64 FLRA No. 123

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 779
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
82ND TRAINING WING
SHEPPARD AIR FORCE BASE, TEXAS
(Agency)

0-AR-4511

DECISION

April 22, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Norman Bennett filed by the Union under § 7122 of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator found that the Agency did not violate the parties' agreement by refusing to temporarily promote the grievant. For the following reasons, we deny in part and dismiss in part the Union's contrary-to-law exceptions, and we remand the award.

II. Background and Arbitrator's Award

The parties stipulated that the grievant, a GS-1712-09 Training Instructor, performed the duties of a GS-1750-11 Training Development Specialist (TDS) from December 13, 2004 through October 31, 2007. [1] *See* Exceptions at 2, 7; Opp'n at 2. However, the Agency did not pay the grievant the higher salary of a TDS because, according to the Agency, the grievant needed to complete certain coursework in order to be qualified to receive a temporary promotion. *See* Award at 2, 4-5.

In November 2005, an Agency Civilian Personnel Flight (CPF) official informed the grievant that he had completed the necessary coursework. *Id.* at 3-4. Shortly thereafter, however, another Agency official, an Instructional Systems Panel Administrator (ISPA), informed the grievant that the Agency had modified the TDS coursework requirements and that the grievant still needed to complete certain coursework in order to be qualified to receive a temporary promotion to TDS. *Id.* at 4-5.

The Union filed a grievance seeking backpay for the Agency's allegedly improper refusal to temporarily promote the grievant. *Id.* at 5. When the grievance was not resolved, it was submitted to arbitration, where the Arbitrator framed the issue as whether the Agency's assignment of the grievant to TDS duties was "a detail or a temporary promotion[,]" under Article 22, Section 8 of the parties' agreement. [2] *Id.* at 2. The Arbitrator found that, under the parties' agreement, an employee cannot be temporarily promoted if that employee is not "'fully qualified for a promotion.'" *Id.* at 6 (quoting agreement). The Arbitrator determined that the grievant was "not fully qualified for the [TDS] position because he did not meet the course work requirement." *Id.* at 7. The Arbitrator thus concluded that the grievant's assignment was a detail, not a temporary promotion.

In addition, the Arbitrator rejected the Union's claim that the Agency committed an unfair labor practice (ULP) by changing the qualifications for the TDS position without providing the Union with notice and an opportunity to bargain. *Id.* at 7. The Arbitrator found

1. We note that the Arbitrator states that the Agency assigned the grievant to the TDS position on December 14, 2004. Award at 2. Given the parties' stipulation, and the fact that the Arbitrator did not explain his deviation from the stipulation, it appears that the Arbitrator made a typographical error in this regard.

2. Article 22 of the parties' agreement states, in pertinent part:

> Section 8. DETAIL AND TEMPORARY PROMOTIONS
>
> a. A detail is the temporary assignment of an employee to duties not within his job description. A detail does not change the employee's official title, grade, or pay rate.
>
> . . . .
>
> c. Details in excess of 30 continuous days will be recorded on Standard Form 50 for inclusion in the employee's personnel folder. Any detail will be recorded on AF Form 971 or in the OPF at the employee's request by submission of an AF-172.
>
> d. Normally, a temporary promotion instead of a detail will be made when:
>
> (1) The employee is fully qualified for promotion . . . .

Award at 6.

that the Union did not "properly join[]" this argument because it did not present the argument at the hearing, and that, in the alternative, the Agency did not commit a ULP because the matter of temporary promotions was "covered by" the agreement. *Id.*

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the award is contrary to law on three grounds. First, the Union contends that the Arbitrator's finding that the assignment of the grievant was a detail is erroneous because the Agency failed to engage in certain procedures that are required under Office of Personnel Management (OPM) regulations, the parties' agreement, or the Agency's internal policies. [3] Exceptions at 4-5. For example, the Union alleges that the Agency failed to document the grievant's assignment with either an SF-50 or an SF-52. [4] *Id.* at 5. Second, the Union asserts that the award is contrary to law because the Arbitrator "erred when he found the grievant was not fully qualified for the position." *Id.* Third, with regard to the Arbitrator's rejection of the Union's ULP claim, the Union asserts that the "Arbitrator erred when he stated that this was a question of the Agency's duty to bargain. . . . The [q]uestion is whether the law was applied equally to [the grievant] when other persons . . . received their [TDS] qualification with the same classes that [the grievant] took[.]" *Id.* at 7.

The Union also argues that the Arbitrator's determination that the grievant was not qualified to receive a temporary promotion to TDS is based on a nonfact. *See id.* at 3. According to the Union, the grievant was qualified to receive a temporary promotion to TDS as of October 3, 2006. *Id.* For support, the Union cites an arbitration exhibit, an October 3 e-mail in which the ISPA states to the grievant: "Your course work now meets the OPM requirements for the [TDS] 1750 series. Your name has been added to the list of prescreened individuals. You will be considered for future 1750 positions upon self nomination." Exceptions, Union Ex. 4.

B. Agency's Opposition

With regard to the Union's contrary-to-law exceptions, the Agency alleges that the Union "did not specifically state how the [A]rbitrator's award violated" the cited OPM regulations. Opp'n at 3. In addition, the Agency argues that the Union fails to explain how the Arbitrator's rejection of the Union's ULP claim is contrary to law. *Id.* at 3-4.

