70 FLRA No. 152

UNITED STATES
DEPARTMENT OF THE NAVY
PUGET SOUND NAVAL SHIPYARD
AND INTERMEDIATE
MAINTENANCE FACILITY
BREMERTON, WASHINGTON
(Agency)

and

BREMERTON METAL TRADES COUNCIL
(Union)

0-AR-5240

DECISION

August 13, 2018

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

I. Statement of the Case

In this case, we vacate an award because the Arbitrator modified the terms of the parties' agreement instead of interpreting the agreement.

Arbitrator Walter Kawecki, Jr. issued an award finding that the Agency had a nondiscretionary policy, established by past practice, of promoting apprentices every six months when they satisfied certain training and education requirements. He also found that this policy had been incorporated into Article 39 of the parties' collective-bargaining agreement (Article 39). Consequently, he found that the Agency violated Article 39 when it failed to timely promote one apprentice (the grievant) who had satisfied the requirements.

The main question before us is whether the award fails to draw its essence from the agreement. The Arbitrator relied on an alleged past practice to effectively create a new contract provision that entitles apprentices to nondiscretionary promotions under certain circumstances. Because the Arbitrator's finding modified – rather than interpreted – Article 39, the award fails to draw its essence from the agreement. Accordingly, we set aside the award.

II. Background and Arbitrator's Award

The grievant participates in the Agency's apprentice program. Under the apprentice program, the Agency initially appoints apprentices to wage trainee (WT)-1, and they are eligible for noncompetitive promotions every six months until they reach the highest grade of WT-8. Article 39 includes general statements about the apprentice program. For example, it provides that: apprentices will be excepted-service employees until their successful completion of the program, the Agency will train apprentices and assign them a variety of increasingly complex work assignments, and the program administrator will certify apprentices' satisfactory completion of the program. In addition, the Agency's apprentice-program policy states that apprentices' "[p]romotion eligibility will be contingent upon satisfactory academic and work performance and successful completion of a minimum of 900 hours of academics, trade theory[,] and related on-the-job training every six months."[1]

As relevant here, the Agency promoted the grievant from WT-3 to WT-4, but delayed processing the promotion, so she did not receive it on her six-month anniversary. The Union filed a grievance alleging that the Agency failed to timely promote the grievant. The grievance went to arbitration.

At arbitration, the parties did not agree to a stipulated issue, so the Arbitrator framed the issues as: "Did the Agency violate the [agreement] and/or a nondiscretionary [A]gency policy or federal regulations by not promoting [the grievant] . . . on [her six-month anniversary]? If so, what is the appropriate remedy?"[2]

Before the Arbitrator, the Union argued that the Agency had a nondiscretionary policy, established by past practice, of promoting apprentices every six months when they satisfied certain training and education requirements. The Union maintained that the grievant met these requirements by her six-month anniversary, but that the Agency failed to timely promote her because of an administrative error.

Conversely, the Agency argued that apprentices are *eligible* for – but not *entitled* to – promotions every six months because, under the apprentice-program policy, "[p]romotion *eligibility* [is] . . . *contingent* upon satisfactory academic and work performance and successful completion of" certain training and education requirements.[3] According to the Agency, promotions are discretionary because the Agency must evaluate whether

[1] Exceptions, Attach. C, Apprentice Program Policy and Guidelines (Apprentice Policy) at 2.
[2] Award at 3.
[3] Apprentice Policy at 2 (emphasis added).

apprentices have successfully completed the apprentice-program requirements before it approves their promotions.

The Arbitrator considered evidence from both parties regarding the existence of a past practice. The Arbitrator found that no evidence contradicted a Union witness's testimony that, "[d]uring the [thirty] years [that he] managed or oversaw the apprenticeship program, he ensured that apprentices were promoted noncompetitively every six months when they": (1) completed and signed a worksheet demonstrating fulfillment of the 900-hour training requirement, and (2) satisfied all educational requirements with at least a 2.5 grade-point average.[4] The Arbitrator also noted that a particular Agency exhibit (Exhibit 7) showed that the Agency promoted apprentices in six-month intervals 60% of the time. The Arbitrator found that Exhibit 7 demonstrated that "the majority of apprentices were promoted within six[-]month intervals, showing a continuing past practice."[5] Further, the Arbitrator found that a letter from the Agency to the Union concerning the process for verifying training hours demonstrated "the Agency's intent . . . to promote [apprentices] every six months."[6]

In light of these findings, the Arbitrator found that the Agency had "a long-standing past practice" of promoting apprentices every six months when the apprentice "met the satisfactory performance of 900 hours of [training] by completing and signing the [training worksheet,] and [met] all [of] the educational requirements with a 2.5 [grade-point average] or better."[7] The Arbitrator found that this practice created a "nondiscretionary"[8] policy that "became part of Article 39."[9] The Arbitrator also found that the grievant was eligible for a promotion under the policy because she satisfied the promotion requirements by her six-month anniversary. Thus, the Arbitrator concluded that the Agency violated the agreement by failing to timely promote the grievant. As a remedy, the Arbitrator found that the grievant was entitled to a retroactive promotion.

