

71 FLRA No. 31

UNITED STATES
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 299
(Union)

0-AR-5416

DECISION

June 5, 2019

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

I. Statement of the Case

In this case, we remind the federal labor-management community that an Arbitrator may not assume jurisdiction over the merits of a grievance when the party invoking arbitration fails to comply with procedural requirements specifically enumerated in the parties’ negotiated grievance procedure.

Here, the parties’ agreement specifies that any request for arbitration that is not scheduled for a hearing within six months will be deemed to be moot and will be considered withdrawn. Despite this clear provision, the Union did not schedule a hearing in the instant case until over seven months after invoking arbitration.

Arbitrator Elliot H. Shaller determined that the Union did not comply with that provision. Nonetheless, the Arbitrator found the grievance arbitrable and reached the merits. We set aside the award because this procedural-arbitrability determination does not draw its essence from the parties’ agreement.

II. Background and Arbitrator’s Award

The Union filed a grievance protesting the Agency’s performance evaluation of the grievant. The Agency denied the grievance on April 21, 2016.

On May 4, 2016, the Union invoked arbitration by sending a certified letter to the Agency. The Union also contacted the Arbitrator to inform him that he had been selected to preside over this case. The Union did not take any further steps to schedule the arbitration for hearing until it sent the Agency an email on December 8, 2016, to inquire about scheduling a hearing and to ask for the name of the Agency’s representative. The Agency sent the Union a response confirming its receipt of the Union’s letter invoking arbitration but indicated that it did not have a record of the case being assigned to an arbitrator. On December 19, 2016, the Agency sent an email to the Union stating that the time for scheduling the case for arbitration had passed. Both parties agreed to allow the Arbitrator to decide the arbitrability issue.

At arbitration, the Agency argued that the grievance was not arbitrable because the Union failed to timely schedule a hearing under Article 28, § 3C (Article 28) of the parties’ agreement. Article 28 provides:

Unless mutually agreed otherwise by the parties, any requested arbitration that has not been scheduled for hearing within six months will be deemed to be moot and will be considered withdrawn. No further arbitration will take place with respect to the matters covered by that grievance.¹

The Arbitrator determined that the hearing was “scheduled seven and one-half months after arbitration was invoked,” but that there was no evidence that the Union sought to delay the hearing unduly.² The Arbitrator found that Article 28 was intended for arbitrations that languished for years and that, based on past practice, “the Union did not bear sole responsibility for meeting the deadline” to schedule a hearing.³ Therefore, the Arbitrator determined that the grievance was arbitrable and proceeded to address the merits.

In an award dated August 29, 2018, the Arbitrator denied the grievance and the Agency filed exceptions on October 1, 2018. The Union filed an opposition on October 23, 2018.

¹ Exceptions, Ex. 1, Collective-Bargaining Agreement (CBA) at 147.

² Award at 25.

³ *Id.* at 27.

III. Analysis and Conclusion: The procedural-arbitrability determination fails to draw its essence from the parties' agreement.

The Agency asserts that the Arbitrator's procedural-arbitrability determination fails to draw its essence from the parties' agreement.⁴ Specifically, the Agency argues that Article 28 required the Union to schedule a hearing within six months of invoking arbitration.

As we explained in *U.S. Small Business Administration*,⁵ when parties agree to a procedural deadline—with no mention of any applicable excuse—the parties intend to be bound by that deadline.⁶ Article 28 clearly and unambiguously requires that an arbitration hearing be scheduled six months after invoking arbitration or the arbitration “will be deemed moot and will be considered withdrawn”⁷ But it does not contain any language that either allows the party invoking arbitration to be dilatory or excuses non-compliance.

The Arbitrator's determination that the grievance was arbitrable is incompatible with the plain wording of Article 28.⁸ The Arbitrator noted that in the

past the parties cooperated in scheduling hearings, so the Union did not bear the sole responsibility of scheduling the hearing.⁹ However, the Authority has recently held that, “arbitrators may not look beyond a collective-bargaining agreement – to extraneous considerations such as past practice – to modify an agreement's clear and unambiguous terms.”¹⁰ Thus, the Arbitrator erred when he relied on purported past practice to modify Article 28's plain wording.

Consequently, because the Arbitrator failed to enforce the plain wording of the parties' agreed-to filing timeframe, the award manifests a disregard of the parties' agreement. Therefore, we grant the Agency's essence exception and vacate the award.

IV. Decision

We set aside the award.

⁴ When reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. The Authority and the courts defer to arbitrators in this context “because it is the arbitrator's construction of the agreement for which the parties have bargained.” Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the 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. *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (citing 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

⁵ 70 FLRA 525, 527 (2018) (*SBA*) (Member DuBester dissenting) (parties may directly challenge procedural-arbitrability determinations on essence grounds).

⁶ *Id.* at 527-28; see also *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808-09 (2018) (*IRS*) (Member DuBester dissenting).

⁷ CBA at 147 (emphasis added).

⁸ See *IRS*, 70 FLRA at 808 (ignoring the plain wording of a deadline for invoking arbitration evidenced a manifest disregard of the agreement); *U.S. Dep't of the Army, 93rd Signal Brigade, Fort Eustis, Va.*, 70 FLRA 733, 734 (2018) (Member DuBester, dissenting); *SSA*, 70 FLRA 227, 229 (2017) (citing *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993) (finding award

deficient because the arbitrator's interpretation of the parties' agreement was incompatible with its plain wording)).

⁹ Award at 25-26.