With regard to the Union's nonfact exception, the Agency concedes that the grievant "met all the required course work for the [TDS position]" beginning on October 3, 2006, but claims that the Arbitrator would have reached the same result even if he had not made an erroneous finding as to the grievant's qualifications. *Id.* at 2. In this connection, the Agency claims that "the grievant failed to bring his newly acquired qualification to the attention of the civilian personnel office (i.e., he failed to update his records) until . . . a mere 2 weeks before the detail ended." *Id.* Also in this connection, the Agency claims that the parties' agreement does not entitle a qualified employee to receive a temporary promotion but states only that "a temporary promotion will *normally* be made" when an employee is fully qualified. *Id.* at 3 (emphasis in original).

IV. Analysis and Conclusions

A. The award is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *See*

3. The Union cites 5 C.F.R. § 335.103(c)(1)(i) and 5 C.F.R. § 335.102(f) in support of this claim.

5 C.F.R. § 335.103(c)(1)(i) states, in pertinent part:

> Covered personnel actions—
>
> (1) Competitive actions. . . . [C]ompetitive procedures . . . apply . . . to the following actions:
>
> (i) Time-limited promotions . . . for more than 120 days to higher graded positions . . . . A temporary promotion may be made permanent without further competition provided the temporary promotion was originally made under competitive procedures and the fact that might lead to a permanent promotion was made known to all potential candidates[.]

5 C.F.R. § 335.102 states, in pertinent part:

> Subject to § 335.103 and, when applicable, to part 319 of this chapter, an agency may:
>
> . . . .
>
> (f) Make time-limited promotions to . . . meet . . . temporary needs for a specified period of not more than 5 years, unless OPM authorizes the agency to make and/or extend time-limited promotions for a longer period.
>
> (1) The agency must give the employee advance written notice of the conditions of the time-limited promotion, including the time limit of the promotion; the reason for a time limit; the requirement for competition for promotion beyond 120 days . . . and that the employee may be returned at any time to the position from which temporarily promoted . . . .

4. Although the Union does not cite a section of the parties' agreement or an internal policy, *see* Exceptions at 5, the Union appears to claim, at least with regard to the SF-50 form, that the Agency violated Article 22, Section 8(c) of the parties' agreement, quoted *supra* note 2.

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)). 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. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Union's contrary-to-law exception to the Arbitrator's determination that the Agency detailed the grievant is misplaced. The Arbitrator interpreted the parties' agreement — not any law, rule, or regulation — to find that the Agency's assignment of the grievant was a detail and not a temporary promotion. *See* Award 2, 6-7. As the Arbitrator's determination in this regard was based on his interpretation and application of the parties' agreement, this exception provides no basis for finding that the award is contrary to law. [5] *See, e.g.*, *Prof'l Airways Sys. Specialists*, 56 FLRA 124, 125 (2000) (rejecting as misplaced a party's contrary-to-law exception to an arbitrator's contractual interpretation). Thus, we deny this contrary-to-law exception.

With regard to the Union's claim that the Arbitrator "erred when he found the grievant was not fully qualified for the" TDS position, the Union does not cite any law, rule, or regulation to support its claim. Exceptions at 5. The Authority has held that such an unsupported allegation provides no basis for finding an award deficient. *See, e.g., AFGE, Local 3495*, 60 FLRA 509, 511 (2004). Therefore, we deny this contrary-to-law exception.

As to the Arbitrator's rejection of the Union's ULP claim, the Union asserts that "the [q]uestion is whether the law was applied equally to [the grievant] when other persons . . . received their [TDS] qualification with the same classes that [the grievant] took[.]" Exceptions at 7. There is nothing in the record to indicate that the Union presented this issue to the Arbitrator. *See* Award at 7. Under 5 C.F.R. § 2429.5 of the Authority's Regulations, the Authority will not consider arguments that could have been, but were not, presented to the arbitrator. *See, e.g.*, *AFGE, Local 376*, 62 FLRA 138, 139 (2007). As the Union could have, but did not, present this issue to the Arbitrator, we dismiss this contrary-to-law exception under § 2429.5.

B. We are unable to determine whether the award is 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. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.* Where the Authority is unable to determine whether a clearly erroneous factual finding would have resulted in a different award, the Authority has remanded the award to the parties for resubmission to the arbitrator, absent settlement. *See, e.g.*, *Gen. Servs. Admin., Region 9*, 48 FLRA 1348, 1357-58 (1994) (*GSA*).

Here, the Arbitrator found that the grievant was not qualified to receive a temporary promotion. Award at 7. However, the Union argues, and the Agency concedes, that during the period covered by the grievance — specifically, on October 3, 2006 — the grievant became qualified for a temporary promotion. Accordingly, we find that the Arbitrator's determination that the grievant was not qualified for a temporary promotion is clearly erroneous insofar as it applies to the portion of the grievance period that began on October 3.

With regard to whether this error renders the award deficient, it is unclear whether, but for this error, the Arbitrator would have reached a different result. In this connection, the award does not mention the grievant's qualifications on or after October 3, and does not cite the evidence regarding the issue. As such, we are unable to assess the Agency's claim that, but for the error, the Arbitrator still would have denied the grievance because the grievant failed to notify the Agency that he was qualified and/or because the agreement does not mandate that all qualified employees receive temporary promotions. Thus, we cannot determine whether the award is based on a nonfact. Accordingly, consistent with *GSA*, 48 FLRA at 1358, we remand the matter to the parties to obtain clarification from the Arbitrator, absent settlement.

V. Decision

For the foregoing reasons, we deny in part and dismiss in part the contrary-to-law exceptions, and we remand the award to the parties for resubmission to the Arbitrator, absent settlement.

5. We note that the Union does not claim that the parties' agreement incorporates the cited regulations, or that the award fails to draw its essence from the agreement.