

71 FLRA No. 155

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
COLEMAN, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 506
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5569

DECISION

June 8, 2020

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

I. Statement of the Case

In this case, we again emphasize that when determining the procedural arbitrability of a grievance, arbitrators may not disregard unambiguous deadlines that parties establish in a collective-bargaining agreement.

The Union filed a grievance alleging that the Agency violated the Federal Service Labor-Management Relations Statute (the Statute) and the parties’ collective-bargaining agreement by bypassing the Union when it assigned two bargaining-unit employees to revise “post orders”¹ – instructions for staff to follow at a given post of duty. Arbitrator Joseph M. Schneider issued an award finding the grievance arbitrable and sustaining it on the merits.

The main issue before us is whether the Arbitrator’s procedural-arbitrability determination fails to draw its essence from the parties’ agreement because the Union filed the grievance outside the time frame established in Article 31, Section d of the parties’ agreement (Article 31). Because the Arbitrator’s conclusion that the grievance was arbitrable is

¹ Award at 2.

incompatible with the plain wording of Article 31, we find that the award fails to draw its essence from the parties’ agreement. Accordingly, we set it aside.

II. Background and Arbitrator’s Award

Suffice it to say, the award is not a sterling example of clarity. What can be discerned from the award, and its citations to the record, is that on December 28, 2017, the Agency assigned two bargaining-unit employees to review various post orders. Post orders contain instructions for staff to follow when working at a given post of duty. The Agency alleged that it tasked the two employees with reviewing the post orders for clerical errors related to spelling, grammar, and formatting.

On March 1, 2018, the Union filed a grievance alleging that the Agency violated the Statute and the parties’ agreement when it “willfully bypassed the [U]nion . . . [by assigning the] two bargaining[-]unit [employees] . . . to sit down with [m]anagement and change post orders for various posts.”² The Union identified the violation date as “December 28, 2017 and continuous.”³ The parties were unable to resolve the grievance, and the Union submitted it to arbitration.

The Arbitrator did not clearly define an issue. He simply stated that the issue concerned the “negotiation of post orders with bargaining[-]unit staff bypassing the . . . [U]nion.”⁴ In addition, and as relevant here, the Arbitrator noted that the Agency raised a procedural-arbitrability issue regarding the timeliness of the Union’s grievance.

Addressing procedural arbitrability, the Arbitrator noted that Article 31 provides that “[g]rievances must be filed within forty . . . calendar days of the date of the alleged grievable occurrence.”⁵ The Arbitrator found that the Agency did not raise the timeliness of the Union’s grievance as an issue until the arbitration proceeding. Based on that finding, the Arbitrator appeared to conclude that the Agency “waived” its right to contest the grievance’s timeliness.⁶ Nevertheless, the Arbitrator considered whether the Union timely filed the grievance under Article 31. And, in this regard, he stated that the Union “could not [have] known” that the Agency was attempting to revise the post orders until January 23, 2018. Because the Union filed the grievance on March 1,

² Exceptions, Attach. B, Grievance Form (Grievance Form) at 1; *see also* Exceptions, Attach. E, Tr. at 17, 110.

³ Grievance Form at 1.

⁴ Award at 2.

⁵ *Id.* at 3 (quoting Collective-Bargaining Agreement Art. 31, § d).

⁶ *Id.* at 6.

2018 – less than forty calendar days after that date – the Arbitrator held that the Union timely filed the grievance.

The Arbitrator proceeded to address the merits of the Union’s grievance. Ultimately, he sustained it and directed the Agency to bargain with the Union over the revisions to the post orders.

On November 22, 2019, the Agency filed exceptions to the award. The Union did not file an opposition.

