71 FLRA No. 198

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
COLEMAN, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 506
COUNCIL OF PRISON LOCALS
(Union)

0-AR-5479

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DECISION

October 13, 2020

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

I. Statement of the Case

In this case, we set aside an award where the Arbitrator found that an Agency memorandum issued *after* the Union filed a grievance provided the basis for the grievance.

On March 2, 2017, the Union filed a grievance alleging that the Agency violated law and the parties' collective-bargaining agreement when it unilaterally terminated a compressed work schedule (CWS) established for certain nursing staff. Eight days later, on March 10, 2017, the Agency issued a memo notifying the Union that it would no longer accommodate the CWS. Arbitrator Edward J. Gutman issued an award finding that the Agency's termination of the CWS on March 10, 2017 was improper and gave rise to the Union's grievance.

Because the Union could not have filed its grievance in response to an event that occurred *after* the grievance was filed, we conclude that the award is so unfounded in reason and fact and so unconnected with the wording of the parties' agreement that it fails to draw its essence from the agreement. Accordingly, we set aside the award.

II. Background and Arbitrator's Award

Since 2006, the parties have had a memorandum of understanding (MOU) establishing a CWS for four nurses working in a health-services department at one of the Agency's prison facilities (USP-2). On March 2, 2017, the Union filed a grievance alleging that on February 27, 2017, the Agency violated the MOU by unilaterally terminating the nurses' CWS.[1] In response, the Agency asserted that the grievance was untimely because the nurses had not been working on a CWS since 2016. On March 10, 2017, about a week after the Union filed the grievance, the Agency issued a memo to the Union stating that it was "unable to accommodate the [CWS] that was approved [in 2006]," and the nurses would remain on a regular eight-hour schedule.[2]

The parties were unable to resolve the grievance, and the dispute proceeded to arbitration. At arbitration, the Arbitrator framed the issue, in relevant part, as whether the Agency violated the MOU, law, or the parties' agreement "when it terminated the [CWS]."[3]

Before the Arbitrator, the Agency argued that the Union failed to timely file the grievance pursuant to Article 31, Section d of the parties' agreement (Article 31). As relevant here, that article requires "[g]rievances [to] be filed within forty . . . calendar days of the date of the alleged grievable occurrence."[4] The Arbitrator did not directly address the Agency's contention that the grievance was untimely under Article 31 – nor did he address any of the Agency's other procedural-arbitrability arguments. Instead, after concluding that the Agency violated the Federal Employees Flexible and Compressed Work Schedules Act of 1982,[5] the Arbitrator stated, "The Agency's procedural defenses cannot be asserted against the statutory violation on which this decision is based."[6] However, in attempting to determine if, and when, the Agency terminated the CWS, the Arbitrator stated, "No action was taken [by the Agency] on the [CWS] . . . until March 10, 2017, when [the Agency] . . . notified the [Union] . . . that [it] [wa]s unable to accommodate the [CWS] that was approved [in 2006]."[7] The Arbitrator further found that the Union's "grievance was [filed as] a response to the . . . March 10, 2017" memo.[8]

[1] Exceptions, Attach. D, Joint Ex. 2, Formal Grievance at 1.
[2] Exceptions, Attach. D, Union Ex. 3, March 10 Memorandum (March 10 Memorandum) at 1.
[3] Award at 6.
[4] Exceptions, Attach. D, Joint Ex. 1, Collective-Bargaining Agreement (CBA) at 71.
[5] 5 U.S.C. § 6131.
[6] Award at 10 n.6.
[7] *Id.* at 6.
[8] *Id.* at 9.

On January 28, 2019, the Agency filed exceptions to the award. The Union did not file an opposition to the exceptions.

III. Analysis and Conclusion: The award fails to draw its essence from Article 31.

The Agency contends that the Union failed to file its grievance within "the contractually agreed timeframe," and, by finding otherwise, the award fails to draw its essence from Article 31.[9] The Authority has found that an award fails to draw its essence from a parties' agreement when the award conflicts with the agreement's plain wording.[10] In addition, the Authority has emphasized that "when parties agree to a filing deadline – with no mention of any applicable exception – the parties intend to be bound by that deadline."[11]

As noted above, Article 31 states that grievances "must be filed" within forty calendar days of the alleged "grievable occurrence."[12] The Arbitrator found that the Agency took "[n]o action" with regard to the status of the CWS until March 10, 2017,[13] when it issued the memo informing the Union that it would no longer "accommodate" the CWS.[14] Even though the Agency issued that memo more than a week *after* the Union filed its grievance,[15] the Arbitrator held that the Union filed the grievance in "response to" the memo.[16] But, if the Agency's issuance of the March 10 memo constituted the grievable occurrence, then the Union's March 2 grievance was premature and not filed in accordance with Article 31. By permitting the grievance to proceed as though the Union had properly filed it, the Arbitrator's award is "so unfounded in reason and fact and so unconnected with the wording and purpose of the parties' agreement as to manifest an infidelity to the obligation of the [A]rbitrator."[17] Therefore, we set aside the award as failing to draw its essence from Article 31.[18]

IV. Decision

We set aside the award.[19]

[9] Exceptions at 7.

