

72 FLRA No. 97

UNITED STATES  
DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF PRISONS  
FEDERAL CORRECTIONAL INSTITUTION  
ALICEVILLE, ALABAMA  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 573  
COUNCIL OF PRISON LOCALS 33  
(Union)

0-AR-5652

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DECISION

October 13, 2021

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

Decision by Member Abbott for the Authority

**I. Statement of the Case**

In this case, we remind the federal labor-relations community that an arbitrator may not disregard the procedural requirements that are specifically enumerated in the parties’ negotiated grievance procedure.<sup>1</sup>

Arbitrator Edward J. Gutman found that the Agency violated a memorandum of understanding (the overtime MOU) by assigning overtime shifts to non-bargaining-unit employees so that the Agency would not have to pay overtime to bargaining-unit employees (BUEs). However, because the Arbitrator’s determination that the grievance was procedurally arbitrable fails to draw its essence from the procedural requirements enumerated in Article 31, Section (f) of the parties’ agreement (Article 31), we vacate the award.

<sup>1</sup> We note that this is the second case arising from the Agency’s decision to utilize non-bargaining-unit employees instead of paying overtime to bargaining-unit employees. *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Aliceville, Ala.*, 71 FLRA 716, 717 (2020) (then-Member DuBester dissenting).

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

The instant case concerns BUEs who work in the “powerhouse” at the Agency’s facilities in Aliceville, Alabama. The instant dispute arose when the Agency assigned shifts—which are normally assigned to BUEs—to non-bargaining-unit employees. The Union filed a grievance with the Regional Director, arguing that the Agency’s actions violated the parties’ argument and the overtime MOU. The Union then invoked arbitration, and the Agency alleged to the Arbitrator that the grievance failed to meet several of the procedural requirements in Article 31.

After opining that a grievance must be “honored” if it “amply describes the alleged violation,” the Arbitrator determined that the Union’s grievance was arbitrable.<sup>2</sup> He found that the grievance was timely because it alleged a continuing violation of the overtime MOU and the parties’ agreement. Additionally, he held that the Agency’s response to the grievance demonstrated that the Agency had sufficient notice of the grievance’s alleged contractual violations.<sup>3</sup> While the Agency argued that the grievance was not arbitrable because it was filed with the wrong official, the Arbitrator nonetheless found that the grievance was arbitrable because “if this grievance were to be dismissed on the procedural grounds pleaded by the Agency, a new grievance with all the i’s properly dotted and t’s appropriately crossed could and likely would be filed.”<sup>4</sup>

The Arbitrator then found that the Agency violated the overtime MOU by failing to assign overtime shifts to BUEs. Therefore, he ordered the Agency to follow the overtime MOU and make affected BUEs whole.

On July 6, 2020, the Agency filed exceptions to the Arbitrator’s award. The Union filed an opposition to the Agency’s exceptions on August 6, 2020.

**III. Analysis and Conclusion: The award fails to draw its essence from the parties’ agreement.**

The Agency argues that the Arbitrator’s procedural-arbitrability determination fails to draw its

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

<sup>3</sup> *See id.* at 17 (relying, in part, on the “general premise favoring arbitration over dismissal of grievances on technical procedural grounds”).

<sup>4</sup> *Id.* at 17-18.

essence from the parties' agreement.<sup>5</sup> Specifically, Article 31 mandates that grievances "will" be filed with the Chief Executive Officer (CEO) of the Aliceville facility "if the grievance pertains to the action of an individual for which the [CEO] of the institution/facility has disciplinary authority over."<sup>6</sup> Because the grievance concerns the assignment practices of management officials under the CEO and the grievance was not filed with the CEO, the Agency asserts that the grievance is not procedurally arbitrable under the parties' agreement.<sup>7</sup>

