

66 FLRA No. 145

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 215
(Union)

and

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY ADJUDICATION
AND REVIEW
(Agency)

0-AR-4803

DECISION

July 16, 2012

Before the Authority: Carol Waller Pope, Chairman, and
Thomas M. Beck, and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Michelle Miller-Kotula filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator concluded that the Agency did not violate either the parties' agreement or the Privacy Act by allowing an Agency official to attend a Step 1-grievance meeting for the sole purpose of taking notes and providing those notes to deciding Agency officials.

For the reasons that follow, we dismiss one of the Union's essence exceptions under §§ 2425.4(c) and 2429.5 of the Authority's Regulations and deny the Union's remaining exceptions.

II. Background and Arbitrator's Award

The grievance concerns the Agency's conduct related to a Step 1-grievance meeting (Step 1-grievance meeting). Award at 1. The Agency's Step 1-grievance-deciding official (Step 1-deciding official) and a second Agency official who took notes

attended for the Agency; the grievant and a Union representative attended for the Union. *Id.*

The Union objected to the second Agency official's attendance, claiming that "privacy concerns" and Article 24 of the parties' agreement* do not allow more than one grievance-deciding official to attend a Step 1-grievance meeting. *Id.* The Step 1-deciding official denied the Union's objection, and the Step 1-grievance meeting proceeded. *Id.* At the close of the Step 1-grievance meeting, the Agency denied the Union's request for a copy of the second Agency official's notes. *Id.* at 2. After the Step 1-grievance meeting, the second Agency official gave her notes to the Step 1-deciding official and the Step 2-grievance-deciding official (Step 2-deciding official). *Id.* at 41. According to the Union, the Agency later destroyed the notes. *Id.* at 26.

The Union filed a grievance on behalf of Agency employees. The grievance alleged that, as relevant here, the Agency violated Articles 3 and 24 of the parties' agreement and the Privacy Act, and committed unfair labor practices (ULPs) under § 7116(a) of the Statute when it allowed a second Agency official to attend the Step 1-grievance meeting to take notes over the Union's objection, denied the Union's request for a copy of the notes, and destroyed the notes. *Id.* at 1, 26.

When the parties could not resolve the grievance, they submitted it to arbitration. The Arbitrator framed two issues. The first was "whether . . . the Agency violated the [parties' agreement] when more than one management official attended the [Step 1-grievance meeting] and took notes." *Id.* at 39. The second was whether "the Agency violated the Privacy Act because the second [Agency] official who attended the meeting, took notes and provided copies to two other management officials." *Id.*

The Arbitrator found that the Agency did not violate the parties' agreement by having a second Agency official attend the Step 1-grievance meeting and take notes. *Id.* at 43. She reasoned that the parties' negotiated grievance procedure outlines the purpose of the Step 1-grievance procedure, but "does not specify who can or cannot be present" at the Step 1-grievance meeting. *Id.* Moreover, the Arbitrator found that the parties' agreement does not require the Agency to provide the Union with a copy of the second Agency official's notes. *Id.* at 44.

* The text of the relevant provisions of the parties' agreement is set forth in the appendix to this decision.

The Arbitrator also rejected the Union's Privacy Act claims, finding that "no privacy violation" resulted from the second Agency official's attendance at the Step 1-grievance meeting, her note taking, or "the manner [in which she] handled the notes." *Id.*

Based on the foregoing, the Arbitrator denied the grievance. *Id.* at 45.

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that the award fails to draw its essence from the parties' agreement in two respects. First, the Union argues that the award improperly creates "additional roles and duties" for attendees at grievance presentations not found in the plain language of Article 24. Exceptions at 12. Instead, the Union contends, Article 24 limits who is to be involved with grievance presentations by expressly stating who can attend a Step 1-grievance meeting. *Id.* Second, the Union argues that the Arbitrator's finding that the Agency did not violate the Privacy Act is inconsistent with Articles 1 and 3. *Id.* at 19-20. Specifically regarding Article 3, the Union argues that the second Agency official's notes constituted "personal notes" which became subject to the Privacy Act under Article 3 when she disclosed them to Agency deciding officials. *Id.* The Union similarly asserts that the Step 1-deciding official's admission that her notes constituted "memory joggers" made them subject to the Privacy Act under Article 3. *Id.*

