73 FLRA No. 65

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
BUTNER, NORTH CAROLINA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 408
COUNCIL OF PRISONS LOCALS 33
(Union)

0-AR-5815

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DECISION

November 3, 2022

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

I. Statement of the Case

Arbitrator Paul Gordon issued an award finding that the Union failed to comply with the parties' master collective-bargaining agreement (master agreement) because the Union filed its grievance with the wrong Agency official. The Arbitrator dismissed the grievance as procedurally inarbitrable, and did not issue a ruling on the merits.

The questions before us are: (1) whether the Arbitrator's procedural-arbitrability determination fails to draw its essence from the master agreement, and (2) whether the Arbitrator exceeded his authority. Because the Union does not establish that the award is deficient on either of these grounds, we deny the Union's exceptions.

II. Background and Arbitrator's Award

In October 2021, the Agency notified bargaining-unit employees in the Agency's food-service department that the Agency would be reducing annual-leave availability. The Union met with the complex warden and the food-service administrator to discuss changes to the annual-leave policy, but the parties could not agree on a new memorandum of understanding regarding that topic.

Subsequently, in November 2021, the Union filed a grievance with the Agency's Mid-Atlantic regional director. The grievance alleged, as relevant here, that the food-service administrator violated the master agreement, and §§ 7114(a)(1) and 7116(a)(5) of the Federal Service Labor-Management Relations Statute (the Statute), by unilaterally changing the annual-leave policy and failing to bargain over those changes. The Union sent a copy of the grievance to the warden the same day that it filed the grievance.

Several months earlier, in June 2021, the Union had filed an unfair-labor-practice (ULP) charge alleging that the Agency violated § 7116(a)(1)-(8) of the Statute by repudiating a memorandum of understanding and the master agreement. The Union later withdrew the ULP charge.

At arbitration over the grievance, the parties were unable to agree to a statement of issues. As relevant here, the Agency submitted the issue at arbitration as, "Did the Union comply with Article 31, Section f.1 of the [m]aster [a]greement?"[1]

The Arbitrator framed the issues, in relevant part, as, "Did the Union comply with Article 31, Section f. (1) [(Section f.1)] of the [m]aster [a]greement?" and "Does 5 U.S.[C. §] 7116[](d) bar the instant grievance from arbitration?"[2]

Noting that the "Agency['s] procedural issues must be addressed as threshold issues," the Arbitrator first considered "[t]he issue of proper service of the grievance."[3] Section f.1 states, in relevant part, that "when filing a grievance, the grievance[] *will be filed* with the [c]hief [e]xecutive [o]fficer of the institution/facility, if the grievance pertains to the action of an individual for which the [c]hief [e]xecutive [o]fficer . . . has disciplinary authority over."[4] The Arbitrator found that the grievance pertained to the food-service administrator's decision to reduce the availability of annual leave without bargaining, and the warden – as chief executive officer – "ha[d]

[1] Award at 2.
[2] *Id.* at 3.
[3] *Id.* at 19.
[4] *Id.* (emphasis added) (quoting Exceptions, Ex. 2, Master Agreement (Master Agreement) at 73).

disciplinary authority over [the f]ood[-s]ervice [a]dministrator."[5] Focusing on the word "will" in Section f.1, the Arbitrator determined that Section f.1 required the Union to file the grievance with the warden.[6]

The Arbitrator acknowledged that the Union sent the warden a copy of the grievance. However, because the Union filed the grievance with the regional director, the Arbitrator found the grievance procedurally inarbitrable under Section f.1. Consequently, the Arbitrator did not address whether § 7116(d) barred the grievance and did not address the merits of the dispute.[7]

On May 19, 2022, the Union filed exceptions to the award,[8] and on June 17, 2022, the Agency filed an opposition.[9]

III. Analysis and Conclusions: We deny the Union's exceptions.

A. The award draws its essence from the master agreement.

The Union argues that the award fails to draw its essence from multiple articles and sections of the master agreement.[10]

First, the Union contends that Article 31, Section e (Section e) does not permit the Arbitrator to decide any threshold issues other than a grievance's timeliness.[11] However, the Union does not identify anything in the master agreement that states that the *only* threshold issue an arbitrator can address is timeliness. Section e simply states that "[i]f a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issue."[12] Section e does not limit an arbitrator's ability to decide other threshold issues.[13] As a result, we deny this exception.[14]

