

72 FLRA No. 28

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3928
(Union)

0-AR-5611

DECISION AND ORDER

March 19, 2021

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

I. Statement of the Case

The Union filed a grievance after the Agency denied a Union representative official time under the parties' collective-bargaining agreement to represent an employee with a disability at a reasonable-accommodation meeting. Arbitrator Dennis Maloney issued an award sustaining the Union's grievance and finding that the Agency violated the parties' agreement and the Federal Service Labor-Management Relations Statute (the Statute) because all reasonable-accommodation meetings constitute formal discussions.

The Agency filed exceptions, arguing that the Arbitrator exceeded his authority, that the award failed to draw its essence from the parties' agreement, and that the award was contrary to law. For the reasons that follow, we grant the Agency's exceptions, in part, and remand the award for further findings.

II. Background and Arbitrator's Award

Article 7 of the parties' agreement governs the administration of official time for Union representational functions (Article 7 official time). A Union representative requested Article 7 official time for December 19, 2018, and the Agency granted it. Early on December 19, the Agency learned that the Union representative planned to use a portion of the approved Article 7 official time to represent a bargaining-unit employee at a meeting concerning a reasonable accommodation¹ for the employee's disability (the December 19 meeting). The Agency informed the Union representative that it would not permit the use of Article 7 official time to attend reasonable-accommodation meetings.² However, a few hours later, the Agency realized that the same employee had previously filed an equal employment opportunity (EEO) complaint against it. The Agency then approved the Union representative's use of official time under Equal Employment Opportunity Commission regulations³ (EEO official time) – rather than Article 7 – to attend the December 19 meeting. The Union representative attended the meeting using EEO official time.

The Union subsequently filed a grievance alleging that the Agency violated several sections of the parties' agreement, as well as § 7114(a)(2)(A) of the Statute,⁴ by denying the Union representative Article 7 official time to attend the employee's reasonable-accommodation meeting. The Union also claimed that the denial of Article 7 official time for reasonable-accommodation meetings was a change of past practice. The Agency denied the grievance, and the parties submitted it to arbitration.

¹ See Award at 3 (defining “[r]easonable accommodation” as “modifications . . . that enable an individual with a disability who is qualified to perform the essential functions of that position” (quoting 29 C.F.R. § 1630.2(o)(1)(ii))).

² Reasonable-accommodation meetings are commonly part of the requisite “informal interactive process,” under Equal Employment Opportunity Commission regulations, for attempting to accommodate disabled employees in the performance of their duties. See 29 C.F.R. § 1630.2(o)(3) (describing the “informal, interactive process” between the employer and employee to “identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations”).

³ See *id.* § 1614.605(b) (providing that, if an employee who has filed an EEO complaint “designates another employee of the agency as his or her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint”).

⁴ 5 U.S.C. § 7114(a)(2)(A) (providing that unions can be represented at “any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment”).

The Arbitrator noted that the parties were “not in total agreement as to the issue in this matter.”⁵ Accordingly, he framed the issue as whether the Agency violated the parties’ agreement; “5 U.S.C. Chapter 71; and/or . . . an alleged past practice” when it “denied [the] Union [representative] official time under Article 7 of the parties[’] [agreement] to attend [the] bargaining[-]unit employee[’]s[reasonable-accommodation] meeting.”⁶

The Arbitrator resolved the issue by stating that “the authority and the record in this case supports the fact that [reasonable-accommodation] meetings are formal” and concern “matters that are properly brought in the grievance form.”⁷ He then found that “the Agency did violate the [parties’ agreement] and . . . 5 U.S.C. Chapter 71, when [it] denied [the] Union [representative] official time under Article 7 . . . to attend [the] bargaining[-]unit employee’s reasonable[-]accommodation meeting.”⁸ As a remedy, the Arbitrator directed the Agency to allow “a Union [r]epresentative to be in attendance at future [reasonable-accommodation] meetings on official time.”⁹

The Agency filed exceptions to the award on March 27, 2020, and the Union timely filed an opposition on May 22, 2020.