On November 8, 2016, the Agency filed exceptions to the Arbitrator's award, and on November 28, 2016, the Union filed an opposition to the Agency's exceptions.

[4] Award at 14.
[5] *Id.*
[6] *Id.* at 15.
[7] *Id.* at 14.
[8] *Id.* at 15.
[9] *Id.* at 14.

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

The Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator's finding of a nondiscretionary past practice of promoting apprentices every six months improperly modifies Article 39.[10] The Authority will find that an arbitration award fails to draw its essence from a collective-bargaining agreement when the excepting 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.[11] Further, arbitrators may consider parties' past practices when interpreting an ambiguous contract provision,[12] but they may not rely on past practices to *modify* the terms of a contract.[13]

As noted above, Article 39 provides, in general terms, for the existence of an apprentice program. But Article 39 does *not* discuss the eligibility requirements for promoting apprentices every six months. Thus, there is no *ambiguous* contract term that required the Arbitrator to consider the parties' past practice. Yet the Arbitrator found that the Agency's alleged "long-standing past practice"[14] of promoting apprentices every six months when they satisfied certain program requirements created a "nondiscretionary"[15] promotion policy that "became part of Article 39."[16] By effectively converting the parties' practice into a brand new contract provision that entitles apprentices to promotions in certain circumstances, the Arbitrator modified – rather than interpreted – Article 39. Although arbitrators may look to parties' past practices when interpreting an

[10] Exceptions at 11-12.
[11] *See, e.g.*, *SSA*, 70 FLRA 227, 229 (2017); *Library of Cong.*, 60 FLRA 715, 717 (2005) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).
[12] *E.g.*, *U.S. Dep't of the Treasury, U.S. Customs Serv., Region IV, Miami Dist.*, 41 FLRA 394, 396, 398-99 (1991) (*Treasury*) (arbitrator did not err by relying on parties' past practice to interpret ambiguous contract provision).
[13] *See Keebler Co. v. Milk Drivers & Dairy Empls. Union, Local No. 471*, 80 F.3d 284, 288 (8th Cir. 1996) ("Although the arbitrator is free to look to past practice to construe ambiguous contract language, he cannot amend the contract."); *Judsen Rubber Works, Inc. v. Mfg., Prod. & Serv. Workers Union, Local No. 24*, 889 F. Supp. 1057, 1064 (N.D. Ill. 1995) (noting that "for reliance on past practice to be proper, it must be predicated on some need for interpretive assistance").
[14] Award at 14.
[15] *Id.* at 15.
[16] *Id.* at 14.

ambiguous[17] contract provision, they may not rely on past practices to create a new contract provision.[18] Because the Arbitrator effectively did so here, we find that his award fails to draw its essence from the agreement, and we set it aside.[19]

In so doing, we acknowledge that the Authority has previously stated that an agreement's silence on a matter addressed by an arbitrator does not, by itself, demonstrate that the arbitrator's award fails to draw its essence from the agreement.[20] However, to the extent that such precedent is inconsistent with this decision, we reverse that precedent.

IV. Decision

We set aside the award.

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[17] Member Abbott reiterates his concerns about use of "ambiguous" contract provisions as he has expressed recently. *See U.S. DHS, CBP, El Paso, Tex.*, 70 FLRA 623, 625 (2018) (Concurring Opinion of Member Abbott) (rejecting the notion of "critical ambiguity" (aka "critical contract terminology") that forms basis upon which to remand).

[18] *See, e.g.*, *Keebler Co.*, 80 F.3d at 288 (award failed to draw its essence from the parties' agreement where "the arbitrator was not construing an ambiguous contract term, but rather was imposing a new obligation upon [the employer] thereby amending the collective[-]bargaining agreement"); *cf. Treasury*, 41 FLRA at 398-99 (rejecting claims that arbitrator's award was deficient where "[a]rbitrator considered the parties' past practice *only to interpret* the agreement" (emphasis added)).

[19] Because we set aside the award on essence grounds, we find it unnecessary to resolve the parties' remaining arguments.

[20] *E.g.*, *U.S. Dep't of the Treasury, IRS, Ogden Serv. Ctr.*, 69 FLRA 599, 602 (2016) (Member Pizzella dissenting); *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Office of Marine & Aviation Operations, Marine Operations Ctr.*, 67 FLRA 244, 246 (2014) ("where an arbitrator interprets an agreement as imposing a particular requirement, the agreement's silence with respect to that requirement does not, by itself, demonstrate that the arbitrator's award fails to draw its essence from the agreement").

