

73 FLRA No. 41

UNITED STATES
DEPARTMENT OF TRANSPORTATION
MARITIME ADMINISTRATION
U.S. MERCHANT MARINE ACADEMY
KINGS POINT, NEW YORK
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3732
(Union)

0-AR-5750

DECISION

August 29, 2022

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

I Statement of the Case

Arbitrator Lise Gelernter found the Agency violated the parties’ collective-bargaining agreement and the Agency’s Superintendent Instructions (SI) 2007-10 and 2019-08 (the instructions) by failing to approve the grievant’s tuition-assistance requests (requests). The Agency filed exceptions to the award on essence and contrary-to-law grounds. For the reasons explained below, we dismiss the Agency’s essence exception in part, dismiss its contrary-to-law exception, and deny the Agency’s remaining exception.

¹ Award at 7.
² See *id.* at 7-8 (stating that the Agency had suspended the program “during CR periods from January 31, 2017 to July 27, 2017, February 1, 2018 to May 18, 2018, and October 3, 2019 to February 8, 2020”); see also Opp’n Br. at 7.
³ Award at 6.
⁴ The rules governing the program are contained in the parties’ agreement and the instructions. The parties agreed that SI 2007-10 controlled during the majority of the relevant period. The Agency implemented SI 2019-08, superseding SI 2007-10, one

II Background and Arbitrator’s Award

This case arose while the grievant, a professor in the Agency’s Marine Transportation Department, pursued a master’s degree in Business Administration. Over four years, the grievant submitted nineteen requests pursuant to the Agency’s tuition-assistance program (the program), of which the Agency partially funded seven requests. During this period, the Agency operated under a “[c]ontinuing [r]esolution” (CR) level of funding several times.¹ Each time it was under a CR, the Agency temporarily suspended the program.² The Agency did not respond to the grievant’s requests submitted while the program was suspended. When the program resumed, the grievant resubmitted those requests, and the Agency denied them. The Agency based the denials, in part, on the assertion that it could not provide “retroactive” assistance for courses in which the grievant had enrolled or had completed before the program’s approval committee (the committee) reviewed the requests.³

The Union filed a grievance alleging the Agency’s actions concerning the grievant’s requests violated the parties’ agreement and the instructions.⁴ The parties were unable to resolve the grievance, and the Union invoked arbitration. At arbitration, the parties stipulated the issue was whether the Agency’s actions violated the parties’ agreement, any regulation, or any other agreement between the parties.

Relying on the parties’ agreement, which the Arbitrator interpreted as requiring the Agency to follow the instructions, the Arbitrator found that the Agency “committed itself” to supporting employees’ professional development by providing tuition assistance “[t]o the extent possible” and “subject to availability of funds.”⁵ Specifically, the Arbitrator found that the Agency was required to provide a certain amount of tuition assistance to employees, and because “[t]here was no evidence that funds were ultimately unavailable in each [relevant] fiscal year,” the instructions required the Agency to distribute program funds “in some kind of reasonable and organized manner.”⁶ Additionally, the Arbitrator found the instructions did not prevent the committee from considering requests for courses in progress or completed. Therefore, the Arbitrator found the Agency had no

month before the grievance was filed. See *id.* at 2-6 & n.2; see also Exceptions Br. at 3, 15.
⁵ Award at 14, 15-16. In relevant part, the parties’ agreement provides that “[s]ubject to constraints imposed by the budget and the guidelines prescribed by the Agency . . . regulations, the Academy agrees to continue its support of unit members’ professional development” *Id.* at 2. And SI 2007-10 provides that “[t]o the extent possible, [the Agency] will provide resources” such as “tuition assistance for graduate education” to enhance its employees’ professional knowledge. *Id.* at 2-3.
⁶ *Id.* at 15-16.

justification for denying requests submitted during a CR once the program resumed.

