

71 FLRA No. 148

UNITED STATES
DEPARTMENT OF DEFENSE
EDUCATION ACTIVITY
ALEXANDRIA, VIRGINIA
(Agency)

and

FEDERAL EDUCATION ASSOCIATION
(Union)

0-AR-5509

DECISION

May 27, 2020

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

I. Statement of the Case

On April 23, 2019, Arbitrator Laurence M. Evans issued an award finding that the Agency violated the parties’ agreement and the Federal Service Labor-Management Relations Statute (the Statute)¹ when it notified the Union that it planned to implement a change to its performance appraisal system in one year. As a remedy, he ordered the Agency to return to the prior system.

The main question before us is whether the Union’s grievance was untimely because it was premature. Because the Agency had not yet implemented the new system, we find that the grievance was premature and, therefore, that the Arbitrator’s finding did not draw its essence from the parties’ agreement. Accordingly, we vacate the award.

II. Background and Arbitrator’s Award

On May 1, 2017, the Agency notified the Union that it would implement a new performance appraisal system the following year, pursuant to a provision in the National Defense Authorization Act for Fiscal Year 2010 (Authorization Act) that required it to establish a

new system that adhered to certain guidelines.² The new program, called the Defense Performance Management and Appraisal Program (DPMAP), would replace one called the Educator Performance Appraisal System (EPAS) that the parties had negotiated pursuant to Article 14 of their agreement.

On June 14, 2017, the Union filed a grievance in which it argued that the Agency’s plan to implement DPMAP “constitutes an anticipatory breach and contractual violation and/or repudiation” of Article 14 and the negotiated EPAS.³ The Agency denied the grievance, finding that it was “non-grievable/non-arbitrable” because it had not yet implemented DPMAP.⁴ The Agency also denied the grievance on the merits. The Union thereafter invoked arbitration, and the Arbitrator sustained the grievance in an award dated April 23, 2019.

As a threshold matter, the Arbitrator observed that the Agency apparently had decided not to pursue its position that the grievance was untimely because the Union filed it prematurely. The Arbitrator reached that conclusion because the Agency’s counsel raised the timeliness issue during the arbitration hearing’s opening statements, and did not withdraw that issue from the proceeding, but did not address it in the Agency’s post-hearing brief. Nevertheless, the Arbitrator framed the issues to include the timeliness of the grievance and reached a conclusion. He noted that Article 12, Section 5(C) of the parties’ agreement, provides, in relevant part, that a “grievance . . . that relates to a specific incident or occurrence[] must be filed within forty-five (45) calendar days after the incident or occurrence giving rise to the grievance.”⁵ The Arbitrator found that the forty-five day window began when the Agency notified the Union that it planned to implement DPMAP. Therefore, he found the Union’s grievance was timely filed.

On the grievance’s merits, the Arbitrator found that the Agency violated Article 2, Section 2 of the

² National Defense Authorization Act of Fiscal Year 2010 § 1113(d), 5 U.S.C. § 9902(a) (2011) (“The Secretary [of Defense] . . . shall promulgate regulations providing for . . .[a] fair, credible, and transparent performance appraisal system”). Member Abbott notes that Congress passed the Authorization Act in October 2009, yet it took nearly eight years until the Agency notified the Union that it would be implementing DPMAP. While he understands that developing and putting into place a new program of this scale may take some time to ensure that it is rolled out properly, he is surprised to see that it took this long for the Agency to carry out its congressional mandate.

³ Exceptions, Attach. 4, Grievance at 1.

⁴ Exceptions, Attach. 5, Response to Grievance at 2.

⁵ Exceptions, Attach. 3, Collective-Bargaining Agreement (CBA) at 33.

¹ 5 U.S.C. § 7116(a)(1), (7).

parties' agreement and § 7116(a)(1) and (7) of the Statute⁶ by implementing DPMAP. He ordered the Agency to return to the prior performance management system.

The Agency filed exceptions to the award on May 28, 2019, and the Union filed an opposition on June 25, 2019.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Agency's essence argument.

