**68 FLRA No. 91**

NATIONAL LABOR RELATIONS BOARD
PROFESSIONAL ASSOCIATION
(Union)

and

NATIONAL LABOR RELATIONS BOARD
(Agency)

0-AR-5071

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DECISION

May 12, 2015

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

## I. Statement of the Case

The Union filed a grievance alleging, as relevant here, that the Agency violated certain selection procedures in the parties' collective-bargaining agreement when filling a position. Arbitrator David Epstein found that the Agency complied with the parties' agreement, and he denied the grievance. There are three substantive questions before us.

The first question is whether the award is based on nonfacts. In this regard, the Union's nonfact arguments: dispute alleged findings that the Arbitrator did not actually make; challenge the Arbitrator's interpretation of the parties' collective-bargaining agreement; disagree with statements in the award that do not constitute factual findings; contest findings regarding matters that were disputed at arbitration; or do not show that the Arbitrator clearly erred in making a central factual finding, but for which he would have reached a different result. Because such arguments do not provide bases for finding an arbitration award deficient on nonfact grounds, the answer is no.

The second question is whether the Arbitrator erred as a matter of law when he found that neither a previous award by another arbitrator nor a related-Authority decision required him to interpret the parties' agreement in the manner proposed by the Union. Neither previous arbitration awards interpreting collective-bargaining agreements nor Authority decisions denying exceptions to such interpretations dictate how an arbitrator resolving a different grievance must interpret the same agreement. Thus, the answer is no.

The third question is whether the award is contrary to law because the Arbitrator's interpretation of the parties' agreement "altered the language" of the agreement.[1] Because the Union's argument challenges the Arbitrator's contract interpretation, it does not provide a basis for finding the award deficient as contrary to law. Therefore, the answer is no.

## II. Background and Arbitrator's Award

When the Agency fills certain positions, Article 16.4 of the parties' agreement (Article 16.4) requires the Agency to consider internal applicants that fall within a certain category (the first area of consideration), before "moving on to" consider another category of internal applicants (the second area of consideration).[2] Specifically, Article 16.4 states that the "[s]electing [o]fficial will fully consider each successive area of consideration before moving on to the next area of consideration."[3]

An Agency official (the selecting official) selected an applicant from the second area of consideration to fill a particular position (the disputed position). Subsequently, the Union filed a grievance alleging, as relevant here, that the Agency violated Article 16.4 because the selecting official failed to "fully consider" the applicants in the first area of consideration before reviewing the applicants in the second area of consideration.[4] The grievance went to arbitration.

At arbitration, the Arbitrator made a series of findings concerning how the Agency filled the disputed position. Specifically, the Arbitrator found that the Agency first posted the vacancy announcement for the disputed position before the selecting official had "assumed her role" at the Agency.[5] After posting the vacancy announcement, the Agency generated lists of the "best[-]qualified" applicants from the first and second areas of consideration,[6] and these lists required action within a designated period, or they would lapse. After the selecting official "assumed her position," she did not fill the disputed position within the designated period, and the first set of lists (the original lists) lapsed.[7] In this regard, the Arbitrator stated: "The notices for applicants[,] issued before [the selecting official]

[1] Exceptions at 2.
[2] Award at 3.
[3] *Id.*
[4] *Id.* at 2 (quoting Article 16.4) (internal quotation marks omitted).
[5] *Id.* at 5.
[6] *Id.* (internal quotation marks omitted).
[7] *Id.*

assumed her position[,] lapsed."[8] Accordingly, the Agency issued a new vacancy announcement, and the Agency, again, generated lists of the "best[-]qualified" applicants from the first and second areas of consideration.[9]

Next, the Arbitrator found that the selecting official considered each of the applicants in the first area of consideration by reviewing their applications, reading their writing samples, and conducting personal interviews with each of them. According to the Arbitrator, the selecting official concluded that although these applicants were "solid," none demonstrated the "creative imagination" that she was seeking.[10] The Arbitrator determined that, without "reject[ing] any of these applicants,"[11] the selecting official then considered the applicants in the second area of consideration by reviewing their applications, reading their writing samples, and conducting interviews. After contemplating the applicants in both the first and second areas of consideration, the selecting official chose an applicant from the second area of consideration to fill the disputed position.

