74 FLRA No. 19

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
POPLAR BLUFF, MISSOURI
(Agency)

0-AR-5977

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DECISION

November 18, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko and Anne Wagner, Members

I. Statement of the Case

Arbitrator Jack P. Cerone issued an award finding a Union grievance was not arbitrable. The Union filed exceptions to the award on essence and exceeded-authority grounds. Because the Union does not demonstrate the award is deficient, we deny the exceptions.

II. Background and Arbitrator's Award

The Union filed a Step 3 grievance alleging the Agency wrongfully failed or refused to process employees' dues deductions. The Agency responded by providing potential dates and times for a grievance meeting. The Union did not respond, the parties did not schedule or conduct a grievance meeting, and the Agency did not provide the Union with a written response to the grievance. The Union invoked arbitration.

At arbitration, the Agency filed a motion to dismiss the grievance, arguing the Union failed to participate in a Step 3 grievance meeting as the parties' collective-bargaining agreement requires. In response, the Union alleged the Agency's argument was untimely because the parties' agreement requires parties to raise procedural-arbitrability claims no later than the Step 3 grievance decision, and the Agency failed to do so. On the first day of the arbitration hearing, the Arbitrator stated that he was "going to withhold [his] ruling on [the Agency's] motion" and was "not going to rule for [the Agency] or against [the Agency] at th[at] point."[1] However, on the third day of the hearing, the Arbitrator stated that the Agency's "motion was denied,"[2] and that he had "sustained" the Union's objection to the motion.[3]

The parties did not stipulate any issues, and the Arbitrator framed them, in relevant part, as whether the grievance was deficient "for a lack of [p]rocedural [a]rbitrability" and "because it failed to follow procedures as laid out and mandated in . . . Article 43, [Section 7(B),] Step 3 and Article 44, Section[s] 1 and 2" of the parties' agreement.[4]

Article 43, Section 7(B), Step 3 of the parties' agreement pertinently provides that the Agency: (1) "shall meet with the aggrieved employee(s) and their Union representative(s) within seven calendar days from receipt of the Step 3 grievance to discuss the grievance," and (2) "will render a written decision letter" on the grievance "within [ten] calendar days after the meeting."[5] At arbitration, the Agency claimed it attempted to schedule a meeting with the Union three times, but the Union argued it did not receive the Agency's emails requesting to meet. The Union claimed it did not receive the emails because they were sent to the Union president's government email address rather than his personal email address, which he used to file the grievance.

The Arbitrator found that "both the Union and the Agency failed to follow" the agreement's procedures because the Union did not meet to discuss the grievance and the Agency did not file a written response to the grievance.[6] However, the Arbitrator determined the "onus" was on the Union to meet with the Agency so that the Agency could "correct or deny" the grievance.[7] In response to the Union's claim that it did not receive the Agency's emails, the Arbitrator found the Union president's "testimony regarding the emails and his inability to communicate [was] proven false."[8] Additionally, the Arbitrator found it was the Union's duty

[1] Exceptions, Attach. 6, July 20, 2023 Hr'g Tr. (July 20, 2023 Hr'g Tr.) at 15.
[2] Exceptions, Attach. 7, Oct. 4, 2023 Hr'g Tr. (Oct. 4, 2023 Hr'g Tr.) at 75.
[3] *Id.* at 77.
[4] Award at 3. Article 44, Section 1 states, in pertinent part: "A notice to invoke arbitration shall be made in writing to the opposite party within [thirty] calendar days after receipt of the written decision rendered in the final step of the grievance procedure." Exceptions, Attach. 3, Collective-Bargaining Agreement (CBA) at 234. Article 44, Section 2 sets forth the "Arbitration Procedure." *Id.*
[5] CBA at 231.
[6] Award at 13.
[7] *Id.*
[8] *Id.* at 14.

