65 FLRA No. 165

NATIONAL TREASURY
EMPLOYEES UNION
LOCAL 233
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
SMALL BUSINESS/SELF EMPLOYED
OPERATING DIVISION
LAGUNA NIGUEL, CALIFORNIA
(Agency)

0-AR-4497

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DECISION

April 29, 2011

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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 Frank Silver filed by the Union under § 7122(a) 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.

In a merits award (the merits award), the Arbitrator found that the Agency's handling of the grievant's hardship reassignment request violated the parties' collective bargaining agreement (CBA). In a remedy award (the remedy award) – the award at issue here – the Arbitrator determined that the grievant was not entitled to backpay for a certain period of time. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

In the merits award, the Arbitrator determined that the Agency violated the CBA when it did not consider placing employees who requested hardship transfers, including the grievant, in "not to exceed" (NTE) vacancies.[1] Award at 2. The Arbitrator remanded the matter to the parties to formulate an appropriate remedy, which would address "whether, in view of the [g]rievant's maternity leave, she would have been ready, willing, and able to accept [one of the NTE] positions [that were] announced" during the pendency of her hardship transfer request. *Id.* In this regard, the Arbitrator stated that "it was obviously the Union's burden to demonstrate [the grievant's] availability for work" as a prerequisite for any valid backpay claim. *Id.*

When the parties could not agree on a remedy, the Arbitrator issued the remedy award, in which he addressed the grievant's entitlement to backpay. *Id.* at 2-3. The Arbitrator found that, after the approval of the grievant's hardship transfer request but before her ultimate hardship reassignment in July 2005 (ultimate reassignment), the Agency posted two NTE announcements for positions at the grievant's desired reassignment location, and that the grievant was qualified for those positions. *Id.* at 4. The Arbitrator also found that the Agency cancelled the second of those announcements, so the second "announcement [was] disregarded[.]" *Id.* at 4-5. With regard to the remaining NTE announcement (the October 25 announcement), the Arbitrator determined that it "opened on October 25[, 2004,] and closed on November 8, 2004, [and] two individuals were selected on December 10, [2004,] with an *effective date of December 26*, 2004." *Id.* at 4 (emphasis added). The Arbitrator found that, in her sworn declaration, the grievant stated that she did not move to the location where she wished to be reassigned until December 27, 2004, and he found further that the grievant was scheduled to be on maternity leave until January 17, 2005. *Id.* at 3-4; *see also* Exceptions, Attach. 6 (Decl. of Grievant) at 11-12. Thus, the Arbitrator determined that the grievant was not ready, willing, and able to accept one of the two positions that had been filled under the October 25 announcement. Award at 4-5.

Although the Arbitrator "[p]resum[ed]" that the Agency had discretion to "hold open" a position with a December 26 effective date until the grievant was available for work, the Arbitrator noted that, in a sworn declaration, the Agency employee in charge of the hardship program (the Agency employee) stated

1. Although the award does not define the term "not to exceed vacancies," the *Code of Federal Regulations* states that agencies may fill "short-term position[s]" using "temporary appointment[s]" for a specified period "not to exceed" one year. 5 C.F.R. § 316.401(a)(1), (c)(1).

that he did not know whether management would have held open a position for the grievant. *Id.* at 5; *see also* Exceptions, Attach. 8 (Decl. of Human Resources Specialist). Consequently, the Arbitrator found that "whether [an NTE] position would have been held open [until the grievant was available for work] is entirely speculative on this record[.]" Award at 5. The Arbitrator found further that nothing in the CBA required the Agency to postpone the effective date of a position in order to offer it to the grievant. *Id.*

Because it could "not be concluded that the [g]rievant was ready, willing, and able to accept a position from the October 25 announcement," the Arbitrator found that she was not entitled to backpay for the period of time between the scheduled expiration of her maternity leave and her ultimate reassignment. *Id.* As an "additional reason" for denying backpay, the Arbitrator noted that the grievant chose to move to her desired reassignment location before she secured a job there, thus "mak[ing] herself unavailable to work [in] her old job" at her former location. *Id.* at 6 & n.4. Because he found that the grievant could have continued working in her former job until she secured her ultimate reassignment, the Arbitrator concluded that the grievant's "loss of pay would not have occurred but for the fact that she moved . . . in December and therefore made herself unavailable to return to her" former job. *Id.* at 5-6. For the foregoing reasons, the Arbitrator found that a backpay remedy "is not appropriate." *Id.* at 6.

