

71 FLRA No. 57

UNITED STATES
DEPARTMENT OF STATE
PASSPORT SERVICES
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1998
INTERNATIONAL ASSOCIATION
OF MACHINISTS AND
AEROSPACE WORKERS
(Union)

0-AR-5472

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DECISION

September 9, 2019

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Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester concurring;
Chairman Kiko dissenting)

I. Statement of the Case

In this case, the Authority reaffirms that procedural requirements contained in negotiated grievance procedures are important and promote the timely, effective and efficient processing of grievances.

In an award dated January 15, 2019, Arbitrator Thomas G. McConnell Jr. found, as relevant here, that the Union’s grievance was arbitrable.¹ The Agency argues that the award fails to draw its essence from the agreement because the Arbitrator ignored his own finding that the Union had filed the grievance at the wrong step. Because the Arbitrator’s award is not irrational, unfounded, implausible, or in manifest disregard of the agreement, we deny this exception.

¹ Award at 31. The Arbitrator went on to conclude that the Agency violated Article 4, Section 6 of the agreement when the Agency failed to provide notice and an opportunity to bargain over changes to forms it provided employees who appeared for investigatory interviews. However, the Agency filed no exception to those conclusions and we do not address them.

II. Background and Arbitrator’s Award

The only questions before us are whether the Union filed its grievance at the wrong step of the parties’ grievance procedure and, if so, whether that procedural error renders the grievance not arbitrable. Therefore, it is not necessary for us to address the circumstances and merits of the underlying grievance.

The Union filed a Step 1 grievance with the director of the Office of Acceptance Facility Oversight on September 20, 2017. The office director promptly informed the Union that she was not the appropriate official who could resolve all of the issues addressed in the grievance and would forward the grievance to the Office of Program Management and Operational Support (program office) as required by Article 20, Section 5(b).² The director of the program office denied the grievance in a Step 2 response on November 1, 2017.³ On November 30, 2017, the Union filed another grievance, this time at Step 2, with the director of the Office of Program Operations but continued to argue that the original grievance had been properly filed at Step 1. On January 12, 2018, the acting director of the program office responded that the later-filed grievance was not arbitrable because the Agency had already responded that the original grievance had not been filed at Step 2.

At arbitration, the parties disputed whether or not the grievance was arbitrable. The Union argued that Article 20, Section 6(c) – which states that “[n]ationwide [i]ssues,” defined as “matters affecting more than one office,” “will be filed at the Step 2/Final Step level”⁴ – gives the Union discretion to file a grievance at Step 1 or Step 2.⁵ The Agency argued that the introductory paragraph to Article 20, Section 6 requires that all matters identified in Section 6(a)-(e) “will” be filed at the Step 2/Final Step level.⁶

In his award, the Arbitrator interpreted Article 20, Section 6(c) to mean that the Union “may” choose to file a grievance and, if it does, the grievance

² Award at 23 (Art. 20, § 5(b) provides that if a grievance “is filed with an inappropriate [m]anagement official or supervisor [that official should forward it]to the appropriate deciding official.”)

³ The Agency determined the grievance should be resolved at Step 2 because Diplomatic Security, which was responsible for designing the investigation forms, was a separate unit that was not under the oversight office director’s chain of command. Exceptions, Attach. 2, Agency’s Post-Hr’g Br. at 6 (“[Diplomatic Security] is in a totally separate bureau than Passport Services.”).

⁴ Award at 4.

⁵ *Id.* at 22.

⁶ *Id.* at 20.

“will” be filed as a Step 2/Final Step grievance.⁷ Thus, he agreed that the Agency properly “converted the Step 1 grievance to a Step 2 grievance [when it issued its] Step 2 response.”⁸ Ultimately, however, the Arbitrator determined that the grievance was not “barred” because this was “a case of first impression” and an earlier agreement between the parties consisted of four steps, rather than two, in the current agreement.⁹

On February 11, 2019, the Agency filed an exception to the Arbitrator’s conclusion that the grievance was arbitrable. On March 18, 2019, the Union filed an opposition to the Agency’s exceptions.

III. Analysis and Conclusion: The Arbitrator’s procedural-arbitrability determination draws its essence from the parties’ agreement.

The Agency argues that the Arbitrator’s determination that the grievance was arbitrable fails to draw its essence from Article 20, Sections 5 and 6 of the parties’ agreement.¹⁰ Specifically, the Agency argues that Article 20 sets out the procedures the parties will follow and to have no “penalty” for a “failure to comply would render those requirements meaningless.”¹¹

We do not agree.

Although the Arbitrator determined that the Union filed the initial grievance at the wrong step, he also concluded that the Agency properly “converted the Step 1 grievance to a Step 2 grievance” and gave its response as

⁷ *Id.* at 23 (“Similarly, in reading Section 6(c) . . . the parties are not saying that the Union has a choice of filing at Step 1 or Step 2, but that if the Union decides to file a grievance at all, that grievance must be filed at Step 2.”).

⁸ *Id.*

⁹ *Id.* at 24.

¹⁰ Exceptions at 7. When 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. The Authority and the courts defer to arbitrators in this context “because it is the arbitrator’s construction of the agreement for which the parties have bargained.” 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 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. *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (citing 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

¹¹ Exceptions at 8.

provided in Article 20, Section 5(b).¹² Accordingly, he determined that the Union’s grievance is not barred.