The Arbitrator also found the Agency's administration of the program was inconsistent and lacked clarity. In support of this finding, the Arbitrator cited the committee's failure to meet as required by the instructions during a CR period to consider requests.⁷ The Arbitrator also referenced the Agency's failure to notify employees about its alleged "policy of not funding [tuition assistance] requests for courses" taken during a CR, as well as its failure to otherwise demonstrate that it maintained a "clear, straightforward or reasonable policy" in place to address such situations.⁸ The Arbitrator further found the Agency failed to act fairly and reasonably by denying some of the grievant's requests because the Agency had provided retroactive assistance to other employees. Additionally, the Arbitrator found the committee had a "policy" of funding up to \$2,500 per course, and had acted unreasonably by not communicating that policy to employees.⁹

Consequently, the Arbitrator concluded the Agency violated the parties' agreement and the instructions. As a remedy, consistent with the Agency's policy of funding a maximum of \$2,500 per course, the Arbitrator directed the Agency to reimburse the grievant "\$2,500 for each unfunded course or course funded at a lower level which [the grievant] took between 2016 and 2020, or the actual tuition for the particular course, whichever is lower."¹⁰

On August 9, 2021, the Agency filed exceptions to the award, and on September 2, 2021, the Union filed an opposition to the Agency's exceptions.

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

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations,¹¹ the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.¹² We conclude that a number of the Agency's arguments are barred by these regulations.

As part of its essence exception, the Agency argues that the award improperly includes a remedy for a course for which the grievant submitted a request after the grievance was filed because only the committee is authorized to approve requests.¹³ The record demonstrates the Agency was aware that the grievant was seeking reimbursement for all unfunded requests as a remedy.¹⁴ However, there is no evidence in the record the Agency raised these arguments contesting the reimbursement sought to the Arbitrator.

The Agency also argues as part of its essence exception that the award is deficient because it "makes no mention" of the guidelines requiring the committee to "consider whether a tuition assistance request encompass[s]" study relevant to the Agency's mission and "ensure that resources are fairly allocated."¹⁵ However, the Union argued in its post-hearing brief that the courses in the grievant's master's degree program would support the Agency's mission and that the grievant had relied on supervisors' assurances that the courses would be funded.¹⁶ The Agency provides no evidence that it argued to the Arbitrator the grievant's requests were denied because the courses encompassing study were not relevant to the Agency's mission. Although the Agency generally asserted in its grievance response that the program "has limited resources" which "must be equitably shared," that response does not reference any specific provision of the instructions, and the Agency does not

⁷ The instructions require the committee to meet three times per year to consider tuition requests and they do not preclude the committee from meeting during a CR. *Id.* at 16-17.

⁸ *Id.* at 17-18; *id.* at 19-20 (further finding that the Agency failed to produce "evidence . . . showing any legal ban on the committee funding courses that faculty take during a period that the [committee] does not meet"; "any applicable rationale for recommending rejection of those requests"; that it communicated to faculty or staff its policy "of not paying more than . . . \$2,500" per course; or that the Agency "did not have the requisite funds available").

⁹ *Id.* at 19-20.

¹⁰ *Id.* at 22.

¹¹ 5 C.F.R. §§ 2425.4(c), 2429.5.

¹² *Int'l Bhd. of Boilermakers, Loc. 290, 72 FLRA 586, 588 (2021) (Local 290) (Chairman DuBester concurring; Member Abbott concurring)* (citing C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOL, 67 FLRA 287, 288 (2014); AFGE, Loc. 3448, 67 FLRA 73, 73-74 (2012)*).

¹³ Exceptions Br. at 6.

¹⁴ *See Award* at 3 ("[The grievant] applied for tuition assistance for each course from June 2016 through July 2020."); Opp'n, Attach. 2 at 1 (Union arbitration exhibit showing requests made through July 2020); Opp'n, Attach. 6, Union Post-Hr'g Br. (Union Br.) at 6, 11-13 (discussing that records were introduced at arbitration showing grievant was seeking reimbursement for all classes taken through July 2020); Opp'n Attach. 7, Step 3 Grievance Response (Step 3 Resp.) at 2 (acknowledging total amount grievant stated was owed, which included funds for courses taken through July 2020). *See also* Exceptions, Attach. L at 1 (documentation of requests that included July 2020 request).

¹⁵ Exceptions Br. at 9-10 (arguing the award fails to mention the requirements of "SI 2007-10" which states that the Committee consider whether a request encompasses an area of study relevant to the Agency's mission and that the Committee must ensure that resources are allocated fairly).

