67 FLRA No. 50

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
WASHINGTON, D.C.
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2798
(Union)

0-AR-4929

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DECISION

January 28, 2014

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

I. Statement of the Case

Arbitrator Alfred O. Haynes, Sr. found that the Agency violated the parties' agreement by failing to temporarily promote the grievant, and he awarded the grievant a retroactive, noncompetitive, temporary promotion and backpay for a period of approximately six months. This case presents us with four substantive questions.

The first question is whether the Arbitrator exceeded his authority by resolving an issue that was not submitted to arbitration. Because the Arbitrator directly responded to the issues before him, and nothing in those issues limited his remedial authority, the answer is no.

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

The third question is whether the award is based on nonfacts. Because the Agency has not shown that the Arbitrator made a clearly erroneous factual finding, but for which the Arbitrator would have reached a different conclusion, the answer is no.

The fourth question is whether the award of a retroactive, noncompetitive, temporary promotion and backpay for a period exceeding 120 days is contrary to law. Because 5 C.F.R. § 335.103(c)(ii) prohibits noncompetitive, temporary promotions over 120 days, the answer is yes.

II. Background and Arbitrator's Award

The grievant is a General Schedule (GS)-11 information-technology specialist in the Agency's Operations Section. On October 7, 2009, the grievant's supervisor assigned him to the Agency's Network Section to assist a GS-13 network specialist. At some point, the grievant requested a grade increase for performing what he alleged were higher-graded duties in the Network Section. The Agency denied his request.

In an email to the grievant, dated May 11, 2010 (May 2010 email), the grievant's supervisor advised the grievant that he would have to stay in the Network Section until the network specialist returned from leave. Later, sometime before July 19, 2010, the grievant returned to his position in the Operations Section.

The grievant's supervisor assigned him to the Network Section again on July 19, 2010. The grievant remained there until January 11, 2011. As relevant here, the Union filed a grievance alleging that the Agency detailed the grievant to perform the duties of a GS-13 position in the Network Section from July 19, 2010, to January 11, 2011. The grievance alleged that, in doing so without temporarily promoting the grievant, the Agency violated Article 12 of the parties' agreement, which addresses details and temporary promotions.

The Agency denied the grievance, and the parties submitted the matter to arbitration. The Arbitrator did not expressly frame an issue, but considered "whether the Agency violated the provisions of Article 12 of the [parties' agreement] in the manner in which it handled [the grievant's] assignment to the Network Section[1] . . . [and] [w]hether [the g]rievant was [p]erforming [h]igher-level [d]uties."[2]

In his analysis of the issues, the Arbitrator noted that Article 12, Section 1.A. states that "[a] detail is the temporary assignment of an employee to a different

[1] Award at 7-8.
[2] *Id.* at 9.

position for a specified period of time with the employee returning to their regular duties at the end of the detail."[3] The Arbitrator found that, under this provision, the grievant was not "official[ly]" detailed to a GS-13 position in the Network Section because the network specialist already encumbered that position.[4]

After the May 2010 email – from July 19, 2010, to January 11, 2011 – the Arbitrator found that, based on statements made by the grievant's supervisor in the May 2010 email, the Agency "altered the work contract for [the grievant] by directing him to return to the Network Section to assist" that department while the network specialist was absent.[5] He determined that this "altered work contract" required the grievant to perform the network specialist's duties, giving him "work responsibilities above his GS-11" grade level.[6] The Arbitrator concluded that because the grievant performed the duties of a GS-13 during the period of the network specialist's absence, the grievant "is deserving of a temporary promotion for his work in the Network Section from July 19, 2010[,] to January 11, 2011."[7]

Turning to remedies, the Arbitrator noted that to be eligible for a GS-13, an employee must have served as a GS-12 for one year, and that the grievant had not done so. Accordingly, as a remedy, the Arbitrator directed the Agency "to [e]ffect a temporary promotion of the [g]rievant to a GS-*12* for the period from July 19, 2010[,] to January 11, 2011[,] [approximately six months], with [backpay]."[8]

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

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Agency's claim that the award is contrary to 5 C.F.R. § 335.103(c).

