

73 FLRA No. 103

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
POPLAR BLUFF, MISSOURI
(Agency)

0-AR-5843

—
DECISION

May 17, 2023

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Before the Authority: Susan Tsui Grundmann,
Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator David S. Paull found that the Agency properly denied the Union's request for information (request) because disclosure of the requested information without employees' written consent would violate the Privacy Act of 1974 (the Privacy Act),¹ the parties' collective-bargaining agreement, and the U.S. Department of Veterans Affairs Handbook (VA handbook). The Union filed exceptions to the award on exceeded-authority, nonfact, essence, and fair-hearing grounds. For the reasons discussed below, we deny the exceptions.

II. Background and Arbitrator's Award

The Union requested, from the Agency, a list of employees who sought a reasonable accommodation (accommodation) from January 2019 through November 2020. The request's stated purpose was to determine the Agency's compliance with timeliness requirements, set forth in the parties' agreement, for processing accommodation requests. The Agency denied the request, citing the Privacy Act, the parties' agreement, and the VA handbook, because the requested information

is "confidential" and "could not be released without the written consent of each employee."²

On January 19, 2021, the Union grieved the Agency's denial of its request. The Agency denied the grievance, and the parties proceeded to arbitration.

At arbitration, the Union proposed a list of eight issues, the Agency proposed one, and the parties agreed that the Arbitrator would frame the issue. The Union's proposed issues were whether the Agency: (1) violated 5 U.S.C. § 7116(a)(1), (5), and (8) by (a) "unilaterally bypassing the Union to have conversations with" unit employees; and (b) "refusing to provide a list of employees" who requested accommodations "without providing specifics of the accommodation[s], as requested by the Union"; (2) violated the parties' agreement by (a) "failing to allow the [Union] to act for" and "negotiate agreements on behalf of the bargaining unit"; (b) "engaging" in "formal discussions and agreements with . . . unit employees concerning matters affecting personnel policies, practices, . . . or working conditions"; (c) "failing to allow employees the ability to be represented by the Union"; and (d) "failing to engage in the . . . accommodation process" and thereby "harm[ing]" employees; (3) "force[d] . . . unit employees to exhaust all of their earned leave . . . by failing to provide . . . accommodations"; and (4) "engage[d] in discrimination against disabled veteran employees[.]"³

The Arbitrator found "the grievance conceded that the [request's] main purpose" was for the Union to obtain the names of employees who might have been adversely affected by the Agency's alleged failure to timely process their accommodation requests so the Union could file a grievance "at some future time."⁴ Therefore, the Arbitrator ultimately adopted the Agency's proposed issue statement: "whether the Agency properly denied the Union's request."⁵

The Arbitrator stated the Union could still raise and argue "every point raised in its [proposed] multi-faceted issue statement,"⁶ and allowed the Union to present evidence of claims specific to employees who were named in the grievance. However, the Arbitrator found that the claims of "additional grievants" the Union raised "for the first time at the hearing" were not properly before him.⁷ Further, he explained that consideration of the Union's evidence "is contingent on whether or not the Agency is permitted by law to comply with the Union's request."⁸

¹ 5 U.S.C. § 552a.

² Award at 28.

³ *Id.* at 4-5.

⁴ *Id.* at 53.

⁵ *See id.* at 5.

⁶ *Id.* at 6.

⁷ *Id.* at 53-54.

⁸ *Id.* at 50.

As to whether the Agency properly denied the request, the Arbitrator found that Article 49, Section 5 of the parties' agreement (Section 5) requires the Agency to disclose certain information unless the disclosure is "precluded by law."⁹ The Arbitrator determined that the Privacy Act precluded disclosure of the requested information.

The Arbitrator also determined that Article 18, Section 3 of the parties' agreement incorporates the confidentiality provision of VA handbook 5975.1. That handbook requires information concerning accommodations, including the accommodation request itself, to "be kept confidential."¹⁰

The Arbitrator further found that Article 24, Section 2(B) of the parties' agreement supports a conclusion that disclosure of information relating to employees' accommodations requires employees' express written consent. The Arbitrator stated that this provision and Article 18, Section 3 "further confirmed" that the requested information should be "kept confidential" and not disclosed without employees' permission.¹¹ Based on these findings, the Arbitrator concluded the "grievance cannot be sustained"¹² because the Agency "properly denied the Union's request."¹³

On September 17, 2022, the Union filed exceptions to the award, and on October 14, 2022, the Agency filed an opposition to the Union's exceptions.

