

**70 FLRA No. 130**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 1101  
(Union)

and

UNITED STATES  
DEPARTMENT OF THE AIR FORCE  
673rd AIR BASE WING  
JOINT BASE ELMENDORF-RICHARDSON  
(Agency)

0-AR-5338

—  
DECISION

June 25, 2018

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

**I. Statement of the Case**

In this case, the Authority denies all exceptions to an award that sustained an Agency-filed grievance about the work schedule of the Union President (the president), who is on 100% official time. Arbitrator Charles E. Krider determined that the Agency did not violate the parties' agreement when it required the president to seek authorization before working in his office outside of the agreed-upon duty hours.

The Agency filed a grievance alleging that the president abused official time<sup>1</sup> and violated the parties' collective-bargaining agreement because he worked outside of his approved tour of duty without authorization. In the absence of a stipulated issue, the Arbitrator framed the issue as whether the Agency violated the parties' agreement when it directed the president to stop working outside of his approved tour of duty without authorization. The Arbitrator found that the Agency did not violate the agreement. There are multiple Union-filed exceptions before us.

Several of the Union's exceptions challenge the Arbitrator's framing of the issue. For the reasons discussed below, these exceptions do not demonstrate

that the Arbitrator erred in his framing of the issue, so we deny them.

In addition, the Union raises several claims that the award is based on nonfacts. Because the Union's arguments challenge the Arbitrator's interpretation of the parties' agreement and statements that are not central facts underlying the award, we deny this exception.

The Union also alleges that the Arbitrator's interpretation of the parties' negotiated grievance procedure fails to draw its essence from the parties' agreement. Because the Arbitrator's interpretation is not irrational, unfounded, implausible, or in manifest disregard of the agreement, we deny this exception.

Additionally, the Union alleges that the award is incomplete, ambiguous, or contradictory as to make implementation of the award impossible. Because the Union does not demonstrate that the award is impossible to implement, we deny this exception.

Finally, the Union contends that the award is contrary to law because it allegedly (1) finds that the president was not engaged in protected activity, and (2) prevents employees, including the president, from engaging in protected activity. Because these contentions misinterpret the award, they do not demonstrate that the award is contrary to law, and we deny this exception.

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

The president was on 100% "official time."<sup>2</sup> Under Article 7, Section 6 (Article 7) of the parties' agreement, his forty-hour tour of duty was made up of "eight-hour" days.<sup>3</sup> Pursuant to an unfair-labor-practice (ULP) settlement agreement, the parties amended Article 7 to state that the president could choose a flexible tour of duty with start and stop times "between [6:00 a.m. and 6:00 p.m.]" and could request to earn credit hours.<sup>4</sup> Subsequently, the president requested – and the Agency approved – an 8:00 a.m. to 4:30 p.m. tour of duty, consisting of eight hours of work and a half-hour unpaid lunch break.

The Agency filed a grievance with the Union, alleging that the president violated Article 7 by working after 4:30 p.m. at least four times, despite his supervisor's instructions not to do so. The grievance charged the president with "abus[ing] official time" and, without permission, "occupying a government office" in order to work "outside of his scheduled tour of duty while he was

<sup>2</sup> *Id.*

<sup>3</sup> Award at 4.

<sup>4</sup> Exceptions, Attach. 10 at 1.

<sup>1</sup> 5 U.S.C. § 7131(d).

not in a duty status.”<sup>5</sup> As the highest-ranked Union official, the president denied the Agency’s grievance. The Agency then invoked arbitration.

