

73 FLRA No. 134

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY GARRISON
PICATINNY ARSENAL, NEW JERSEY
(Agency)

and

INTERNATIONAL ASSOCIATION
OF FIREFIGHTERS
LOCAL F-169
(Union)

0-AR-5864

DECISION

September 29, 2023

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

I. Statement of the Case

The Union filed a grievance alleging the Agency's indefinite closure of a fire station caused staffing changes that violated the parties' collective-bargaining agreement, as well as various Agency policies, regulations, and standards. Arbitrator A. Martin Herring issued an arbitrability award finding the grievance timely as alleging a continuing violation. He then issued a merits award sustaining the grievance and directing the Agency to restore staffing "as it existed" prior to the station closure.¹

The Agency filed exceptions. We find §§ 2425.4(c) and 2429.5 of the Authority's Regulations² bar several of the Agency's essence challenges to the arbitrability and merits awards. We also find the Agency's remaining essence exception to the arbitrability award does not show that the Arbitrator's interpretation of the parties' agreement is deficient. Further, we partially grant and partially deny the incomplete-and-ambiguous

exception and remand the merits award for resubmission to the Arbitrator, absent settlement, for clarification of the awarded remedy.

II. Background and Arbitrator's Awards

The Agency, through the Picatinny Arsenal Fire Department (the fire department), provides fire and emergency services. For several years, the fire department operated two stations: station one, with at least eight staffed positions per shift, and station two, with at least four staffed positions per shift. On September 28, 2021,³ the Agency notified the Union that it would indefinitely close station two due to budgetary shortfalls. On October 12, the Agency closed station two and reduced the number of staffed fire-department positions per shift from twelve to nine.

On November 8, the Union filed a grievance alleging that, on "October 12-17, 20-31, November 1-3, and on a continuing occurrence, the Agency has failed to properly staff" the fire department.⁴ The Union asserted that this violated staffing requirements in the parties' agreement;⁵ Standard Operating Guideline 900.003 (guideline 900.003);⁶ a Department of Defense instruction;⁷ nationally accepted fire-department operation standards;⁸ an Agency community-risk assessment;⁹ a U.S. Department of the Army regulation;¹⁰ and a statute requiring compliance with nationally accepted technical standards.¹¹ The Agency denied the grievance, and the parties submitted it to arbitration. The parties did not stipulate issues for resolution, and the Arbitrator did not frame any.

At the Agency's request, the Arbitrator addressed the grievance's arbitrability as a threshold matter. According to the Agency, the grievance was untimely under Article 15, Section 7 of the parties' agreement (Article 15). Article 15 states that "[g]rievances must be presented within [twenty-one] days after receipt of the notice of action, occurrence of the incident[,] or knowledge of the incident (whichever occurs first)."¹² The Agency argued that the Union filed the grievance more than twenty-one days after the first event: the September 28 notice of station two's indefinite closure. The Union countered that the Agency was barred from raising timeliness for the first time at the arbitration hearing and that the grievance involved a continuing

¹ Merits Award at 12.

² 5 C.F.R. §§ 2425.4(c), 2429.5.

³ Unless otherwise stated, all dates are in 2021.

⁴ Exceptions, Ex. 2, Grievance (Grievance) at 1.

⁵ Opp'n, Ex. 2, Collective-Bargaining Agreement Art. 16, § 3 (CBA).

⁶ Exceptions, Ex. 3.

⁷ DOD Instruction 6055.06, DOD Fire & Emergency Servs. (F&ES) Program (2019).

⁸ Nat'l Fire Prot. Ass'n, Standard 1710: Standard for the Org. & Deployment of Fire Suppression Operations, Emergency Med. Operations, & Special Operations to the Pub. by Career Fire Dep'ts (2020).

⁹ Opp'n, Ex. 6.

¹⁰ Army Regul. 420-1, Chapter 25, 273, 279 (2019).

¹¹ Nat'l Tech. Transfer & Advancement Act of 1995, Pub. L. No. 104-113, § 12(d), 110 Stat. 775, 783 (1996).

