

73 FLRA No. 22

UNITED STATES
DEPARTMENT OF
HEALTH AND HUMAN SERVICES
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-5613

June 24, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members

I. Statement of the Case

When the Agency reassigned certain employees as part of a reorganization, the Union argued that the Agency failed to: properly notify the Union, give the Union an opportunity to bargain, or comply with contract provisions regarding involuntary reassignments. As a result, the Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement (CBA) and § 7116(a)(1), (5), and/or (8) of the Federal Service Labor-Management Relations Statute¹ (Statute). Arbitrator David P. Clark found that the grievance was arbitrable and sustained it on the merits. The Agency filed exceptions alleging the award was based on a nonfact and failed to draw its essence from the parties' CBA. We deny the Agency's exceptions because they fail to demonstrate how the award is deficient.

¹ 5 U.S.C. § 7116(a)(1), (5), (8).

² All dates occurred in 2019 unless noted otherwise.

³ Exceptions, Attach. G, Union's Exhibits, Union's Ex. 2 at 2-3.

⁴ *Id.* at 1.

II. Background and Arbitrator's Award

In May 2019,² the Agency decided to undergo a reorganization to reassign and relocate bargaining-unit employees (BUEs) from various duty stations to the Agency's headquarters in Washington, D.C. The Agency held an all-hands meeting and a webinar with affected BUEs to discuss details of their reassignments and continued to move forward with the reorganization. On June 21, the Union emailed the Agency regarding the reorganization. According to the Union, it never received notice concerning the reorganization nor an opportunity to bargain the changes in accordance with Article 3 of the parties' CBA.³ As a result, the Union requested that the Agency stop the reorganization. On June 25, the Agency informed the Union that it would send the required notice, but did not commit to any bargaining.⁴

On July 10, the Union filed a grievance alleging that the Agency violated the parties' CBA and the Statute by unilaterally implementing the reorganization and directing assignments without providing the Union with notice and an opportunity to bargain. The grievance also asserted that the Agency had failed to take the steps required by Article 35 of the CBA to minimize the adverse impact of the reassignments. On July 15, the Agency finally sent formal notice to the Union, but neither discussed nor engaged in impact-and-implementation bargaining with the Union. The parties did not resolve the grievance, and the grievance proceeded to arbitration. In relevant part, the Arbitrator framed the issue as follows: "Whether the Union's grievance is arbitrable?"⁵

Article 45, Section 8(D) (Article 45) of the parties' CBA provides:

The Union may file a national grievance over issues affecting bargaining unit employees covered by the Agreement from more than one chapter by filing the grievance with the designated management official within thirty (30) calendar days of the time the Union became aware, or should have become aware, of the matter grieved.⁶

⁵ Award at 1. The other issue before the Arbitrator was "[w]hether the Agency's actions in reassigning and relocating bargaining unit employees from regional offices in ACL to Washington, D.C. constituted a failure to give notice to the Union and an opportunity to bargain, in violation of 5 U.S.C. § 7116(a)(1), (5), and/or (8) of the Federal Service Labor-Management Relations Statute, and/or Article 3 and 35 of the [p]arties' CBA?" *Id.* However, only the arbitrability issue is relevant to the Agency's exceptions.

⁶ Exceptions, Attach. F, 2010 Collective-Bargaining Agreement at 194.

According to the Agency, the Union's grievance was untimely because the Union became aware of the reorganization and reassignments on May 6, the date of the all-hands meeting, and therefore was obligated to file the grievance within thirty days of that date, or no later than June 4. The Union argued that it timely filed the grievance because it filed within thirty days of June 20 when the Union's national office learned of the reorganization.

Regarding when the Union "became aware, or should have become aware, of the matter grieved,"⁷ the Arbitrator noted that the matter grieved included the Agency's failure to provide the Union notice of the reorganization as well as the Agency's failure to either bargain impact and implementation or comply with Article 35's requirement to minimize the adverse impact of the involuntary reassignments.⁸ Until the Agency ignored the Union's request to bargain, the Arbitrator found that "the Union had no idea whether the Agency intended to engage in impact and implementation bargaining."⁹ The Arbitrator ultimately found that "the [p]arties' email exchange on June 25, 2019 represented the moment the Union knew, or should have known, that it needed to preserve its ability to raise any complaint about the Agency's obligation to bargain under the Statute and the CBA."¹⁰ Accordingly, the Arbitrator found that "the Union filed its grievance within the [thirty]-day deadline established by Article 45."¹¹ On the merits, the Arbitrator sustained the grievance finding that the Agency violated Articles 3 and 35 of the CBA, as well as § 7116(a)(1), (5), and/or (8) of the Statute.

The Agency filed exceptions to the award on April 6, 2020, and the Union filed an opposition to the exceptions on May 4, 2020.

III. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency claims that the award is deficient because the Arbitrator's arbitrability determination is based on a nonfact.¹² 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.¹³ However, the Authority has held that a party's disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be given such evidence, provides no basis for finding an award deficient on nonfact grounds.¹⁴ In addition, the Authority will not find an award deficient on a nonfact basis where the alleged nonfact was disputed by the parties before the arbitrator.¹⁵

The Agency argues that the nonfact occurred when the Arbitrator concluded that the June 25 email exchange "represented the moment that the Union knew, or should have known, that it needed to preserve its ability to raise any complaint about the Agency's obligation to bargain under the Statute and the CBA."¹⁶ The Agency's nonfact exception challenges the Arbitrator's evaluation of the evidence. Based on the Agency's actions and the email correspondence between the parties, the Arbitrator found that "the Union learned for the first time on June 25, 2019, that the Agency was not providing a clear declaration of intent with respect to impact and implementation bargaining, one way or the other."¹⁷ Moreover, the parties clearly disputed at arbitration when the Union became aware of the matter grieved.¹⁸ Because challenges to the Arbitrator's evaluation of evidence do not provide a basis for finding the award deficient,¹⁹ and the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties had

⁷ Award at 6 (quoting Article 45).

⁸ See *id.* at 20.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Exceptions Br. at 5-8.

¹³ *U.S. Dep't of HHS, FDA, San Antonio, Tex.*, 72 FLRA 179, 179-80 (2021) (Chairman DuBester concurring) (citing *U.S. DHS, Citizenship & Immigr. Servs., Dist. 18*, 71 FLRA 167, 167 (2019) (then-Member DuBester dissenting)).

¹⁴ *Int'l Bhd. of Boilermakers, Loc. 290*, 72 FLRA 586, 588 (2021) (*Loc. 290*) (Chairman DuBester concurring; Member Abbott concurring) (citing *U.S. DOD, Def. Logistics Agency, Disposition Servs., Battle Creek, Mich.*, 70 FLRA 949, 950 (2018) (*Def. Logistics Agency*) (Member Abbott concurring; then-Member DuBester concurring); *Fraternal Ord. of Police, Lodge No. 168*, 70 FLRA 788, 790 (2018)).

¹⁵ *Def. Logistics Agency*, 70 FLRA at 950 (citing *U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010)).

¹⁶ Exceptions Br. at 7.

¹⁷ Award at 21.

¹⁸ *Id.* at 16, 18 (summarizing parties' procedural-arbitrability arguments concerning whether the grievance was timely filed).

¹⁹ See *Loc. 290*, 72 FLRA at 588 (denying nonfact exception because it merely challenged arbitrator's evaluation of the evidence); *U.S. Dep't of VA, VA Puget Sound Health Care Sys., Seattle, Wash.*, 72 FLRA 441, 443 (2021) (Chairman DuBester concurring) (same); *AFGE, Loc. 3369*, 72 FLRA 158, 159 (2021) (same).

disputed before the arbitrator,²⁰ we deny the nonfact exception.²¹

- B. The award draws its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator failed to dismiss the Union's grievance as untimely.²² The Agency contends that the Arbitrator "improperly disregarded the parties' negotiated thirty (30) day time limit to file a grievance"²³ by finding that the "June 25, 2019 e-mail exchange was 'the moment that the Union knew, or should have known that it needed to preserve its ability to raise any complaint about the Agency's obligation to bargain under the Statute and the CBA.'"²⁴

When the Authority rejects a nonfact exception, the Authority will also reject an essence exception premised on that nonfact exception.²⁵ Here, the Agency's essence argument is premised on its belief that the Arbitrator's factual conclusion – that June 25 represented the moment the Union became aware or should have become aware of the Agency's intent with respect to impact and implementation bargaining – is incorrect. As such, this objection does not provide a basis for finding the award deficient, and we deny the Agency's essence exception.²⁶

IV. Decision

We deny the Agency's exceptions.

²⁰ See *AFGE, Loc. 466*, 70 FLRA 973, 974 (2018) (denying nonfact exception challenging arbitrator's conclusion regarding when the union was aware of the matter grieved because "the parties clearly disputed at arbitration when the time to file the grievance began").

²¹ See *Def. Logistics Agency*, 70 FLRA at 951 (denying nonfact exception challenging arbitrator's determination of which agency notification triggered the grievance-filing deadline because "the parties disputed that very matter at arbitration, and the [arbitrator] based that conclusion on his evaluation of the evidence").

²² Exceptions Br. at 8-12.

²³ *Id.* at 8.

²⁴ *Id.* at 11 (citing Award at 20).

²⁵ *U.S. Dep't of HHS, FDA, San Diego, Cal.*, 67 FLRA 255, 256 (2014) (*San Diego*) (denying essence exception premised on denied nonfact exception); see also *U.S. Dep't of VA*, 72 FLRA 518, 520 (2021) (Chairman DuBester concurring) (denying a nonfact exception that was premised on a previously denied essence exception).

²⁶ See *San Diego*, 67 FLRA at 256.