

71 FLRA No. 214

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
NORTHERN CALIFORNIA HEALTH CARE SYSTEM
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1206
(Union)

0-AR-5568

DECISION

November 20, 2020

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

Decision by Member Abbott for the Authority

I. Statement of the Case

With this case, we further address the outer limits of a negotiated grievance procedure.¹ Specifically at issue in this case is whether a Union can seek reimbursement from the Agency for expenses the Union incurred as a result of its contract with a third party for hotel accommodations and catering in conjunction with a three-day training for Union stewards.

Because the complaint does not constitute a grievance under § 7103(a)(9) of the Federal Service Labor-Management Relations Statute (Statute),² we find that the Union’s search for reimbursement cannot be the subject of a grievance or subsequent arbitral award. Accordingly, we vacate the award.

¹ See *U.S. DOJ, Fed. BOP, Fed. Med. Ctr. Carswell, Fort Worth, Tex.*, 70 FLRA 890, 891-92 (2018) (Member DuBester dissenting) (*Carswell*) (citing *AFGE, Local 1547*, 67 FLRA 523 (2014), *rev’d sub nom. U.S. Dep’t of the Air Force, Luke Air Force Base, Ariz. v. FLRA*, 844 F.3d 957 (D.C. Cir. 2016)).

² 5 U.S.C. § 7103(a)(9).

II. Background and Arbitrator’s Award

As relevant here, the Union notified the Agency on May 29, 2018,³ that it would conduct a “Stewards Training” for bargaining-unit employees (BUEs) from July 23 to July 25.⁴ The Agency agreed to excuse employees from work and allow them to be on paid “official time” while they were in training.⁵ By the end of June, the Union had made hotel and catering arrangements to accommodate the BUEs anticipated for the training. A few days before the training, the Agency notified the Union that attendees would have to use personal leave rather than official time based on its interpretation of the then-newly issued Executive Order (EO) 13,837. As a result of this change, many employees withdrew from the training. According to the Union, it “could not cancel the hotel rooms or food for those employees who would no longer attend” due to the late notice from the Agency.⁶ The Union filed a grievance seeking reimbursement for the unused lodging and food expenses – a sum of \$9,233.66 – because it “detrimentally relied upon the Agency’s consent for employees to use Official Time” to attend the training.⁷

The Arbitrator stated that the issue was “[w]hether the Agency violated Articles 4 and 48 of the [parties’ agreement] by . . . failing to reimburse the union for all expenses associated with the training,”⁸ and emphasized that the dispute was “really about the doctrines of detrimental reliance and equity.”⁹ The Arbitrator found that the “federal government is not immune from paying damages it directly caused a contracting party.”¹⁰ The Arbitrator noted that the Agency argued that EO 13,837 prohibited it from paying for training expenses. However, he emphasized that the Agency was not “paying for training expenses . . . [but] being ordered to reimburse the Union for out of pocket costs which the Agency proximately caused when it gave only one to three business days’ notice that attending employees would not be compensated for their training time.”¹¹ The Arbitrator found that the Agency’s failure to reimburse the lodging and food expenses violated the parties’ agreement. Accordingly, the Arbitrator ordered

³ All dates are for 2018, unless otherwise noted.

⁴ Award at 3.

⁵ *Id.*

⁶ *Id.* at 4.

⁷ *Id.*

⁸ *Id.* at 2. The Arbitrator noted in the award that the Union modified the issue to seek only reimbursement of the lodging and food expenses. *Id.* at 2 n.1. The Arbitrator also noted that the parties did not include the collective-bargaining agreement as an arbitration exhibit. *Id.* at 6 n.4.

⁹ *Id.* at 5.

¹⁰ *Id.*

¹¹ *Id.* at 6.

the Agency to reimburse the Union for the \$9,233.66 of out-of-pocket expenses.

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

III. Analysis and Conclusion: The Arbitrator lacked jurisdiction because the Union's complaint did not constitute a grievance under the Statute.

This case concerns a jurisdictional issue under the Statute that we consider *sua sponte*.¹² Furthermore, the Authority has held that an award cannot stand if an arbitrator lacked jurisdiction in the first place.¹³

As relevant here, a grievance under the Statute is any complaint concerning "the effect or interpretation, or a claim of breach, of a collective[-]bargaining agreement."¹⁴ While the Union casts its complaint as a violation of the parties' agreement,¹⁵ the gravamen of the complaint seeks compensatory damages from the Agency for expenses it incurred through a contract with a third party.¹⁶ Furthermore, as evident from the award, the

