

**71 FLRA No. 43**

UNITED STATES  
DEPARTMENT OF DEFENSE  
DOMESTIC ELEMENTARY  
AND SECONDARY SCHOOLS  
(Agency)

and

FEDERAL EDUCATION ASSOCIATION  
STATESIDE REGION  
(Union)

0-AR-5408

\_\_\_\_\_

DECISION

July 16, 2019

\_\_\_\_\_

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

**I. Statement of the Case**

In this case, we again determine that an arbitrator may not assume jurisdiction over the merits of a grievance when the party invoking arbitration fails to comply with the collective-bargaining agreement's procedural requirements.

The Union filed a grievance challenging the Agency's suspension of an employee (the grievant). At arbitration, the Agency argued that the grievance was not arbitrable because the Union untimely invoked arbitration. Arbitrator Vincent C. Longo issued an award finding the grievance procedurally arbitrable and sustaining it on the merits.

The issue before us is whether the Arbitrator's procedural-arbitrability determination fails to draw its essence from the parties' agreement. Because the Union failed to invoke arbitration within the twenty-day timeframe contained in Article 27, Section 1 of the parties' agreement (Article 27), the Arbitrator's conclusion that the grievance was procedurally arbitrable conflicts with that article's plain wording. Accordingly, the Arbitrator's procedural-arbitrability determination fails to draw its essence from Article 27, and we vacate the award.

**II. Background and Arbitrator's Award**

The Union filed a grievance challenging the Agency's one-day suspension of the grievant. The Agency denied the grievance and invoked its right under Article 26, Section 6 of the parties' agreement (Article 26) to request mediation as an intermediate step before arbitration. As relevant here, Article 26 requires the parties to mediate any grievance that is not resolved by the final step of the grievance procedure. And, "[i]f the grievance is unresolved [through] mediation, [either] the [Union] or the Agency may pursue the grievance to arbitration."<sup>1</sup>

Before beginning mediation, the Union requested and received a panel of arbitrators for arbitration. However, because Article 26 requires mediation before arbitration, the grievance did not proceed to arbitration at that time.

The parties' mediation ended on July 31, 2015, but it did not resolve the grievance. Approximately two years later, on May 26, 2017, the Union contacted the Agency about advancing the grievance to arbitration. Around that time, the grievance was submitted to arbitration.

Before the Arbitrator, the Agency argued that the Union failed to timely invoke arbitration under Article 27. In relevant part, that article requires the invoking party to serve a written request for arbitration to the opposing party "within twenty . . . days following the conclusion of the last stage in the grievance procedure."<sup>2</sup> And Article 26 provides that "the last day of mediation will be considered the conclusion of the last stage in the grievance procedure."<sup>3</sup>

The Arbitrator found that the last stage of the grievance procedure occurred on July 31, 2015, when mediation ended. He also recognized that the Union failed to invoke arbitration within twenty days of that date. Nevertheless, the Arbitrator observed that the Union had requested a panel of arbitrators *before* mediation, and he found that the Agency conceded arbitrability by signing off on that request. In the Arbitrator's view, the Union did not have the "sole responsibility" to advance the dispute to arbitration, because Article 27 imposed a joint responsibility on the parties to meet and select an arbitrator.<sup>4</sup> Accordingly, the Arbitrator found the grievance procedurally arbitrable.

<sup>1</sup> Award at 4 (quoting Collective-Bargaining Agreement (CBA) Art. 26, § 6(c)).

<sup>2</sup> *Id.* (quoting CBA Art. 27, § 1(b)).

<sup>3</sup> *Id.* (quoting CBA Art. 26, § 6(c)).

<sup>4</sup> *Id.* at 17.

On the merits, the Arbitrator sustained the grievance and directed the Agency to make the grievant whole.

On September 7, 2018, the Agency filed exceptions to the award, and, on October 9, 2019, the Union filed an opposition to the Agency's exceptions.

### III. Analysis and Conclusion: The Arbitrator's procedural-arbitrability determination fails to draw its essence from Article 27.