to check its government email. In this connection, the Arbitrator found that Article 51 of the parties' agreement "establishes an expectation that Union officials will use government equipment."[9] Moreover, the Arbitrator found that, "[i]f the Union did not hear from the Agency in the . . . time [allotted in Article 43, Section 7(B), Step 3], it is their grievance and their obligation to pursue a meeting."[10] The Arbitrator stated that the "Union cannot just rush off to [a]rbitration," and that "the Union skipped a very important step in the well[-]laid[-]out procedure," specifically, "to meet and discuss the issues in Step 3 before going off on their own."[11]

The Arbitrator concluded that he could not assume jurisdiction over the merits of a grievance because the Union – as the party invoking arbitration – failed to comply with the agreement's procedural requirements. Thus, the Arbitrator found the grievance was not arbitrable.

On July 5, 2024, the Union filed exceptions to the award. The Agency filed an opposition to the exceptions on August 6, 2024.

III. Preliminary Matter: We assume, without deciding, that the Agency's opposition is properly before us.

As noted above, the Agency filed its opposition on August 6, 2024. The deadline to file an opposition is thirty days after the date exceptions are served on the opposing party.[12] Because the Agency's opposition was due on August 5, 2024, the Authority's Office of Case Intake and Publication ordered the Agency to show cause why its opposition should not be dismissed as untimely.[13] The Agency filed a response to the order, conceding that it filed its opposition one day late, but claiming that was due to technical difficulties with the Authority's eFiling system.[14] Because consideration of the Agency's opposition would not alter our ultimate decision in this case, we assume, without deciding, that the opposition is properly before us.[15]

IV. Analysis and Conclusions

A. The Union does not demonstrate the award fails to draw its essence from the parties' agreement.

The Union argues the award fails to draw its essence from various sections of Article 43 of the parties' agreement.[16] The Authority will find an award is deficient as failing to draw its essence from a collective-bargaining agreement when the appealing party establishes 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.[17]

First, the Union contends the agreement requires the Agency to raise arbitrability issues no later than the Agency's Step 3 grievance decision.[18] As the Agency did not provide a written response to the grievance, the Union argues the Arbitrator improperly allowed the Agency to raise arbitrability issues in its motion to dismiss.[19] For support, the Union cites Article 43, Section 1 (Section 1) and Article 43, Section 4 (Section 4) of the parties' agreement.[20]

Section 1 provides, in pertinent part: "The purpose of . . . [A]rticle [43] is to provide a mutually acceptable method for prompt and equitable settlement of grievances."[21] Section 4 provides, in pertinent part: "The [Agency] must assert any claim of non-grievability or non-arbitrability no later than the Step 3 decision."[22] As discussed above, the Arbitrator found the Agency attempted to schedule a grievance meeting and it was the Union's obligation to follow up with the Agency. Sections 1 and 4 do not address what happens when the Agency's failure to provide a written response to, or render a decision on, a Step 3 grievance is due to the Union failing to follow up on the Agency's attempts to schedule a

[9] *Id.* Article 51, Section 4 of the parties' agreement pertinently provides that the Agency will furnish each Union office with certain equipment and technology, including email access, and that "[i]t is expected that the Union will utilize such equipment and technology to communicate with and receive notices from the [Agency] as provided elsewhere in th[e a]greement." CBA at 256.
[10] Award at 14.
[11] *Id.*
[12] 5 C.F.R. § 2425.3(b).
[13] Order to Show Cause at 2.
[14] Agency's Resp. to Order to Show Cause at 1.
[15] *AFGE, Loc. 2814*, 72 FLRA 777, 778 n.7 (2022) (Chairman DuBester concurring; Member Abbott concurring) (assuming, without deciding, that opposition was properly before the Authority where considering it would not alter the ultimate decision in the case).
[16] Exceptions at 6.
[17] *U.S. Dep't of VA, John J. Pershing Veterans' Admin. Ctr., Poplar Bluff, Mo.*, 73 FLRA 842, 842-43 (2024).
[18] Exceptions at 6, 8-9.
[19] *Id.*
[20] *Id.* at 6 ("allowing the Agency to raise . . . [arbitrability] issues when it was clear they did not provide a written [grievance] response is flat out contrary to the plain wording of . . . Section 4; and . . . Section 1"); *see also id.* at 8-9.
[21] CBA at 228.
[22] *Id.* at 229.

