73 FLRA No. 101

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
POPLAR BLUFF, MISSOURI
(Agency)

0-AR-5839

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DECISION

May 8, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

The Union filed a grievance challenging the Agency's failure to select an employee (the grievant) for a position. Arbitrator Elizabeth C. Simon found the Union's grievance untimely and, alternatively, that the Agency did not violate the parties' collective-bargaining agreement by failing to select the grievant. The Union excepted to the Arbitrator's award on several grounds, including fair-hearing, essence, fraud, and nonfact. Because the Union's exceptions do not establish that the award is deficient, we deny them.

II. Background and Arbitrator's Award

The grievant applied for an air-conditioning-equipment mechanic position as an internal candidate. The Agency found that the grievant met the minimum qualifications for the position. However, after interviewing the grievant, the Agency determined that he did not have the necessary experience to perform the position's duties, so it did not offer him the position. Instead, the Agency offered the position to two higher-ranked candidates, who both turned it down.

In response to a Union request, the Agency verified on June 19, 2019,[1] that it had not selected the grievant for the position. On July 2, the Union audited the position-selection process in accordance with procedures from the parties' agreement. Following the audit, the Union requested additional documents from the Agency (the first information request). A month later, the Union submitted an information request concerning a specific Agency official (the second information request). The Agency responded to neither request.[2]

On August 9, the Union filed a grievance alleging that the Agency's failure to appoint the grievant to the mechanic position violated the merit-promotion provisions of the parties' agreement. The Union further alleged that the Agency discriminated against the grievant because he is a veteran. The grievance proceeded to arbitration.

At the outset, the Arbitrator noted that the case "was complicated by the animosity between the parties," who "presented a number of arguments and counter-arguments [that were] only tangentially relevant to th[e Union's] grievance."[3] Due to these complications, and based on the parties' failure to stipulate the issues, the Arbitrator determined that she would frame and address "only" two issues:[4] whether the case was procedurally arbitrable and, if so, whether the Agency violated the parties' agreement by failing to select the grievant for the mechanic position.

Addressing procedural arbitrability, the Arbitrator noted that the parties' agreement included a "clear" thirty-day filing requirement.[5] The Arbitrator found that the Union filed the grievance more than thirty days after receiving notice, on June 19, that the Agency had not selected the grievant. Even using the "lenient date" of the July 2 audit, the Arbitrator found that the grievance was eight days late.[6] According to the Arbitrator, the Union "possessed the basic information it needed to file a grievance" by no later than August 1.[7] With regard to the grievance's timeliness, the Arbitrator found irrelevant the Union's arguments that the Agency

[1] Unless otherwise noted, dates are in 2019.
[2] *See* Award at 8-9 (noting Agency's claim that first information request was "never received" or "did not comply" with the requirement that the request be in writing); *id.* at 9 n.5 (noting Agency's admission that it did not respond to second information request because it did not believe request was relevant to grievance).
[3] *Id.* at 4 n.1.
[4] *Id.*
[5] *Id.* at 8.
[6] *Id.*
[7] *Id.* at 9.

failed to respond to the information requests[8] and took actions that "blocked the Union from exercising its contractual rights."[9] The Arbitrator concluded that the grievance was untimely under the parties' agreement.

The Arbitrator also found that, "[e]ven if the grievance were arbitrable," the grievant's "non-selection did not violate the [parties' agreement]."[10] On the issue of anti-veteran discrimination, the Arbitrator found that the Union's allegations concerned an Agency official who was not involved in the selection process and that the Union "presented no rebuttal evidence" to counter the Agency's evidence that eighteen out of the twenty-two most recent hires had veteran status.[11]

Ultimately, the Arbitrator denied the grievance, first, on the basis that the Union filed it untimely and, second, because the Union failed to establish that the Agency violated the parties' agreement when it did not select the grievant.[12]

The Union filed exceptions to the award on September 3, 2022, and the Agency filed an opposition on October 6, 2022.[13]

III. Analysis and Conclusions

A. The Union has not established that the hearing was unfair.

The Union raises two fair-hearing exceptions. An award will be found deficient on the ground that an arbitrator failed to provide a fair hearing 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.[14] Disagreements with an arbitrator's evaluation of evidence, including the determination of the weight to be accorded such evidence, provide no basis for finding an award deficient on this ground.[15]

