

74 FLRA No. 55

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES CUSTOMS
AND BORDER PROTECTION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-5924

DECISION

March 3, 2026

Before the Authority: Colleen Duffy Kiko, Chairman,
and Anne Wagner and Charles O. Arrington, Members

I. Statement of the Case

The Agency assigned U.S. Customs and Border Protection (CBP) officials outside the U.S. Border Patrol (Border Patrol) to determine whether discipline was appropriate in two misconduct investigations concerning Border Patrol agents. Claiming these assignments conflicted with an established past practice, the Union grieved the Agency's refusal to bargain before changing the practice. At arbitration, the Agency argued the grievance was procedurally inarbitrable because the Union filed it after the grievance-filing deadline in the parties' collective-bargaining agreement. Without addressing the arbitrability issue, Arbitrator Alfred D. Peters issued an award sustaining the grievance and directing the Agency to comply with the past practice until it satisfied its bargaining obligations.

The Agency filed exceptions to the award arguing that it fails to draw its essence from the parties' agreement and that it conflicts with management's rights under § 7106(a) of the Federal Service Labor-Management Relations Statute (the Statute).¹ Because the award does

not provide sufficient findings for us to determine whether it draws its essence from the parties' agreement, we remand the case to the parties for resubmission, absent settlement, to arbitration.

II. Background and Arbitrator's Award

To avoid real or perceived conflicts of interest in two disciplinary investigations concerning Border Patrol agents, the Agency assigned CBP officials outside the Border Patrol to render the disciplinary decisions. On July 6 and 7, 2022, the Agency sent the subjects of the first investigation notices of proposed discipline, which identified a CBP official as the deciding official in their cases. In response, the Union directed questions concerning the proposed discipline to the identified deciding official at CBP. The Agency sent a notice of proposed discipline – again identifying a CBP official as the deciding official – to the subject of the second investigation on October 7, 2022.

On November 8, 2022, the Union filed a grievance alleging that the Agency violated the parties' agreement² and the Statute³ by failing to bargain over a change to an established past practice. According to the Union, the parties had a past practice whereby the Agency would assign only uniformed Border Patrol leadership to serve as deciding officials in disciplinary cases involving Border Patrol agents. The grievance proceeded to arbitration.

Although the parties did not stipulate the issues, both parties submitted versions of the same question: "Whether the Union [could] prove the parties had an established past practice of appointing only uniformed [Border Patrol leadership] to serve as . . . deciding official[s] [i]n discipline and adverse action cases

¹ 5 U.S.C. § 7106(a).

² Award at 6 (quoting Exceptions, Attach. C, Joint Ex. 1, Collective-Bargaining Agreement (CBA) at 5 ("[P]ast practices will stay in place unless they conflict with this [a]greement or are re-negotiated in accordance with law and this [a]greement.")).

³ 5 U.S.C. § 7116(a)(5) ("[I]t shall be an unfair labor practice for an agency . . . to refuse to . . . negotiate in good faith with a labor organization as required" by the Statute).

involving [Border Patrol agents].”⁴ The Union also submitted a second issue, specifically: “[I]f the [U]nion established a past practice, whether the Agency violated . . . the parties’ . . . agreement and[/]or . . . [§] 7116(a)(1) and (5) [of the Statute] by failing to negotiate a change of the established past practice in accordance with the law and the . . . agreement; and . . . if so, what shall be the remedy?”⁵ The Agency “ha[d] no objection” to the Union’s second issue⁶ and, in its closing brief to the Arbitrator, also included it as an issue.⁷ Neither party initially submitted an issue regarding procedural arbitrability. In his award, the Arbitrator quoted the parties’ submitted issues and noted the parties agreed to let him resolve any differences between those issues, but he did not frame any issues.