Arbitrator was forced to resort to the "doctrines of detrimental reliance and equity," instead of citing any provision of the parties' agreement that required the Agency to reimburse the Union.¹⁷ In fact, the Arbitrator could not cite to the parties' agreement, because neither party provided the agreement as an exhibit.¹⁸ It fatally undermines the pretense that the Arbitrator's award rests on his finding of a contract violation when he cannot cite to the contract.¹⁹ Therefore, the complaint is more appropriately described as a commercial contract dispute, not an allegation of a violation of a collective-bargaining agreement.²⁰

As such, the complaint did not constitute a grievance under § 7103(a)(9) of the Statute, and the Union's claim for the reimbursement of commercial expenses cannot be the subject of a grievance or

¹² *U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr.*, 71 FLRA 758, 759 (2020) (Member DuBester dissenting) (*Warner Robins*) (citing *Carswell*, 70 FLRA at 891 (stating that jurisdictional issues can be considered *sua sponte* (citation omitted)); *U.S. Dep't of HUD*, 70 FLRA 605, 607 (2018) (Member DuBester dissenting) (stating that a "statutory exclusion 'appl[ies] irrespective of whether a party makes such a claim before the Authority'" (citation omitted)); *U.S. Small Bus. Admin., Wash., D.C.*, 51 FLRA 413, 423 n.9 (1995)); *see also U.S. DOL*, 70 FLRA 903, 904 (2018) (Member DuBester dissenting) (finding that the Authority could consider jurisdictional matters *sua sponte*) (citations omitted).

¹³ *Warner Robins*, 71 FLRA at 759 (citing *SSA*, 71 FLRA 205, 205-06 (2019) (Member Abbott concurring; Member DuBester dissenting)).

¹⁴ 5 U.S.C. § 7103(a)(9)(C)(i). A grievance under the Statute is also any complaint "concerning any matter relating to the employment of any employee," and "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9)(A), (B), and (C)(ii) (emphasis added). This dispute involves solely a claim for reimbursement of expenses incurred by the Union as a result of a third-party contract. Therefore, it does not involve "the employment of an employee" or a "condition of employment." *See Carswell*, 70 FLRA at 892 (finding a complaint regarding a certificate awarded to interns at the completion of a program did not involve the employment of an employee or a condition of employment).

¹⁵ Award at 2.

¹⁶ *Id.* at 4 (claiming that it detrimentally relied on the Agency's promise to allow employees to use official time to attend the training); *id.* (citing *Signal Hill Aviation Co. v. Stroppe*, 96 Cal. App. 3d 627, 637 (Cal. Ct. App. 1979), for the proposition that "a promisor is bound to its promise when the promisee

reasonably changes its position in reliance upon the promise made").

¹⁷ *Id.* at 5 (stating that "this dispute is really about the doctrines of detrimental reliance and equity").

¹⁸ *Id.* at 6 n.4.

¹⁹ *See id.* at 5-6 & n.4 (referring generally to an alleged contractual obligation "for the two signatories to collectively make arrangements for Official Time training," but admitting that the relevant section of the parties' agreement was "[r]eferred by the parties, [but] not made an exhibit at arbitration").

²⁰ This conclusion is supported by the fact that the Union cites to, and the Arbitrator inherently relies on, a California Appellate Court decision, *Signal Hill Aviation Co. v. Stroppe*. Award at 4. *Signal Hill* relies on the doctrine of promissory estoppel which, according to the Court, the state of California recognizes in contract disputes. 96 Cal. App. 3d at 637.

subsequent arbitral award.²¹ Accordingly, we vacate the award.²²

IV. Order

We vacate the award.

Member DuBester dissenting:

In today's decision, the majority vacates an award requiring the Agency to reimburse the Union for expenses incurred arising from its detrimental reliance on the Agency's approval of official time for steward training. In its exceptions, the Agency argues that the award is contrary to law, and that the Arbitrator exceeded his authority, on grounds that reimbursement of these expenses is prohibited by Executive Order 13,837.

The majority, however, never reaches these arguments. Instead, concluding that this case "concerns a jurisdictional issue" that it may consider *sua sponte*, it declares that the Arbitrator never had jurisdiction over the dispute because the Union's complaint "did not constitute a grievance" under § 7103(a)(9) of the Federal Service Labor-Management Relations Statute (Statute).¹

As noted, the Agency made no such argument in its exceptions. And because no show-cause order was issued raising the majority's jurisdictional concerns, the Union was never afforded any opportunity to address this issue. Indeed, the record before us *does not even contain a copy of the Union's grievance*. Undeterred, the majority confidently discerns that this grievance – as yet unseen – "is more appropriately described as a commercial contract dispute" over which the Arbitrator lacked jurisdiction.²

At the outset, I fail to see how the majority's decision to vacate an award under these circumstances – an approach it has taken in previous cases³ – serves the interests of the federal labor-management relations community. In addition to raising fundamental due process concerns, it simply makes no sense to render