According to the Union, the Arbitrator refused to allow the introduction of evidence about a different arbitrator's finding – in a separate arbitration award (the Remington award) – that the Agency inappropriately denied the Union official time for representational duties.[16] The record shows that the Arbitrator did not allow questioning about the Remington award at the hearing, but permitted the Union to discuss its alleged relevance in the post-hearing brief.[17] Review of the Union's post-hearing brief demonstrates it did, in fact, argue that the Remington award proved the Agency interfered with the grievance's timely filing.[18] However, the Arbitrator determined that the Union's arguments were not relevant to the arbitrability issue.[19] This finding constitutes

[8] *Id.* (finding that "the real issue is whether the absence of a response [to the first information request] from the Agency prevented the Union from [timely] filing its grievance" and concluding that it did not, because the Union possessed the information it needed to file a grievance after conducting the audit); *id.* at 9 n.5 (stating that failure to respond to the second information request was "not relevant to the issue of procedural arbitrability").

[9] *Id.* at 8 n.4.

[10] *Id.* at 11.

[11] *Id.* at 12.

[12] *See id.* at 13 (finding that the Union violated the grievance-filing deadline in the parties' agreement and, "[a]lternatively, even if the case had proceeded to the merits, the Union ha[d] not established that the Agency's decision not to select [the grievant] . . . violated the [parties' agreement]").

[13] On November 10, 2022, the Authority issued an order directing the Agency to correctly serve the Union with its opposition by November 25, 2022. In response, the Agency submitted a certificate of service, including documentation from a commercial delivery service. The tracking history of that delivery service establishes that the Agency deposited the Union's copy of the opposition – and thus effectuated service – on November 23, 2022. *See* 5 C.F.R. § 2429.27(d) ("[T]he date of service shall be the date on which you have: deposited the served documents . . . with a commercial-delivery service that will provide a record showing the date on which the document was tendered to the delivery service . . . ."). Therefore, we find that the Agency complied with the Authority's order, and it is unnecessary to address either the Union's supplemental submission concerning this matter or whether the Union properly requested permission to file it. *See NAGE, Loc. R1-144, Fed. Union of Scientists & Eng'rs*, 65 FLRA 552, 552 n.2 (2011) (after ruling on alleged service deficiencies, finding it "unnecessary to address" a "supplemental submission [concerning those deficiencies] or decide whether it is properly before us"); *see also AFGE, Council 270*, 73 FLRA 73, 73 n.7 (2022) (declining to consider supplemental submission where party "failed to request leave to file that submission").

[14] *AFGE, Loc. 2338*, 73 FLRA 229, 231 (2022).

[15] *AFGE, Loc. 2338*, 71 FLRA 1131, 1132 (2020) (Member Abbott dissenting in part).

[16] Exceptions at 4-5.

[17] Opp'n, Attach. 8, Tr. (Tr.) at 161-63.

[18] Exceptions, Attach. 1, Union's Post-Hr'g Br. at 38 (arguing Remington award established that Agency "miscalculat[ed] official time . . . to prevent representation" by Union).

[19] Award at 8 n.4 (finding allegations that the Agency "blocked the Union from exercising its contractual rights" were not relevant).

weighing the evidence and, as such, does not demonstrate that the Arbitrator failed to conduct a fair hearing.[20]

The Union also argues that the hearing was unfair because two of the Arbitrator's findings rely on evidence that the Agency did not properly introduce.[21] First, the Union alleges that a finding related to the grievance's timeliness was based on an email that was not correctly authenticated by its sender.[22] Second, the Union asserts that the Agency's arbitration witnesses did not have direct knowledge of the Union's first information request and so could not have testified that the Agency "never received" it.[23] As these arguments also challenge the Arbitrator's weighing of the evidence, they do not demonstrate that the Arbitrator failed to conduct a fair hearing.[24]

Accordingly, we deny the Union's fair-hearing exceptions.

B. The Union has not established that the award does not draw its essence from the parties' agreement.

The Union argues that the award does not draw its essence from Article 44, Section 2 of the parties agreement (Article 44).[25] The Authority will find an award fails to draw its essence from the parties' agreement when the excepting party establishes 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.[26]

Article 44 provides that an "arbitrator's decision shall be final and binding."[27] The Union asserts that, under this provision, an arbitration award becomes enforceable as an "appendix" to the parties' local agreement.[28] In the Remington award, an arbitrator found that the Agency "improperly reduc[ed]" official time, thus interfering with the Union's representational duties.[29] The Union asserts that the Arbitrator showed "a manifest disregard" for this "key piece" of the parties' local agreement.[30] However, the Authority has long held that arbitration awards are not precedential[31] and rejected essence exceptions based on an arbitrator's failure to reach the same conclusion as those contained in a prior award.[32] Even assuming that Article 44 required the Arbitrator to accept the findings of the Remington award, the Arbitrator determined that these findings were "*not directly relevant* to the Union's explanation for its delay in filing the grievance."[33]

