71 FLRA No. 160

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 PRISIONS LOCAL #33
(Union)

0-AR-5517

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DECISION

June 19, 2020

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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 remind arbitrators not to look beyond the plain wording of parties' collective-bargaining agreements when making procedural-arbitrability determinations.

In 2000, the Agency and Union entered into a local supplemental agreement requiring the Agency to provide suitable cover – such as an exterior awning – at the perimeter of an Agency federal correctional facility where armed correctional officers (officers) exchanged weapons. The Union filed a grievance in 2017 alleging, as relevant here, that the Agency violated the local supplemental agreement and the parties' master collective-bargaining agreement by not providing that cover. Arbitrator Daniel R. Saling issued an award finding that (1) the grievance was procedurally arbitrable, and (2) the Agency violated the local supplemental agreement, as alleged by the Union.

The main question before us is whether the award fails to draw its essence from the local supplemental agreement. We find that the award fails to draw its essence from that agreement because it expired when the parties' former master agreement expired in 2001. Accordingly, we set aside the award.

II. Background and Arbitrator's Award

The Agency, which operates a federal correctional facility, entered into a master agreement with the Union on March 9, 1998. That master agreement authorized the parties to enter into a local supplemental agreement as long as it did not "conflict with [the] terms of the [m]aster [a]greement or change any policies, regulations[,] or laws."[1] The parties entered into a local supplemental agreement on February 24, 2000, but the master agreement expired on March 8, 2001 (1998 master agreement). As relevant here, the local supplemental agreement stated that it "will not exceed the life of the [1998 m]aster [a]greement."[2] A new master agreement was not implemented until July 21, 2014 (the 2014 master agreement).

As relevant here, Article 29 of the local supplemental agreement required the Agency to "provide a suitable cover for [officers] to exchange weapons while on perimeter post."[3] When the prison finished construction in July 2001, there was an exterior aluminum awning at the front gate of the facility but not at the rear gate. The Union filed a grievance on February 14, 2017, alleging that the Agency violated the local supplemental agreement and the 2014 master agreement by failing to provide appropriate cover for the officers when they changed shifts and exchanged weapons at the rear gate of the facility. The parties could not resolve the dispute, and it proceeded to arbitration.

The Arbitrator framed the issues at arbitration, as relevant here, as (1) whether the "grievance [was] procedurally arbitrable," and (2) whether "the Agency violate[d] the terms of the [1998 m]aster [a]greement and . . . [l]ocal [s]upplemental . . . [a]greement when it did not provide appropriate cover for . . . officers to exchange weapons."[4]

Regarding whether the Union timely filed the grievance, the Arbitrator found that the local supplemental agreement provisions are "enforceable under the grievance and arbitration provisions of the [1998 m]aster [a]greement."[5] He considered the Agency's argument that the Union should have filed the grievance in 2001, when the facility was first constructed. But the Arbitrator found that the alleged violation was of a continuing nature, and the Union timely filed its grievance.

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[1] Award at 6.
[2] *Id.*
[3] *Id.* at 21.
[4] *Id.* at 4.
[5] *Id.* at 6.

On the merits, the Arbitrator noted that the local supplemental agreement stated that it "cannot exceed the term of the [1998 m]aster [a]greement."[6] But the Arbitrator found that the language was "unclear and ambiguous."[7] And he further found that the terms of the local supplemental agreement continued and did not expire after the 2014 master agreement was implemented. As a result, he found that the Agency was required to provide suitable cover for the officers and that the Agency violated the local supplemental agreement and 1998 master agreement by not providing cover at the rear gate.

On June 21, 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 local supplemental agreement.

The Agency argues that the award fails to draw its essence from the local supplemental agreement because that agreement became unenforceable when the parties implemented the 2014 master agreement.[8] The Authority has found that an award fails to draw its essence from a collective-bargaining agreement where, as relevant here, the award conflicts with the agreement's plain wording.[9]

Here, the plain wording of the local supplemental agreement states it "will not exceed the life of the [1998 m]aster [a]greement."[10] The Arbitrator found, and it is undisputed, that the 1998 master agreement became unenforceable when the parties implemented a new master agreement on July 21, 2014.[11] Thus, by its own terms, the local supplemental agreement did not continue past July 21, 2014.[12] The Arbitrator's finding that the local supplemental agreement was still in effect on February 14, 2017 conflicts with the plain wording of the local supplemental agreement. Thus, the provisions of the 2014 master agreement applied when the Union filed its grievance in 2017.[13] Therefore, we find that the award fails to draw its essence from the local supplemental agreement.[14]

IV. Decision

We vacate the Arbitrator's award.

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[6] *Id.* at 20.
[7] *Id.*
[8] Exceptions Br. at 8-9 ("The [local supplemental agreement] expired . . . when the parties signed [the 2014] agreement[,] which means any violation . . . had to be filed . . . within [forty] days of the expiration of the [local supplemental agreement]"); *see id.* at 14 n.2 (incorporating by reference the arguments raised in Agency's post-hearing brief); *see also* Exceptions, Attach. A, Agency's Post-Hr'g Br. (Agency's Post-Hr'g Br.) at 13-15. We find the Agency sufficiently raised in its exceptions the argument that forty days was the applicable agreement's window for grievances to be timely. Exceptions Br. at 7-8. While the Agency's exception goes on to focus its argument that the "continuing violation" theory is inapplicable, that does not somehow negate the entirety of the Agency's exception. *Id.* at 8-9.
[9] *U.S. Dep't of VA, Med. Ctr., Asheville, N.C.*, 70 FLRA 547, 548 (2018) (*VA*) (Member DuBester dissenting). The Authority will find that an arbitration award fails to draw its essence from a collective-bargaining agreement when the excepting 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. *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 755 (2018) (Member DuBester dissenting).

