

**67 FLRA No. 49**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 2595  
NATIONAL BORDER PATROL COUNCIL  
(Union)

and

UNITED STATES  
DEPARTMENT OF HOMELAND SECURITY  
U.S. CUSTOMS AND BORDER PROTECTION  
U.S. BORDER PATROL  
(Agency)

0-AR-4853

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DECISION

January 28, 2014

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

**I. Statement of the Case**

The Agency declined to extend a forty-eight-hour deadline for the grievants to consult with the Union president before submitting written statements, requested by their supervisors, concerning work-related incidents. Arbitrator James Conner found that the Agency did not violate the parties' agreement when it declined to extend the deadline. The question before us is whether the Arbitrator's interpretation of the parties' agreement is contrary to Authority precedent. Because Authority precedent does not demonstrate that the Arbitrator's interpretation of the parties' agreement is deficient as a matter of law, we find that the answer is no.

**II. Background and Arbitrator's Award**

The pertinent facts in this case are undisputed. The grievants' respective supervisors ordered the grievants to submit written statements concerning two work incidents. The statements were due two days after the incident for one of the grievants, and by the end of the day of the incident for the second grievant. The supervisors also provided the grievants with a standard form advising them of their right to union representation as set forth in Article 31B of the parties' agreement, the pertinent wording of which is set forth below.

Both grievants subsequently contacted the Union president and requested representation from him. The Union president was not able to provide immediate representation in either case and, accordingly, asked the Agency to give one grievant a one-day extension, and the other grievant a two-day extension, to submit their written statements. The Agency did not approve the time extensions, and the grievants submitted their written statements without consulting with the Union president.

The Union filed separate grievances claiming that the Agency violated Article 31B(3) of the parties' agreement when it refused to grant the grievants a reasonable extension of time so that they could meet with their chosen representative. Specifically, the Union claimed that the Agency effectively denied the grievants union representation and also violated the "[forty-eight]-hour rule" contained in Article 31B(3).<sup>1</sup>

Article 31B of the parties' agreement states, in relevant part:

(1) The [Agency] will provide the Union (or another person of the employee's choice not involved in the investigation) the opportunity to be represented at any examination of an employee in the unit by a representative of the [Agency] if:

- a. the employee reasonably believes that the examination may result in disciplinary action against the employee; and
- b. the employee request[s] representation.

....

(3) The [Agency] agrees prior to taking a written or sworn statement from an employee, or when an employee is going to be interrogated before witnesses which may lead to disciplinary action against the employee, he or she will be advised in writing of his or her right to be represented by the Union.

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<sup>1</sup> Exceptions at 7.

The failure to obtain representation will not delay the interrogation by more than [forty-eight] hours from the time the employee receives notice of the interrogation. The employee and the Union will promptly designate the representative and make reasonable efforts to minimize the delay. Upon request, a reasonable extension of time will be granted when the representative must travel more than 100 miles to represent the employee.<sup>2</sup>

When the parties could not resolve their dispute, they consolidated the grievances and submitted them to arbitration. The parties stipulated to the following issues: (1) “Are the consolidated grievances arbitrable? If so,”; (2) “[w]as there a violation of Article 31B of the [parties’ agreement]? If so,”; (3) “[w]hat is the appropriate remedy?”<sup>3</sup>

The Arbitrator found the grievances arbitrable, but found that the second paragraph of Article 31B(3), on which the Union relied, applies only to interrogations – not written statements.<sup>4</sup> The Arbitrator thus found that the Agency did not violate the parties’ agreement by denying the requested time extensions.

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

### III. Analysis and Conclusions

#### A. The award is not contrary to law.

The Union claims that the award is contrary to law because the Arbitrator’s interpretation of Article 31B is contrary to Authority precedent.<sup>5</sup> In resolving this claim, the Authority reviews any question of law raised by an exception and the award de novo.<sup>6</sup> In applying a de novo standard of review, the Authority assesses whether the arbitrator’s legal conclusions are consistent with the applicable standard of law.<sup>7</sup>

The Union relies upon two Authority decisions – *AFGE, National Border Patrol*

*Council & National INS Council (AFGE)*<sup>8</sup> and *U.S. INS, U.S. Border Patrol, Del Rio, Texas (INS)*<sup>9</sup> – to support its claim that the Authority has previously found that language similar to that set forth in the second paragraph of Article 31B(3) applies to both written statements and oral interrogations.<sup>10</sup> The Union claims that, in *AFGE*, the Authority found that the language set forth in Article 31B of the parties’ agreement is “stronger than the [s]tatutory right” to representation set forth in § 7114(a)(2) of the Federal Service Labor-Management Relations Statute (the Statute).<sup>11</sup> The Union also claims that, in *INS*, the Authority found that an “‘interrogation’ is considered not just to be a[n] [oral] query of the employee, but also a demand for a written statement.”<sup>12</sup> On these bases, the Union argues that the Authority has interpreted language contained in both paragraphs of Article 31B(3) to apply to “interrogation[s]” and “demands for information in writing.”<sup>13</sup>

In *AFGE*, a negotiability case, the Authority found negotiable a proposal that contained language expressly affording employees “involved in a . . . shooting incident” the “opportunity to consult with a union representative prior to being required to provide a written report or oral statement.”<sup>14</sup> In *INS*, an unfair labor practice case addressing representational rights under § 7114(a)(2)(B) of the Statute, the Authority found that, under certain circumstances, written memoranda could constitute an “examination in connection with an investigation, within the meaning of [the Statute].”<sup>15</sup> Neither of these decisions interprets Article 31B of the parties’ agreement. Moreover, neither of these decisions held that, as a matter of law, the language contained in the parties’ agreement means that a written memorandum equates to an “examination” in every instance under § 7114(a)(2), or that the grievants were entitled to representation under the circumstances of this case. Therefore, the Union’s reliance on those decisions does not show that the Arbitrator erred as a matter of law.