Second, the Union argues that the award fails to draw its essence from Article 32, Section h (Section h) because the Arbitrator did not have "power to add to, subtract from, disregard, alter, or modify any . . . terms of th[e master] agreement."[15] Specifically, the Union alleges that the Arbitrator "dismiss[ed] the grievance without any authority from the [master a]greement."[16] Contrary to the Union's allegation, the Arbitrator relied on Section f.1 to find that the Union erred by filing the grievance with the wrong Agency official.[17] The Arbitrator reasoned that, as the grievance pertained to the food-service administrator, Section f.1 required the Union to file the grievance with the warden.[18] The Union does not dispute that the grievance concerned the food-service administrator's

[5] *Id.* at 21.
[6] *Id.*
[7] *Id.* ("[T]he Arbitrator does not have jurisdiction to decide the merits of the dispute.").
[8] The Union requested an expedited, abbreviated decision. *See* Exceptions Form at 16. After considering the circumstances of this case, including its complexity, potential for precedential value, and dissimilarity to other, fully detailed decisions involving the same or similar issues, we determine that an expedited, abbreviated decision is not appropriate in this case and deny the Union's request. *See U.S. Dep't of the Army, Mil. Dist. of Wash., Fort Myer, Va.*, 72 FLRA 772, 773 n.20 (2022) (denying request for expedited, abbreviated decision).
[9] For purposes of resolving this case, we assume, without deciding, that the Arbitrator lawfully exercised jurisdiction over this grievance. *See NAIL, Loc. 7*, 63 FLRA 85, 86 (2009) (assuming without deciding the arbitrator properly exercised jurisdiction over the grievance).
[10] Exceptions Br. at 22-32. The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining 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. *Fed. Educ. Ass'n, Stateside Reg.*, 73 FLRA 32, 33 (2022) (*FEA*).
[11] Exceptions Br. at 31.
[12] Master Agreement at 73.
[13] *See id.*
[14] *See FEA*, 73 FLRA at 34 (denying essence exception that failed to identify any wording in the parties' agreement that was contrary to the arbitrator's findings); *U.S. Dep't of HHS, FDA, San Antonio, Tex.*, 72 FLRA 179, 180 (2021) (*FDA*) (Chairman DuBester concurring) (noting that "a different interpretation of the parties' agreement does not automatically render the arbitrator's interpretation implausible"). The Union also argues, without providing any support, that if the Agency wished to challenge arbitrability, "[t]hat decision is left for the courts." Exceptions Br. at 31; *see also id.* at 19 (arguing that if the Agency believed the Union filed the grievance with the wrong official, "that decision is to be made by the courts"). Because the Union fails to support this argument, we deny it. *See AFGE, Loc. 2382*, 66 FLRA 664, 666-67 (2012) (denying essence exception as a bare assertion where the excepting party "d[id] not identify any specific contractual wording to establish that the finding is irrational, unfounded, implausible, or in manifest disregard of the [m]aster [a]greement"); *U.S. Dep't of VA, Reg'l Off., Winston-Salem, N.C.*, 66 FLRA 34, 37-38 (2011) (rejecting a contrary-to-law argument as a bare assertion where the excepting party did not identify any laws, rules, or regulations with which the award conflicted). Additionally, the Union alleges that the parties' agreement "covers the subject of arbitrability as a[] threshold issue." *See* Exceptions Br. at 12. Because the covered-by doctrine does not provide a basis for setting aside the award on essence grounds, we reject this argument. *See U.S. Dep't of the Treasury, IRS*, 68 FLRA 329, 333 (2015) ("[T]he misapplication of the 'covered-by' doctrine does not provide a basis for finding an award deficient under the essence standard . . . .").
[15] Exceptions Br. at 31.
[16] *Id.*
[17] *See* Award at 21.
[18] *See id.*

actions; nor does it dispute that it filed the grievance with the regional director. Moreover, nothing in Section h limits the Arbitrator's authority to decide threshold issues. Therefore, we deny this exception.[19]

Third, the Union asserts that, pursuant to Article 31, Section f.6 (Section f.6), the Agency should have challenged the grievance's procedural arbitrability by filing a separate grievance.[20] Section f.6 states only that "grievances filed by the [Agency] must be filed with a corresponding Union official."[21] That section does not prevent the Agency from challenging a grievance's procedural arbitrability through related arbitration proceedings. Thus, the Union does not establish that the award fails to draw its essence from Section f.6.[22]

The Union also argues that the award fails to draw its essence from Article 32, Section a (Section a) because the Union did not agree to modify the grievance to include the Agency's procedural-arbitrability issue.[23] Section a allows an arbitrator to frame the issues "[i]f the parties fail to agree on [a] joint submission."[24] Here, it is undisputed that the parties did not stipulate to the issues.[25] Thus, Section a authorized the Arbitrator to frame the issues. Moreover, Section a concerns a grievance's modification, and does not prevent either party from challenging a grievance's arbitrability. Accordingly, the Union does not demonstrate that the award fails to draw its essence from Section a.

