

67 FLRA No. 137

INTERNATIONAL FEDERATION
OF PROFESSIONAL AND TECHNICAL ENGINEERS
LOCAL NO. 1
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
NORFOLK NAVAL SHIPYARD
PORTSMOUTH, VIRGINIA
(Agency)

0-AR-5005

DECISION

August 20, 2014

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Edward A. Pereles issued an award (the Pereles award) finding that the parties jointly failed to implement a prior arbitration award issued by Arbitrator M. David Vaughn (the Vaughn award) concerning, in pertinent part, returning an employee (the grievant) to his officially assigned position. As an initial matter, Arbitrator Pereles found that only issues arising after the Vaughn award were arbitrable. In addition, he determined that the Agency did not violate the parties' collective-bargaining agreement or law by failing to provide the grievant with a position description and backpay for lost overtime during a period, following the issuance of the Vaughn award, when the grievant was informally detailed to unclassified duties. Arbitrator Pereles noted that the Agency recorded a "presumptive" satisfactory performance rating for the grievant, and stated that there was no evidence that the grievant suffered any loss because of the rating.¹ Further, Arbitrator Pereles clarified the Vaughn award's remedy by providing instructions for how the parties should implement that award. There are six questions before us.

The first question is whether we should consider arguments concerning incidents that occurred before the Vaughn award. Because Arbitrator Pereles found that

issues regarding the pre-Vaughn-award period were not arbitrable, and neither party excepts to that finding, the answer is no.

The second question is whether Arbitrator Pereles's finding that the Agency was not required to provide a position description to the grievant is contrary to law, rule, or regulation. Because the Union fails to support its argument that the award is deficient on this ground, the answer is no.

The third question is whether the award is contrary to 5 C.F.R. § 430.208(a), which precludes giving an employee a rating without evaluating the employee's actual performance. Although Arbitrator Pereles made a statement regarding the Agency giving the grievant a "presumptive" rating² – in response to the Union's argument that the grievant received no rating – he did not frame, or resolve, an issue regarding whether that rating was contrary to 5 C.F.R. § 430.208(a). The Union does not except on the ground that Arbitrator Pereles exceeded his authority by failing to frame or resolve such an issue. Accordingly, the Union's reliance on 5 C.F.R. § 430.208(a) provides no basis for finding the Pereles award contrary to law.

The fourth question is whether Arbitrator Pereles's finding that the grievant was not entitled to backpay is contrary to the Back Pay Act (the Act).³ Because the Union does not argue that the parties' joint failure to implement the Vaughn award is an unjustified or unwarranted personnel action, the answer is no.

The fifth question is whether Arbitrator Pereles's finding that the Agency was not required to provide a position description to the grievant fails to draw its essence from the parties' agreement. Because the Union does not demonstrate that this finding is irrational, unfounded, implausible, or in manifest disregard of the agreement, the answer is no.

The sixth and final question is whether the Pereles award is incomplete, ambiguous, or contradictory. Because the Union does not argue that the Pereles award is impossible to implement, the answer is no.

II. Background and Arbitration Awards

The grievant was assigned to the Agency's Radioactive Material Accountability Team (the team) when he was suspended for five days based on an unauthorized absence from work and alleged misconduct.

¹ Pereles Award at 17.

² *Id.*

³ 5 U.S.C. § 5596(b).

During its investigation into the alleged misconduct, the Agency became aware of complaints of a hostile work environment allegedly caused by the grievant's sexual comments. While keeping the grievant officially assigned to the team, the Agency responded to the hostile-work-environment allegations by informally detailing him to unclassified duties outside of the team.

The grievant filed a grievance challenging his five-day suspension. The grievance went to arbitration before Arbitrator Vaughn.

The stipulated issue before Arbitrator Vaughn was as follows: "Was the five-day disciplinary suspension issued to [the grievant for just cause, did it promote the efficiency of the service[,] and was it reasonable and in accordance with Agency instructions, regulations, the [parties' collective-bargaining a]greement[,] and the law?"⁴ In addition to the stipulated issue, Arbitrator Vaughn considered whether: (1) the grievant's informal details were improper; (2) the grievant's due-process rights were violated as a result of being removed from the team while the Agency investigated the hostile-work-environment allegations against him; and (3) the grievant was entitled to lost overtime as a result of the informal details.

