United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of BROADCASTING BOARD OF GOVERNORS And AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1812	Case No. 18 FSIP 004

DECISION AND ORDER

The American Federation of Government Employees, Local 1812 (Union) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §7119, between it and the Broadcasting Board of Governors (Agency or Management).

Following an investigation of the Union's request for assistance, which involves one remaining article in the parties' successor collective bargaining agreement, the Panel asserted jurisdiction over this dispute and decided to resolve it through a Written Submissions procedure with the opportunity for rebuttal statements. The parties were informed that, after considering the entire record, the Panel would take whatever action it deemed appropriate to resolve the dispute, which could include the issuance of a binding decision. The Panel has now considered the entire record, including the parties' final offers, written submissions, and the parties' rebuttal statements.

BACKGROUND

The Agency's mission is to inform, engage, and connect people around the world in support of freedom and democracy. It performs its mission by broadcasting programs in 60 languages to approximately 171 million people weekly via radio, television,

the Internet and other news media. The bargaining unit has just under 1,100 General Schedule and Wage Grade employees who populate a variety of positions. The parties are governed by an agreement that expired on September 22, 2008, but continues to self-renew annually unless/until the parties reach agreement on a new successor CBA. In 2013, they also agreed to further additions and revisions to their CBA.

The parties have been engaged in lengthy negotiations over their successor CBA for several years. In the fall of 2015, the parties filed a joint-request for Panel assistance over that CBA and, on December 17, 2015, the Panel directed the parties to submit their dispute to a third-party facilitator/factfinder. On July 18, 2016, Factfinder M. David Vaughn (Factfinder) issued his Factfinding Report and Recommendations concerning the parties' dispute over their successor CBA and the parties subsequently submitted objections to various portions of the Factfinder's report to the Panel on August 1, 2016. After deliberation, the Panel issued a Decision and Order on January 5, 2017, to resolve all remaining objections.[1]

All portions of the successor CBA, including the language imposed by the Panel, was subsequently submitted to the Agency Head for review pursuant to 5 U.S.C. §7114(c)(2). The Agency Head rejected Article 22, Section 5, which was language that the Panel imposed on the parties. This language read as follows:

> A reasonable time before the date of an arbitration hearing, but not later than the conclusion of the final step of the grievance process, the Party challenging the grievability and/or arbitrability of a grievance must notify the other Party of the challenge and reasonably explain the grounds for the challenge.

The Agency Head declined to adopt the foregoing language writing that it interfered with the Agency's right to raise statutory arbitrability claims at any point in grievance proceedings, including at arbitration. As a result of this rejection, the parties engaged in bilateral negotiation efforts between February and June of 2017 to address the Agency's objections. They could not reach agreement, so they sought out the assistance of the Federal Mediation and Conciliation Services, Case No. 20171207003. The parties received 2 days of mediation assistance, and the Mediator referred the parties to

---

[1] *See Broadcasting Board of Governors and AFGE, Local 1812*, 15 FSIP 121 (Jan. 7, 2017).

the Panel on October 10, 2017, after the parties could not reach agreement. On December 13, 2017, the Panel asserted jurisdiction over all remaining issues.

ISSUES

Following Agency Head review, the Union conceded that the Agency can raise statutory arbitrability claims at any time. The primary focus is now what, if any, consequences should accrue when such challenges are raised beyond a certain timeframe. The parties have also identified a second related dispute concerning the timing for raising grievability challenges.

I. Statutory Arbitrability

With respect to challenges based upon statutory arbitrability, the parties are in tentative agreement on the following language for Article 22, Section 5(a):

> Nothing in this Agreement prevents a Party from challenging arbitrability based on statutory jurisdiction or any other applicable law that precludes arbitrability (whether or not such preclusion is specifically stated) any time during the arbitration process. The Party raising the challenge must notify the Party of the challenge and reasonably explain the grounds for the challenge. The Arbitrator shall give the other Party a reasonable opportunity to respond to such an arbitrability challenge.

