

67 FLRA No. 125

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2198
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
BECKLEY, WEST VIRGINIA
(Agency)

0-AR-5027

DECISION

July 1, 2014

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

Arbitrator Barry E. Shapiro issued an award finding that the Union did not timely file its grievance alleging that the Agency wrongfully failed to pay the grievant interest on a backpay award.

The central issue is whether the Arbitrator's award is based on a nonfact because "[t]he [A]gency produced no evidence that the [g]rievant knew or should have known the [A]gency did not pay interest."¹ Because the Union's nonfact exception directly challenges the Arbitrator's determination of the procedural arbitrability of the grievance, we deny the Union's exception.

II. Background and Arbitrator's Award

The grievant is a physician's assistant employed by the Agency. On August 24, 2007, the Union filed a grievance on behalf of the grievant and others, alleging that they were wrongfully denied on-call pay. The Agency sustained the grievance and notified the grievant that it would take some time to calculate and distribute the payments owed to the grievant and others. On July 9, 2008, the grievant sent an email to the Agency inquiring about the status of his backpay. The Agency

responded that a portion of the grievant's backpay had already been paid as part of his June 27 and July 11, 2008 paychecks. It advised the grievant that the remaining portion would be paid in installments over the next several pay periods. The grievant received the final installment of his backpay sometime between late September and mid-October 2008. While the grievant testified to making oral requests for a detailed accounting of how his backpay was calculated as early as 2008, the Arbitrator found that the record is only "clear about how often the [g]rievant made requests for the information in 2009, 2010, [and] 2011."² On March 1, 2012, the Union submitted a grievance alleging that the Agency wrongfully failed to pay the grievant interest on his backpay. The grievance was unresolved, and the parties proceeded to arbitration.

Before the Arbitrator, the Agency argued that the grievance was untimely. The parties' agreement requires that a grievance be filed "within [thirty] calendar days of the date that the employee or Union became aware, or should have become aware, of the act or occurrence" being grieved.³ The Arbitrator reasoned that "it is difficult to determine with certainty when the [thirty]-day limit for filing a grievance over any alleged incorrectness or incompleteness in the back payments (including the question of interest) should have begun" in this case.⁴ He concluded, however, that even if measured from "the latest possible date – a date, in other words, most advantageous to the [g]rievant," the grievance would be untimely.⁵ That date, according to the Arbitrator, would be sometime in mid- to late October 2008, when the grievant received his first paycheck since June 2008 that "did not include a large additional amount" attributable to his backpay.⁶ Thus, the Arbitrator concluded that, "[e]ven allowing for some uncertainty about precise dates, [the grievance] should probably have been filed by the end of 2008."⁷ Instead, it was filed in "March 2012, more than three years later."⁸ Accordingly, the Arbitrator denied the grievance.

The Union filed exceptions to the award, and the Agency filed an opposition to the Union's exceptions.

III. Preliminary Matter: One of the Union's exceptions fails to raise a ground recognized in § 2425.6(e) of the Authority's Regulations.

Section 2425.6 of the Authority's Regulations specifically enumerates the grounds that the Authority

² Award at 3.

³ *Id.* at 7 (internal quotation marks omitted).

⁴ *Id.* at 9.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

¹ Exceptions at 4.

currently recognizes for reviewing arbitration awards.⁹ In addition, the Regulations provide that if exceptions argue that an award is deficient based on private-sector grounds not currently recognized by the Authority, then the excepting party “must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions.”¹⁰ Further, § 2425.6(e)(1) of the Regulations provides that an exception “may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support” the grounds listed in § 2425.6(a)-(c), or “otherwise fails to demonstrate a legally recognized basis for setting aside the award.”¹¹ Thus, an exception that does not raise a recognized ground is subject to dismissal under the Regulations.¹²

The Union excepts to the award on the ground that it is “contrary to”¹³ and “ignores the language of”¹⁴ the parties’ agreement with respect to when the time limits for filing a grievance begin. These arguments do not raise grounds currently recognized by the Authority for reviewing awards.¹⁵ And the Union does not cite legal authority to support any ground not currently recognized by the Authority.¹⁶ Accordingly, we dismiss this exception.¹⁷

IV. Analysis and Conclusion: The award is not based on a nonfact.

The award is based on the Arbitrator’s determination of the procedural arbitrability of the grievance under the parties’ agreement.¹⁸ The Authority generally will not find an arbitrator’s ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the

procedural-arbitrability ruling itself.¹⁹ However, the Authority has stated that a procedural-arbitrability determination may be found deficient on grounds that do not directly challenge the determination itself, which include claims that an arbitrator was biased or exceeded his or her authority.²⁰

The Union argues that the award is based on a nonfact because “[t]he [A]gency produced no evidence that the [g]rievant knew or should have known the [A]gency did not pay interest.”²¹ Rather, the Union argues, “[t]he assertion that an accounting was provided [to] the [g]rievant is rebutted” by the evidence.²² Thus, according to the Union, “[t]here is no basis for attributing knowledge to the [g]rievant[,] and it is plain he would not have let such a matter go past without action.”²³ Here, even assuming that the Union has properly supported its nonfact exception under 5 C.F.R. § 2425.6(e)(1), the exception directly challenges the Arbitrator’s determination of the procedural arbitrability of the grievance.²⁴ We therefore deny the Union’s nonfact exception.²⁵

V. Decision

We dismiss, in part, and deny, in part, the Union’s exceptions.

⁹ See 5 C.F.R. § 2425.6(a)-(b).

¹⁰ *Id.* § 2425.6(c).

