71 FLRA No. 238

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
MIAMI, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
AFL-CIO
LOCAL 3690
(Union)

0-AR-5570

DECISION

December 31, 2020

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

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement by partially denying an official-time request. Arbitrator Fredric R. Ditcher issued an award finding the grievance procedurally arbitrable and sustaining it on the merits. The Agency now argues that the award fails to draw its essence from the parties' agreement because the Arbitrator misinterpreted the agreement's (1) procedural-arbitrability requirements and (2) official-time approval procedure. Because the Agency does not establish that the Arbitrator's contractual interpretations were irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, we deny the exceptions.

II. Background and Arbitrator's Award

The grievant, who was the Union president, requested official time to prepare for three upcoming arbitrations. His supervisor asked for additional information about the request, and the grievant complied. After the supervisor neither approved nor denied the official-time request for more than a week, the grievant resubmitted it. The supervisor then granted some of the requested time but failed to offer any reasons for disapproving the remaining time.

The Union filed a grievance alleging that the Agency violated the parties' agreement by failing to grant the grievant's full official-time request. The parties were unable to resolve the grievance and the Union invoked arbitration. Pursuant to their agreement, the parties requested and received a panel of arbitrators. The Union was dissatisfied with that panel and requested a second, from which the parties ultimately selected the Arbitrator. Because they were unable to stipulate an issue, the Arbitrator framed the issue to be resolved, in relevant part, as whether the Agency violated law or Articles 7 or 11 of the parties' agreement by partially denying the official-time request.

Before addressing the merits issue, the Arbitrator noted the Agency's procedural challenge to the arbitrability of the grievance. Specifically, the Agency argued that the Union failed to comply with Article 32, Section b(3) of the parties' agreement (Article 32), which states that the parties have five workdays from receipt of a panel to "attempt to agree on an arbitrator. If for any reason either party does not like the first list of arbitrators, they may request a second panel."[1] After the parties received their first panel of arbitrators, the Union elected to request a second panel. The Arbitrator found that the Agency provided "no evidence" that the Union's request for the second panel was untimely.[2] The Arbitrator further noted that once the parties received the second panel, they attempted to agree on an arbitrator within five days, consistent with Article 32. Accordingly, he concluded that the Agency "failed to offer evidence to support [its] position" that "the request for th[e] second panel was not timely."[3]

On the merits, the Arbitrator noted that Article 7, Section e of the parties' agreement (Article 7)[4] sets forth the approval procedures for official time at the Agency's facility, and Article 11, Section a(1) (Article 11) provides that "reasonable official time will be granted."[5] Guided by the language of 5 U.S.C. § 7131(d),[6] the Arbitrator determined that the definition

[1] Exceptions, Attach. C, Collective-Bargaining Agreement (CBA) at 74.
[2] Award at 6 n.1.
[3] *Id.*
[4] *Id.* at 3 ("Article 7, Section e provides: Union representatives will be permitted to leave their work sites to perform and discharge their representational responsibilities after being properly relieved. This will be done in accordance with the following: (1) local Union representatives . . . must request the time from their supervisor prior to leaving the work site.").
[5] *Id.* at 10 (quoting Art. 11, § a(1)).
[6] *Id.* at 9 (noting that § 7131(c) states that "Union representatives 'shall be granted official time in any amount the

of "reasonable" in Article 11 "is to be mutually determined."[7] The Arbitrator found that the grievant's official-time request was made in accordance with Articles 7 and 11, for the purpose of fulfilling his representational duties. Referencing recent Authority precedent stressing the importance of informed decision-making,[8] the Arbitrator also noted that the Agency appropriately sought information about the grievant's official-time request, and the grievant responded by providing additional information. However, the Arbitrator found that the Agency first "ignored" the request and, then, partially denied it without providing an explanation of its considerations.[9] The Arbitrator concluded that the Agency had not attempted to come to an agreement with the Union about the use of reasonable official time. Therefore, he sustained the grievance.

The Agency filed exceptions to the award on October 31, 2019, and the Union filed an opposition to the exceptions on December 30, 2019.

III. Analysis and Conclusion: The Agency does not establish that the award fails to draw its essence from the parties' agreement.

The Agency presents two arguments as to why the Arbitrator's award fails to draw its essence from the parties' agreement.[10]

First, the Agency argues that the Arbitrator erred in finding that the Union complied with Article 32's procedural requirements.[11] In this regard, the Agency contends that the Union did not attempt to agree on an arbitrator, or request a second panel, within five days of receiving the first panel.[12] But, as the Arbitrator found, Article 32 permitted the Union to request a second panel,[13] and, the Agency – as it did before the Arbitrator – has "failed to offer evidence to support [its] position" that the Union's request for the second panel was untimely under Article 32.[14] Moreover, it is undisputed that, after receiving the second panel, the parties attempted to agree on an arbitrator within the required five-day timeframe.[15] Thus, we find that the Agency does not demonstrate that the Arbitrator's conclusion regarding arbitrability is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement.[16] Accordingly, we deny this essence exception.

Second, the Agency argues that the Arbitrator's interpretation of Article 7 and Article 11 fails to draw its essence from the parties' agreement because it creates a process for official-time requests that differs from the process that the parties agreed to.[17] Specifically, the Agency asserts that, because Article 7 requires Union representatives to request official time from their supervisors, the "Agency has a right to determine what is reasonable."[18] However, the Agency's assertion is not substantiated by the wording of the parties' agreement: nothing in the agreement explicitly states that the Agency has a unilateral right to determine the reasonableness of official-time requests.[19] Thus, the Arbitrator's finding – that under Article 11 "[t]he definition of reasonable is to be mutually determined" – does not conflict with the

Agency and the exclusive representative involved agree is reasonable, necessary and in the public interest'").