Arbitrator Vaughn upheld the grievant's suspension for unauthorized absence and misconduct. Addressing the additional issues before him, Arbitrator Vaughn found that the grievant's due-process rights were not violated, but that the grievant's ongoing details out of the team were "an unofficial penalty"⁵ for his inappropriate behavior. Arbitrator Vaughn did not find the grievant's details out of the team to be an unjustified or unwarranted personnel action warranting backpay, but stated that they had "served [their] purpose" and that the grievant deserved an opportunity to demonstrate that he had changed his behavior.⁶ In this regard, Arbitrator Vaughn explained that the grievant's "continued banishment" was not "fair and equitable."⁷

Accordingly, Arbitrator Vaughn awarded prospective relief only. Specifically, he: (1) directed the grievant to deliver written apologies to both the entire team and one particular employee; and (2) stated that, once the grievant complied, the Agency and the Union were required to "consult with each other to determine how, when[,] and under what circumstances [the grievant's return to [the team] . . . will be effected."⁸ Neither party filed exceptions to the Vaughn award.

⁴ Exceptions, Attach., Joint Ex. C, Vaughn Award (Vaughn Award) at 2.

⁵ *Id.* at 61.

⁶ *Id.*

⁷ *Id.* at 62 (emphasis added).

⁸ *Id.*

After Arbitrator Vaughn issued his award, the grievant remained informally detailed while the parties attempted to negotiate the grievant's return to the team. When the negotiations failed, the Agency ended the grievant's informal detail and formally reassigned him to a permanent position outside of the team. The grievant requested that the Agency pay him for overtime that he may have missed while detailed out of the team, but the Agency refused. In response, the Union filed three grievances. The Agency consolidated the grievances during the course of processing them. The consolidated grievances went to arbitration before Arbitrator Pereles.

Arbitrator Pereles framed the issues as:

- (1) Is any one of the consolidated three . . . [g]rievances here in dispute arbitrable? If so,
- (2) (a) Is the Agency required to return the [g]rievant to [the team] . . . pursuant to the Vaughn [a]ward?

Without regard to the answer in 2(a)

(b) Was the "banishment" of the [g]rievant from [the team] an "unwarranted" or "unjustified" personnel action? If so,

[(c)] Is the [g]rievant entitled to monetary compensation pursuant to the . . . Act?

Without regard to . . . 2[(a), (b), or [(c)]

(d) Did the Agency violate law, rule, regulation[,] or the [a]greement by failing to provide the [g]rievant position descriptions for the work to which he was assigned during the period following his assignments to work other than in [the team?]⁹

Arbitrator Pereles found that: (1) the consolidated grievances were arbitrable "in so far as [they] relate to the period *following* the issuance of the Vaughn [a]ward"; (2) the Agency was required to return the grievant to the team; (3) the grievant's post-Vaughn-award detail "d[id] not constitute an unwarranted or unjustified personnel action"; (4) the grievant was not entitled to backpay; and (5) the Agency was not required under law or the parties' agreement to provide a position description for the grievant's

⁹ Pereles Award at 13-14.

post-Vaughn-award detail.¹⁰ Arbitrator Pereles explained that, although the parties made “a good[-]faith effort toward implementation” of the Vaughn award, the parties were “mutually unable ‘. . . to determine how, when[,] and under what circumstances’” the grievant was to be returned to the team.¹¹

Arbitrator Pereles directed the Agency to detail the grievant back to the team, in his former position, for up to 180 days. Arbitrator Pereles stated that if the grievant demonstrates during the detail that he has changed his behavior and can satisfactorily perform the duties of his former position, then – at the end of the detail – the grievant can choose either to remain in that position or to return to his current position. However, Arbitrator Pereles also stated that if, during the detail, the grievant either requests in writing to return to his current position or demonstrates that he has not changed his behavior, cannot perform satisfactorily, or has a hostile-work-environment complaint raised against him, then the Agency may return him to his current position before the end of the detail.

The Union filed exceptions to the Pereles award. The Agency filed an opposition to the Union’s exceptions.

