance's arbitrability. *Id.*
[6] *Id.* at 13 (internal quotation marks omitted); *see also* Opp'n, Ex. 1 at 151.
[7] Award at 13.
[8] *Id.* at 13-14.
[9] On this point, the Union reiterated the argument that it made in its exceptions to the awards grievance, which the Authority rejected in *IUPEDJ*, 71 FLRA at 823. The Union argued that the Agency "was inactive in [another] grievance for more than a year and six months, but nonetheless asserted the validity of the grievance." Award at 5; *see also id.* at 11 (finding that a single example of a past practice involving a prior grievance, where the Agency asserted that the Union's obstruction caused the delay, "hardly meets the standard definition of a past practice").

from moving forward on the Porter grievance. He also found that the Union's "complaint about selection of arbitrators without [its] involvement is irrelevant" because "[t]hat dispute predated" the Porter grievance.[10]

Ultimately, the Arbitrator found that the Union failed to actively pursue the Porter grievance during the relevant six-month period and he dismissed the grievance as not arbitrable.[11]

The Union filed exceptions to the award on December 4, 2019, and the Agency filed an opposition to the Union's exceptions on January 3, 2020.

III. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union argues that the award is based on a nonfact because the August emails demonstrate that the Union "unambiguously" attempted to schedule a conference call to discuss the Porter grievance[12] and, therefore, the evidence contradicts the Arbitrator's finding that the Union did not actively pursue the Porter grievance within the six-month time period.[13]

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.[14] Further, disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, does not provide a basis for finding that an award is based on a nonfact.[15]

The Arbitrator found that the August 1 email merely constituted a "statement of intent"[16] and that the rest of the August emails concerned only the awards grievance.[17] Therefore, he concluded that the emails "[did] not establish active pursuit" of the Porter grievance.[18] The Union does not establish that the Arbitrator's findings are clearly erroneous.[19] Rather, it challenges the Arbitrator's evaluation of the evidence, which does not provide a basis for finding that the award is based on a nonfact.[20] Accordingly, we deny this exception.

B. The award is not contrary to law.[21]

The Union argues that the award is contrary to law because the Arbitrator misapplied past practice principles and "failed to consider the evidence of the . . . [p]arties' prior conduct."[22] In support of this argument, the Union contends that the Arbitrator "recognized" that the term "actively pursue" is ambiguous.[23] The Union further contends that even though the Arbitrator recognized the Agency's nearly one-year delay in another grievance, he failed to consider that delay as evidence of a past practice extending Article 2's time limit.[24]

These are the same arguments that the Union raised on exceptions to the Arbitrator's dismissal of the awards grievance, and that we rejected in *Independent Union of Pension Employees for Democracy & Justice*[25] (*IUPEDJ*). Here, as in *IUPEDJ*, we note that the Arbitrator made no finding that the term "actively pursue" is ambiguous.[26] And, for the same reasons discussed in *IUPEDJ*, we find that the Arbitrator applied the correct standard for determining whether an alleged past practice modified the terms of a collective-bargaining agreement and found that the parties did not have a binding past practice.[27]

Additionally, as it did in *IUPEDJ*, the Union contends that the award is inconsistent with the "prevention doctrine," which excuses a party's failure to perform a contractual obligation if such performance is hindered, prevented or made impossible by the actions of the other party.[28] On this point, the Union contends that the Arbitrator erred by failing to conclude that the Agency's insistence that another grievance be heard first prevented the Union from actively pursuing the

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[10] *Id.* at 15.
[11] *Id.* at 14; *see also id.* at 15.
[12] Exceptions at 7.
[13] *Id.* at 3, 7.
[14] *NLRB Prof'l Ass'n*, 68 FLRA 552, 554 (2015).
[15] *E.g., AFGE, Local 12*, 70 FLRA 582, 583 (2018) (*Local 12*).
[16] Award at 13.
[17] *Id.* (internal quotation marks omitted).
[18] *Id.* at 14.
[19] *See* Exceptions, Ex. 3 at 2 (stating that on "August 1, 2018, the Union notified the Agency that it wished to pursue all of its arbitrations"). As the Arbitrator noted, the only grievance specifically referenced in the August emails is the awards grievance. *Id.* at 1-4; *see also* Award at 13. The August 1 email does not mention any specific grievance. *See* Opp'n, Ex. 1 at 151.
[20] *Local 12*, 70 FLRA at 583.
[21] In resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo. *U.S. Dep't of State, Bureau of Consular Affairs, Passport Servs. Directorate*, 70 FLRA 918, 919 (2018) (*Passport*). In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.* In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *Id.*
[22] Exceptions at 8.
[23] *Id.*
[24] *Id.* at 8-9.
[25] 71 FLRA 822.
[26] *Id.* at 823.
[27] *Id.*
[28] *E.g., Collins v. Pension Benefit Guar. Corp.*, 881 F.3d 69, 73 (D.C. Cir. 2018) (citing *Williston on Contracts* 4th, § 39.3).

Porter grievance.[29] However, the Arbitrator found that the parties' "impasse"[30] over scheduling another grievance "did not suspend or nullify Article 2,"[31] and that "nothing prevented the Union"[32] from requesting a meeting to specifically discuss the Porter grievance, as he found the Union had with the awards grievance.[33] The Union does not challenge those findings as nonfacts.

Accordingly, the Union's arguments do not demonstrate that the award is contrary to law.

C. The award draws its essence from the parties' agreement.[34]

The Union argues that the award fails to draw its essence from the parties' agreement because the Arbitrator did not consider the parties' past practice when interpreting the term "actively pursue."[35] As discussed previously, the Arbitrator rejected the Union's contention regarding the parties' past practice, and the record supports that finding. Consequently, the Union's past-practice argument does not demonstrate that the award fails to draw its essence from the parties' agreement and we deny this exception.[36]

IV. Decision

We deny the Union's exceptions.

[29] Exceptions at 9-10.
[30] Award at 14.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 15.
[34] When reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority will find that an arbitration award is deficient as failing to draw its essence from the 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 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. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017); *see also U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 103, 104 & n.13 (2019).
[35] Exceptions at 10-11.
[36] *IUPEDJ*, 71 FLRA at 824 (citing *AFGE, Local 836*, 69 FLRA 502, 506 (2016) (rejecting essence exception that restates fair-hearing exception for same reasons that fair-hearing exception had been denied)). Additionally, the Union essentially restates its contrary-to-law and essence arguments to contend that the Arbitrator exceeded his authority because he modified the parties' agreement by disregarding the parties' prior conduct and applying his own standard as to what constitutes a past practice. Exceptions at 10. As we explained in *IUPEDJ*, because we have previously rejected the Union's contention, we find that it does not provide a basis upon which to find that the Arbitrator exceeded his authority. 71 FLRA at 824. Accordingly, we deny the Union's exceeded-authority exception.