During the arbitration hearing, the Agency elicited witness testimony stating that the grievance was untimely.⁸ In response, citing Article 33(c) of the parties’ agreement,⁹ the Union objected to the timeliness issue being raised for the first time at that point in the proceedings.¹⁰ The Agency disagreed¹¹ and, in its closing brief to the Arbitrator, argued the grievance was procedurally inarbitrable because the Union filed it after the deadline established by Article 33(f) of the parties’ agreement.¹² Article 33(f)(1) provides that “Union initiated grievances may be submitted in writing . . . within [thirty] calendar days of the incident” being grieved.¹³ In its closing brief, the Union asserted that “the initial issue to be decided by the Arbitrator” was “[w]hether the . . . [g]rievance was timely filed, and if not, whether it was the ‘appropriate time’ for the Agency to wait until the middle of the arbitration to raise . . . arbitrability . . . or[,] by its inaction, did the Agency’s failure to raise timeliness constitute a waiver of an arbitrability challenge?”¹⁴ The

Union again argued that, under Article 33(c), the Agency failed to timely raise the procedural-arbitrability issue.¹⁵

In his award, the Arbitrator addressed the merits of the Union’s grievance without discussing the Agency’s procedural-arbitrability argument or listing Article 33 of the parties’ agreement as a relevant provision. Finding a past practice existed, the Arbitrator determined that the Agency violated the parties’ agreement and the Statute by changing the past practice without first bargaining with the Union. To remedy these violations, the Arbitrator directed the Agency to cease and desist from further delegations of disciplinary authority that conflicted with this practice until the Agency satisfied its statutory and contractual bargaining obligations.

The Agency filed exceptions on October 26, 2023, and the Union filed an opposition on November 27, 2023.

III. Analysis and Conclusion: We remand the award for further findings.

The Agency argues the award fails to draw its essence from Article 33(f) because the Union filed its grievance after that provision’s thirty-day filing deadline.¹⁶ The Authority will find an arbitration award fails to draw its essence from the parties’ agreement when the appealing party establishes 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.¹⁷

⁴ Award at 2 (quoting Union’s proposed issue); *see also* Exceptions, Attach. B., Hr’g Tr. (Tr.) at 5. The Arbitrator stated the Agency’s framing of the second issue as follows: “Whether the Union [could] prove the parties had an established past practice of appointing only uniformed [Border Patrol leadership] to serve as . . . deciding official[s] [i]n discipline and adverse action cases involving [Border Patrol agents] or was the Agency’s selection of deciding officials consistent with policy and the parties’ . . . [a]greement.” Award at 2; *see also* Exceptions, Attach. F, Agency Closing Br. (Agency’s Closing Br.) at 1 (stating its proposed issue as “[w]hether the Union can prove the parties had an established past practice of appointing only uniformed Border Patrol [a]gent managers to serve as a deciding official on discipline and adverse action cases involving Border Patrol [a]gents, or was the selection of the two deciding officials that form the basis of the Union’s grievance . . . consistent with Agency policy and the parties’ . . . [a]greement?”).

⁵ Tr. at 5-6; *see also* Award at 2.

⁶ Tr. at 6.

⁷ Agency’s Closing Br. at 3 (restating Union’s second issue with slight modifications).

⁸ Tr. at 119.

⁹ Article 33(c) of the parties’ agreement provides:

Allegations by management as to grievability or arbitrability should be raised at the earliest practical time. However, the parties recognize that questions of arbitrability or grievability may be raised at any appropriate time. Management will attempt to raise such issues at the time that a decision is issued on the grievance at the level of [h]eadquarters, unless the basis of the grievability/arbitrability determination arises after that time.

CBA at 73.

¹⁰ Tr. at 149-50.

¹¹ *Id.* at 150.

¹² Agency’s Closing Br. at 27-29.

¹³ CBA at 76.

¹⁴ Exceptions, Attach. G, Union Closing Br. at 4.

¹⁵ *Id.* at 12-16.

¹⁶ Exceptions Br. at 16.

¹⁷ SSA, 73 FLRA 708, 713 (2023).

