

73 FLRA No. 69

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 4014
NATIONAL CITIZENSHIP
AND IMMIGRATION SERVICES
COUNCIL 119
(Union)

0-AR-5760

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DECISION

November 17, 2022

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Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members

I. Statement of the Case

Arbitrator Kelly J. Hansen issued an attorney-fee award (fee award). The Agency excepted, arguing the Arbitrator lacked authority to issue the fee award after the parties' mutually-agreed-upon extensions of time expired. For the reasons discussed below, we remand the matter to the parties for resubmission to the Arbitrator, absent settlement.

II. Background

On February 19, 2021,¹ the Arbitrator issued a merits award, to which no exceptions were filed. The Union filed a petition for attorney fees on March 19. The Agency filed a response to the Union's petition on April 19, and the Union filed a reply to the Agency's response on April 23.

As relevant here, Article 14 of the parties' agreement (Article 14) requires the Arbitrator to render a decision on an attorney-fee petition within thirty days of

receipt of the Agency's objections.² However, the parties mutually agreed to extend the time limit for the fee award to May 23. Between May 23 and July 14, the Arbitrator requested, and the parties agreed, to three extensions. On July 26, three days after the final extension expired, the Agency emailed the Arbitrator and the Union, objecting to any further extensions and asserting the Arbitrator lacked authority to issue a fee award. The same day, the Union responded, arguing the Arbitrator had authority to issue a fee award despite the expired time limit. Without addressing the Agency's objection or Article 14, the Arbitrator issued the fee award on July 27.

The Agency filed exceptions to the fee award on August 25. The Union filed an opposition to the Agency's exceptions on September 24.

III. Analysis and Conclusion: We remand the matter of whether the Arbitrator had the authority to issue the fee award after the Agency objected on timeliness grounds.

The Agency excepts on exceeded-authority and essence grounds. Specifically, the Agency argues the Arbitrator erred by issuing the fee award beyond the time limit set by Article 14 and the mutually-agreed-to extensions of time.³

After the Arbitrator missed a series of extensions to render the fee award, the Agency objected to any further extensions.⁴ In its objection, the Agency argued the Arbitrator no longer had authority to issue a fee award because the Arbitrator was "beyond the jurisdiction . . . afforded . . . by the [collective-bargaining agreement], and beyond the supplementary jurisdiction [granted by] the parties . . . by mutual agreement."⁵ The Agency relied on Article 14, which pertinently provides that "[t]he Arbitrator shall render a decision on the Union's petition for attorney fees within thirty (30) days of receipt of the Agency's objections . . ."⁶ However, the Arbitrator never addressed Article 14 or the Agency's objection, either before rendering the fee award or in the fee award itself.

Where an arbitrator fails to discuss critical contract language, which language might reasonably require a result opposite to the arbitrator's award, the award cannot be considered to draw its essence from the parties' agreement.⁷ In those cases, the Authority remands the award for the arbitrator to address the contract

¹ All subsequent dates occurred in 2021.

² The pertinent wording of Article 14 is set forth below.

³ Exceptions Br. at 19-34, 51.

⁴ Exceptions, Ex. H at 4-5.

⁵ *Id.*

⁶ See Exceptions, Ex. A at 58.

⁷ See, e.g., *AFGE, Council 220*, 54 FLRA 156, 160 (1998) (*Council 220*) (citing *Cannelton Indus. v. Dist. 17, UMWA*, 951 F.2d 591, 594 (4th Cir. 1991); *Young Radiator Co. v. Int'l Union, UAW*, 734 F.2d 321, 326 n.5 (7th Cir. 1984)).

provision in dispute.⁸ Remanding in such cases permits the arbitrator, who is the parties' choice to interpret and apply their collective-bargaining agreement, to interpret in the first instance the provision that may be dispositive of the matter.⁹

Here, the Arbitrator failed to address contractual language – Article 14 – that could reasonably result in a determination that the Arbitrator lacked the authority to issue the fee award because it was untimely. Accordingly, we remand the fee award to the parties for resubmission to the Arbitrator, absent settlement, for further findings regarding whether the Arbitrator had authority to issue the fee award after the expiration of the contractual time limit and the mutually-agreed-to extensions of time.¹⁰

IV. Decision

We remand the issue of whether the fee award was timely to the parties for resubmission to the Arbitrator, absent settlement.

⁸ *E.g.*, *SSA, Off. of Disability Adjudication & Rev.*, 64 FLRA 527, 530 (2010) (citing *Council 220*, 54 FLRA at 159-60; *SSA, Balt., Md.*, 57 FLRA 690, 694 (2002)).

⁹ *Id.* (citing *Council 220*, 54 FLRA at 160).

¹⁰ *See U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 72 FLRA 146, 148 (2021) (Chairman DuBester dissenting on other grounds) (citing *AFGE, Loc. 3506*, 64 FLRA 583, 584 (2010)) (remanding an award when an arbitrator's findings were insufficient for the Authority to determine whether the award was deficient on the grounds raised by the party's exceptions). The

Agency also argues the fee award is contrary to law because, in granting fees, the Arbitrator recharacterized findings from the merits award. Exceptions Br. at 35-50. In light of our decision to remand, we find it unnecessary to address these exceptions at this time, as the Arbitrator's determinations on remand may affect them. *See, e.g., U.S. Dep't of HHS*, 72 FLRA 522, 525 n.28 (2021) (Chairman DuBester concurring) (finding it unnecessary to address the remaining exceptions after remanding an award for further arbitral proceedings); *AFGE, Nat'l Border Patrol Council, Loc. 1929*, 63 FLRA 465, 468 (2009) (same).