III. Analysis and Conclusions

- A. We will not consider the Union’s arguments that concern the pre-Vaughn-award period.

According to the Union, Arbitrator Pereles erred as a matter of law in his review of the Agency’s actions toward the grievant during a particular four-year period, and in the remedy he fashioned.¹² The four-year period includes one period of approximately three years between the grievant’s initial informal detail from the team and the Vaughn award, and a second period of approximately one year following the Vaughn award. Specifically, the Union argues that Arbitrator Pereles erred as a matter of law by: (1) “failing to find that the Agency violated the [parties’] agreement” by not providing the grievant with a position description for over four years;¹³ (2) “excusing the Agency from providing the grievant a performance appraisal” during his four years of informal details,¹⁴ and (3) finding “that removing [the grievant] from his position . . . for misconduct” did not violate the grievant’s due-process rights and “was not disciplinary.”¹⁵ The Union argues that Arbitrator Pereles’s errors resulted in

his decision to deny retroactive relief,¹⁶ and it asserts that the grievant is entitled to over four years of backpay.¹⁷

Arbitrator Pereles determined that only issues arising during the second period – after the Vaughn award – were arbitrable.¹⁸ Neither party filed exceptions to that arbitrability determination. When an arbitrator finds that an issue is not arbitrable and a party fails to except to that arbitrability finding, the Authority will not consider exceptions that involve the non-arbitrable issue.¹⁹ Consequently, the Union’s arguments regarding issues arising during the first (three-year) period – before the Vaughn award – provide no basis for finding the Pereles award deficient.

As a result of Arbitrator Pereles’s unchallenged arbitrability determination, the only Union arguments before us are those that involve the post-Vaughn-award period, specifically, the arguments that: (1) the Agency violated law, rule, or regulation by failing to provide the grievant with a position description or a performance appraisal during that period; (2) Arbitrator Pereles’s finding that the Agency was not required to provide a position description fails to draw its essence from the parties’ agreement; (3) the grievant is entitled to backpay because the parties failed to implement the Vaughn award; and (4) the Pereles award is incomplete and contradictory.

- B. The Pereles award is not contrary to law, rule, or regulation.

1. Position Description

The Union argues that the Pereles award is contrary to law because “[e]very federal employee is entitled to be assigned to a position, the duties of which are described in a position description.”²⁰ The Agency counters that the Union does not cite any law, rule, or regulation to which the award is contrary.²¹

Under § 2425.6(e)(1) of the Authority’s Regulations,²² an exception “may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground” listed in § 2425.6(a)-(c), “or otherwise fails to demonstrate a legally recognized basis for setting

¹⁰ *Id.* at 14 (emphasis added).

¹¹ *Id.* at 15 (quoting Vaughn Award at 62).

¹² Exceptions at 5.

¹³ *Id.* at 6.

¹⁴ *Id.* at 8-9.

¹⁵ *Id.* at 14; *see also id.* at 11-19.

¹⁶ *Id.* at 19-20.

¹⁷ *Id.* at 14.

¹⁸ Pereles Award at 14.

¹⁹ *See, e.g., AFGE, Local 1367*, 67 FLRA 378, 379-80 (2014) (denying the union’s exception that the arbitrator exceeded his authority by failing to resolve an issue when the union did not except to the arbitrator’s finding that the issue was not arbitrable).

²⁰ Exceptions at 6.

²¹ Opp’n at 4.

²² 5 C.F.R. § 2425.6(e)(1).

aside the award.”²³ The Union cites *U.S. DOD, Marine Corps Logistics Base, Albany, Georgia*,²⁴ for the general proposition that grievances “often arise over incorrect or inaccurate position descriptions,”²⁵ but cites no law, rule, or regulation to support its contention that the portion of the Pereles award concerning position descriptions is contrary to law; the cited decision also does not support the Union’s argument. As a result, the Union fails to support its contrary-to-law claim regarding position descriptions, and we deny the Union’s exception under § 2425.6 of the Authority’s Regulations.²⁶

