74 FLRA No. 10

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
SEAGOVILLE, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1637
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5791

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DECISION

October 9, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko and Anne Wagner, Members

I. Statement of the Case

Arbitrator Edward B. Valverde issued an award finding the Union's grievance procedurally arbitrable and granting the grievance on the merits. The Agency filed exceptions to the Arbitrator's arbitrability determination on essence grounds, and to the merits determination on contrary-to-law grounds. For the reasons discussed below, we partially dismiss, and partially deny, the Agency's exceptions challenging the Arbitrator's arbitrability determination. Further, we find the merits determination contrary to law and set it aside.

II. Background and Arbitrator's Award

The grievant is a correctional officer. One of the grievant's supervisors (the captain) reported alleged misconduct to the facility's warden. Specifically, the captain reported that the grievant failed to perform inmate rounds and fraudulently recorded performing rounds in a log book. The Agency issued the grievant a memorandum on February 25, 2020,[1] notifying him he would be temporarily reassigned to a phone-monitor position (February reassignment) "pending resolution of the disciplinary process."[2] While reassigned, the Agency issued the grievant another memorandum on May 13 notifying him he would be temporarily reassigned to another phone-monitor position (May reassignment) "pending resolution of the disciplinary process."[3] Both memoranda indicated that the grievant was prohibited from working overtime during the reassignments. On July 6, the Agency temporarily reassigned the grievant to a laundry and food service position (July reassignment), and on August 10, the Agency reassigned the grievant back to a phone-monitor position (August reassignment). The Agency did not issue accompanying memoranda regarding the July and August reassignments.

On October 8, the Union filed a grievance alleging the Agency violated the parties' collective-bargaining agreement by erroneously reassigning the grievant and denying him the opportunity to work overtime assignments. On December 3, the Agency completed its investigation, finding no misconduct. The Agency then returned the grievant to his former position and restored his ability to work overtime.

The grievance was submitted to arbitration. The Arbitrator noted the parties did not stipulate to an issue, and he recited the parties' proposed issues. The Agency proposed, as relevant here, a threshold issue of whether the grievance was "timely filed in accordance with Article 31, Section d" of the parties' agreement (Article 31(d)), and a merits issue of whether the Agency violated the Federal Service Labor-Management Relations Statute (the Statute) or the parties' agreement when it "temporarily reassigned [the grievant] on February 26."[4] The Union proposed one issue: whether "the Agency follow[ed] the [parties' a]greement and applicable laws, rules, and regulations when it removed [the grievant] from his bid[-]upon post on February 26, 2020, through December of 2020 and further forbid him from working overtime?"[5] The Arbitrator did not specifically frame any issues, but addressed the parties' proposed threshold and merits issues.

Addressing the grievance's timeliness, the Arbitrator applied Article 31(d), which states that "[g]rievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence" or "within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence."[6] He found the February and May reassignments were not included in the "period of injury to [the grievant]" because the memoranda related to those reassignments provided the Union with sufficient

[1] Unless otherwise noted, all dates hereafter occurred in 2020.
[2] Award at 8 (internal quotation marks omitted).
[3] *Id.*
[4] *Id.* at 2-3.
[5] *Id.* at 3.
[6] *Id.* at 6 (quoting Art. 31(d)).

information to timely file a grievance disputing the alleged misconduct within the contractual timeframes, which the Union had not done.[7] However, the Arbitrator found that because the Agency failed to provide the Union or the grievant similar notice for the July and August reassignments, neither knew "whether the basis of subsequent reassignments [was] related to the initial reassignment" and grievable.[8] The Arbitrator determined that the Union first became aware of the July and August reassignments on September 1, when it received a roster from the Agency.[9] Because the Union filed the grievance on October 8 – within forty days of September 1 – the Arbitrator concluded the grievance was timely filed with respect to the July and August reassignments.

Addressing the merits, the Arbitrator first considered Article 6, Section b.2 of the parties agreement (Article 6), in which the parties agreed to "be treated fairly and equitably in all aspects of personnel management."[10] He found the Agency violated this provision because the captain conducted a "superficial investigation"[11] of the grievant's alleged misconduct before reporting it to the warden, and knew the log-book allegation was without merit within a few days of the February reassignment but failed to notify the warden. According to the Arbitrator, the captain's failure to report the log-book allegation's lack of merit was "gross negligent conduct."[12] The Arbitrator further found the captain's failure to notify the warden caused her to erroneously believe the grievant engaged in misconduct, which in turn caused her to "lose confidence" in the grievant and "led to her decision to reassign and deny him access to overtime assignments."[13]

Based on these "negligent and gross[ly] negligent" Agency actions, the Arbitrator found the Agency also violated Article 18, Section p of the parties' agreement (Article 18(p)).[14] This provision requires overtime assignments to be "distributed and rotated equitably among bargaining[-]unit employees" as well as the "equitable distribution of overtime assignments to members of the unit."[15] The Arbitrator found the Agency violated Article 18(p) because it restricted the grievant's ability to receive overtime opportunities while reassigned.