Member DuBester, dissenting:

The majority's decision is another step in their misguided effort to eliminate consideration of parties' past practices when determining the parties' rights and obligations in their collective-bargaining relationship. In previous cases, the majority has rejected reliance on parties' past practices "to modify the clear terms of a bargained-for agreement."[1] I strongly disagreed. In my view, "[a]n arbitrator's award that appears contrary to the express terms of the agreement may nevertheless be valid if it is premised upon reliable evidence of the parties' intent."[2]

Now, the majority rejects reliance on parties' past practices even where no "clear terms of a bargained-for agreement" are involved. The majority's holding here, like their previous rejection of past-practice principles, conflicts with decades of legal authority on this subject, including long-standing, well-reasoned Authority past-practice precedent, established arbitral practice, and the predominant view of the courts.

Contrary to the majority, I would find that the award does *not* fail to draw its essence from the parties' agreement. In order to establish conditions of employment through a past practice, a party must show that the practice has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other.[3] And here, the Arbitrator found that the Agency "has . . . a nondiscretionary promotion practice of promoting apprentices every [six] months" when the apprentice meets the Agency's requirements.[4] The majority does not dispute this finding.

The Arbitrator further finds that this "long-standing past practice . . . became part of" the provision in the parties' agreement, Article 39, establishing the Agency's apprentice-training program.[5] Relying on this past practice, the Arbitrator determines that the grievant met all the requirements for her promotion, and concludes that "[b]ut for[] the Agency failing to timely process the paperwork," the grievant would have been promoted earlier.[6]

The majority rejects the Arbitrator's reliance on the parties' undisputed past practice because "Article 39 does *not* discuss the eligibility requirements for promoting apprentices every six months."[7] But the parties' failure to expressly discuss this particular aspect of the apprentice program does not alter the significance of the parties' past practice.

As the Authority has held, "the meaning of [an] agreement must '[u]ltimately . . . depend[] on the intent of the contracting parties.'"[8] And as the Supreme Court has explained in the context of labor arbitration: "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the [workplace] common law – the practices of the [workplace] – is equally a part of the collective[-]bargaining agreement, although not expressed in it."[9] *Elkouri and Elkouri* adds: "It is well recognized that the contractual relationship between the parties normally consists of more than the written word. Day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are not at variance with any written provision negotiated into the contract by the parties and where they are . . . long standing and were not changed during contract negotiations."[10] "Unquestionably, the custom and past practice of the parties constitutes one of the most significant evidentiary considerations in labor-management arbitration,"[11] and accordingly can be used "to fill in the contract's gaps."[12]

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[1] *U.S. Small Bus. Admin.*, 70 FLRA 525, 528 (2018) (*SBA*) (Member DuBester dissenting); *see also U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence, Colo.*, 70 FLRA 748 (2018) (Member DuBester dissenting) (*DOJ*); *U.S. Dep't of the Army 93rd Signal Brigade Fort Eustis, Va.*, 70 FLRA 733, 734 (2018) (*Army*) (Member DuBester dissenting).

[2] *SBA*, 70 FLRA at 531 (Dissenting Opinion of Member DuBester) (quoting *Elkouri & Elkouri, How Arbitration Works*, 12-28 (Kenneth May ed., 8th ed. 2016) (*Elkouri*) (citing *Int'l Bhd. of Elec. Workers, Local Union No. 199 v. United Tel. Co. of Fla.*, 738 F.2d 1564, 1568 (11th Cir. 1984))); *see, e.g.*, *Dep't of the Navy, Naval Underwater Sys. Ctr., Newport Naval Base*, 3 FLRA 413, 414 (1980) (parties may establish terms and conditions of employment by practice, and those terms and conditions may not be altered by either party in the absence of agreement); *see also DOJ*, 70 FLRA at 750-51 (Dissenting Opinion of Member DuBester); *Army*, 70 FLRA at 735 (Dissenting Opinion of Member DuBester).

[3] *See, e.g.*, *U.S. Dep't of the Interior, U.S. Geological Survey Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 737 (2015).

[4] Award at 15.

[5] *Id.* at 14.

[6] *Id.* at 13.

[7] Majority at 4.

[8] *IRS, Wash., D.C.*, 47 FLRA 1091, 1110 (1993).

[9] *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960)

[10] *Elkouri* at 12-2 (quoting Arbitrator Marlin M. Volz, in *Metal Specialty Co.*, 39 LA 1265, 1269 (Volv, 1962)).

[11] *Id.* at 12-1.

[12] *Id.* at 12-28; *see also Cruz-Martinez v. DHS*, 410 F.3d 1366, 1371 (Fed. Cir. 2005) ("We find that the arbitrator was correct that, on the facts in this case, the collective[-]bargaining agreement does not preclude the consideration of extrinsic evidence to show a binding past practice. This is particularly the case here where the past practice does not contradict any written provision in the collective[-]bargaining agreement, but simply defines the course of dealing between the parties in an area where the contract is silent, i.e., the past practice fills a gap in the contract.").

The Arbitrator's award adheres to these principles. The majority's decision disregards them. Accordingly, I defer to the Arbitrator's rational and well-reasoned interpretation of the parties' agreement and would find that the award draws its essence from the agreement. I dissent from the majority's decision to do otherwise.