III. Analysis and Conclusions

A. The Union does not demonstrate that the Arbitrator exceeded his authority.

The Union argues that the Arbitrator exceeded his authority by framing the issue as only related to the request

and not addressing whether the Agency failed to timely process employees' requests for accommodations.¹⁴ As relevant here, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration.¹⁵ It is well settled that when parties do not agree on the issues, arbitrators have the discretion to frame them,¹⁶ and the Authority accords the arbitrator's formulation substantial deference.¹⁷ Where an arbitrator has framed the issues, the Authority examines whether the award is directly responsive to the issues as framed by the arbitrator.¹⁸

The parties did not stipulate to the issue, and "agreed that the Arbitrator may decide the ultimate issue to be resolved."¹⁹ The Arbitrator adopted the Agency's proposed issue, which was "whether the Agency properly denied the Union's request,"²⁰ and the award is directly responsive to that issue.²¹ Therefore, the Union does not demonstrate that the Arbitrator exceeded his authority, and we deny this exception.²²

B. The Union does not demonstrate that the award is based on a nonfact.

The Union argues the award is based on a nonfact because the Arbitrator did not resolve the issue pertaining to employees' accommodations.²³ To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.²⁴ A challenge that fails to identify clearly erroneous factual findings does not demonstrate that an award is based on a nonfact.²⁵ Here, the Arbitrator's framing of the issue does not constitute a "factual finding."²⁶ Therefore, the Union's claim provides no basis for finding that the award is based on a nonfact, and we deny the exception.²⁷

⁹ *Id.* at 52-53.

¹⁰ *Id.* at 52 (quoting VA handbook 5975.1, § 13).

¹¹ *Id.* at 51-52.

¹² *Id.* at 51.

¹³ *Id.* at 55.

¹⁴ Exceptions Br. at 8-9.

¹⁵ *Fraternal Ord. of Police, DC Lodge 1*, 73 FLRA 408, 411 (2023) (*Police*) (citing *NTEU, Chapter 149*, 73 FLRA 133, 135 (2022)).

¹⁶ *Id.* (citing *U.S. Dep't of VA, Nashville Reg'l Off., VA Benefits Admin.*, 72 FLRA 371, 374 (2021) (Member Abbott concurring on other grounds)).

¹⁷ *AFGE, Loc. 1101*, 70 FLRA 644, 645, 646 (2018) (Member DuBester concurring) (citing *AFGE, Council of Prison Locs. #33, Loc. 0922*, 69 FLRA 351, 352 (2016)).

¹⁸ *NTEU, Chapter 149*, 73 FLRA 413, 415 (2023) (*Chapter 149*) (citation omitted).

¹⁹ Award at 5.

²⁰ *Id.*

²¹ *Id.* at 55.

²² See *Police*, 73 FLRA at 411 (denying exceeded-authority exception when the award was directly responsive to the issue as framed by the arbitrator (citing *NAIL, Loc. 10*, 71 FLRA 513, 515 (2020); *AFGE, Loc. 2502, Council of Prison Locs. 33*, 73 FLRA 59, 61 (2022) (Chairman DuBester concurring))).

²³ Exceptions Br. at 6-7.

²⁴ *Police*, 73 FLRA at 410 (citing *NTEU*, 73 FLRA 101, 103 (2022)).

²⁵ *AFGE, Loc. 3254*, 70 FLRA 577, 580 (2018) (*Local 3254*) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 69 FLRA 197, 201 (2016)).

²⁶ See *id.*; see also *NAIL, Loc. 17*, 68 FLRA 97, 99 (2014) (*Local 17*) (Member DuBester concurring) ("arbitrator's interpretation of the scope of a grievance does not constitute a matter that can be challenged as a nonfact" (citing *AFGE, Council Loc. 2128*, 59 FLRA 406, 408 (2003); *U.S. DOD, Def. Contract Mgmt. Agency*, 59 FLRA 396, 403 (2003) (Member Pope dissenting in part on other grounds))).

²⁷ See, e.g., *Local 3254*, 70 FLRA at 580; *Local 17*, 68 FLRA at 99.

- C. The Union does not demonstrate that the award fails to draw its essence from the parties' agreement.

