68 FLRA No. 24

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3331
(Union)

0-AR-5019

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DECISION

December 19, 2014

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

I. Statement of the Case

The Union filed a grievance alleging that the Agency acted improperly by removing the grievant from the Agency's upward mobility program (UpMo Program or program) without promoting her to her target position. Arbitrator Andrée Y. McKissick issued an award finding that the Agency violated the parties' agreement and Agency policy. We must decide four questions.

First, we must determine whether the award was based on two nonfacts: (1) that the Arbitrator "created her own fact by deciding that an [individual development plan (IDP)] is a self-assessment";[1] and (2) that the grievant was absent only 14% of the time from June 8, 2009 to December 8, 2009. For the reasons set forth below, we find that the award is not based on nonfacts.

Second, we must decide whether the Arbitrator's decision to draw an adverse inference against the Agency regarding the existence of the grievant's IDP is contrary to law. Because the Agency asserts that the Arbitrator erroneously found that possession of the IDP was in the Agency's office, but does not challenge this finding as a nonfact, we find that this argument provides no basis for concluding that the award is contrary to law.

Third, we must determine whether the Arbitrator exceeded her authority by: (1) "unilaterally bas[ing] the [a]ward on a discrimination claim";[2] and (2) relying on information that "fell outside the scope of the Arbitrator[']s self-set area of examination."[3] For the reasons set forth below, we find that the Arbitrator did not exceed her authority.

And fourth, we must determine whether the award is ambiguous and contradictory so as to make implementation impossible because the Arbitrator made inconsistent statements regarding the period for which the grievant is to be awarded backpay. Because the period for awarding backpay is clear from the award as a whole, we find that the award is not ambiguous and contradictory so as to make implementation impossible.

II. Background and Arbitrator's Award

The grievant was selected from a nationwide pool of applicants to join the Agency's UpMo Program – an accelerated training program that allows administrative employees in lower-level positions to be promoted to more technical and professional jobs. When the grievant began the program, she was a general schedule (GS)-9 employee; the grievant's target position was GS-11.

Each individual UpMo Program plan may last from six to twenty-four months. The grievant's UpMo Program plan specified that the training period to achieve a promotion to GS-11 would be six months, from June 8, 2009, to December 8, 2009. The grievant's training period was eventually extended to September 6, 2011, at which time the Agency removed her from the program without granting her a promotion.

The Union filed a grievance alleging that the Agency violated various provisions of the parties' agreement, as well as Agency policy, by removing the grievant from the program without promoting her. The grievance was unresolved and was submitted to arbitration. The parties stipulated to the following issue: "Whether . . . the Agency violated the [parties' agreement] or Agency policy when it failed to promote [the grievant] to . . . [GS-]11? If so, what shall the remedy be?"[4]

The Arbitrator first addressed the period of time that should be considered to determine whether the grievant had satisfied the program's requirements. Because the grievant's training plan specified a training period of six months, the Arbitrator stated that she would

[1] Exceptions at 5.

[2] *Id.* at 11 n.1.
[3] *Id.* at 11.
[4] Award at 5.

examine the grievant's performance only for that period of time, or from June 8, 2009, to December 8, 2009.

The Arbitrator stated that, to successfully complete the program, the grievant was required to: (1) satisfactorily complete the prescribed training plan; (2) successfully demonstrate the ability to perform the job element criteria identified for the position; and (3) complete all self-assessment report requirements. The Arbitrator found that the grievant satisfied these three requirements.

As part of her analysis, the Arbitrator considered the parties' testimony regarding the grievant's IDP. According to the Arbitrator, the Agency claimed that it never received an IDP from the grievant; the grievant, however, asserted that she had submitted the IDP to the Agency and that her copy of the IDP was in "office boxes and unrecoverable."[5] The Arbitrator "credit[ed] the [g]rievant's version of events regarding the [IDP]."[6] Moreover, because the Arbitrator found that the possession of the IDP was in the Agency's office, and thus was within the jurisdiction of the Agency, the Arbitrator found that "the absence of [the IDP] allows for an adverse inference against the Agency."[7]

