

67 FLRA No. 85

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1858
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY AVIATION AND MISSILE COMMAND
(Agency)

0-AR-4991

—
DECISION

March 27, 2014

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

Arbitrator John J. Popular II concluded that the Agency did not violate the parties' collective-bargaining agreement by selecting an employee other than the grievant for a vacant position. In exceptions to the Arbitrator's award, the Union argues that the Arbitrator issued a "premature decision."¹ Because this argument does not set forth a ground that is recognized for review under the Authority's Regulations, we dismiss this exception. The Union also contends that the award is contrary to law because the Agency illegally pre-selected a different applicant. Although this argument sets forth a recognized ground for review – that the award is contrary to law – the Union fails to support this argument. Because the Authority's Regulations require a party to "explain how, under standards set forth in the decisional law of the Authority or [f]ederal courts"² the award is deficient, we deny this exception. The Union additionally asserts in its exceptions that the Arbitrator "did not interpret [the collective-bargaining agreement] correctly."³ But because the Union does not demonstrate that the Arbitrator's interpretation of the agreement is deficient, we deny this exception.

¹ Exceptions at 2; *see also id.* at 3.

² 5 C.F.R. § 2425.6(b).

³ Exceptions at 3.

II. Background and Arbitrator's Award

The grievant applied for a vacant position (the position) within the Agency. The vacancy announcement stated that the individual selected would be required to "plan, direct, coordinate, manage[,] and review assigned areas" (manager element).⁴ A three-member panel interviewed and scored the grievant, along with five other applicants. Because the panel scored employee G higher than the grievant, the Agency selected employee G for the position.

The Union filed a grievance that went to arbitration. The Union argued that, because one of the panel members previously worked with employee G, the panel was predisposed towards selecting her for the position. The Union also asserted that the Agency violated Article 30, Section 5 of the parties' agreement. That provision states that the "experience elements" used by the Agency when filling a position "must be based on the requirements of the specific position being filled."⁵ The Union contended that the manager element was "generic" and, therefore, did not accurately reflect the job description and actual duties of the position.⁶

The Arbitrator denied the Union's grievance. He found that the Agency's criteria for evaluating the grievant were appropriate and that the panel fairly considered the grievant. The Arbitrator further determined that, under Article 30, Section 5, the elements for a vacancy must be based on "the specific position being filled."⁷ Although the Arbitrator found that the Agency used "generic" language when describing the managerial duties of the position,⁸ he believed the Agency's decision was "justified" because the language accurately encapsulated the managerial duties that would be performed by the employee selected for the position.⁹ The Arbitrator, therefore, concluded that the Agency did not violate the parties' agreement. Thus, according to the Arbitrator, "no pre-selection" occurred when the Agency selected employee G for the position.¹⁰

III. Preliminary Issue: Two of the Union's exceptions do not satisfy § 2425.6 of the Authority's Regulations.

The Authority's Regulations specifically enumerate the grounds that the Authority currently

⁴ Award at 6 (citation and internal quotation marks omitted).

⁵ *Id.* at 2 (citation omitted).

⁶ *Id.* at 4.

⁷ *Id.* at 6. (citation and internal quotation marks omitted).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 7.

recognizes for reviewing awards.¹¹ In addition, the Regulations provide that, if exceptions argue that an arbitration award is deficient based on private-sector grounds not currently recognized by the Authority, then the excepting party “must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions.”¹² Further, § 2425.6(e)(1) of the Regulations provides that an exception “may be subject to dismissal or denial if: [t]he excepting party fails to raise and support” the grounds listed in § 2425.6(a)-(c), “or otherwise fails to demonstrate a legally recognized basis for setting aside the award.”¹³ Thus, an exception that does not raise a recognized ground is subject to dismissal under the Regulations.¹⁴

The Union argues that the Arbitrator improperly “made a premature decision” because he issued his award before the parties received the hearing transcript or submitted closing briefs.¹⁵ This contention does not raise a recognized ground for reviewing an award under 5 C.F.R. § 2425.6(a)-(b), or cite legal authority to support a ground not currently recognized by the Authority. We, therefore, dismiss this exception.¹⁶