The Agency claims that the Arbitrator's procedural-arbitrability determination fails to draw its essence from the parties' agreement.<sup>5</sup> Specifically, the Agency argues that the Arbitrator disregarded Article 27's twenty-day timeframe for invoking arbitration.<sup>6</sup>

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.<sup>7</sup> The Authority has found that an award fails to draw its essence from a collective-bargaining agreement where the award conflicts with the agreement's plain wording.<sup>8</sup>

As we emphasized in *U.S. DOD Education Activity*, "when parties agree to a filing deadline – with no mention of any applicable exception – the parties intend to be bound by that deadline."<sup>9</sup> Here, the plain wording of Article 27 required the Union to invoke arbitration "within twenty . . . days following the conclusion of the last stage in the grievance procedure."<sup>10</sup> Consistent with Article 26, the Arbitrator found that the last stage of the grievance procedure occurred on July 31, 2015, when mediation ended.<sup>11</sup> The Union conceded that it did not attempt to advance the dispute to arbitration

<sup>5</sup> Exceptions Br. at 7.

<sup>6</sup> *Id.* at 10.

<sup>7</sup> *E.g.*, *U.S. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (Member DuBester concurring in part and dissenting in part) (citing *Library of Congress*, 60 FLRA 715, 717 (2005)).

<sup>8</sup> *E.g.*, *id.* (citing *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993)).

<sup>9</sup> 70 FLRA 937, 938 (2018) (*DOD*) (Member DuBester dissenting) (citation omitted).

<sup>10</sup> Award at 4 (emphasis added) (quoting CBA Art. 27, § 1(b)).

<sup>11</sup> *Id.* at 16; *see also id.* at 4 (stating that "the last day of mediation will be considered the conclusion of the last stage in the grievance procedure" (quoting CBA Art. 26, § 6(c))).

until May 26, 2017 – nearly two years *after* mediation ended.<sup>12</sup> And although the Arbitrator found that the Union timely invoked arbitration when it requested a panel of arbitrators,<sup>13</sup> it is undisputed that the Union took that action *before* July 31, 2015<sup>14</sup> and, thus, outside of the twenty-day invocation period established in Article 27.<sup>15</sup>

Because the Arbitrator cited no authority or contractual wording allowing him to disregard Article 27's explicit twenty-day timeframe for invoking arbitration, we find that the Arbitrator's procedural-arbitrability determination evidences a manifest disregard, and does not represent a plausible interpretation, of the parties' agreement.<sup>16</sup> Therefore, we grant the Agency's essence exception and vacate the award.<sup>17</sup>

### IV. Decision

We set aside the award.

<sup>12</sup> *Id.* at 13.

<sup>13</sup> *Id.* at 17.

<sup>14</sup> *Id.* at 16-17 (finding that the Union requested a panel of arbitrators on September 10, 2014).

<sup>15</sup> *See id.* at 4 (stating that the party invoking arbitration must serve the appropriate forms on the opposing party "following the conclusion of the last stage in the grievance procedure" (emphasis added) (quoting CBA Art. 27, § 1(b))).

<sup>16</sup> *See DOD*, 70 FLRA at 938 ("The Arbitrator cited no authority or contractual language allowing him to disregard the parties' explicit forty-five-day limitation."); *see also U.S. Dep't of the Army, 93rd Signal Brigade, Fort Eustis, Va.*, 70 FLRA 733, 734 (2018) (Member DuBester dissenting) (noting that the relevant contract provision did not contain any wording that excused non-compliance with the procedural requirement of the parties' agreement).

<sup>17</sup> Because we vacate the award, it is unnecessary for us to address the Agency's remaining exceptions. *E.g.*, *U.S. DOD, Def. Logistics Agency Aviation, Richmond, Va.*, 70 FLRA 206, 207 (2017); *see* Exceptions Br. at 12, 14 (arguing that the award was based on nonfacts).

**Member Abbott, concurring:**

As I have noted several times, it is imperative that the Authority bring clarity to our decisions.

Our decision clearly indicates that by waiting nearly two years (July 31, 2015 to May 26, 2017)<sup>1</sup>, in light of the CBA's twenty-day requirement,<sup>2</sup> the Union failed to timely advance their grievance to arbitration.