The Agency argues that the Arbitrator's determination that the grievance was timely fails to draw its essence from Article 12, Section 5(C) because the grievance was premature.⁷ In its opposition, the Union argues that the Authority should not consider the Agency's prematurity argument because the Agency did not argue it before the Arbitrator.⁸ Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.⁹ The Authority has held that §§ 2425.4(c) and 2429.5 do not bar the Authority from considering a claim on exceptions where it is clear from the award that the arbitrator considered the argument.¹⁰ Furthermore, the Authority has found that §§ 2425.4(c) and 2429.5 do not bar a party's argument where the record demonstrates that the claim was raised before the arbitrator and that the party made the argument in its opening statement.¹¹

Here, the Arbitrator found that the Agency "noted the timeliness issue" in its opening statement at the arbitration hearing and "did not withdraw that issue from [the] proceeding."¹² Subsequently, he considered

⁶ 5 U.S.C. § 7116(a)(1), (7) ("[I]t shall be an unfair labor practice for an agency . . . to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; [or] to enforce any rule or regulation . . . which is in conflict with any applicable collective[-]bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed.").

⁷ Exceptions Br. at 7.

⁸ Opp'n at 12.

⁹ 5 C.F.R. §§ 2425.4(c), 2429.5.

¹⁰ *AFGE, Local 916*, 68 FLRA 457, 458 (2015) (holding that §§ 2425.4(c) and 2429.5 do not bar exception where award shows arbitrator considered its argument); *cf. NAIL, Local 17*, 68 FLRA 97, 98 (2014) (Member DuBester concurring) (holding that §§ 2425.4(c) and 2429.5 do not bar exception even though party did not raise argument before arbitrator because arbitrator *sua sponte* considered argument in award).

¹¹ *AFGE, Local 836*, 69 FLRA 502, 503 (2016) (Member Pizzella dissenting on other grounds) (finding that §§ 2425.4(c) and 2429.5 do not bar argument that party addressed in opening statement before arbitrator).

¹² Award at 5.

and rejected the Agency's argument that the grievance was premature before turning to the merits of the Union's grievance.¹³ Consequently, §§ 2425.4(c) and 2429.5 do not bar the Agency's essence exception.

IV. Analysis and Conclusion: The award does not draw its essence from the parties' agreement.

The Agency argues that the award does not draw its essence from the parties' agreement.¹⁴ Specifically, the Agency argues that the Arbitrator's determination that the grievance was procedurally arbitrable is at odds with Article 12, Section 5(C)'s requirement that a grievance must be filed within forty-five days of the triggering event. The Agency contends that the Union could not have filed a grievance concerning the Agency's implementation of DPMAP because that had not yet occurred.¹⁵

The Arbitrator found that the triggering event for the Union's grievance was the Agency's notification that it planned to implement DPMAP. He found that the Union "did not have to wait until DPMAP went into actual effect because the 'incident . . . giving rise to the grievance' occurred on or about May 1, 2017, when the Agency announced it would be implementing DPMAP."¹⁶

The Arbitrator's finding that the Agency's notification that it planned to implement DPMAP constituted the triggering event does not represent a plausible interpretation of the plain language of the parties' agreement. Here, the plain language of Article 12, Section 5(C) provides that the Union may file a grievance "after the incident or occurrence giving rise to the grievance."¹⁷ At the time of the Agency's notification, DPMAP's implementation had not yet occurred, so it could not be considered an "incident or occurrence."¹⁸ The grievance's characterization of the Agency's violation as an "anticipatory breach and contractual violation"

¹³ *Id.* at 13.

¹⁴ An award fails to draw its essence from a collective-bargaining agreement when the excepting 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. *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 755 (2018) (Member DuBester dissenting).

¹⁵ Exceptions Br. at 7.

¹⁶ Award at 13.

¹⁷ CBA at 33 (emphasis added).

¹⁸ *Id.*

underscores the point that the grievance addressed something that the Union expected to occur, rather than something that had already happened.¹⁹

Because the Arbitrator failed to enforce the plain language of the parties' agreed-to framework for filing a grievance within forty-five days after a triggering event, we find that his procedural-arbitrability determination does not represent a plausible interpretation of the parties' agreement.²⁰ Therefore, we grant the Agency's essence exception and vacate the award.²¹

V. Decision

We grant the Agency's essence exception.

¹⁹ See Exceptions, Attach. 4, Grievance at 1; see also *U.S. Dep't of the Interior, U.S. Geological Survey, Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 736 (2015) (time for union to file unfair labor practice charge concerning change does not begin to run until agency implements change); *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 245 (2011) (finding exception premature where it relied on assumptions about actions arbitrator would take).