The Union also contends that the Arbitrator “misinterpreted” 5 U.S.C. “Chapter 71 in regard[] to the hiring.”¹⁷ In this regard, the Union asserts that, although the Agency has a management “right to hire and fire employees,” it may not discriminate against a prohibited group or commit a prohibited personnel practice.¹⁸ And according to the Union, pre-selection is a prohibited personnel practice.¹⁹ We find that the Union’s argument is sufficient to raise a claim that the award is contrary to law. But we also find that the Union has not supported this claim. In this regard, although the Union cites federal law that the award allegedly violates, the Union does not explain the alleged violation, or how the award is otherwise deficient. Because the Union has failed to support its assertion that the award is contrary to law, we deny this exception under § 2425.6(c) of the Authority’s Regulations.²⁰

¹¹ See 5 C.F.R. § 2425.6(a)-(b); see also *AFGE, Local 1858*, 67 FLRA 147, 147-48 (2013) (*AFGE*).

¹² 5 C.F.R. § 2425.6(c).

¹³ *Id.* § 2425.6(e)(1).

¹⁴ *E.g.*, *AFGE*, 67 FLRA at 148.

¹⁵ Exceptions at 2; see also *id.* at 3.

¹⁶ 5 C.F.R. § 2425.6(a)-(c) and (e)(1); *AFGE*, 67 FLRA at 148; *AFGE, Local 1738*, 65 FLRA 975, 976 (2011) (Member Beck concurring in the result) (union’s exception that award was “contrary to the plain language of the negotiated agreement” did not raise a recognized ground for review) (citation and internal quotation marks omitted)).

¹⁷ Exceptions at 3.

¹⁸ *Id.* at 2.

¹⁹ *Id.*

²⁰ 5 C.F.R. § 2425.6(c); *AFGE, Local 1938*, 66 FLRA 741, 743 (2012) (citation omitted).

IV. Analysis and Conclusion: The award draws its essence from the parties’ agreement.

The Union argues that the Arbitrator “did not interpret Article 30[, Section 5] of the [c]ollective [b]argaining [a]greement correctly”²¹ and thus incorrectly denied the Union’s grievance.²² 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

²¹ Exceptions at 3.

Regarding this exception, Member DuBester notes the following: I agree that the Union’s claim – that the Arbitrator “did not interpret . . . the [c]ollective [b]argaining [a]greement correctly,” *id.* – suffices to raise a recognized private-sector ground for review of the award; i.e., that the award fails to draw its essence from the parties’ agreement, see 5 C.F.R. § 2425.6(b)(2). I reach this conclusion cognizant of the Authority’s Arbitration Initiative and our revised Regulations that counsel the parties that the Authority no longer construes parties’ exceptions as raising recognized grounds for review when the parties have failed to state such grounds. See, e.g., *AFGE, Local 3955, Counsel of Prison Locals 33*, 65 FLRA 887, 889 (2011) (Member Beck dissenting in part); *accord AFGE, Local 1897*, 67 FLRA 239, 240 n.19 (2014). As I have stated previously, though, where parties articulate a well-established standard supporting a recognized ground, that action is sufficient to raise a recognized ground under § 2425.6 of the Authority’s regulations. See, e.g., *AFGE, Gen. Comm.*, 66 FLRA 367, 370 (2011) (*Gen. Comm.*) (finding that the union’s claim that the award was not based on “a plausible interpretation of the [parties’ agreement]” was sufficient to raise the recognized private-sector ground of essence); *AFGE, Local 3627*, 65 FLRA 1049, 1051 n.2 (2011) (finding that the union’s claim that the award failed to “resolve the issues submitted” was sufficient to raise the recognized private-sector ground of exceeds authority). Although I acknowledge that “correct interpretation” does not have the precise meaning of “plausible interpretation,” in my view, “interpretation” is central to an arbitrator’s proper role and the Supreme Court’s decision in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (establishing the essence standard). For this reason, accepting the Union’s “correct-interpretation” claim as raising the essence ground is reasonable and correct under the law and our Regulations.