According to the Agency, the grievance was untimely because the Union learned the Agency delegated disciplinary authority to a CBP official in the first investigation on July 6, 2022, but did not file its grievance until November 8, 2022 – more than thirty days later.¹⁸

The Union acknowledges that the Arbitrator “did not address the timeliness issue,” but argues that “the Authority should not remand the matter as the [agreement] does not set forth the consequences of any untimely” Union-initiated grievance.¹⁹ The Union also claims that it is “very likely that [the] Arbitrator . . . viewed the timeliness issue as a matter not before him since the parties [stated²⁰] the issues at the beginning of the hearing and the Agency did not raise the timeliness issue.”²¹

Because the Arbitrator did not cite Article 33(f) or discuss the timeliness issue at all, we cannot determine whether the Arbitrator: (1) declined to address the timeliness issue because he found it was not within the scope of the issues before him;²² (2) found the Agency waived its arbitrability argument by failing to raise it earlier; (3) considered the arbitrability question but found the grievance timely; or (4) found the grievance untimely but nevertheless arbitrable. Simply put, the award contains no explanation for why the Arbitrator did not interpret or apply Article 33(f). As such, the award does not contain sufficient findings for us to resolve the Agency’s essence challenge to the Arbitrator’s procedural-arbitrability determination.²³

Where an arbitrator’s findings are insufficient for the Authority to determine whether the award is deficient

on the grounds raised by a party’s exceptions, the Authority will remand the award.²⁴ Consistent with this principle, we remand the award to the parties for resubmission to arbitration, absent settlement, for further findings.²⁵ Any resulting award should include analysis of whether the Arbitrator considers the timeliness issue to be a matter before him for resolution; if so, whether the Agency properly raised that issue; and, if so, whether the Union timely filed the grievance. The award should also explain the basis for any timeliness determination by reference to Article 33 of the parties’ agreement.

The Agency also argues the Arbitrator’s merits determinations do not draw their essence from the parties’ agreement and conflict with management’s rights under § 7106(a) of the Statute.²⁶ Because we are remanding the case for further findings concerning the grievance’s arbitrability, it is premature to consider the Agency’s challenges to the Arbitrator’s findings on the merits.²⁷

IV. Decision

We remand the case to the parties for action consistent with this decision.

¹⁸ Exceptions Br. at 16.

¹⁹ Opp’n Br. at 27.

²⁰ The Union characterizes the issues as being “stipulated,” *id.* at 28, but, as noted above, the parties did not technically stipulate the issues.

²¹ *Id.* at 27-28.

²² *Cf. Ass’n of Admin. L. Judges, IFPTE*, 74 FLRA 325, 330 (2026) (Member Arrington concurring) (“When parties do not stipulate to the issues, arbitrators have the discretion to frame them, and the Authority accords the arbitrator’s formulation substantial deference.”); *Ass’n of Civilian Technicians, Ky. Long Rifle Chapter 83*, 73 FLRA 812, 814 (2024) (arbitrators are not required to specifically address every argument raised by a party).

²³ *See, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mendota, Cal.*, 73 FLRA 788, 789 (2024) (*DOJ*) (where the arbitrator did not identify an agreement provision that required the arbitrator to frame specific arbitrability issues, the arbitrator’s failure to address a contractual provision concerning the unframed issue did not warrant finding the award deficient on essence grounds); *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., S. D., Cal.*, 73 FLRA 495, 496 (2023) (*MCC San Diego*) (finding that there were inadequate findings to resolve essence exception where “the [a]rbitrator provided no contractual interpretation that the Authority [could] review”).

²⁴ *MCC San Diego*, 73 FLRA at 496 (remanding award for further findings where “the [a]rbitrator did not discuss the language of – let alone provide any interpretation of – the parties’ agreement”).

²⁵ *See DOJ*, 73 FLRA at 790-91 (remanding award for further findings where “the award contain[ed] no contract interpretation, whatsoever, that would [have] enable[d] [the Authority] to resolve the [a]gency’s essence challenge to the [a]rbitrator’s timeliness determination”). *Cf. U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 73 FLRA 775, 777 (2024) (remanding to parties for resubmission to arbitrator, absent settlement, where award did not contain sufficient findings for Authority to resolve nonfact arguments).

²⁶ Exceptions Br. at 10-16.

²⁷ *See DOJ*, 73 FLRA at 791 (finding it premature to consider exceptions challenging awarded remedies where the Authority remanded for further findings on grievance’s arbitrability and merits).