68 FLRA No. 137

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

0-AR-5072

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DECISION

August 27, 2015

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

I. Statement of the Case

The Union filed a grievance alleging that the Agency failed to properly compensate an employee (the grievant) for work that the grievant performed outside of duty hours during a period of approximately twelve years. Arbitrator Paul Lansing found that the parties' collective-bargaining agreement (the agreement) contains a thirty-day limit for filing grievances, but that strict compliance with that limit would lead to an unjust result in the circumstances of this case. So he addressed the merits of the grievance, found that the Agency violated the agreement, and awarded the grievant $24,000 in backpay. We must decide two substantive questions.

The first question is whether the award fails to draw its essence from the agreement because the Arbitrator did not enforce the agreement's time limit for filing grievances. The Arbitrator's decision to excuse that time limit is a procedural-arbitrability determination that cannot be challenged on essence grounds. Therefore, there is no basis for finding that the award fails to draw its essence from the agreement.

The second question is whether the award is based on a nonfact because the Arbitrator did not set forth a factual basis for his determination to award the grievant $24,000. Alleging that there was no evidence to support an arbitrator's finding does not demonstrate that an award is based on a nonfact. Thus, the answer is no.

II. Background and Arbitrator's Award

The grievant is a respiratory therapist at a Veterans Affairs hospital (hospital) in Poplar Bluff, Missouri, where he has been employed since 1991. From 1991 through 1998, three respiratory therapists worked at the hospital. In 1998, however, two of the therapists left, leaving the grievant as the sole respiratory therapist on staff. The grievant remained as the only respiratory therapist at the hospital until August 2010. During this time, the Agency frequently called on the grievant to perform work after hours. Although the grievant's supervisor occasionally approved overtime pay for these periods, the grievant did not regularly receive overtime pay or compensatory time for the duties that he performed after hours.

In August 2010, the Agency decided "to increase the number of [respiratory therapists] on the hospital staff and to offer on-call pay for work done after hours by employees of the hospital."[1] On August 18, 2010, the Agency provided the grievant with a memorandum informing him that, from that date forward, he would receive additional compensation for work performed outside of duty hours. In November 2011, the Union filed a grievance on behalf of the grievant, alleging that the Agency failed to properly compensate him for work that he performed outside of duty hours from November 1998 through August 2010. The grievance went to arbitration.

At arbitration, the Agency asserted that the agreement requires employees to submit grievances within thirty days of the date on which they become aware, or should have become aware, of the act or occurrence giving rise to the grievance. The Agency noted that, while the grievant acknowledged that he did not perform any unpaid work beyond August 2010, he did not file a grievance until November 2011. Accordingly, the Agency argued that the Arbitrator should dismiss the grievance as untimely.

The Arbitrator acknowledged that the grievance was not "brought forward in a timely manner."[2] Nonetheless, he found that "[a] strict reading" of the thirty-day requirement "would lead to an unjust result," and determined that "[t]he most equitable solution is to

[1] Award at 3.
[2] *Id*. at 9.

grant the [g]rievant some compensation."[3] Therefore, the Arbitrator awarded the grievant $24,000 for overtime that he purportedly worked from November 1998 to August 2010. The Arbitrator reasoned that this award of backpay would ensure that "the [Agency] knows that services cannot be accepted from employees without compensating them; and the Union knows that a grievance must be brought forward in a timely fashion as specified by the requirement in the [agreement]."[4]

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

III. Preliminary Matter: We will not consider the Union's opposition to the Agency's exceptions.

On October 2, 2014, the Agency eFiled its exceptions to the award. The Agency served its exceptions on the Union's representative by first-class mail on that same day. As such, the Union's opposition had to be filed with the Authority no later than November 10, 2014, in order to be timely.[5] However, the Union did not file (postmark) its opposition until November 14, 2014.

On November 20, 2014, the Authority's Office of Case Intake and Publication (CIP) issued an order directing the Union to show cause why the Authority should consider its untimely opposition. CIP instructed the Union to respond to this order by December 4, 2014. However, the Union did not file its response until December 22, 2014. As the Union's response to the order to show cause was untimely, we will not consider it. Accordingly, as the Union has failed to show cause why the Authority should consider its untimely opposition to the Agency's exceptions, we will not consider it.