In addition, the Union argues that the Arbitrator exceeded her authority in two respects. First, the Union argues that the Arbitrator failed to address whether the Agency violated § 7116(a) of the Statute by refusing to provide the Union with a copy of the notes taken at the Step 1-grievance meeting and destroying those notes. *Id.* at 14. Although "the parties did not stipulate to a common wording of the § 7116 issue" and "the Arbitrator was free to frame the issue," the Union asserts that she was obligated to resolve the § 7116 issue because both parties raised it before and during the arbitration hearing. *Id.* at 15 (citing *AFGE, Local 1547*, 65 FLRA 91 (2010) (*AFGE*)). Second, the Union argues that the Arbitrator failed to provide a "legal foundation" for her interpretation of Article 24 because she failed to discuss or resolve the parties' "arguments regarding the bargaining history of Article 24, [the] negotiability of the Union's interpretation, and whether the Union's interpretation would impact management rights." *Id.* at 16.

Finally, the Union claims that the award is incomplete, ambiguous, or contradictory as to make

implementation impossible because the Arbitrator's interpretation of Article 24 fails to address who can attend future Step 1-grievance meetings. *Id.* at 6.

B. Agency's Opposition

The Agency argues that the Union's first essence exception does not establish that the award is deficient under the Authority's deferential essence standard. Opp'n at 5. As to the Union's second essence exception, the Agency claims that the Union fails to argue or provide evidence that the Agency violated the Privacy Act or Articles 1 and 3 of the parties' agreement. *Id.* at 13.

In addition, the Agency argues that the Union's exceeds-authority exceptions lack merit. The Agency argues that the Union's first exceeds-authority exception should be dismissed because the Union did not raise the issue of whether the Agency violated § 7116(a) before the Arbitrator. *Id.* at 7-9 (citing 5 C.F.R. §§ 2425.4(c), 2429.5). Even if the Union did raise this issue, the Agency contends, in the absence of a stipulation, the Arbitrator's formulation of the issue is entitled to substantial deference. *Id.* at 9 (citing *NTEU*, 63 FLRA 198 (2009) (*NTEU*)). The Agency further argues that, as the Arbitrator's formulation of the issue was reasonable, and the award directly responds to the formulated issue, the Arbitrator did not exceed her authority by failing to resolve a submitted issue. *Id.* at 10. As to the Union's second exceeds-authority exception, the Agency claims that the Arbitrator did not exceed her authority by failing to resolve legal arguments because they were only included in the parties' post-hearing briefs, but not stipulated to by the parties or presented to the Arbitrator at the arbitration hearing. *Id.* at 13.

Finally, the Agency disagrees with the Union's contention that the award is incomplete, ambiguous, or contradictory, arguing that the Union fails to demonstrate that implementation of the award is impossible. *Id.* at 2-3.

IV. Preliminary Matter

Under §§ 2425.4(c) and 2429.5, the Authority will not consider any evidence or arguments that could have been, but were not, presented before the arbitrator. 5 C.F.R. §§ 2425.4(c), 2429.5; *see, e.g., Broad. Bd. of Governors*, 66 FLRA 380, 384 (2011) (*Governors*).

- A. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Union's claim that the award fails to draw its essence from Article 1 of the parties' agreement.

The Union contends that the Arbitrator's ruling on the Privacy Act issue fails to draw its essence from Article 1 of the parties' agreement. Exceptions at 19. The record indicates that the Union raised before the Arbitrator issues concerning the Privacy Act. Award at 1-2. Thus, the Union was aware that the Arbitrator might make findings regarding the Privacy Act, and the Union could have raised any potential Privacy Act arguments related to Article 1 during the arbitration proceedings. As the Union could have, but did not, make these arguments to the Arbitrator, we dismiss these exceptions under §§ 2425.4(c) and 2429.5. *See Governors*, 66 FLRA at 384.

- B. Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Union's claim that the Arbitrator exceeded her authority by failing to address whether the Agency violated § 7116(a) of the Statute.

The Union contends that the Arbitrator exceeded her authority by failing to address whether the Agency violated § 7116(a) of the Statute. Although the Agency argues that the Union did not raise the issue of whether the Agency violated § 7116(a) before the Arbitrator, Opp'n at 7-9 (citing 5 C.F.R. §§ 2425.4(c), 2429.5), the record shows otherwise. Award at 1 ("[t]he Union asserts that [the Agency]... violated ... [§] 7116(a)"). Accordingly, the Union's exceeds-authority exception is not barred by §§ 2425.4(c) and 2429.5, and we address it below.

