

73 FLRA No. 15

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

0-AR-5774

DECISION

June 15, 2022

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

I Statement of the Case

Arbitrator John Remington issued an award finding that the Agency violated the parties' collective-bargaining agreement by misapplying a provision governing the Union's allocation of official-time hours. The Agency filed exceptions on essence and nonfact grounds. Because the Agency's exceptions fail to demonstrate that the award is deficient, we deny them.

II Background and Arbitrator's Award

Article 48 of the parties' agreement governs official time. Article 48, Section 10 (Section 10) provides a formula for determining the Union's annual allotment of official-time hours. It also establishes various percentages of official-time allowances for Union representatives at the Agency's main duty stations and facilities that are more

than fifty miles from the main station. Specifically, Section 10.A. states:

Every local union will receive an allotment of hours equal to 4.25 hours per year for each bargaining unit position represented by that local union. Each . . . local union is entitled to a minimum of 50% official time. . . . Where a local represents employees at [Community Based Outpatient Clinics (clinics)]. . . at a duty station greater than 50 miles from the facility, that local union will be allotted 25% official time at that duty station.¹

Section 10.D. permits the parties to negotiate higher amounts of official time "locally."²

In accordance with Section 10.D., the parties negotiated a memorandum of understanding (MOU) in 2015 that granted the Union a certain number of hours of official time annually.³ As relevant here, in 2016 the Agency sought to reopen the MOU to renegotiate the allotment of official-time hours, and when the parties could not reach agreement, they submitted the dispute to the Federal Service Impasses Panel (Panel) for resolution. Before the Panel, the Union proposed increasing the amount of official-time hours in the MOU. The Agency proposed keeping Section 10.A.'s establishment of 4.25 hours per unit employee and excluding clinic employees from the unit-employee count. The Panel issued a decision that imposed a provision requiring the Agency to count unit employees in March and September of each year and allocated official-time hours using the formula established in Section 10.A.⁴ The Panel's decision did not impose any exclusionary language regarding the clinic employees because "Section 10 already discusses [clinic] representation."⁵

In July 2019, the Agency notified the Union that it had "exhausted all negotiated official time."⁶ In response, the Union filed a grievance, asserting an error in the bargaining-unit count that the Agency used to reach that conclusion because it did "not match previous counts provided to the Union,"⁷ and claiming that the Agency miscalculated the number of bargaining-unit employees used to determine the annual official-time allotment in an

¹ Award at 6-7 (quoting Exceptions, Attach., Joint Ex. 1, 2011 Master Collective-Bargaining Agreement (Agreement) at 248).

² *Id.* at 7 (quoting Agreement at 249).

³ See Exceptions, Attach., Union Ex. 8, *Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 17 FSIP 032 (Decision) at 2.

⁴ *Id.* at 2-3, 5; see also *id.* at 13, App. 1, Revised Agency proposal ("The official time allocation will be calculated each year in

March and September based on the total number of bargaining unit employees located multiplied by a factor of 4.25 as outlined in Article 48 . . . of the master agreement.").

⁵ *Id.* at 7.

⁶ Award at 9 (internal quotation marks omitted).

⁷ *Id.* at 10.

attempt to reduce official time hours. The Agency denied the grievance and the Union invoked arbitration.

In an interim decision, the Arbitrator denied the Agency's claim that the grievance was not procedurally arbitrable under the parties' agreement.⁸ A few weeks later, the Arbitrator proceeded with a hearing on the merits.

The Arbitrator framed the merits issue as whether the Agency miscounted the number of bargaining-unit employees in violation of the parties' agreement. In the merits award, the Arbitrator first considered the Agency's "renewed claims" concerning the grievance's arbitrability.⁹ As the arbitrability issue had been addressed in the interim award, the Arbitrator simply reiterated that the grievance was arbitrable "within the meaning of Article 44[,] . . . Section 2."¹⁰

On the merits, the Arbitrator determined that the Agency's June unit-employee count was "contrary to" the Panel's decision directing biannual counts in March and September.¹¹ Relying in part upon the Panel's findings regarding the number of bargaining-unit employees represented by the Union, the Arbitrator found that "evidence of the Agency's duplicity" concerning counts provided to the Union was "overwhelming."¹² The Arbitrator therefore concluded that the Agency "willfully" provided a "misleading and significantly lower"¹³ count to improperly reduce the allotment of annual official time.