grievance meeting. As such, the Union's contentions provide no basis for finding the Arbitrator's decision to address the arbitrability issue is irrational, unfounded, implausible, or in manifest disregard of Sections 1 and 4.[23]

Second, the Union argues Article 43, Section 7 (Section 7) of the parties' agreement puts the burden on the Agency, not the Union, to meet to discuss the grievance, and the Arbitrator erred by shifting that burden to the Union.[24] In this regard, the Union asserts that Section 7, Note 5 of the agreement mandates that the Section 7(B), Step 1 (Step 1) time limits apply when the Union elevates a grievance, and those time limits require the Agency to meet and provide a written response within fourteen calendar days of receipt of the grievance.[25] According to the Union, the Agency neither met nor provided a written response to the grievance, and the Agency is required to provide a written response even when no meeting occurs.[26] The Union claims that, if the parties wanted to make it a mutual obligation for the parties to hold a meeting, then they would have stated that in the agreement, as they have established mutual obligations in other places, such as Article 43, Section 10.[27] The Union further asserts that, when the Agency fails to meet its obligations under the agreement, Article 43, Section 9 (Section 9) allows the Union to advance the grievance to the next step.[28] Finally, the Union claims the Arbitrator's interpretation of Article 43 "delay[s] the processing of grievances . . . contrary to . . . Section 1[,] which requires 'prompt and equitable settlement of grievances.'"[29]

As discussed previously, Section 7(B), Step 3 pertinently provides that the Agency "shall meet" with the Union "within seven calendar days from receipt of the Step 3 grievance to discuss the grievance," and "will render a written decision letter" on the grievance "within [ten] calendar days after the meeting."[30] Section 7, Note 5 pertinently provides that "the time limits of Step 1 will apply" when a grievance is initiated at a higher step of the grievance procedure.[31] In turn, Step 1 states, in relevant part, "The immediate or acting supervisor will make every effort to resolve the grievance immediately but must meet with the employee/representative and provide a written answer within [fourteen] calendar days of receipt of the grievance."[32] Under Section 9, "[s]hould the [Agency] fail to comply with the time limits at any step in Section 7 . . . , the grievance may be advanced to the next step."[33]

The Arbitrator found the Agency attempted to schedule a grievance meeting, but the Union did not respond. The Arbitrator also found that, as the party filing the grievance, the Union had the obligation to pursue a meeting with the Agency if the Union did not hear from the Agency within the contractual time frame. Nothing in the above-quoted provisions of Article 43 conflicts with the Arbitrator's findings or addresses what happens when the Union fails to respond to Agency attempts to schedule a grievance meeting. Further, nothing in the quoted provisions requires the Agency to provide a written response when a grievance meeting does not occur. Thus, the Union's arguments provide no basis for finding the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement.[34]

We deny the essence exceptions.

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[23] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Elkton, Ohio*, 74 FLRA 29, 31 (2024) (*DOJ*) (denying essence exception where excepting party did not cite any contractual wording that conflicted with arbitrator's findings or otherwise demonstrate those findings were irrational, unfounded, implausible, or in manifest disregard of parties' agreement).

[24] Exceptions at 6, 8.

[25] *Id.*

[26] *Id.* at 8.

[27] *Id.* Article 43, Section 10 states, in pertinent part: "Grievances may be combined and decided as a single grievance at the later steps of the grievance procedure by mutual consent." CBA at 233.

[28] Exceptions at 9.