¹⁰ *SBA*, 70 FLRA at 528. We note the Arbitrator found instructive a decision by the U.S. Court of Appeals for the Federal Circuit, *Muller v. GPO*, 809 F.3d 1375 (Fed. Cir. 2016) (finding noncompliance with an agreement's four-month deadline to hold arbitration hearing did not require dismissal of grievance because parties' past practice had modified terms of their agreement). However, that decision – involving the arbitration of an adverse action under 5 U.S.C. § 7512 and the interpretation of a different collective-bargaining agreement – is not controlling here. Moreover, the Arbitrator even acknowledged that *Muller* is “distinguishable” because, unlike here, the provision at issue in *Muller* did not state the consequences for failing to meet the hearing-scheduling deadline. Award at 26; see *Muller*, 809 F.3d at 1380 (relying in part on the contractual provision's failure to “stipulate[] any consequences for the union or the agency in the event of noncompliance with these deadlines”).

Member DuBester, dissenting:

I disagree with the majority's conclusion that the Arbitrator's award manifests a disregard of the parties' agreement.¹ In fact, the majority's conclusion illustrates precisely why our earlier decision in *U.S. Small Business Administration (SBA)*² – upon which today's decision rests – was wrongly decided.

In *SBA*, the majority "reconsidered" Authority precedent and found that "arbitrators may not look beyond a collective-bargaining agreement – to extraneous considerations such as past practice – to modify an agreement's clear and unambiguous terms."³ Applying that principle to the instant case, the majority reverses the Arbitrator's determination that the grievance was arbitrable because it "is incompatible with the plain wording of Article 28"⁴ – specifically, Section 3(C) of that provision. Section 3(C) states that, "[u]nless mutually agreed otherwise by the parties, any requested arbitration that has not been scheduled for hearing within six months will be deemed to be moot and will be considered withdrawn."⁵

The majority's decision is wrong for several reasons. First, the language of Section 3(C) is far from "clear[] and unambiguous[]." To the contrary, as the Arbitrator recognized, the provision "is silent on which party is responsible for scheduling the hearing."⁷ In light of this ambiguity, the Arbitrator properly considered testimony of an Agency witness that Section 3(C) was introduced by the Agency during bargaining to address its concern about cases that were not scheduled for years after the Union had invoked arbitration.⁸ Based on this testimony, the Arbitrator reasonably concluded that this "contractual language was intended for situations different from this case."⁹

¹ Majority at 4.

² 70 FLRA 525, 527 (2018) (*SBA*) (Member DuBester dissenting).

³ *Id.* at 528.

⁴ Majority at 3.

⁵ Exceptions, Ex. 1, Collective-Bargaining Agreement (CBA) at 147.

⁶ Majority at 3.

⁷ Award at 25. This is in contrast to provisions within the same article which clearly place the burden for processing a grievance through a certain stage upon the moving party. See, e.g., CBA at 146 (Art. 28, § 1(A)) (requiring the request for arbitration to be made within thirty calendar days after receipt of the final decision on the grievance).

⁸ Award at 25 (noting testimony that the provision was "introduced by the Agency to prevent the Union from invoking cases for arbitration and then not attempt to schedule a case [for hearing] and [cases] sat for years" (internal quotation marks omitted)).

⁹ *Id.*

Second, the Arbitrator correctly considered the context in which the arbitrability dispute arose between the parties. Specifically, he noted that after the step-two decision on the grievance issued on April 21, 2016, the Union promptly sent a letter to the Agency on May 4, 2016 invoking arbitration, and sent a letter to the Arbitrator the following day requesting possible hearing dates. More importantly, the Arbitrator found that the Agency misplaced the Union's letter invoking arbitration, and so no response was sent to the Union and no attorney was assigned by the Agency to the matter.¹⁰ In fact, the Agency did not confirm receiving the Union's letter until December 8, 2016, when the Union emailed Agency counsel asking to whom the matter had been assigned, and expressing a desire to schedule the arbitration "soon."¹¹

Based on these findings, the Arbitrator reasonably concluded that the Union "did not bear sole responsibility for meeting the deadline,"¹² particularly in light of the parties' past practice of "cooperat[ing] in scheduling hearings . . . based on mutual consent."¹³ Noting that the arbitration was scheduled only seven and one-half months after the Union invoked arbitration, the Arbitrator concluded that the hearing was "not unduly delayed" and found "no evidence that the Union sought to delay the hearing in the manner that the time-limit was intended to prevent."¹⁴

Against this background, the majority's conclusion that the arbitration was barred by Section 3(C) demonstrates the folly of our decision in *SBA*. Disregarding the parties' bargaining history, past practices, and even the context in which an arbitrability dispute arises in favor of an arguably ambiguous contractual provision hardly provides the parties "with stability and repose with respect to [the] matters [that they have] reduced to writing."¹⁵ Indeed, under the majority's approach, either party could prevent a case from being decided at arbitration by simply ignoring, or even avoiding, the other party's efforts to schedule the case for hearing within the six-month time frame set forth in Section 3(C).

And on a more fundamental level, as I noted in my dissent in *SBA*, the majority's "terse rejection of the [a]rbitrator's careful and detailed contract interpretation" is inconsistent with established judicial practice of deferring to arbitrators' contractual interpretations "because it is the *arbitrator's* construction of the

¹⁰ *Id.* at 15.

¹¹ *Id.* at 15-16.

¹² *Id.* at 27.

¹³ *Id.* at 25.

¹⁴ *Id.*

¹⁵ *SBA*, 70 FLRA at 528 (quoting *Dep't of the Navy v. FLRA*, 962 F.2d 48, 59 (D.C. Cir. 1992)).

agreement for which the parties have bargained.”¹⁶ Applying that deferential standard, the Arbitrator’s procedural-arbitrability determination readily survives the Agency’s essence challenge. Accordingly, I dissent from the majority’s conclusion to the contrary.

¹⁶ *Id.* at 532 (Dissenting Opinion of Member DuBester).