The Arbitrator also considered the Agency's contention that the grievant was chronically absent and that her absences affected her ability to perform her duties. The Arbitrator noted that the Union contended that the grievant was absent only "14% [of the time] from June 8, 2009 to December 8, 2009."[8] The Arbitrator concluded that the grievant's "absences did not adversely affect" her performance during the six-month period at issue.[9]

Finally, the Arbitrator noted that seventy-nine out of eighty program trainees received a promotion, and found that the program carried with it "a strong presumption for promotion."[10] According to the Arbitrator, the fact that the grievant was the only trainee to not receive a promotion indicated that the grievant "was not treated fairly and equitably."[11] The Arbitrator also observed, "[i]t is . . . interesting to note that the [g]rievant is a female of Indian descent as well as a veteran."[12]

The Arbitrator concluded that the Agency violated the parties' agreement and the UpMo Program and policy. The Arbitrator determined that, as a result, the grievant "shall be retroactively promoted to a GS-11" and returned to the program.[13] The Arbitrator also awarded the grievant backpay from December 6, 2009, to October 4, 2011, the date on which the grievance was filed.

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

III. Preliminary Issue: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Agency's ambiguous-and-contradictory exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations,[14] the Authority will not consider evidence or arguments that could have been, but were not, presented to the Arbitrator.[15] In its exceptions, the Agency argues that the award is contradictory so as to make implementation impossible because the award reinstates the grievant into the UpMo Program, despite also promoting her to GS-11.[16] According to the Agency, "once an employee reaches her 'target position,' which in this case is a [GS-11], she has completed the program and is no longer a participant."[17] In its opposition, the Union contends that the grievant's UpMo Program agreement states that the grievant's "position has the promotion potential up to GS-13."[18]

Before the Arbitrator, the Union requested the grievant's return to the program "[in] conjunction with" a retroactive promotion to a GS-11.[19] The Agency does not claim that it was precluded from responding below that this combination of remedies was impossible. Nor does the Agency provide any evidence that it made such a response below. Because the Agency could have presented this argument before the Arbitrator, but failed to do so, we find that this exception is barred under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, and we dismiss this exception.

[5] *Id*. at 18; *see also id.* at 17-18.
[6] *Id*. at 18.
[7] *Id*.
[8] *Id*. at 23.
[9] *Id*.
[10] *Id*. at 24.
[11] *Id*. at 26.
[12] *Id*. at 24.
[13] *Id*. at 1, 29.
[14] 5 C.F.R. §§ 2425.4(c), 2429.5.
[15] *E.g., AFGE, Local 3571*, 67 FLRA 218, 219 (2014) (citing 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DHS, CBP*, 66 FLRA 495, 497 (2012)).
[16] Exceptions at 4.
[17] *Id*.
[18] Opp'n at 9 (citing Joint Ex. VI at 1).
[19] Award at 15.

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Agency argues that the Arbitrator's award is based on two nonfacts. 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.[20] The Authority will not find an award deficient based on the arbitrator's determination of any factual matter that the parties disputed at arbitration.[21] However, an arbitrator's statements describing the positions of the parties are not factual findings underlying the award.[22]

First, the Agency argues that the Arbitrator "created her own fact by deciding that an IDP is a self-assessment."[23] According to the Agency, the Arbitrator failed to address whether the grievant completed her self-assessments. Rather, the Agency contends, the Arbitrator relied on the Union's "adverse-inference argument regarding self-assessments to substantiate the existence of the [g]rievant's IDP," which she then "apparently considered to meet the [program's] 'self-assessment' requirement."[24] The Agency contends that, "[h]ad the Arbitrator understood that an IDP did not constitute a self-assessment . . . she would have reached a different result in this case."[25]

Even assuming the Arbitrator made a factual finding that an IDP is a self-assessment and that this finding is erroneous, the Agency has not shown that this is a central fact underlying the award, but for which the Arbitrator would have reached a different result. The Arbitrator found that the grievant completed the program's three requirements, including the requirement that she complete all self-assessment reports.[26] The Agency concedes that whether the grievant completed the self-assessment reports was disputed below.[27] Accordingly, because the Authority will not find an award deficient on any factual matter disputed below, the Agency's argument cannot demonstrate that the award is based on a nonfact.[28]

