

71 FLRA No. 12

UNITED STATES
 DEPARTMENT OF THE ARMY
 ABERDEEN PROVING GROUND
 RESEARCH, DEVELOPMENT
 AND ADMINISTRATION
 ABERDEEN PROVING GROUND, MARYLAND
 (Agency)

and

NATIONAL FEDERATION
 OF FEDERAL EMPLOYEES
 LOCAL 178
 (Union)

0-AR-5366

—
 DECISION

February 22, 2019

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

I. Statement of the Case

We set aside an implausible contract interpretation that requires the Agency to apply procedures for rating panels, which *precede* the referral of job candidates for possible selection, to interview panels that *follow* the referral of job candidates.

II. Background and Arbitrator's Award

In order to fill several vacancies, the Agency requested and received a certificate that listed the best-qualified candidates for the vacant positions (referral certificate). Thereafter, the Agency convened an interview panel to evaluate the candidates on the referral certificate.

The Union filed a grievance, alleging that the interview panel violated Article 11, Section 11.04(d) of the parties' agreement (Section 11.04(d)). Section 11.04(d) requires, in relevant part, that "[a]ll rating[-]panel members must be in, or have served in, positions that are in the same series or family of trades which they are evaluating and must be at, or have served in, positions at the same or higher-level of the position

being evaluated."¹ It is undisputed that only one of the four interview panelists satisfied those requirements.

In response to the Union's step-two grievance, an Agency official conceded that the interview panel did not satisfy Section 11.04(d)'s requirements. However, in response to the step-three grievance, a higher-level management official stated that Section 11.04 applies "only to the rating and ranking process" used to determine an applicant's basic eligibility for a position *before* the Agency receives a referral certificate.² Because the challenged interview panel convened *after* the Agency received a referral certificate, the step-three official asserted that Section 11.04(d) did not apply to the interview panel. The parties proceeded to arbitration.

Relying primarily on the Agency's step-two response, the Arbitrator found that Section 11.04(d) applied to the interview panel because of the Agency's "obligation to set up selection procedures that are *consistent with* Article 11."³ According to the Arbitrator, the Agency failed to do so and violated Section 11.04(d). As a remedy, the Arbitrator directed the Agency to grant the grievants two years of priority consideration for promotions within the unit.

On April 13, 2018, the Agency filed exceptions, and on May 14, 2018, the Union filed an opposition.

III. Analysis and Conclusion: The award fails to draw its essence from Section 11.04(d) of the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator erroneously concluded that the interview panel was a rating panel subject to the requirements of Section 11.04(d).⁴ Section 11.04 is entitled "Candidate Evaluation," and it addresses how the Agency determines "eligibility for promotion"⁵ and how the Agency "rat[es] and refer[s]" eligible job candidates.⁶ In connection with that process, Section 11.04(d) states that the Agency may use rating panels to evaluate candidates.⁷ The Arbitrator found that Section 11.04(d) applied to the interview panel

¹ Award at 4.

² Exceptions, Attach. 5, Joint Ex. 7, Step-Three Response at 2.

³ Award at 14.

⁴ Exceptions at 3-5. As relevant here, the Authority will find that an arbitration award fails to draw its essence from a collective-bargaining agreement when the appealing party establishes that the award does not represent a plausible interpretation of the agreement. *AFGE, Local 2152*, 69 FLRA 149, 152 (2015) (*Local 2152*) (citing *AFGE, Council 220*, 54 FLRA 156, 159 (1998)).

⁵ Award at 3-4 (Section 11.04(b)).

⁶ *Id.* at 3 (Section 11.04(a) states that the Agency "will normally use an automated rating and referral system").

⁷ *Id.* at 3-4 (Section 11.04).

because of the Agency's "obligation to set up selection procedures that are *consistent with* Article 11."⁸ But the Arbitrator failed to explain *why* Section 11.04(d) would apply to an interview panel that the Agency convened *after* receiving a referral certificate.⁹

In fact, Article 11, Section 11.05 (Section 11.05) applies to the Agency's actions *after* receiving a referral certificate.¹⁰ Regarding interviews, Section 11.05 provides that the Agency may interview "any, all[,] or none of the candidates on the referral list," without any of Section 11.04(d)'s rating-panel restrictions.¹¹ Here, because it is undisputed that the Agency convened the interview panel *after* receiving the referral certificate,¹² it was implausible for the Arbitrator to find that Section 11.04(d) governed the interview panel.¹³ Accordingly, we grant the Agency's essence exception and set aside the award.¹⁴

IV. Decision

We set aside the award.

⁸ *Id.* at 14.

⁹ *See* Exceptions at 4-5.

¹⁰ Award at 4-5 (Section 11.05, entitled "Referral and Selection").

¹¹ *Id.* at 5 (Section 11.05(a)).

