68 FLRA No. 131

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
LOCAL 143
(Union)

0-AR-5095

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DECISION

August 14, 2015

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

I. Statement of the Case

Arbitrator Kathy L. Eisenmenger issued an award finding that a particular claim by the Union was procedurally arbitrable, and that the Agency violated the parties' agreement when it failed to assign an employee (the grievant) an overtime shift (the overtime opportunity). We must decide two substantive questions.

The first question is whether the award fails to draw its essence from a provision in the parties' agreement that limits what issues an arbitrator may hear. Because the Agency's essence argument directly challenges the Arbitrator's procedural-arbitrability determination, and such determinations may not be challenged directly on essence grounds, the answer is no.

The second question is whether the Arbitrator exceeded her authority. Because the Agency has not demonstrated that the Arbitrator disregarded limits on her authority or resolved an issue not submitted to arbitration, the answer is no.

II. Background and Arbitrator's Award

The parties' agreement contains separate provisions governing the assignment of: (1) unanticipated overtime, and (2) anticipated overtime. Specifically, Article 35, Section C.(1) of the agreement (the unanticipated-overtime provision) governs the assignment of unanticipated overtime, while Article 35, Section B.(1) (the anticipated-overtime provision) governs the assignment of anticipated overtime.

The Union filed a grievance under the first step of the parties' negotiated grievance procedure. This step-one grievance: (1) alleged that the grievant was wrongfully denied the overtime opportunity, and (2) requested certain information from the Agency. The Agency did not respond to the step-one grievance. Accordingly, under the negotiated grievance procedure, the Union did not file a step-two grievance, but proceeded to file a step-three grievance. In an addendum to the step-three grievance and on the parties' step-two grievance form (Form 280), the Union alleged that the Agency violated the unanticipated-overtime provision when it failed to assign the grievant the overtime opportunity.

The case went to arbitration, where the parties stipulated to the following issues: "[Did] the Agency violate[] Article 35 of the parties' [agreement] when it did not assign [the overtime opportunity] to the [g]rievant? If yes, what shall be the remedy?"[1] In addition, as relevant here, the Agency raised an issue regarding whether the Union was permitted to present "new issues" at the arbitration hearing when "the Union alleged a violation of a different section of the [parties' agreement] than the section the Union cited at [s]tep [two] of the grievance procedure."[2] In this regard, the Agency argued that the Union violated the specificity requirements of Article 27, Section 8.A. and 8.B. of the parties' agreement because it: identified, on the Form 280, the *unanticipated*-overtime provision as the section of the parties' agreement that the Agency allegedly violated; then argued, before the Arbitrator, that the Agency violated the *anticipated*-overtime provision. Article 27, Section 8.A. provides, in pertinent part, that "[a]ll issues raised under [s]tep [two] of this [a]rticle shall be identified in writing."[3] Section 8.B. states, in pertinent part, that "[i]ssues not raised and actions not requested in the initial filing of the [Form 280] may not be introduced at arbitration absent mutual agreement."[4] According to the Agency, these provisions barred the Union from raising an alleged violation of the anticipated-overtime provision at arbitration.

[1] Award at 2.
[2] *Id.*
[3] Exceptions, Attach. F, Collective-Bargaining Agreement at 111.
[4] *Id.*

The Arbitrator disagreed, and found that the issue of whether the Agency violated the anticipated-overtime provision was properly before her. She reasoned that the Agency "in effect waived the arbitrability argument" when it failed to respond to the Union's step-one grievance and to provide the Union with the information that it had requested in that grievance.[5] According to the Arbitrator, "[t]he Agency's untimely and overall insufficient adherence to" the steps of the parties' negotiated grievance procedure "directly and adversely affected the Union's reliance on an alleged violation of [the unanticipated-overtime provision] when, in fact, the aggrieved incident involved [anticipated overtime]."[6] Therefore, the Arbitrator found that "the Union's citation of [the unanticipated-overtime provision] . . . was not improper and did not obviate the Union's right to amend its grievance at the arbitration."[7] And, on the merits, the Arbitrator found that the Agency violated the anticipated-overtime provision when it failed to award the grievant the overtime opportunity.