Despite this agreement, there is still controversy over the consequences of a "late" filed statutory arbitrability claim.

1. Union Position

The **Union** proposes additional language that requires the parties to identify statutory arbitrability challenges as early as possible or face financial repercussions. If a party raises such a challenge more than 15 days after arbitration has been invoked, the raising party must pay for any cancelled or additional hearing dates imposed by the Arbitrator. None of the foregoing applies, however, if the basis for a statutory challenge "could not have been apparent" until after the 15 day window elapses. So, for example, if the Federal Labor Relations Authority (FLRA) issues a new decision that impacts the parties'

dispute, a party could cite that decision at a later date presumably without penalty.

Although the Union's proposed language generally refers to the parties, it is really intended to address the Agency's actions. In the Union's view, the Agency has evidenced a pattern of waiting until an arbitration hearing has begun to raise statutory arbitrability claims. This action creates delays and additional fees and costs for the Union, the Agency, and the taxpayer. Therefore, the Union's proposed language is meant to curb this behavior. But it still gives Management an "out" by allowing them to raise "late" challenges if they could not have known of a challenge until a late date. The Union concedes that elsewhere in the parties' successor CBA, the parties have reached tentative agreement on language that requires the parties to share arbitration costs equally. In the Union's view, however, this does not mean that the Union's provision is somehow "covered by" an existing agreement because a *tentative* agreement is not the same thing as a *final* agreement. Moreover, the fees splitting provision does not even address the issue of statutory arbitrability claims.

2. Agency Position

The **Agency** opposes inclusion of the Union's language. The Union's language penalizes the Agency for raising its statutory rights and is unfair. The FLRA has long held that statutory arbitrability challenges may be raised at any time;[2] the Union's proposed language punishes both parties for exercising this right. Moreover, the Union's provision contravenes the parties' tentative agreement elsewhere in the successor CBA that the parties will share arbitration costs equally. This language states:

> The Arbitrator's fees and expenses shall be borne equally by the parties to the arbitration. If, prior to the arbitration hearing, the parties mutually resolve the grievance, any cancellation fee shall be borne equally by the parties. If a party refers a grievance to an arbitration, and later withdraws the request for any reason other than a mutually-agreed-upon resolution, that party shall bear the full cost

---

2 *See, e.g., U.S. Dep't of Veteran Affairs and AFGE, Local 2109*, 67 FLRA 269 (2014); *AFGE, Local 1923 and SSA*, 66 FLRA 424 (2012).

of any cancellation fee imposed by the Arbitrator. The Agency shall make all arrangements necessary for the provision of a hearing transcript. In all arbitrations, each party shall bear its costs for transcripts or its own expenses. The Agency will be responsible for costs associated with travel to and from an arbitration for Agency employees required at an arbitration.

The Union has provided no colorable basis for distinguishing this language. Further still, the provision arguably violates the FLRA's "covered-by" rule. Finally, Management disagrees with the Union's claim that the Agency chooses to wait until arbitration to raise statutory arbitrability claims. Under the current CBA, parties are unable to raise arbitrability challenges until the actual arbitration hearing. So it is the language of the contract, rather than the Agency's motives, that create late-raised challenges.[3]

CONCLUSION

The Panel shall order the Union to withdraw its provision. There is no disagreement that the Agency may raise a statutory arbitrability challenge at any time during an arbitration proceeding. Yet, the Union seeks to place a *de facto* curb on this ability by imposing a financial penalty should the Agency fail to raise such a claim within a certain time frame. The Panel believes that attaching what is essentially an arbitrability fine to "late" claims is incompatible with the parties' agreed upon notion that statute-based arbitrability claims are appropriate to raise at any point. In this regard, adopting this language would likely discourage either party from raising a statutory arbitrability challenge if they knew that they would have to pay (potentially) thousands of dollars regardless of the outcome of that challenge. Moreover, as noted by the Agency, the parties have already reached tentative agreement elsewhere in their successor CBA on the topic of arbitration fees. Specifically, the parties have tentatively agreed that they will *share* all costs for arbitrations. The Union provided no compelling rationale for why the Panel should distinguish this language.[4]

---

[3] The Agency did not cite the language it referred to.