III. Analysis and Conclusions

A. The Arbitrator exceeded his authority.

The Agency argues that the Arbitrator exceeded his authority by finding that *all* reasonable-accommodation meetings constitute formal discussions, despite framing the arbitral issue as pertaining to only a *single* meeting.¹⁰ Similarly, it argues that the Arbitrator exceeded his authority by awarding a remedy relating to future reasonable-accommodation meetings.¹¹

Generally, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.¹² Where the parties fail to stipulate the issue, the arbitrator may formulate the issue on the basis of the subject matter before him or her, and this formulation is accorded

substantial deference.¹³ In those circumstances, the Authority examines whether the award is directly responsive to the issue the arbitrator framed.¹⁴

Here, the Union’s grievance included an allegation that the Agency’s denial of Article 7 official time for reasonable-accommodation meetings constituted reversal of a past practice that affected all such meetings.¹⁵ However, the Arbitrator limited the issue for resolution to the reasonable-accommodation meeting on December 19.¹⁶ Addressing that meeting, the Arbitrator concluded that the Agency “violate[d] the [parties’ agreement] and . . . [the Statute] when [it] denied [the] Union [representative] official time under Article 7 . . . to attend.”¹⁷ At that point, the Arbitrator had resolved his framed issues, and “the arbitration process should have ended.”¹⁸ But the Arbitrator went on to determine that *all* “[reasonable-accommodation] meetings are formal [discussions].”¹⁹ He then directed the Agency to allow “a Union [r]epresentative to be in attendance at *future* [reasonable-accommodation] meetings on official time.”²⁰

Because the Arbitrator unambiguously framed the issue as concerning *one* meeting on December 19, he was without authority to consider the status of any “future” reasonable-accommodation meetings.²¹ Accordingly, we grant these exceeded-authority exceptions and set aside the findings and remedy to the extent that they concern reasonable-accommodation meetings other than the December 19 meeting.

B. We remand the award for further findings concerning the December 19 meeting.

As we have set aside the portions of the award pertaining to future reasonable-accommodation meetings, we consider the Agency’s remaining exceptions only as they concern the award’s application to the December 19 meeting. The Agency argues that the award fails to

⁵ Award at 2.

⁶ *Id.*

⁷ *Id.* at 6.

⁸ *Id.*

⁹ *Id.*

¹⁰ Exceptions Br. at 6-7.

¹¹ *Id.* at 7.

¹² *AFGE, Loc. 1633*, 64 FLRA 732, 733 (2010).

¹³ *AFGE, Loc. 522*, 66 FLRA 560, 562 (2012).

¹⁴ *Id.*

¹⁵ See Exceptions, Ex. 9, Step II Grievance at 2 (stating that grievance concerning a “change in policy” was filed due to Agency “not allowing any Union representatives to have official time and be present at reasonable[-]accommodations meetings to represent an employee”).

¹⁶ Award at 2.

¹⁷ *Id.* at 6.

¹⁸ *U.S. Dep’t of Transp., FAA*, 59 FLRA 776, 777-78 (2004) (*FAA*) (Member Pope dissenting) (setting aside arbitrator’s findings and remedy concerning “a matter that [wa]s not encompassed” by the issue as he framed it).

¹⁹ Award at 6.

²⁰ *Id.* (emphasis added).

²¹ See *FAA*, 59 FLRA at 778 (arbitrator erred in making findings outside of issue he framed).

derive its essence from the parties' agreement²² and is contrary to law and precedent concerning formal discussions under § 7114(a)(2)(A) of the Statute.²³

The Arbitrator found that the Agency violated the parties' agreement, and the Statute, by denying the Union representative Article 7 official time to attend the December 19 meeting.²⁴ These conclusions were based on his finding that the "authority and the record in th[e] case support[ed] the fact" that all reasonable-accommodation meetings, including the December 19 meeting, are "formal."²⁵ However, the Arbitrator provided no legal analysis or factual support for these findings beyond ambiguously stating that the December 19 meeting concerned matters "properly brought in the grievance form."²⁶ He also failed to specify any article of the parties' agreement, or section of the Statute, that the Agency violated.²⁷

Given the cursory and unsupported quality of the Arbitrator's conclusions, we are unable to determine whether the award is contractually or legally deficient as concerning the December 19 meeting.²⁸ For example, the Arbitrator did not specify the articles of the parties' agreement he was interpreting, or how he was applying them to the circumstances surrounding the December 19

meeting. Therefore, we are unable to determine whether his contractual interpretation was irrational, unfounded, implausible, or in manifest disregard of the agreement.²⁹ Likewise, despite the highly fact-dependent nature of formal-discussion determinations,³⁰ the Arbitrator made no factual findings concerning the December 19 meeting, such as findings about its participants, topics of discussion, or duration.³¹ Therefore, we are unable to conduct a de novo review to determine whether the award is consistent with law and precedent concerning formal discussions under § 7114(a)(2)(A) of the Statute.³²

Where, as here, the 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.³³ Accordingly, we remand the award to the parties for resubmission to arbitration, absent settlement, for further

²² Exceptions Br. at 15. The Authority will find that an arbitration award is deficient as failing to draw its essence from a 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. *AFGE, Loc. 1148*, 70 FLRA 712, 713 n.11 (2018) (then-Member DuBester concurring).