¹² CBA Art. 15, § 7.

violation, such that “each day that passed created a new timeline for filing the grievance.”¹³

In the arbitrability award, the Arbitrator “credit[ed]” the Union’s argument that the grievance involved a continuing violation and found the grievance arbitrable.¹⁴

In the merits award, the Arbitrator considered the parties’ agreement, along with the “other incorporated rules, regulations[,] and guidelines” on which the Union based its grievance.¹⁵ The Arbitrator found the language in these documents was “more than advisory.”¹⁶ He also found that the parties had a past practice based on the “plain meaning and practicable implementation” of these documents, and that the Agency “could not . . . ignore[] or unilaterally change[]” that practice.¹⁷ The Arbitrator sustained the grievance and directed the Agency to “restore” fire-department staffing “as it existed prior to the [indefinite closure of station two].”¹⁸

The Agency filed exceptions to the award on February 15, 2023,¹⁹ and the Union filed an opposition on March 17, 2023.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar some of the Agency’s arguments.

In excepting to the arbitrability award, the Agency argues that the Arbitrator’s application of the continuing-violation theory fails to draw its essence from the parties’ agreement and is “legally erroneous.”²⁰ The Union alleges that the Agency may not raise these

arguments here because the Agency did not raise them below.²¹ 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.²²

The grievance asserted that the Agency’s alleged staffing violations were a “continuing occurrence.”²³ At arbitration, the Agency countered by arguing that the Union failed to establish the existence of a continuing violation.²⁴ However, nothing in the record indicates that the Agency argued, as it does now,²⁵ that the continuing-violation theory is contrary to the parties’ agreement or “legally erroneous” as applied to the grievance.²⁶ Because the Agency could have raised these arguments to the Arbitrator, but did not, we dismiss them under §§ 2425.4(c) and 2429.5.²⁷

The Agency also raises an essence exception to the merits award.²⁸ Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority will not consider arguments that differ from, or are inconsistent with, a party’s arguments to the arbitrator.²⁹ Characterizing guideline 900.003 as a “bargained [a]greement,” the Agency argues that the merits award fails to draw its essence from guideline 900.003’s staffing requirements.³⁰ The Agency also argues that the Arbitrator’s interpretation of guideline 900.003 “add[s] to” the guideline, in violation of a provision of the parties’ agreement concerning “published Agency polic[ies.]”³¹ Yet, to the Arbitrator, the Agency argued that guideline 900.003 is neither a negotiated agreement nor an Agency policy³² and that “no

¹³ Arbitrability Award at 4.

¹⁴ *Id.*

¹⁵ Merits Award at 10.

¹⁶ *Id.* at 10-11.

¹⁷ *Id.*

¹⁸ *Id.* at 12.

¹⁹ Because the Arbitrator initially mistyped an email address, he did not serve the merits award on the Agency until January 17, 2023. As the Agency filed the exceptions within thirty days of service, they are timely under § 7122(b) of the Federal Service Labor-Management Relations Statute and § 2429.23(d) of the Authority’s Regulations. See 5 U.S.C. § 7122(b); 5 C.F.R. § 2425.2(b); *AFGE, Loc. 2*, 48 FLRA 1394, 1395-96 (1994) (where “award as originally mailed could not be delivered by the Postal Service as addressed,” finding “proper service of the award . . . began with the date on which the award was [sent] . . . with an address that allowed for delivery to be perfected”).

²⁰ Exceptions Br. at 7-9.

²¹ Opp’n Br. at 24.

²² 5 C.F.R. §§ 2425.4(c) (“[A]n exception may not rely on any . . . arguments . . . that could have been, but were not, presented to the arbitrator.”), 2429.5 (“The Authority will not consider any . . . arguments . . . that could have been, but were not, presented in the proceedings before the . . . arbitrator.”).

²³ Grievance at 1.

²⁴ See Opp’n, Attach. 6, Agency Merits Br. (Agency Merits Br.) at 10 (“It was the Union’s burden to produce evidence here, not the Agency[’s]. It is true the Union alleged a continuing violation, but it is altogether another matter to prove one.”).

²⁵ See Exceptions Br. at 7-9.

²⁶ See Agency Merits Br. at 8-11 (arguing that Union failed to establish a prima facie case of staffing violations).