Because the Union's arguments provide no basis for finding that the award is irrational, unfounded, implausible, or in manifest disregard of the master agreement, we reject them and deny the essence exceptions.[26]

B. The Union fails to establish that the Arbitrator exceeded his authority.

The Union alleges that the Arbitrator (1) failed to resolve issues submitted to arbitration and (2) disregarded specific limitations on his authority by finding the grievance procedurally inarbitrable.[27] As relevant here, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, or disregard specific limitations on their authority.[28] Where the parties fail to stipulate the issue, the arbitrator may formulate the issue based on the subject matter of the grievance, and the Authority defers to the arbitrator's formulation.[29]

The Union argues that the Arbitrator failed to resolve issues that the parties submitted to arbitration.[30] However, as mentioned above, the parties did not stipulate to the issues.[31] In the absence of a stipulation, the Arbitrator framed the issue as whether the grievance was arbitrable.[32] Having found that the Union filed the grievance with the wrong individual, the Arbitrator concluded that the grievance was not arbitrable and did not address its merits.[33] Given that the Arbitrator formulated the procedural-arbitrability issue as the threshold issue and

[19] Similarly, the Union argues that the award fails to draw its essence from Article 6, Section b.6 (Section b.6) because there was "no procedure in the [master agreement] that allows an arbitrator to determine any threshold issue outside . . . [the] timely filing of the grievance." Exceptions Br. at 31. Section b.6 states that employees have a right "to have all provisions of the [master a]greement adhered to." Master Agreement at 11. Because the Arbitrator relied on Section f.1 to find the grievance procedurally inarbitrable, and the Union does not identify any language in the master agreement that is contrary to the Arbitrator's conclusion, we reject this argument. *See FDA*, 72 FLRA at 180 (finding the excepting party "fail[ed] to identify any language that demonstrates the [a]rbitrator ignored, irrationally interpreted, or implausibly read the parties' agreement in concluding that the [excepting party] incorrectly denied the grievant's telework request").

[20] *See* Exceptions Br. at 21, 31.

[21] Master Agreement at 73.

[22] *See FEA*, 73 FLRA at 34.

[23] Exceptions Br. at 31.

[24] Master Agreement at 75 ("If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard. However, the issues [and] the alleged violations . . . requested in the written grievance may be modified only by mutual agreement.").

[25] *See* Award at 2; Exceptions Br. at 5 ("The [p]arties did not stipulate to a statement of issues.").

[26] The Union also argues that, because the Arbitrator allegedly failed to follow the master agreement's grievance process, the award is contrary to § 7121 of the Statute and 29 C.F.R. § 1404.13. Exceptions Br. at 20 (arguing that the "Arbitrator d[id] not have the authority to implement a procedure that [wa]s not provided in the . . . [master a]greement."). Additionally, the Union contends that the award was procured by improper means and that the Arbitrator was biased against the Union. Exceptions Br. at 33 (contending that the Arbitrator was "bound by the four corners of the contract"). We deny the Union's contrary-to-law and bias exceptions because they are based on the same arguments as the previously denied essence exception. *See AFGE, Loc. 2052, Council of Prisons, Locs. 33*, 73 FLRA 59, 61 n.20 (2022) (*Loc. 2052*) (Chairman DuBester concurring) (denying contrary-to-law exception that was based on the same arguments as the denied essence exception); *AFGE, Loc. 2076*, 71 FLRA 1023, 1025 n.16 (2020) (then-Member DuBester concurring) (denying bias exception that was based on the same arguments as the denied essence exception).

[27] *See* Exceptions Br. at 20-22.

[28] *Loc. 2052*, 73 FLRA at 61 (citing *U.S. DHS, U.S. CBP, L.A., Cal.*, 72 FLRA 411, 412 (2021)).

[29] *See AFGE, Loc. 1741*, 61 FLRA 118, 120 (2005).

[30] *See* Exceptions Br. at 21.

[31] *See* Award at 2.

[32] *Id.* at 2-3.

[33] *Id.* at 21 (concluding that he "d[id] not have jurisdiction to decide the merits of the dispute").

resolved that issue,[34] the Union provides no basis for finding that the Arbitrator exceeded his authority.[35]

The Union also contends that the Arbitrator disregarded specific limitations on his authority – in Sections a, e, and f.6 – by finding the grievance procedurally inarbitrable.[36] Because we have already found that the award does not fail to draw its essence from those sections, we also deny this argument.[37]

Accordingly, we deny the Union's exceeded-authority exceptions.