Each party proposed issues to the Arbitrator. The Union asked the Arbitrator to address whether the Agency: failed to process the grievance through the four steps in the parties’ negotiated grievance procedure, violated various sections of the Federal Service Labor-Management Relations Statute (the Statute),<sup>6</sup> and violated the parties’ agreement. The Agency’s proposed issue was whether “[the president] . . . improperly work[ed] outside his official duty time on various occasions, without proper authority.”<sup>7</sup> Because the parties could not agree on the issue, the Arbitrator framed it, in pertinent part, as whether the Agency violated “any provision of the [parties’ agreement] when it issued a directive to the [president] that he work only his regularly scheduled tour of duty.”<sup>8</sup>

At arbitration, the Union asserted that the grievance was not arbitrable because the Agency had advanced the grievance to arbitration without completing all of the steps in the parties’ negotiated grievance procedure, which are set forth in Article 10, Section 8 (Article 10) of the parties’ agreement. Article 10 states that, at the first step, the grievance “must be . . . presented to the first[-]level supervisor.”<sup>9</sup> If the parties do not settle the grievance at the first step, then, in the second step, the grievance “can be submitted” to the “second[-]level supervisor” or to an Agency labor-relations employee.<sup>10</sup> The third and fourth steps expressly refer to actions that “the [U]nion” must take within specified timeframes to advance a grievance.<sup>11</sup> Article 11, Section 1 (Article 11) states that, after the fourth step, a grievance “may be submitted to arbitration.”<sup>12</sup>

Regarding the first two steps, the Arbitrator found that it would be nonsensical to require the Agency to submit its grievance to the Agency officials referenced in Article 10 because those officials are the same ones who *initiated* the grievance. And because the third and fourth steps explicitly refer to “the [U]nion” as the grieving party, the Arbitrator found that those steps did not apply to an Agency-filed grievance.<sup>13</sup> Consequently, he found that not all four steps in Article 10 applied to

this Agency-filed grievance and that, after the Union president denied the grievance, Article 11 permitted the Agency to take the grievance “directly to arbitration.”<sup>14</sup>

On the merits, the Arbitrator found that the president had worked outside of his approved tour of duty on “several occasions”<sup>15</sup> without requesting overtime pay or compensatory time. The Arbitrator also found that the parties’ agreement did not permit the president to decide *unilaterally* to work outside of his approved tour. According to the Arbitrator, “[i]f the [president] needs to work [more than eight hours of official time per day] to fulfill his Union responsibilities[, then] he still needs authorization from his supervisor.”<sup>16</sup> Thus, the Arbitrator concluded that the Agency did not violate the parties’ agreement when the president’s supervisor instructed him not to work outside of his tour without prior authorization.

On December 22, 2017, the Union filed exceptions to the Arbitrator’s award, and on January 19, 2018, the Agency filed an opposition to the Union’s exceptions.

### III. Analysis and Conclusions

- A. The Union has not demonstrated that the Arbitrator’s framing of the issue is deficient.

The Union makes a number of arguments related to the Arbitrator’s framing of the issue. Where the parties fail to stipulate the issue, the arbitrator may formulate the issue on the basis of the subject matter before him or her, and the Authority accords this formulation substantial deference.<sup>17</sup> In those circumstances, the Authority examines whether the award is directly responsive to the issue that the arbitrator framed.<sup>18</sup> As relevant here, the Arbitrator framed the issue as whether the Agency violated “any provision of the [parties’ agreement] when it issued a directive to the [president] that he work only his regularly scheduled tour of duty.”<sup>19</sup>

The Union argues that, because the framed issue ignored the Union’s claims that many of the Agency’s actions – including the filing of the grievance itself – violated the Statute, the Arbitrator based the framed issue

<sup>5</sup> Exceptions, Attach. 5, Agency’s Grievance and Union’s Response (Grievance) at 2.

<sup>6</sup> 5 U.S.C. §§ 7106(b)(2)-(3), 7114.

<sup>7</sup> Opp’n at 4.

<sup>8</sup> Award at 4.

<sup>9</sup> *Id.* at 5.

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

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

<sup>12</sup> *Id.* at 6.

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

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

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.* at 13.

<sup>17</sup> *AFGE, Council of Prison Locals #33, Local 0922*, 69 FLRA 351, 352 (2016) (*Local 0922*) (citing *AFGE, Local 522*, 66 FLRA 560, 562 (2012)).