The Arbitrator rejected the Agency's reliance on Article 30, Section g of the parties' agreement (Article 30(g)) to justify its actions. Under Article 30(g), the Agency "retains the right to respond to an alleged offense by an employee which may adversely affect the Employer's confidence in the employee or the security or orderly operation of the institution," and "may elect to reassign the employee to another job within the institution . . . pending investigation and resolution of the matter[.]"[16] The warden testified that learning of potentially exculpatory evidence would not have reduced the length of the reassignment so long as the investigation was still pending. However, the Arbitrator found the warden's stance "arbitrary," and unsupported by "evidence" or "regulatory, statutory, or contractual provision."[17] The Arbitrator further found the warden made inconsistent statements concerning whether "the charges against [the grievant] merited an investigation" and that the warden's "concern[s] about the integrity of the facility" that led to the grievant's reassignment were based on the erroneous belief the grievant engaged in misconduct.[18]

As a remedy for the Agency's contract violations, the Arbitrator directed the Agency to compensate the grievant for loss of overtime opportunities.

On January 24, 2022, the Agency filed exceptions to the award, and the Union filed an opposition to the Agency's exceptions on February 25, 2022. On September 26, 2023, the Authority issued *Consumer Financial Protection Bureau* (*CFPB*),[19] which revised the test the Authority will apply in cases where parties file management-rights exceptions to arbitration awards finding collective-bargaining-agreement violations. The Authority allowed the parties to file additional briefs concerning how the *CFPB* test should apply in this case. The parties both filed supplemental briefs on November 17, 2023.[20]

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

The Agency challenges the Arbitrator's timeliness determination, in part, on the basis that the award fails to draw its essence from Article 30(g) because the Arbitrator improperly interpreted that provision as requiring notice of a reassignment to the Union in order to trigger the filing deadline in Article 31(d).[21] The Agency also asserts such notice is not required because Article 18, Section o of the parties' agreement (Article 18(o)) allows

[7] *Id.* at 9.
[8] *Id.* at 10.
[9] *Id.* at 9.
[10] *Id.* at 4.
[11] *Id.* at 17.
[12] *Id.*
[13] *Id.* (internal quotation marks omitted).
[14] *Id.* at 19.
[15] *Id.* at 4 (quoting Art. 18(p)).
[16] *Id.* at 5 (quoting Art. 30(g)).
[17] *Id.* at 18.
[18] *Id.*
[19] 73 FLRA 670 (2023).
[20] The Agency and the Union filed separate requests for extensions until November 17, 2023, to file their supplemental briefs, and the Authority granted the requests.
[21] Exceptions at 11-13.

it to reassign employees without advance notice.[22] The Agency asserts the Arbitrator erred in requiring actual notice to the Union when neither Article 30(g) nor Article 18(o) requires such notice.[23]

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.[24] Before the Arbitrator, the Agency argued the grievance was untimely filed under Article 31(d) because the grievant knew in February – based on the first memorandum – or in May – based on the second memorandum – that he was being reassigned in accordance with Article 30(g).[25] To support its position, the Agency also cited Article 31, Section e and Article 32, Section h of the parties' agreement.[26] While the Agency argued before the Arbitrator that he should deny the grievance on the merits because Article 30(g) permitted it to reassign the grievant,[27] it did not challenge the grievance's timeliness based on that provision.[28] Additionally, the Agency made no arguments to the Arbitrator regarding Article 18.[29] Specifically, the Agency did not argue that the Arbitrator could not base the filing deadlines in Article 31(d) on notice to the Union, because Article 30(g) and Article 18(o) did not require such notice.