The Agency contends that the award is contrary to 5 C.F.R. § 335.103(c) because it requires the Agency to grant a retroactive, temporary promotion and backpay for a period exceeding 120 days without applying competitive procedures.[9] Under § 2425.4(c) and § 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the Arbitrator.[10] The Union argues that the Agency did not raise this issue "during the entire grievance process or at the hearing before the [A]rbitrator" and that, as a result, the Authority should bar the Agency's argument.[11]

The record shows that, in its post-hearing brief, the Agency argued that any award of a retroactive, temporary promotion and backpay for a period exceeding 120 days without applying competitive procedures would be contrary to 5 C.F.R. § 335.103(c).[12] As a result, § 2425.4(c) and § 2429.5 do not bar the Agency from making that argument in its exceptions, and we address it below.

IV. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Agency argues that the Arbitrator exceeded his authority by resolving an issue that was not submitted to arbitration.[13] Specifically, the Agency contends that the Arbitrator erred in awarding the grievant a retroactive, temporary promotion to the GS-12 level when the issue before him involved only the Agency's alleged failure to temporarily promote the grievant to the GS-13 level.[14]

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.[15] Where the parties fail to stipulate the issue, the arbitrator may formulate the issue on the basis of the subject matter before him.[16] And absent a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference.[17] In addition, arbitrators have great latitude in fashioning remedies.[18]

As discussed above, the Arbitrator did not expressly frame an issue, but he considered: "whether the Agency violated the provisions of Article 12 of the [parties' agreement] in the manner in which it handled

[3] *Id.* at 8.
[4] *Id.* at 9.
[5] *Id.* at 10.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 11 (emphasis added).
[9] Exceptions at 6.
[10] 5 C.F.R. §§ 2425.4(c), 2429.5; *see, e.g., Broad. Bd. of Governors*, 66 FLRA 380, 384 (2011).
[11] Opp'n at 12 (citing 5 C.F.R. § 2429.5).
[12] Agency's Post-Hr'g Br. at 9-10.
[13] Exceptions at 7.
[14] *Id.* at 8.
[15] *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).
[16] *U.S. DOD, Educ. Activity, Arlington, Va.*, 56 FLRA 887, 891 (2000).
[17] *Id.; U.S. Dep't of the Army, Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997).
[18] *See U.S. DOJ, U.S. Fed. BOP, U.S. Penitentiary, Lewisburg, Pa.*, 39 FLRA 1288, 1301 (1991).

[the grievant's] assignment to the Network Section[19] . . . [and] [w]hether [the g]rievant was [p]erforming [h]igher-level [d]uties."[20]

The Arbitrator limited his review to these issues. In resolving these issues, the Arbitrator found that the grievant had performed the duties of a GS-13. But the Arbitrator noted that, to be eligible for a GS-13, an employee must have served as a GS-12 for one year, and that the grievant had not done so.[21] Therefore, as a remedy, he awarded the grievant a retroactive, temporary promotion to the GS-12 level.[22] Nothing in the issues restricted the Arbitrator's remedial authority,[23] and the retroactive, temporary promotion to the GS-12 level is directly responsive to the issues before the Arbitrator. Consequently, the Arbitrator did not exceed his authority.

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

The Agency argues that the award fails to draw its essence from Article 12 of the parties' agreement.[24]

In 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.[25] 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.[26]

The Agency contends that the Arbitrator found that the grievant's assignment to the Network Section was not a "detail" within the meaning of Article 12, Section 1 of the parties' agreement.[27] The Agency argues that, under Article 12, Section 1 and Section 2.A., the Arbitrator could not find that the grievant was temporarily promoted without first finding that he was detailed.[28] But the Union argues that wording in Article 12, Section 2.A. (which the Union cites as Article 12, Section 5) supports the Arbitrator's award.[29]