The Arbitrator also determined that the percentage allocations of official time provided in Section 10.A. "guarantee[] that there will be a union

representative available, on official time, for at least 50% [of the time] at the main installation and 25% at the [clinics]."¹⁴ The Arbitrator found these percentages provide a minimum allocation of official time and are "independent of the [banked] hours created by the formula."¹⁵ Applying this interpretation, the Arbitrator concluded that because the Union represents six clinics and only four with an assigned representative with 25% official time, "the remainder of that official time can be used by the local union at its discretion."¹⁶ On this basis, the Arbitrator found that "there should have been more than enough [banked] official time available to allow the local president to continue on 100% official time for the remainder of [fiscal year] 2019 even if the Union had fully depleted its formula allocation of official time."¹⁷

Moreover, the Arbitrator found that Section 10.C. requires the parties to maintain local agreements and practices establishing official-time percentages even if those percentages are above the 50% minimum amount,¹⁸ and that the Agency "ignored" this section when it denied the local president the 100% official time that he had been on for the past seven years.¹⁹ Based on these findings, the Arbitrator concluded that the Agency violated Section 10 when it determined that the Union "exhausted its allocation of official time in July of 2019."²⁰ As a remedy, the Arbitrator directed the Agency to reissue bargaining-unit counts for the affected time periods and, in doing so, to include clinic employees.

The Agency filed exceptions to the award on November 19, 2021, and the Union filed an opposition on December 17, 2021.²¹

⁸ Neither party provided a copy of the interim award.

⁹ Award at 19.

¹⁰ *Id.* The Arbitrator also rejected the Agency's res judicata and collateral estoppel claims for lack of relevant evidence, *id.*; see also *id.* at 11 n.3, and the Agency's claim that it was denied a fair hearing, finding that claim "wholly without merit." *Id.* at 20.

¹¹ *Id.* at 23.

¹² *Id.* at 22.

¹³ *Id.*

¹⁴ *Id.* at 23-24.

¹⁵ *Id.* at 23.

¹⁶ *Id.* at 24.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 25.

²¹ The Union also filed a motion to dismiss (motion) on December 6, 2021. In the motion, the Union asked the Authority to dismiss the Agency's exceptions as untimely under 5 C.F.R. § 2425.2 and because they were served on a Union representative, but not the counsel of record, as required by 5 C.F.R. § 2429.27. Mot. at 1-2. In relevant part, 5 C.F.R. § 2429.27(a) provides that a party filing a document "is responsible for serving a copy upon all counsel of record or other designated representative(s)." Section 2425.2(b) provides, in relevant part, that "[t]he time limit for filing an exception to an arbitration award is thirty (30) days after the date of service of the award." 5 C.F.R. § 2425.2(b). Here, the Agency failed to serve the Union's counsel of record; but did timely serve its exceptions on the Union's representative. Mot. at 1. In response, the Union timely filed an opposition. The Authority has declined to dismiss filings on the basis of minor deficiencies where the deficiencies did not impede the opposing party's ability to respond. *U.S. Dep't of the Air Force, Joint Base Elmendorf-Richardson*, 69 FLRA 541, 543 (2016) (declining to dismiss exceptions that were not served on the proper representative when deficiency did not impede opposing party's ability to respond (citing *NAGE, Loc. R14-143*, 55 FLRA 317, 318 (1999))). We find that the Union was not harmed by the Agency's failure to serve the Union's counsel, and decline to dismiss the Agency's exceptions.