Thus, the Union’s claim provides no basis for finding the award contrary to Authority precedent, and we deny the Union’s contrary-to-law exception.

<sup>2</sup> Award at 3.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 7-8.

<sup>5</sup> Exceptions at 4, 8.

<sup>6</sup> *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).

<sup>7</sup> *Id.*

<sup>8</sup> 40 FLRA 521, 549-50 (1991).

<sup>9</sup> 46 FLRA 363, 363-64 (1992).

<sup>10</sup> Exceptions at 5-8.

<sup>11</sup> *Id.* at 5-6 (citing *AFGE*, 40 FLRA at 549-50).

<sup>12</sup> *Id.* at 6 (quoting *INS*, 46 FLRA at 363-64).

<sup>13</sup> *Id.* at 7-8.

<sup>14</sup> *AFGE*, 40 FLRA at 546; *see also id.* at 550.

<sup>15</sup> *INS*, 46 FLRA at 364; *see also id.* at 371.

**B. The award does not fail to draw its essence from Article 31B of the parties' agreement.**

The Union also asserts that the award fails to draw its essence from Article 31B of the agreement.<sup>16</sup> The Union bases its essence exception on the claim that the Arbitrator's interpretation of Article 31B is inconsistent with Authority precedent.<sup>17</sup> This claim is essentially the same as the Agency's contrary-to-law argument.<sup>18</sup> When an essence claim is substantively the same as a contrary-to-law claim that the Authority has rejected, the Authority also rejects the essence claim.<sup>19</sup> As we have rejected the contrary-to-law claim, we also reject the essence claim.

**IV. Decision**

We deny the Union's exceptions.

**Member Pizzella, concurring:**

Although I join with my colleagues to deny the Union's exceptions, several aspects of this case concern me.

The filing of this grievance by AFGE, National Border Patrol Council, Local 2595 (which represents employees stationed at the Yuma, Arizona Sector of the U.S. Border Patrol) does not contribute to the "effective conduct of public business"<sup>1</sup> or to those "progressive work practices [that] facilitate and improve employee performance."<sup>2</sup>

The parties' disagreement concerning Article 31.B has been the subject "of several grievances, an [unfair labor practice (ULP)] decision, and at least three arbitration awards" from 1987 to 2012.<sup>3</sup> The specific question of whether the Agency was obligated to grant a forty-eight-hour extension for an employee to provide a written statement was raised previously by the Union, and addressed by another arbitrator,<sup>4</sup> in a 2011 grievance.<sup>5</sup> The prior grievances, arbitration awards, and ULP complaints already established that this provision makes a clear and unmistakable distinction between an Agency request for an employee to submit to an "interrogation" (that permits a delay of no "more than [forty-eight] hours from the time the employee receives notice of the interrogation") and a "written" statement that makes no allowance for a delay.<sup>6</sup> Even though the central facts of this case are not in dispute, the Union, nonetheless, filed the instant grievance seemingly to achieve a different result when the Agency simply requested that the grievants provide a written statement concerning their eye-witness accounts of incidents involving other employees.

As I noted in my very first concurring opinion as a Member of the Authority, in *U.S. DHS, CBP (CBP)*,<sup>7</sup>

<sup>1</sup> 5 U.S.C. § 7101(a)(1)(B).

<sup>2</sup> *Id.* § 7101(a)(2); *see also INS v. FLRA*, 855 F.2d 1454, 1460 (9th Cir. 1988) (Congress directed the Authority to interpret the Federal Service Labor-Management Relations Statute to promote governmental effectiveness and efficiency).

<sup>3</sup> Award at 4; Exceptions, Attach. 5 (Union's Post-Hearing Brief) at 2.

<sup>4</sup> Award at 4; Exceptions, Attach. 6 (Agency's Post-Hearing Brief) at 6-7.

<sup>5</sup> The 2011 grievance was filed by one of the two-named grievants in this case and challenged the same request to provide a written statement. Award at 4; Union's Post-Hearing Brief at 2; Agency's Post-Hearing Brief at 6-7.

<sup>6</sup> Award at 3; *see also id.* at 8.

<sup>7</sup> 67 FLRA 107, 112-13 (2013) (Concurring Opinion of Member Pizzella) (quoting 5 U.S.C. § 7101(a)(1)(b) (internal quotation marks omitted)); *see also NTEU, Chapter 32*, 67 FLRA 174, 177 (2014) (Concurring Opinion of Member Pizzella) (citations omitted).

<sup>16</sup> Exceptions at 4, 8.

<sup>17</sup> *Id.*

<sup>18</sup> *See id.* at 4-8.

<sup>19</sup> *See, e.g., AFGE, Local 2128*, 66 FLRA 801, 804 n.4 (2012) (declining to analyze separately an essence exception that was substantively the same as a contrary-to-law exception).

the filing of frivolous and repetitive grievances unwisely consumes federal resources: time, money, and human capital; serves to undermine “the effective conduct of [government] business”;<sup>8</sup> and completely fails to take into account the resulting costs to the taxpayers who fund the Agency’s operations and pay for the significant costs of Union official time used to process this grievance that began on November 1, 2010.<sup>9</sup>

Thank you.

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<sup>8</sup> *CBP*, 67 FLRA at 112 (Concurring Opinion of Member Pizzella) (quoting 5 U.S.C. § 7101(a)(1)(B) (internal quotation marks omitted)).

<sup>9</sup> *See* Exceptions, Attach. 7-1.