67 FLRA No. 33

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
RICHMOND, VIRGINIA
(Agency)

0-AR-4891

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DECISION

December 19, 2013

_____

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

I. Statement of the Case

Arbitrator Carmelo R. Gianino found that, because there was no higher-graded position to which the Agency could promote certain employees (the grievants), the parties' collective-bargaining agreement did not entitle the grievants to receive temporary promotions.

The main substantive question before us is whether award fails to draw its essence from the parties' agreement. Because the Union does not demonstrate that the Arbitrator's interpretation of the parties' agreement is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, the answer is no.

II. Background and Arbitrator's Award

The Union claimed that the grievants were not being "properly paid for . . . an increase in scope and responsibility of work" that they were performing.[1] Based on that claim, the Union filed a grievance alleging that the Agency violated a temporary-promotions provision, Article 12, Section 2 of the parties' agreement. As relevant here, Article 12, Section 2 states that "[e]mployees detailed to a higher[-]grade[d] position . . . must be temporarily promoted."[2]

Although the Arbitrator did not expressly frame an issue, he noted that the Union alleged that the Agency had violated Article 12, Section 2, and that the Union asserted that the "question" in dispute was whether the Agency was "obligated under the [parties'] agreement to pay the employees at the [higher] grade that . . . they were performing."[3]

After noting that there was "conflicting testimony" regarding what the Union was seeking with regard to a remedy,[4] the Arbitrator considered whether there was a higher-graded position to which the grievants could be promoted. In this connection, the Arbitrator found that the Agency had submitted to an Agency human-resources committee a functional statement that pertained to upgrading General Schedule (GS)-7 medical machine technicians – the position held by most of the grievants – to GS-8 medical instrument technicians. The Arbitrator found that the committee "determined that the [functional statement] met the requirements for a . . . GS-8."[5] But the Arbitrator also found that before the higher-graded position could be established, the committee needed to recommend, and the Agency's director needed to approve, funding for the position. The Arbitrator added that if the Agency's director approved funding for the position, then the Agency would start a "boarding process," where "selected candidates" for the position would be "vetted to [e]nsure they met the requisite qualifications."[6] However, the Arbitrator stated, the committee did not recommend, and the Agency's director did not approve, funding for the position, so a "higher[-]graded position was never put in place."[7]

The Arbitrator determined that because there was no higher-graded position, the grievants "could not be considered 'detailed to a higher[-]grade[d] position'" under Article 12. Section 2.[8] Accordingly, the Arbitrator determined that the Agency did not violate Article 12, Section 2. He also stated that there was "no provision[] in the agreement" that entitled the grievants to either temporary promotions or "remuneration" for the Agency's failure to give them such promotions.[9] For these reasons, the Arbitrator denied the grievance.

The Union filed exceptions to the award, and the Agency filed an opposition to the Union's exceptions.

[1] Award at 3; *see also id.* at 4; Exceptions, Attach., Union Letter to Agency (Sept. 3, 2009).

[2] Award at 3.
[3] *Id.* (internal quotation marks omitted).
[4] *Id.*
[5] *Id.* at 4.
[6] *Id.*
[7] *Id.*
[8] *Id.* (quoting Art. 12, § 2 of the parties' agreement).
[9] *Id.*

III. Preliminary Matter

The Union did not file exceptions to the July 27, 2012 award until November 9, 2012.[10] Because the time limit for filing exceptions to an arbitration award is thirty days after the date of service of the award,[11] the Authority issued an order directing the Union to show cause why the Authority should not dismiss the exceptions as untimely filed.[12]

In response, the Union provided an affidavit from the Union's attorney, asserting that the first time the Union's attorney received the award was on October 11, 2012, when the Arbitrator emailed it to the attorney's office.[13] The Union also provided a copy of the October 11 email,[14] in which the Arbitrator states that: (1) he sent the award and bill to the Agency in July 2012 with the belief that the Agency would forward them to the Union; (2) the Agency apparently did not forward them to the Union; (3) the award and the bill were attached to the email.[15]

