

**67 FLRA No. 155**

UNITED STATES  
DEPARTMENT OF HOMELAND SECURITY  
IMMIGRATION AND CUSTOMS ENFORCEMENT  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
NATIONAL COUNCIL 118  
(Union)

0-AR-4957

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DECISION

September 26, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

**I. Statement of the Case**

Arbitrator Raymond L. Britton issued an award determining that the Agency violated Article 9 of the parties' collective-bargaining agreement, dated June 8, 2000, by refusing to bargain over the impact and implementation of its plan to standardize and automate the Agency's detainee intake forms.

The Agency challenges the award on three grounds. First, the Agency argues that the Arbitrator based his procedural-arbitrability determination on a nonfact. As this argument directly challenges the Arbitrator's procedural-arbitrability determination, we deny this exception.

Second, the Agency argues that the award is contrary to law "since it misapplies 5 U.S.C. § 7114(b)(4)."<sup>1</sup> Because this exception challenges the Arbitrator's interpretation of the parties' agreement, we deny this exception.

Finally, the Agency argues that the award fails to draw its essence from the parties' agreement. Because the Agency bases its argument on a misinterpretation of the Arbitrator's award, we deny this exception.

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<sup>1</sup> Exceptions at 5.

**II. Background and Arbitrator's Award**

On April 25, 2011,<sup>2</sup> the Agency notified the Union that the Agency intended to change the intake worksheet that the Agency's field offices use when arresting illegal aliens, with the goal of automating the process shortly thereafter. In that letter, the Agency acknowledged its duty to bargain regarding the impact and implementation of the proposed change in working conditions and informed the Union that any demands to bargain, as well as any bargaining proposals, should be made under Article 9 of the parties' agreement.

Article 9 provides that, "[w]ithin twenty-two (22) workdays after being served with the notice of [a] proposed change," the Union "may request any additional information necessary to clarify or determine the impact of the proposed change."<sup>3</sup> Article 9 further provides that, "[i]f the Union has requested additional information," additional "proposals may be made within fifteen (15) workdays of receipt of the information."<sup>4</sup>

On May 23, the Union requested bargaining. In its request, the Union also: (1) submitted two proposals; (2) asked for a briefing regarding the proposed change; and (3) "requested 'supporting documentation' and four . . . specific data requests pursuant to . . . [§] 7114(b)(4)."<sup>5</sup> The Union received the four specific data requests on June 4 (June 4 response).

On June 16, the Agency held the requested briefing. At that briefing, the Union asked for copies of the slides used in the presentation. The Agency provided the Union with copies of the slides on July 9. On July 29 – fifteen workdays later – the Union submitted additional proposals (July 29 proposals) regarding the Agency's proposed change.

On that same day and before it had received the Union's amended proposals, the Agency informed the Union that any additional proposals had been due on June 24 – fifteen workdays after the Union had received the Agency's June 4 response. In this letter (July 29 letter), the Agency also informed the Union that, because no proposals had been received by June 24, the Agency was proceeding with its plan to standardize and automate the intake worksheet. On August 15, the Agency notified the Union that, for the reasons stated in the Agency's July 29 letter, the Union's July 29 proposals were untimely.

On September 7, the Union filed a grievance alleging that the Agency violated both the parties'

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<sup>2</sup> All dates refer to 2011.

<sup>3</sup> Award at 5 (quoting Article 9(B)(1)(b)).

<sup>4</sup> *Id.* (quoting Article 9(B)(1)(c)).

<sup>5</sup> *Id.* at 9; *see also* Opp'n, Attach. 4 at 2.

agreement and the Statute when it refused to bargain with the Union over its July 29 proposals.

In response, the Agency claimed the Union's grievance was untimely. The parties' agreement provides that a party may file a grievance within twenty-two workdays "after the event giving rise to the grievance."<sup>6</sup> In the Agency's view, the event giving rise to the grievance was the Union's receipt of the Agency's July 29 letter, which occurred on August 1; accordingly, to be timely, the grievance must have been postmarked by August 31. In the Union's view, the event giving rise to the grievance was the Union's receipt of the Agency's letter stating that the July 29 proposals were untimely, which occurred on August 15; accordingly, to be timely, the grievance was due September 7.

The matter was unresolved, and the parties submitted it to arbitration.

Before turning to the merits of the case, the Arbitrator first addressed the Agency's contention that the grievance was untimely. After setting forth the parties' arguments, the Arbitrator concluded that the Agency had not met its "burden of proving . . . that the filing of the grievance . . . was untimely."<sup>7</sup> According to the Arbitrator, the Agency erred by beginning its calculation of the filing period from August 1, and, as a result of this error, "arriv[ed] at the incorrect date of August 31" as the deadline for filing the grievance.<sup>8</sup> Therefore, the Arbitrator held that the Union's grievance was timely.

