71 FLRA No. 221

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
KANSAS CITY CAMPUS
(Agency)

and

NATIONAL TREASURY EMPLOYEES UNION
CHAPTER 66
(Union)

0-AR-5409

_____

DECISION

December 8, 2020

_____

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 once again remind arbitrators not to look beyond the plain wording of parties' collective-bargaining agreements when making procedural-arbitrability determinations.

The Union filed a step-three grievance asserting mass and institutional claims against the Agency. Arbitrator Howard S. Bellman issued an award finding, as relevant here, that the claims were procedurally arbitrable. The main question before us is whether the Arbitrator's procedural-arbitrability determinations fail to draw their essence from Article 41 of the parties' agreement. Because the Arbitrator ignored the plain wording of that article, we find that the award fails to draw its essence from the parties' agreement, and we set it aside.

II. Background and Arbitrator's Award

Employees working in the Agency's "Document Retention Department" (Files) work either a day or night shift.[1] The night-shift employees are seasonal and, generally, work on either the "[s]pecialty [t]eam" (the affected employees) or the "[r]etention [t]eam."[2] On August 3, 2016, the Agency held a "'thirty-day' meeting"[3] with all seasonal employees – including the affected employees – to inform them "that they may be released to non-work status."[4] At that meeting, the Agency did not provide a release date. About two weeks later, on August 18, 2016, the Agency told the affected employees that if they did not transfer to day shift, then the Agency would release them to non-work status effective close of business the next day. The following day, August 19, 2016, the Agency released the employees who did not transfer to day shift and announced that overtime work was available on August 20 for each "fully successful file clerk[] in Files."[5]

The Union filed a step-three grievance including mass and institutional claims, alleging that the Agency violated the parties' agreement by not providing proper notice before releasing employees and not equitably distributing overtime.[6] At the time the Union filed its step-three grievance, it provided the name of one employee.[7] In its response to the step-three grievance, the Agency argued that the Union did not provide names of multiple employees when it filed the grievance form – a requirement for filing a mass-grievance claim under Article 41 of the parties' agreement.[8] Approximately one month later, during the step-three meeting, the Union added an additional employee to the grievance. The Agency then issued a revised response and omitted its procedural objection to the Union's mass-grievance claims. But the parties could not resolve the grievance, and the dispute proceeded to arbitration.

The Arbitrator framed the issues, in relevant part, as: (1) are the mass-grievance claims arbitrable; and (2) are the institutional-grievance claims arbitrable?

On the first issue, Article 41, Section 5 states that a grievance is considered a "mass grievance[]" if the Union filed it "on behalf of two . . . or more employees."[9] That article further required the Union to "initiate [mass

[1] Award at 3.
[2] *Id.*
[3] *Id.* The Agency holds thirty-day meetings to inform employees that they may be released to non-work status within the next thirty days. Opp'n at 6.
[4] Award at 3.
[5] *Id.*
[6] Article 41 states that "Mass grievances . . . will be initiated at [s]tep-three of th[e grievance] procedure." Exceptions, Attach. 9, Joint Ex. 1, Nat'l Agreement (NA) at 132.
[7] Exceptions, Attach. 9, Joint Ex. 2, Grievance Form.
[8] Article 41 states that "Grievances are considered mass[-]grievance[claims when] . . . the Union has filed . . . on behalf of two . . . or more employees." NA at 132. "The Union is required to provide the names of all known grievants when it files the mass grievance [at step-three of the grievance procedure]." *Id.*
[9] *Id.*

grievances] at [s]tep[-three]" and "provide the names of all known grievants when it files the mass grievance."[10] At arbitration, the Agency argued that the Union's mass-grievance claims were not arbitrable because it named only one employee when it filed its grievance, and the "grievance was not amended."[11] But, the Arbitrator found that the Agency withdrew its objection in its revised step-three response after the Union added an additional employee. Accordingly, the Arbitrator concluded that the Union's mass-grievance claims were arbitrable.