2. Performance Appraisals

The Union argues that the Pereles award is inconsistent with 5 C.F.R. § 430.208(a).²⁷ That regulation states, in pertinent part, that “[a]s soon as practicable after the end of the appraisal period, a written, or otherwise recorded, rating of record shall be given to each employee,”²⁸ and that “[a]n agency shall not issue a rating of record that assumes a level of performance by an employee without an actual evaluation of that employee’s performance.”²⁹ The Union asserts that the grievant received no performance appraisal and no rating while he was informally detailed to unclassified duties and that the regulation prohibits presumptive ratings.³⁰

As stated previously, Arbitrator Pereles framed the issues that he resolved.³¹ While he commented that the “record reflects” that the grievant received a “presumptive” satisfactory rating³² – in response to the Union’s argument that the grievant received no rating – Arbitrator Pereles did not frame or resolve an issue regarding whether the Agency violated 5 C.F.R. § 430.208(a) by failing to evaluate the grievant’s actual performance, or to give him a performance appraisal, during his post-Vaughn-award detail. Further, the Union has not excepted on the ground that Arbitrator Pereles exceeded his authority by failing to resolve such an

²³ *Id.*; see, e.g., *AFGE, Local 31*, 67 FLRA 333, 333 (2014); *U.S. Dep’t of VA, Cent. Tex., Veterans Health Care Sys., Temple, Tex.*, 66 FLRA 71, 73 (2011) (explaining that under § 2425.6(e)(1), an exception that fails to support a properly raised ground is subject to denial).

²⁴ 57 FLRA 275 (2001) (holding that an award finding a violation of the parties’ collective-bargaining-agreement provision requiring accurate position descriptions was not contrary to 5 U.S.C. § 7122(a)).

²⁵ Exceptions at 6.

²⁶ *NTEU, Chapter 215*, 67 FLRA 183, 184 (2014) (denying the union’s contrary-to-law exception because it offered no supporting argument).

²⁷ Exceptions at 8.

²⁸ 5 C.F.R. § 430.208(a).

²⁹ *Id.* § 430.208(a)(2).

³⁰ Exceptions at 9.

³¹ Pereles Award at 13.

³² *Id.* at 17.

issue.³³ As such, the Union’s reliance on 5 C.F.R. § 430.208(a) provides no basis for finding the Pereles award contrary to law. Accordingly, we deny this exception.³⁴

3. The Act

The Union argues that the Pereles award is contrary to the Act because Arbitrator Pereles did not award backpay.³⁵ The Agency argues that the grievant’s continued detail after the Vaughn award was a result of the parties’ negotiations about how to implement the Vaughn award and that Arbitrator Pereles correctly denied backpay.³⁶

An award of backpay is authorized under the Act when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action directly resulted in the withdrawal or reduction of the employee’s pay, allowances, or differentials.³⁷ A violation of a collective-bargaining agreement or a law, rule, or regulation constitutes an unjustified or unwarranted personnel action under the Act.³⁸

Here, Arbitrator Pereles did not find that the Agency failed to comply with the Vaughn award; rather, he found that the parties were *mutually* unable to implement that award.³⁹ And the Union does not claim that the failure to implement the Vaughn award violated the parties’ agreement or any law, rule, or regulation. Consequently, there is no basis for finding that the parties’ joint failure to implement the Vaughn award – which resulted in the grievant’s additional year on an informal detail – was an unjustified or unwarranted

³³ See, e.g., *AFGE, Local 2823*, 67 FLRA 171, 172 (2014) (noting excepting party’s failure to raise an exceeded-authority exception).

³⁴ See, e.g., *AFGE, Council 215*, 66 FLRA 771, 774 (2012) (deferring to the arbitrator’s formulation of the issues for resolution and denying an exception claiming that the arbitrator did not resolve an issue that was not included in her formulation); *AFGE, Local 1917, Nat’l Immigration & Naturalization Council*, 56 FLRA 521, 525 (2000) (denying the union’s exceeded-authority exception because, although she referenced part of an issue raised by the union in her award, the arbitrator did not frame that issue for resolution).

³⁵ Exceptions at 19-20.

³⁶ Opp’n at 7.

³⁷ *AFGE, Local 446*, 58 FLRA 361, 361 (2003).