²⁰ *U.S. DOD Domestic Elementary & Secondary Schs.*, 71 FLRA 236, 237 (2019) (Member Abbott concurring; Member DuBester dissenting) (setting aside award where arbitrator's determination that grievance was procedurally arbitrable did not represent plausible interpretation of provision in parties' agreement that established timeframe for submitting to arbitration). The dissent cites our decision in *NLRB Prof'l Ass'n*, 71 FLRA 737, 739-40 (2020) (*NLRB*) as an example where we recently applied "the deference owed to arbitrators in construing grievances before them." Dissent at 8. But *NLRB* is distinguishable because we did not consider, much less reach a determination on, an essence exception, whereas our decision in the instant case rests solely on an essence exception. Chairman Kiko and Member Abbott in *NLRB* observed that *U.S. DOJ, Federal BOP, Federal Correctional Institution, Miami, Florida*, 71 FLRA 660, 662-64 (2020) (*DOJ*) (Member Abbott concurring; Member DuBester dissenting) "clarifie[s] the discussion about essence exceptions -- and any reliance on private-sector arbitration awards" and "charts the course for this Authority, and for the federal labor-relations community, into the future." *NLRB*, 71 FLRA at 738 n.16. Member Abbott further notes that contrary to what is now well-settled Authority precedent, the dissent continues to advocate for the ill-suited private sector-based standard of "narrow" review. See *DOJ*, 71 FLRA at 662-64.

²¹ Because we grant this exception, it is unnecessary for us to address the Agency's remaining essence, contrary-to-law, and nonfact exceptions. Exceptions Br. at 8-15; *U.S. Dep't of Commerce, Nat'l Inst. of Standards & Tech.*, 71 FLRA 199, 202 n.28 (2019) (Member DuBester dissenting) (citing *U.S. DOD Educ. Activity*, 70 FLRA 937, 938 n.18 (2018) (Member DuBester dissenting)).

Member DuBester, dissenting:

I disagree with the majority's conclusion that the Arbitrator's procedural-arbitrability determination does not represent a plausible interpretation of the parties' collective-bargaining agreement. Accordingly, I would deny the Agency's essence exception and address the Agency's remaining exceptions.

On May 5, 2017, the Agency sent an "Official Notice" to the Union concerning "the implementation of the new DOD Performance Management and Appraisal Program (New Beginnings)."¹ The notice stated that "[b]eginning May 2018, New Beginnings will be the performance management system used by DoDEA."²

The Union responded to the "Official Notice" by filing a grievance on June 14, 2017, in which it alleged that the Agency, "in insisting on implementing the New Beginnings . . . violates and continues to violate" provisions in the parties' agreement governing performance management.³ The Agency denied the grievance, explaining that "the implementation of DPMAP is not discretionary[,] but is mandated by law."⁴

The Union invoked arbitration, and the Arbitrator conducted a hearing on November 27, 2018.⁵ Consistent with the Agency's assertions, DPMAP had been implemented in May 2018.

The Arbitrator found that the Agency violated the parties' agreement, as well as 5 U.S.C. § 7116(a)(1) and (7), by implementing DPMAP as announced.⁶ And in rendering his decision, the Arbitrator rejected the Agency's argument that the Union's grievance had been untimely filed because it was filed before the May 2018 implementation date.

The majority concludes that the Arbitrator's timeliness finding does not draw its essence from the parties' agreement. Towards this end, it notes that "the plain language of [the parties' negotiated grievance procedure] provides that the Union may file a grievance 'after the incident or occurrence giving rise to the

¹ Exceptions, Attach. 2, Agency Implementation Email at 1. The Defense Performance Management and Appraisal Program is known by the acronym "DPMAP."

² *Id.*

³ Exceptions, Attach. 4, Grievance at 1.

⁴ Exceptions, Attach. 5, Response to Grievance (Resp.) at 2 (citing requirements contained in the National Defense Authorization Act for Fiscal Year 2010).

⁵ Award at 11.