²⁷ See *U.S. Dep’t of State, Passport Serv.*, 73 FLRA 201, 202 (2022) (barring essence arguments not raised below).

²⁸ Exceptions Br. at 10-12.

²⁹ *IAMAW, Franklin Lodge No. 2135*, 73 FLRA 118, 119 n.7 (2022) (dismissing contrary-to-law exceptions that relied upon regulations the excepting party had argued were inapplicable at arbitration).

³⁰ Exceptions at 12.

³¹ *Id.* (quoting CBA Art. 15, § 14).

³² Agency Merits Br. at 15 (stating that Union presented “[n]o evidence . . . establishing either that [guideline] 900.003 is an [Agency] policy, [or] that it was properly negotiated”); Opp’n, Ex. 7, Agency Merits Reply at 5-7 (arguing that guideline 900.003 is not a local policy and was not negotiated by the Agency); see also Merits Award at 8 (summarizing Agency argument that guideline 900.003 and community risk assessment are “not laws, rules or regulations,” “[Agency] policy or regulation,” or “incorporated into” the parties’ agreement).

enforceable minimum[-staffing] requirements flow from [it].”³³

As the Agency’s essence challenge to the merits award is based entirely on arguments that are inconsistent with the Agency’s arguments to the Arbitrator, we dismiss the exception under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations.³⁴

IV. Analysis and Conclusions

- A. The Agency does not establish that the arbitrability award fails to draw its essence from the parties’ agreement.

The Agency argues the Arbitrator’s determination that the Union timely filed the grievance fails to draw its essence from Article 15.³⁵ 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.³⁶

The Agency contends that the Arbitrator “ignored the unambiguous language” in Article 15 “limiting the time within which grievances must be filed” to twenty-one days after notice, occurrence, or knowledge of an event, “whichever occurs first.”³⁷ However, the Arbitrator “credit[ed] the Union’s position and argument” that the Agency’s alleged violations were “continuing.”³⁸ He also

agreed with the Union that “each day that passed created a new timeline for filing” under the parties’ agreement.³⁹ Under the Arbitrator’s interpretation, each of the alleged improper-staffing events from October 20 to November 3 occurred within twenty-one days of the grievance’s November 8 filing⁴⁰ and, thus, formed the basis for a timely grievance. Although the Agency disagrees with how the Arbitrator interpreted Article 15’s filing deadline,⁴¹ the Agency provides no basis for finding this interpretation deficient.⁴² Therefore, we deny this exception.⁴³

- B. We partially grant and partially deny the incomplete-and-ambiguous exception.

The Agency presents two arguments that the merits award is incomplete and ambiguous.⁴⁴ In order for the Authority to find an award deficient on this ground, “the appealing party must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain.”⁴⁵

First, the Agency claims that the merits award is incomplete and ambiguous because of the Arbitrator’s “complete failure to define the issues” for resolution.⁴⁶ As the Agency notes, the parties did not stipulate issues for resolution, and the Arbitrator did not frame any.⁴⁷ However, the Agency does not explain how the Arbitrator’s failure to frame the issues makes the merits award impossible to implement. Therefore, this argument does not establish that the award is deficient.⁴⁸

Second, the Agency argues that the merits award is incomplete and ambiguous because it does not specify the parameters of the parties’ past staffing practice or the

³³ Agency Merits Br. at 16.

³⁴ See *AFGE, Council of Locs. 222*, 72 FLRA 738, 740 (2022) (barring arguments that were inconsistent with the excepting party’s position before the arbitrator and dismissing exceptions that relied on those barred arguments).

³⁵ Exceptions Br. at 5-7.

³⁶ *AFGE, Loc. 2092*, 73 FLRA 596, 597 (2023).

³⁷ Exceptions Br. at 5-7.

³⁸ Arbitrability Award at 4.

³⁹ *Id.*

⁴⁰ See Grievance at 1.

⁴¹ Exceptions Br. at 7 (explaining basis for Agency’s interpretation of Article 15).

⁴² See *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 73 FLRA 620, 622 (2023) (denying essence exception where arbitrator’s interpretation of grievance and parties’ agreement supported procedural-arbitrability determination).

