

72 FLRA No. 151

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 906
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEMBER SERVICES
HEALTH RESOURCE CENTER
(Agency)

0-AR-5730

DECISION

May 4, 2022

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

I. Statement of the Case

In this case, we set aside an award that improperly relied on interpretations of an executive order, rather than the parties’ negotiated settlement agreement.

The parties previously entered into a settlement agreement concerning how disabled-veteran employees could take leave for medical treatment consistent with Executive Order No. 5396 (the executive order).¹ Subsequently, the Agency denied a disabled veteran’s request for medical leave for failing to provide documentation showing that the veteran’s disability was connected to military service (service-connected disability). At arbitration, the Union maintained that, under the settlement agreement, disabled-veteran employees were entitled to leave for medical treatment regardless of whether their disability was service connected.

Arbitrator Steven E. Kane issued an award finding that, although a service-connected disability requirement was not specified in the settlement agreement, the Agency could impose that requirement

because that was consistent with external guidance on interpreting the executive order.

Because the award relies on interpretations of the executive order—rather than the wording of the settlement agreement—we set aside the award as failing to draw its essence from the settlement agreement.

II. Background and Arbitrator’s Award

In 2016, the parties entered into the settlement agreement to resolve a grievance the Union had filed concerning the appropriate procedures for disabled veterans to take leave for medical treatment. The parties agreed that, in order to take leave for medical treatment, a disabled veteran must: (1) confirm their status as a disabled veteran to their supervisor and provide notice of intent to take annual leave (rather than sick leave or leave without pay); (2) give prior notice of definite days and hours of absence required for medical treatment; and (3) provide proof of the medical appointment upon returning to work.

Several years later, when a disabled-veteran member of the bargaining unit (the grievant) requested leave for medical treatment, the Agency denied the request based on the grievant’s failure to provide documentation showing that the disability was service connected. The Union grieved the denial of leave. When the parties were unable to resolve the grievance, the Union invoked arbitration.

As relevant here, the parties stipulated to the following issues: “Did the Agency violate the settlement agreement . . . when it began forcing employees to signify if their medical leave is for a service-connected injury or illness [and if] so, what shall the remedy be for [v]eteran employees” in the bargaining unit?²

The Arbitrator determined that “the term ‘disabled veteran’ was not defined” in the settlement agreement³ and that the parties did not specify that medical leave could be granted only for service-connected disabilities. However, the Arbitrator found that it was appropriate to consider “parole evidence to achieve a common[-]sense interpretation” of the phrase disabled veteran.⁴ Relying on Office of Personnel Management guidance and Merit Systems Protection Board case law,⁵ the Arbitrator found that the executive order permits disabled veterans to take leave for medical treatment only when their disability is service related.

² Award at 1.

³ *Id.* at 3.

⁴ *Id.* at 7.

⁵ *Id.* (the Arbitrator “adopt[ed]” these interpretations of the executive order that were presented in another recent arbitral hearing concerning nearly identical issues).

¹ Special Leaves of Absence to be Given Disabled Veterans in Need of Medical Treatment, Exec. Order No. 5396 (July 17, 1930).

Based on this finding, the Arbitrator concluded that the Agency did not violate the settlement agreement by imposing a service-connected disability requirement.

The Union filed exceptions to the award on May 4, 2021, and, on May 17, 2021, the Agency filed an opposition.

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

The Union argues that the award fails to draw its essence from the settlement agreement because the Arbitrator added a service-connected disability requirement that is not found in the settlement agreement.⁶ As the Union notes, the Arbitrator found that the settlement agreement did not specify that medical leave could be granted only for veterans with service-connected disabilities.⁷ Nevertheless, relying exclusively on interpretations of the executive order, the Arbitrator determined that the Agency did not violate the settlement agreement by imposing such a requirement.⁸

In another recent case, the Authority held that the executive order's leave entitlements are a "floor[,] . . . not a ceiling," and parties may negotiate more generous leave protections for disabled-veteran employees than the order might require.⁹ Thus, regardless of whether the executive order applies only to veterans with service-connected disabilities,¹⁰ the parties could negotiate greater leave entitlements. If the terms of the settlement agreement are more generous than the executive order itself—an issue that we need not

decide—then the Agency is bound to comply with those negotiated terms.¹¹

Because the Arbitrator interpreted the contract by reference to more restrictive interpretations of the executive order—rather than the wording of the settlement agreement itself—the award evidences a manifest disregard of the settlement agreement.¹² Therefore, we set aside the award as failing to draw its essence from the settlement agreement.¹³

IV. Decision

We grant the Union's essence exception and set aside the award.

