68 FLRA No. 50

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
SERVICE EMPLOYEES
INTERNATIONAL UNION
LOCAL 551
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
RICHARD L. ROUDEBUSH
MEDICAL CENTER
INDIANAPOLIS, INDIANA
(Agency)

0-AR-5049

DECISION

February 20, 2015

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

I. Statement of the Case

Arbitrator Bruce B. McIntosh issued an award granting backpay to the grievant for a temporary promotion, but rejecting a challenge of a special, one-time initial professional standards board's (the board's) denial of a permanent promotion. The Arbitrator also denied the Union's request for interest and attorney fees under 5 U.S.C. § 5596 (BPA).

The Union raises six substantive exceptions to the Arbitrator's award. First, the Union argues that the Arbitrator exceeded his authority by failing to address an issue submitted to arbitration. Because there were no stipulated issues, and the Arbitrator answered the issues as he framed them, we deny this exception.

Second, the Union argues that the award is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible. Because the Union fails to demonstrate that the award is impossible to implement, we deny this exception.

Third, the Union contends that the award fails to draw its essence from the parties' agreement. Because the Union does not demonstrate that the award fails to draw its essence from the parties' agreement, we deny this exception.

Fourth, the Union contends that the award is contrary to an Agency rule or regulation. Because the Union fails to demonstrate a conflict between an Agency rule or regulation and the award, we deny this exception.

Fifth, the Union argues that the award is based on a nonfact. Because this exception challenges the Arbitrator's interpretation of the parties' agreement, we deny this exception.

Finally, the Union argues that the denial of attorney fees is contrary to the BPA. Because the award is contrary to the BPA and the record is insufficient for the Authority to make an ultimate finding on the issue of attorney fees, we remand this portion of the award to the parties, absent settlement, for resubmission to the Arbitrator.

II. Background and Arbitrator's Award

The grievant works for the Agency as a general schedule (GS)-5, medical support assistant (MSA). The grievant also performed duties that are normally performed by a GS-6, advanced MSA. At a certain point, the grievant's supervisor concluded that the grievant's duties would qualify her for a permanent promotion to a GS-6, advanced MSA. The supervisor submitted to the board a recommendation that the grievant receive a promotion to GS-6, advanced MSA. This process is known as boarding. However, the board determined that the grievant did not qualify for the promotion.

Under the Agency's rules "[t]here is no reconsideration (appeal) for the initial boarding."[1] Article 21 of the parties' agreement also requires that an employee "who performs the grade-controlling duties of a higher-graded position for at least [twenty-five percent] of his/her time for [ten] consecutive work days . . . shall be temporarily promoted."[2] Also, Article 37 of the parties' agreement states that "[a] grievance means any complaint [b]y an employee[] or the Union concerning . . . any claimed violation, misinterpretation[,] or misapplication of law, rule, or regulation affecting conditions of employment."[3] Article 37 continues, stating that it "shall not govern a grievance concerning . . . [a]ny examination, certification[,] or appointment . . . [or t]he classification of any position which does not result in the reduction in grade or pay of an employee."[4]

[1] Exceptions, Ex. 4 (The Basics of Boarding) at 5.
[2] Award at 3 (quoting Art. 21, § 2 of the parties' agreement).
[3] *Id.* (quoting Art. 37, § 2 of the parties' agreement).
[4] *Id.*

The Union filed a grievance alleging that the Agency improperly boarded the grievant and had not compensated her for her temporary promotion. The matter was unresolved, and the parties submitted it to arbitration.

At arbitration, the parties could not agree on the issues, so the Arbitrator framed the relevant issues as follows: (1) "whether the issue[] of one-time initial boarding is excluded from coverage under the grievance procedure of the [parties' agreement]," and (2) "whether [the g]rievant performed grade-controlling duties of a higher classification of, at least, twenty-five percent of her time, for more than ten consecutive days entitling her to be paid at the higher rate."[5]

The Agency argued that the matter was not substantively grievable because, under the Agency's rules and the parties' agreement, there is no appeal of the one-time boarding process. The Union argued that the Agency failed to follow the proper procedure when it conducted the boarding process. Specifically, the Union alleged that the Agency had not properly trained its employees or the board members on the boarding process and that, because the board received a mislabeled boarding packet, the board did not follow its guidelines to return the packet for more information. Additionally, the Union presented evidence that the grievant had worked more than twenty-five percent of her time on higher-graded duties for more than ten days.