<sup>18</sup> *Id.*

<sup>19</sup> Award at 4.

on a nonfact<sup>20</sup> and exceeded his authority,<sup>21</sup> and the award is contrary to law.<sup>22</sup> The Union also asserts that the Arbitrator's framing of the issue denied the Union a fair hearing because the framed issue did not permit the Union to rebut the grievance's official-time-abuse allegation.<sup>23</sup> Because the parties did not stipulate to the issue and the Arbitrator's framed issue includes only contractual violations, he was not required to address any statutory claims.<sup>24</sup> Further, the Union does not demonstrate how it was prejudiced by allegedly not having the opportunity to rebut the grievance's charge of official-time abuse.<sup>25</sup> Accordingly, the Union has not demonstrated that the Arbitrator's framing of the issue is deficient.<sup>26</sup>

<sup>20</sup> Exceptions at 25 (arguing that the framed issue is different from "the grievance [that] the Union answered").

<sup>21</sup> *Id.* at 33-34; *see id.*, Attach. 3, Union Submission for Grievance 17-01-04 at 1 (alleging violations of § 7106(b)(2) and (3), and § 7114, of the Statute); *see also Local 0922*, 69 FLRA at 352 (citing *U.S. DOD, Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996)) (An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration.).

<sup>22</sup> Specifically, the Union claims that the Agency attempted to use the grievance process to: (1) retaliate against the president for engaging in activity protected under § 7102 of the Statute, and (2) change Articles 7, 10, and 11 of the parties' agreement without bargaining as required under §§ 7114 and 7119. Exceptions at 9-10, 13-14. Consequently, according to the Union, by filing the grievance, the Agency violated §§ 7116 and 7118 of the Statute. *Id.* at 9-10, 14. The Union also argues that the award is contrary to § 7121 of the Statute because the Arbitrator failed to apply the standards and burdens of proof that an administrative law judge would when adjudicating a ULP, and that the award is contrary to § 7131 because the Arbitrator failed to resolve the Union's statutory claims. *Id.* at 16-18.

<sup>23</sup> Exceptions at 22-23.

<sup>24</sup> *E.g.*, *NAGE, SEIU, Local 551*, 68 FLRA at 285, 287 (2015); *SPORT Air Traffic Controllers Org.*, 66 FLRA 547, 549 (2012) (*SPORT*) (citing *U.S. DHS, U.S. ICE*, 65 FLRA 792, 795 (2011) (*ICE*)).

<sup>25</sup> *E.g.*, *AFGE, Local 2152*, 69 FLRA 149, 152 (2015) (*Local 2152*) (citing *AFGE, Local 1668*, 50 FLRA 124, 126 (1995) (*Local 1668*)) (The Authority will find an arbitration award deficient on fair-hearing grounds where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole.); *AFGE, Council of Prison Locals, Local 3828*, 66 FLRA 504, 505 (2012) (*Local 3828*).

<sup>26</sup> *SPORT*, 66 FLRA at 549 (citing *ICE*, 65 FLRA at 795; *Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 891 (2010)) ("As the issues before the Arbitrator were purely contractual, the Union's statutory claim provides no basis for finding the award contrary to law."); *Local 3828*, 66 FLRA at 505 (citing *Local 1668*, 50 FLRA at 126); *see also AFGE, Council of Prisons Locals, Council 33*, 70 FLRA 191, 194 (2017) (citing *NAIL, Local 17*, 68 FLRA 97, 99 (2014))

## B. The award is not based on nonfacts.

In addition to the nonfact claim discussed above, the Union alleges that the award is based on several additional nonfacts.<sup>27</sup> To establish that an award is based on a nonfact, the excepting party must demonstrate that the arbitrator made a clearly erroneous factual finding, but for which the arbitrator would have reached a different result.<sup>28</sup>

First, the Union argues that the Arbitrator's interpretation of the parties' negotiated grievance procedure is a nonfact.<sup>29</sup> However, the Authority has held that parties may not challenge an arbitrator's interpretation of a collective-bargaining agreement on nonfact grounds.<sup>30</sup> Thus, the Union's argument lacks merit.