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

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider arguments that could have been, but were not, presented to the arbitrator.²² This includes arguments that differ from, or are inconsistent with, a party's arguments to the arbitrator.²³

The Agency argues that the Arbitrator's arbitrability determination fails to draw its essence from Article 43 of the parties' agreement because a July 10, 2019, email shows when the Union was aware of the act giving rise to the grievance and the Union failed to file the grievance within thirty days of that date.²⁴ Yet in its post-hearing brief, the Agency argued to the Arbitrator that the grievance was untimely under a provision in Article 44 requiring that an arbitration hearing date must be scheduled within six months after the parties select an arbitrator.²⁵ In making this argument, the Agency took the position that the July 10 email was "irrelevant" to the Union's grievance, and objected to its introduction as evidence on this basis.²⁶ We find that the Agency's argument on exception that the July 10 email establishes the Union's knowledge of the events contained in its grievance – and is therefore controlling as to the grievance's arbitrability – is inconsistent with the position it took before the Arbitrator. Therefore, §§ 2425.4(c) and

2429.5 of the Authority's Regulations bar this argument,²⁷ and we dismiss the portion of the Agency's essence exception that relies on it.²⁸

IV. Analysis and Conclusions

A. The award draws its essence from the parties' agreement.

The Agency asserts that the award fails to draw its essence from Section 10²⁹ and is contrary to the Panel decision.³⁰ A final action by the Panel is incorporated into a collective-bargaining agreement and the Authority considers arguments challenging an arbitrator's interpretation of a Panel decision as an argument that the award fails to draw its essence from that agreement.³¹

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.³²

²² 5 C.F.R. §§ 2425.4(c), 2429.5.

²³ *Id.* §§ 2425.4(c), 2429.5; *see NLRB*, 72 FLRA 334, 336 (2021) (*NLRB*) (citing *Dep't of VA, Edith Nourse Rogers Mem'l VA Med. Ctr., Bedford, Mass.*, 71 FLRA 232, 233 (2019) (then-Member DuBester concurring)).

²⁴ Exceptions Br. at 3. Article 43, Section 7.B, provides that a grievance must be filed "within [thirty] calendar days of the date that the employee or Union became aware, or should have become aware, of the act or occurrence; or, anytime if the act or occurrence is of a continuing nature." Agreement at 230.

²⁵ Opp'n, Attach. 1, Agency's Post-Hr'g Br. (Agency's Post-Hr'g Br.) at 4-8, 12-13, 15. The Agency's arguments in its post-hearing brief related to Article 43 concerned the grievance's alleged lack of specificity and the Union's failure to file the grievance at the proper step. *Id.* at 9-10, 13-14.

²⁶ *Id.* at 9 (arguing that "this email was not related to this instant grievance").

²⁷ *NLRB*, 72 FLRA at 336 (citing *AFGE, Loc. 2145*, 69 FLRA 7, 8 (2015)).

²⁸ Member Kiko notes that the Agency argued below that *if* the July 10 email *were* relevant, "the grievance would likely be decided to be untimely filed because the grievance would not have been filed within the negotiated 30-day timeframe identified in Article 43." Agency's Post-Hr'g Br. at 9. However, even if the Agency had sufficiently raised its timeliness argument below, resolution of this exception would require review of the interim award, which the Agency failed to provide. It is the excepting

party's obligation to ensure that exceptions are "self-contained" and include legible copies of any necessary documents that the Authority "cannot easily access," as well as a legible copy of any arbitration award under review. 5 C.F.R. § 2425.4(a). Thus, even if this argument were not barred under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Agency's failure to provide the interim award would be fatal to its exception. *E.g., U.S. Dep't of VA, VA Hosp. Med. Ctr.*, 72 FLRA 677, 679 & n.21 (2022) (agency's failure to provide merits award was fatal to its claim that the arbitrator did not award backpay to support fee award); *U.S. Dep't of VA, John Pershing Veterans Admin.*, 71 FLRA 511, 512 (2020) (denying exception as unsupported where excepting party failed to provide the Authority with necessary supporting documents).

²⁹ Exceptions Br. at 15-18.

³⁰ *Id.* at 6-11.

³¹ *U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 56 FLRA 498, 500-01 (2000) (stating that an argument that an award is inconsistent with a provision imposed by the Panel is a claim that the award fails to draw its essence from the parties' agreement (citing *U.S. Dep't of VA, Med. Ctr., Kerrville, Tex.*, 45 FLRA 457, 465 (1992))); *see also* 5 U.S.C. § 7119(c)(5)(C) ("any final action of the Panel . . . shall be binding on [the] parties during the term of the agreement, unless the parties agree otherwise").