Before the Arbitrator, the parties disputed whether the selecting official had "fully considered" applicants in the first area of consideration within the meaning of Article 16.4.[12] In particular, the Union argued that Article 16.4 required the selecting official to review applicants from the first area of consideration and select one for the position, or, alternatively, reject each of them, before considering any applicants from the second area of consideration. And the Union argued that past practice, the parties' bargaining history, a previous award by a different arbitrator (the *Ables* opinion), and *NLRB* (*NLRB*)[13] – the Authority's decision denying, in part, and granting, in part, exceptions to the *Ables* opinion – all supported the Union's interpretation of "fully consider."[14]

However, the Arbitrator rejected the Union's arguments. Starting with the contract wording, he found that "[n]othing in [Article 16.4] states, directly or indirectly, that the [s]electing [o]fficial must make a final decision as to each member of the first area of consideration before any consideration of any subsequent area of consideration."[15] In this regard, he noted that interpreting "fully consider" to require a "final decision" as to each applicant from the first area of consideration would "push[] the Arbitrator into the impermissible ground of rewriting . . . the collective[-]bargaining agreement."[16] Additionally, the Arbitrator noted that, under the Union's interpretation of Article 16.4, a selecting official could "game the system by rejecting all first[-]area applicants, [considering] . . . the second[-]area applicants, and then posting a new [vacancy announcement] inviting first[-]area applicants to reapply so that the [s]electing [o]fficial could select a more impressive first[-]area applicant."[17]

In addition, the Arbitrator found "nothing in the [parties' bargaining] history" [18] to indicate that the parties intended to impose the Union's proposed meaning of "fully consider."[19] Similarly, the Arbitrator rejected the Union's argument that the parties had established a past practice that conflicted with the selecting official's actions. Rather, the Arbitrator noted that, in filling a prior position, an Agency selecting official had considered applicants from both the first and second areas of consideration before selecting an applicant from the first area of consideration. And the Arbitrator found that this previous selection "was not, at any point, challenged by the Union."[20]

Further, the Arbitrator rejected the Union's reliance on the *Ables* opinion and *NLRB* because he found that: (1) the *Ables* opinion was "not binding" in the matter before him;[21] and (2) neither the *Ables* opinion nor *NLRB* addressed the meaning of the term "fully consider" in Article 16.4.[22]

Based on the foregoing, the Arbitrator concluded that, under Article 16.4, "[t]he [s]electing [o]fficial may 'fully consider' each applicant within an 'area of consideration' and, without deciding 'yes' or 'no' as to each applicant[,] proceed to 'fully consider' an applicant from the next 'area of consideration' before making the final decision in selecting an applicant from . . . among the areas of consideration."[23] Consequently, the Arbitrator found that the manner in which the selecting official filled the disputed position did not violate Article 16.4.

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

[8] *Id.*
[9] *Id.* (internal quotation marks omitted).
[10] *Id.* at 6 (internal quotation marks omitted).
[11] *Id.*
[12] *Id.* at 9 (internal quotation marks omitted). *Compare id.* (Agency's explanation of "fully consider"), *with id.* at 13 (Union's explanation of "fully consider").
[13] 50 FLRA 88 (1995).
[14] *See* Award at 9-13.
[15] *Id.* at 7 (internal quotation marks omitted).
[16] *Id.* (Arbitrator's emphasis omitted).
[17] *Id.* at 9 (internal quotation marks omitted).
[18] *Id.*
[19] *Id.* (quoting Article 16.4) (internal quotation marks omitted).
[20] *Id.* at 8.
[21] *Id.* at 12.
[22] *Id.* at 10-12 (quoting Article 16.4) (internal quotation marks omitted).
[23] *Id.* at 15.