V. Analysis and Conclusions

- A. The award does not fail to draw its essence from the parties' agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the 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 collective bargaining 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. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*).

The Union challenges the Arbitrator's interpretation of Article 24 by claiming that the article limits who can attend a Step 1-grievance meeting to those expressly mentioned in the article. Exceptions at 12. Article 24, Section 9 sets forth the parties' negotiated procedures for processing Step 1 grievances, including a requirement that grievances be submitted in writing, a description of what information a grievance should contain, the time limits by which the Step 1 official must hold a Step 1 meeting and issue a decision, and the time limit for appealing to Step 2. But nothing in the language of Article 24 expressly identifies who can attend a Step 1-grievance meeting. Consistent with the plain wording of Article 24, the Arbitrator determined that this provision does not specify who can attend a Step 1-grievance meeting. *Id.* at 43. Therefore, the Union's claim does not provide a basis for finding that the Arbitrator's interpretation of Article 24 is irrational, unfounded, implausible, or in manifest disregard for the agreement. *See OSHA*, 34 FLRA at 575. Accordingly, we deny this exception.

In addition, the Union contends that the Arbitrator's finding that the Agency did not violate the Privacy Act is inconsistent with Article 3. The Union argues that the second Agency official's notes constituted "personal notes," and the Step 1-deciding official's notes constituted "memory joggers," which were subject to the Privacy Act under the terms of Article 3. Exceptions at 20.

Article 3 provides that "personal notes or memory joggers ... become records subject to the Privacy Act" when certain conditions are met. Award at 37 (quoting Article 3). The Union's claim assumes that the officials' notes are either "personal notes" or "memory joggers" within the meaning of Article 3. Although the Arbitrator described the officials' testimony regarding their notes, *see* Award at 16, 19-20, the Arbitrator made no findings that the notes constitute either personal notes or memory joggers within the meaning of Article 3. And the Authority will not make a finding not present in an award. *See U.S. Nuclear Regulatory Comm'n*, 65 FLRA 79, 86 (2010). Accordingly, as the Union has not demonstrated that the Arbitrator erred in failing to make these findings, the Union has not established that the Arbitrator's award is irrational, implausible, or in manifest disregard of that provision. Consequently, we deny this exception.

- B. The Arbitrator did not exceed her authority.

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration. *E.g.*, *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Ashland, Ky.*, 58 FLRA 137, 139 (2002). In assessing whether an arbitrator failed to resolve an issue submitted to arbitration in cases where the parties do not stipulate the issue for resolution, the Authority accords the arbitrator's formulation of the issue to be decided the same substantial deference that the Authority accords an arbitrator's interpretation and application of a collective bargaining agreement. *Id.*

The Union contends that the Arbitrator exceeded her authority by failing to address whether the Agency violated § 7116(a) of the Statute. In the absence of a stipulation that includes an unfair labor practice (ULP) issue, an arbitrator is not obligated to address and resolve such an issue. *NTEU*, 63 FLRA at 198. In *NTEU*, the Authority concluded that the arbitrator was not obligated to address and resolve whether the agency committed ULPs under § 7116(a) of the Statute where the parties failed to stipulate the issues for resolution and the arbitrator framed and resolved the merits issue as whether the agency violated the parties' agreement. *Id.* at 200.

It is undisputed that the parties in this case did not stipulate the issues for resolution, and the Arbitrator framed them. Exceptions at 15; Award at 39; Opp'n at 9. The Arbitrator did not frame an issue to be resolved as whether the Agency committed a ULP. Instead, the Arbitrator formulated the issues as whether the Agency violated the parties' agreement and the Privacy Act. Award at 39.