³² *SSA, Off. of the Gen. Couns.*, 72 FLRA 554, 555 (2021) (citing *AFGE, Loc. 17*, 72 FLRA 162, 164 (2021)).

Citing the Panel decision for support, the Agency asserts that when a clinic has a designated union representative, Section 10 excludes employees at that clinic from the bargaining-unit-employee count for purposes of calculating the Union's bank of official-time hours.³³ However, the Panel did not impose that condition on the parties. Rather, the Panel imposed a modified version of the Agency's last best offer for the MOU,³⁴ omitting the Agency's language that *would have* excluded clinic bargaining-unit employees who had union representation on site, and retaining the calculation as set forth in Section 10.³⁵ As noted by the Arbitrator, Section 10 provides that a "local union will receive an allotment of hours equal to 4.25 hours per year for *each* bargaining[-]unit position represented by that local union,"³⁶ and there is no language in Section 10 or the MOU requiring the exclusion of clinic bargaining-unit employees from the count under any circumstances. Therefore, the Arbitrator's conclusion that the count must include those employees is a plausible interpretation of Section 10.³⁷

The Agency also argues that the Arbitrator's conclusion that the local union president is entitled to a minimum of 50% official time in addition to the Union's allotment of official-time hours is not a plausible interpretation of the parties' agreement.³⁸ Specifically, the Agency asserts that Section 10.A. does not entitle Union representatives to any particular percentage of hours "once the bank of [allotted] hours [has] been depleted."³⁹

As noted, the Arbitrator determined that, under Section 10.A., the provision allocating union representatives official time on a percentage basis operates independently of the formula allocating each local union official time based on the number of bargaining-unit positions the local represents.⁴⁰ Applying this interpretation, the Arbitrator concluded that the union representatives are entitled to the percentage allocations "irrespective of how many official time hours the Union has in its bank of official time."⁴¹ In addition to relying upon the language of Section 10.A. for this conclusion, the Arbitrator also found that this interpretation was consistent with Article 48, Section 1, which the Arbitrator found

demonstrated that the parties "intended to provide for minimal accessible union representation for all bargaining-unit employees" at both the main installation and the eligible duty stations.⁴²

Upon reviewing the Agency's exception, we find no language in Section 10 that expressly ties the percentage allocation of official time to the allocation calculated with respect to the number of represented bargaining-unit employees. Nor has the Agency demonstrated the Arbitrator implausibly concluded that this interpretation of Section 10.A. was consistent with Article 48, Section 1. As the Arbitrator's interpretation of Section 10 is consistent with its language, and the Agency has otherwise failed to establish that this interpretation is irrational, implausible, or in manifest disregard of the agreement, we deny the essence exception.

B. The award is not based on a nonfact.

The Agency asserts that, to the extent the Arbitrator concluded that a past practice existed between the parties concerning clinic employees' inclusion in the bargaining-unit count, the award is based on a nonfact.⁴³ 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.⁴⁴ However, the Authority will not find an award deficient on nonfact grounds based on a party's disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be accorded such evidence,⁴⁵ or interpretation of a collective-bargaining agreement.⁴⁶

The Agency argues that an Agency witness testified at length about the exclusion of clinic employees from the bargaining-unit count.⁴⁷ However, the Arbitrator found this particular witness evasive and not credible.⁴⁸ Instead, the Arbitrator credited testimony from a Union witness that the parties had previously included clinic employees, and noted that the Agency did not object to the proffered testimony of others who would corroborate the testimony of this witness.⁴⁹ The Agency's disagreement

³³ Exceptions Br. at 9-12 (citing Decision at 3).

³⁴ Decision at 4, 5; *see also* Exceptions Br. at 14 n.14.

³⁵ Decision at 5, 7; *see also id.* at 13 ("The official time allocation will be calculated each year in March and September based on the total number of bargaining unit employees located multiplied by a factor of 4.25 as outlined in Article 48 . . . of the master agreement.").