IV. Analysis and Conclusions

A. The Agency's essence exception does not provide a basis for finding the award deficient.

The Agency argues that the award fails to draw its essence from the agreement.[6] Specifically, the Agency argues that the Arbitrator incorrectly interpreted Article 43, Section B of the agreement by considering a grievance that was filed more than thirty days after the events that gave rise to the grievance.[7]

Procedural-arbitrability determinations involve questions of whether a grievance satisfies a collective-bargaining agreement's procedural conditions.[8] Arbitrators' determinations regarding timeliness are procedural-arbitrability determinations.[9] Additionally, questions concerning whether the preliminary steps of the grievance procedure have been excused are procedural-arbitrability questions.[10] For example, an arbitrator's determination that the circumstances of a particular case do not warrant "strict compliance"[11] with an agreement's grievance-filing deadline is a procedural-arbitrability determination.[12] The Authority generally will not find an arbitrator's procedural-arbitrability determination deficient on grounds that directly challenge the determination itself, including a claim that an award fails to draw its essence from a collective-bargaining agreement.[13]

Here, the Arbitrator found that the grievance could proceed regardless of the agreement's thirty-day time limit. Specifically, he acknowledged that limit and the Union's failure to "address[]" it, but he found that, in the circumstances of the case, "[a] strict reading of the . . . [a]greement would lead to an unjust result."[14] In other words, he found that given the circumstances of the case, strict compliance with the limit was not warranted.

[3] *Id*.
[4] *Id*. at 10.
[5] 5 C.F.R. § 2429.21(a).
[6] Exceptions at 2.
[7] *Id*. at 2-3.

[8] *U.S. DHS, U.S. CBP, Border Patrol, San Diego Sector, San Diego, Cal.*, 68 FLRA 128, 131 (2014) (*CBP*) (citing *AFGE, Local 2041*, 67 FLRA 651, 652 & n.22 (2014)).
[9] *Id*.
[10] *E.g.*, *AFGE, Local 2431*, 67 FLRA 563, 563-64 (2014); *U.S. Dep't of the Army Headquarters, I Corps & Fort Lewis, Fort Lewis, Wash.*, 65 FLRA 699, 701 (2011); *see also U.S. Dep't of VA, Med. Ctr., Hous., Tex.*, 57 FLRA 653, 653-54 (2001) (arbitrator's decision not to dismiss grievance, despite union's failure to comply with the agreement by proceeding to step three before requesting arbitration, was procedural-arbitrability determination); *U.S. DOD Educ. Activity, Arlington, Va.*, 56 FLRA 887, 888, 891 (2000) (arbitrator's determination to resolve merits of grievance because "both parties had not been adhering to the time limitations" in the agreement was procedural-arbitrability determination).
[11] *U.S. Dep't of the Army, Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 922 (1997).
[12] *Id.* at 923; *see also AFGE, Local 1915*, 32 FLRA 1223, 1224-25 (1988) (arbitrator made a procedural-arbitrability determination when she found that, given the particular circumstances of the case before her, "the grievance process should . . . not to be construed so technically as to deny the parties an opportunity to be heard on the merits of the issue to be arbitrated").
[13] *CBP*, 68 FLRA at 131; *but see U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 624 (2014) (Authority may find procedural-arbitrability determination deficient as contrary to law, or on grounds that do not directly challenge the determination itself, such as claims that an arbitrator was biased or exceeded his or her authority).
[14] Award at 9.

Consistent with the principles set forth above, this is a procedural-arbitrability determination.

Despite the dissent's assertions, the Arbitrator did *not* find that the grievance was "not arbitrable."[15] To the contrary: He found that the time limit in the agreement should be *excused*, and, thus, he resolved the merits of the grievance. Under the above-cited precedent – which neither party challenges, and the dissent fails to acknowledge – this is a determination that the grievance *was* procedurally arbitrable. So, contrary to the dissent's claim, neither we nor the Arbitrator have "ignore[d]" anything.[16] Nor does this decision, upholding the Arbitrator's procedural-arbitrability determination in the particular circumstances of this case, "free" arbitrators "to disregard procedural requirements as they see fit."[17]

The Agency's essence exception attempts to directly challenge the Arbitrator's procedural-arbitrability determination. As essence exceptions that directly challenge procedural-arbitrability determinations do not provide a basis for finding those determinations deficient,[18] we deny the Agency's essence exception.

B. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[19] As relevant here, the Authority has held that arguing that no evidence exists to support an arbitrator's finding does not demonstrate that the arbitrator's award is based on a nonfact.[20]

The Agency argues that the award is based on a nonfact because the Arbitrator failed to "set forth a factual basis for his determination to award $24,000.00 to the [g]rievant."[21] According to the Agency, there is "no evidence . . . as to what [the grievant's] rates of pay might have been" during the twelve-year period at issue.[22] The Agency also argues that there is no "specific or detailed evidence of the dates [the grievant] claims to have worked without compensation."[23] But, as discussed above, an argument that no evidence was presented to support an arbitral finding does not demonstrate that the award is based on a nonfact.[24] Accordingly, we deny this exception. In doing so, we note that the Agency has not argued that the award is contrary to law.[25]

V. Decision

We deny the Agency's exceptions.