Article 12, Section 1.A. of the parties' agreement provides, in pertinent part, that "[a] detail is the temporary assignment of an employee to a different position for a specified period of time with the employee returning to their regular duties at the end of the detail."[30] And Article 12, Section 2.A. states that "[e]mployees detailed to a higher[-]grade position for a period of more than ten (10) consecutive work days must be temporarily promoted."[31] However, as the Union argues, Article 12, Section 2.A. also states that "an employee who performs the grade-controlling duties of a higher-graded position for at least 25% of the time . . . shall be temporarily promoted."[32] This wording, which the Agency does not address in its essence exception, does not condition temporary promotions upon formal details. The Arbitrator's determination that the grievant could be temporarily promoted without first being detailed is consistent with this provision. Further, nothing in Article 12 prohibited the Arbitrator from finding that the grievant was entitled to a temporary promotion, despite the Agency's failure to formally detail him. Thus, the Agency has failed to demonstrate that the Arbitrator's interpretation of Article 12 is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, and we deny the Agency's essence exception.[33]

C. The award is not based on nonfacts.

The Agency argues that the award is based on nonfacts.[34] To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[35]

The Agency argues that the Arbitrator erred by relying on the May 2010 email – which it claims was not in evidence – and that, but for that reliance, the Arbitrator would not have found that the grievant should be temporarily promoted.[36] But the Arbitrator cited "several" other emails and found that, "[i]n sum, the

[19] Award at 7-8.
[20] *Id.* at 9.
[21] *Id.* at 10.
[22] *Id.* at 11.
[23] *U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Honolulu, Haw.*, 66 FLRA 858, 861-62 (2012) (arbitrator did not exceed his authority by awarding a particular remedy where remedy addressed harm at issue).
[24] Exceptions at 9.
[25] *See AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[26] *See U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[27] Exceptions at 9.
[28] *Id.*
[29] Opp'n at 8.
[30] *Id.*, Attach. 1 at 32.
[31] *Id.* at 33.
[32] Opp'n at 8 (citing Art. 12, § 2(A) of the parties' agreement).
[33] *OSHA*, 34 FLRA at 575.
[34] Exceptions at 10-12.
[35] *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993).
[36] Exceptions at 10.

record shows that [the grievant] successfully fulfilled the expanded duties assigned to him by [his supervisor] during this period."[37] Thus, there is no basis for finding that, but for the Arbitrator's reliance on the May 2010 email, the Arbitrator would have reached a different result.

The Agency also argues that the Arbitrator failed to examine whether the grievant performed GS-13-level duties, that the Union presented no evidence that the grievant performed such duties, and that the Arbitrator failed to determine that the grievant performed such duties for more than 25% of the time.[38] However, the Agency does not explain how the Arbitrator's failure to make certain determinations or the Union's failure to present certain evidence show that the Arbitrator made clearly erroneous factual findings, but for which the Arbitrator would have reached a different result. Accordingly, we deny the Agency's nonfact exceptions.

D. The award is contrary to 5 C.F.R. § 335.103(c) in part.

As discussed above, the Agency argues that the award is contrary to 5 C.F.R. § 335.103(c) because it requires the Agency to grant a retroactive, temporary promotion and backpay to the grievant, for a period exceeding 120 days, without applying competitive procedures.[39]

When exceptions involve an award's consistency with law, the Authority reviews any question of law raised by the exceptions and the award de novo.[40] 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.[41] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[42]

In *U.S. Department of VA, Ralph H. Johnson Medical Center, Charleston, South Carolina* (*VA*), the Authority sought an advisory opinion from the Office of Personnel Management (OPM) regarding whether a noncompetitive promotion for more than 120 days would violate 5 C.F.R. § 335.103(c).[43] In its advisory opinion, OPM interpreted 5 C.F.R. § 335.103(c) as requiring that time-limited promotions of more than 120 days be made under competitive procedures, consistent with agencies' merit-promotion plans.[44] Deferring to this interpretation, the Authority concluded that, under 5 C.F.R. § 335.103(c), arbitrators may not award retroactive, temporary promotions of more than 120 days without applying competitive procedures.[45]

The Union argues that a Merit Systems Protection Board (MSPB) decision found that OPM's advisory opinion is not a "rule" and is not binding on the Authority.[46] For this reason, the Union claims that the Authority should no longer follow *VA* or OPM's advisory opinion.[47] The Union does not provide the Authority with a citation to the MSPB case upon which it relies, and it is not clear what decision it is citing. However, we address the Union's claim to the extent it argues that the Authority should no longer follow *VA* and should no longer defer to OPM's interpretation of its own regulation, 5 C.F.R. § 335.103(c).