After finding the mass-grievance claims arbitrable, the Arbitrator determined that the Agency violated the parties' agreement by: (1) failing to provide a proper notice of release to employees under Article 14 and (2) failing to equitably distribute overtime under Article 24. To remedy those violations, he directed the Agency to reimburse all affected employees for "lost earnings and benefits due to the[m] not receiving [a] notice of release" and "overtime that they were not allowed to work on August 20, 2016."[12]

Next, the Arbitrator considered the arbitrability of the Union's institutional claims. The Arbitrator first noted that the Union filed the grievance under Article 41, which concerns employee grievances – *not* Article 42, which concerns institutional grievances.[13] However, he observed that Article 41, Section 1(D) did not specifically preclude the Union from filing institutional claims as an Article 41 "employee" grievance.[14] Thus, the Arbitrator found the Union's institutional claims arbitrable.

Regarding the institutional claims' merits, the Arbitrator found that the Agency violated the parties' agreement by failing to properly notify the Union of either the release of employees, under Article 14, or the overtime opportunity, under Article 24. As a remedy, the Arbitrator directed the Agency to comply with the notice requirements in the parties' agreement for employee releases.

On September 10, 2018, the Agency filed exceptions to the award, and on October 15, 2018, the Union filed an opposition to the Agency's exceptions.[15]

III. Analysis and Conclusion: The award fails to draw its essence from the parties' agreement.

As relevant here, the Agency argues that the award fails to draw its essence from the parties' agreement in several respects.[16]

First, the Agency argues that the Arbitrator's finding that the Union's mass-grievance claims are procedurally arbitrable fails to draw its essence from Article 41, Section 5.[17] The Arbitrator found the mass-grievance claims procedurally arbitrable because the Agency rescinded its objection in its step-three response after the Union added an additional employee at the

[10] *Id.*
[11] Award at 5.
[12] *Id.* at 8.
[13] Exceptions, Attach. 9, Joint Ex. 2, Grievance Form.
[14] Article 41, Section 1(D) states,

> The grievance procedures of this Article shall not apply to the following: (1) any claimed violation of Subchapter III of Chapter 73 of Title 5 (relating to prohibited political activities); (2) retirement, life insurance or health insurance; (3) a suspension or removal under Section 7532 of Title 5 (relating to national security matters); (4) any examination, certification, or appointment; (5) the classification of any position that does not result in the reduction in grade of the employee; (6) matters already filed with the Merit Systems Protection Board (MSPB) as an adverse action which are, therefore, statutorily precluded from duplicate filing under this procedure; (7) matters over which an employee has filed a written complaint of discrimination through the formal EEO complaint process; (8) the separation of a probationary employee; (9) matters specifically excluded by other articles of this Agreement; (10) non-selection from among a group of properly ranked and certified candidates consistent with 5 C.F.R § 335.103(d); and (11) reprimands received by employees serving a probationary or trial period.

NA at 130-31.
[15] In response to a procedural deficiency order issued by the Authority's Office of Case Intake and Publication, the Agency refiled its exceptions with attachments and cured its deficiencies on October 29, 2018. On November 16, 2018, pursuant to the deficiency order, the Union filed a timely supplemental opposition.
[16] Exceptions Br. at 28-34. The Authority will find that an arbitration 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. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (*SBA*) (Member DuBester concurring, in part, and dissenting, in part).
[17] Exceptions Br. at 28-30. Article 41 requires that the Union "provide the names of all known grievants *when it files* [*a*] *mass grievance*" "on behalf of two . . . or more employees." NA at 132 (emphasis added).

step-three meeting.[18] But, contrary to Article 41, the Union provided the name of only one employee at the time it filed its step-three grievance.[19] The parties' agreement requires that the Union "provide the names of all known grievants *when it files* the mass grievance" "at [s]tep[-three] of th[e grievance] procedure"[20] – not during a subsequent grievance meeting.[21] Therefore, the Arbitrator's interpretation of Article 41 conflicts with the plain wording of the parties' agreement.[22] Accordingly, we set aside the Arbitrator's finding, and associated remedies,[23] concerning those claims.[24]