## III. Preliminary Matter: We dismiss the Union's exception that fails to raise a recognized ground for review under § 2425.6(e)(1) of the Authority's Regulations.

The Authority's Regulations enumerate the grounds upon which the Authority will review arbitration awards.[24] In addition, the Regulations provide that if an excepting party argues that an arbitration award is deficient based on a private-sector ground not currently recognized by the Authority, then that party "must provide sufficient citation to legal authority that establishes the ground[] upon which the party filed its exception[]."[25] Further, § 2425.6(e)(1) of the Regulations cautions that an exception "may be subject to dismissal . . . if . . . [t]he excepting party fails to raise" a ground listed in § 2425.6(a)-(c) of the Regulations, or "otherwise fails to demonstrate a legally recognized basis for setting aside the award."[26]

The Union argues that the Arbitrator's interpretation of Article 16.4 "violat[es]" a provision of the parties' agreement that prohibits arbitrators from modifying the terms of that agreement.[27] This argument does not articulate a ground currently recognized by the Authority for reviewing an arbitration award, and the Union does not cite any private-sector precedent that establishes it as a ground. Accordingly, we dismiss the Union's exception under § 2425.6.[28]

## IV. Analysis and Conclusions

### A. The award is not based on nonfacts.

The Union argues that the award is based on six nonfacts.[29] To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[30] The Authority rejects nonfact exceptions that challenge alleged findings that an arbitrator did not actually make.[31] Additionally, an arbitrator's conclusions that are based on his or her interpretation of a collective-bargaining agreement may not be challenged as nonfacts.[32] Moreover, the Authority will not find an award deficient based on an arbitrator's determination regarding any factual matter that the parties disputed at arbitration.[33]

First, the Union alleges that the Arbitrator erroneously found that the selecting official had not assumed her position when the original lists lapsed.[34] However, the Arbitrator found that the original lists were "*issued* before [the selecting official] assumed her position," not that they *lapsed* before she assumed her position.[35] Thus, the Union's first nonfact argument challenges an alleged finding that the Arbitrator did not actually make. As stated above, this does not provide a basis for finding that the award is based on a nonfact.[36]

Second, the Union challenges as a nonfact[37] the Arbitrator's statement that interpreting Article 16.4 to require a "final decision" as to each applicant from the first area of consideration before considering anyone from the second area of consideration would "push[] the Arbitrator into the impermissible ground of rewriting . . . the collective[-]bargaining agreement."[38] However, this statement constituted the Arbitrator's interpretation of the parties' agreement. Therefore, it cannot be challenged as a nonfact.[39]

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[24] 5 C.F.R. § 2425.6(a)-(b); *see also NAIL, Local 17*, 68 FLRA 97, 98 (2014) (*Local 17*).
[25] 5 C.F.R. § 2425.6(c).
[26] *Id.* § 2425.6(e)(1); *see also Local 17*, 68 FLRA at 98.
[27] Exceptions at 2.
[28] *E.g.*, *Local 17*, 68 FLRA at 98-99 (dismissing argument that arbitrator erred when he found that certain action was contrary to the negotiated agreement).

Member Pizzella notes that he would not dismiss the Union's exception – "a violation of Article 11, § 11.2(b), of the CBA because [the Arbitrator] altered the language of Article 16, § 16.4(a) & (b) . . ." – for the reasons that he set forth in *AFGE, Local 1897*, 67 FLRA 239, 243 (2014) (Concurring Opinion of Member Pizzella) ("[O]ur regulations do not require a party to invoke any particular magical incantation to perfect an exception so long as the party [sufficiently explains how the award is deficient]." (citations omitted) (internal quotation marks omitted)). According to Member Pizzella, the Union's argument raises an unmistakable essence exception that should be addressed on its merits although he would deny the exception because the Arbitrator's interpretation is a plausible interpretation of the parties' agreement.

