

71 FLRA No. 4

UNITED STATES
DEPARTMENT OF STATE
PASSPORT SERVICES
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1998
(Union)

0-AR-5394

DECISION

February 4, 2019

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

I. Statement of the Case

We uphold an award that requires the Agency to provide notifications to employees about computer disruptions or outages because the Agency previously agreed to do so, and the Agency must honor its agreement.

Arbitrator Joshua M. Javits found that the Agency violated a settlement agreement by failing to timely notify employees about how their work productivity would be measured while the Agency's computers were experiencing disruptions or outages. The Agency filed nonfact and essence exceptions to the Arbitrator's award.

We deny the nonfact exception because it challenges the Arbitrator's interpretation of the settlement agreement, which is not a factual matter. And we deny the essence exception because the Agency has failed to demonstrate that the Arbitrator's interpretation of the settlement agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement.

II. Background and Arbitrator's Award

The grievants are passport specialists who work under a production quota. Disruptions or outages of Agency computers (downtime) can prevent passport specialists from meeting their quota. Passport specialists

use the Agency's Management Information System (MIS) to record their productivity and to note downtime.

The Agency has a policy (the policy) that is designed to mitigate the negative effects that downtime might have on passport specialists' productivity. Under the policy, the Agency may determine whether work is "measurable" or "non-measurable," i.e., whether employees' production quota will or will not apply, during downtime.¹

In May 2016, the Agency and the Union negotiated and entered into a settlement agreement (the settlement agreement) to resolve a grievance concerning the policy. The settlement agreement states, in pertinent part:

2. [M]anagement must notify passport specialists promptly about whether any or all of the day will be counted a[s] measurable

3. This notification will generally occur within [two] hours of the disruption or outage. . . . Outages that also impact management's ability to notify [bargaining-unit employees] of these disruptions and outages, e.g. e-mail outages, network interruptions, power outages, are examples of reasonable reasons for the notification to be delayed.

4. When the Agency does not promptly advise passport specialists about whether or not a day is measurable, those specialists that reported system outages/latency . . . are granted an extension on entering MIS until the Agency's notification on measurability . . . is provided.²

In May 2017, the Union filed a grievance alleging that the Agency violated the settlement agreement by failing in eight instances to timely notify employees about whether downtime would be "measurable."³ The grievance proceeded to arbitration, and the issues before the Arbitrator were, in pertinent part: "Did the Agency violate . . . the [settlement agreement] . . . ? If so, what is the appropriate remedy?"⁴

¹ Award at 20.

² *Id.* at 19-20.

³ *See id.* at 2, 5-6.

⁴ *Id.* at 2.

The Arbitrator noted that, during negotiations over the settlement agreement, the Agency rejected a Union proposal that would have created an “absolute fixed two hour deadline” to notify employees as to whether a period of downtime would be “measurable” or “non-measurable.”⁵ And he observed that, under the settlement agreement, notification about “measurability” during downtime would “generally” occur within two hours of the downtime.⁶ He determined that such wording gave the Agency “a degree of latitude to provide notifications outside of the two hour period when necessary.”⁷ At the same time, he found that the term “generally” “impose[d] an obligation on management” and should not be interpreted in a way that would “read[] out the notification requirement entirely.”⁸

With these considerations in mind, the Arbitrator determined that the word “generally” means “for the most part” or “whenever possible.”⁹ Thus, he found that notification should “‘for the most part’ be made within two hours” of downtime occurring.¹⁰ The Arbitrator added that management would be excused from this requirement “[o]nly if there is some exceptional or unusual circumstance.”¹¹ In doing so, he rejected the Agency’s argument that the notification requirement was merely aspirational because he found that such an interpretation would “essentially allow management to provide notification to employees at any time without consequence.”¹²

Based on the evidence before him, the Arbitrator found that “on numerous occasions” the Agency failed to provide notification “within the agreed two hour period.”¹³ And he found that the Agency did not provide any “credible explanation” as to why it failed to comply with the notification requirement.¹⁴ Accordingly, the Arbitrator concluded that the Agency violated the settlement agreement. As a remedy, he directed the Agency to cease and desist from violating the settlement agreement.

On July 24, 2018, the Agency filed exceptions to the award, and on August 20, 2018, the Union filed an opposition to the Agency’s exceptions.

⁵ *Id.* at 24; *see also id.* at 8-9, 15-16.

⁶ *Id.* at 22-23.

⁷ *Id.* at 23.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 23-24.

¹² *Id.*

¹³ *Id.* at 25.

¹⁴ *Id.*

III. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency argues that the award is based on a nonfact.¹⁵ The Agency challenges the Arbitrator’s determination that the Agency’s proposed interpretation of the settlement agreement would “essentially allow management to provide notification to employees at any time without consequence.”¹⁶ The Agency asserts that this determination is based on a nonfact because “the . . . settlement agreement provides consequences for the Agency should it not notify employees within the [two]-hour period.”¹⁷ As this argument challenges the Arbitrator’s interpretation of the settlement agreement, which is not a factual matter, the exception provides no basis for finding that the award is based on a nonfact. Accordingly, we deny the Agency’s nonfact exception.