The remaining claims considered by the Arbitrator were whether (1) the Agency violated the parties' agreement by failing to provide a notice of release to the Union and (2) the Agency gave defective notice of overtime.[25] The Agency argues that those claims were "institutional" in nature, and the Arbitrator's finding that they were procedurally arbitrable fails to draw its essence from Article 41, Section 1(B).[26] As noted above, the Union filed its grievance as an employee grievance under Article 41, instead of institutional grievance under Article 42.[27] Nevertheless, the Arbitrator found that the employee-grievance provision in the parties' agreement – Article 41, Section 1(D) – did not exclude the Union from raising its institutional-grievance claims through the process reserved for employee grievances.[28] But Article 41 does, in fact, specify that it does not "apply to institutional grievances."[29] In other words, the parties' agreement did not permit the Union to bring its institutional-grievance claims under Article 41. The Arbitrator's contrary conclusion, and his holding that the Union's institutional claims were arbitrable, conflict with the plain wording of Article 41.[30] As a result, we set aside the Arbitrator's findings, and associated remedies, concerning the Union's institutional-grievance claims.[31]

The Union argues that the Arbitrator did not analyze its allegation that the Agency gave defective notice of overtime as an *institutional* claim.[32] Because we have found that the Arbitrator's procedural-arbitrability determination regarding the Union's institutional- *and* mass-grievance claims fail to draw their essence from the parties' agreement, it is irrelevant whether the Union intended to vindicate institutional or employee rights when it argued that the Agency gave defective notice of overtime.[33] Regardless, for the reasons explained above, the Arbitrator erred in concluding that the claims were arbitrable.[34]

[18] Award at 5-6.
[19] *Id.* at 1; *see* Exceptions, Attach. 9, Joint Ex. 2, Grievance Form.
[20] NA at 132 (emphasis added).
[21] Member Abbott notes that while the grievance steps are fluid and intended to clarify and define the grievance, nonetheless, contracts have consequences and the Union agreed to the requirement of naming two grievants at the time of filing.
[22] *See U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (Member DuBester dissenting) (finding "that the [a]rbitrator impermissibly ignored the time limits set out in the parties' agreement and, thus, that the award fail[ed] to draw its essence from the parties' agreement"); *SBA*, 70 FLRA at 527-28 ("Because the [a]rbitrator's waiver determination has no basis in the parties' agreement, it does not represent a plausible interpretation of that agreement."); *SSA*, 64 FLRA 1119, 1122 (2010) (*SSA*) (Member DuBester concurring; Chairman Pope dissenting) ("When an arbitrator's award is clearly inconsistent with the terms of the parties' agreement . . . the award cannot . . . draw its essence from the agreement.").
[23] Award at 8 (remedying the claims by directing the Agency to reimburse all affected employees for "lost earnings and benefits due to the[m] not receiving [a] notice of release" and "overtime that they were not allowed to work on August 20, 2016").
[24] *See U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 387, 389 (2019) (Member DuBester dissenting in part) (setting aside the portion of the award that pertained to the 2014 grievance after granting essence exception challenging that grievance's procedural arbitrability).
[25] Award at 7-8.
[26] Exceptions Br. at 30-32. The Union argues that the Agency only raised Article 42 at arbitration and not Article 41, Section 1(B). Opp'n at 17. However, we find that the Agency properly raised the substance of this argument – that the Union should have filed its institutional-grievance claims under Article 42 – below. *See* Award at 7.
[27] Award at 7.
[28] *Id.*
[29] NA at 130 ("Nothing in . . . Article [41] shall apply to institutional grievances, covered by the procedure in Article 42").
[30] *See SSA*, 64 FLRA at 1122 ("When an arbitrator's award is clearly inconsistent with the terms of the parties' agreement . . . the award cannot . . . draw its essence from the agreement.").
[31] *E.g.*, Award at 8 (remedying these claims by directing the Agency to comply with the notice requirement in the parties' agreement concerning employee releases).
[32] Opp'n at 22-23. The Union also contends that it "did not raise this issue as an alleged violation." *Id.* But, the Union raised this issue as part of its equitable distribution of overtime claim, and the Arbitrator addressed it in the award. Award at 7-8; Exceptions, Attach. 6, Union's Post Hr'g Br. at 17 ("The timing of the [overtime] notice prevented the Union from exercising its right to open discussions regarding the equitable distribution of overtime.").
[33] *See generally U.S. Dep't of VA,* 71 FLRA 785, 787 n.24 (2020) (Member DuBester dissenting) ("Because we vacate the award, we do not address either parties' remaining arguments.").
[34] *SSA*, 64 FLRA at 1122 ("When an arbitrator's award is clearly inconsistent with the terms of the parties' agreement . . . the award cannot . . . draw its essence from the agreement.").