The Authority follows the practice of the federal courts and generally affords deference to an agency's interpretation of its own regulations, giving the interpretation "controlling weight unless it is plainly erroneous or inconsistent with the regulation."[48] However, the Authority declines to defer to an agency's "litigative positions."[49] Accordingly, for an agency's interpretation to be entitled to deference, the interpretation must have been publicly articulated prior to "litigation."[50] In that regard, an interpretation articulated prior to litigation "is in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack . . . [and] there is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."[51]

Title 5, § 335.103(c)(ii) of the Code of Federal Regulations states that "competitive procedures . . . apply to . . . [d]etails for more than 120 days to a higher[-]grade position." OPM's interpretation of 5 C.F.R. § 335.103(c) discussed above – requiring that time-limited promotions of more than 120 days be made under competitive

[37] Award at 10.
[38] Exceptions at 12.
[39] *Id.* at 6.
[40] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[41] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[42] *Id*.
[43] 60 FLRA 46, 49 (2004) (Chairman Cabaniss and then-Member Pope separately concurring).
[44] *Id.*
[45] *Id*.
[46] Opp'n at 14.
[47] *Id.*
[48] *Cong. Research Emps. Ass'n, IFPTE, Local 75*, 59 FLRA 994, 1000 (2004) (*IFPTE*).
[49] *U.S. DOJ, Fed. BOP, Med. Facility for Fed. Prisons*, 51 FLRA 1126, 1136 (1996) (quoting *FLRA v. U.S. Dep't of the Treasury, Fin. Mgmt. Serv.*, 884 F.2d 1446, 1455 (D.C. Cir. 1989)).
[50] *Id.* (quoting *Nordell v. Heckler*, 749 F.2d 47, 48 (D.C. Cir. 1984)).
[51] *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)).

procedures consistent with an agency's merit-promotion plan – is not plainly erroneous or inconsistent with 5 C.F.R. § 335.103(c)(ii). Further, OPM was not a litigant in *VA* – it merely responded to the Authority's request for an advisory opinion – and there is no basis for finding that OPM's interpretation was advanced to defend its past action against attack.[52] We recognize that OPM's interpretation may create an incentive for agencies to violate the regulation (in that an agency that ignores competitive procedures cannot be required to pay employees for higher-graded duties performed in excess of 120 days, while an agency that complies with competitive procedures presumably can). Nevertheless, applying the foregoing, the Union has failed to establish that OPM's interpretation is plainly erroneous or inconsistent with the language of the regulation. Accordingly, we find that OPM's opinion is entitled to our deference.[53]

Here, the Arbitrator awarded the grievant a retroactive, temporary promotion and backpay for a period of about six months. The Arbitrator did not find, and the Union does not allege, that the temporary promotion was made based on competitive procedures. Therefore, the Arbitrator's backpay remedy requires modification because, to the extent that it exceeds 120 days, it is contrary to 5 C.F.R. § 335.103(c).[54] For this reason, we grant the Agency's exception in part and modify the backpay award to limit it to 120 days.[55]

V. Decision

We deny the Agency's exceptions in part, grant them in part, and modify the award of backpay to limit it to 120 days.

[52] *Id.*
[53] *See IFPTE*, 59 FLRA at 1000.
[54] *SSA, Port St. Lucie Dist., Port St. Lucie, Fla.*, 64 FLRA 552, 554 (2010) (*SSA*); *see VA*, 60 FLRA at 49.
[55] *SSA*, 64 FLRA at 554.