Because the parties disputed at arbitration whether the Agency was required to notify the Union of any reassignments,[30] the Agency could have raised its Article 30(g) or Article 18(o) arguments to the Arbitrator.[31] As it did not do so, it may not raise those arguments now, and we dismiss them.[32]

IV. Analysis and Conclusions

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

The Agency argues the Arbitrator's determination that the grievance was timely fails to draw its essence from Article 31(d).[33] 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.[34]

Article 31(d) requires that a grievance be filed within "forty . . . calendar days of the date of the alleged grievable occurrence" or forty days from the date "the party filing the grievance can reasonably be expected to have become aware of the occurrence."[35] Although the Agency asserts the grievant knew about the July and August reassignments before September 1,[36] the Arbitrator determined the earliest date the Union – the party filing the grievance – became aware of the grievable occurrence was September 1.[37] The Authority has held that an arbitrator's determination of the date on which a party became aware of a grievable action constitutes a factual finding.[38] Under Authority precedent, mere disagreement with an arbitrator's factual findings does not provide a basis for finding that an award fails to draw its essence from the parties' agreement,[39] and the Agency does not challenge the Arbitrator's finding as a nonfact. As the Agency's

[22] *Id.* at 13-15.
[23] *Id.* at 15, 17.
[24] 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DHS, Citizenship & Immigr. Servs.*, 73 FLRA 82, 83-84 (2022) (citing 5 C.F.R. §§ 2425.4(c), 2429.5; *AFGE, Loc. 3627*, 70 FLRA 627, 627 (2018)).
[25] Exceptions, Attach. A, Agency Post-Hr'g Br. (Agency Br.) at 5-8.
[26] *Id.* at 8-10 (arguing Agency could raise threshold issues at any time and Arbitrator has no power to disregard or modify terms of the parties' agreement).
[27] *Id.* at 15-18.
[28] *Id.* at 6 (noting February reassignment was issued in accordance with Article 30(g), but making no argument challenging arbitrability determination).
[29] *Id.* at 5 (noting grievance alleged violation of Article 18 in context of argument that grievance lacked required specificity, but making no arguments related to Article 18).
[30] *See* Opp'n, Ex. A at 16-17 (arguing Union had no notice of July and August reassignments because Agency provided no memorandum for those reassignments); Agency Br. at 6-8 (arguing grievant had requisite notice based on February memorandum); *see also* Exceptions, Attach. C, Tr. at 7-9 (discussion regarding Agency's introduction of timeliness issue), 83-85 (Union's notice of reassignments).
[31] *U.S. Dep't of State, Passport Serv.*, 73 FLRA 201, 202 (2022) (finding excepting party could have raised arguments to arbitrator where parties disputed matter below).
[32] *Id.* (barring only arguments not raised below and considering remainder of exception).
[33] Exceptions at 9-13, 15-17.
[34] *AFGE, Loc. 2092*, 73 FLRA 596, 597 (2023) (citing *NTEU, Chapter 149*, 73 FLRA 413, 416 (2023)).
[35] Award at 6 (quoting Art. 31(d)).
[36] Exceptions at 15-17.
[37] Award at 7-10.
[38] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Victorville, Cal.*, 73 FLRA 725, 726 (2023) (*BOP Victorville*) (citing *AFGE, Loc. 3707*, 72 FLRA 666, 667 (2022) (Chairman DuBester concurring)).
[39] *Id.* (citing *AFGE, Loc. 3342*, 72 FLRA 91, 92 (2021)).

exception challenges the Arbitrator's factual determination of when the Union discovered the grievable action, it provides no basis for concluding the award fails to draw its essence from the parties' agreement.[40]

As part of its essence exception, the Agency also argues the Statute does not require the Agency to notify the Union when it reassigns a bargaining-unit member.[41] However, the Agency does not cite a provision of the parties' agreement to support its argument, and does not allege that the award is contrary to law on this basis. Therefore, we deny this argument as unsupported.[42]

We deny the Agency's essence exception.

B. The merits portion of the award is contrary to § 7106(a) of the Statute.

The Agency argues the award conflicts with management's rights to determine internal-security practices under § 7106(a)(1) and assign work under § 7106(a)(2)(B) of the Statute.[43] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[44] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[45]

In *CFPB*, the Authority revised its test for resolving management-rights exceptions in cases where an arbitrator has found a collective-bargaining-agreement violation.[46] Under the four-part *CFPB* framework, the first question is whether the excepting party establishes the arbitrator's interpretation and application of the parties' agreement, and/or the awarded remedy, affects a management right.[47] If the answer to that question is yes, then, under the second question, the Authority will determine whether the arbitrator correctly found, or the opposing party demonstrates, that the pertinent contract language – as interpreted and applied by the arbitrator – is enforceable under § 7106(b).[48]