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

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Agency's exceptions.

The Agency claims that the Arbitrator failed to provide a fair hearing because she deprived the Agency of notice and due process with respect to the Union's anticipated-overtime claim.[8] According to the Agency, "[h]ad the Union properly identified its grievance[,] the Agency would at least have been able to discuss the case with potential witnesses, and could have provided the exhibits to those witnesses so that they could intelligently defend the Agency."[9] The Union argues that the Agency failed to make a fair-hearing argument at arbitration.[10]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[11] Before the Arbitrator, the Union raised an anticipated-overtime claim, and the Agency challenged the arbitrability of that claim at the arbitration hearing.[12] But there is no indication in the record that the Agency argued to the Arbitrator – either at the hearing or in the Agency's post-hearing brief – that she would be denying the Agency a fair hearing if she resolved the Union's claim. Because the Agency could have raised its fair-hearing argument before the Arbitrator, but did not do so, we dismiss this exception as barred by §§ 2425.4(c) and 2429.5.

IV. Analysis and Conclusions

The Agency challenges the Arbitrator's conclusion that the anticipated-overtime claim was properly before her on the grounds that: (1) the award fails to draw its essence from the parties' agreement; and (2) the Arbitrator exceeded her authority.[13] We discuss these grounds separately below. However, as an initial matter, the Agency alleges that the Arbitrator's conclusion was a substantive-arbitrability, not a procedural-arbitrability, determination.[14] As discussed above, the Arbitrator's conclusion that the anticipated-overtime claim was properly before her was based on her determination that the Agency effectively "waived" its arbitrability argument concerning the specificity requirements of the parties' agreement when it failed to respond to the Union's step-one grievance and to provide the Union with the information that it requested in that grievance.[15]

Procedural arbitrability involves questions of whether a grievance satisfies a collective-bargaining agreement's procedural conditions, while substantive arbitrability involves questions of whether the grievance's subject matter is arbitrable.[16] The Authority has consistently held that an arbitrator's ruling on whether a grievance meets the specificity requirements of a collective-bargaining agreement is a procedural-arbitrability determination.[17] And the Authority has recently, and unanimously, confirmed that an arbitrator's finding that a party has waived its challenge to a procedural-arbitrability determination is itself a procedural-arbitrability determination.[18]

The dissent nevertheless claims that the Arbitrator's decision that the Agency effectively waived its arbitrability argument does not concern procedural

[5] Award at 29.
[6] *Id.*
[7] *Id.*
[8] Exceptions Br. at 20-22.
[9] *Id.* at 21.
[10] Opp'n at 23.
[11] 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012).
[12] *See* Exceptions, Attach. A, Tr. at 10-13.
[13] Exceptions Br. at 11.
[14] *Id.* at 18-20.
[15] Award at 29.
[16] *AFGE, Local 2041*, 67 FLRA 651, 652 (2014) (*Local 2041*).
[17] *E.g.*, *AFGE, Local 1235*, 66 FLRA 624, 624 (2012) (*Local 1235*); *AFGE, Local 3615*, 65 FLRA 647, 649 (2011); *U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Portland Dist.*, 64 FLRA 271, 273 (2009); *GSA*, 53 FLRA 925, 938 (1997).
[18] *See U.S. DHS, U.S. CBP, Border Patrol San Diego Section, San Diego, Ca.*, 68 FLRA 128, 131 (2014); *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 624 (2014).

arbitrability.[19] But the dissent neither attempts to distinguish Authority precedent concerning procedural-arbitrability determinations nor cites any authority that conflicts with this precedent.[20] Instead, the dissent cites decisions of the U.S. Supreme Court and U.S. Court of Appeals for the Tenth Circuit defining procedural arbitrability as addressing whether the parties have satisfied the prerequisites for arbitration.[21] But that precedent in no way suggests that an arbitrator's determination that a party has waived its procedural-arbitrability challenge is not itself a procedural-arbitrability determination.