⁴³ Member Kiko notes that the Authority’s Regulations bar consideration of the Agency’s alternative argument that the Arbitrator’s application of the continuing-violation theory to the grievance-filing deadline fails to draw its essence from Article 15. See *supra* section III. Therefore, unlike in *U.S. DOJ, Federal BOP, Federal Corrections Complex, Terre Haute, Indiana (BOP)*, 72 FLRA 711 (2022) (Chairman DuBester dissenting), the Authority may not consider whether application of the continuing-violation theory is inconsistent with the plain wording of the agreement. See *BOP*, 72 FLRA at 712 (granting essence exception where arbitrator cited “no provision in the parties’ agreement or any law that support[ed] the award’s characterization of the violation as a continuing violation”).

⁴⁴ Exceptions Br. at 12-14.

⁴⁵ *U.S. EEOC, Balt. Field Off., Balt., Md.*, 59 FLRA 688, 692 (2004) (*EEOC*).

⁴⁶ Exceptions Br. at 12-13.

⁴⁷ *Id.* at 13; see also Opp’n Br. at 37 (acknowledging that the merits award “does not include an express statement of the issue”).

⁴⁸ See *AFGE, Loc. 1415*, 69 FLRA 386, 389 (2016) (denying exception where arguments did “not provide a basis” for finding the award was incomplete or ambiguous).

requirements of the remedy.⁴⁹ The Agency argues that implementation is impossible because the Arbitrator did not sufficiently explain “what specifically the Agency needs to do” in order to comply with the award.⁵⁰

After finding that the parties had a past practice of implementing various policies and regulations related to fire-department staffing, the Arbitrator stated that the Agency could not “ignore[] or unilaterally change[]” this practice.⁵¹ The Arbitrator then directed the Agency to “restore” “staffing . . . as it existed prior to the [indefinite closure of station two].”⁵² In its opposition, the Union asserts that the “Arbitrator’s remedy is clear”⁵³ because the Arbitrator “identified the change in staffing at issue” as the Agency’s reduction of minimum-staffing levels from twelve to nine.⁵⁴ Yet, the Union goes on to state that the Arbitrator interpreted guideline 900.003 as “requir[ing] the Agency to staff *both* [f]ire [s]tations.”⁵⁵

It is unclear whether, in the merits award, the Arbitrator directed the Agency to (1) reopen station two and restore its staffing level to four positions; (2) staff station one with twelve positions—the total staffing level that existed when both stations one and two were open; or (3) take some other action. As such, it is impossible for the Agency to know what it must do to implement that award. Therefore, we grant the exception and remand the merits award to the parties, absent settlement, to resubmit to the Arbitrator for clarification.⁵⁶ The Arbitrator should specify the actions necessary to bring the Agency into conformity with the “staffing” that existed prior to the indefinite closure of station two.⁵⁷

V. Decision

We dismiss and deny the essence exceptions; partially grant and partially deny the incomplete-and-ambiguous exception; and remand the merits award for clarification.

⁴⁹ Exceptions Br. at 13-14.

⁵⁰ *Id.* at 13.

⁵¹ Merits Award at 11.

⁵² *Id.* at 12.

⁵³ Opp’n Br. at 39.

⁵⁴ *Id.* at 38; *see also id.* at 3-4 (claiming “entire basis for the grievance was the Agency’s abandonment of minimum staffing [of twelve] personnel”).

⁵⁵ *Id.* at 39 (emphasis added); *see also* Opp’n, Attach. 9, Union Merits Br. at 1 (arguing that the Agency violated guideline 900.003, “which explicitly requires the [A]gency to maintain a total of [twelve] personnel per shift *divided between two fire stations*” (emphasis added)).

⁵⁶ *See EEOC*, 59 FLRA at 692 (remanding award to parties where remedy required clarification as to which of several possible employees should receive overtime); *U.S. Dep’t of Com., Pat. & Trademark Off.*, 34 FLRA 992, 998-99 (1990) (remanding award to seek clarification where remedy was ambiguous “as to which employees or what period of time the make[-]whole remedy is to apply”).

⁵⁷ *See* Merits Award at 12.