

72 FLRA No. 156

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
NATIONAL VETERANS AFFAIRS COUNCIL  
(Union)

0-AR-5482

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DECISION

May 12, 2022  
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Before the Authority: Ernest DuBester, Chairman, and  
Colleen Duffy Kiko and James T. Abbott, Members

**I. Statement of the Case**

In this case, we remind the federal labor-relations community that contract provisions that define parties’ obligations to engage in mid-term bargaining are enforceable at arbitration.

After the Union declined to mid-term bargain over new procedures for requesting and tracking official time, the Agency unilaterally implemented the procedures. Arbitrator Malcolm L. Pritzker found that the procedures concerned a matter that was covered by the parties’ agreement. The Arbitrator also found that the parties had agreed to bargain over covered matters in certain circumstances, but that such mid-term bargaining could take place only with mutual consent. Because the Union did not consent to mid-term bargaining, the Arbitrator found that the Agency violated the parties’ agreement by unilaterally implementing the new procedures.

The Agency argues that the award is deficient because it fails to draw its essence from the provisions in the parties’ agreement concerning mid-term bargaining. The Agency also argues that the Arbitrator erroneously applied the “covered by” doctrine. We find that the Agency’s exceptions do not demonstrate that the award is deficient, and we deny them.

**II. Background and Arbitrator’s Award**

In 2012, the Agency introduced a new time-recording system: the Veterans Affairs time and attendance system (VATAS). The Union subsequently requested to bargain over the implementation of VATAS, and the parties signed a Memorandum of Understanding (MOU) in August 2013 regarding the training of local union representatives about VATAS. The parties executed another MOU pertaining to VATAS training in October 2014. In 2016, the Agency entered into two MOUs with local chapters of the Union regarding official-time procedures.

In December 2017, the Agency reopened the parties’ agreement for term bargaining. In March 2018, the Agency notified the Union that the Agency would be implementing a formalized process for requesting, tracking, and recording the use of official time using VATAS (the change). The Agency took the position that the change neither conflicted with, nor was covered by, the parties’ existing agreements, so the Agency sought immediate mid-term bargaining. The Union responded that the parties’ agreement already specified how to track and record official time, and also cited the parties’ MOUs concerning VATAS and official time. Accordingly, the Union asserted that the change was covered by existing agreements, and the Union refused to mid-term bargain. Instead, the Union offered to bargain over the change later, in the course of term negotiations. The Agency responded by reasserting that the change was not covered by existing agreements and insisting that the Union bargain pursuant to a mid-term-bargaining article in the parties’ agreement (Article 47). Next, the Agency implemented the change, the Union filed a grievance, and the matter proceeded to arbitration.

The Arbitrator framed the issues as: “(1) Is the Union required to participate in mid-term bargaining?” and “(2) Did the Agency violate the parties’ master agreement[,] and if so, what shall the remedy be?”<sup>1</sup>

The Arbitrator found that tracking and recording official time was “inseparably bound up” with and, thus, “covered by” the agreement.<sup>2</sup> To determine the parties’ contractual mid-term-bargaining obligations, the Arbitrator first applied Article 47, Section 1(B), which provides:

Recognizing that the [agreement] cannot cover all aspects or provide definitive language on each subject addressed, it is understood that

<sup>1</sup> Award at 1.

<sup>2</sup> *Id.* at 6.

mid-term agreements at all levels may include substantive bargaining on all subjects covered in the [agreement], so long as they do not conflict, interfere with, or impair implementation of the [agreement]. However, matters that are excluded from mid-term bargaining will be identified within each article.<sup>3</sup>

Under Article 47, the Arbitrator found that bargaining about the change was permissible because it “would not ‘conflict, interfere with or impair implementation of the [agreement],’”<sup>4</sup> and the agreement “does not identify the tracking and recording of official time as being excluded.”<sup>5</sup>

However, the Arbitrator also applied Section 3 of the parties’ “Duration of Agreement” article (the reopener clause), which states, in relevant part, that “[n]egotiations initiated by either party during the term to add to, amend, or modify this [a]greement may be conducted only by mutual consent of the parties.”<sup>6</sup> Because the Union did not “consent,” the Arbitrator found that the Union was not required to bargain mid-term over using VATAS to track and record official time.<sup>7</sup> Therefore, the Arbitrator concluded that the Agency violated the agreement by implementing the change. As a remedy, the Arbitrator directed the Agency to return to the previous practice of tracking and recording official time, and ordered that any bargaining over the tracking and recording of official time must take place during term negotiations.

On March 8, 2019, the Agency filed exceptions to the Arbitrator’s award. On April 12, 2019, the Union filed its opposition to the Agency’s exceptions.