The Union's arguments do not demonstrate that the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. Therefore, we deny the essence exception.[34]

C. The Union has not established that the award was obtained by fraud.

The Union contends that the award was fraudulently obtained because, at arbitration, a court reporter recorded Union members without their consent.[35] Under § 7122(a) of the Federal Service Labor-Management Relations Statute, the Authority will find an award deficient on grounds similar to those applied by federal courts in private-sector labor-relations cases.[36] Federal courts will find an arbitration award deficient in

[20] *See AFGE, Loc. 3294*, 70 FLRA 432, 435-36 (2018) (*Loc. 3294*) (Member DuBester concurring) (denying fair-hearing exception where party "simply disagree[d] with how the [a]rbitrator evaluated the evidence"); *NFFE, Loc. 858*, 63 FLRA 227, 231 (2009) (*Loc. 858*) (denying fair-hearing exception challenging arbitrator's finding that certain evidence was irrelevant).

[21] Exceptions at 18-20.

[22] *Id.* at 19-20 (regarding email purporting to provide requested information as attachments, where Union alleged that it did not receive the attachments).

[23] *Id.* at 19. Regardless of whether this request was received, the Arbitrator found that "the real issue [wa]s whether the absence of a response from the Agency prevented the Union from [timely] filing its grievance." Award at 9. The Arbitrator found that it did not, because the Union "possessed the basic information it needed to file a grievance" after conducting the audit. *Id.*

[24] *See Loc. 3294*, 70 FLRA at 435-36; *Loc. 858*, 63 FLRA at 231 (exception disagreeing with arbitrator's evaluation of evidence and testimony, including the determination of the weight to be accorded such evidence, did not demonstrate that arbitrator failed to conduct fair hearing).

[25] Exceptions at 7.

[26] *NTEU*, 73 FLRA 431, 433 (2023) (*NTEU*).

[27] Exceptions, Ex. 2, Collective-Bargaining Agreement (CBA) at 235.

[28] Exceptions at 7-8.

[29] *Id.* at 8 (quoting Exceptions, Ex. 4, Remington Award at 29).

[30] *Id.*

[31] *AFGE, Council of Prison Locs. C-33, Loc. 720*, 67 FLRA 157, 159 (2013).

[32] *See, e.g.*, *Bremerton Metal Trades Council*, 71 FLRA 569, 570 n.12 (2020) ("To the extent that the [u]nion's reference to the prior arbitration award could be construed as an argument that the [a]rbitrator erred by failing [to] reach the same conclusion in his award, we reject that argument."); *see also AFGE, Loc. 1741*, 72 FLRA 501, 502 (2021) (Member Abbott dissenting on other grounds) (denying essence exception based on previous arbitration award); *U.S. Dep't of VA, Member Servs. Health Rec. Ctr.*, 71 FLRA 311, 312 (2019) (Member DuBester concurring) (denying argument that earlier arbitration award supported essence exception).

[33] Award at 8 n.4 (emphasis added) (declining to address, as irrelevant, Union allegations that "the Agency repeatedly blocked the Union from exercising its contractual rights").

[34] *See, e.g.*, *NTEU*, 73 FLRA at 433.

[35] Exceptions at 10 & n.7 (citing *Fed. Emps. Metal Trades Council*, 49 FLRA 1096, 1099 (1994) (*Metal Trades*)).

[36] *IAMAW, Loc. 2333*, 53 FLRA 1605, 1608 (1998) (*IAMAW*).

the private sector when it is established that the award was obtained by fraud.[37] In order to find an award deficient on that basis, the fraud: (1) must not have been discoverable on the exercise of due diligence prior to arbitration; (2) must materially relate to an issue in the arbitration; and (3) must be established by clear and convincing evidence.[38]

The Union asserts its participants had a right not to be recorded at the arbitration hearing under Article 17, Section 4 of the parties' agreement, which requires mutual consent before recording "conversation[s] between a bargaining[-]unit employee and a[n Agency] official."[39] The Union also argues that the court reporter, an alleged agent of the Agency, violated an Agency policy requiring consent in the production and use of video and audio recordings.[40] Even if the Union were able to establish that these consent requirements applied to the arbitration hearing, it is unclear how the court reporter's alleged failure to seek consent before recording the proceedings materially relates to the arbitrated issues: the grievance's arbitrability or the Agency's non-selection of the grievant for an air-conditioning-mechanic position.[41]