The Arbitrator ruled that the Agency's boarding guidelines[6] and Article 37 of the parties' agreement "remove[d] from the negotiated [g]rievance [p]rocedure an appeal from the [board's] denial of the [g]rievant's promotion."[7] Consequently, the Arbitrator denied the Union's request that the Agency perform the boarding process a second time. Furthermore, the Arbitrator found that the grievant had met the requirements for a temporary promotion and ordered that she "be paid . . . any part of the pay of [the higher-graded position] that exceeded that which she received."[8] However, the Arbitrator ruled that "[s]ince the action of the Agency did not constitute a withdrawal o[r] reduction of [the g]rievant's pay but was a failure to pay her for her duties of her temporary position, the Union's request for interest and attorney[] fees pursuant to [the BPA] is denied."[9]

[5] *Id.* at 2-3.
[6] Although the Arbitrator refers to this as the "[g]rievance [p]rocedure," the text cited by the Arbitrator in that instance matches the Agency's boarding guidelines, titled "[t]he [b]asics of [b]oarding." *Compare id.* at 12, *with* The Basics of Boarding at 5.
[7] Award at 12.
[8] *Id.* at 12-13.
[9] *Id.* at 13.

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

III. Preliminary Matters: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Union's exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[10]

The Union argues that the Agency failed to follow the proper procedures for an initial boarding "and the Arbitrator, by failing to enforce the procedure, issued a decision that was contrary to the Agency rule or regulation."[11] Specifically, the Union cites "[t]he [b]asics of [b]oarding," a guide which details the responsibilities of the immediate supervisor in the boarding process, and the fact that the grievant had sixty days to appeal the decision under this policy, but was informed that she could not appeal the decision.[12] At arbitration, the Union argued that the Agency had violated its rules and regulations, and requested that the Arbitrator order that the boarding process be performed again; the Agency opposed this requested relief. However, the Union did not argue that its requested relief was required by Agency rules and regulations or that a failure to grant its requested relief would violate an Agency rule or regulation. Because the Union could have raised such an argument before the Arbitrator, but did not do so, we dismiss this exception as barred by §§ 2425.4(c) and 2429.5.

IV. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Union argues that the Arbitrator exceeded his authority by failing to resolve an issue submitted to arbitration. 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.[13] Absent a stipulated issue, the arbitrator's framing of the issues is accorded the same substantial deference that the Authority accords an arbitrator's interpretation of a collective-bargaining agreement.[14] In those circumstances, the Authority

[10] 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012).
[11] Exceptions Br. at 10.
[12] The Basics of Boarding at 3, 5.
[13] *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).
[14] *NTEU*, 63 FLRA 198, 200 (2009) (citations omitted).

examines whether the award is directly responsive to the issues that the arbitrator framed.[15]

The Union alleges that the Arbitrator exceeded his authority by "fail[ing] to address the issue of the boarding process in his statement of the issue or his decision."[16] The parties in this case did not stipulate the issues for resolution. Accordingly, the Arbitrator framed the issues. The Union does not contend that the award is not directly responsive to the issue as the Arbitrator formulated it. Rather, the Union contends that the Arbitrator exceeded his authority by failing to address a matter that one party submitted, but to which the parties did not stipulate. Because the parties did not stipulate to the matter of the boarding process, the Arbitrator was not obligated to specifically address that matter.[17] Accordingly, even assuming that the Arbitrator did not address the matter of the boarding process, the Arbitrator did not exceed his authority by not addressing that matter. We deny this exception.

B. The award is not incomplete, ambiguous, or contradictory so as to make implementation of the award impossible.

The Union alleges that the award is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible. The Authority will set aside an award that is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible.[18] To prevail on this ground, the appealing party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain.[19]

The Union argues that since "[t]he Arbitrator failed in his decision to discuss the boarding process and whether that can or cannot be grieved[,] . . . the [a]ward does not make [that issue] clear[,] and is therefore ambiguous and impossible to implement in that regard."[20] However, the Union's argument – that the Arbitrator failed to adequately address a non-stipulated matter – does not explain how the award is impossible to implement. Specifically, the Union does not explain how the award's remedy – to award backpay and to find that the appeal of the board's decision cannot be grieved – is impossible to implement in the absence of a discussion concerning the boarding process. Despite the Union's contentions to the contrary, the award's alleged failure to address a non-stipulated matter does not alone render it incomplete, ambiguous, or contradictory so as to make implementation of the award impossible. Accordingly, we deny this exception.