The Agency argues the Arbitrator's interpretation and application of Article 30(g), as well as the remedy, affect management's right to assign work under § 7106(a)(2)(B) of the Statute.[49] Specifically, the Agency argues the award limits the Agency's ability to "assign an employee to a post of its choosing (assignment of work)."[50] The Agency further argues the overtime remedy affects this right because, by "retroactively placing the grievant back into his position," it "does not permit the Agency to complete an investigation before either taking a disciplinary action or returning an employee to his position as Article 30[(g)] allows."[51]

The right to assign work under § 7106(a)(2)(B) includes the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned.[52] The right also includes the right to assign overtime and to determine when overtime will be performed.[53] The Arbitrator found the Agency violated Articles 6 and 18 by reassigning the grievant and denying him overtime opportunities.[54] In other words, the Arbitrator interpreted and applied those articles to limit the Agency's ability to reassign the grievant to positions where overtime was unavailable. Further, the Union does not dispute the Agency's contention that the award affects management's right to assign work.[55] For these reasons, we find the award affects management's right to assign work, and the answer to the first *CFPB* question is yes.[56]

We turn next to the second question. In addressing this question, the Agency notes that the Arbitrator "does not mention §[]7106(b) . . . in his discussion of Article 30(g)."[57] The Agency also notes the Union does not "specifically label Article 30(g) [as] an

[40] *Id.* (denying essence exception challenging arbitrator's determination that grievance was timely filed under parties' agreement where exception was based on date union allegedly became aware of grievable event).
[41] Exceptions at 14, 16 n.4.
[42] 5 C.F.R. § 2425.6(e)(1) ("An exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground [for review].").
[43] Exceptions at 18-25 (citing 5 U.S.C. §§ 7106(a)(1), (2)(B)); Agency Supp. Br. at 3-15.
[44] *See U.S. DHS, U.S. CBP, U.S. Border Patrol, Rio Grande Valley Sector, Edinburg, Tex.*, 73 FLRA 784, 785 (2024) (*CBP*) (citing *U.S. Dep't of the Interior, U.S. Park Police*, 73 FLRA 276, 278 (2022)).
[45] *Id.* (citing *U.S. Dep't of the Navy, Naval Med. Ctr. Camp Lejeune, Jacksonville, N.C.*, 73 FLRA 137, 140 (2022)).
[46] *CFPB*, 73 FLRA at 676-81.
[47] *Id.* at 676-77.
[48] *Id.* at 677-80.
[49] Exceptions at 18, 20 (citing 5 U.S.C. § 7106(a)(2)(B)); Agency Supp. Br. at 3-7, 9-15.
[50] Agency Supp. Br. at 9.
[51] *Id.* at 10.
[52] *CBP*, 73 FLRA at 786.
[53] *See, e.g.*, *AFGE, Council 215*, 60 FLRA 461, 464 (2004) (citing *AFGE, Loc. 1302, Council of Prison Locs. C-33*, 55 FLRA 1078, 1079 (1999) (Member Wasserman concurring); *SSA, Se. Program Serv. Ctr., Birmingham, Ala.*, 55 FLRA 320, 321 (1999)).
[54] Award at 17-19.
[55] Union Supp. Br. at 1.
[56] *CBP*, 73 FLRA at 786 (in concluding award affected management's right to assign work, Authority noted, among other things, that union did not dispute arbitrator's interpretation and application of the parties' agreement affected that right).
[57] Agency Supp. Br. at 11.

enforceable procedure or arrangement."[58] On this basis, the Agency contends that the second *CFPB* question must be answered in the negative.

However, to the extent the Agency is arguing that the Arbitrator enforced Article 30(g), that argument is based upon a misunderstanding of the award. In sustaining the grievance, the Arbitrator found the Agency violated Article 6 by failing to treat the grievant fairly and equitably because it acted with negligence and gross negligence in its initiation and pursuit of the investigation of him.[59] The Arbitrator also found the Agency violated Article 18 by restricting the grievant's ability to receive overtime opportunities while reassigned.[60] Although the Arbitrator discussed Article 30(g), he did so merely to consider and reject the Agency's reliance on that article to justify its actions. In short, the Arbitrator found the Agency violated Articles 6 and 18, not Article 30(g). Therefore, in applying the second part of *CFPB*, we consider whether Articles 6 and 18 are enforceable under § 7106(b).