III. Analysis and Conclusion: The award fails to draw its essence from the parties’ agreement.

The Agency contends that the Arbitrator’s procedural-arbitrability determination – regarding the timeliness of the Union’s grievance – fails to draw its essence from Article 31.⁷ As noted above, that article states that “[g]rievances must be filed within forty . . . calendar days of the date of the alleged grievable occurrence.”⁸ It further provides that “the grievance must be filed within forty . . . calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence.”⁹

The Authority has found that when parties agree to a procedural deadline – with no mention of any applicable excuse – they intend to be bound by that deadline.¹⁰ Article 31 clearly and unambiguously required the Union to file its grievance within forty calendar days of the “alleged grievable occurrence.”¹¹ As the Union itself acknowledged in its grievance, the alleged grievable occurrence happened on “December 28, 2017,” when the Agency assigned the “two bargaining[-]unit [employees] . . . to sit down with [m]anagement and change [p]ost [o]rders.”¹² The Union even conceded to the Arbitrator that December 28, 2017 was “the date [that it] became aware of the violation” and that it “technically [filed the grievance] beyond the forty[-]day . . . time frame” in Article 31.¹³ Despite this, the Arbitrator concluded that the Union’s grievance – filed more than sixty calendar days after December 28,

2017 – was timely.¹⁴ We find that this conclusion is inconsistent with the plain wording of Article 31.¹⁵

Moreover, the Arbitrator cited no contractual wording that permitted him to disregard the parties’ explicit forty-day time frame for filing a grievance. To the extent that the Arbitrator concluded that the Agency “waived” its right to contest the timeliness of the Union’s grievance,¹⁶ we note that nothing in the parties’ agreement provides for such a waiver. Accordingly, to the extent that the Arbitrator’s procedural-arbitrability determination is based on a finding of waiver, it does not represent a plausible interpretation of the parties’ agreement.¹⁷

Based on the above, we find that the Arbitrator’s procedural-arbitrability determination fails to draw its essence from the parties’ agreement.¹⁸ Accordingly, we grant the Agency’s essence exception and set aside the award.¹⁹

IV. Decision

We set aside the award.

⁷ Exceptions Br. at 13-14.

⁸ Exceptions, Attach. D, Collective-Bargaining Agreement (CBA) at 71.

⁹ *Id.*

¹⁰ *U.S. Dep’t of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 179, 180 (2019) (Member DuBester dissenting).

¹¹ CBA at 71; Award at 3.

¹² Grievance Form at 1.

¹³ Exceptions, Attach. F, Union’s Post-Hr’g Br. at 4.

¹⁴ Award at 6.

¹⁵ *See U.S. Dep’t of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 387, 388-89 (2019) (Member DuBester dissenting in part) (finding award incompatible with plain wording of agreement where agreement required arbitration within six months, arbitration did not occur within that time frame, but arbitrator proceeded to resolve underlying grievance).

¹⁶ Award at 6; *see also* Exceptions Br. at 10 (noting that it is “not clear” whether the Arbitrator found that the Agency waived its right to contest the timeliness of the grievance).

¹⁷ *See Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (Member DuBester concurring, in part, and dissenting, in part) (finding award failed to draw its essence from agreement where “nothing in the agreement” permitted arbitrator to conclude that agency waived an argument by failing to raise it at a particular time).

¹⁸ *Id.* at 528.

¹⁹ Because we set aside the award for failing to draw its essence from the parties’ agreement, it is unnecessary for us to address the Agency’s remaining exceptions. *E.g.*, *U.S. DOD, Def. Logistics Agency Aviation, Richmond, Va.*, 70 FLRA 206, 207 (2017).

Member DuBester, dissenting:

I disagree with the majority's conclusion that the Arbitrator's procedural-arbitrability determination does not represent a plausible interpretation of the parties' collective-bargaining agreement. In its haste to find the Union's grievance untimely, the majority omits a number of relevant facts.

It is true that the Union acknowledged in its post-hearing brief that it became aware on December 28, 2017 that "bargain[ing]-unit employees were utilized by the Agency to review and possibly assist in changes" to the post orders.¹ However, the majority fails to mention that the Union subsequently attempted to determine what, if any, changes were actually being made to the post orders.