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

The Union alleges that the award is deficient because it fails to draw its essence from the parties' agreement. The Union argues that "the Arbitrator's [a]ward ignore[d] the plain language of the [parties' agreement] and does not represent a plausible interpretation of the [parties' agreement] nor [wa]s it derived from the agreement itself."[21] 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.[22] 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.[23] 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."[24] In addition, when a party does not interpret an award correctly, an exception based on that misinterpretation does not demonstrate that the award fails to draw its essence from the parties' agreement.[25]

The Union argues that the Arbitrator's statement that "Article 37 removes from the negotiated [g]rievance [p]rocedure an appeal from the [board]'s denial of [the g]rievant's promotion" fails to draw its essence from the parties' agreement.[26] As support, the Union quotes a portion of Article 37, which states that "a grievance means any complaint by an employee[] of the Union concerning any matter relating to employment . . . concerning the . . . misapplication of law, rule or

[15] *AFGE, Local 522*, 66 FLRA 560, 562 (2012)
[16] Exceptions Br. at 7.
[17] *AFGE, Council 215*, 66 FLRA 771, 774 (2012).
[18] 5 C.F.R. § 2425.6(b)(2)(iii).
[19] *U.S. Dep't of the Air Force, Grissom Air Reserve Base, Ind.*, 67 FLRA 302, 304 (2014) (quoting *U.S. DOD, Def. Logistics Agency*, 66 FLRA 49, 51 (2011)).
[20] Exceptions Br. at 9.
[21] *Id.* at 11.
[22] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[23] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[24] *Id.* at 576.
[25] *U.S. Dep't of HHS, Substance Abuse & Mental Health Servs. Admin.*, 65 FLRA 568, 572 (2011).
[26] Award at 12.

regulation affecting conditions of employment."[27] The Union argues that the Agency did not follow its own rules when conducting the boarding and that at arbitration the Union "challenged the process applied when boarding the [g]rievant, not the outcome of the boarding."[28]

Although the award is unclear on this point, even assuming that the Arbitrator addressed the boarding process and found that it was excluded from the grievance procedure under Article 37, the Union still fails to demonstrate that the award fails to draw its essence from the agreement. Whether Article 37 excludes the boarding process, as opposed to the boarding result, from the grievance procedure is a matter of interpretation of the parties' agreement left to the Arbitrator. Although arguing that "[t]he boarding process falls directly into the category of activities that were meant to be covered by the [p]arties' [agreement]," the Union fails to articulate why it is an implausible interpretation to include both the process and the substantive outcome of boarding as subjects excluded from the grievance procedure by Article 37.[29] Consequently, even assuming that the Arbitrator intended to include the boarding process in his ruling, the Union has not demonstrated how the award fails to draw its essence from the parties' agreement.

Accordingly, we deny this exception.

D. The award is not contrary to an Agency rule or regulation.

The Union contends that the award is contrary to the Agency's rules and regulations regarding boarding. When evaluating exceptions asserting that an arbitration award is contrary to a governing agency rule or regulation, the Authority determines whether the award is inconsistent with the plain wording of, or is otherwise impermissible under, the rule or regulation.[30]

The Union argues that "the Arbitrator violated rule and regulation when including the boarding process with the boarding decision, as matters excluded from the grievance process."[31] In support, the Union cites "[t]he [b]asics of [b]oarding," guidelines detailing the responsibilities of an immediate supervisor in the boarding process.[32] However, even assuming that the Arbitrator intended to include both the boarding process and the boarding result in his decision, the Union does not explain how the award conflicts with the referenced Agency rules and regulations. Nothing in the cited rules or regulations indicates that the Arbitrator must treat the boarding process separately from the boarding result when applying the exclusions in Article 37. As such, the Union has failed to demonstrate a conflict between the award and the Agency's rules and regulations. Accordingly, we deny this exception.

E. The award is not based on a nonfact.

The Union challenges the award as being based on a nonfact. To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[33] However, a challenge to an arbitrator's interpretation of the parties' agreement cannot be challenged as a nonfact.[34]

The Union argues that "[s]ince no language in Article 37 of the [parties' agreement] 'removes' from the grievance procedure the review of the procedure in boarding an employee, the Arbitrator's decision . . . is based on a non[f]act."[35] However, this exception challenges the Arbitrator's interpretation of the parties' agreement. As noted above, a party cannot use a nonfact exception to challenge an arbitrator's interpretation of the parties' agreement.[36] Accordingly, we deny this exception.

F. The award is contrary to the BPA.

The Union contends that the award is contrary to law because it "does not conform [to] the requirements or rules as set forth in" the BPA.[37] The Union's exception involves the consistency of the award with law. Thus, we review the questions of law raised by the Union's exceptions de novo.[38] In applying a standard of de novo review the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[39] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[40] Where an arbitrator's findings support an

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[27] Exceptions Br. at 11-12 (quoting Art. 37, § 2 of the parties' agreement).
[28] *Id.* at 12.
[29] *Id.*
[30] *SSA, Region IX*, 65 FLRA 860, 863 (2011) (citations omitted).
[31] Exceptions Br. at 10.
[32] The Basics of Boarding at 3, 5.
[33] *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993).
[34] *United Power Trades Org.*, 67 FLRA 311, 315 (2014) (*Power Trades*).
[35] Exceptions Br. at 13.
[36] *Power Trades*, 67 FLRA at 315.
[37] Exceptions Br. at 13.
[38] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995).
[39] *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).
[40] *U.S. Dep't of the Air Force, Warner Robins Air Logistics Complex Robins Air Force Base, Ga.*, 68 FLRA 102, 103 (2014) (citations omitted).