The Arbitrator then addressed whether the Agency violated the parties agreement by refusing to bargain over the Union's July 29 proposals. The Arbitrator determined that, "[i]n light of the existing facts and events" as set forth in his award, any amendments to the Union's initial proposals were due July 29.<sup>9</sup> In making this determination, the Arbitrator noted that the Agency's June 4 response was a "first response" to the Union's May 23 information request, and that the Union did not receive "the briefing power point slides and information" until July 9.<sup>10</sup> As a result, the Arbitrator held that July 29 – 15 fifteen days after the Union had received the copies of the slides – "is the date" that the Union's additional proposals were "due to be submitted."<sup>11</sup> Accordingly, the Arbitrator held that the Union's July 29 proposals "were timely" and that the Agency had violated Article 9 of the parties' agreement.<sup>12</sup>

<sup>6</sup> Award at 7 (quoting Article 47.I.3); *see also id.* at 8.

<sup>7</sup> *Id.* at 9.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 10.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

The Arbitrator then directed the Agency "to negotiate with the Union over its" July 29 proposals "and to engage in post-implementation bargaining."<sup>13</sup> He further "retained" jurisdiction "should there be any bargaining disputes between the parties on this issue."<sup>14</sup>

The Agency filed exceptions to the award, and the Union filed an opposition to those exceptions.

### III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar certain of the Agency's exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.<sup>15</sup> Likewise, the Authority will not consider challenges to requested relief that could have been raised during arbitration, but were not.<sup>16</sup>

The Agency argues that the award is contrary to law because "it effectively abrogates all of management's rights under 5 U.S.C. § 7106."<sup>17</sup> Specifically, the Agency argues that the Arbitrator interpreted Article 9 as granting the Union "fifteen (15) workdays to amend its proposals each time [the Union] requests any additional information," thereby requiring the Agency to negotiate in a situation where "the bargaining process is completely at the whim of the Union, and bargaining is conducted whenever the Union feels that it would be so obliged."<sup>18</sup> Before the Arbitrator, the Agency alleged that the "premise" of the Union's case is that the Union could "request additional information throughout the entire bargaining process" and this would "restart the timelines for submitting proposals."<sup>19</sup> Although the Agency contended that, if the Arbitrator adopted such an interpretation of Article 9, there would be "no parameters on requesting additional information" and thus "the Union could theoretically extend the bargaining process infinitely," the Agency did not argue that such an interpretation would violate its management rights under § 7106.<sup>20</sup> Because the Agency could have made this argument below, but did not do so, we find that this exception is barred under §§ 2425.4(c) and 2429.5 and dismiss it.

<sup>13</sup> *Id.* at 11.

<sup>14</sup> *Id.*

<sup>15</sup> 5 C.F.R. §§ 2425.4(c), 2429.5; *see also U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012).

<sup>16</sup> *U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 56 FLRA 498, 502 (2000).

<sup>17</sup> Exceptions at 9; *see also id.* at 9-11.

<sup>18</sup> *Id.* at 9-10.

<sup>19</sup> Exceptions, Attach. 3 at 16.

<sup>20</sup> *Id.*

The Agency also argues that the Arbitrator exceeded his authority when he retained jurisdiction “should there be any bargaining disputes between the parties on this issue.”<sup>21</sup> According to the Agency, “at no point . . . did either [p]arty ask the [A]rbitrator to resolve any bargaining disputes that they may have in the future.”<sup>22</sup> As a result, the Agency contends, by awarding this remedy, the Arbitrator exceeded his jurisdiction. However, in its post-hearing brief, the Union specifically “request[ed] that the Arbitrator retain jurisdiction should there be any bargaining disputes between the parties on this issue.”<sup>23</sup> Additionally, both parties were provided an opportunity to file a reply brief. Despite this, the Agency failed to contend below that the Arbitrator would exceed his authority if he were to grant the requested relief. Accordingly, because the Agency failed to challenge the Union’s requested relief in the proceedings before the Arbitrator, despite having had an opportunity to do so, we find that §§ 2425.4(c) and 2429.5 bar this exception and dismiss it.

#### IV. Analysis and Conclusions

##### A. The award is not based on a nonfact.

The Agency contends that the Arbitrator relied on a nonfact when he determined that the grievance was timely. Specifically, the Agency contends that the Arbitrator erroneously “relie[d] . . . on August 26 . . . as the trigger date for filing a grievance” when he should have relied on August 1, the date on which the Union received the Agency’s letter notifying the Union that the bargaining process “ha[d] concluded.”<sup>24</sup> According to the Agency, but for this error, the Arbitrator would have found that the Union’s grievance was untimely.

An arbitrator’s determination as to the timeliness of a grievance constitutes a determination regarding the procedural arbitrability of that grievance.<sup>25</sup> An arbitrator’s determination as to procedural arbitrability may be found deficient only on grounds that do not challenge the procedural-arbitrability determination itself.<sup>26</sup> Such grounds include arbitrator bias or the fact that the arbitrator exceeded his or her authority.<sup>27</sup> Exceptions challenging an arbitrator’s procedural-arbitrability determination as based on a nonfact, however, provide no basis for finding an award deficient.<sup>28</sup>

<sup>21</sup> Award at 11.