[15] Dissent at 7, 8.
[16] *Id.* at 8.
[17] *Id.*
[18] *CBP*, 68 FLRA at 131.
[19] *U.S. Dep't of VA Med. Ctr., Wash., D.C.*, 67 FLRA 194, 196 (2014) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).
[20] *U.S. DOD Educ. Activity, Arlington, Va.*, 56 FLRA 836, 842 (2000) (*DOD*) (agency's claim that "no evidence has been presented" to support the arbitrator's factual finding did not demonstrate that a central fact underlying the award was clearly erroneous); *NAGE, Local R4-45*, 55 FLRA 695, 700 (1999) (the absence of facts is no basis for a nonfact exception) (citing *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Leavenworth, Kan.*, 53 FLRA 29, 40 (1997)).
[21] Exceptions at 4.
[22] *Id.*
[23] *Id.* (quoting Award at 6) (internal quotation marks omitted).
[24] *DOD*, 56 FLRA at 842.
[25] *Cf. U.S. Dep't of HHS, Gallup Indian Med. Ctr., Navajo Area Indian Health Serv.*, 60 FLRA 202, 212 (2004) (remanding backpay award where agency argued that award was contrary to the Back Pay Act and Authority was "unable to determine whether the amount of backpay awarded [was] permitted under the Back Pay Act").

Member DuBester, concurring:

I concur in the decision to deny the Agency's exceptions. I write separately to address certain considerations that relate to my determination to uphold the Arbitrator's procedural-arbitrability determination.

It is evident from the award that the Arbitrator found that the grievance was not filed in strict compliance with the thirty-day filing period set forth in the parties' collective-bargaining agreement.[1] But the Arbitrator nevertheless determined that the grievance was arbitrable, and proceeded to resolve it.

Private-sector precedent, as affirmed by the courts, holds that "'procedural' questions which grow out of [a grievance-arbitration proceeding] . . . should be left to the arbitrator."[2] The Authority's case law is to the same effect. Authority precedent is quite clear that arbitrators' procedural-arbitrability determinations are disturbed only on very limited bases. [3] These bases do not include an essence challenge such as the Agency makes in this case.[4] The question is whether this case presents any reason to make an exception to this rule.

I do not find a basis for making an exception. I note particularly that the Arbitrator, in considering the grievance's arbitrability, finds fault with both parties' positions in the proceeding. The Arbitrator finds that the Agency's position is inconsistent with the Agency's goal of providing a high standard of patient care and the grievant's unique role and responsibilities as the hospital's only certified respiratory therapist.[5] But the Arbitrator also faults the Union for not processing the matter in a more timely manner, and for leaving a variety of remedy issues unaddressed.[6] In these circumstances, I am not willing to make an exception to our general rule on procedural arbitrability, or disturb the Arbitrator's procedural-arbitrability determination.

[1] *See* Award at 8-9,
[2] *John Wiley & Sons v. Livingston, Inc.*, 376 U.S. 543, 557 (1964).
[3] *E.g., U.S. DHS, U.S. CBP, Border Patrol, San Diego Sector, San Diego, Cal.*, 68 FLRA 128, 131 (2014).
[4] *Id.*
[5] Award at 8.
[6] *Id.* at 9.

Member Pizzella, dissenting:

Iconic Academy Award-winning actress Katharine Hepburn famously once said, "if you obey all the rules, you miss all the fun."[1] While there may be a time and place for that advice – college campus comes to mind – it is not an appropriate standard for an arbitrator who is hired to resolve disputes between federal unions and agencies. But, in this case, Arbitrator Paul Lansing appears to have taken Ms. Hepburn's advice too much to heart. Although he knew the rules, and even made a half-hearted attempt to apply them, he nonetheless chose to go rogue and came up with an entirely new set of rules after the game was already over.

The parties' agreement requires that a grievance must be filed "within [thirty][-]calendar days of the date that the employee or Union became aware . . . of the act or occurrence [that gave rise to the grievance]."[2] Nothing complicated there. And AFGE Local 2338 does not dispute that it was aware in August 2010 that it could file a grievance.[3] But it did not file the grievance until November 2011 (fourteen months late).[4] The Union never explained why "this grievance [wasn't] brought forward in a timely manner."[5]

In the one (and only) part of his award that he got right, Arbitrator Paul Lansing determined, that under the parties' agreement, the grievance was untimely and therefore not arbitrable. As the majority admits, "[a]rbitrators' determinations regarding timeliness are procedural-arbitrability determinations" that may not be challenged.[6]

Untimely grievance . . . not arbitrable. That should have been the end of this case. But, as "Bluto" Blutarsky – a figure I've now had to invoke far too many times[7] – infamously declared in the movie Animal House: "Over? Did you say 'over'? Nothing is over until we decide it is!"