Further, the Agency and the dissent rely on decisions regarding whether the *subject matter* of a grievance is arbitrable.[22] Here, however, there is no dispute that, under the parties' agreement, issues regarding the anticipated-overtime provision may be submitted to arbitration.[23] Thus, whether a potential violation of that provision is *substantively* arbitrable is not at issue in this case. Rather, the only arbitrability issue that the Agency raises is whether the Union failed to "take the *steps* necessary [under the parties' agreement] to place the issue of anticipated overtime before the arbitrator."[24] Under the principles set forth above, this is a procedural-arbitrability – not substantive-arbitrability – issue. And, by finding that the Agency effectively waived its procedural-arbitrability challenge, and, therefore, that the Union was not precluded from alleging a violation of the anticipated-overtime provision under the steps of the parties' negotiated grievance procedure, the Arbitrator made a procedural-arbitrability determination.

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, including a claim that an award fails to draw its essence from a collective-bargaining agreement.[25] However, a procedural-arbitrability determination may be found deficient on grounds that do not directly challenge the determination.[26] This includes claims that the arbitrator exceeded his or her authority,[27] but only insofar as the exceeded-authority claim does not directly challenge the procedural-arbitrability determination.[28]

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

The Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator's finding that the anticipated-overtime claim was properly before her "ignored every contractual limitation on what issues may be heard and what the award may address."[29] This essence argument directly challenges the Arbitrator's procedural-arbitrability determination and, consistent with the principles set forth above, provides no basis for finding the award deficient.[30] Accordingly, we deny the Agency's essence exception.

B. The Arbitrator did not exceed her authority.

The Agency argues that, for two reasons, the Arbitrator exceeded her authority.[31]

First, the Agency claims that the Arbitrator disregarded specific limits on her authority when she ignored provisions of the parties' agreement mandating that "an arbitrator's award will be limited to those issues included on the . . . Form 280."[32] In support of its position, the Agency cites *U.S. Department of Transportation, FAA* (*FAA*).[33] But the Agency's claim regarding the parties' agreement directly challenges the Arbitrator's procedural-arbitrability determination and, as such, does not provide a basis for finding the award deficient.[34] Further, the Agency's reliance on *FAA* is misplaced. In the portion of *FAA* that the Agency cites, the Authority found that an arbitrator exceeded her authority when she resolved a merits issue that the parties had not submitted to arbitration.[35] Here, the Agency expressly put before the Arbitrator the procedural-arbitrability question that she resolved.[36] Thus, *FAA* is inapposite.

[19] Dissent at 7-8.
[20] *See id.*
[21] *See id.* at 8 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002); *Soc'y of Prof'l Eng'g Emps in Aerospace* v. *Spirit Aerosystems, Inc.*, 541 Fed. Appx. 817, 818 (10th Cir. 2013)).
[22] *See id.* (citing *AFGE, Local 1815*, 65 FLRA 430, 431 (2011) (*Local 1815*); *AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009)); Exceptions Br. at 19 (citing *Local 1815*, 65 FLRA at 431).
[23] *See* Exceptions Br. at 7.
[24] *Id.* at 11 (emphasis added).
[25] *U.S. DHS, U.S. CBP, Border Patrol, San Diego Sector, San Diego, Cal.*, 68 FLRA 128, 131 (2014) (*CBP*) (citing *Local 2041*, 67 FLRA at 652 & n.22).
[26] *U.S. Dep't of VA, Reg'l Office, Winston-Salem, N.C.*, 66 FLRA 34, 37 (2011) (*VA*).
[27] *Id.*
[28] *U.S. Dep't of Transp., FAA*, 64 FLRA 612, 613 (2010) (*FAA*).
[29] Exceptions Br. at 15.
[30] *See, e.g., CBP*, 68 FLRA at 131.
[31] Exceptions Br. at 11-15.
[32] *Id.* at 14.
[33] 64 FLRA 612.
[34] *E.g., VA*, 66 FLRA at 38.
[35] *FAA*, 64 FLRA at 613-14 (citing *U.S. Dep't of the Treasury, U.S. Mint, Denver, Colo.*, 60 FLRA 777, 779 (2005)).
[36] Award at 2.