[10] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 71 FLRA 892, 893 (2020) (*DOJ*) (Member DuBester concurring in part) (citing *U.S. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (*SBA*) (Member DuBester concurring, in part, and dissenting, in part)). 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. *Id.* at 893 n.14

[11] *Id.* at 893 (quoting *U.S. Dep't of the Air Force, 673rd Air Base Wing, Joint Base, Elmendorf-Richardson, Alaska*, 71 FLRA 781, 782 (2020) (Member DuBester dissenting)).

[12] CBA at 71.

[13] Award at 3. All dates referenced hereafter occurred in 2017.

[14] *Id.*; *see also* March 10 Memorandum at 1.

[15] Exceptions, Attach. D, Joint Ex. 4, Letter Invoking Arbitration at 1 (noting that the "grievance was filed on March 2, 2017").

[16] Award at 9.

[17] *See DOJ*, 71 FLRA at 894 (quoting *SBA*, 70 FLRA at 527).

[18] *See id.* (setting aside award where arbitrator found that the grievance was filed in response to an event that occurred after the filing of the grievance).

[19] In light of this decision, it is unnecessary to resolve the Agency's other exceptions. *See AFGE, Local 1992*, 70 FLRA 313, 315 (2017).

Member DuBester, concurring:

As I have long maintained, when reviewing an arbitrator's interpretation of a collective-bargaining agreement under an essence exception, the Authority should apply the deferential standard of review that Federal courts use in reviewing arbitration awards in the private sector.[1] Nevertheless, under the particular facts and circumstances of this case, I concur in the decision to set aside the award.

The Agency argued that the Union's March 2, 2017 grievance was untimely because it was filed several years after the Union knew or should have known that the Agency had discontinued the use of a compressed work schedule for nurses. The Arbitrator found that "[w]hile the Agency may have been correct that the Union had to be aware that the compressed work schedule had not been in effect for an extended period without complaint, the grievance was a response to the Warden's March 10, 2017, notification terminating the compresse[d] schedule."[2] However, the award does not explain how the grievance, which was filed *before* the Warden issued the notification, could be found timely under Article 31 of the parties' collective-bargaining agreement. Consequently, I agree that the award fails to draw its essence from the parties' agreement.

[1] *See, e.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 660, 672-76 (2020) (Dissenting Opinion of Member DuBester).
[2] Award at 9-10.

Member Abbott, concurring:

I concur that the grievance is not procedurally arbitrable and that the Arbitrator's award does not draw its essence from the parties' agreement because the Arbitrator permitted the grievance to proceed as though the Union had properly filed it. Ultimately, the Arbitrator allowed the Union to arbitrate the matter when it was not procedurally arbitrable. However, I do so for reasons different than those specified in the majority.[1]

The majority concludes that the Union's March 2, 2017 grievance was premature and filed before the Agency's March 10, 2017 memo.[2] Because the grievance was filed before the triggering event, the majority concludes the grievance was not filed in accordance with Article 31 of the parties' CBA.[3]

In my opinion, the fact that the grievance was filed before the memo was issued is irrelevant. Contrary to the majority's implicit assertion,[4] the Agency never argued that the award failed to draw its essence from the parties' agreement because it was filed prematurely. Instead, the Agency argues that the Union's grievance is untimely because it was filed more than forty calendar days after the event that gave rise to the grievance, or triggering event.[5] The Agency asserts in its exceptions and post-hearing brief that the compressed work schedule (CWS) was discontinued in January 2014.[6] On this point, the Arbitrator acknowledged the Agency's argument that the triggering date for the grievance was July 24, 2016.[7]

Thus, I would grant the Agency's exception, as the Agency argued in its exceptions, that the grievance dated March 2, 2017 is untimely pursuant to the requirements of Article 31 of the parties' agreement. However, I would grant the Agency's exception because the triggering event occurred more than forty days before the grievance was filed – on July 24, 2016.

[1] Majority at 3-4.

[2] The Arbitrator found the triggering event for the grievance to be the March 10, 2017 Agency-issued memorandum indicating the Agency was "unable to accommodate" the compressed work schedule (CWS). *See* Award at 3; *see also* Majority at 3.

[3] Majority at 3-4.

[4] *Id.*

[5] Exceptions at 6-7 ("Here, the 'alleged grievable occurrence' is the unilateral termination of the 2006 compressed work schedule for Registered Nurses as [United States Penitentiary (USP)]-2. The [U]nion was aware as early as January 2014, that the Registered Nurses in USP-2 were not working a CWS. However, according to the grievance form, the alleged violation date is February 27, 2017, the date [the Union] . . . sent an email inquiring about an eleven-year-old CWS that the union knew was not in place.").

[6] *Id.* at 7; Exceptions, Attach. B, Agency Post-hearing Br. at 5. In its Exceptions, the Agency states that the "2006 CWS that had not been in place since at least 2012." *See* Exceptions at 18. Member Abbott notes that no matter what date the CWS for the Registered Nurses in USP-2 ceased to exist, it happened at least forty days before March 2, 2017, making the grievance untimely and not procedurally arbitrable.

[7] Award at 4-5; Exceptions, Attach. D, Joint Ex. 3, Agency Response to Grievance at 1 ("However, the actual date of the violation would have been July 24, 2016.").