Article 31 clearly states that the Union must file grievances with the CEO if the Union is grieving the actions of an individual under the CEO.<sup>8</sup> The Authority has previously set aside an award where the arbitrator relied on equitable principles rather than enforcing the plain wording of Article 31.<sup>9</sup> Here, the Union filed the grievance with the Regional Director and it grieved the actions of management officials who work at the Aliceville facility.<sup>10</sup> Most importantly, the Arbitrator relied on equitable principles such as "the general premise favoring arbitration" in order to proceed to the merits of the grievance without addressing the

grievance's noncompliance with the plain wording of Article 31.<sup>11</sup>

In disregarding Article 31's arbitrability requirements, the Arbitrator reasoned that, even if he dismissed the grievance on procedural-arbitrability grounds, the Union could merely file a new grievance because it alleged a continuing violation.<sup>12</sup> The Authority has held that arbitrators are not free to ignore the procedural rules that parties negotiate into a collective-bargaining agreement.<sup>13</sup> Similarly, arbitrators are not free to resolve the merits of a procedurally deficient grievance based on what they think or predict will happen if they dismiss the grievance. Even if the Arbitrator's dismissal of the procedurally deficient grievance would have resulted in the Union filing a procedurally sufficient grievance, nothing in the parties' agreement empowered him to simply assume jurisdiction over a future grievance that may or may not occur.

The dissent continues to cite *National Weather Service Employees Organization v. FLRA*<sup>14</sup> for the proposition that the Authority must defer to an arbitrator's interpretation of a contract<sup>15</sup>—no matter how wrong or implausible are an arbitrator's interpretations of a contractual provision.<sup>16</sup> However, in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Miami, Florida*, we noted that the Authority is not obligated to blindly defer to the erroneous conclusions that are made by arbitrators.<sup>17</sup> Therefore, because the

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<sup>5</sup> See Exceptions Br. at 27-28 ("Based on this reasoning, and not any analysis of the actual requirements of Article 31 of the parties' agreement, Arbitrator Gutman denied 'the dismissal sought on procedural deficits.'"). 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).

<sup>6</sup> Exceptions, Attach. C, Master Agreement at 72.

<sup>7</sup> See Exceptions Br. at 27-28.

<sup>8</sup> Opp'n at 22.

<sup>9</sup> *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Talladega, Ala.*, 71 FLRA 1145, 1146-47 (2020) (*BOP Talladega*) (then-Member DuBester dissenting) (arbitrator's determination that failure to comply with Article 31 was a "substantively harmless" "technical violation" constituted an impermissible modification to the arbitrability requirements in the parties' negotiated grievance procedure).

<sup>10</sup> Award at 1, 8-9. While the grievance indicates that the Union attempted to informally resolve the grievance with the CEO, these actions do not alter the explicit filing requirements of Article 31. See Opp'n, Ex. 11 at 1.

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<sup>11</sup> Award at 17-18; see *U.S. Dep't of the Air Force, 673rd Air Base Wing, Joint Base Elmendorf-Richardson, Ala.*, 71 FLRA 781, 782-83 (2020) (*Air Force*) (then-Member DuBester dissenting) (setting aside procedural-arbitrability determination based on equitable principles rather than the plain wording of the parties' agreement).

<sup>12</sup> Award at 17-18.

<sup>13</sup> *BOP Talladega*, 71 FLRA at 1146-47 ("the [a]rbitrator did not cite contractual language allowing him to disregard the procedural requirements in Article 31 because 'the [a]gency eventually knew the substance of the grievance'"); *Air Force*, 71 FLRA at 782-83 ("Because Section 8 clearly and unambiguously requires the [u]nion to file its Step 3 grievance within five workdays, and does not provide any exceptions authorizing the [a]rbitrator to consider the impact on 'labor relations,' the [a]rbitrator's determination that the grievance was arbitrable does not represent a plausible interpretation of the parties' agreement."); *U.S. Dep't of the Army, 93rd Signal Brigade, Fort Eustis, Va.*, 70 FLRA 733, 734 (2018) (then-Member DuBester dissenting) ("The [a]rbitrator's determination that the grievance was arbitrable is incompatible with the plain wording of Article 45.").

<sup>14</sup> 966 F.3d 875, 881 (D.C. Cir. 2020).

<sup>15</sup> See Dissent at 5.

<sup>16</sup> See *id.*

<sup>17</sup> 71 FLRA 660, 664 (2020) (Member Abbott concurring; then-Member DuBester dissenting), *pet. for review dismissed sub nom. AFGF, Loc. 3690 v. FLRA*, 3 F.4th 384 (D.C. Cir. 2021).