The timeliness of a party's exceptions is determined based on the date of service.[16] A party may use "an affidavit coupled with additional evidence" to demonstrate when it was served.[17] Based on the affidavit and the email, we find that there is sufficient evidence to establish October 11, 2012, as the date of service. We note, in this regard, that the Agency does not dispute the Union's claims regarding the timeliness of its exceptions.[18] Accordingly, we determine timeliness using October 11, 2012, as the date of service.[19]

As stated above, the time limit for filing an exception to an arbitration award is thirty days after the date of service of the award.[20] In computing the thirty-day time period, the first day counted is the day after, not the day of, service of the arbitration award.[21] If the award is served by email, then the date of service is the date of transmission.[22] Applying these rules and the rules set forth in § 2429.21 of the Authority's Regulations, the Union's exceptions were due on November 13, 2012. As the Union filed its exceptions before that date,[23] we find that the Union's exceptions are timely, and we consider them.

IV. Analysis and Conclusions

A. We deny the Union's nonfact and contrary-to-law exceptions.

The Union asserts that the award is based on a nonfact,[24] but says nothing further to support that claim.[25] Similarly, the Union alleges that the award "ignores . . . the law,"[26] and asserts that "[o]nce . . . employees are performing higher[-]graded duties[, an] agency has no authority under law . . . to refuse to pay them as it has here."[27] But the Union does not provide any support to demonstrate that the award is contrary to law.[28] Under § 2425.6(e) of the Authority's Regulations, unsupported exceptions are "subject to . . . denial."[29] Consistent with § 2425.6(e), we deny the Union's nonfact and contrary-to-law exceptions as unsupported.

As discussed further below, the Union argues that the award fails to draw its essence from the parties' agreement.[30] In its essence discussion, the Union states that "[t]he legal test for finding a constructive temporary promotion is well established under the case law" of the Authority, and cites several Authority decisions involving arbitral awards of temporary promotions under collective-bargaining agreements.[31] As the Union does not connect its statement and citations to any claim that the award is contrary to law, the record does not support a conclusion that the Union is making a contrary-to-law claim in this regard. But assuming, without deciding, that the Union is making such a claim, the claim lacks merit. In this regard, the decisions that the Union cites all involved arbitrators' findings that employees were performing the duties of established, higher-graded

[10] Order to Show Cause (Order) at 2.
[11] 5 C.F.R. § 2425.2(b).
[12] Order at 1-2.
[13] *See id.* at 2; Letter from Union Att'y to Authority (Dec. 12, 2012) (Union Att'y Letter); Union Att'y Aff. at 1.
[14] Union Att'y Letter; Exceptions, Attach. A, Arbitrator's Email to Union Att'y (Oct. 11, 2012) (Arbitrator's Email).
[15] Arbitrator's Email.
[16] 5 C.F.R. § 2425.2.
[17] *Haw. Fed. Emps. Metal Trades Council*, 57 FLRA 450, 452 (2001) (citing *NAGE, Local R14-52*, 55 FLRA 648, 648-49 (2001)).
[18] *See* Opp'n at 1, 6.
[19] *Id.* at 2.
[20] 5 C.F.R. § 2425.2(b).
[21] *Id.*
[22] *Id.* § 2425.2(c)(3).
[23] Order at 2.
[24] Exceptions at 4.
[25] *See id.* at 4-7.
[26] *Id.* at 7.
[27] *Id.* at 6.
[28] *See id.* at 4-7.
[29] 5 C.F.R. § 2425.6(e).
[30] Exceptions at 4.
[31] *Id.* at 5 (citing *USDA, Food Safety & Inspection Serv.*, 65 FLRA 417 (2011) (*FSIS*); *U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 57 FLRA 72 (2001) (*Johnson Med. Ctr.*); *USDA, Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 57 FLRA 4 (2001) (*APHIS*); *SSA, Office of Hearings & Appeals, Mobile, Ala.*, 55 FLRA 778 (1999) (*SSA Mobile*); *U.S. DOJ, BOP, Fed. Corr. Inst., Loretta, Pa.*, 55 FLRA 339 (1999) (*FCI Loretta*); *U.S. Dep't of the Army, Fort Polk, La.*, 44 FLRA 1548 (1992) (*Fort Polk*)).

positions.[32] Here, the Arbitrator did not make such a finding. Thus, the decisions do not apply here, and they provide no basis for finding the award contrary to law.