¹⁶ Union Br. at 2, 5-8, 10.

otherwise demonstrate that it argued at arbitration that the Arbitrator should apply any particular provision of the instructions to find that the grievant's requests were properly denied on either basis it now argues on exception.¹⁷

Lastly, the Agency asserts the award is contrary to the Training Act¹⁸ and contrary to management's right to determine its budget and the training needs for employees.¹⁹ However, there is nothing in the record that demonstrates that the Agency raised these arguments to the Arbitrator. As noted previously, the Agency was aware the Union was seeking reimbursement for the grievant's courses as a remedy. It follows that the Agency should have known to raise arguments that awarding these reimbursements would violate these provisions.

Here, because the Agency has not demonstrated that it raised any of the arguments above to the Arbitrator, and it could have done so, we dismiss them.²⁰

IV. Analysis and Conclusion: The award draws its essence from the parties' agreement.

The Agency argues the award fails to draw its essence from the parties' agreement because "the Arbitrator failed to fully consider and apply" the plain language of the parties' agreement and instructions.²¹ When reviewing an arbitrator's interpretation of an 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.²²

In support of its exception, the Agency contends the Arbitrator erred by only considering and applying the provision of the instructions that states the Agency would provide assistance "to the extent possible."²³ The Agency

maintains that the Arbitrator failed to adequately consider the plain language of the parties' agreement stating the Agency would provide tuition assistance "subject to constraints imposed" by the Agency.²⁴

Contrary to the Agency's arguments, the Arbitrator expressly considered the requirements of the instructions and the parties' agreement.²⁵ Specifically, the Arbitrator determined that the parties' agreement requires the Agency to "support professional development . . . except to the extent there are 'constraints imposed by budget and the guidelines prescribed by Agency . . . regulations.'"²⁶ The Arbitrator interpreted this reference to "guidelines" and Agency regulations as referring to the instructions.²⁷ As to budgetary constraints, the Arbitrator found that "there was no evidence" that funds were unavailable such that the Agency was constrained from providing tuition assistance.²⁸

The Agency also argues the Arbitrator's award directing the Agency to reimburse the grievant \$2,500 per course fails to draw its essence from the agreement because the guidelines do not "set any minimum amount the [c]ommittee could recommend."²⁹ At the outset, the Arbitrator did not require the Agency to reimburse the grievant \$2,500 per course, but rather concluded that the Agency must reimburse the grievant "\$2,500 for each unfunded course or course funded at a lower level which [the grievant] took between 2016 and 2020, or the actual tuition for the particular course, *whichever is lower*."³⁰ In reaching this conclusion, the Arbitrator determined that the agreement "does not set any budgetary minimum or maximum" and that the Agency's amount of tuition assistance is "contingent upon the [Agency's] budget . . . [and] availability of funds."³¹ However, the Arbitrator also found that, in applying the instructions, the committee had established a "policy" of funding no more than \$2,500 per course.³² And the Arbitrator found that the Agency neither argued, nor is it apparent from the record, that "funds were . . . unavailable" during the relevant period.³³ We therefore disagree with the Agency that the Arbitrator's interpretation sets "a minimum amount that

¹⁷ See Step 3 Resp. at 2.

¹⁸ 5 U.S.C. § 4101.

¹⁹ See Exceptions Br. at 13-16.

²⁰ See *Local 290, 72 FLRA at 588 (citing AFGE, Loc. 2923, 69 FLRA 286, 287 (2016)) (dismissing exceptions where excepting party failed to demonstrate that it raised arguments before the arbitrator)*.

²¹ Exceptions Br. at 6; see also *id.* at 8-12.

²² *Int'l Bhd. of Boilermakers, Loc. 290, Bremerton Metal Trades Council, 72 FLRA 694, 696 (2022) (citing AFGE, Loc. 3342, 72 FLRA 91, 92 (2021))*.

²³ Exceptions Br. at 9-10.

²⁴ See *id.*

²⁵ Award at 14-15 (finding that the agreement and instructions "create[d] a mixed system of entitlement and discretion" that requires the Agency to provide tuition assistance to employees).

²⁶ *Id.* at 15 (quoting Exceptions, Attach C, Collective-Bargaining Agreement, Art. 18 § 1).

²⁷ See *id.* at 4-5, 21. The Agency acknowledged that "guidelines" refers to the parties' agreement and instructions. See Exceptions Br. at 8-9.