It is important to note that procedural steps and requirements promote the timely, effective, and efficient processing of grievances. In recent cases, we have noted that parties and arbitrators may not simply ignore procedural requirements and that in many cases, the failure to meet such requirements – in particular those that establish timelines – may prove fatal.¹³ But this is not that kind of case.¹⁴ Here, the procedural requirement at issue is intended to ensure that a grievance is directed to the Agency official who is best able to answer all of the issues raised.¹⁵ The Agency thus acted appropriately by referring the grievance to a Step 2 Agency official who addressed all of the issues.¹⁶

Under these circumstances, we cannot conclude that the Arbitrator’s interpretation of Article 20 and conclusion that the grievance is not barred is not a plausible interpretation. Therefore, we deny the Agency’s essence exception.

IV. Decision

We deny the Agency’s exception.

¹² Award at 23.

¹³ See, e.g., *U.S. DOD Domestic Elementary & Secondary Schs.*, 71 FLRA 236 (2019) (Member Abbott concurring; Member DuBester dissenting) (union did not invoke arbitration within twenty days of last stage in grievance procedure); *U.S. Dep’t of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 179 (2019) (Member DuBester dissenting) (union did not schedule hearing within six months of invoking arbitration); *U.S. DOD Educ. Activity*, 70 FLRA 937 (2018) (Member DuBester dissenting) (union did not file grievance within forty-five days of triggering event); *U.S. Dep’t of the Treasury, IRS*, 70 FLRA 806 (2018) (Member DuBester dissenting) (union did not invoke arbitration within thirty days of receiving agency’s response to grievance); see also *U.S. Dep’t of the Army, 93rd Signal Brigade, Fort Eustis, Va.*, 70 FLRA 733, 734 (2018) (Member DuBester dissenting) (non-compliance with procedural requirement of parties’ agreement requiring service of arbitration invocation onto installation commander).

¹⁴ Member Abbott notes that the Authority must be willing to make these tough calls, to reach that fine distinction, in order to preserve the intent of the Federal Service Labor-Management Relations Statute and the legitimate interests of Agency and Union representatives alike. The parties drafted this agreement that provided only that a grievance erroneously filed at Step 1 could be converted to a Step 2. Here, we must leave the parties with the language they agreed upon, and to the interpretation given that language by the arbitrator they selected. See *U.S. DHS, U.S. CBP*, 69 FLRA 412, 417 (2016) (Concurring Opinion of Member Pizzella); *U.S. DHS, Border & Trans. Sec. Directorate, U.S. CBP, El Paso, Tex.*, 62 FLRA 241, 251 (2007) (Dissenting Opinion of Chairman Cabaniss).

¹⁵ Award at 5.

¹⁶ *Id.* at 5-6.

Member DuBester, concurring:

Given the circumstances of this case, I concur in the Decision to deny the Agency's exception.

Chairman Kiko, dissenting:

The Arbitrator interpreted the clear wording of Article 20 of the parties' agreement (Article 20), and determined that the contract *required* the Union to file its grievance at Step 2,¹ and the Agency properly elevated the Step 1 grievance to Step 2 and provided a Step 2 response.² It is undisputed that, rather than invoking arbitration on that Step 2 response, the Union treated it as a Step 1 response and filed a Step 2 grievance. Consistent with the parties' agreement, the Agency sensibly declined to issue another Step 2 response, and contested arbitrability.

The Arbitrator found that the Agency's interpretation of Article 20, and its procedural processing of the grievance, *was entirely correct*.³ However, he stated: "The fact that I have sided with the Agency does not, in my estimation, result in the conclusion that the Union is barred from arbitrating this matter."⁴ In this regard, the Arbitrator relied on equitable considerations – such as the newness of the *negotiated* two-step grievance procedure, and the "harsh result" of cancellation – to nullify the procedural requirements memorialized in the parties' agreement.⁵ The Authority has held that Arbitrators may not reach one procedural-arbitrability determination based on the wording of the parties' agreement, and then arrive at a completely contradictory conclusion based on external considerations.⁶ Accordingly, consistent with our precedent, I would find that the award does not represent a plausible interpretation of Article 20 of the parties' agreement. I would grant the Agency's essence exception and set aside the award. Therefore, I dissent.

¹ Award at 23 (interpreting Article 20, Section 6 to mean that the Union "may" decide whether to file a grievance at all, but, if the grievance concerns a matter identified in subsections (a) through (e), "that grievance *must* be filed at Step 2" (emphasis added)).

² *Id.*

³ *Id.* at 24 ("I have found that the Agency is correct in its interpretation of Article 20, Sections 5 and 6 of the CBA . . .").

⁴ *Id.*

⁵ *Id.*

⁶ *E.g., U.S. DOD Educ. Activity*, 70 FLRA 863, 864 (2018) (Member DuBester dissenting) (reversing procedural-arbitrability determination where arbitrator conceded correctness of agency's arguments for dismissing the grievance but relied on a "*non-contractual* basis for finding the grievance arbitrable"); *see also U.S. DOD Domestic Elementary & Secondary Schs.*, 71 FLRA 236, 237 (2019) (Member Abbott concurring; Member DuBester dissenting).