

73 FLRA No. 12

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R3-74
SERVICE EMPLOYEES
INTERNATIONAL UNION
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
BUTLER VA MEDICAL CENTER
BUTLER, PENNSYLVANIA
(Agency)

0-AR-5776

DECISION

June 14, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members

I. Statement of the Case

In this case, Arbitrator Norman R. Harlan denied a grievance alleging that the Agency violated the parties' collective-bargaining agreement (CBA) when it reassigned an employee without following proper CBA procedures concerning department-initiated reassignments. The Union argues that the Arbitrator's award fails to draw its essence from the CBA because the Arbitrator ignored dispositive contract language. As discussed below, we are unable to determine whether the award is deficient as raised in the Union's exception, and we remand it for further action consistent with this decision.

II. Background

On April 21, 2020, the Agency reassigned a psychologist working as a Military Sexual Trauma Coordinator to the position of Local Recovery Coordinator

(LRC). On June 4, 2020, the Union filed a grievance alleging that the Agency had failed to solicit internal applicants for the LRC role, in violation of Article 7, Section 1 of the CBA, regarding employee rights, and in violation of Article 25, Section 7. That provision states, in relevant part:

D. The Department will adhere to the following procedures prior to effecting a Department initiated reassignment of an employee(s):

1. The Department will determine which employees are qualified for the reassignment.
2. The Department will solicit volunteers from within the pool of qualified employees, 30 days in advance of a Department initiated reassignment.
3. A Department initiated reassignment of an emergent nature will be accomplished by detailing qualified employees on a temporary basis until such time the procedures for involuntary reassignment have been completed.
4. If there are more volunteers than needed, the Department will reassign the employee(s) with the greatest amount of seniority in accordance with Article 60: Seniority; and
5. If there are not enough volunteers, the Department will reassign the employee(s) with the least amount of seniority in accordance with Article 60: Seniority.¹

The Union requested as a remedy that the Agency follow the procedures outlined in Article 25, including soliciting internal applicants for the LRC position and, if there are no interested qualified individuals, reassign the employee with the least amount of seniority. The Agency denied the grievance² and the matter proceeded to arbitration.

In an October 26, 2021 award, the Arbitrator noted that the Union's representative defined the issue at the hearing by stating "I can just limit our request and remedy to posting this position and there be an application process."³ The Arbitrator found that "[t]here is no language in either" Articles 4 or 5 of the CBA, regarding management and union rights, "which supports the relief

¹ Exceptions, Attach. 4, Joint-Agency Exhibits at 350 (Article 25: Details, Reassignments, and Temporary Promotions); *see also* Award at Appendix II(b)-(c) (the Union's Step 3 Grievance). The Union's Step 3 Grievance specifically recites the exact language of Article 7, Section 1 and Article 25, Section 7 that the Union alleges the Agency violated by not soliciting internal

applicants for the LRC opportunity. Award at Appendix II(b)-(c).

² In the grievance denial, the Agency specifically concluded that "[t]he Agency finds no violations of Article 25 of the [CBA]." Award at Appendix II(e).

³ *Id.* at 3; *see also id.* at 4.

sought by [the Union].”⁴ The Arbitrator then concluded that “[c]learly” there was no “express” or “implied” language within the CBA which required the Agency to post the LRC position.⁵ The Arbitrator noted that Article 41, Section 7 of the CBA – which provides that an arbitrator may not add to, subtract from, or modify the terms of the CBA – “expressly prohibits an arbitrator from ‘writing [c]ontract.’”⁶ The Arbitrator then denied the grievance.

The Union filed an exception to the award on November 24, 2021. The Agency did not file an opposition to the Union’s exception.