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the award is contrary to law – specifically, Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act,[2] 42 U.S.C. § 2000e(k) (§ 2000e(k)) – because the Arbitrator relied on the Agency employee's declaration stating that he did not know whether management would have held open a position for the grievant until her leave ended.[3] *See* Exceptions at 5. In this regard, the Union asserts that the Agency employee's declaration constitutes "direct evidence of discrimination against the [g]rievant." *Id.* at 10. The Union contends that "for all intent[s] and purposes, the Arbitrator[] relied on the Agency [employee's declaration] as justification for the Agency's failure to select the [g]rievant" for an NTE vacancy under the October 25 announcement, and, thus, the award permits the Agency's "direct discrimination against the [g]rievant due to her pregnancy-related condition." *Id.* at 11.

The Union argues further that the award fails to draw its essence from the CBA. The Union contends that the Arbitrator's decision to deny the grievant backpay because she moved from her former location misconstrues the CBA as imposing an "affirmative duty" on employees not to relocate due to hardship, where that relocation would "create a liability for the Agency if [the Agency] later violated" the CBA's provisions regarding hardship transfer requests. *Id.* at 12. The Union contends that imposing such an obligation on employees renders their contractual right to request hardship transfers "meaningless[,]" *id.*, and allows the Agency to "ignore" the CBA article regarding hardship transfers because "there will not be any substantive consequence for violating it[,]" *id.* at 14. *See also id.* at 15-18.

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2. The Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978), amended Title VII by adding subsection (k) to the "Definitions" section. Subsection (k) provides, in pertinent part:

> [Unlawful employment practices] "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

42 U.S.C. § 2000e(k).

3. The Agency employee's declaration states, in pertinent part:

> I was . . . in charge of the [Agency's] hardship program [when the grievant's transfer request was pending]. . . . I understand that at the time of the effective date of the [NTE] position[s filled pursuant to the October 25 announcement, the grievant] was on extended leave[,] and [I] don't know if management would have held the position for her or chose to [bypass her] due to unavailability.

Exceptions, Attach. 8 (Decl. of Human Resources Specialist).

B. Agency's Opposition

The Agency contends that the Arbitrator correctly determined that the positions filled pursuant to the October 25 announcement had "an effective date prior to the [g]rievant's scheduled return to duty." Opp'n at 7 (citation omitted). With regard to the Union's pregnancy discrimination claim, the Agency asserts that Union failed to present such a claim to the Arbitrator and that the Agency employee's declaration, which the Union cites as evidence of discrimination, proves nothing more than the Agency employee's "lack of knowledge" as to whether a position would have been held open for the grievant until she was available to work. *Id.* at 11-12. In response to the Union's essence exception, the Agency argues that the law prohibited the Arbitrator from awarding backpay to the grievant for time when she was unavailable to work, and nothing in the CBA could authorize a backpay remedy "in violation of the law." *Id.* at 14-15.

IV. Preliminary Matter

The Agency contends that the Union did not raise its pregnancy discrimination argument before the Arbitrator. Under § 2429.5 of the Authority's Regulations (§ 2429.5), the Authority generally will not consider evidence or arguments that could have been, but were not, presented to the arbitrator.[4] *See Soc. Sec. Admin.*, 57 FLRA 530, 534 (2001) (*SSA*) (citing *NAGE, Local R4-45*, 53 FLRA 517, 520 (1997); *U.S. Agency for Int'l Dev.*, 53 FLRA 187, 187 n.2 (1997)). The parties each filed two briefs with the Arbitrator concerning the appropriate remedy for the Agency's violation of the CBA. *See* Exceptions, Attachs. 12 (First Agency Brief), 13 (First Union Brief), 14 (Second Agency Brief), & 15 (Second Union Brief).[5] In the First Union Brief, the Union cited § 2000e(k) to support its contention that the Arbitrator "should note that [the grievant's] pregnancy or subsequent maternity leave would not have barred her selection to [a] position" under the October 25 announcement. Exceptions, Attach. 13 at 6 (citation omitted). The Second Agency Brief – which followed the First Union Brief – included the Agency employee's declaration, *see id.*, Attach. 14 at 12, which the exceptions characterize as "direct evidence of discrimination[,]" Exceptions at 10. In the Second Union Brief – which followed the Second Agency Brief – the Union asserted that the Arbitrator should disregard the Agency employee's declaration because, in "the Union's view[,] . . . it would have been inappropriate for management not to select [the grievant] because she was on maternity leave." *Id.*, Attach. 15 at 2. To support this assertion, the Union cited its prior argument in the First Union Brief regarding § 2000e(k). *See id.* Therefore, we find that the Union presented to the Arbitrator its pregnancy discrimination argument concerning the Agency employee's declaration, and, consequently, we resolve the exception rather than dismissing it under § 2429.5.