²³ Exceptions Br. at 10-13. When considering contrary to law claims, the Authority reviews the questions of law raised by the award and the party's exceptions de novo. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998) (*NFFE*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts. *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (Member Pizzella concurring).

²⁴ Award at 6.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* (stating only that the Agency violated "the [parties' agreement]" and "5 U.S.C. Chapter 71").

²⁸ See *AFGE, Loc. 3408*, 70 FLRA 638, 639 (2018) (*Loc. 3408*) (then-Member DuBester concurring) (noting that "the [a]rbitrator's cursory analysis [did] not provide a sufficient basis . . . to assess whether the award is deficient" on contrary-to-law and essence grounds).

²⁹ See *AFGE, Loc. 3974*, 67 FLRA 306, 310 (2014) (finding that it was impossible to rule on essence exceptions where it was "unclear what contract provisions the [a]rbitrator relied on").

³⁰ See, e.g., *U.S. DOL, Off. of the Assistant Sec'y for Admin. & Mgmt., Chi., Ill.*, 32 FLRA 465, 470 (1988) (holding that the Authority considers eight listed factors, as well as "the totality of the facts and circumstances presented," to determine a meeting's formality).

³¹ See *id.* (relevant factors for determining whether a discussion is "formal" include whether the management official who held the discussion "is merely a first-level supervisor or is higher in the management hierarchy," "whether any other management representatives attended," "whether a formal agenda was established," the "manner in which the meeting[] was conducted," and "how long the meeting[] lasted").

³² See *NFFE*, 53 FLRA at 1710 (noting that the Authority's ability to conduct de novo review is "dependent on the sufficiency of the record").

³³ See, e.g., *AFGE, Loc. 3506*, 64 FLRA 583, 584 (2010) ("Where an arbitrator has not made sufficient factual findings for the Authority to assess . . . legal conclusions, and those findings cannot be derived from the record, the Authority will remand the award to the parties for further action.").

findings regarding *only* the December 19 meeting.^{34, 35} Consistent with this decision, the resulting award should explain the statutory or contractual bases for any conclusions; explain any interpretations of the parties' agreement; and provide adequate factual findings.³⁶

IV. Decision

We grant the Agency's exceptions, in part, and remand the case for action consistent with this decision.³⁷

³⁴ Member Kiko notes that Authority precedent dictates a remand in this case because the Arbitrator's award is so poorly reasoned that we cannot address some of the Agency's exceptions. *Compare Loc. 3408*, 70 FLRA at 639 (remanding an award where Authority was unable to resolve raised exceptions due to insufficiency of the award), with *U.S. Dep't of the Air Force, 47th Flying Training Wing, Laughlin Air Force Base, Del Rio, Tex.*, 70 FLRA 425, 426 (2018) (then-Member DuBester dissenting) (declining to remand issue related to alternative remedy), and *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, 70 FLRA 592, 594 (2018) (then-Member DuBester dissenting) (declining to remand a second time where arbitrator again failed to provide factual support for his legal conclusions). However, continuing to litigate whether the Union representative should have received a few hours of Article 7 official time – when it is undisputed that he attended the meeting at issue *on official time* – is not an effective or efficient use of government resources. See Exceptions Br. at 2 (noting that EEO official time was approved for the December 19 meeting); Opp'n Br. at 4 (same); see also 5 U.S.C. § 7101(b) (noting the Authority's mandate to interpret the Statute "in a manner consistent with the requirement of an effective and efficient Government").

³⁵ Member Abbott agrees with Member Kiko that continuing to litigate this case based on the facts presented would not be an effective or efficient use of government resources. Although not implicated directly by this case, just below the surface of the choppy waters of this dispute lurks an issue of great significance. Specifically, that issue concerns the potential conflict between the interests of employees when they pursue a personal EEO complaint and to what extent a union may intervene on its own behalf – even when the employee has not named the union as their representative or the employee has requested that the union not be present when it engages with management officials on their personal complaint. See *Pension Benefit Guar. Corp., Wash., D.C.*, 62 FLRA 219, 227 (2007) (Dissenting Opinion of Chairman Cabaniss).

³⁶ The Agency also argues that the Arbitrator exceeded his authority by failing to address the issue of past practice, Exceptions Br. at 6, and that he awarded an improper remedy. *Id.* at 9. In light of our decision to remand, we find it unnecessary to address these exceptions as they may be impacted by a subsequent award. See *AFGE, Nat'l Border Patrol Council, Loc. 1929*, 63 FLRA 465, 468 (2009) (declining to address the remaining exceptions after remanding an award for further arbitral proceedings).