The Union argues the award fails to draw its essence from Section 5 because the Arbitrator concluded the agreement does not require the Agency to disclose to the Union employees' information where such disclosure is "precluded by law."²⁸ The Authority will find that an award fails to draw its essence from a collective-bargaining 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.²⁹

Section 5 states:

If the Union makes a request under 5 U.S.C. [§] 7114(b)(4), the Department agrees to provide the Union, upon request, with information that is normally maintained, reasonably available, and necessary for the Union to effectively fulfill its representational functions and responsibilities. This information will be provided to the Union within a reasonable time and at no cost to the Union.³⁰

Although Section 5 does not expressly state that the Agency will provide information unless "precluded by law," it states that it pertains to requests made under § 7114(b)(4) of the Federal Service Labor-Management Relations Statute.³¹ Section 7114(b)(4) requires agencies to furnish requested information "to the extent not prohibited by law."³² As Section 5 applies to § 7114(b)(4) requests, the Arbitrator's conclusion that Section 5 only requires disclosures not "precluded by law" is not irrational, unfounded,

implausible, or a manifest disregard of Section 5.³³ Accordingly, the Union does not demonstrate that the award fails to draw its essence from Section 5, and we deny the exception.³⁴

- D. The Arbitrator did not deny the Union a fair hearing.

The Union argues the Arbitrator denied it a fair hearing for several reasons.³⁵ An award will be found deficient on the ground that an arbitrator failed to provide a fair hearing where the excepting party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole.³⁶ However, it is well established that an arbitrator has considerable latitude in conducting a hearing, and an arbitrator's limitation on the submission of evidence does not, by itself, demonstrate that the arbitrator failed to provide a fair hearing.³⁷ Further, disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded to it, provides no basis for finding an award deficient on fair-hearing grounds.³⁸

First, the Union argues the Arbitrator failed to consider pertinent testimony because he stated that the Union's witnesses "expressed their belief that they were forced into constructive retirement and medical[-]disability retirement due to the Agency's failure" to timely process their accommodation requests when, in fact, only one witness testified about constructive retirement issues.³⁹ As discussed previously, the Arbitrator determined that specific accommodation claims were not part of the issue before him, and we have rejected the Union's argument that the Arbitrator exceeded his authority in framing the issue.⁴⁰ Therefore, the Union's

²⁸ See *Exceptions Br.* at 8 (quoting Award at 53).

²⁹ *AFGE, Loc. 446*, 73 FLRA 421, 421 (2023) (citing *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 67, 69 (2022) (Member Kiko concurring on other grounds)).

³⁰ Award at 23.

³¹ 5 U.S.C. § 7114(b)(4).

³² *Id.*

³³ See Award at 50-51. The Arbitrator found that the Privacy Act prohibited disclosure of the requested information, a finding the Union does not dispute.

³⁴ See *Chapter 149*, 73 FLRA at 416-17.

³⁵ *Exceptions Br.* at 4-5.

³⁶ *AFGE, Loc. 2338*, 73 FLRA 229, 231 (2022) (citing *NTEU*, 66 FLRA 835, 836 (2012)).

³⁷ *AFGE, Loc. 3369*, 72 FLRA 158, 160 (2021) (*Local 3369*) (citing *AFGE, Loc. 2923*, 69 FLRA 286, 291 (2016) (*Local 2923*); *AFGE, Loc. 3979, Council of Prisons Locs.*, 61 FLRA 810, 813 (2006) (*Local 3979*); *U.S. Dep't of Com., Pat. & Trademark Off., Arlington, Va.*, 60 FLRA 869, 879 (2005) (*PTO*)).

³⁸ *U.S. Dep't of VA, VA Greater L.A. Healthcare Sys., L.A., Cal.*, 71 FLRA 953, 954 (2020) (Member DuBester concurring) (citing *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 71 FLRA 338, 340-41 (2019) (Member DuBester concurring)).

³⁹ *Exceptions Br.* at 4 (quoting Award at 32).

⁴⁰ *Local 3254*, 70 FLRA at 579 (denying fair-hearing exception challenging arbitrator's framing of the issue (citing *AFGE, Council of Prison Locs., Loc. 3828*, 66 FLRA 504, 505 (2012) (*Local 3828*)).

argument does not demonstrate that the Arbitrator refused to hear or consider any pertinent and material evidence.⁴¹

Additionally, in support of its assertion that witness testimony was not “accurately recorded” or considered, the Union cites the Arbitrator’s description of the Union’s witnesses and the court reporter.⁴² Specifically, the Union challenges the Arbitrator’s description of its witnesses as “rank and file Union members” when the witnesses were actually “a mixture of Union members, representatives, and bargaining[-]unit employees.”⁴³ Although the Union disagrees with the Arbitrator’s description of these witnesses, it does not explain how this description demonstrates the Arbitrator refused to hear or consider pertinent and material evidence.⁴⁴