[4] We do not reach this conclusion by relying upon the Agency's theory that the Union's proposal is covered by that tentatively agreed upon language. The Panel has no

II. Grievability

1. Union's Position

The **Union** proposes that arbitrability challenges unrelated to statutory arbitrability or a party's failure to timely invoke arbitration must be raised by the final step of the grievance process or be deemed forever waived. The Union claims that the parties had no dispute over this topic until after the Union filed its request for Panel assistance, at which point the Agency added "clarifying" limiting language that distinguished between arbitrability and grievability challenges (discussed in greater detail below). Indeed, the Union maintains that the parties even reached tentative agreement on this issue at mediation. Management's new language is unnecessary.

Moreover, the Union believes that the Agency's provision is meant to collaterally attack language that the Panel imposed in its January-2017 decision that the Agency never objected to on Agency Head review. In this regard, the Panel imposed the following Factfinder recommended language for Article 21, Section 6:

> A reasonable time before the date of an arbitration hearing, but not later than the conclusion of the final step of the grievance process, the Party challenging the grievability and/or arbitrability of a grievance must notify the other Party of the challenge and reasonably explain the grounds for the challenge.[5]

---

authority to resolve covered-by disputes. Moreover, the Agency's theory is legally inaccurate. The covered-by rule applies only to those agreements that are final and binding. The Agency Head in this case rejected a portion of the parties' successor CBA. When an Agency Head rejects one part of an agreement, he or she rejects *all* of the agreement. *See, e.g., POPA and PTO*, 41 FLRA 795, 802 (1991) (citations omitted). As such, the agreement is *not* finalized. Because there is no final agreement in this dispute, the covered-by doctrine is inapplicable. *See, e.g., AFGE, Local 12 and U.S. DoL*, 68 FLRA 1061, 1068 (2015); *AFGE, Immigration and Customs Enforcement, Nat'l Council 118 and U.S. DHS, U.S. Immigration and Customs Enforcement*, 68 FLRA 910, 915 (2015).

[5] *Broadcasting Board of Governors and AFGE, Local 1812*, 2015 FSIP 121 at 37, 44.

According to the Union, this language establishes the proposition that the Agency could not raise "*any* arbitrability argument" beyond the final step of the grievance process. (emphasis in original). The Union views the Agency's newly submitted provision as an attempt to relitigate the appropriateness of the above imposed language. The Union maintains that the Agency's provision would permit it to "sit on its rights and raise arbitrability arguments at the eleventh hour without accountability."

2. Agency's Position

The **Agency** is generally agreeable to the Union's language but proposes including language referring to "the initial ability to grieve the matter at hand." This language is meant to clarify that *grievability* challenges, as opposed to *arbitrability* challenges, cannot be raised after the final step of the grievance process (with the exception of claims based on statutory jurisdiction or a party's failure to timely invoke arbitration). Management is not opposed to language that precludes a grievability challenge from being raised at arbitration for the first time. However, Management is reluctant to include language which could inadvertently prohibit a party from raising arbitrability arguments that could not have been know until an arbitration hearing commences.

Management disagrees with the Union's description of the intent of Article 21, Section 6 as imposed by the Factfinder and the Panel in its 2017 decision. It believes that the Factfinder, and therefore the Panel, "clearly limited" challenges to "claim[s] of non-greivability." The Agency's provision "does just what the [Factfinder] intended, and should therefore be adopted." Moreover, it maintains that the parties discussed the distinction between grievability and arbitrability at mediation over this matter. The Agency's newly submitted language is simply a "clarification" of that discussion.

CONCLUSION

We will order an alternative to the provisions offered by the parties. In this regard, we impose the following language:

> Excluding statutory arbitrability challenges and challenges based on a failure to timely invoke arbitration, a reasonable time before the date of an arbitration hearing, but not later than the conclusion

> of the final step of the grievance process, the Party challenging the grievability or arbitrability of a grievance must notify the other Party of the challenge and reasonably explain the grounds for the challenge.