³⁷ Nothing in this decision precludes the parties from mutually agreeing to select a different arbitrator upon remand. See *Loc. 3408*, 70 FLRA at 639 n.15 (allowing for selection of a different arbitrator where previous arbitrator failed to provide adequate support for his award).

Chairman DuBester, dissenting in part:

I agree that the award should be remanded because the Arbitrator's findings are insufficient to determine whether the award is deficient on the grounds raised by the Agency's exceptions. However, I disagree with the majority's determination to limit the Arbitrator, on remand, to making further findings only with respect to the December 19 meeting.

The majority's basis for this latter conclusion is that the Arbitrator exceeded his authority by "determin[ing] that *all* '[reasonable-accommodation] meetings are formal [discussions],'"¹ and by "direct[ing] the Agency to allow 'a Union [r]epresentative to be in attendance at *future* [reasonable-accommodation] meetings on official time.'"² The majority reasons that the Arbitrator was not authorized to "consider the status of any 'future' reasonable-accommodation meetings" because he "unambiguously framed the issue [before him] as concerning *one* meeting on December 19."³

But the Arbitrator did not "unambiguously" frame the issue in this manner. Rather, the Arbitrator stated that the issue before him was whether the Agency violated the parties' collective-bargaining agreement (CBA), applicable law and the parties' past practice when it "denied a Union steward official time under Article 7 of the parties' CBA to attend a bargaining unit employees' [reasonable-accommodation] meeting."⁴ And in framing the issue, the Arbitrator clarified that "[t]he Union's grievance . . . is about the Union's right to attend [reasonable-accommodation] meetings."⁵ Moreover, he specifically referenced the Union's contention "that it is entitled to attend [reasonable-accommodation] meetings as a matter of law,"⁶ as well as the Agency's argument that reasonable-accommodation meetings "are not formal discussions."⁷

The Authority has consistently held that "in formulating and resolving the issues before them, arbitrators may rely on the arguments that the parties raise in the proceeding."⁸ Moreover, the Authority accords "substantial deference" to arbitrators'

formulations of the issues.⁹ Applying these well-established principles, I would not find that the Arbitrator exceeded his authority by addressing the question of whether reasonable-accommodation meetings are formal discussions.

Nor do I agree that the Arbitrator exceeded his authority by directing the Agency to allow a Union representative to attend future reasonable-accommodation meetings on official time. As noted, the Arbitrator was authorized to determine whether the Agency violated the parties' agreement and applicable law by denying the Union official time to attend reasonable-accommodation meetings. Having found that the Union prevailed on this issue, the Arbitrator was similarly authorized to direct the Agency to comply with the parties' agreement and governing law when conducting such meetings.¹⁰

However, I do agree with the majority that the Arbitrator failed to provide sufficient legal analysis or factual support for his resolution of these issues to enable the Authority to determine whether the award is consistent with law. Accordingly, while I concur in the decision to remand the award to the parties for resubmission to arbitration, I would not limit the scope of the issues to be addressed in the manner directed by the majority.

Under these circumstances, I believe it was well within the Arbitrator's remedial authority to require the Agency to review its hazard and safety controls and to take any necessary action to meet its legal obligation to provide the grievants a safe working environment. Accordingly, I dissent from the majority's decision to set aside this remedy.

¹ Majority at 4 (quoting Award at 6).

² *Id.* (quoting Award at 6 (emphasis added by majority)).

³ *Id.*

⁴ Award at 2.

⁵ *Id.* at 3.

⁶ *Id.*; see also *id.* at 2 (noting the Union's position that "at all times for these meetings its representation is on official time").

⁷ *Id.* at 5.

⁸ *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 68 FLRA 960, 966 (2015) (*BOP Guaynabo*) (further noting that "[t]he law is clear in this regard"); see also *U.S. Dep't of HHS, SSA, Off. of Hearings & Appeals*, 48 FLRA 833, 838 (1993) (same).

⁹ *BOP Guaynabo*, 68 FLRA at 966.

¹⁰ *U.S. Dep't of Transp., FAA*, 71 FLRA 932, 935 (2020) (then-Member DuBester dissenting on other grounds) (noting that "arbitrators may direct prospective relief, including directing the agency to comply with the violated contractual provision in conducting future actions"); *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 66 FLRA 712, 715 (2012) (Member Beck dissenting) ("it is well established that, where an arbitrator has found a contractual violation with regard to a particular action, the arbitrator may direct prospective relief, including directing the agency to comply with the violated contract provision in conducting future actions"); see also *U.S. Dep't of the Air Force, Joint Base Elmendorf-Richardson*, 69 FLRA 541, 547 (2016) (Member Pizzella dissenting); *Air Force Space Div., L.A. Air Force Station, Cal.*, 24 FLRA 516, 519 (1986).