### III. Analysis and Conclusions

#### A. The award draws its essence from the parties’ agreement.

The Agency argues that the award fails to draw its essence<sup>8</sup> from the agreement because Article 47 allows mid-term bargaining over subjects addressed in the agreement “as long as they do not conflict, interfere with, or impair implementation of the [agreement].”<sup>9</sup> The Agency also argues that the reopener clause does not apply in this case.<sup>10</sup>

As relevant here, Article 47 states that “mid-term agreements at all levels may include substantive bargaining on all subjects covered in the [agreement], so long as they do not conflict, interfere with, or impair implementation of the [agreement].”<sup>11</sup> The Arbitrator found that the change was covered by the parties’ existing agreement.<sup>12</sup> Further, he found that “[b]argaining about tracking and recording [official time] under . . . VATAS . . . would not ‘conflict, interfere with[,] or impair implementation of the agreement,’” and that the agreement “does not identify the tracking and recording of official time as being excluded.”<sup>13</sup>

The Agency would have us stop at that point in the Arbitrator’s analysis and conclude that the Union was required to mid-term bargain the change. But, although Article 47 *permits* mid-term bargaining in certain circumstances, its plain wording does not *mandate* mid-term bargaining of covered topics. And the parties’ reopener clause further establishes the non-mandatory nature of mid-term bargaining over covered topics.

The reopener clause provides that “[n]egotiations initiated by either party during the term to add to, amend, or modify this [a]greement may be conducted only by *mutual consent of the parties*.”<sup>14</sup> The Arbitrator found that this provision required the mutual consent of both parties in order for mid-term bargaining over covered topics to occur, and that the Union did not

<sup>8</sup> The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the excepting 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. *NATCA*, 72 FLRA 299, 300 n.17 (2021) (*NATCA*).

<sup>9</sup> Exceptions Br. at 15; *see also* CBA at 242.

<sup>10</sup> Exceptions Br. at 17.

<sup>11</sup> CBA at 242.

<sup>12</sup> Award at 6.

<sup>13</sup> *Id.* at 5.

<sup>14</sup> CBA at 301 (emphasis added).

<sup>3</sup> Opp’n, Ex. 1, Collective-Bargaining Agreement (CBA) at 242.

<sup>4</sup> Award at 5 (quoting CBA at 242).

<sup>5</sup> *Id.*

<sup>6</sup> CBA at 301.

<sup>7</sup> Award at 6.

consent.<sup>15</sup> The Agency has failed to demonstrate how the Arbitrator's interpretation of the reopener clause is irrational, unreasonable, implausible, or manifests disregard of the agreement. Accordingly, we deny the Agency's essence exception.<sup>16</sup>

B. The award is not contrary to law.

The Agency argues that the award is contrary to law<sup>17</sup> because the Arbitrator misapplied the "covered by" doctrine established in Authority precedent.<sup>18</sup> Specifically, the Agency argues that (1) the "covered by" doctrine is not applicable because there was not an allegation of failure to bargain in this case; and (2) the change was not covered by the parties' existing agreements.<sup>19</sup>

The Authority has held that contract provisions that define parties' obligations to engage in mid-term bargaining are enforceable at arbitration.<sup>20</sup> As discussed above, the Arbitrator interpreted Article 47 and the reopener clause to define the parties' *contractual* mid-term-bargaining obligations. In particular, Article 47 expresses the parties' willingness, in certain circumstances, to engage in "substantive bargaining on all subjects *covered* in the [agreement]."<sup>21</sup> Thus, the lack of a *statutory* allegation regarding the failure to bargain does not establish that the Arbitrator erred by doing precisely what the contract wording

required him to do: determine whether the change was covered by the parties' existing agreements.<sup>22</sup> Because the Arbitrator's conclusion that the change was covered is a matter of contract interpretation, and we have denied the Agency's essence exception, the Agency's disagreement with the Arbitrator's contract interpretation does not establish that the award is contrary to law.<sup>23</sup>

Based on the foregoing reasons, the Agency does not establish that the award is contrary to law.

#### IV. Decision

We deny the Agency's exceptions.

<sup>15</sup> Award at 6.

<sup>16</sup> See *NATCA*, 72 FLRA at 300-01 (denying an essence exception because the excepting party failed to demonstrate that the arbitrator's interpretation was not a plausible interpretation of the parties' agreement) (citing *U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 103, 105 (2019) (denying an essence exception where the award was supported by the plain wording of the parties' agreement)).

<sup>17</sup> The Authority reviews questions of law de novo. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In conducting de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts. *E.g., NLRB*, 72 FLRA 334, 338 (2021).

<sup>18</sup> The "covered by" doctrine excuses parties from bargaining on the ground that they have already bargained and reached agreement concerning the matter at issue. *U.S. DOD, U.S. Air Force 325th Fighter Wing, Tyndall Air Force Base, Fla.*, 66 FLRA 256, 260 (2011); see *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 813-14 (2000) (describing the Authority's two-prong "covered by" test).

<sup>19</sup> Exceptions Br. at 13-14.

<sup>20</sup> *AFGE Council of Prison Locs., Council 33*, 68 FLRA 757, 759 (2015) (*Council 33*) (citing *NTEU*, 63 FLRA 299, 300 (2009)).

<sup>21</sup> CBA at 242 (emphasis added).

<sup>22</sup> See *Council 33*, 68 FLRA at 759 ("[W]hen an arbitrator finds that an agreement limits a party's statutory-bargaining rights, and that finding draws its essence from the agreement, an award that enforces the agreement is not contrary to law.").

<sup>23</sup> *Id.*