[29] Exceptions at 1, 5-6, 8-11.
[30] *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 623 (2014) (*White Sands*); *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry*).
[31] *E.g.*, *White Sands*, 67 FLRA at 623-24.
[32] *United Power Trades Org.*, 67 FLRA 311, 314 (2014).
[33] *Lowry*, 48 FLRA at 593-94.
[34] Exceptions at 10; *see also id.* at 5, 9.
[35] Award at 5 (emphasis added).
[36] *E.g.*, *White Sands*, 67 FLRA at 623-24.
[37] Exceptions at 1, 5-6, 9.
[38] Award at 7.
[39] *E.g.*, *U.S. DHS, U.S. CBP, JFK Airport, Queens, N.Y.*, 62 FLRA 129, 131 (2007); *AFGE, Local 3302*, 52 FLRA 677, 679-80 (1996); *U.S. Dep't of the Treasury, IRS, Se. Region, Atlanta, Ga.*, 46 FLRA 572, 577 (1992) (*IRS*).

Third, the Union alleges that the award is based on a nonfact because the Arbitrator erroneously found that, under the Union's interpretation of Article 16.4, "a selecting official could game the system."[40] But the Arbitrator did not make a factual finding that a selecting official *actually did* or *will* game the system. The Arbitrator merely suggested that "gam[ing] the system" *could* be an unintended consequence of interpreting Article 16.4 to force a selecting official to make a decision after considering only applicants from the first area of consideration.[41] The Arbitrator's statement does not constitute a factual finding, and, as such, the Union cannot challenge it on nonfact grounds.[42]

Fourth, the Union alleges that the Arbitrator's finding that there was "nothing in the [parties' bargaining] history"[43] to indicate that the parties intended to impose the Union's proposed meaning of "fully consider"[44] is a nonfact.[45] However, the issue of whether there was anything in the parties' bargaining history to inform the Arbitrator's interpretation of "fully consider" was disputed at arbitration.[46] Accordingly, the Union's argument provides no basis for finding the award deficient as based on a nonfact.[47]

The Union's fifth nonfact argument relates to the Arbitrator's finding that, in filling a prior position, an Agency selecting official considered applicants from both the first and second areas of consideration before selecting an applicant from the first area of consideration.[48] Specifically, the Union alleges that the Arbitrator's finding, that this previous selection "was not . . . challenged by the Union,"[49] is a nonfact because testimony at arbitration showed that the Union was not aware of the Agency's consideration process in that selection.[50] But the Union does not establish that either: (1) the Arbitrator's finding that the selection "was not . . . challenged by the Union"[51] is clearly erroneous; or (2) this finding was a central fact, but for which the Arbitrator would have reached a different result. Because the Union must meet both of these requirements in order to establish that the award is based on a nonfact, the Union's argument does not establish that the award is deficient.[52]

Sixth, the Union claims that the award is based on a nonfact because the Arbitrator erroneously concluded that the *Ables* opinion was inapposite.[53] We assume, without deciding, that the Arbitrator's interpretation of the *Ables* opinion is a factual determination that is subject to challenge on nonfact grounds,[54] and that the Arbitrator clearly erred in finding the *Ables* opinion inapposite. But, as discussed in Section IV.B. below, the Arbitrator was not bound by the *Ables* opinion. And there is no basis for finding that, had the Arbitrator not allegedly erred in finding that opinion inapposite, he would have *chosen* to apply it and reached a different result. Thus, the Union does not demonstrate that, but for the alleged error, the Arbitrator would have reached a different result. As such, the Union's claim does not establish that the award is based on a nonfact.[55]

For the foregoing reasons, we deny the Union's nonfact exceptions.