[29] *Id.* Section 1 states, in pertinent part: "The purpose of this article is to provide a mutually acceptable method for prompt and equitable settlement of grievances." CBA at 228.

[30] CBA at 231.

[31] *Id.* at 232.

[32] *Id.* at 230.

[33] *Id.* at 233.

[34] *DOJ*, 74 FLRA at 31 (denying essence exception where excepting party did not cite any contractual wording that conflicted with arbitrator's findings or otherwise demonstrate those findings were irrational, unfounded, implausible, or in manifest disregard of parties' agreement).

B. The Arbitrator did not exceed his authority.

The Union claims the Arbitrator exceeded his authority in certain respects.[35] 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 persons who are not encompassed by the grievance.[36]

First, the Union argues the Arbitrator exceeded his authority because, in the award, he ruled on the Agency's motion to dismiss after already denying that motion during the arbitration hearing.[37] According to the Union, this action violated "the common[-]law principle of functus officio," which "precludes arbitrators from reconsidering their decision[s]."[38] The Union claims that when the Arbitrator denied the motion to dismiss during the hearing, the parties understood that to be a final ruling to which the Agency could have filed – but did not file – interlocutory exceptions.[39] Relatedly, the Union asserts that: (1) the Federal Service Labor-Management Relations Statute (the Statute) should be interpreted in a manner consistent with the requirement of an effective and efficient government;[40] (2) "[t]o help achieve this goal, Congress required that all collective[-]bargaining agreements include procedures for the settlement of grievances";[41] (3) those procedures must be "fair and simple," provide for "expeditious processing," and be subject to binding arbitration;[42] and (4) if a party fails to timely file exceptions to an arbitration award, then the parties must take the actions required by the award.[43]

Under the functus-officio doctrine, once an arbitrator resolves matters submitted to arbitration, the arbitrator is generally without further authority unless they retain jurisdiction or receive permission from the parties.[44] The functus-officio doctrine prevents arbitrators from reconsidering a final award.[45] However, the Authority has held this doctrine does not apply until the arbitrator's award is completed, delivered to, and received by the parties.[46] In this regard, the Authority has stated that "an oral bench decision can constitute a valid award," but if it is not "reduced to writing and served on the parties," it is not "subject to the filing of exceptions" and is not "a final and binding award."[47]

As stated previously, on the first day of the arbitration hearing, the Arbitrator stated that he was "going to withhold [his] ruling on [the Agency's] motion" and was "not going to rule for [the Agency] or against [the Agency] at this point."[48] On the third day of the hearing, the Arbitrator stated that the Agency's "motion was denied,"[49] and told the Union that he had "sustained" the Union's objection to the motion.[50] However, there is no indication that the Arbitrator intended these statements to constitute a final award, and he did not reduce the statements to writing or serve them on the parties. Thus, there was no basis for the Agency to file exceptions to the statements, and the functus-officio doctrine does not apply to them.[51] As for the Union's citations to various provisions of, and policies underlying, the Statute, the Union does not explain how those provisions and policies demonstrate that the Arbitrator failed to resolve an issue submitted to arbitration, resolved an issue not submitted to arbitration, disregarded specific limitations on his authority, or awarded relief to persons who are not encompassed by the grievance. As such, those citations provide no basis for finding the Arbitrator exceeded his authority.[52]

Second, the Union argues the Arbitrator exceeded his authority by addressing Article 51 of the parties' agreement because neither the grievance nor the Arbitrator's formulation of the issues cited that article.[53] As noted above, arbitrators exceed their authority when they resolve an issue not submitted to arbitration.[54] However, when parties do not stipulate to the issues, arbitrators have the discretion to frame them, and the Authority accords the arbitrator's formulation substantial deference.[55] The Authority has held that arbitrators do not exceed their authority where the award is directly responsive to the formulated issues.[56] Further, arbitrators