[7] *Id.* at 9-10.

[8] *U.S. DHS, U.S. CBP*, 71 FLRA 119, 120 (2019) (Member DuBester dissenting).

[9] Award at 8.

[10] The Authority will find that an arbitration award is deficient as failing to draw its essence from a 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. *AFGE, Local 1148*, 70 FLRA 712, 713 n.11 (2018) (Member DuBester concurring).

[11] Exceptions Br. at 9.

[12] *Id.*

[13] *See* CBA at 74 ("If for any reason either party does not like the first list of arbitrators, they may request a second panel.").

[14] Award at 6 n.1; *see also id.* (finding that "[t]here [wa]s no evidence as to the date the second panel was requested.").

[15] *Id.* at 6.

[16] *See IFPTE, Ass'n Admin. Law Judges*, 70 FLRA 316, 317 (2017) (denying essence exceptions to arbitrator's plain-language interpretation of grievance provisions). Additionally, we note that challenges to an arbitrator's evaluation of the evidence, including determinations as to the weight to be accorded such evidence, *see* Exceptions Br. at 9-10, do not demonstrate that an award fails to draw its essence from the parties' agreement. *See NTEU, Chapter 299*, 68 FLRA 835, 838 (2015).

[17] Exceptions Br. at 14.

[18] *Id.* at 12-13 (argument based on text of Articles 7 and 11 concerning the Agency's approval of official-time requests).

[19] Chairman Kiko notes that she finds this case distinguishable from *U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Ariz.*, 71 FLRA 227 (2019) (*Davis-Monthan*) (Member DuBester concurring; Chairman Kiko dissenting). In *Davis-Monthan*, unlike here, the agreement expressly gave the agency the "responsibility to determine what constitutes a reasonable amount of [official] time." 71 FLRA at 230 (Dissenting Opinion of Chairman Kiko); *see also U.S. Dep't of Transp., FAA*, 71 FLRA 694, 698 (2020) (Concurring Opinion of Member Abbott) (noting that the wording that parties agree to in "contracts have consequences," and "we do not allow agencies 'to wriggle out of a poorly thought out and constructed contract provision[s]'").

plain wording of the parties' agreement.[20] Applying his interpretation to the approval process in Article 7, the Arbitrator held that the Agency should share information about the basis for its disapproval so the parties could work towards agreement,[21] which the Agency failed to do here.[22] While the Agency disagrees with the Arbitrator's interpretation and application of these articles, it provides no basis for finding the interpretation or application irrational, unfounded, implausible, or in manifest disregard of the agreement.[23] As such, we also deny this essence exception.[24]

IV. Order

We deny the Agency's exceptions.

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[20] Award at 10. Chairman Kiko notes that the Authority recently denied an essence challenge to a similar interpretation of the same contract in *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 1247, 1248-49 (2020) (*BOP*). There, the Authority noted that the parties' agreement did not state that the Agency was solely responsible for determining reasonableness of official-time requests. *Compare id.* (parties' agreement did not "explicitly grant either party sole authority to determine what constitutes a reasonable amount of official time") *with Cong. Research Emps. Ass'n, IFPTE, Local 75*, 64 FLRA 486, 490 (2010) (agreement "specifically charged" agency with determining whether representational functions were "performed within reasonable limits"). *See also U.S. Dep't of the Air Force, Edwards Air Force Base, Cal.*, 68 FLRA 817, 819 (2015) (declining to grant essence exception where "the excepting party fail[ed] to establish that the arbitrator's interpretation of th[e] agreement conflict[ed] with its express provisions").

[21] *See BOP*, 71 FLRA at 1248 (noting the importance for *informed* official-time decisions).

[22] Award at 8.

[23] *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Tallahassee, Fla.*, 71 FLRA 622, 624 (2020) (Member DuBester concurring) (citing *U.S. Dep't of the Navy, U.S. Marine Corps, Fin. Ctr., Kan. City, Mo.*, 38 FLRA 221, 228 (1990) (essence exception amounts to disagreement with arbitrator's interpretation and application of parties' agreement)); *SSA*, 63 FLRA 691, 693 (2009) (essence exception "fails to establish that the [a]rbitrator's interpretation . . . conflicts with express provisions of the agreement").

[24] The Agency further contends that we should reverse our precedent concerning the carve-out doctrine, allowing it to argue that the award, which concerns § 7131(d) of the Statute, excessively interferes with its right to assign work under § 7106(a). Exceptions Br. at 15. Chairman Kiko notes that the carve-out doctrine was recently overturned in *BOP*, 71 FLRA at 1251. However, unlike in that case, a careful review of the record establishes that the Agency did not raise issues of management's rights at arbitration. The Authority will not consider any arguments that could have been, but were not, presented to the arbitrator. 5 C.F.R. §§ 2425.4(c), 2429.5. Accordingly, we dismiss this exception under §§ 2425.4(c) and 2429.5. *See U.S. DHS, U.S. CBP*, 66 FLRA 335, 337-38 (2011) (declining to consider arguments a party should have known to make to the arbitrator).

Member DuBester, concurring:

I agree that the Agency's exceptions should be denied. However, for the reasons stated in my dissent in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Miami, Florida*,[1] the majority's decision to reverse the Authority's "carve-out" doctrine contradicts the language and purpose of § 7131(d) of the Federal Service Labor-Management Relations Statute. Accordingly, I disagree with my colleague that, had the Agency raised a management-rights argument before the Arbitrator,[2] the award would properly be subject to attack under the arbitrary test articulated by the majority in *U.S. DOJ, Federal BOP*.[3]

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[1] 71 FLRA 1247, 1254-58 (2020) (Dissenting Opinion of Member DuBester).
[2] Majority at 5 n.24.
[3] 70 FLRA 398 (2018) (Member DuBester dissenting).