<sup>22</sup> Exceptions at 22.

<sup>23</sup> Opp’n, Attach. 16 at 36.

<sup>24</sup> Exceptions at 20.

<sup>25</sup> *U.S. Dep’t of the Navy, Naval Surface Warfare Ctr., Indian Head, Md.*, 55 FLRA 596, 598 (1999).

<sup>26</sup> *AFGE, Local 2921*, 50 FLRA 184, 185-86 (1995).

<sup>27</sup> *Id.* at 186.

<sup>28</sup> *AFGE, Local 3283*, 66 FLRA 691, 692 (2012).

The Agency challenges the Arbitrator’s procedural-arbitrability determination solely as being based on a nonfact. As stated above, this argument provides no basis for finding the award deficient.

Accordingly, we deny this exception.

##### B. The award is not contrary to law.

The Agency contends that the award is contrary to law. The Agency argues that, in order to receive an additional fifteen workdays to submit additional proposals under Article 9, any information requested by the Union must satisfy not only the contractual requirements of that provision, but also the particularized need requirements of § 7114(b)(4). The Agency contends that, because the June 16 briefing, as well as the slides used during the briefing, did not meet these additional statutory requirements, the Arbitrator “mistakenly held that the Union had satisfied” the particularized need requirements of § 7114(b)(4), and, as a result, he “improperly” provided the Union an additional fifteen workdays to submit its proposals.<sup>29</sup>

In finding that the Agency erred in failing to provide the Union an additional fifteen workdays to amend its proposals after the Union had received the June 16 briefing slides, the Arbitrator was interpreting Article 9 of the parties’ agreement. Although the Agency contends that Article 9 should be read to include the particularized need requirements of § 7114(b)(4), that provision makes no mention of § 7114(b)(4), either explicitly or by mirroring its language. Thus, the issue of whether the parties complied with Article 9 was a matter of contract interpretation for the Arbitrator.<sup>30</sup> As a result, the cases cited by the Agency – all of which involve the application of the particularized need standard under § 7114(b)(4) – are inapposite, and the Agency’s exception fails to provide a basis for finding the award deficient.

Accordingly, we deny this exception.

##### C. The award does not fail to draw its essence from the parties’ agreement.

The Agency argues that the Arbitrator’s award fails to draw its essence from the parties’ agreement. In reviewing an arbitrator’s interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use

<sup>29</sup> Exceptions at 8.

<sup>30</sup> *Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 891 (2010) (where grievance involves dispute regarding bargaining obligation as defined by the parties’ agreement, issue of whether parties have complied with the agreement becomes matter of contract interpretation).

in reviewing arbitration awards in the private sector.<sup>31</sup> Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the 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 collective-bargaining 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.<sup>32</sup> The Authority and the courts defer to arbitrators in this context “because it is the arbitrator’s construction of the agreement for which the parties have bargained.”<sup>33</sup> In addition, when a party does not interpret an award correctly, an exception based on that misinterpretation does not demonstrate that the award fails to draw its essence from the parties’ agreement.<sup>34</sup>

The Agency contends that the Arbitrator interpreted Article 9 to mean that “every time the Union requests information, [the Union] can receive an additional fifteen (15) workdays to amend its proposals.”<sup>35</sup> According to the Agency, this interpretation not only ignores other provisions of the parties’ agreement, but also permits the Union to make repeated requests for information, thereby granting the Union the ability to prolong the negotiation process indefinitely. Such an interpretation, the Agency argues, is “unconnected with the wording and purpose” of the parties’ agreement and “leads to an implausible and irrational interpretation” of that agreement.<sup>36</sup>

Despite the Agency’s contention, the Arbitrator did not find that the parties’ agreement grants the Union the ability to make repeated requests for information. Rather, the Arbitrator found that the Union made a single information request under Article 9. The Arbitrator determined – consistent with the Union’s argument both below and before the Authority – that the Agency only partially fulfilled that request with its “first response” on June 4 and did not completely satisfy the Union’s request until the Union received copies of “[t]he briefing power point slides and information” – i.e., the “supporting documentation” mentioned in the Union’s May 23 letter – on July 9.<sup>37</sup> Therefore, the Agency’s contention, which is based on a misinterpretation of the Arbitrator’s award,

does not demonstrate that the award fails to draw its essence from the parties’ agreement.<sup>38</sup>

Accordingly, we deny this exception.

## V. Decision

We dismiss, in part, and deny, in part, the Agency’s exceptions.

<sup>31</sup> 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

<sup>32</sup> *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

<sup>33</sup> *Id.* at 576.

<sup>34</sup> *U.S. Dep’t of HHS, Substance Abuse & Mental Health Servs. Admin.*, 65 FLRA 568, 572 (2011) (*HHS*).

<sup>35</sup> Exceptions at 18.

<sup>36</sup> *Id.* at 14.

<sup>37</sup> Award at 10; Opp’n, Attach. 4 at 2.

<sup>38</sup> *HHS*, 65 FLRA at 572.