As to the court reporter, the Union claims the Arbitrator “used his own court reporter, unbeknownst to the Union, to create a record of the arbitration which he unilaterally made the official record.”⁴⁵ It bases this claim on the Arbitrator’s reference in the award to the court reporter’s name,⁴⁶ which differs from the name on the transcript.⁴⁷ However, according to the Agency, both of these individuals work for the same court-reporting company and were “involved in the logistical process for ensuring that reporting services were present.”⁴⁸ Moreover, the Union does not identify any evidence supporting its allegation that the Arbitrator based his decision on a transcript that misrepresented the testimony. The Union’s conclusory assertions do not demonstrate that the name referenced in the award was anything more than a typographical error by the Arbitrator. As such, the

Union’s argument does not demonstrate that it was denied a fair hearing.⁴⁹

Further, the Union argues that it was denied a fair hearing because the Arbitrator only allowed it to ask witnesses to identify documentary evidence as “true an[d] accurate,” and did not allow it to ask about the content of the documents.⁵⁰ However, in one of the examples cited by the Union to support this claim, the record demonstrates the Arbitrator determined that the Union had laid a sufficient foundation to introduce an exhibit into evidence, and advised the Union that it was unnecessary for the witness to further describe evidence that the Arbitrator would examine.⁵¹ The record also shows the Arbitrator admitted the exhibit into evidence and the Union proceeded with further questioning.⁵² Additionally, the Arbitrator accepted the Union’s post-hearing brief – despite it being untimely – and therefore provided the Union the opportunity to elaborate on the content of the evidentiary documents.⁵³ Therefore, the Union does not demonstrate the Arbitrator restricted testimony or otherwise failed to consider pertinent evidence related to that testimony.

Accordingly, we find the Union has not demonstrated that the Arbitrator denied it a fair hearing, and we deny this exception.⁵⁴

IV. Decision

We deny the Union’s exceptions.

⁴¹ See *Local 3828*, 66 FLRA at 505 (denying fair-hearing exception where arbitrator only considered evidence relevant to framed issue); *AFGE, Loc. 3438*, 65 FLRA 2, 3 (2010) (denying fair-hearing exception when excepting party failed to demonstrate that the arbitrator failed to consider material evidence).

⁴² Exceptions Br. at 4-5.

⁴³ *Id.* at 4.

⁴⁴ *U.S. Dep’t of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 498, 504 (2023) (denying fair-hearing exception where excepting party failed to explain how arbitrator’s action denied it a fair hearing); see also *AFGE, Loc. 3294*, 70 FLRA 432, 435 (2018) (Member DuBester concurring) (denying fair-hearing exception claiming the award contained “critical misstatements,” because objection was a “simpl[e] disagree[ment] with how the [a]rbitrator evaluated the evidence”); *AFGE, Loc. 3911, AFL-CIO*, 68 FLRA 564, 568 (2015) (denying fair-hearing exception based on argument that arbitrator “distorted witness testimony”); *AFGE, Loc. 2610*, 30 FLRA 1153, 1154 (1988) (finding arbitrator’s alleged error in stating facts did not demonstrate award deficient).

⁴⁵ Exceptions Br. at 5.

⁴⁶ Award at 2.

⁴⁷ Opp’n, Ex. 18, Relevant Tr. Portions (Tr.) at 661.

⁴⁸ Opp’n Br. at 5.

⁴⁹ See, e.g., *AFGE, Loc. 3354*, 64 FLRA 330, 333 (2009) (denying fair-hearing exception based on excepting party’s criticism of arbitrator’s typographical errors and conclusory assertion that the errors demonstrated that the arbitrator failed to consider evidence).

⁵⁰ Exceptions Br. at 5. We note that it is unclear whether the Union challenged the alleged restriction of the testimony before the Arbitrator. The record, as submitted by the parties, demonstrates the Arbitrator advised the Union it was unnecessary to lay a detailed foundation about evidence that the Arbitrator would examine. See Tr. at 41. Therefore, we assume, without deciding, that this argument is properly before us. See *Chapter 149*, 73 FLRA at 415 n.18 (assuming, without deciding, that an argument was properly before the Authority).

⁵¹ See Tr. at 41 (Arbitrator stating that there is “no point telling me what the exhibit says when I can read it myself”).

⁵² See *id.* at 41-65.

⁵³ Award at 3.

⁵⁴ See *Local 3369*, 72 FLRA at 160 (denying fair-hearing exception based, in part, on an arbitrator’s “considerable latitude in conducting a hearing” (citing *Local 3979*, 61 FLRA at 813)); see also *Local 2923*, 69 FLRA at 291 (citation omitted); *PTO*, 60 FLRA at 879 (arbitrator’s limitation on the submission of evidence did not, by itself, demonstrate that the arbitrator failed to provide a fair hearing).