Second, the Agency asserts that the award is based on a nonfact because the Arbitrator wrongly concluded that the grievant was absent 14% of the time from June 8, 2009, to December 8, 2009. According to the Agency, the grievant was actually absent more than 26% of this time.[29] The Agency contends that, because of this erroneous factual finding, the Arbitrator incorrectly found that the grievant's "absences did not adversely affect" her performance.[30]

The Agency misconstrues the Arbitrator's award. The Arbitrator did not find that the grievant was absent 14% of the time from June 8, 2009, to December 8, 2009. Rather, she merely restated the Union's position regarding this issue.[31] Because an arbitrator's statements describing the positions of the parties are not factual findings underlying the award, this argument provides no basis for finding the award deficient.[32] Moreover, even assuming the Arbitrator made a factual finding, the grievant's rate of absenteeism was disputed at arbitration.[33] As stated above, the Authority has long held that it will not find an award deficient based on the arbitrator's determination of any factual matter that the parties disputed at arbitration.[34]

Accordingly, we deny the Agency's nonfact exceptions.

B. The award is not contrary to law.

The Agency contends that the award is 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.[35] 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.[36] In making that assessment, the Authority defers to the arbitrator's underlying factual findings,[37] unless a party

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[20] *U.S. Dep't of VA Med. Ctr., Wash., D.C.*, 67 FLRA 194, 195 (2014) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry*)).
[21] *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 626, 628 (2012) (*DHS*) (citing *NAGE, SEIU, Local R4-45*, 64 FLRA 245, 246 (2009) (*Local R4-45*)).
[22] *AFGE, Local 3354*, 64 FLRA 330, 332 (2009) (*Local 3354*).
[23] Exceptions at 5; *see also id.* at 3 (stating Arbitrator found grievant completed self-assessments based on nonfact that "IDP is a self-assessment").
[24] *Id.* at 6.
[25] *Id.*
[26] Award at 18.
[27] *See* Exceptions at 5 (discussing conflicting testimony on whether the grievant completed the program's three requirements).
[28] *E.g.*, *DHS*, 66 FLRA at 628 (citing *Local R4-45*, 64 FLRA at 246).
[29] Exceptions at 3, 6.
[30] *Id.* at 6 (quoting Award at 23).
[31] Award at 23.
[32] *Local 3354*, 64 FLRA at 332.
[33] *See* Award at 9, 13, 23.
[34] *DHS*, 66 FLRA at 628 (citing *Local R4-45*, 64 FLRA at 246).
[35] *AFGE, Local 3506*, 65 FLRA 121, 123 (2010) (*Local 3506*) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995); *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[36] *Id.* (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[37] *Id.*

demonstrates that the findings are nonfacts.[38] Absent a nonfact, challenges to an arbitrator's factual findings cannot demonstrate that an award is contrary to law.[39]

The Agency argues that the award is contrary to law because the Arbitrator wrongly drew an adverse inference against the Agency regarding the existence of the grievant's IDP.[40] According to the Agency, the Arbitrator based his adverse inference on the erroneous finding that "possession of the IDP was in the Agency's office."[41] The Agency contends that because "the Union did not claim that the Agency ever possessed the [g]rievant's IDP, and because the Agency did not refuse to produce the document," the Arbitrator's adverse inference on this issue is contrary to law.[42]

The Agency's contrary-to-law challenge is premised on the Agency's claim that it did not have possession of the grievant's IDP. But the Agency does not contend that the Arbitrator's contrary determination is a nonfact. The Agency's claim therefore does not provide any basis for finding the award contrary to law.[43]

Accordingly, we deny the Agency's contrary-to-law exception.

C. The Arbitrator did not exceed her authority.

The Agency contends that the Arbitrator exceeded her authority.[44] 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.[45]

First, the Agency contends that the Arbitrator exceeded her authority by resolving an issue not before her. Specifically, the Agency contends that "the Arbitrator unilaterally based the [a]ward on a discrimination claim"[46] that was not before her.[47] As support for this claim, the Agency notes that the Arbitrator observed that "the [g]rievant is a female of Indian descent as well as a veteran."[48] However, contrary to the Agency's contention, the Arbitrator did not resolve the issue of whether the Agency discriminated against the grievant; she merely made a passing comment about the grievant's national origin, sex, and veteran status. This comment does not amount to a resolution of an issue not before the Arbitrator.[49] Accordingly, this argument provides no basis for finding the award deficient.

