

71 FLRA No. 153

UNITED STATES
DEPARTMENT OF THE AIR FORCE
673RD AIR BASE WING
JOINT BASE
ELMENDORF-RICHARDSON, ALASKA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1101
(Union)

0-AR-5516

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DECISION

June 5, 2020

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

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, we again 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 the collective-bargaining agreement's procedural requirements.

The Agency excepts to Arbitrator Dorothy Fallon's award, which reduced the grievant's three-day suspension for safety violations to a written reprimand. Because the Arbitrator found the grievance procedurally arbitrable even though the Union did not comply with procedural requirements in Article 10, Section 8 of the parties' agreement (Section 8), we find that the award does not draw its essence from the parties' agreement and vacate it.

II. Background and Arbitrator's Award

The grievant is a Sheet Metal Mechanic whom the Agency disciplined for "failure to observe safety practices including failure to use required

PPE [Personal Protective Equipment]." The Agency suspended him for three days.¹

The parties have a multi-step grievance process. As relevant here, the Agency denied the grievance after the Union advanced it to Step 3. It reasoned that the Union did not timely file it under Section 8, nor did it submit it to one of the officials identified in Section 8. The Agency found that these facts rendered the grievance procedurally deficient.

Regarding Step 3 procedures, Section 8 states in pertinent part:

Step 3:

- a. If the decision is not settled at Step 2, the [U]nion has 5 workdays to submit the [g]rievance in writing to the [s]quadron [c]ommander or designee.²

After the Agency denied the Step 3 grievance, the Union invoked arbitration. In advance of the arbitration hearing, the Agency filed a motion to dismiss that, as relevant here, argued that the Union had not complied with Section 8's procedural requirements because it did not file the Step 3 grievance within the agreement's specified timeline. Additionally, the Agency argued that the Union had not complied with Section 8's provision specifying Agency officials with whom the Union was supposed to file the Step 3 grievance.

The Arbitrator denied the motion during the arbitration hearing. She rejected the Agency's timeliness argument and concluded that "labor relations between the parties is better served by a hearing on the merits since the Agency is not harmed by the brief delay in filing the . . . Step 3 Grievance[]." ³

On the merits, the Arbitrator sustained, in part, and denied, in part, the grievance and ordered the discipline to be reduced to a reprimand.

¹ The Agency initially proposed a reprimand. It rescinded and replaced the proposed reprimand with a proposed five-day suspension, citing consideration of the grievant's disciplinary record, which included a three-day suspension for loafing on duty. The Agency ultimately imposed a three-day suspension in recognition of the Union's assertion that the Agency failed to stop and correct the grievant's unsafe actions when they were observed.

² Exceptions, Joint Ex. 1, Collective-Bargaining Agreement (CBA) at 58.

³ Award at 7.

The Agency filed exceptions to the award on June 28, 2019, and the Union filed an opposition on July 10, 2019.

III. 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 because the Union failed to comply with the procedural requirements in the parties' agreement.⁴ Specifically, the Agency argues that the award fails to enforce provisions in Section 8 governing the timeline for advancing a grievance from Step 2 to 3.⁵

The Agency argues that the Arbitrator erred by finding the Union's Step 3 grievance timely. Section 8 clearly and unambiguously states that "the [U]nion has 5 workdays" to file a Step 3 grievance.⁶ We have emphasized that "when parties agree to a filing deadline – with no mention of any applicable exception – the parties intend to be bound by that

deadline."⁷ Because Section 8 clearly and unambiguously requires the Union to file its Step 3 grievance within five workdays, and does not provide any exceptions authorizing the Arbitrator to consider the impact on "labor relations,"⁸ the Arbitrator's determination that the grievance was arbitrable does not represent a plausible interpretation of the parties' agreement.^{9, 10}

Because arbitrators are not free to ignore the procedural rules parties negotiate into a

⁴ The Authority will find an arbitration award is deficient as failing 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. *Library of Cong.*, 60 FLRA 715, 717 (2005) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