Specifically, on that same day, the Union requested the Agency provide it with "a copy of whatever changes that have already been made but not disseminated" so that it could determine whether it had the right to bargain over the changes.² And after the Agency failed to respond to this request, the Union sent correspondence to the prison's warden on January 22, 2018 demanding to bargain over the changes. It also sent an email to the warden and a captain requesting that the Agency "cease and desist" from making any changes to the post orders "until all negotiations are complete."³

A different Agency official responded that day by telling the Union that "there have been no changes made to the post orders" and, consequently, "there is nothing to cease and nothing to [bargain]."⁴ However, on January 23, 2019, the same official informed the Union that changes were being prepared for the post orders, but "[u]ntil [the Agency] attempts to put these changes in place, there is nothing for you to invoke on."⁵

In its March 1, 2018 grievance, the Union alleged that the Agency had violated provisions of the Federal Service Labor-Management Relations Statute and the parties' bargaining agreement by bypassing the Union

and by failing to respond to its bargaining demands.⁶ Specifically, in addition to citing the Agency's action in bypassing the Union by "select[ing]" two bargaining-unit employees "to sit down with management and change post orders," the grievance alleged that a violation also occurred on January 22, 2018 arising from the failure of the warden and the captain to respond to the Union's cease and desist request.⁷ Consistent with these allegations, the grievance stated that these violations occurred on "December 28, 2017" and were also "continuous," and it sought as one of its requested remedies that the Arbitrator "[o]rder the [A]gency . . . to bargain in good faith per [5 U.S.C. §] 7117."⁸

Addressing the Agency's argument that the grievance was untimely filed, the Arbitrator noted that Article 31 of the parties' agreement requires that "[g]rievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence."⁹ And in considering whether the grievance was timely filed, the Arbitrator referenced the Agency's January 23 response to the Union, in which it informed the Union that changes were being prepared to the post orders.¹⁰ On this basis, the Arbitrator concluded that the forty-day filing deadline did not begin until "on or after January 23, 2018," which the Arbitrator found was the earliest date on which there "was a certainty that there were changes being made to post orders which earlier had been denied."¹¹

Based upon the record before the Arbitrator, I would uphold this determination. As I have stated before, where parties have agreed to submit a procedural-arbitrability question to the arbitrator, the arbitrator's determination is subject to review only on narrow grounds.¹² Here, acting within his contractual authority to "decide timeliness if raised as a threshold issue,"¹³ the Arbitrator reasonably construed the Union's grievance as challenging Agency actions that occurred

¹ Exceptions, Attach. F, Union's Post-Hr'g Br. at 4.

² Exceptions, Attach. B, Union Ex. 2, Union's Dec. 28 Email at 1; *see also* Exceptions, Attach. B, Union Ex. 4, Informal Resolution Memorandum at 1-2 (requesting that the Agency respond within five days).

³ Exceptions, Attach. B, Union Ex. 7, Jan. Emails (Jan. Emails) at 1; Exceptions, Attach. B, Union Ex. 6, Letter of Intent to Negotiate at 1.

⁴ Jan. Emails at 1.

⁵ *Id.* at 2 (the Agency further explained that the official preparing the changes "can prepare all he wants, he just can't actually do anything before you see it").

⁶ Exceptions, Attach. B, Joint Ex. 2, Grievance Form at 1.

⁷ *Id.*

⁸ *Id.*

⁹ Award at 3 (quoting Collective-Bargaining Agreement (CBA) Art. 31, § d).

¹⁰ *Id.* at 6 (citing Jan. Emails at 2).

¹¹ *Id.* This determination is consistent with the Arbitrator's finding that the issues before him "related to the Agency's refusal to negotiate relative to local issues." *Id.* at 4.

¹² *U.S. DOD, Educ. Activity, Alexandria, Va.*, 71 FLRA 765, 768 (2020) (Dissenting Opinion of Member DuBester) (citing *U.S. Small Bus. Admin.*, 70 FLRA 525, 532 (2018)) ((Dissenting Opinion of Member DuBester) (noting that "[t]he parties select, hire, and pay for arbitrators based on their qualifications to resolve the parties' disputes")); *see also IFPTE, Ass'n Admin. Law Judges*, 70 FLRA 316, 317 (2017); *Dep't of HHS, SSA, Louisville, Ky. Dist.*, 10 FLRA 436, 437 (1982)).

¹³ Award at 2 (quoting CBA Art. 31, § e).

after December 28, 2017 and within the forty-day period preceding the filing date of the grievance. Accordingly, I would deny the Agency's exception on this issue, and would consider the Agency's remaining exceptions.