¹¹ *Id.*

¹² *E.g.*, *AFGE, Local 12*, 67 FLRA 387, 389 (2014).

¹³ Exceptions at 4.

¹⁴ *Id.* at 5.

¹⁵ See 5 C.F.R. § 2425.6(a)-(b).

¹⁶ *E.g.*, *AFGE, Local 1858*, 66 FLRA 942, 943 (2012).

¹⁷ Regarding this exception, in addition to agreeing that the Union’s claim does not raise a recognized private-sector ground for review of the award, Member DuBester notes, consistent with his position in other cases, that the Union even fails to articulate a well-established standard supporting a recognized ground. *Cf.*, *e.g.*, *AFGE, Gen. Comm.*, 66 FLRA 367, 370 (2011) (finding that the union’s claim that the award was not based on “a plausible interpretation of the [parties’ agreement]” was sufficient to raise the recognized private-sector ground of essence); *AFGE, Local 3627*, 65 FLRA 1049, 1051 n.2 (2011) (finding that the union’s claim that the award failed to “resolve the issues submitted” was sufficient to raise the recognized private-sector ground of exceeds authority); *see generally AFGE, Local 1858*, 67 FLRA 327, 328 n.21 (2014).

¹⁸ *AFGE, Local 3438*, 65 FLRA 2, 3 (2010) (“An arbitrator’s timeliness determination is a procedural-arbitrability ruling.”).

¹⁹ *E.g.*, *AFGE, Local 933*, 65 FLRA 9, 11 (2010).

²⁰ *Id.*; *see also U.S. EEOC*, 60 FLRA 83, 86 (2004) (citing *AFGE, Local 2921*, 50 FLRA 184, 185-86 (1995)).

²¹ Exceptions at 4.

²² *Id.*

²³ *Id.*

²⁴ *E.g.*, *U.S. Dep’t of Commerce, Nat’l Oceanic & Atmospheric Admin., Office of Marine & Aviation Operations, Marine Operations Ctr.*, 67 FLRA 244, 245 (2014) (“[T]he timeliness of a grievance is a procedural-arbitrability determination that cannot be directly challenged through a nonfact exception.”).

²⁵ *Id.* at 245-46.

Member Pizzella, concurring:

I join my colleagues to deny the Union's nonfact exception.

With respect to the Union's other exception, while I agree with my colleagues that the exception should not be granted, I disagree with their conclusion that the exception should be dismissed under § 2425.6(e) because it does not state a recognized ground for review.

As I stated in my concurrence in *AFGE Local 1897*, I believe that the Authority's Regulations do not require a party "to invoke any particular magical incantations" to perfect an exception, as long as the party provides "sufficient citation to legal authority" or "explain[s] how" the award is deficient.¹ Here, the Union claims that the award is "contrary to"² and "ignores the language of"³ the parties' collective-bargaining agreement, dated March 2011⁴ (the "parties' agreement"). Even though the Union does not use the specific phrase, "fails to draw its essence,"⁵ it has clearly set forth an arguable essence exception that cannot be summarily dismissed.⁶

Therefore, I would address the exception and deny it because it does not provide a basis for finding the award deficient. The Union claims that the award "ignores the language of the [parties' agreement] on when the time limits for filing [a grievance] begin."⁷ According to the Union, the "Arbitrator ruled that the Union[']s grievance] was untimely[,] but without any explanation for when the Union should have been aware

of the error in payments or why the Union was unreasonable in depending on the [A]gency to have properly completed back pay calculations."⁸ This exception merely challenges the Arbitrator's procedural-arbitrability determination.⁹ Accordingly, it does not provide a basis for finding the award deficient.¹⁰ On that basis, I would deny the Union's exception.

Thank you.

¹ 67 FLRA 239, 243 (2014) (Concurring Opinion of Member Pizzella) (internal quotation marks and alterations omitted) (quoting *AFGE, Local 33*, 65 FLRA 887, 891 (2011) (Concurring Opinion of Member Beck); *AFGE, Local 1738*, 65 FLRA 975, 977 (2011) (Concurring Opinion of Member Beck)); cf. *NTEU v. FLRA*, No. 12-1199, 2014 U.S. LEXIS 11208, *20 (D.C. Cir. June 17, 2014) (noting that "a party is not required to invoke 'magic words' in order to adequately raise an argument before the Authority").

² Exceptions at 4.

³ *Id.* at 5.

⁴ Exceptions, Attach. D at 1.

⁵ 5 C.F.R. § 2425.6(b)(2)(ii).

⁶ Cf. *AFGE, Local 1858*, 67 FLRA 327, 328-29 (2014) (allegation that arbitrator did not interpret the parties' agreement correctly raised an essence exception); *AFGE, Gen. Comm.*, 66 FLRA 367, 370 (2011) (allegation that award did not "provide a plausible interpretation of the [parties' agreement]" raised an essence exception); *AFGE, Local 1738*, 65 FLRA 975, 977 (2011) (Dissenting Opinion of Member Beck) (allegations that award "ignored the plain language of" and is "contrary to the plain language of" the parties' agreement raise an essence exception (internal quotation marks and alterations omitted)).

⁷ Exceptions at 5.

⁸ *Id.* at 4.

⁹ E.g., *U.S. DOT, FAA, Wash., D.C.*, 65 FLRA 950, 953 (2011) (finding that essence exception challenging arbitrator's timeliness conclusion directly challenged his procedural-arbitrability determination); see also *AFGE, Local 2921*, 50 FLRA 184, 186 (same).

¹⁰ *Id.*