²⁸ Award at 16.

²⁹ Exceptions Br. at 10; see generally *id.* at 10-12.

³⁰ *Id.* at 22 (emphasis added).

³¹ *Id.* at 15-16.

³² Award at 19.

³³ *Id.* at 16.

the committee could recommend.”³⁴ Accordingly, we find that the Agency’s argument fails to demonstrate that the Arbitrator’s interpretation conflicts with the agreement.³⁵

The Agency further contends that the Arbitrator imposed criteria not found in the parties’ agreement by considering whether the Agency’s “administration of the program was ‘fair and reasonable.’”³⁶ We find this argument unavailing. As explained above, the Arbitrator interpreted the parties’ agreement as incorporating the instructions³⁷ and the instructions provide that the Agency is required to consider tuition assistance “fairly.”³⁸ The Arbitrator determined the Agency failed to meet this requirement because the Agency’s actions were inconsistent with several specific procedures explicitly set forth in the instructions.³⁹ Because the instructions required the Agency to act fairly, the Arbitrator’s consideration of whether the Agency acted fairly and reasonably is an entirely plausible interpretation of the parties’ agreement.

Accordingly, we find that the Agency has not demonstrated the Arbitrator’s interpretation of the parties’ agreement is irrational, implausible, or in manifest disregard of that agreement and we deny this exception.

V. Decision

We dismiss the Agency’s exceptions, in part, and deny the exceptions, in part.

³⁴ See Exceptions Br. at 10.

³⁵ See *Broad. Bd. of Governors, Off. of Cuba Broad.*, 66 FLRA 1012, 1018 (2012) (denying essence exception when excepting party had failed to demonstrate the agreement prohibited the arbitrator from making the challenged determination); see also *GSA*, 55 FLRA 493, 495 (1999) (denying essence exception challenging an arbitrator’s interpretation recognizing that, while an agency had the authority to set the amount of performance awards, that authority was not absolute).

³⁶ Exceptions Br. at 12 (asserting that “the only ‘fairness’ requirement is that applicants be treated fairly across the organization” and that “[b]y that measure, [the grievant] was treated more than fairly”); see Award at 15.

³⁷ See Award at 4-5, 21.

³⁸ See *id.* at 5 (“The [SI] created a revised process for the awarding of tuition assistance to ‘ensure that all employee

requests are fairly considered.”) (quoting SI 2019-08); Exceptions Br. at 3 (“The [c]ommittee shall be responsible for the review of all requests, to make recommendations on the allocation of institutional resources for training, to ensure that resources are fairly allocated across each division and that approved requests are in keeping with institutional needs and priorities.” (quoting SI 2007-10 Para. 5(d))); see also Opp’n Br. at 16.

³⁹ Award at 16-17 (finding that the Agency failed to “adhere” to procedures for submission of tuition assistance requests and failed to hold committee meetings); *id.* at 18-19 (finding that the Agency failed to communicate to faculty and staff the committee’s policy of not paying more than \$2,500 per course); *id.* at 19-21 (finding that the committee’s rejection of retroactive requests was not consistent). The Agency does not challenge these findings as nonfacts.

Member Kiko, dissenting:

I disagree with the majority's conclusion that the award draws its essence from the parties' collective-bargaining agreement.¹

Reviewing the parties' agreement and the tuition-assistance instructions (the instructions), the Arbitrator found that the agreement "does not set any budgetary minimums or maximums" for the tuition-assistance program (the program).² Further, the Arbitrator found that the instructions contain "no clear mandate concerning the funding level" of the program.³ Nevertheless, she concluded that the Agency "arguably acted reasonably" in setting \$2,500 as the maximum amount of tuition reimbursement available per course.⁴

The Arbitrator determined that the Agency's administration of the program violated the agreement and the instructions, but she rejected the Union's request for full tuition reimbursement.⁵ Instead, the Arbitrator devised her own relief: The Agency must reimburse the grievant "at least \$2,500 per unfunded course"⁶ or partially funded course, or the amount of actual tuition for any courses that cost less than \$2,500.⁷

In the Agency's essence challenge to the award of \$2,500 per course, the Agency argues that nothing in the instructions "set[s] any minimum amount" for tuition reimbursement.⁸ This argument is consistent with the Arbitrator's own findings that neither the agreement nor the instructions guaranteed any *minimum* amount of reimbursement.⁹ Still, the Arbitrator determined that the