The Union does not contend that the award is not directly responsive to the issues as the Arbitrator formulated them. Rather, the Union cites cases where the parties stipulated the issue for resolution, but argues only that the Arbitrator was obligated to resolve the § 7116(a) issue because both parties raised it before the Arbitrator. Exceptions at 15. As the parties did not stipulate to a ULP issue, however, the cases on which the Union relies are inapposite. And, therefore, the Arbitrator was not obligated to address and resolve such an issue. *See NTEU*, 63 FLRA at 200. For these reasons, we defer to the Arbitrator's formulation of the issue for resolution and deny this exception. *See id.*

The Union also argues that the Arbitrator exceeded her authority because she did not provide a "legal foundation" for her interpretation of Article 24 by failing to discuss or resolve several of the parties' arguments. Exceptions at 16. Where an exceeds-authority claim essentially reiterates an essence

exception that the Authority has denied, the Authority denies the exceeds-authority exception. *Governors*, 66 FLRA at 386. As the Union's claim relies on the premise that the award fails to draw its essence from Article 24, and as we found that the award does not fail to draw its essence from Article 24, we deny the exceeds-authority exception. *Id.* at 386.

- C. The award is not incomplete, ambiguous, or contradictory as to make implementation impossible.

The Union asserts that the award is incomplete, ambiguous, or contradictory as to make implementation impossible because the Arbitrator's interpretation of Article 24 fails to address who can attend future Step 1-grievance meetings. Exceptions at 6.

The Authority will find that an award is deficient on this ground when the excepting party shows that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain. *E.g.*, *U.S. Dep't of Homeland Sec., AFGE, Local 1395*, 64 FLRA 622, 624 (2010).

Here, the Arbitrator clearly found that the Agency did not violate Article 24 by allowing a second Agency official to attend the Step 1-grievance meeting because Article 24 does not specify who may attend a Step 1-grievance meeting. Award at 43, 45. The Union's assertion that the Arbitrator failed to address who can attend future Step 1-grievance meetings does not show how implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain. That is, the Arbitrator's interpretation of Article 24 unambiguously means that nothing in Article 24 bars a second Agency official from attending a Step 1-grievance meeting. *See id.* Therefore, we deny this exception.

VI. Decision

The Union's essence exception related to Article 1 is dismissed under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, and the Union's remaining exceptions are denied.

APPENDIX

Article 1 of the parties' agreement provides, in relevant part:

Section 1. Relationships to Laws and Government-Wide Rules and Regulations

In the administration of all matters covered by this agreement, officials and employees shall be governed by existing or future laws and existing government-wide rules and regulations, as defined in 5 U.S.C. 71, and by subsequently enacted government-wide rules and regulations implementing 5 U.S.C. 2302.

Exceptions, Attach. 4 at 1-1.

Article 3 of the parties' agreement provides, in relevant part:

Section 4. Official Records and Files in General

....

- D. Personal notes pertaining to an employee not qualifying as a system of records under the Privacy Act may only be kept and maintained by and for the personal use of the management official who wrote them. Such notes will not be disclosed to anyone. These notes must be maintained in a secure location. Personal notes shown or circulated to anyone must be maintained in accordance with this Section. These personal notes or memory joggers will not be used to circumvent timely disclosure to an employee, nor may they be used to retain information that should properly be contained in a system of records such as the SF-7B file. The personal notes will be kept or destroyed as the manager who wrote them sees fit. If any of these conditions are broken, these personal notes are no longer mere extensions of the supervisor's memory and become records subject to the Privacy Act.

If a memory jogger is maintained in electronic form, such a record will only be kept on a portable electronic medium which is solely under the control of the management official who created it. The portable electronic medium

will be locked in a secure storage area with access limited to the management official who created the record.

Id. at 3-4, 3-5.

Article 24 of the parties' agreement provides, in relevant part:

Section 9. Procedures for Employee Grievances

Step 1

A grievance must be submitted in writing, preferably, on the standard grievance form provided by the Administration, and presented to the Step 1 management official (designated in the Grievance Steps Chart below). The written grievance should normally describe the matter(s) being grieved, include the article(s) of the agreement that is involved, explain how the article(s) is allegedly violated and state the requested relief.

Within ten (10) working days after receipt of the grievance, the Step 1 official must hold a meeting or, if one is not requested, issue a decision in writing. If the meeting is held after the fifth workday, the Step 1 official must issue a decision within five (5) working days after the meeting. The decision will either grant, partially grant, or deny the relief sought. The grievance may be appealed to the Step 2 official within five (5) working days after receipt of the Step 1 decision. The Step 1 official will forward the grievance material to the Step 2 official as indicated by the grievant's election to proceed to the next step.

Id. at 24-5.