Second, the Agency alleges that the Arbitrator resolved an issue not submitted to arbitration when she ruled on whether the Agency violated the anticipated-overtime provision.[37] An arbitrator exceeds his or her authority when he or she resolves an issue not submitted to arbitration.[38] Here, as discussed previously, the Arbitrator resolved the question that the Agency expressly put before her – whether the Union could properly raise an anticipated-overtime claim – and found against the Agency in this regard. The Agency has not shown that finding to be deficient. As a consequence, the Arbitrator properly ruled on whether the Agency violated the anticipated-overtime provision, and the Agency's exception does not demonstrate that the Arbitrator exceeded her authority by doing so.

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

[37] Exceptions Br. at 12-14.
[38] *Local 1235*, 66 FLRA at 625.

Member Pizzella, dissenting:

Groucho Marx once described the "the art of looking for trouble" – "finding it everywhere, diagnosing it incorrectly and applying the wrong remedies."[1]

NTEU, Local 143 (Local 143) filed a grievance claiming that the Customs and Border Protection point-of-entry facility at Santa Teresa, New Mexico (CBP Santa Teresa) violated Article 35, *Section C* ("Unanticipated Overtime")[2] of the parties' national agreement. Arbitrator Kathy Eisenmenger could not find a violation of *Section C*. However, Arbitrator Eisenmenger permitted Local 143 to throw an entirely different provision − *Section B* ("Anticipated Overtime")[3] − that was never even mentioned anywhere in the grievance[4] into the mix at the arbitration hearing without any warning whatsoever to the Agency. Arbitrator Eisenmenger ignored this inconvenient fact and found that CBP Santa Teresa violated Section B.[5]

Earlier this year, in *U.S. Department of Homeland Security, U.S. Customs and Border Protection, U.S. Border Patrol, Yuma Sector* (*CBP Yuma*), the majority acknowledged that "an arbitrator exceeds his or her authority *by resolving an issue not submitted to arbitration* . . ."[6] In my dissent in that case, I noted that an arbitrator may not simply "address[] and base[] his award on . . . sections that *were not even mentioned* by [the union] in its grievance."[7]

That is exactly what occurred here. Arbitrator Eisenmenger based her award on a provision that was not even grieved. In other words, she *exceeded her authority*. In the majority's words, Arbitrator Eisenmenger resolved a question of procedural arbitrability.

This is not just a matter of semantics – the grievance answered, by the Agency, and submitted, by Local 143, to arbitration *never asked* Arbitrator Eisenmenger to answer whether Local 143 could raise at arbitration an allegation concerning *Section B*. Just because the majority now characterizes her wrong decision as addressing a question of procedural arbitrability does not make it so. As I have noted before

[1] http://www.brainyquote.com/quotes/quotes/g/grouchomar146422.html#rfO9BkSS7h0xLbcC.99
[2] Joint Ex. 1 at 166.
[3] Joint Ex. 1 at 166.
[4] Award at 29.
[5] *Id.* at 36.
[6] *U.S. DHS, U.S. CBP, U.S. Border Patrol, Yuma* Sector, 68 FLRA 189, 191 (2015) (*CBP Yuma*) (citing *U.S. Dep't of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 307-08 (1995).
[7] *Id*. at 195-96 (Dissenting Opinion of Member Pizzella) (emphasis added).

what Confucius observed centuries ago: "[t]he beginning of wisdom is to call things by their proper names."[8]

The majority asserts, as though it is a remarkable proposition, that "there is no dispute that, under the parties' [collective-bargaining] agreement, issues regarding the anticipated-overtime provision [*Section B*] *may be* submitted to arbitration."[9] Okay . . . but . . . there is also *no dispute* that, under the parties' collective-bargaining agreement, issues regarding "call-out orders" (Section E) and "trades[s] [of] overtime assignments" (Section F) − or any one of hundreds of other sections in the parties' agreement − *may be* submitted to arbitration. The Union could have alleged, in its grievance, a violation of any of these provisions but did not do so. The Union alleged *only* a violation of *Section C(1)* ("unanticipated overtime").

