

**65 FLRA No. 9**

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
G. V. (SONNY) MONTGOMERY  
VA MEDICAL CENTER  
JACKSON, MISSISSIPPI  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 589  
(Union)

0-AR-4345

—  
DECISION

August 26, 2010

—  
Before the Authority: Carol Waller Pope, Chairman,  
and Thomas M. Beck and Ernest DuBester, Members

**I. Statement of the Case**

This matter is before the Authority on exceptions to an award and supplemental award of Arbitrator Patrick Hardin filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Regulations. The Union did not file an opposition to the Agency's exceptions.

The Union filed a grievance alleging that the grievants were not properly compensated when they were required to perform duties of a higher-graded position for twenty-three months. The Arbitrator determined that the employees at issue were entitled to backpay for performing the duties of the higher-graded position. For the reasons set forth below, we dismiss the Agency's exceptions.

**II. Background and Arbitrator's Award****A. Background**

The Union filed a grievance alleging that the Agency did not properly compensate the GS-6 Police Officer grievants when they were required to conduct training duties of higher-graded GS-7 Police Officer

Instructors for twenty-three months.<sup>1</sup> Original Award at 3.

The Agency failed to timely respond to the grievance. Article 42, Section 9 of the Master Agreement provides that if the Agency fails to timely respond to a grievance, the dispute is to be resolved "in favor of the grievant" as long as the requested remedy is legal and reasonable. *Id.* at 4 (quoting Article 42, Section 9 of the Master Agreement).

The parties submitted the matter to arbitration. The Arbitrator framed the issue as whether the requested remedy was "'legal and reasonable under the circumstances of the grievance' within the meaning of Article 42, Section 9, of the parties' Master Agreement[?]" Original Award at 2. The issue further stated that if the Arbitrator determined that the remedy was not legal or reasonable, he was to decide what the remedy should be.

**B. Arbitrator's Award**

At the arbitration hearing, the Union requested three remedies. First, the Union asked that the grievants be temporarily promoted to the GS-7 Police Officer Instructor position for the twenty-three months during which they performed training duties. Second, the Union requested that the grievants be awarded a "16-hours time-off award[.]" *Id.* at 4. Third, the Union requested that the grievants receive a special contribution award totaling \$9,568. *Id.*

Before the Arbitrator, the Agency argued that the Union's requested remedies were not legal or reasonable for several reasons. First, the Agency claimed that the grievants had not met the requirements of Article 12, Section 2.a of the Master Agreement to be compensated at the GS-7 pay rate. *Id.* at 6. Second, the Agency contended that the 16-hours time-off award requested by the Union was unreasonable. Third, the Agency argued that the monetary award requested by the Union was not legal because each of the grievants had already received a \$2,500 special contribution award for the training that they conducted. Award at 5. The Agency claimed that it was illegal to grant a special contribution award in excess of \$5,000 to any employee.

---

1. The original grievance concerned three GS-6 Police Officer grievants. The Agency's exceptions pertain to just two of the grievants.

The Arbitrator made several determinations with regard to the Union's request that the Agency temporarily promote the grievants. The Arbitrator rejected the Agency's argument that the grievants were not entitled to temporary promotions under Article 12, Section 2.a of the Master Agreement. In this regard, the Arbitrator concluded that the Agency could not argue on the merits that the grievants were not entitled to the temporary promotions because Article 42 of the Master Agreement required that the grievance be resolved in the grievants' favor. Moreover, the Arbitrator found that, in any event, Article 12, Section 2.a did not forbid the temporary promotions. *Id.* at 7. Accordingly, the Arbitrator found that the temporary promotions were both legal and reasonable. *Id.* at 7-8.

The Arbitrator directed the Agency to provide the grievants with backpay for sixteen hours per week, for the entire twenty-three month period during which they performed the training duties. The Arbitrator determined that the amount of backpay should be calculated based on the difference between the GS-6 rate of pay that the grievants received for the hours that they performed training duties and the GS-7 rate of pay that they should have received for performing the duties. *Id.* at 9.

Turning to the Union's two other requested remedies, the Arbitrator determined that the Union's request that each of the grievants receive sixteen hours of time off was not reasonable. *Id.* at 8. In addition, the Arbitrator concluded that the Union's request that each of the grievants receive a special contribution award totaling \$9,568 was also not reasonable. *Id.*

### C. Arbitrator's Supplemental Award

A dispute arose between the parties concerning the Agency's interpretation of, and compliance with, the Arbitrator's award. The Agency took the position that it did not need to provide the grievants with any backpay. Supplemental Award 2-3. In the Agency's view, the \$2,500 special contribution award already provided to each of the grievants covered the total amount of backpay due to the grievants because it exceeded the amount each was due under the award. Consequently, the Agency did not provide any backpay to either grievant. *Id.* The Union disputed the offset and initiated supplemental proceedings before the Arbitrator to resolve the issue.