³⁸ See, e.g., *U.S. Dep’t of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 105 (2012) (*IRS*) (citation omitted) (stating that a violation of a collective-bargaining agreement is an unwarranted or unjustified personnel action); *AFGE, Local 1592*, 64 FLRA 861, 861-62 (2010) (stating that a violation of an “applicable law, rule, regulation, or collective[-]bargaining agreement” is an unwarranted or unjustified personnel action).

³⁹ Pereles Award at 15.

personnel action. As the first requirement for awarding backpay is not satisfied, we find that Arbitrator Pereles's failure to award backpay is not contrary to the Act, and we deny this exception.

- C. Arbitrator Pereles's finding that the Agency was not required to provide a position description to the grievant does not fail to draw its essence from the parties' agreement.

The Union argues that the award fails to draw its essence from the parties' agreement because, it alleges, the agreement mandates that employees receive position descriptions.⁴⁰ The Agency counters that the provisions of the parties' agreement relied upon by the Union do not apply to the grievant's situation.⁴¹

The Authority reviews an arbitrator's interpretation of a collective-bargaining agreement using the deferential standard of review used by federal courts for arbitration awards in the private sector.⁴² Applying this standard, the Authority finds an arbitration award is deficient as failing to draw its essence from the 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 collective-bargaining 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.⁴³ The Authority defers to arbitrators in this context because it is the arbitrator's construction of the agreement for which the parties have bargained.⁴⁴

To support its essence exception, the Union cites Article 15, Section 1 of the parties' agreement,⁴⁵ which states, in relevant part, that "[t]he [e]mployer agrees to maintain current and accurate position descriptions."⁴⁶ The Union does not claim that the Agency failed to maintain current and accurate position descriptions for any position. Therefore, the Union provides no basis for finding that the award is irrational, unfounded, implausible, or in manifest disregard of Article 15, Section 1.

In addition, the Union asserts that Arbitrator Pereles ignored the "clear language" of Article 15, Section 4,⁴⁷ which states, in pertinent part: "An employee will be notified of his right to be furnished a copy of the position description to which he is assigned."⁴⁸ Arbitrator Pereles found that the Agency was not required to provide a position description to the grievant for his post-Vaughn-award detail because that detail was to unclassified duties and, thus, the grievant "did not have an assignment to a position."⁴⁹ The Union provides no explanation how Section 4, which does not mention informal details to unclassified duties, is contrary to Arbitrator Pereles's finding. Further, the Union does not argue that the Agency failed to notify the grievant of his right to be provided with a copy of the position description for his officially assigned position. Therefore, the Union provides no basis for finding that the Pereles award is irrational, unfounded, implausible, or in manifest disregard of Article 15, Section 4.

Accordingly, we deny the Union's essence exception.

- D. The award is not incomplete or contradictory.

The Union argues that the award is incomplete and contradictory because, it claims, Arbitrator Pereles "accept[ed] the Vaughn [a]ward finding that the action banishing [the grievant] was disciplinary in nature and . . . [that] the [A]gency's continued banishment [was] improper," but neither found the Agency's action to be an unjustified or unwarranted personnel action nor awarded retroactive relief.⁵⁰ For an award to be found deficient as incomplete, ambiguous, or contradictory, the excepting party must show that implementation of the award is impossible because the meaning and effect of the award are too unclear or uncertain.⁵¹ Because the Union does not argue that the Pereles award is impossible to implement, we deny this exception.⁵²

IV. Decision

We deny the Union's exceptions.

⁴⁰ Exceptions at 7.

⁴¹ Opp'n at 24-25.

⁴² 5 U.S.C. § 7122(a)(2); *see also AFGE, Council 220*, 54 FLRA 156, 159 (1998).

⁴³ *SSA, Office of Disability Adjudication & Review*, 64 FLRA 1000, 1001 (2010) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

⁴⁴ *Id.*

⁴⁵ Exceptions at 6.

⁴⁶ Exceptions, Attach., Joint Ex. B at 30.

⁴⁷ Exceptions at 6-7.

⁴⁸ Exceptions, Attach., Joint Ex. B at 31.

⁴⁹ Pereles Award at 17.

⁵⁰ Exceptions at 13.

⁵¹ *IRS*, 67 FLRA at 106 (citation omitted).

⁵² *Id.*