Additionally, the Union argues that the Arbitrator made three alleged misstatements that constitute nonfacts, specifically that: (1) the Agency denied the president's request for "a flexible work schedule,"<sup>31</sup> (2) the president was the "grievant,"<sup>32</sup> and (3) the president worked outside of his approved tour of duty on "several occasions."<sup>33</sup> However, the Union has not established that any of these alleged misstatements are central facts underlying the award, but for which the Arbitrator would have reached a different result.<sup>34</sup> Therefore, we reject this argument.

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

The Union argues that the award fails to draw its essence from Articles 10 and 11 of the parties' agreement because the Arbitrator erroneously found that the Agency did not need to follow all four steps in the grievance procedure before invoking arbitration.<sup>35</sup> 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: (1) cannot in any rational way be derived from the agreement; (2) is so

(arbitrator's interpretation of the scope of the issues before him or her cannot be challenged as a nonfact).

<sup>27</sup> Exceptions at 24-28.

<sup>28</sup> *AFGE, Local 2959*, 70 FLRA 309, 310 (2017) (citing *U.S. Dep't of VA, Med. Ctr., Wash., D.C.*, 67 FLRA 194, 196 (2014)).

<sup>29</sup> *See* Exceptions at 26-27.

<sup>30</sup> *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 70 FLRA 186, 187-88 (2017) (citing *Nat'l Nurses United*, 70 FLRA 166, 167 (2017)).

<sup>31</sup> Exceptions at 26 (citing Award at 3).

<sup>32</sup> *Id.* at 27; *see* Award at 4, 12-13.

<sup>33</sup> Exceptions at 25 (quoting Award at 3).

<sup>34</sup> *E.g.*, *U.S. Dep't of the Treasury, IRS*, 69 FLRA 122, 124 (2015).

<sup>35</sup> Exceptions at 29-32.

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.<sup>36</sup>

As discussed previously, Article 10 sets forth the steps of the parties' negotiated grievance procedure, provides that a grievance must advance progressively through a chain of command, and references specific Agency officials.<sup>37</sup> As the Arbitrator found, it would be nonsensical to require the Agency to submit its grievance to the Agency officials referenced in the first two steps because those officials are the same ones who initiated the grievance.<sup>38</sup> Here, the Agency complied with the first step by submitting the grievance to the Union.<sup>39</sup> When the president – the highest-ranked Union official<sup>40</sup> – rejected the grievance at the first step, there was no higher-ranked Union official to whom the Agency could submit the grievance as a second step. Further, under the plain wording of Article 10, the Agency was not required to advance the grievance through the third and fourth steps because those steps explicitly refer to actions that “the [U]nion” – not the Agency – must take to advance the grievance.<sup>41</sup> Therefore, the Arbitrator's conclusion that the Agency was not required to process the grievance through all four steps before submitting it arbitration is not irrational, unfounded, implausible, or in manifest disregard of Articles 10 and 11. Accordingly, we deny the essence exception.

D. The award is not incomplete, ambiguous, or contradictory as to make it impossible to implement.

The Union argues that the award – which found that the president must seek authorization before working in his government office outside of his tour of duty – is

<sup>36</sup> *Local 2152*, 69 FLRA at 152 (citing *AFGE, Council 220*, 54 FLRA 156, 159 (1998)); see *U.S. Small Bus. Admin.*, 70 FLRA 525, 526-28 (2018) (permitting challenge to arbitrator's procedural-arbitrability determination on essence ground).

<sup>37</sup> Award at 4-5 (Article 10's first step requires filing party to submit grievance to “first[-]level supervisor,” second step permits submission of unresolved grievance to “second[-]level supervisor” or Agency labor-relations employee).

<sup>38</sup> See *id.* (Article 10 provides first-step grievance can be submitted to *first-level supervisor* and second-step grievance can be submitted to *labor-relations officer*); Grievance at 2 (grievance alleges that *first-level supervisor* repeatedly reaffirmed that president was not authorized to work outside his tour of duty); *id.* at 3 (*labor-relations officer* is the person who filed the grievance).