award of backpay under the BPA, the arbitrator's failure to award backpay is contrary to the BPA.[41]

The Union argues that, because the Arbitrator found that the Agency violated the parties' agreement and "failed [to] pay the [g]rievant for the duties that she was performing," the Arbitrator's denial of attorney fees was contrary to the BPA.[42] In his award, the Arbitrator determined that the grievant had qualified under the parties' agreement for a temporary promotion and ordered that she "be paid . . . any part of the pay of [the higher-graded position] that exceeded that which she received."[43] However, the Arbitrator also ruled that "[s]ince the action of the Agency did not constitute a withdrawal o[r] reduction of [the g]rievant's pay[,] but was a failure to pay her for her duties of her temporary [promotion], the Union's request for interest and attorney[] fees pursuant to [the BPA] is denied."[44]

The Authority has long held that, when resolving a request for attorney fees, arbitrators must set forth specific findings supporting their determinations on each pertinent statutory requirement.[45] The Authority will examine the record to determine whether it permits the Authority to resolve the matter. If the record does, then the Authority will modify the award or deny the exception as appropriate. If the record does not, then the Authority will remand the award for further proceedings.[46] In conducting a de novo review, although deferring to the facts found by the arbitrator, the Authority will find deficient legal conclusions that are unsupported by the facts.[47]

The threshold requirement for entitlement of attorney fees under the BPA is a finding that an employee (1) "ha[s] been affected by an unjustified or unwarranted personnel action" (2) "which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee."[48] A violation of the parties' agreement constitutes an unjustified and unwarranted personnel action.[49] The Arbitrator made factual findings satisfying each of the threshold requirements for attorney fees under the BPA. In particular, the Arbitrator found that the violation of the parties' agreement: (1) was through "the action of the Agency";[50] and (2) caused the grievant to suffer an actual loss in pay as she qualified to "be paid in an amount equal to any part of the pay of the [higher-graded position] that exceeded that which she [had] received."[51] Contrary to the Arbitrator's ruling that "the action of the Agency did not constitute a withdrawal o[r] reduction of [the g]rievant's pay," these findings satisfy the threshold requirements for an award of attorney fees under the BPA.[52]

However, in addition to the threshold requirements, the BPA further requires that an award of fees be: (1) in conjunction with an award of backpay to the grievant on correction of the personnel action; (2) reasonable and related to the personnel action; and (3) in accordance with standards established under 5 U.S.C. § 7701(g), which pertains to attorney fees awarded by the Merit Systems Protection Board.[53] The prerequisites for an award under 5 U.S.C. § 7701(g) are that: (1) the employee must be the prevailing party; (2) the award of attorney fees must be warranted in the interest of justice; (3) the amount of fees must be reasonable; and (4) the fees must have been incurred by the employee.[54] Because the Arbitrator did not fully address these additional requirements for an award of attorney fees, the record is insufficient to permit the Authority to resolve the matter.

Because the award is contrary to the BPA, but the record is insufficient to evaluate the additional requirements for an award of attorney fees, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to address the Union's request for attorney fees.[55]

V. Decision

We dismiss, in part, and deny, in part, the Union's exceptions. We also remand the portion of the award concerning attorney fees to the parties, absent settlement, for resubmission to the Arbitrator to make specific findings, consistent with the BPA and § 7701(g).

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[41] *NTEU, Chapter 164*, 67 FLRA 336, 338 (2014).
[42] Exceptions Br. at 13.
[43] Award at 12-13.
[44] *Id.* at 13.
[45] *U.S. DHS, U.S. CBP*, 66 FLRA 335, 341 (2011) (*DHS*).
[46] *USDA., Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 53 FLRA 1688, 1694 (1998).
[47] *NAGE, Local R5-188*, 54 FLRA 1401, 1409-10 (1998).
[48] 5 U.S.C. § 5596(b)(1).
[49] *U.S. Dep't of the Treasury, IRS, St. Louis*, 67 FLRA 101, 105 (2012).
[50] Award at 13. Although the Arbitrator at one point states that Article 22, Section 2A requires the temporary promotion, the text quoted by the Arbitrator in that instance matches Article 21, Section 2A. *Compare id.* at 12, with *id.* at 3 (quoting Art. 21, § 2 of the parties' agreement).
[51] Award at 12-13.
[52] *Id.* at 13.
[53] *U.S. DOD, Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995).
[54] *Id.*
[55] *DHS*, 66 FLRA 335, 341 (2011).