71 FLRA No. 218

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
TALLADEGA, ALABAMA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3844
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5493

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DECISION

November 23, 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

We once again remind arbitrators that they may not disregard the plain wording of parties' collective-bargaining agreements.

Arbitrator Dennis R. Nolan issued an award finding that the Union violated Article 31, Section f.1 of the parties' master agreement (Article 31) by not filing its grievance with the proper Agency official. Nevertheless, he found the grievance arbitrable because the Union's violation was substantively harmless. On the merits of the grievance, the Arbitrator concluded that the Agency violated the parties' agreement and the Fair Labor Standards Act (FLSA) by not providing employees with a thirty-minute duty-free lunch break or compensation in lieu of a break.

The main question before us is whether the Arbitrator's procedural-arbitrability determination fails to draw its essence from the parties' agreement. Because the Arbitrator relied on extraneous considerations to overrule the plain wording of the parties' agreement, we set aside the award.

II. Background and Arbitrator's Award

In August 2017, the Union filed a grievance with the Agency's human-resources department alleging that the Agency, a federal prison, violated the parties' agreement and the FLSA by not providing employees with a thirty-minute duty-free lunch break or compensation in lieu of a break. The Agency's human-resources department rejected the grievance, stating that the Union improperly filed it. The Union then re-filed the grievance with one of the Agency's regional offices. The parties could not resolve the dispute and proceeded to arbitration.

At the arbitration hearing on August 1, 2018, the Agency argued that the Union never filed a grievance or, if the Union did file a grievance, it was not procedurally arbitrable. Specifically, the Agency contended that, under Article 31, the Union was required to file its grievance with the Warden. As relevant here, Article 31 states that "the grievance will be filed with the [c]hief [e]xecutive [o]fficer of the institution/facility, if the grievance pertains to the action of an individual for which the [c]hief [e]xecutive [o]fficer of the institution/facility has disciplinary authority over."[1] It was undisputed that the Warden is the chief executive officer of the Agency.[2] At the arbitration hearing, the Arbitrator stated that "the Union . . . made a prima facie showing that it attempted to file its grievance."[3]

In his award, the Arbitrator found that the Agency "failed to prove that the Union did not file a grievance."[4] But, he also determined that the Union committed a "technical violation of Article 31" by not filing the grievance with the Warden.[5] Nevertheless, the Arbitrator concluded that the Union's error was "substantively harmless" and "did not [materially] impair the Agency's ability to present its case."[6] And he concluded that the grievance was arbitrable because "the Agency eventually knew the substance of the grievance."[7]

On the merits, the Arbitrator held that the Agency violated the parties' agreement and the FLSA by not providing employees with a duty-free, thirty-minute lunch break or compensation in lieu of a break.

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[1] Exceptions, Attach. B, Master Agreement (MA) at 72.
[2] Opp'n, Ex. C, Tr. (Tr.) at 9. It is also undisputed that the operation shift lieutenant is responsible for scheduling employees' duty-free lunch, and the Warden is responsible for disciplining the operation shift lieutenant. *Id.* at 8.
[3] *Id.* at 16.
[4] Award at 2.
[5] *Id.*
[6] *Id.*
[7] *Id.*

On April 9, 2019, the Agency filed an exception to the award, and the Union filed an opposition on May 14, 2019.

III. Analysis and Conclusion: The award fails to draw its essence from Article 31 of the parties' agreement.

The Agency argues, in its sole exception, that the award fails to draw its essence from Article 31 because the Union improperly filed its grievance with the human-resources department instead of the Warden.[8] The Authority has found that an award fails to draw its essence from a collective-bargaining agreement where the award conflicts with the agreement's plain wording.[9]

Article 31 states that "the grievance will be filed with the [c]hief [e]xecutive [o]fficer of the institution, if the grievance pertains to the action of an individual for which the [c]hief [e]xecutive [o]fficer of the institution/facility has disciplinary authority over."[10] Here, it is undisputed that the Union filed its grievance with the human-resources department.[11] Additionally, it is undisputed that the chief executive officer of the institution is the Warden, and the Warden disciplines the employee who schedules employees' duty-free lunch.[12] In the context of these undisputed circumstances, the parties' agreement is clear and unambiguous – the grievance must be filed with the Warden.[13]