⁵ Exceptions at 22. Member Abbott observes that the dissent touts the argument that the Agency did not argue in its essence-exception that the Union failed to timely file a Step 3 grievance. Dissent at 1. However, the Agency's essence-exception incorporates by reference several arguments that were raised before the Arbitrator in a motion to dismiss. Exceptions at 22 ("The [m]otion contained specific arguments citing specific language (evidence) in the CBA that should preclude Arbitrator Fallon's award."). In that motion, the Agency specifically argued that the instant grievance was not arbitrable because the Union failed to file a timely Step 3 grievance. Exceptions, Ex. 1 at 5 ("The Step 3 Grievance was also untimely.") Moreover, the Agency's exceptions elsewhere state that the Step 3 grievance was untimely based on the plain language of the parties' agreement. Exceptions at 28.

⁶ CBA at 58.

⁷ *U.S. DOD Educ. Activity*, 70 FLRA 937, 938 (2018) (Member DuBester dissenting) (citing *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (Member DuBester dissenting)) (granting essence exception where arbitrator cited no authority or contractual language allowing him to disregard procedural requirement in parties' agreement); see also *U.S. Dep't of the Army, 93rd Signal Brigade, Fort Eustis, Va.*, 70 FLRA 733, 734 (2018) (*Fort Eustis*) (Member DuBester dissenting) (granting essence exception where parties' agreement does not contain wording that excuses party's non-compliance with its procedural requirement).

⁸ Award at 7.

⁹ *U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 387, 388-89 (2019) (Member DuBester dissenting in part) (granting essence exception where arbitrator concluded grievance was procedurally arbitrable despite finding collective-bargaining agreement's clear and unambiguous wording appeared to indicate grievance was moot).

¹⁰ Additionally, the Agency correctly argues that the Union failed to file the Step 3 grievance with the official identified in Section 8. Section 8 sets forth the specific officials to receive Step 3 grievances. The Union did not file the Step 3 grievance with the appropriate official. Section 8 does not contain any exceptions to this requirement nor does it excuse the Union's non-compliance with the negotiated grievance procedure. Therefore, the Arbitrator's determination that the grievance was arbitrable, notwithstanding the Union's failure to file with the appropriate official, is incompatible with Section 8's plain wording. *Fort Eustis*, 70 FLRA at 734 (granting essence exception where parties' agreement does not excuse non-compliance with the procedural requirement of the parties' agreement).

collective-bargaining agreement,¹¹ we grant the Agency's essence exception and vacate the award.¹²

IV. Decision

We grant the Agency's essence exception.

¹¹ *U.S. Dep't of VA, John J. Pershing Med. Ctr., Poplar Bluff, Mo.*, 68 FLRA 852, 856 (2015) (Member DuBester concurring; Member Pizzella dissenting) (Dissenting Opinion of Member Pizzella) ("If an arbitrator is free to ignore the procedural rules that are negotiated by the parties into a collective-bargaining agreement simply because the arbitrator believes another outcome should be dispensed, then what purpose is served by including procedural requirements in the first place?").

¹² Because we vacate the award, it is unnecessary for us to address the Agency's remaining exceptions. *E.g., U.S. DOD, Def. Logistics Agency Aviation, Richmond, Va.*, 70 FLRA 206, 207 (2017); *see* Exceptions at 18-22, 25-28 (arguing that the Agency was denied a fair hearing, the award is based on a nonfact, the award is contrary to law, the Arbitrator exceeded her authority, and the Arbitrator was biased).

Member DuBester, dissenting:

The majority grants the Agency's essence exception, and vacates the Arbitrator's award, based on the Agency's argument "that the award fails to enforce provisions in [the parties' collective bargaining agreement] governing the timeline for advancing a grievance from Step 2 to 3."¹ The problem with this decision is that the Agency made no such argument in its exception.