²² Chairman Pope finds that this allegation does not raise a “ground[]” for finding the award deficient under § 7122(a)(2) of the Statute and § 2425.6 of the Authority’s Regulations. In this connection, failure to provide a “plausible interpretation” of an agreement is a *standard* that the Authority applies to determine whether an award is deficient under an established ground – failing to draw its essence from the agreement. *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990). As the Union has neither cited one of the grounds for review that the Authority recognizes (which are easily found in § 2425.6(a)-(b) of our Regulations) nor provided citation to legal authority that establishes the purported ground on which the Union relies under § 2425.6(c), Chairman Pope would dismiss the exception. See, e.g., *Gen. Comm.*, 66 FLRA at 370 n.4.

awards in the private sector.²³ Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' 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.²⁴ 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."²⁵

When the Agency fills a vacant position, Article 30, Section 5 of the parties' collective-bargaining agreement requires that "[t]he experience elements used must be based on the requirements of the specific position being filled."²⁶ According to the Union, the Agency modified this requirement by considering a generic element, i.e., the manager element, rather than "specific experience factors" when it evaluated applicants for the position.²⁷ The Arbitrator, however, found that the Agency was justified in considering proficiency in general managerial duties because these duties are a necessary component of the position. The Union cites nothing in the language of Article 30, Section 5 that contradicts or forecloses this interpretation. Accordingly, we find that the Union has failed to establish that the Arbitrator's interpretation is irrational, implausible, or in manifest disregard of the parties' agreement, and deny the Union's essence exception.²⁸

V. Decision

Based on the foregoing, we dismiss the Union's exceptions, in part, and deny them, in part.

Member Pizzella, concurring:

Although I agree to dismiss the Union's exceptions, in part, and deny them, in part, the situation before us raises concerns that warrant additional comment. It is a well-established merit-systems principle that, when an agency selects an applicant for a vacant position, that selection "should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity."¹ Moreover, Congress deemed it a prohibited personnel practice for an agency to improperly manipulate the hiring process in order to ensure the selection of an unqualified individual.² Yet – despite these well-established principles – the Agency allowed one of the applicant's former team leaders to decide whether that applicant should be selected.³

"To ensure that every citizen" has "confidence in the integrity of the Federal Government,"⁴ all Federal employees must "act impartially"⁵ and "endeavor to avoid any actions creating the appearance that they are violating the law" or ethical standards governing their conduct.⁶ The Agency's conduct in this case clearly creates doubt as to whether the Agency acted impartially in its selection of employee G.

As Executive Order 12,674, which sets forth principles of ethical conduct for federal government employees, aptly states, "[p]ublic service is a public trust."⁷ The public's trust in the Federal Government is weakened when agencies fail to act in accordance with the merit-system principles described above. To increase this trust, agencies must ensure they adhere to these principles – which the Authority takes seriously and believes are essential to an effective civil service – and must strive to avoid actions like those of the Agency here, which, although lawful, certainly create an appearance of impropriety. Indeed, it is quite possible that this grievance, the Arbitrator's award, and these exceptions could have been avoided altogether – as well as all the costs to taxpayers associated with these processes – had the Agency simply altered the composition of the panel.

Thank you.

²³ See 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

²⁴ *AFGE, Local 2128*, 66 FLRA 801, 803 (2012); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*DOL*).

²⁵ *DOL*, 34 FLRA at 576.

²⁶ Award at 2.

²⁷ Exceptions at 3.

²⁸ E.g., *AFGE, Council of Prison Locals C-33, Local 720*, 67 FLRA 157, 158-59 (2013).

¹ 5 U.S.C. § 2301(b)(1).

² *Id.* § 2302(b)(6).

³ See Exceptions, Attach. 3, Tr. at 15, 40.

⁴ 5 C.F.R. § 2635.101(a).

⁵ *Id.* § 2635.101(b)(8).

⁶ *Id.* § 2635.101(b)(14).

⁷ Exec. Order No. 12,674, 3 C.F.R. § 215 (1989 Comp.), *reprinted as amended* in 3 C.F.R. § 306 (1990 Comp.).