IV. Decision

We set aside the award.[35]

Member DuBester, dissenting:

I disagree that the Arbitrator's procedural-arbitrability determination fails to draw its essence from the parties' collective-bargaining agreement. Contrary to the majority, I believe the Arbitrator's conclusion that the Union's grievance was arbitrable as a mass grievance under Article 41, Section 5 constitutes a plausible interpretation of the parties' agreement.

In making his determination, the Arbitrator noted that after the parties held their step 3 meeting to discuss the grievance, the Agency sent a response to the Union stating, among other things, that the grievance "only identified the name of one grievant."[1] Noting that the Union was required to provide the names of all known grievants when it filed the grievance, the memorandum concluded by stating: "If you only know of one grievant by name, this grievance is inappropriately filed as a mass grievance. If you know of more, you failed to adhere to the [bargaining agreement] in the filing of this grievance."[2]

The Arbitrator found that the Agency timely raised this objection pursuant to Article 43, Section 7 of the parties' agreement, which requires the Agency to raise procedural arbitrability issues no later than the last grievance response.[3] But he also noted that the Agency subsequently issued a revised response which omitted these two sentences. And citing the testimony of an Agency representative, the Arbitrator found that the Agency omitted these sentences because the Union had added the name of a second grievant following the step 3 meeting.[4]

On these grounds, the Arbitrator determined that the Agency "intentionally withdrew its objection" to the mass grievance because it "concluded that the requirements for a mass grievance were met."[5] And finding nothing in the parties' agreement that "prohibits the Agency from withdrawing such an objection during the pendency of a grievance, or allows it to reinstate such an objection once withdrawn," the Arbitrator concluded that the grievance was arbitrable as a mass grievance.[6]

Based upon the record before the Arbitrator, I would uphold this determination. As I noted in my dissent in *U.S. Small Business Administration*, the majority's rejection of the Arbitrator's procedural-arbitrability finding is inconsistent with established judicial practice of deferring to arbitrators' contractual interpretations

[35] Because we set aside the award, we do not address the Agency's remaining exceptions. *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 660, 662 n.26 (2020) (Member Abbott concurring; Member DuBester dissenting).
[1] Award at 4.
[2] *Id.*
[3] *Id.* at 3.
[4] *Id.* at 6.
[5] *Id.*
[6] *Id.*

"because it is the arbitrator's construction of the agreement for which the parties have bargained."[7] This is particularly true where – as here[8] – the plain language of the parties' agreement expressly empowers the Arbitrator to decide whether the dispute was arbitrable.[9]

Applying the deferential standard owed to arbitrators when analyzing essence challenges to awards,[10] I would uphold the Arbitrator's conclusion that the Union's grievance was arbitrable as a mass grievance. Accordingly, I dissent from the majority's conclusion to the contrary.

[7] 70 FLRA 525, 532 (2018) (Dissenting Opinion of Member DuBester) (citations omitted).
[8] Article 43, Section 4(A)(6) states that "[t]he arbitrator shall have the authority to make all arbitrability and/or grievability determinations." Award at 3.
[9] *U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 387, 392 (2019) (Dissenting Opinion of Member DuBester) (citing *Cleveland Elec. Illuminating Co. v. Util. Workers Union of Am.*, 440 F.3d 809, 812 (6th Cir. 2006)).
[10] *Nat'l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875, 881 (D.C. Cir. 2020) (affirming that, in reviewing exceptions to arbitration awards, the Authority "is required to apply a similarly deferential standard of review" as applied by federal courts "in private[-]sector labor-management issues").