B. The award is not contrary to law.

The Union argues that the award is contrary to law in two respects.[56] In resolving an exception claiming that an award is contrary to law, the Authority reviews any question of law raised by an exception and the award de novo.[57] In applying a de novo standard of review, the Authority assesses whether the Arbitrator's legal conclusions are consistent with the applicable standard of law.[58] Under this standard, the Authority defers to the

[40] Exceptions at 1 (referring to Award at 9).
[41] Award at 8-9 (internal quotation marks omitted).
[42] *See, e.g., U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div., Keyport, Wash.*, 55 FLRA 884, 888 n.2 (1999) (Member Cabaniss dissenting) (arbitrator's use of a particular term was not a factual finding where "nothing else in the record or the award [indicated] that the [a]rbitrator used the term in a technical sense and as a resolution of a factual dispute between the parties").
[43] Award at 9.
[44] *Id.* (quoting Article 16.4) (internal quotation marks omitted).
[45] Exceptions at 1, 6, 8.
[46] *See* Award at 7-14.
[47] *E.g., Lowry*, 48 FLRA at 594.
[48] Exceptions at 6 (discussing Award at 8).
[49] Award at 8.
[50] *E.g.*, Exceptions at 10 ("the one time [that] the Agency contended [that] it went to the second area and then back to the first, the Agency had not informed the Union that it had done so").
[51] Award at 8.
[52] *E.g., U.S. DOD Educ. Activity, Arlington, Va.*, 56 FLRA 836, 842 (2000).
[53] *See* Exceptions at 1, 6, 8.
[54] *See U.S. DHS, U.S. CBP*, 68 FLRA 253, 259 (2015) (Authority assumed that one arbitrator's interpretation of another arbitrator's award was a factual determination that was subject to challenge on nonfact grounds).
[55] *E.g., White Sands*, 67 FLRA at 623 (to show nonfact, excepting party must show, among other things, that the arbitrator would have reached a different result).
[56] *See* Exceptions at 1-2, 11-12.
[57] *See 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)).
[58] *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).

Arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[59]

First, the Union claims that the award is contrary to law because the Arbitrator incorrectly concluded that neither the *Ables* opinion nor *NLRB* provided a binding interpretation of the term "fully consider" in Article 16.4.[60] But arbitration awards are not precedential, so even if the *Ables* opinion involved similar issues or the "interpretation of the same . . . contract provision[]," [61] the Arbitrator was not bound by it.[62] And that the Authority denied (in pertinent part) exceptions to the contract interpretation at issue in the *Ables* opinion "did not require the Arbitrator, as a matter of law, to reach a particular result [regarding the contract interpretation] in this case."[63] For these reasons, the Union's contention does not demonstrate that the award is contrary to law.

Second, the Union argues that the award is contrary to law because the Arbitrator's interpretation of Article 16.4 "altered the language of" the parties' agreement.[64] However, the Authority has rejected, as "misplaced," contrary-to-law exceptions that challenge an arbitrator's interpretation of the parties' agreement.[65] Thus, here, the Union's disagreement with the Arbitrator's interpretation of Article 16.4 provides no basis for finding that the award is contrary to law.[66]

For the foregoing reasons, we find that the Union has not demonstrated that the award is contrary to law.

## V. Decision

We dismiss the Union's exceptions, in part, and deny them, in part.

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[59] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012)).
[60] Exceptions at 11 (internal quotation marks omitted); *see also id.* at 1-2, 12.
[61] *U.S. Dep't of the Air Force, Warner Robins Air Logistics Complex, Robins Air Force Base, Ga.*, 68 FLRA 102, 106 (2014).
[62] *Id.*; *AFGE, Local 2382*, 66 FLRA 664, 667 (2012) (*Local 2382*); *AFGE, Council 236*, 49 FLRA 13, 16-17 (1994) (citing *IRS*, 46 FLRA at 577).
[63] *Local 2382*, 66 FLRA at 667 (noting that "the Authority's decisions denying exceptions to other arbitration awards did not require the Arbitrator, as a matter of law, to reach a particular result in this case.")
[64] Exceptions at 2.
[65] *E.g.*, *AFGE, Local 779*, 64 FLRA 672, 674 (2010) (*Local 779*); *Prof'l Airways Sys. Specialists*, 56 FLRA 124, 125 (2000) (*PASS*).
[66] *E.g.*, *Local 779*, 64 FLRA at 674; *PASS*, 56 FLRA at 125.