Second, the Agency argues that the Arbitrator exceeded her authority by relying on statistics that "fell outside the scope of the Arbitrator[']s self-set area of examination."[50] According to the Agency, because the Arbitrator stated that her "'only area of scrutiny' was 'from June 8, 2009 to December 2009,'"[51] she exceeded her authority by relying on the fact that the grievant "was the only one of [eighty] people . . . to be removed from the program"[52] from 2000 until September 6, 2011.

This argument is based on a misreading of the award. Although the Arbitrator stated that she would examine "the [g]rievant's six-month period for the duration of training for a GS-11 appointment" only,[53] she established this limitation solely for determining whether the grievant had satisfied the program's requirements. Because the Arbitrator relied on statistics outside of this timeframe to determine only whether the Agency had violated: (1) its own "HR Advisory," which states that "[p]romotion to the full performance level should be the rule, not the exception"[54] and (2) Article 8, Section 1 of the parties' agreement, which provides that "all employees shall be treated fairly and equitably,"[55] the Arbitrator did not exceed any "self-set" limitation on her authority.[56]

Moreover, this statistic is directly relevant to whether the Agency violated these provisions.[57] And, in concluding that the Agency violated both the advisory and the parties' agreement, the Arbitrator focused on the fact that the grievant was the *only* participant not to receive a promotion.[58] Specifically, the Arbitrator stated, "*all* were promoted to the higher target grade *except for*

[38] *AFGE, Local 331*, 67 FLRA 295, 296 (2014) (*Local 331*).
[39] *Id.*
[40] Exceptions at 7-10.
[41] *Id.* at 9 (quoting Award at 18).
[42] *Id.*
[43] *Local 331*, 67 FLRA at 296.
[44] Exceptions at 10-11.
[45] *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).
[46] Exceptions at 11 n.1.
[47] *Id.* at 11.
[48] *Id.* at 10 (quoting Award at 24).
[49] *U.S. Dep't of the Treasury, U.S. Mint, Denver, Colo.*, 60 FLRA 777, 779 (2005); *see also U.S. Patent & Trademark Office*, 32 FLRA 1168, 1178 (1988) (award exceeds the arbitrator's authority "when the arbitrator *resolve[s]* an issue not submitted") (emphasis added).
[50] Exceptions at 11.
[51] *Id.* at 10.
[52] *Id.* at 11.
[53] Award at 16.
[54] *Id.* at 6 (citing Joint Ex. IV, HR Advisory 335-5, Office of Human Resources and Organizational Services, Career Ladder Guidance).
[55] *Id.* at 5.
[56] Exceptions at 11; *see also* Award at 24.
[57] *See NACTA*, 62 FLRA 490, 491 (2008) ("Arbitrators do not fail to confine themselves to stipulated issues when they consider matters directly relevant to the resolution of those issues.") (citation omitted).
[58] Award at 26.

this [g]rievant"[59] and "the grievant [wa]s the *only one* not to be promoted."[60] This fact remains unchanged regardless of the time period examined – that is, the grievant still remains the only participant that the Agency failed to promote during the relevant time period.

Accordingly, we deny the Agency's exceeds-authority exception.

D. The award is not ambiguous and contradictory so as to make implementation impossible.

The Agency argues that "[t]he award is deficient because it is ambiguous and contradictory, and therefore unenforceable."[61] The Authority will find an award deficient when it is incomplete, ambiguous, or contradictory so as to make implementation impossible.[62]

According to the Agency, the award is ambiguous and contradictory because it states that the grievant shall "be awarded back[]pay with interest from December 6, 2009 to October 4, 2011,"[63] but also states that backpay "commenc[es] on October 4, 2011."[64] The Agency argues that, because of these contradictory statements, "it is impossible for the Agency to implement any backpay in compliance with this award."[65]