But another aspect of this case troubles me as well. As our decision demonstrates, the burden to advance a grievance to arbitration (or any stage of the grievance procedure for that matter) falls on the grieving party (whether agency or union). I find it odd, however, that the Agency also sat idly for two years. At some point, it would have proved helpful had the Agency declared that, because the Union had not requested arbitration within the twenty-day timeframe, the matter was now closed.

All parties involved in the grievance-arbitration process would be well served to remind themselves that the Statute intends for grievances to be resolved expeditiously.<sup>3</sup> Only when both parties act in a timely manner does the grievance procedure "facilitate[] . . . the amicable settlement[] of [a] dispute[]." <sup>4</sup>

In other words, there comes a time when a dispute must come to an end . . . the sooner the better.

**Member DuBester, dissenting:**

I disagree with the majority's decision to grant the Agency's essence exception regarding the Arbitrator's procedural-arbitrability determination. As I noted in my dissent in *U.S. Small Business Administration*, the majority's rejection of the Arbitrator's careful and detailed contract interpretation is inconsistent with established judicial practice of deferring to arbitrators' contractual interpretations "because it is the *arbitrator's* construction of the agreement for which the parties have bargained."<sup>1</sup>

Here, the undisputed facts show that the Union submitted its written request for a panel of arbitrators to the Federal Mediation and Conciliation Service (FMCS) in September 2014 and the request form was also signed by an Agency representative. The FMCS provided a list of arbitrators in December 2014. The parties attempted to mediate a resolution to the grievance but, when that attempt was unsuccessful, they selected the arbitrator in June 2017 and the case proceeded to hearing.

Addressing the Agency's argument that the Union had not timely invoked arbitration, the Arbitrator noted that a provision in the parties' collective-bargaining agreement gave the Union twenty days from the last stage of the grievance procedure to submit a request for an arbitrator panel. However, he found that the Agency had acquiesced to the Union's actions to "move [the] grievance forward" by both signing the request form and selecting the arbitrator before proceeding to mediation.<sup>2</sup> He then noted that another provision of the parties' agreement imposed a "joint responsibility" on the parties to meet and select an arbitrator within thirty days of receiving the panel of arbitrators from FMCS.<sup>3</sup> Finding that the parties did not meet this requirement, and that compliance with this provision was "not the sole responsibility" of the Union, the Arbitrator concluded that the Agency had not met its burden of establishing that the Union was untimely in moving the grievance to arbitration.<sup>4</sup>

<sup>1</sup> 70 FLRA 525, 532 (2018) (Dissenting Opinion of Member DuBester) (citations omitted).

<sup>2</sup> Award at 16-17.

<sup>3</sup> *Id.* at 17. Article 27, Section 2(b) of the parties' agreement states: "Within thirty (30) days from the date of the response from the FMCS conveying the names of the prospective arbitrators, the Parties shall meet, either in person or telephonically, to select an arbitrator." Exceptions, Attach. 1, Master Labor Agreement at 138.

<sup>4</sup> Award at 17. The Arbitrator reiterated this finding in rejecting the Agency's argument that the grievance was also barred by the doctrine of laches. In addressing this argument, he further found that the resulting delay did not prejudice the Agency's ability to "adequately present its case." *Id.* at 18.

<sup>1</sup> Majority at 2.

<sup>2</sup> *Id.*

<sup>3</sup> 5 U.S.C. § 7121(b)(1)(B) ("Any negotiated grievance procedure . . . [shall] provide for expeditious processing.).

<sup>4</sup> *Id.* § 7101(a)(1)(C).

Applying the deferential standard owed to arbitrators when analyzing essence challenges to awards,<sup>5</sup> I would conclude that the Arbitrator's contractual interpretation survives the Agency's essence challenge. In rendering his award, the Arbitrator carefully considered not only the language of the parties' agreement but also the context in which the parties' timeliness dispute arose, including the Agency's acquiescence in the Union's efforts to move the grievance to arbitration.

Accordingly, I dissent from the majority's decision, and would reach the Agency's remaining exceptions.

---

<sup>5</sup> 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. DOL (OSHA)*, 34 FLRA 573, 575 (1990).