³⁶ Award at 6 (emphasis added); *see also id.* at 23 (citing Agreement at 248).

³⁷ *Id.* at 24.

³⁸ Exceptions Br. at 16-18.

³⁹ *Id.* at 18.

⁴⁰ Award at 23.

⁴¹ *Id.*

⁴² *Id.* at 23-24; *see id.* at 6 (quoting Art. 48, § 1).

⁴³ Exceptions Br. at 11-15.

⁴⁴ *Fed. Educ. Ass'n, Stateside Region*, 72 FLRA 724, 725 (2022) (*Educ.*) (citing *AFGE, Loc. 2516*, 72 FLRA 567, 568 (2021)).

⁴⁵ *Int'l Bhd. of Boilermakers, Loc. 290, Bremerton Metal Trades Council*, 72 FLRA 694, 696 (2022) (*Boilermakers*) (citing *U.S. Dep't of VA, Nashville Reg'l Off., VA Benefits Admin.*, 72 FLRA 371, 374-75 (2021)).

⁴⁶ *Educ.*, 72 FLRA at 725 (citing *SSA*, 71 FLRA 580, 582 n.22 (2020) (then-Member DuBester concurring); *NTEU*, 69 FLRA 614, 619 (2016)).

⁴⁷ Exceptions Br. at 12.

⁴⁸ Award at 15.

⁴⁹ *Id.* at 18.

with the Arbitrator's evaluation of the evidence does not establish that the award is based on a nonfact.⁵⁰ Moreover, the conclusion that clinic employees were not required to be excluded from the count is based on the Arbitrator's interpretation of Section 10. The Agency's disagreement with the Arbitrator's interpretation of Section 10 does not provide a basis to find that the award is based on a nonfact.⁵¹

Accordingly, we deny the Agency's nonfact exception.

V. Decision

We dismiss in part, and deny, in part, the exceptions.

⁵⁰ *Boilermakers*, 72 FLRA at 696.

⁵¹ *Educ.*, 72 FLRA at 725.

Member Kiko, concurring:

I write separately to reiterate that parties have an obligation under the Federal Service Labor-Management Relations Statute to negotiate agreements that provide for official time in amounts that are “reasonable, necessary, and in the public interest.”¹

As the Federal Service Impasses Panel (Panel) pointed out, the Union “request[ed] a dramatic increase” in official time hours, but “provided little supporting evidence to demonstrate that its requested hours are necessary to further its own goals.”² And the Panel-imposed agreement even states that “the use of official time must be balanced with mission requirements in a way that is mutually beneficial.”³ Because of the ambiguous and unclear phrasing of the parties’ official-time provisions, the Arbitrator’s interpretation is not irrational or implausible. But although the Agency’s exceptions are properly dismissed in part and denied in part, the Union’s efforts to obtain “unprecedented” amounts of official time⁴ – to such an extent that official-time usage “hamper[s] the Agency’s ability to conduct its mission”⁵ – do not “contribute[] to the effective conduct of public business.”⁶

¹ 5 U.S.C. § 7131(d).

² Exceptions, Attach., Union Ex. 8, *Dep’t of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 17 FSIP 032 at 5-6. In this regard, the Panel noted that it was “difficult to credit” the Union’s claims that it needed additional official time for workers’ compensation claims because the Union provided “inconsistent information about the number of hours necessary to represent” employees with these claims and the Union provided “no explanation for this inconsistency.” *Id.* at 6. Additionally, the Union alleged that it needed official time to address equal-employment-opportunity (EEO) issues, but the Panel refuted that allegation by noting that the parties’ agreement

entitled Union representatives to “duty time,” rather than official time, when representing employees in EEO matters. *Id.* Moreover, the Panel pointed out that the closest comparable facility put forth by the Union to support its request still provided nearly 2,500 fewer official-time hours than the number sought by the Union. *Id.* at 5. Official-time usage has already required the Agency to hire an additional four employees to serve in the place of Union representatives on official time. *Id.*

³ *Id.* at 13.

⁴ *Id.* at 5.

⁵ *Id.*

⁶ 5 U.S.C. § 7101(a)(1)(B).