Agency-imposed *maximum* of \$2,500 per course was reasonable.¹⁰

And here is where the award loses coherence. After finding that no employee was guaranteed any minimum amount of funding, and that \$2,500 was the maximum per course, the Arbitrator directed the Agency to reimburse the grievant at the maximum limit for every course he submitted for reimbursement. Effectively, the Arbitrator converted the *maximum funding allowed* into the *minimum funding required* in the grievant's case – without explaining why the agreement or instructions required these reimbursement amounts. The Arbitrator's conversion of a funding ceiling into a reimbursement floor cannot be rationally derived from the agreement or instructions,¹¹ and, indeed, the Arbitrator's own findings belie the notion that \$2,500 per course was guaranteed to any employee, including the grievant.¹²

Many of the Arbitrator's findings criticized the Agency for not communicating rules or decisions more clearly, and the Arbitrator found that the absence of sufficient explanations rendered some of the Agency's actions unreasonable.¹³ But applying the Arbitrator's own logic here, it was unreasonable for the Arbitrator to conclude – without *any* discussion of the courses' individual characteristics – that every one of the grievant's courses merited the maximum allowable tuition reimbursement under the program. If the agreement and instructions required the Agency to explain with particularity its funding decisions for each of the grievant's courses, then the Arbitrator's award – which lacks any course-specific analysis or reimbursement-amount justifications – fails to draw its essence from the agreement and instructions for similar reasons.

¹ Majority at 6.

² Award at 15.

³ *Id.* at 16.

⁴ *Id.* at 21; *see also id.* at 20 ("There was no evidence that the [Agency] provided more than \$2,500 per course to any employee, so the limitation on [the grievant] was not per se unreasonable . . .").

⁵ The Union calculated that the previously un-reimbursed amount was \$66,849.50. Exceptions, Attach. B, Grievance at 3; Opp'n, Attach. 6, Union's Post Hr'g Br. at 12.

⁶ Award at 21.

⁷ *Id.* at 22.

⁸ Exceptions Br. at 10. Because the parties' agreement incorporates the instructions, *see* Exceptions, Attach. C, Collective-Bargaining Agreement Art. 18, § 1 (stating that the program is "[s]ubject to . . . the guidelines prescribed by the Agency"), I agree with the majority that the essence framework applies to the Agency's arguments that are based on the instructions. *See SSA*, 65 FLRA 523, 527 (2011) ("[W]hen a collective[-]bargaining agreement incorporates the agency regulation with which an award allegedly conflicts, the matter becomes one of contract interpretation because the agreement, not the regulation, governs the matter in dispute.").

⁹ Award at 15-16.

¹⁰ *Id.* at 21.

¹¹ *See, e.g., Int'l Bhd. of Boilermakers, Loc. 290, Bremerton Metal Trades Council*, 72 FLRA 694, 696 (2022) (*as relevant here, an award fails to draw its essence from an agreement when the award cannot in any rational way be derived from the agreement*).

¹² Award at 21.

¹³ *E.g., id.* at 18 (finding unreasonable "lack of clarity" in Agency's treatment of tuition-reimbursement requests submitted during continuing resolutions), 20 (finding failure to communicate funding limitation unreasonable). Contrary to the majority's assertion, however, the Arbitrator did not find it was "inconsistent" for the tuition-assistance advisory committee to cancel its meetings during continuing resolutions. Majority at 3. *Compare id.* (stating that the Arbitrator supported her finding that the administration of the program was "inconsistent" by relying on "the committee's failure to meet as required by the instructions during a [continuing-resolution] period"), *with Award* at 17 ("[T]he committee's decision not to meet during the suspension of the . . . program [throughout continuing-resolution periods] appears to be reasonable . . .").

Accordingly, I would grant the Agency's essence exception and set aside the award.¹⁴

¹⁴ Because I would set aside the award on this basis, I would not address either the merits of the Agency's other arguments, or whether the Authority's Regulations bar those arguments. *See U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 573 n.18 (2018) (then-Member DuBester

dissenting) (finding it unnecessary to address remaining arguments, or whether certain arguments were properly before the Authority, after setting aside award).