B. The award does not fail to draw its essence from the settlement agreement.

The Agency argues that the award fails to draw its essence from the settlement agreement for several reasons.¹⁸

First, the Agency argues that the Arbitrator’s interpretation of the word “generally” ignores the “plain wording” of paragraph 3 of the settlement agreement.¹⁹ As noted above, that paragraph states that

¹⁵ Exceptions Form at 5. To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *U.S. Dep’t of VA, VA Reg’l Office, St. Petersburg, Fla.*, 70 FLRA 799, 800 (2018) (VA). But an arbitrator’s interpretation of a collective-bargaining agreement cannot be challenged as a nonfact. *Id.* at 800-01.

¹⁶ Award at 24.

¹⁷ Exceptions Form at 5.

¹⁸ An arbitration fails 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. *U.S. Dep’t of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 755 (2018). The Authority has found that an award fails to draw its essence from an agreement when an arbitrator’s interpretation conflicts with the express provisions of an agreement. *NTEU, Chapter 83*, 68 FLRA 945, 948 (2015) (*NTEU*). Further, in the absence of a successful nonfact exception, the Authority defers to an arbitrator’s factual findings. *AFGE, Local 933*, 70 FLRA 508, 511 (2018) (*Local 933*).

¹⁹ Exceptions Form at 7-9.

“[t]his notification will generally occur within [two] hours” of the downtime.²⁰ The Arbitrator interpreted “generally” to mean that notifications should “‘for the most part’ be made within two hours.”²¹ That interpretation is entirely consistent with the dictionary definition of “generally.”²² Further, the Agency does not point to a contractual provision that defines the word “generally” differently.²³ Accordingly, we reject this argument.²⁴

Second, the Agency contends that the Arbitrator erred in requiring it to show “exceptional or unusual circumstances” in order to demonstrate that its untimely notifications did not violate the settlement agreement.²⁵ However, requiring the Agency to show why it should be permitted to depart from the usual practice of providing a timely notification is consistent with, and supports the enforcement of, the textual requirement that the Agency “generally” provide notifications in a prompt and timely manner.²⁶ Thus, we reject this argument.²⁷

Third, the Agency argues that the award requires that the Agency provide notification within the two-hour deadline “on all occasions,” such that the word “generally” is rendered “meaningless.”²⁸ And the Agency contends that this interpretation ignores that the Agency rejected a proposal that included a “fixed” two-hour notification deadline.²⁹ Contrary to this argument, the Arbitrator found that the Agency has “leeway” and “a degree of latitude” to provide notifications outside the two hour period “when necessary.”³⁰ And the Arbitrator specifically “accept[ed]” that the Agency rejected a “fixed” deadline during negotiations.³¹ But the Agency has not explained what circumstances justified its failures to provide notification within two hours of downtime. Further, we defer to the Arbitrator’s finding that the Agency failed to

provide timely notifications on “numerous” occasions.³² Therefore, the Agency’s argument does not show that the Arbitrator’s conclusion that the Agency violated the agreement was premised on an implausible interpretation of “generally.”

Finally, the Agency asserts that the Arbitrator imposed a remedy “without regard for the remedy” set forth in paragraph 4 of the settlement agreement,³³ which says that if the Agency fails to provide prompt notification, passport specialists who reported downtime will be granted “an extension on entering MIS” until notification is provided.³⁴ The Arbitrator’s awarded remedy was simply to direct the Agency to “cease and desist” from violating the agreement.³⁵ Even assuming that the cited portion of paragraph 4 provides a “remedy” for violations of the agreement, the Agency fails to explain why the Arbitrator lacked the contractual authority to direct the Agency to comply with the parties’ preexisting settlement agreement.

Based on the foregoing, we deny the Agency’s essence exception.

IV. Decision

We deny the Agency’s exceptions.

²⁰ Award at 19.

²¹ *Id.* at 23.

²² *Generally*, *New Oxford American Dictionary* (3d ed. 2010) (defining the word “generally” as “in most cases; usually”).

²³ See Exceptions Form at 7-9; see also *NTEU*, 68 FLRA at 949 (deferring to the arbitrator’s interpretation of a contractual term in part because the contract left the term undefined).

²⁴ See *AFGE, Local 3254*, 70 FLRA 577, 580 (2018).

²⁵ Exceptions Form at 8.

²⁶ See Award at 23 (“It would be improper for Agency management to interpret the ‘generally’ language in such a way that it effectively reads out the notification requirement entirely”), 24 (“It would be improper to allow the overall rule (to notify employees within two hours) to be swallowed by the exception (‘generally’).”).

²⁷ See *IFPTE Ass’n Admin. Law Judges*, 70 FLRA 316, 317 (2017).

²⁸ Exceptions Form at 7-8.

²⁹ *Id.* at 8.

³⁰ Award at 22-23.

³¹ See *id.* at 22-24.

³² *Id.* at 25; see *Local 933*, 70 FLRA at 511 (absent successful nonfact exception, Authority defers to arbitrator’s factual findings).

³³ Exceptions Form at 8-9.

³⁴ Award at 20.

³⁵ *Id.* at 25.