⁶ *Id.* at 13-14.

grievance.”⁷ And it concludes that the Agency’s May 5, 2017 notice “could not be considered an ‘incident or occurrence’” within the meaning of the parties’ agreement because, “[a]t the time of the Agency’s notification, DPMAP’s implementation had not yet occurred.”⁸

I strongly disagree. Where, as here, the parties have agreed to submit a procedural-arbitrability question to the arbitrator, the arbitrator’s determination is subject to review only on narrow grounds.⁹ This deference is appropriate “because it is the *arbitrator’s* construction of the agreement for which the parties have bargained.”¹⁰ Articulating this deferential standard, the Supreme Court has consistently held that “if an ‘arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,’ the fact that ‘a court is convinced he committed serious error does not suffice to overturn his decision.’”¹¹

We need not go nearly to that extent to affirm the Arbitrator’s determination in this case. Far from committing a “serious error,” the Arbitrator reasonably construed the Union’s grievance as challenging the Agency’s announcement of its decision to implement DPMAP in its May 2017 notice to the Union.¹² And, contrary to the majority’s assertions, the Arbitrator *did apply* the plain language of the parties’ agreement by finding that the grievance, which was filed within forty-five days of the Agency’s announcement, was timely filed.

Nevertheless, the majority concludes that the Arbitrator “failed to enforce the plain language” of the parties’ agreement because, at the time of the announcement, “DPMAP’s implementation had not yet occurred.”¹³ But this conclusion ignores the Arbitrator’s

finding that the Union could properly challenge the Agency’s decision to implement DPMAP by grieving the Agency’s announcement because that presented the Agency’s decision as essentially a *fait accompli*.

Specifically, in rejecting the Agency’s timeliness argument, the Arbitrator concluded that the Union “did not have to wait until DPMAP went into actual effect” to file its grievance because there was “no record evidence that the Agency was at all tentative about its decision to implement DPMAP.”¹⁴ This finding is consistent with the Agency’s assertions in denying the grievance, in which it explained that “the implementation of DPMAP is not discretionary[,] but is mandated by law.”¹⁵ Indeed, given the certainty of the Agency’s announcement, I agree with the Arbitrator’s observation that “if [the Union] had filed its grievance within [forty-five] days of May 1, 2018, the Agency would have likely taken the position that the Union’s grievance . . . was untimely filed.”¹⁶

And to the extent that the majority concludes that the Arbitrator could not have plausibly interpreted the grievance as challenging the Agency’s decision to implement DPMAP, this ignores the deference owed to arbitrators in construing grievances before them.¹⁷ Indeed, we recently applied this deferential standard to reject a union’s challenge to the manner in which an arbitrator construed its grievance in finding the grievance untimely.¹⁸ We should exercise the same deference to reject the Agency’s essence exception to the Arbitrator’s procedural-arbitrability determination in this case.

Accordingly, I dissent.

⁷ Majority at 4 (quoting Article 12, Section 5(C) of the parties’ agreement).

⁸ *Id.*

⁹ *U.S. Small Bus. Admin.*, 70 FLRA 525, 532 (2018) (Dissenting Opinion of Member DuBester).

¹⁰ *Id.* (noting that “[t]he parties select, hire, and pay for arbitrators based on their qualifications to resolve the parties’ disputes”) (citing *IFPTE, Ass’n Admin. Law Judges*, 70 FLRA 316, 317 (2017); *Dep’t of HHS, SSA, Louisville, Ky. Dist.*, 10 FLRA 436, 437 (1982)); see also *United Paperworkers Int’l Union v. Misco*, 484 U.S. 29, 37-38 (1987) (because both parties “have contracted to have disputes settled by an arbitrator,” “it is the arbitrator’s view of the facts and of the meaning of the contract that they have agreed to accept”).

¹¹ *Garvey v. Major League Baseball Ass’n*, 532 U.S. 504, 509 (2001) (quoting *E. Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000)).

¹² See Award at 13 (finding that the “‘incident . . . giving rise to the grievance’ occurred on or about May 1, 2017, when the Agency announced it would be implementing DPMAP”).

¹³ Majority at 4.

¹⁴ Award at 13.

¹⁵ Resp. at 2.

¹⁶ Award at 13.

¹⁷ See, e.g., *U.S. DOD, Def. Contract Mgmt. Agency*, 59 FLRA 396, 403 (2003) (rejecting agency’s challenge to the manner in which the arbitrator construed the grievance).

¹⁸ *NLRB Prof’l Ass’n*, 71 FLRA 737, 739-40 (2020) (rejecting union’s argument that the arbitrator “incorrectly construed the grievance to allege that the [agency committed] [an unfair labor practice] by failing to bargain with the [union] over the *decision* to eliminate the health unit, rather than by unilaterally implementing that decision”).