Further, this exception is based on the Union's unsupported assertion that the hearing participants were unaware that the court reporter was recording the arbitration proceedings. The Agency disputes that assertion,[42] and the record indicates that the Arbitrator informed both parties that she did "not want anyone else . . . recording" the proceeding because the court reporter would "make[] the official transcript."[43] Because the Union fails to establish that the alleged fraud occurred, let alone that it was material, we deny this exception.[44]

D. The Union has not established that the award is based on a nonfact.

The Union argues the award is based on a nonfact. To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[45] A party's disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, does not provide a basis for finding that an award is based on a nonfact.[46]

The Union contends that the Arbitrator erred in determining the relevance of Union allegations that the Agency "blocked the Union from exercising its contractual rights."[47] The Arbitrator's determination that certain Union arguments were not relevant to the arbitrability issue constitutes weighing the evidence, which does not establish that the award is based on a nonfact.[48] Therefore, we deny this exception.

E. The remaining exceptions do not demonstrate that the award is deficient.

The Union argues that (1) the Arbitrator exceeded her authority by failing to resolve an issue related to the Union's second information request[49] and (2) the award is based on the nonfact that the Union did not present rebuttal evidence at arbitration.[50] These exceptions challenge the Arbitrator's conclusion that the Agency did not violate the parties' agreement when it did not select the grievant.[51]

The Authority has repeatedly held that when an arbitrator bases an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient before the Authority will set the award aside.[52] If the excepting party does not demonstrate that the award is deficient on a ground relied on by the

[37] *Id.* (citing *Metal Trades*, 49 FLRA at 1099).
[38] *Id.*
[39] Exceptions at 11 (citing CBA at 61).
[40] *Id.* at 12 (citing Exceptions, Ex. 7, Directive 1078 at 15 (stating that "video or audio recording[s] are prohibited for unofficial purposes, including . . . grievances related to . . . employment-related actions")).
[41] *See IAMAW*, 53 FLRA at 1609 (finding excepting party failed to establish that allegedly false testimony was "materially related to an issue in the arbitration").
[42] *See* Opp'n at 3-4 (arguing Union had notice of recording because the application used for the virtual hearing "automatically" notified the parties).
[43] Tr. at 126.
[44] *See Metal Trades*, 49 FLRA at 1099-1100 (denying fraud exception based on "unsupported allegations that [opposing party] submitted false documents . . . and . . . committed perjury" because excepting party did "not provide[] copies of the alleged false documents or the hearing transcripts").
[45] *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 418, 419 (2023).
[46] *AFGE, Loc. 12*, 70 FLRA 582, 583 (2018).
[47] Exceptions at 14-15 (quoting Award at 8 n.4).
[48] *See AFGE, Loc. 2142*, 72 FLRA 764, 766 (2022) (Chairman DuBester concurring) (exception challenging arbitrator's finding that certain agency actions were irrelevant to grievance constituted disagreement with arbitrator's evaluation of the evidence and did not establish award was based on nonfact).
[49] Exceptions at 9-10.
[50] *Id.* at 8-9.
[51] *Id.* at 10 (arguing that the merits issue required resolution of "the matter of the Union's [second] information request"); *id.* at 9 (arguing that the Union presented evidence to rebut Agency evidence related to the merits of the case).
[52] *Fraternal Ord. of Police, DC Lodge 1*, 73 FLRA 408, 412 (2023).

arbitrator, and the award would stand on that ground alone, then it is unnecessary to address exceptions to the other grounds.[53]

The Arbitrator found the grievance procedurally inarbitrable because the Union did not timely file it.[54] This finding constitutes a separate and independent basis for the award.[55] As shown above, the Union fails to establish that the Arbitrator's arbitrability conclusion, or the award as a whole, is deficient. Because the Union's remaining exceptions challenge only the Arbitrator's alternative finding concerning the merits, it is unnecessary to resolve those exceptions, and we deny them.[56]

IV. Decision

We deny the exceptions.

[53] *AFGE, Council of Prison Locs. 33, Loc. 3690*, 69 FLRA 127, 132 (2015).
[54] Award at 13.
[55] *See AFGE, Loc. 3438*, 65 FLRA 2, 4 (2010) (finding that "timeliness determination constitute[d] a separate and independent basis" for award).
[56] *See id.* (denying exceptions to "alternative" merits finding where party failed to establish that arbitrability finding was deficient).