B. The award does not fail to draw its essence from the parties' agreement.

The Union asserts that the award fails to draw its essence from the parties' agreement.[33] When reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[34] Under this standard, the Authority will find that 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.[35] The Authority and the courts defer to arbitrators in this context because it is the arbitrator's construction of the agreement for which the parties have bargained.[36]

As stated above, Article 12, Section 2 provides that "[e]mployees detailed to a higher[-]grade[d] position . . . must be temporarily promoted."[37] The Arbitrator found, as a factual matter, that a higher-graded position was "never put in place," so the grievants "could not be considered 'detailed to a higher[-]grade[d] position'" under Article 12, Section 2.[38] Accordingly, the Arbitrator determined that the Agency did not violate Article 12, Section 2 by not giving the grievants temporary promotions.[39] He also found that no provision in the parties' agreement entitled the grievants to such promotions or remuneration for not receiving such promotions.

To support its essence exception, the Union makes the following arguments: (1) the Arbitrator's reliance on the Agency director's disapproval of the higher-graded position would render "moot . . . any contractual provision" and "allow[Agency managers] to decide that the contract is not violated simply because they decide it isn't";[40] (2) the parties' agreement "does not require the [A]gency [to] authorize filling the higher[-]graded position" in order to temporarily promote employees;[41] (3) the Arbitrator erred by finding that conflicting testimony made it unclear what the Union was requesting as a remedy; (4) the Arbitrator erred by finding that there could be no remedy because the grievants "have not been approved for submission for the required boarding";[42] and (5) "[o]nce . . . employees are performing higher[-]graded duties[, an] agency has no authority under . . . contract to refuse to pay them as it has here."[43]

But the Union does not challenge the Arbitrator's factual finding that there was no higher-graded position to which the Agency could promote the grievants.[44] Moreover, the Union's arguments do not demonstrate that it was irrational, unfounded, implausible, or in manifest disregard of the parties' agreement for the Arbitrator to interpret Article 12, Section 2 as requiring the existence of a higher-graded position in order for the grievants to receive temporary promotions. And the Union does not cite any other provision of the parties' agreement that allegedly entitled the grievants to promotion or remuneration in lieu of promotion, so the Union provides no basis for finding that the Arbitrator erred in declining to find such entitlements. For these reasons, the Union has not shown that the award fails to draw its essence from the parties' agreement. Although the grievants might be entitled to relief through other avenues unrelated to the parties' agreement, such relief is not within the Authority's province to consider under the circumstances of this case. For these reasons, we deny the Union's essence exception.

V. Decision

We deny the Union's exceptions.

[32] *See FSIS*, 65 FLRA at 417; *Johnson Med. Ctr.*, 57 FLRA at 72-73; *APHIS*, 57 FLRA at 4-5; *SSA Mobile*, 55 FLRA at 778; *FCI Loretta*, 55 FLRA at 339-40; and *Fort Polk*, 44 FLRA at 1549.
[33] Exceptions at 4.
[34] *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[35] *E.g., U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 103 (2012).
[36] *E.g., id.*
[37] Award at 3.
[38] *Id.* at 4 (quoting Article 12, Section 2 of the parties' agreement).
[39] *See id.*
[40] Exceptions at 4.
[41] *Id.* at 7; *see also id.* at 5.
[42] *Id.* at 6.
[43] *Id.*
[44] *See id.* at 4-7; Award at 4.