Even though the Arbitrator found that the Union should have filed the grievance with the Warden, he determined the grievance was arbitrable because the Union's "technical violation" was "substantively harmless."[14] However, the parties' agreement does not excuse the Union's noncompliance with Article 31,[15] nor does it allow for the Arbitrator to excuse the Union's violation based on whether it "impair[ed] the Agency's ability to present its case" or was otherwise "substantively harmless."[16] And the Arbitrator did not cite contractual language allowing him to disregard the procedural requirements in Article 31 because "the Agency eventually knew the substance of the grievance."[17] By finding the grievance arbitrable,[18] the Arbitrator impermissibly modified the parties' agreement by creating a "substantively harmless" exception to the arbitrability requirements of the parties' negotiated grievance procedure.[19] Thus, the Arbitrator

[8] Exceptions Br. at 3-8. The Authority will find that an arbitration award is deficient as failing 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. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (*SBA*) (Member DuBester concurring, in part, and dissenting, in part).

[9] *SBA*, 70 FLRA at 527.

[10] MA at 72.

[11] Award at 2.

[12] Tr. at 8-9.

[13] *See* MA at 72; *see also U.S. Dep't of the Air Force, 673rd Air Base Wing, Joint Base, Elmendorf-Richardson, Alaska*, 71 FLRA 781, 782-83 (2020) (*Air Force*) (Member DuBester dissenting) ("[A]rbitrators are not free to ignore the procedural rules parties negotiate into a collective-bargaining agreement").

[14] Award at 2.

[15] The Arbitrator noted that, unlike in *SBA*, this parties' agreement "does not contain a provision stating that any procedural violation 'shall result in cancellation of the grievance.'" Award at 2 n.1. However, the Authority has set aside arbitrators' procedural-arbitrability determinations for failing to enforce the plain wording of the parties' procedural filing requirements even where the collective-bargaining agreement did not expressly require cancellation of an improperly filed grievance. *E.g.*, *U.S. Dep't of the Army, 93rd Signal Brigade, Fort Eustis, Va.*, 70 FLRA 733, 734 (2018) (*Army*) (Member DuBester dissenting) (setting aside an arbitrator's procedural-arbitrability determination, in part, because nothing in the parties' agreement "excuse[d] the [u]nion's non-compliance with the negotiated grievance procedure").

[16] Award at 2; *see Air Force*, 71 FLRA at 782 (setting aside arbitrator's determination that untimely filed grievance was arbitrable, where arbitrator relied on "labor relations between the parties" and lack of harm, because the agreement "d[id] not provide any exceptions authorizing the [a]rbitrator to consider impact on 'labor relations'" or other equitable considerations).

[17] Award at 2; *see U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 71 FLRA 790, 791 (2020) (Member DuBester dissenting) (procedural-arbitrability determination failed to draw its essence from the parties' agreement because the "[a]rbitrator cited no contractual wording that permitted him to disregard the parties' explicit forty-day time frame for filing a grievance"); *see also U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (Member DuBester dissenting) (granting essence exception where the arbitrator relied on "a general 'presumption favoring arbitrability'" and "ignored the plain word[ing] of the [parties'] agreement").

[18] Member Abbott notes that while the result to set aside the award appears draconian, it is not up to the Arbitrator, or the Authority for that matter, to decide that a negotiated grievance procedure that has steps, procedures and service requirements, which the parties freely negotiated in their CBA, is or is not harmful enough to say "never mind." As the oft-told tale goes, contracts have consequences and the Arbitrator is not free to ignore a negotiated provision agreed to by the parties.

[19] *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Aliceville, Ala.*, 71 FLRA 716, 717 (2020) (Member DuBester dissenting) (finding award failed to draw its essence from the parties' agreement where the arbitrator "looked beyond" the parties' agreement "to modify [the] agreement's clear and unambiguous terms").

relied on extraneous considerations and ignored the plain wording of Article 31.[20]

In its opposition, the Union argues that the Authority's procedural-arbitrability review should be limited to the "initial ruling" of the Arbitrator on August 1, 2018.[21] But the alleged "initial ruling" was simply the Arbitrator's statement, at the arbitration hearing, that "the Union . . . made a prima facie showing that it attempted to file its grievance."[22] Because the Arbitrator subsequently finalized his procedural-arbitrability determination in his award,[23] we reject the Union's proposed limitation.

Therefore, we find the award fails to draw its essence from Article 31 of the parties' agreement.[24]

IV. Decision

We set aside the award.