IV. Decision

We deny the Union's exceptions.

[34] *Id.* at 3, 19. The Union alleges that the Arbitrator ruled on a procedural-arbitrability issue that was not properly submitted at arbitration. *See* Exceptions Form at 15; *see also* Exceptions Br. at 20-22. However, the Agency submitted the issue before the Arbitrator. *See* Award at 2 ("At the hearing[,] the Agency stated the issue[] as: . . . Did the Union comply with Article 31, Section f.1 of the [m]aster [a]greement . . . ?"); *see also Loc. 2052*, 73 FLRA at 61 (finding the arbitrator resolved properly submitted issue that was raised by the opposing party's hearing motion); *AFGE, Loc. 1741*, 72 FLRA 501, 503 (2021) (Member Abbott dissenting on other grounds) (stating that "where parties have not stipulated to threshold issues, arbitrators do not exceed their authority by identifying and resolving such issues"). Therefore, the Arbitrator did not exceed his authority by adopting and resolving the Agency's issue.

[35] *See AFGE, Loc. 3917*, 72 FLRA 651, 654 (2022) (Chairman DuBester concurring) (finding the arbitrator was not required to address the merits issues because the arbitrator "framed the merits issues to be addressed only in the event that the grievance was arbitrable").

[36] *See* Exceptions Br. at 20-22.

[37] *See Int'l Bhd. of Boilermakers, Loc. 290*, 72 FLRA 769, 770 (2022) (Member Kiko concurring) (denying exceeded-authority exception that restated denied essence exception).

Member Grundmann, concurring:

I agree with the majority in all respects but one: the rationale for denying the Union's request for an expedited, abbreviated decision (EAD). The majority denies that request based on "the circumstances of this case, including its complexity, potential for precedential value, and dissimilarity to other, fully detailed decisions involving the same or similar issues."[1] The majority does not explain, and it is not apparent to me, why those circumstances warrant denying the request.[2]

Nevertheless, § 2425.7 of the Authority's Regulations provides that an excepting party may request an EAD "[w]here an arbitration *matter* before the Authority does not involve allegations of unfair labor practices [(ULPs)] under 5 U.S.C. [§] 7116."[3] Section 2425.7 does not define the term "matter,"[4] and thus does not clearly limit it to cases where either the arbitrator or the Authority actually *resolves* ULP issues. Nor would I limit it to those situations.

I acknowledge that an Authority decision resolving arbitration exceptions may not be appealed to a court of appeals unless the Authority's "order involves" a ULP,[5] which means that "a statutory [ULP] must be either an explicit ground for, or be necessarily implicated by, the Authority's decision."[6] However, EADs "resolve[] the parties' arguments without a full explanation of the background, arbitration award, parties' arguments, and analysis of those arguments."[7] Thus, the typical EAD does not provide sufficient information, on its face, for an appeals court to *assess* whether a ULP is "an explicit ground for, or . . . necessarily implicated by, the Authority's decision."[8] In my view, the most prudent approach is for the Authority to deny EAD requests whenever a ULP issue is before the arbitrator – regardless of whether or how it ultimately is resolved. Here, as the majority acknowledges, a ULP issue was before the Arbitrator.[9] For that reason, I agree that it is appropriate to deny the Union's EAD request. Accordingly, I concur.

[1] Majority at 3 n.8.

[2] I also note that the Agency does not oppose the Union's request, which weighs in favor of granting it. *See* 5 C.F.R. § 2425.7 (citing, as one consideration, "whether any opposition . . . objects to issuance of such a decision and, if so, the reasons for such an objection[]").

[3] *Id.*

[4] *Id.*

[5] 5 U.S.C. § 7123(a)(1).

[6] *Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 67-68 (D.C. Cir. 1987) (*OEA*).

[7] 5 C.F.R. § 2425.7.

[8] *OEA*, 824 F.2d at 68. In fact, shortly before issuing the proposed version of 5 C.F.R. § 2425.7, the Authority issued an EAD that, on its face, did not address a ULP, *see United Power Trades Org.*, 63 FLRA 422 (2009) – and then moved for a voluntary remand, and issued a full-length decision, after the EAD was appealed to the U.S. Court of Appeals for the D.C. Circuit, *see United Power Trades Org.*, 64 FLRA 440 (2010), *pet. for review denied sub nom. United Power Trades Org. v. FLRA*, 427 F. App'x 5 (D.C. Cir. 2011).

[9] *See* Majority at 2.