Arbitrator failed to address the Union's non compliance with Article 31's requirement to file the grievance with the CEO, we will not blindly defer to the Arbitrator's flawed determination that the grievance is procedurally arbitrable.<sup>18</sup>

Accordingly, because the Arbitrator's procedural-arbitrability determination is not a plausible interpretation of Article 31, we grant the Agency's essence exception and vacate the award.<sup>19</sup>

#### **IV. Decision**

We grant the Agency's essence exception and set aside the award.

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<sup>18</sup> Award at 17-18.

<sup>19</sup> Because we vacate the award, we will not address the Agency's remaining exceptions. See *U.S. DOD, Def. Logistics Agency Aviation, Richmond, Va.*, 70 FLRA 206, 207 (2017); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 66 FLRA 300, 304 (2011).

**Chairman DuBester, dissenting:**

Contrary to the majority, I believe that the Arbitrator's determination that the grievance was procedurally arbitrable represents a plausible interpretation of the parties' collective-bargaining agreement. The Arbitrator did not, as the majority claims, rely only on "equitable principles" in finding the grievance arbitrable.<sup>1</sup> Rather, he found that because the Agency did not raise any of its procedural objections to the grievance until the hearing or "shortly before the hearing," it had arguably "waived any such objection."<sup>2</sup> And he found that none of the alleged procedural deficiencies prevented the Agency from responding to the "merits of the matter."<sup>3</sup>

He further found that the Agency's grievance denial "undermines its dismissal arguments."<sup>4</sup> On this point, he noted that after the Union invoked arbitration, the Agency responded to the grievance, stating that it was "procedurally rejected" in part because the grievance "was not received by the Southeast Regional Director."<sup>5</sup> Thus, the Arbitrator's discussion of the equitable reasons for finding the grievance arbitrable was only one consideration in his determination that the grievance was arbitrable.

As I have stated previously,<sup>6</sup> where the arbitrability question has been submitted to an arbitrator, federal courts and the Authority have recognized that an arbitrator's procedural-arbitrability determination is entitled to deference and is subject to review only on narrow grounds.<sup>7</sup> Applying the deferential standard that

governs arbitrators' procedural-arbitrability determinations, I would deny the Agency's essence exception. Accordingly, I dissent.

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<sup>1</sup> Majority at 3.

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

<sup>3</sup> *Id.*

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

<sup>5</sup> *Id.* at 11.

<sup>6</sup> *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Talladega, Ala.*, 71 FLRA 1145, 1148 (2020) (Dissenting Opinion of then-Member DuBester); *see also, e.g., U.S. Dep't of the Army, Moncrief Army Health Clinic, Fort Jackson, S.C.*, 72 FLRA 207, 210-11 (2021) (Dissenting Opinion of Chairman DuBester); *U.S. Dep't of the Treasury, Off. of the Comptroller of the Currency*, 71 FLRA 387, 392-93 (2019) (Dissenting Opinion of then-Member DuBester); *U.S. DOD Educ. Activity*, 70 FLRA 863, 866 (2018) (Dissenting Opinion of then-Member DuBester); *U.S. Small Bus. Admin.*, 70 FLRA 525, 532 (2018) (Dissenting Opinion of then-Member DuBester) (parties' challenges to arbitrators' procedural-arbitrability determinations are "subject to the deferential essence standard").

<sup>7</sup> *Nat'l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875, 881 (D.C. Cir. 2020) (*NWS*) (stating that "[w]hen reviewing an arbitrator's award, the Authority is required to apply a similarly deferential standard of review to that a federal court uses in private-sector labor-management issues" and concluding that "[w]hether the [a]rbitrator correctly interpreted the

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[collective-bargaining agreement] was beyond the scope of the Authority's review").

Citing its decision in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Miami, Florida*, 71 FLRA 660, 664 (2020) (*FCI Miami*) (Member Abbott concurring; then-Member DuBester dissenting), *pet. for review dismissed sub nom. AFGE, Local 3690 v. FLRA*, 3 F.4th 384 (D.C. Cir. 2021), the majority criticizes my "continue[d]" reliance upon *NWS* to articulate the deferential standard of review properly applied to essence exceptions. Majority at 4. But this criticism is misplaced, as the court could not have been clearer in *NWS* regarding the standard we should apply. And to the extent that the majority suggests that the court's dismissal of the union's petition for review in *FCI Miami* somehow endorsed its continued misapplication of this standard, this is simply untrue. The court's dismissal was based solely on jurisdictional grounds.