In his supplemental award, the Arbitrator determined that the offset was not authorized by his original award. *Id.* at 3. According to the Arbitrator,

the Agency did not argue at the arbitration hearing that any backpay awarded to the grievants should be offset by the amount of the special contribution awards that the grievants had received. The Arbitrator also found that such an argument lacked merit. Accordingly, the Arbitrator ordered the Agency to award the grievants backpay as directed in his original award. *Id.* at 4.

### III. Agency's Exceptions<sup>2</sup>

The Agency argues that the Arbitrator's awards are contrary to law for several reasons. The Agency claims that the award is contrary to the VA Handbook, which incorporates 5 C.F.R. § 335.103(c)(i), governing temporary promotions. Exceptions at 4. The Agency argues that both the handbook and the regulation provide that backpay for temporary promotions of more than 120 days cannot be awarded in the absence of competitive procedures. *Id.* at 4 (citing VA Handbook 5005/13, Part III, Chapter 3; VA Handbook 5005/2, Chapter 4, Section 15; 5 C.F.R. § 335.103(c)(i)).<sup>3</sup> Accordingly, the Agency asks that the award be vacated in its entirety or, alternatively, that the temporary promotions be limited to 120 days.

The Agency also contends that the award violates Article 22, Section 7 of the parties' Master Agreement. According to the Agency, this provision would only allow the grievants two sixty-day temporary promotions, with each in a separate twelve-month period. Exceptions at 5.

In addition, the Agency claims that the award violates VA Directive 5017, which the Agency argues prohibits the distribution of special

---

2. The Arbitrator issued his original award on October 19, 2007. The Agency's exceptions were filed with the Authority on February 8, 2008. *See* former 5 C.F.R. § 2429.21(b) (effective through November 8, 2009). The time limit for filing an exception to an arbitration award is thirty (30) days beginning on the date the award is served on the filing party. 5 C.F.R. § 2425.1(b). Therefore, to the extent that the exceptions pertain to the original award, they are untimely.

3. 5 C.F.R. § 335.103(c) states, in pertinent part:

Covered personnel actions--(1) Competitive actions. Except as provided in paragraphs (c)(2) and (3) of this section, competitive procedures in agency promotion plans apply to all promotions under § 335.102 of this part and to the following actions: (i) Time-limited promotions under § 335.102(f) of this part for more than 120 days to higher-graded positions[.]

contribution awards for the same duties for which temporary promotions are given. *Id.* The Agency notes that special contribution awards in the amount of \$2,500 were already given to each of the grievants for the training duties that they performed from April through October 2006. Exceptions, Ex. C at 1-4. Therefore, the Agency asks that the Authority limit the grievants' temporary promotions to the seventeen months to which the special contribution awards did not apply. The Agency notes that such a modification would still violate 5 C.F.R. § 335.103 to the extent that it would exceed 120 days. In the alternative, the Agency requests that the Authority set aside the award in its entirety.

#### IV. Analysis and Conclusions

For the following reasons, we dismiss the Agency's exceptions.

The Agency's arguments claiming that the award is contrary to law and the parties' agreement are not properly before the Authority. Exceptions are barred by 5 C.F.R. § 2429.5 of the Authority's Regulations when they pertain to an issue that could have been but was not presented to an arbitrator. *See U.S. Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 59 FLRA 542, 544 (2003); *see also U.S. Dep't of Energy, Oak Ridge Office, Oak Ridge, Tenn.*, 64 FLRA 535, 536 n.5 (2010) (pursuant to 5 C.F.R. § 2429.5, Authority declined to consider argument that regulation supported agency's claim that arbitration award required candidates to meet higher qualification standards than those promulgated by Office of Personnel Management where that argument was not presented to the arbitrator); *U.S. Dep't of Agric. Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 57 FLRA 4, 5 (2001) (consistent with 5 C.F.R. § 2429.5, Authority refused to consider agency's argument that award granting temporary promotions violated Back Pay Act because agency failed to make that argument before arbitrator).

The Agency had the opportunity to argue before the Arbitrator that the Union's requested remedies violated the Master Agreement, government-wide regulations governing temporary promotions, and Agency directives. However, there is no evidence in the record that the Agency did so.

The case law interpreting 5 C.F.R. § 2429.5 makes clear that the Authority will not consider a contention that could have been, but was not, presented to the Arbitrator. As there is no evidence in the record that the Agency raised any of the

arguments before the Arbitrator that it is now raising in its exceptions, we conclude that the Agency's exceptions are not properly before the Authority.

Based on the foregoing, we dismiss the Agency's exceptions contending that the award is contrary to law and the parties' Master Agreement.

#### V. Decision

The Agency's exceptions are dismissed.