<sup>39</sup> Grievance at 1.

<sup>40</sup> See Award at 2.

<sup>41</sup> *Id.* at 5.

“unclear” and impossible to implement because it allegedly requires the Agency to “order a Union [r]epresentative to cease representation,” which could be a ULP.<sup>42</sup>

For the Authority to find an award deficient as incomplete, ambiguous, or contradictory, the excepting party must show that it is impossible to implement the award.<sup>43</sup> The Union's argument does not demonstrate how the award is *impossible* to implement.<sup>44</sup> Consequently, we deny this exception.

E. The award is not contrary to law.

The Union argues that the Arbitrator's “determination that the [president] was[ not] engaged in protected activity [on the occasions that he worked past 4:30 p.m.] is contrary to law.”<sup>45</sup> Relatedly, the Union argues that the award violates § 7102 of the Statute because implementation would prevent employees, including the president, from performing representational activities outside of their tours of duty.<sup>46</sup> Specifically, the Union alleges that the award would “allow the Agency to dictate the hours that employee[s] may work at the Union [o]ffice,” permit the Agency to “direct . . . employee[s] [performing statutorily protected activity] in [their] off[-]duty hours,” and authorize the Agency to prohibit employees – including the president – from working on internal Union business while off duty.<sup>47</sup>

The Union misinterprets the award. The award does *not* state that the president was engaged in something other than protected activity, and it does not implicate any Union representative other than the president. Further, neither the award, nor the Agency's opposition to the Union's exceptions, indicates that the Agency intended the grievance to prevent the president, or other Union representatives, from engaging in protected activity. The Agency explains that its purpose in filing the grievance was to try to limit its potential liability, for workers' compensation (in the event of injury) or unpaid overtime, because the president was working more than his approved official-time hours.<sup>48</sup> Contrary to the Union's argument,

<sup>42</sup> Exceptions at 20-21.

<sup>43</sup> *Local 2152*, 69 FLRA at 153 (citing *AFGE, Local 1395*, 64 FLRA 622, 624 (2010)).

<sup>44</sup> We note that the award states only that, according to the parties' agreement, the president cannot work outside of his tour of duty without authorization. See Award at 13. The award does *not* state that the Agency *must* withhold that authorization, as the Union suggests.

<sup>45</sup> Exceptions at 15.

<sup>46</sup> *Id.* at 10-11, 15.

<sup>47</sup> *Id.* at 10-11.

<sup>48</sup> Opp'n at 14.

the award does no more than enforce the parties' agreement, which limits the president's official-time tour of duty to "eight-hour days."<sup>49</sup> The award states that, under the parties' agreement, the president cannot work "overtime at his own discretion"<sup>50</sup> and, therefore, he must seek authorization before working more than his approved official-time hours in his government office.<sup>51</sup>

Because the Union's arguments are based on a misinterpretation of the award, they provide no basis for finding the award contrary to law.<sup>52</sup>

#### IV. Decision

We deny the Union's exceptions.

#### Member DuBester, concurring:

I agree with the decision to deny the Union's exceptions. In doing so, I note that the parties' agreement limits the president's official-time paid tour of duty to "eight-hour days."<sup>1</sup> The award, reasonably interpreted, finds that, under the agreement, the president cannot work compensable "overtime at his own discretion"<sup>2</sup> and, therefore, he must seek authorization before working, on a paid basis, more than his approved official-time hours in his government office.<sup>3</sup> With that understanding of the award, I agree that the Arbitrator's award is not deficient.

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<sup>49</sup> Award at 4 (quoting Article 7).

<sup>50</sup> *Id.* at 13 (emphasis added).

<sup>51</sup> *Id.*

<sup>52</sup> *AFGE, Nat'l Joint Council of Food Inspection Locals*, 64 FLRA 1116, 1118 (2010) (party's misunderstanding of award provides no basis for finding award contrary to law).

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<sup>1</sup> Award at 4 (quoting Article 7).

<sup>2</sup> *Id.* at 13 (emphasis added).

<sup>3</sup> *Id.*