The Arbitrator – who issued the award before the Authority issued *CFPB* – did not make any findings, or otherwise discuss, either article's relation to § 7106(b) of the Statute. Neither party argues there is any need to remand the case for further development of the record. Absent any arbitral analysis of § 7106(b), the opposing party – the Union, in this instance – "has the burden to demonstrate" that the Arbitrator's interpretation and application of Articles 6 and 18 are enforceable under § 7106(b).[61] As the Authority emphasized in *CFPB*, the party raising § 7106(b) "should rely on Authority precedent and standards concerning" the subsection(s) of § 7106(b) it cites.[62]

In its supplemental brief, the Union asserts that because "the parties chose to negotiate procedures of assigning and reassigning jobs in Articles 6, 18, and 30[,] any violation thereof would be enforceable under [§] 7106(b)(2)" of the Statute.[63] As noted above, in *CFPB*, the Authority emphasized that the party raising § 7106(b) "should rely on Authority precedent and standards concerning" the subsection(s) of § 7106(b) it cites.[64] However, the Union does not provide any supporting arguments, or cite any precedent, to explain how the provisions upon which it relies are enforceable under § 7106(b)(2).

The Union additionally argues in its supplemental brief that Article 6 is enforceable as an appropriate arrangement under § 7106(b)(3).[65] The Authority emphasized in *CFPB* that parties raising § 7106(b)(3) "should apply [a modified version of] the test established in" *NAGE, Local R14-87* (*KANG*).[66] However, the Union does not discuss that test or explain how it should apply in this case.

Based on the foregoing, we find that the Union has not met its burden of demonstrating that Articles 6 and 18 – as interpreted and applied by the Arbitrator – are enforceable under § 7106(b) of the Statute.[67] Therefore, the answer to the second *CFPB* question is no, and we find the Agency has successfully challenged the Arbitrator's finding of a contract violation on management-rights grounds.

Under *CFPB*, where an excepting party "successfully challenges the underlying finding of a [contract] violation," "the Authority will set aside *both* the finding of a violation *and* the remedy for the violation."[68] Consistent with that principle, we set aside the Arbitrator's finding of a contract violation and his awarded remedy – and, thus, the merits portion of the award – as contrary to management's right to assign work. Consequently, we need not consider the third and fourth questions under *CFPB*.[69]

The Agency also argues that the award is contrary to management's right to determine internal-security practices under § 7106(a)(1) of the Statute.[70] Because we have set aside the relevant portions of the award as

[58] *Id.* at 12.
[59] Award at 17-19.
[60] *Id.*
[61] *See CFPB*, 73 FLRA at 679 (explaining, where arbitrator makes no relevant findings, union "ha[s] the burden to demonstrate that the [contract] provision at issue . . . is enforceable under § 7106(b)"). Member Wagner notes that, consistent with the standard applied to questions of law raised by exceptions, we review the question of whether the Union has met its burden under *CFPB* de novo.
[62] *Id.* at 680.
[63] Union Supp. Brief at 4.
[64] *CFPB*, 73 FLRA at 680.
[65] Union Supp. Br. at 4.
[66] *CFPB*, 73 FLRA at 680 (citing *NAGE, Loc. R14-87*, 21 FLRA 24 (1986)).
[67] *CBP*, 73 FLRA at 786 (finding union failed to meet its burden to demonstrate contractual provisions interpreted by arbitrator were enforceable where union did not make any specific arguments about any § 7106(b) provisions); *see also U.S. Dep't of the Treasury, IRS*, 73 FLRA 888, 890 (2024) (*IRS*) (finding union failed to meet its burden to demonstrate provision at issue was enforceable under § 7106(b) (citing *CFPB*, 73 FLRA at 679)).
[68] *CFPB*, 73 FLRA at 680; *e.g.*, *IRS*, 73 FLRA at 891.
[69] *CFPB*, 73 FLRA at 680 (recognizing that it is unnecessary to address the third and fourth *CFPB* questions unless "the answer to the [second] question is yes").
[70] Exceptions at 18-25 (citing 5 U.S.C. § 7106(a)(1)); Agency Supp. Br. at 3-15.

contrary to management's right to assign work, we need not resolve the Agency's remaining argument.[71]

V. Decision

We partially dismiss and partially deny the Agency's essence exception, grant the Agency's contrary-to-law exception, and set aside the merits portion of the award.

[71] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 73 FLRA 860, 864 (2024) (finding it unnecessary to resolve whether award interfered with management's right to discipline where Authority found award impermissibly interfered with management's right to determine internal security (citing *U.S. Dep't of the Army, Ariz. Dep't of Emergency & Mil. Affs., Ariz. Army Nat'l Guard*, 73 FLRA 617, 619 n.22 (2023), *recons. denied*, 73 FLRA 809 (2024))). In its supplemental brief, Agency Supp. Br. at 6-7, the Agency asserted for the first time that the award affects management's right to assign employees. For the same reason, even assuming this argument is properly before us, we need not resolve this argument.