Therefore, I am perplexed why my colleagues find it remarkable that I make no "attempt to distinguish Authority precedent concerning procedural-arbitrability determinations."[10] The pertinent question here is why the majority makes no attempt to distinguish longstanding Authority precedent, which they reaffirmed earlier this year, that "an arbitrator exceeds his or her authority *by resolving an issue not submitted to arbitration* . . . ."[11]

"Procedural arbitrability involves '*procedural questions*, such as whether the *preliminary steps* of the grievance procedure have been exhausted or excused."[12] According to the United States Supreme Court, "procedural" questions address "*prerequisites* such as time limits, notice, laches, estoppel, and *other conditions precedent* to an obligation to arbitrate."[13] Later, in *Society of Professional Engineering Employees in Aerospace v. Aerosystems, Inc*., the U.S. Court of Appeals for the Tenth Circuit held that "[p]rocedural arbitrability addresses whether parties have satisfied conditions that *allow* them to use arbitration."[14] In this case, however, there was *no such question* – i.e. whether the grievance was timely, whether a grievance concerning overtime could be grieved, or (as the majority asks) "whether the parties have satisfied the prerequisites for arbitration"[15] because Local 143 never raised a question concerning *Section B* in the grievance that was submitted to the Arbitrator.

But to the extent there is any room for disagreement as to how the question in this case should be characterized, the Supreme Court has determined that some "question[s] of arbitrability" fall into a grey area between "substantive" and "procedural" arbitrability.[16] According to the Court, a question which will "determine whether the underlying controversy *will proceed to arbitration* on the merits" should be characterized as a "gateway" question,[17] as opposed to a question that concerns "procedural"[18] arbitrability (e.g. "time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate" – none of which are present in this case).[19] As the Court held, "gateway" questions are more akin to "substantive-arbitrability," than they are to procedural-arbitrability, determinations.[20]

Local 143 grieved Article 35, *Section C*.[21] The Agency addressed *Section C* in its response. Local 143 took its dispute with the Agency, concerning *Section C*, to arbitration. But, when Arbitrator Eisenmenger addressed *any question concerning Section B*, she exceeded her authority.[22]

This is yet another example, which the United States Court of Appeals for the District of Columbia Circuit previously observed, where the majority asks the "wrong question"[23] and endorses an "incoherent arbitral award."[24]

I would set aside the award because the Arbitrator exceeded her authority.

Thank you.

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[8] *See U.S. Dep't of VA, Med. Ctr., Dayton, Ohio*, 68 FLRA 360, 363 (2015) (Dissenting Opinion of Member Pizzella).
[9] Majority at 5 (emphasis added).
[10] *Id*.
[11] *CBP Yuma*, 68 FLRA at 191.
[12] *AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009) (internal citations omitted).
[13] *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79, 85 (2002) (*Howsam*) (internal citations omitted) (emphasis added).
[14] *Soc'y of Prof'l Eng'g Emps in Aerospace v. Spirit Aerosystems, Inc*., 541 Fed. Appx. 817, 818 (10th Cir. 2013) (citing *Howsam*, 537 U.S. at 85).
[15] Majority at 4.
[16] *Id*.
[17] *Id.*; *see also AFGE, Local 1815*, 65 FLRA 430, 431 (2011) (determination based on subject matter concerns substantive arbitrability); *AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009) (determination based on subject matter concerns substantive arbitrability).
[18] *Howsam*, 537 U.S. at 85.
[19] *Id*.
[20] *Id.*
[21] Joint Ex. 2 at 9.
[22] *CBP Yuma*, 68 FLRA at 191 ("an arbitrator exceeds his or her authority by resolving an issue not submitted to arbitration").
[23] *AFGE, Local 1164*, 67 FLRA 316, 321 (2014) (Dissenting Opinion of Member Pizzella) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 737 F.3d 779, 787-88 (D.C. Cir. 2013).
[24] *Id.* (citing *Fed. BOP v. FLRA*, 654 F.3d 91, 97 (D.C. Cir. 2011).