[10] Award at 6. The Arbitrator quoted the relevant portions of the local supplemental agreement in the award.
[11] *Id.* at 19-20; *see* Agency's Post-Hr'g Br. at 15.
[12] Award at 5.
[13] *Id.* at 6.
[14] *See VA*, 70 FLRA at 548 (finding the award failed to draw essence from the parties' agreement where the award conflicted with agreement's plain terms). Because we set aside the award, we do not address the Agency's remaining exceptions. *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 660, 662 n.26 (2020) (Member Abbott concurring; Member DuBester dissenting).

Member DuBester, dissenting:

The Agency's exceptions challenge the Arbitrator's award on a number of grounds that should be addressed. But, the majority vacates the award on a ground not raised by the Agency in its exceptions.

It is important to note that, contrary to the majority's assertion, the Arbitrator did not premise his award upon a finding that "the local supplemental agreement was still in effect" on the date the Union filed its grievance.[1] Rather, the Arbitrator concluded that the local supplemental agreement had established *terms pertaining to the employees' conditions of employment* that the Agency was not free to disregard while the parties were negotiating a new Master Agreement.[2] And he also found that the language of the local supplemental agreement was "unclear and ambiguous" with respect to this issue.[3]

The Arbitrator's conclusion that the Agency was required to abide by the terms of the local supplemental agreement under these circumstances is certainly reviewable on exceptions to the Authority. But the Agency did not challenge this conclusion in its essence exception. Rather, in the exception purportedly addressed by the majority, the Agency simply argued that the Union's grievance was untimely filed under the language of the parties' *2014 Master Agreement* because it should have been filed within forty days of when the local supplemental agreement expired. And contrary to the majority's assertion, the Agency did not otherwise challenge this conclusion in the remainder of its essence exception, which focused exclusively on "threshold issues dealing with the procedural arbitrability" of the Union's grievance."[4]

As I have previously stated, the Authority should not vacate awards on grounds that were not raised by the excepting party.[5] This is particularly true where, as here, the majority vacates the award based upon the "plain wording" of a document – specifically, the local supplemental agreement – that the Agency did not even include as part of the record with its exceptions.[6] Indeed, as the majority notes, the Arbitrator found this agreement was "unclear and ambiguous" with respect to whether its terms continued after the parties implemented their 2014 Master Agreement.[7] Simply put, without reviewing all of the language of the local supplemental agreement relevant to the Arbitrator's finding on this point, we are in no position to assess this finding, much less to conclude that it was contrary to the "plain wording" of that agreement.

Accordingly, I dissent from the majority decision to vacate the award.

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[1] Majority at 3.

[2] Award at 20 ("To maintain labor peace and stability, an employer is not free to unilaterally roll back wages, hours[,] or working conditions. Most of the terms of the expired [Master] Agreement must continue in full force . . . with few exceptions, until a new successor [Master] Agreement is reached between the bargaining parties."); *id.* at 20-21 ("an expired Master Agreement must continue in full force and [e]ffect, with few exceptions, until a new successor Master Agreement is reached between the bargaining parties and this is equally true for the [local supplemental agreement]. The Agency is not free to ignore the wages, hours[,] or working conditions that are contained in either the Master Agreement or the [local supplemental agreement].").

[3] *Id.* at 20.

[4] Exceptions Br. at 7-8. In its exception, the Agency specifically limited these remaining threshold issues to whether the Union used the proper form to file the grievance; whether it had filed the grievance with the wrong person; whether the grievance lacked specificity; whether the Union improperly invoked arbitration; and whether it failed to provide its witness list in a timely manner. *Id.*; *see also id.* at 14 n.2 (incorporating by reference only these arguments as they were raised in the Agency's post-hearing brief).

[5] *U.S. Dep't of the Air Force, 673rd Air Base Wing, Joint Base Elmendorf-Richardson, Alaska*, 71 FLRA 781, 784 (2020) (Dissenting Opinion of Member DuBester).

[6] 5 C.F.R. § 2425.4(a)(2)-(3) (an exception must "set[] forth[] in full" all arguments "in support of" its exceptions, including "specific references to the record . . . and any other relevant documentation," as well as "[l]egible copies of any documents" that "the Authority cannot easily access (such as . . . provisions of collective[-]bargaining agreements."); *see also U.S. Dep't of VA, James A. Haley Veterans Hosp.*, 71 FLRA 699, 699-700 (2020) (Member DuBester dissenting on other grounds) (dismissing exceptions under 5 C.F.R. § 2425.4(a)(2)-(3) for failure to provide copy of relevant documents on which exceptions relied); *AFGE, Local* 12, 68 FLRA 754, 755 (2015) (Member DuBester dissenting on other grounds) (dismissing essence exception under 5 C.F.R. § 2425.4(a)(2)-(3) for failure to provide collective-bargaining agreement on which exception relied); *U.S. DOJ, Fed. BOP, Corr. Inst., McKean, Pa.*, 49 FLRA 45, 47-48 (1994) (denying exception under 5 C.F.R. § 2425.2(d) for failure to provide copy of relevant document on which exception relied).

[7] Majority at 3 (quoting Award at 20).