Much of the dispute between the parties on this issue arises from their disagreement over the language imposed by the Panel for Article 21, Section 6 in its prior decision. Although the parties could have chosen to pursue this disagreement through other forums (*e.g.*, grievances, unfair labor practices) we deem it necessary to provide the parties with clarity and a sense of finality in this order.

The language that we impose is intended to enshrine the parties' acknowledgement that statutory arbitrability claims can be raised at any point. Although the Factfinder and the Panel did not impose such a requirement, they did not have the benefit of the argument (and subsequent agreement) that such claims are ripe at any point of an arbitration proceeding. Thus, we find it important to include this distinction.

Moreover, we conclude that our language clarifies the Panel's previously imposed language. Any language we impose must make holistic sense when viewed within the larger context of the parties' successor CBA. Our language clarifies the scope and timing of grievability "or" arbitrability challenges while deferring to the previously discussed statutory framework. Thus, for this and all other previously discussed reasons, the Panel will order the adoption of the language we set forth above.

III. Remaining Undisputed Issues

The parties are in agreement on a provision requiring an arbitrator to provide the parties with any arbitrability decision in writing prior to any substantive arbitration hearing. Thus, the Panel imposes their inclusion into Article 22, Section 5. Additionally, in their filings with the Panel, the parties have agreed to drop two other provisions concerning timelines for presenting certain types of arbitrability challenges. Accordingly, these two provisions should not be included within the Article.

ORDER

Pursuant to the authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, and

because of the failure of the parties to resolve their dispute during the course of proceedings instituted under the Panel's regulations, 5 C.F.R. § 2471.6(a)(2), the Federal Service Impasses Panel under § 2471.11(a) of its regulations hereby orders the adoption of the following:

I. Statutory Arbitrability

The Union's provision shall be withdrawn.

II. Grievability

The Panel shall impose the following language:

Excluding statutory arbitrability challenges and challenges based on a failure to timely invoke arbitration, a reasonable time before the date of an arbitration hearing, but not later than the conclusion of the final step of the grievance process, the Party challenging the grievability or arbitrability of a grievance must notify the other Party of the challenge and reasonably explain the grounds for the challenge.

III. Agreed-Upon Provisions

The parties' other agreed-upon language shall be included in the CBA.

By direction of the Panel.

Mark A. Carter
FSIP Chairman

March 20, 2018
Washington, D.C.

APPENDIX I-DISPUTED PROVISIONS

Statutory Arbitrability

1. Union's Provision

[Statutory] [a]rbitrability challenges . . . should be raised no later than fifteen (15) calendar days after the arbitration is invoked. If the party challenging the arbitrability raises the challenge after fifteen (15) calendar days after arbitration has been invoked and the challenge results in a hearing day or days being canceled the party raising the challenge shall bear the full costs of any cancellation fee imposed by the arbitrator. If the challenge results in adding an additional hearing day or days, the party raising the challenge shall be responsible for all costs imposed by the arbitrator for the extra day or days and any additional transcription costs. This subsection does not apply if the basis for the challenge could not have been apparent until after the fifteen (15) calendar day time limit.

Grievability

1. Union's Provision

Excluding [statutory arbitrability challenges and challenges based on a failure to timely invoke arbitration], an arbitrability challenge cannot be raised if the challenging Party did not first raise the issue prior to the conclusion of the final step of the grievance process. If a challenge is timely raised, the Arbitrator shall give the other Party a reasonable opportunity to respond to such a challenge.

2. Agency's Provision

Excluding [statutory arbitrability challenges and challenges based on a failure to timely invoke arbitration], an arbitrability challenge regarding the initial ability to grieve the matter at hand cannot be raised if the challenging Party did not first raise the issue prior to the conclusion of the final step of the grievance process described in Article 21 of this [CBA]. If a challenge is timely raised, the

Arbitrator shall give the other Party a reasonable opportunity to respond to such a challenge.