The Agency devoted nearly three pages of its exceptions to its argument that the award failed to draw its essence from the parties' agreement.² As part of this exception, it challenged the Arbitrator's finding that the Union's *Step 2* grievance was timely filed and served upon the proper official.³ It also challenged the Arbitrator's finding that the Union was not required by the parties' agreement to have filed its grievance at the *Step 4* level.⁴ However, the Agency never argued that "the Arbitrator erred by finding the Union's *Step 3* grievance timely."⁵

My colleague's effort to rebut this conclusion falls well short of the mark. Specifically, the Agency did not "incorporate[] by reference" this argument in its essence exception.⁶ In the portion of its exception upon which my colleague relies for this assertion, the Agency simply notes that it had filed a motion with the Arbitrator to dismiss the grievance, and that this motion contained "arguments citing specific language" in the parties' agreement.⁷ But the Agency only generally describes these issues as "related to timeliness, delivery of grievances to the wrong parties, and the failure to submit a *Step 4* grievance."⁸ As such, even this cursory reference contains no mention of its argument that the *Step 3* grievance was untimely, and it certainly does not "incorporate" such an argument "by reference" in its essence exception.⁹

¹ Majority at 3.

² Exceptions at 22-25.

³ *Id.* at 22 ("The *Step 2* Grievance was not submitted timely, nor was it served upon the Second Level Supervisor nor the Labor Relations Officer as required by the CBA.").

⁴ *Id.* at 25.

⁵ Majority at 3. The majority also concludes that "the Agency correctly argues that the Union failed to file the *Step 3* grievance with the official identified in [the parties' agreement]." *Id.* at 4 n.10. However, the Agency similarly failed to raise this argument as part of its exceptions.

⁶ Majority at 3 n.5.

⁷ Exceptions at 22.

⁸ *Id.*

⁹ My colleague also asserts that the Agency's exceptions "elsewhere state" that the *Step 3* grievance was untimely filed. Majority at 3 n.5. The cited reference, however, appears in the Agency's exception alleging that the Arbitrator exceeded her

Vacating an award on grounds that were not raised by a party in its exceptions violates fundamental principles of due process. Parties should be provided the opportunity to address and, if possible, rebut arguments presented for our review in exceptions from arbitration awards. The Authority's regulations incorporate this principle by requiring parties filing exceptions to explain and support their arguments,¹⁰ and by guaranteeing the opposing party the right to file a brief addressing the grounds asserted in the exceptions.¹¹

But more fundamentally, by deciding this case on grounds not raised in the Agency's exceptions, the majority "abdicates its role as a neutral adjudicator and embraces the role of Agency advocate."¹² It is for these reasons that the Authority, with the exception of jurisdictional issues, has "long declined to address issues that are not raised by a party."¹³

The majority's departure from this principle undermines the very process upon which we rely to address and resolve challenges to arbitration awards. Accordingly, I would not vacate the award on the grounds relied upon by the majority, and I would instead consider the arguments that actually *were* raised by the Agency in its exceptions.

authority "when she proceeded on the merits of the instant case without first determining the threshold issue of procedural arbitrability, which should have been determined in favor of the Agency." Exceptions at 28. To the extent that this argument could even be construed to allege that the Arbitrator erred by finding the *Step 3* grievance timely, it was raised as part of the Agency's claim that the Arbitrator exceeded her authority, an exception the majority expressly declined to consider. Majority at 4 n.12.

¹⁰ 5 C.F.R. §§ 2425.4(a)(1)-(2); 2425.6(b)(2)(i) ("If a party argues that an award is deficient on private-sector grounds under paragraph (a)(2) of this section, then the excepting party must explain how, under standards set forth in the decision law of the Authority or Federal courts . . . [t]he award . . . [f]ails to draw its essence from the parties' collective bargaining agreement"); *see also id.* § 2425.6(e) (subjecting an exception to dismissal or denial if excepting party "fails to raise and support a ground" for setting aside an award).

¹¹ *Id.* § 2425.3.

¹² *U.S. Dep't of the Army, Fort Polk, La.*, 61 FLRA 8, 14 (2005) (Dissenting Opinion of Member Pope).

¹³ *Id.* (citing collected cases).