²¹ *Carswell*, 70 FLRA at 892. Member Abbott notes that he has previously raised concerns about the outer limits of negotiated grievance procedures under the Statute. See *U.S. Dep't of VA, VA Med. Ctr., Decatur, Ga.*, 71 FLRA 428, 432 n.53 (2019) ("Member Abbott observes that he has expressed reservations about employees pursuing alleged Privacy Act violations as grievances through the negotiated grievance procedure because he questions whether the Privacy Act is a law, rule, or regulation affecting conditions of employment under 5 U.S.C. § 7103(a)(9)(C)(ii)."); *U.S. Dep't of VA, Veterans Benefit Admin., Nashville Reg'l Office*, 71 FLRA 322, 324-25 (2019) (Member Abbott concurring; Member DuBester dissenting) (Concurring Opinion of Member Abbott) (stating that complaints arising under the Privacy Act are not grievable because they do not affect conditions of employment).

²² Although we do not reach the merits of the Arbitrator's decision, we are still concerned about the Arbitrator's actions in dismissing the Agency's sovereign immunity argument below. See Exceptions, Attach. 3, Agency's Closing Br. at 5 ("The [Agency] is unaware of any law that requires it to pay for the [U]nion's hotel and catering expenses . . . [and] cannot expend funds to the [U]nion unless funds have been appropriated by Congress for that purpose."); Award at 6 ("Neither party has cited any legal authority relieving the [Agency] of liability for these out-of-pocket expenses incurring by the Union."). The Authority has held that "a collective-bargaining agreement may only authorize monetary awards where the requirements for a statutory waiver of sovereign immunity . . . have been satisfied." *AFGE, Local 2338*, 71 FLRA 343, 344 (2019) (citing *U.S. Dep't of Trans., FAA, Detroit, Mich.*, 64 FLRA 325, 328-29 (2009)).

¹ Majority at 3-4.

² *Id.* at 4.

³ See, e.g., *U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr.*, 71 FLRA 758, 761 (2020) (Dissenting Opinion of Member DuBester) (noting that the majority concluded the union's grievance was barred by an earlier EEO complaint pursuant to § 7121(d) of the Statute even where "neither the [u]nion, the [a]gency, nor the [a]rbitrator addressed" this question; no show cause order was issued, "thereby depriving the [u]nion of any opportunity to respond to the majority's jurisdictional concerns"; and the EEO complaint was not a part of the record).

decisions that so readily lend themselves to motions for reconsideration.⁴

Moreover, based upon the limited record before us, I cannot agree that the award should be vacated on jurisdictional grounds. The majority appears to base its decision upon its finding that the grievance could not have constituted a “complaint concerning ‘the effect or interpretation, or a claim of breach, of a collective[-]bargaining agreement.’”⁵ And presumably because we do not have a copy of the actual grievance, the majority appears to base *this* conclusion on the Arbitrator’s application of the doctrine of detrimental reliance to sustain the Union’s grievance.

But this speculative analysis ignores that the Arbitrator’s specific conclusion that the Agency’s actions “violated the [collective-bargaining agreement].”⁶ While the majority seems to take issue with the degree to which the Arbitrator grounded this conclusion upon the language of the parties’ agreement, this concern is appropriately addressed through exceptions challenging the *merits* of the award.⁷ It certainly does not support a conclusion that the Union’s complaint was never a “grievance” to begin with.

Accordingly, I dissent.

⁴ See, e.g., *Library of Cong.*, 60 FLRA 939, 941 (2005) (citing *U.S. Dep’t of the Air Force, 375th Combat Support Grp., Scott Air Force Base, Ill.*, 50 FLRA 84, 85-87 (1995)) (noting that the Authority will find the “extraordinary circumstances” necessary for granting a motion for reconsideration “when the moving party has not been given an opportunity to address an issue raised *sua sponte* by the Authority in the decision”).

⁵ Majority at 3 (quoting 5 U.S.C. § 7103(a)(9)(C)(i)).

⁶ Award at 6.

⁷ On this point, I would note that the Authority has previously affirmed awards granting union grievances based upon the doctrine of detrimental reliance. See, e.g., *U.S. Dep’t of Transp., FAA*, 63 FLRA 15, 16 (2008) (*FAA*); see also *U.S. Dep’t of the Treasury, IRS, Okla. City, Okla.*, 64 FLRA 615, 617 (2010) (“The Authority has upheld arbitration awards that relied on principles of equitable estoppel.”) (citing *Overseas Educ. Ass’n*, 29 FLRA 240, 244 (1987); *FAA*, 63 FLRA at 19).