⁶ Exceptions Br. at 2. For an award to be found deficient as failing to draw its essence from the parties' agreement, the excepting party must establish 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 parties' agreement as to manifest infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard for the agreement. *AFGE, Loc. 1594*, 71 FLRA 878, 879 (2020).

⁷ Award at 7.

⁸ *Id.* ("[M]y opinion stands or falls upon the validity of the appropriate legal interpretations of the [executive order].").

⁹ *U.S. Dep't of VA, Nashville Reg'l Off., VA Benefits Admin.*, 72 FLRA 371, 373 & n.20 (2021) (Member Abbott concurring) (quoting *United Am. Nurses, D.C. Nurses Ass'n & United Am. Nurses Loc. 203*, 64 FLRA 879, 882 (2010)).

¹⁰ Member Kiko notes that the executive order provides a right to "annual or sick leave" for "medical treatment of disabled veterans who are employed in the executive civil service of the United States." Exec. Order No. 5396 para. 1. She sees nothing in the plain wording in the executive order that suggests an intent to limit the scope of the right to take leave for medical treatment exclusively to disabled veterans who can demonstrate a connection between their service and their disability.

¹¹ We note that, in *AFGE, Local 1822 (Loc. 1822)*, the Authority recently addressed the same settlement agreement and a nearly identical service-connected disability requirement. 72 FLRA 595, 595-96 (2021) (Chairman DuBester concurring). In *Loc. 1822*, an arbitrator found that the Agency could impose a service-connected disability requirement despite acknowledging that "nowhere" in the settlement agreement did the parties create such a requirement. *Id.* at 596. For the reasons discussed above, the Authority granted the union's essence exception and set aside that portion of the award. *Id.* at 598.

Chairman DuBester notes, for the purpose of finding a common rationale for today's decision, that he concurred in *Loc. 1822* because it was "clear from the context in which the parties negotiated the settlement agreement, and from the manner in which the Agency amended the policy as a consequence of that agreement, that the parties intended to clarify that a service-connected disability was not a requirement for approving leave under the executive order." *Id.* at 600. Chairman DuBester believes that this conclusion is equally applicable to today's decision.

¹² See, e.g., *id.* at 598; *U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Dist. St. Paul Minn.*, 72 FLRA 634, 635 (2022) (granting essence exception where arbitrator relied on extraneous evidence rather than the plain wording of the parties' collective bargaining agreement) (citing *U.S. DHS, U.S. CBP*, 71 FLRA 744, 745 (2020) (Member Abbott concurring; then-Member DuBester dissenting)); *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993) (finding that an award evidenced manifest disregard of an agreement because the arbitrator's interpretation was "not compatible with" the "plain wording" of that agreement).

¹³ In light of this disposition, we need not consider the Union's other exceptions. See *U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1170 n.45 (2020) (then-Member DuBester concurring) (after setting aside portion of award, Authority found it unnecessary to address other arguments challenging that same portion of the award).

Member Abbott, dissenting:

The relevant question that we must resolve here is not whether the award fails to draw its essence from the settlement agreement (SA), but whether the award is consistent with the requirements of the Executive Order and other applicable laws and regulations.

Parties cannot simply enter into agreements to create entitlements that run counter to laws, rules, regulations, or executive orders. Here, the parties, through their SA attempted to do just that by establishing an entitlement that did not meet the requirements of the Executive Order. However, once the Agency began imposing a service-connected requirement, it complied with the Executive Order. Thus, I cannot agree that the award does not draw its essence from the parties' SA. As such, I would deny the Union's exception and uphold the Arbitrator's award.

This case draws parallels with an earlier decision of this Authority in *AFGE, Local 1822 (Local 1822)*.^{*} In that case, I joined with my colleagues to conclude that the award, to the extent the arbitrator found that the agency did not violate the parties' SA by imposing a service-connected disability requirement. I was wrong to agree with that disposition in *Local 1822*. However, in *Local 1822*, we should have considered that the Office of Personnel Management has issued guidance and the Merit System Protection Board has ruled on the meaning of the Executive Order.

As I have noted previously, I have committed to do my part to ensure that Authority decisions are clear, concise, and understandable, but also consistent. Thus, I acknowledge my error in joining with the majority in *Local 1822* and trust that this will avoid confusion within the federal employee-labor management community.

^{*} 72 FLRA 595, 597-98 (2021) (Chairman DuBester concurring) (citing *U.S. DHS, U.S. CBP*, 71 FLRA 744, 745 (2020) (Member Abbott concurring; then-Member DuBester dissenting)).