V. Analysis and Conclusions

A. The remedy award is not contrary to law.

The Union contends that the award is contrary to § 2000e(k) because, "for all intent[s] and purposes, the Arbitrator[] relied on the Agency [employee's declaration] as justification for the Agency's failure to select the [g]rievant[.]" Exceptions at 11. 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 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.*

Section 2000e(k) requires that "women affected by pregnancy, childbirth, or related medical conditions . . . be treated the same for all employment-related purposes . . . as other persons not

4. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations – including § 2429.5 – were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the exceptions and opposition in this case were filed before the effective date of the revised Regulations, we apply the prior version of the Regulations.

5. The parties designated these briefs: (1) "Agency['s] Brief Regarding Remedies," Exceptions, Attach. 12; (2) "[Union's] Post Hearing Statement and Affidavits Regarding Remedies," *id.*, Attach. 13; (3) "Agency's Reply to Union's Statement Regarding Remedies. . .," *id.*, Attach. 14; and (4) "[Union's] Post Hearing Response to the Agency's Second Brief Regarding Remedies," *id.*, Attach. 15. To simplify the discussion, we refer to them, respectively, as "First Agency Brief," "First Union Brief," "Second Agency Brief," and "Second Union Brief."

so affected but *similar in their ability . . . to work*[.]" (Emphasis added.) Thus, as relevant here, § 2000e(k) requires employers to ensure the equal treatment of persons who are similarly *able to work*, regardless of pregnancy, childbirth, or related medical conditions. The Arbitrator made a factual finding that the grievant was *not* ready, willing, and *able to work* in time to accept one of the positions filled pursuant to the October 25 announcement, with an effective date of December 26, because: (1) the grievant did not move to the location where the positions were being filled until December 27; and (2) the grievant was scheduled to be on maternity leave until January 17, 2005. *See* Award at 3-4. Although the Union asserts that the Arbitrator was "simply wrong" to conclude that the grievant was unavailable to work until the end of her scheduled maternity leave, *see* Exceptions at 16 n.7, we note that: (1) the Union did not file a nonfact exception to this finding; and (2) the grievant's own declaration states that she did not move to her desired reassignment location until December 27, *see id.*, Attach. 6 (Decl. of Grievant) at 11-12. With regard to the latter, the grievant's declaration also specifically states that she was "ready, willing[,] and able to work" at her desired reassignment location as of December 27, *see id.* at 12, which was later than the effective date of the positions filled under the October 25 announcement.

The Arbitrator's factual finding regarding the grievant's inability to work supports his conclusion that the grievant was not entitled to backpay because she was not available to work on December 26, 2004, as required by the effective date of the positions filled under the October 25 announcement. *See* Award at 4-5. Although the Arbitrator referenced the statements in the Agency employee's declaration, he did so only in connection with his finding that "[w]hether a position would have been *held open* [until the grievant was available to work was] entirely speculative[,]" and that, consequently, he had no basis to conclude that the Agency was obligated to hold open such a position. *Id.* at 5 (emphasis added). As the Union has not established that the Agency would have accorded different treatment to another employee who, like the grievant, was unavailable to work, we deny the exception contending that the award is contrary to § 2000e(k).

B. It is unnecessary to resolve the Union's essence exception.

After concluding that the grievant was not entitled to backpay because she was unable to work in time to accept one of the positions filled under the October 25 announcement, the Arbitrator noted an "additional reason" for denying backpay to the grievant. *Id.* at 5-6. In this regard, the Arbitrator determined that the grievant could have continued working at her former location until her ultimate reassignment, and "[h]er loss of pay would not have occurred but for the fact that she moved . . . in December and therefore made herself unavailable to return to her" former job. *Id.* The Union argues that this determination fails to draw its essence from the CBA. *See* Exceptions at 14-18.

When an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient in order to have the award found deficient. *See, e.g., U.S. Dep't of the Treasury, Internal Revenue Serv., Oxon Hill, Md.*, 56 FLRA 292, 299 (2000) (*Oxon Hill*). In such circumstances, if an excepting party does not demonstrate that the award is deficient on one of the grounds relied on by the arbitrator, then it is unnecessary for the Authority to resolve exceptions to the other ground. *See id.*

We have denied the Union's contrary-to-law exception to the Arbitrator's finding that the grievant was not ready, willing, and able to work in time to accept one of the positions filled under the October 25 announcement. *See supra* Part V.A. That finding regarding the grievant's ability to work constitutes a separate and independent basis for the Arbitrator's decision to deny the grievant's request for backpay. Accordingly, we find it unnecessary to resolve the essence exception to the Arbitrator's "additional" ground for denying backpay. *See Oxon Hill*, 56 FLRA at 299.

VI. Decision

The Union's exceptions are denied.