[35] Exceptions at 10, 12-16.
[36] *U.S. Dep't of VA, Winston-Salem, N.C.*, 73 FLRA 794, 795 (2024) (*VA*).
[37] Exceptions at 12-13.
[38] *Id.* at 12.
[39] *Id.* at 12-13.
[40] *Id.* at 12 (citing 5 U.S.C. § 7101(b)).
[41] *Id.*
[42] *Id.* (citing 5 U.S.C. § 7121) (internal quotation marks omitted).
[43] *Id.*
[44] *AFGE, Loc. 2338*, 73 FLRA 845, 849 (2024).
[45] *NTEU, Chapter 103*, 66 FLRA 416, 417 (2011).
[46] *AFGE, Loc. 2172*, 57 FLRA 625, 627 (2001) (*Loc. 2172*).
[47] *Id.* at 628.
[48] July 20, 2023 Hr'g Tr. at 15.
[49] Oct. 4, 2023 Hr'g Tr. at 75.
[50] *Id.* at 77.
[51] *Loc. 2172*, 57 FLRA at 628.
[52] *DOJ*, 74 FLRA at 30-31 (denying exceeded-authority argument where the excepting party did not explain how the arbitrator failed to resolve issue). We note the Union does not argue the award is contrary to law.
[53] Exceptions at 14-16.
[54] *U.S. DHS, U.S. CBP*, 74 FLRA 6, 8 (2024).
[55] *VA*, 73 FLRA at 796.
[56] *U.S. Dep't of VA, Colmery-O'Neil VA Med. Ctr., Topeka, Kan.*, 73 FLRA 897, 899 (2024).

do not exceed their authority by addressing any issue that is necessary to decide a framed issue.[57]

The parties did not stipulate an issue, and the Arbitrator framed the relevant issues as whether the grievance was deficient "for a lack of [p]rocedural [a]rbitrability" and "because it failed to follow procedures" in the parties' agreement.[58] In resolving those issues, the Arbitrator found the Union did not respond to the Agency's attempts to schedule a grievance meeting.[59] The Union explained its lack of response by arguing that it did not receive the Agency's emails because they were sent to the Union president's government email rather than his personal email. Accordingly, resolving whether the Union "failed to follow procedures" in the parties' agreement required the Arbitrator to resolve whether, *under the parties' agreement*, the Union's non-responsiveness should be excused because the Agency sent its invitations to schedule the grievance meeting to the Union president's government email.[60] As such, the Arbitrator's finding that Article 51 "establishes an expectation that Union officials will use government equipment" was responsive to the issues the Arbitrator framed.[61] Thus, the Arbitrator did not exceed his authority in this regard.[62]

We deny the exceeded-authority exceptions.

V. Decision

We deny the Union's exceptions.

[57] *See U.S. Dep't of the Navy, U.S. Marine Corps, Marine Corps Base, Quantico*, 67 FLRA 114, 115 (2013) (*Marine Corps*); *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div.*, 60 FLRA 530, 532 (2004) (*Navy*).

[58] Award at 3.

[59] *Id.* at 11.

[60] *Id.* at 3.

[61] *Id.* at 14; *see also* CBA at 256 (Article 51, Section 4 requires, in relevant part, that the Agency provide "[a]ccess to email" to each Union office and, correspondingly, "[i]t is expected that the Union will utilize such equipment and technology to communicate with and receive notices from the [Agency] as provided elsewhere in th[e a]greement").

[62] *See Marine Corps*, 67 FLRA at 115 (arbitrator did not exceed authority by addressing whether grievants worked a maxi-flex or compressed work schedule because it was necessary to resolve framed issue of whether the agency lawfully compensated grievants for Sunday and holiday work); *Navy*, 60 FLRA at 532 (arbitrator did not exceed authority by considering whether agency's overtime system violated parties' agreement because it was necessary to resolve whether the grievant was improperly denied overtime). We note that the Union argues Article 51 does not require the Union to use government equipment, Exceptions at 15, but does not claim the award fails to draw its essence from Article 51.