[20] *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 the arbitrator erred by relying on extraneous considerations to modify unambiguous wording of the parties' agreement); *Army*, 70 FLRA at 734 (same).

[21] Opp'n Br. at 6.

[22] Tr. at 16.

[23] Award at 2 ("I denied th[at] objection[] at the hearing but will elaborate on and memorialize my ruling here."). Additionally, the Union contends that the Warden "specifically designated that . . . grievances[] must go through [h]uman[-r]esources . . . to be stamped prior to submission to his office." Opp'n Br. at 7. And the Union also claims that the human-resources department rejected the initial filing because the grievance had to be filed at a regional office. *Id.* However, the Union conceded it did not make these arguments below. *See id.* at 6-7. Thus, we do not consider them. *See* 5 C.F.R. § 2429.5 ("The Authority will not consider any evidence, factual assertions, arguments . . . that could have been, but were not, presented in the proceedings before the . . . arbitrator."); *see also* 5 C.F.R. § 2425.4(c).

[24] We note that *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 71 FLRA 997, 997 (2020), also involves Article 31. However, unlike here, that case did not involve an arbitrator excusing a filing error based on equitable considerations. Rather, in that case, the arbitrator found that, under Article 31 and the circumstances before him, the grievance was properly filed with the regional director. *Id.*

Member DuBester, dissenting:

Contrary to the majority, I believe that the Arbitrator's determination that the grievance was procedurally arbitrable represents a plausible interpretation of the parties' collective-bargaining agreement. Here, the Arbitrator found that the parties' agreement did not require dismissal of a grievance filed with the incorrect official.[1] He further found that the Union filed the grievance first with the Agency's human resources department, then with the Agency's Southeast Region. He also credited the testimony of an Agency representative that grievances are "frequently filed at the Regional level" and "there would have been no reason not to accept this grievance."[2] More importantly, he found that the Agency was aware of the substance of the grievance, and that the Union's "filing of the grievance with the regional office did not impair the Agency's ability to present its case."[3] And on these grounds, the Arbitrator concluded that the grievance was arbitrable.

As I have stated previously,[4] where the parties have agreed to submit the arbitrability question to an arbitrator, federal courts and the Authority have recognized that an arbitrator's procedural-arbitrability determination is entitled to deference and is subject to review only on narrow grounds.[5] Applying the deferential standard that governs arbitrators' procedural-arbitrability determinations, I would deny the Agency's essence exception. Accordingly, I dissent.

[1] Award at 2 n.1.

[2] *Id.* at 2.

[3] *Id.*

[4] *E.g.*, *U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 387, 392-93 (2019) (Dissenting Opinion of Member DuBester); *U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 179, 181 (2019) (Dissenting Opinion of Member DuBester); *U.S. DOD Educ. Activity*, 70 FLRA 863, 866 (2018) (Dissenting Opinion of Member DuBester); *U.S. Small Bus. Admin.*, 70 FLRA 525, 532 (2018) (*SBA*) (Dissenting Opinion of Member DuBester) (parties' challenges to arbitrators' procedural-arbitrability determinations are "subject to the deferential essence standard").

[5] *See, e.g.*, *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *Orion Pictures Corp. v. Writers Guild of Am., W., Inc.*, 946 F.2d 722, 725 (9th Cir. 1991) ("Once a party has 'initially submitted the arbitrability question to the arbitrator, any subsequent judicial review [is] narrowly circumscribed"' and a federal court must "enforce that ruling if it represents a 'plausible interpretation' of the [collective-bargaining agreement].") (quoting *George Day Const. Co. v. United Bhd. of Carpenters & Joiners*, 722 F.2d 1471, 1476-77 (9th Cir. 1984)); *see also Nat'l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875, 881 (D.C. Cir. 2020) ("When reviewing an arbitrator's award, the Authority is required to apply a similarly deferential standard of review to that a federal court uses in private-sector labor-management issues."); *SBA*, 70 FLRA at 527 (Member DuBester concurring, in part, and dissenting, in part) (holding that the Authority will review procedural-arbitrability determinations on essence grounds, "[c]onsistent with the Authority's mandate . . . to review arbitral awards on grounds 'similar to those applied by [f]ederal courts in private[-]sector labor-management relations"') (quoting 5 U.S.C. § 7122(a)(2)).