III. Analysis and Conclusion: We remand the award for further findings concerning the Union’s essence exception.

The Union argues that the Arbitrator’s conclusion that there is no explicit or implied language in the CBA that requires the Agency to post the LRC position fails to draw its essence from the CBA⁷ because it ignores Article 25, Section 7, which “is directly applicable” to the department-initiated reassignment to the LRC position in this case.⁸ The Union argues that the Arbitrator’s inexplicable “ignorance of Article 25 can only be described as irrational or unconnected to the wording and purposes of the negotiated agreement.”⁹ The Union urges us to “remand this case back to arbitration with a different arbitrator for further proceedings.”¹⁰

Given the Arbitrator’s brief and unsupported conclusion at issue here, we are unable to determine whether the Arbitrator’s contractual interpretation is deficient as failing to draw its essence from the agreement.

⁴ *Id.* at 8.

⁵ *Id.*

⁶ *Id.* In the award, the Arbitrator stated “Section 1 of ARTICLE 7 is quoted supra, p.7. It expressly prohibits an arbitrator from ‘writing [c]ontract.’” *Id.* However, the only CBA provision quoted on page seven of the award is Article 41, Section 7, which provides that “[t]he arbitrator will derive his or her authority from this negotiated agreement and in rendering a decision, must not add to, subtract from, nor modify any terms of this agreement.” *Id.* at 7.

⁷ When reviewing an arbitrator’s interpretation of a collective-bargaining agreement, the Authority will find that an arbitration award is deficient as failing to draw its essence from the 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 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. *U.S. Dep’t of HHS*, 72 FLRA 522, 524 n.19 (2021) (*HHS*) (Chairman DuBester concurring) (citing *Ass’n of Admin. Law Judges, IFPTE*, 72 FLRA 302, 304 (2021) (Member Abbott concurring)).

The Arbitrator did not discuss how or why the Arbitrator concluded that “[c]learly there is no express language or any implied language within the [CBA] which requires the Agency to post the position of [LRC].”¹¹ The Arbitrator did not provide any factual support or legal analysis beyond this one conclusion. The Arbitrator did not specify the CBA language that the Arbitrator reviewed and interpreted, or how the Arbitrator applied that language to the circumstances presented in this case. Moreover, it is unclear from the award whether the Arbitrator even considered Article 25, Section 7, which is discussed at length in the Union’s grievance. As a result, we are unable to determine whether the Arbitrator’s contractual interpretation was irrational, unfounded, implausible, or in manifest disregard of the agreement.¹²

Where, as here, the arbitrator’s findings are insufficient for the Authority to determine whether the award is deficient on the grounds raised by a party’s exceptions, the Authority will remand the award.¹³ Accordingly, we remand the award to the parties for resubmission to arbitration, absent settlement, for further findings on whether the CBA required the Agency to post the LRC position. Consistent with this decision, the resulting award should explain the contractual bases for any conclusions; explain any interpretations of the parties’ agreement; and provide adequate factual findings.¹⁴

IV. Decision

We remand this case for action consistent with this decision.¹⁵

⁸ Exception Br. at 4.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Award at 8.

¹² See *HHS*, 72 FLRA at 524 (where the arbitrator did not articulate any factual findings, conclusions, or contractual interpretations, the Authority was unable to determine whether the arbitrator’s contractual interpretation was irrational, unfounded, implausible, or in manifest disregard of the agreement and remanded the matter for further findings); *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 72 FLRA 146, 148 (2021) (*DHS*) (Chairman DuBester dissenting in part) (where the arbitrator failed to explain or support conclusions, the Authority was unable to determine whether the award drew its essence from the agreement and thus remanded for further findings).

¹³ *HHS*, 72 FLRA at 524 (citing *DHS*, 72 FLRA at 148).

¹⁴ *Id.* at 524-25 (citing *DHS*, 72 FLRA at 149).

¹⁵ Nothing in this decision precludes the parties from mutually agreeing to select a different arbitrator upon remand. *E.g., U.S. Dep’t of VA*, 72 FLRA 212, 214 n.25 (2021) (Chairman DuBester concurring in part).