¹² *See* Exceptions, Attach. 6, Agency Ex. 8, Referral Certificate at 1. The dissent attempts to conflate the distinct requirements in Section 11.04 on Candidate Evaluation and in Section 11.05 on Referral and Selection. Dissent at 4. Undeniably, the requirements for "rating panels" appear *only* in Section 11.04 on Candidate Evaluation. Award at 4. Section 11.05 on Referral and Selection does not refer to *panels* at all, let alone set requirements for post-referral interview panels. *Id.* at 4-5. The dissent's attempts to make sense of the Arbitrator's award are as irreconcilable with the agreement's plain wording as the award itself.

¹³ *See Local 2152*, 69 FLRA at 152.

¹⁴ Because we set aside the award as failing to draw its essence from the parties' agreement, we need not resolve the Agency's remaining exceptions. Exceptions at 5 (arguing that the Arbitrator exceeded his authority), 5-7 (arguing that the award is contrary to law); *e.g.*, *AFGE, Local 2145*, 69 FLRA 7, 9 (2015).

Member DuBester, dissenting:

I disagree with the majority's decision to set aside the Arbitrator's award. While the majority attempts to conjure, from non-existent language, the Agency's differing responsibilities *before* and *after* "referral of job candidates for . . . selection,"¹ the Arbitrator makes clear that the Agency's requirement to use a properly composed interview panel applies to "*all*" promotion actions.² I agree.

Article 11, Section 11.04 of the parties' agreement provides, simply, that "rating panel members must [have experience] in . . . the same series or family of trades which they are evaluating and must [have experience] at the same or higher-level of the position being evaluated."³ Applying this language, the Arbitrator finds that the Agency "was bound to follow the procedures contained in Article 11" for "*all*" promotion actions, including determinations of "eligibility, rating, ranking, referral and selection."⁴ And, as relevant here, the Arbitrator's interpretation derives precisely from the contract's plain language: that Article 11's procedures apply to "*all*" promotions.⁵

It is the majority's interpretation of Article 11—and not the Arbitrator's—that is implausible, irrational, and in manifest disregard of the Article's plain language. Under the majority's distorted lens, Article 11's requirement to staff an experienced rating panel only applies to determining applicants' "basic eligibility for a position" prior to referral.⁶ In other words, the majority erroneously finds that the Agency's "selecting supervisor" was free to choose from any of the referred candidates with or without a panel.⁷

However, the selecting supervisor did not simply choose from the sixteen referred candidates. Rather, as the Arbitrator correctly found, the Agency set up a panel to rank the candidates for their selecting supervisor's review in attempting to comply with Article 11, Section 11.04(d).⁸ This process follows Article 11's "Promotions within the Unit" procedures, and—but for the panel's composition—would have complied with the parties' intent.⁹ Therefore, the Arbitrator's findings are based on a plausible interpretation of the parties' agreement.

Moreover, the Arbitrator expressly considered, and rejected, the majority's adopted interpretation.¹⁰ Specifically, the Arbitrator found that the Agency's attempt to distinguish its responsibilities depending on whether candidates are, or are not, "referred," "ignores the Agency's obligation to set up selection procedures that are *consistent with* Article 11[']s"¹¹ purpose to "to ensure fair, equitable, [and] consistent practices in carrying out the merit promotion procedures."¹²

The majority unwisely continues its assault on arbitrators' reasonable interpretations of contractual language¹³ for which the parties have bargained,¹⁴ and once again gets into "the business of rewriting parties' contracts for them."¹⁵ Because I cannot agree with this injudicious approach, I would deny the Agency's exceptions.

Accordingly, I dissent.

¹ Majority at 1.

² Award at 14 (emphasis added).

³ *Id.* at 4 (Section 11.04 of the parties' agreement).

⁴ *Id.* at 14 (emphasis added).

⁵ *Id.* at 4.

⁶ Majority at 2.

⁷ Award at 4 (Section 11.05 of the parties' agreement).

⁸ *Id.* at 6-7.

⁹ *Id.* at 2, 5-8.

¹⁰ *Id.* at 14-15.

¹¹ *Id.* at 14.

¹² *Id.* at 2 (quoting Section 11.01 of the parties' agreement).

¹³ *E.g.*, *U.S. DOD Educ. Activity*, 70 FLRA 937, 939 (2018) (Dissenting Opinion of Member DuBester); *U.S. Dep't of the Navy, Naval Supply Sys. Command Fleet Logistics Ctr.*, 70 FLRA 817, 819 (2018) (Dissenting Opinion of Member DuBester); *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 810 (2018) (Dissenting Opinion of Member DuBester); *U.S. Dep't of Transp., FAA*, 70 FLRA 687, 690 (2018) (Dissenting Opinion of Member DuBester); *U.S. Dep't of the Navy, Military Sealift Command*, 70 FLRA 671, 674 (2018) (Dissenting Opinion of Member DuBester).

¹⁴ *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Forrest City, Ark.*, 68 FLRA 672, 674 (2015) (The Authority grants extraordinary deference to an arbitrator's interpretation of collective bargaining agreement because the agreement expressly makes the arbitrator the interpreter and enforcer of the agreement.).

¹⁵ *Navy*, 70 FLRA at 819 (Dissenting Opinion of Member DuBester).