However, the Arbitrator clearly stated in three separate places in her award that the period for calculating backpay would end on October 4, 2011.[66] These statements make clear that the Arbitrator merely misspoke when she stated (once) that backpay "shall commence on October 4, 2011."[67] Accordingly, the Agency has failed to establish that the award is ambiguous or contradictory, and we deny this exception.[68]

V. Decision

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

[59] *Id*. at 24 (emphasis added).
[60] *Id*. at 25-26 (emphasis added).
[61] Exceptions at 3.
[62] *U.S. DOL, Mine Safety & Health Admin., Se. Dist.*, 40 FLRA 937, 943 (1991) (citation omitted).
[63] Exceptions at 4 (internal quotation marks omitted).
[64] *Id*. (internal quotation marks omitted).
[65] *Id*.
[66] Award at 1, 28 (backpay shall be awarded "until October 4, 2011,"), 29 (the grievant shall "be awarded" backpay "from December 6, 2009 to October 4, 2011").
[67] *Id*. at 28.
[68] *See, e.g., SSA, Office of Disability Adjudication & Review, Region 1*, 65 FLRA 334, 336 (2010) ("the Authority interprets the language of an award in context, without undue focus on isolated statements").

Member Pizzella, concurring:

I agree with my colleagues that the Agency's exceptions should be dismissed, in part, and denied, in part. But I write separately because the Arbitrator, Andrée Y. McKissick, needlessly complicated the case by abandoning her role as an independent arbiter and veering into the role of a census-taker.

It is bewildering that Arbitrator McKissick found it necessary to comment on the grievant's race, gender, and veteran status when resolving the issues concerning the grievant's removal from the upward mobility program, even though the matter of discrimination was never alleged, implied, or discussed by either party at any point.[1] I believe that the Arbitrator's comment on these non-merit factors raised potential controversy when it was unnecessary to do.

Arbitrators should not delve into issues that have no bearing on the dispute before them.[2] As I have noted previously, "[a]rbitrators are hired by parties to clarify and resolve, not add confusion to, their disputes."[3] Unfortunately, Arbitrator McKissick did quite the opposite by including her ambiguous observation.

This case stands as a prime example of how arbitrators jeopardize the efficiency of the collective-bargaining process by wandering into matters that should be left undisturbed. The parties need no help in creating disputes. Arbitrators, therefore, should assist the parties in resolving their differences, rather than adding to the confusion.

I am also concerned by what Arbitrator McKissick describes as the "delinquent acts and omissions" of the Agency.[4] In the award, the Arbitrator found that the Agency was guilty of committing "acts of negligence" and operating with a "lack of honesty" by failing to submit timely feedback to the grievant and backdating evaluation forms in an attempt to obscure the fact that the Agency did not fulfill its obligations.[5]

[1] *See* Exceptions at 11 ("Neither the Union nor the Agency mentioned a single word about potential discrimination throughout two days of hearings. Nor was a word about discrimination written in either the Agency's or the Union's post-hearing briefs.").
[2] *Cf. Dep't of the Treasury, U.S. Mint, Denver, Colo.*, 60 FLRA 777, 779-80 ("[T]he Authority has consistently held that arbitrators must confine their decisions and possible remedies to those issues submitted to arbitration for resolution.") (quoting *U.S. Dep't of the Navy, Naval Sea Logistics Ctr., Detachment Atl., Indian Head, Md.*, 57 FLRA 687, 688 (2002)).
[3] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 693 (Concurring Opinion of Member Pizzella).
[4] Award at 25.
[5] *Id*. at 25-26.

Indeed, the Arbitrator found that, but for these transgressions, the grievant would have been in a better position to be promoted.

As I have noted in prior instances of agency misconduct, such actions "contribute to a commonly held belief that, the federal government is unable to effectively manage its multitude of agencies, bureaus[,] and over two million employees."[6] It is unfortunate to see the resources of the Authority consumed by a claim that arises in part from the misconduct of the Agency, at the expense of good-faith disputes that will promote more effective labor-management relations.

Thank you.

[6] *U.S. Dep't of the Air Force, Grissom Air Reserve Base, Ind.*, 67 FLRA 302, 305 (2014) (Concurring Opinion of Member Pizzella).