[1] Shelley Zalis, *Dare to Lead with Generosity*, Huffington Post (May 7, 2015, 1:59 p.m.), http://www.huffingtonpost.com/shelley-zalis/dare-to-lead-with-generosity_b_7214520.html.
[2] *See* Award at 4; *see also* Award at 9.
[3] *See* Award at 9; *see also* Exceptions at 2.
[4] Award at 9.
[5] *Id.*
[6] Majority at 3 (citing *U.S. DHS, U.S. CBP, Border Patrol, San Diego Sector, San Diego, Cal.*, 68 FLRA 128, 131 (2014)).
[7] *See AFGE, Local 919*, 68 FLRA 573, 577 (2015) (Dissenting Opinion of Member Pizzella); *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 452 (2014) (Dissenting Opinion of Member Pizzella).

Even though he found that the grievance was untimely, the Arbitrator determines that *his own ruling* does not apply to himself. Quite out of thin air and with the forced largesse of the American taxpayer, Arbitrator Lansing goes on to conclude that "[t]he [g]rievant should receive some recognition and compensation"[8] and decides *to give $24,000* to the grievant.

My colleagues acknowledge that, according to Authority precedent, procedural-arbitrability determinations may not be "directly challenged."[9] In this case, the Arbitrator made just *one* procedural-arbitrability determination – that the grievance was untimely. Even though the majority tries to color the Agency's exception as a "direct[] challenge [to a] procedural-arbitrability determination,"[10] the Agency *does not challenge* that determination, directly or indirectly. Quite to the contrary, the Agency *is the only participant* in this case who follows Arbitrator's procedural-arbitrability determination.

Ironically, it is the Arbitrator who *ignores his own* procedural-arbitrability determination goes on to dispense $24,000 in "equitable" largesse (or what some might call a taxpayer shakedown) based on his own rules of "industrial justice."[11]

The majority also ignores the Arbitrator's procedural-arbitrability determination. The Authority has long held that arbitrators "must not dispense their own brand of industrial justice."[12] Contrary to that precedent, the majority determines that Arbitrator Lansing was free to ignore his own procedural-arbitrability determination and dispense a remedy "*regardless of* the agreement's *thirty-day time limit*."[13]

I am particularly concerned about how the majority's decision today will impact federal labor-management relations. The Arbitrator's decision, in this case, more closely resembles what one would expect from a justice of the peace in the 1870's wild west than it does grievance arbitration in 2015. If an arbitrator is free to ignore the procedural rules that are negotiated by the parties into a collective-bargaining agreement simply because the arbitrator believes another outcome should be dispensed, then what purpose is served by including procedural requirements in the first place?

The majority sends an unmistakable message to the federal labor-management relations community, and those arbitrators who adjudicate federal dispute resolution, that arbitrators are free to disregard procedural requirements as they see fit. That is a dangerous precedent that undermines the purpose of collective bargaining established in the Federal Service Labor-Management Relations Statute.[14]

In the end, AFGE, Local 2338 gets to sit back and watch all of this play out, and learns that not playing by the rules may in some cases turn out to be quite lucrative. Arbitrator Lansing's award makes no more sense than telling a tardy guest that he is too late for the party, but then giving him a check for the inconvenience he incurred while driving all the way to your house.

It is obvious to me that the Agency's essence exception *is not a challenge* to the *Arbitrator's procedural-arbitrability determination*. Rather, the Agency asks the Authority to require the Arbitrator to play *by the procedural rules* that are clearly set *out in the parties' agreement* and that he determined were not followed by AFGE, Local 2338.

I would conclude that the Arbitrator's award does not draw its essence from the parties' agreement.

Thank you.

[8] Award at 9.
[9] *Id*. at 1.
[10] *Id*. at 4.
[11] *U.S. Dep't of VA, N. Ariz. Veterans Admin. Health Care System, Prescott, Ariz.*, 57 FLRA 922, 923 (2002) ("[T]he Authority has consistently held that arbitrators must confine their decisions and possible remedies to those issues submitted to arbitration for resolution and 'must not dispense their own brand of industrial justice.'") (quoting *U.S. Dep't of the Navy, Naval Sea Logistics Center, Detachment Atl., Indian Head, Md.*, 57 FLRA 687, 688 (2002) (*Indian Head*); *U.S. Dep't of VA*, 24 FLRA 447, 450 (1986)).
[12] *Id*. (quoting *Indian Head*, 57 FLRA at 688; *U.S. Dep't of VA*, 24 FLRA 447, 450 (1986)).
[13] Majority at 4 (emphasis added).
[14] 5 U.S.C. §§ 7101-7135.