

70 FLRA No. 111

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
ASHEVILLE, NORTH CAROLINA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 446
(Union)

0-AR-5309

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DECISION

May 7, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

Arbitrator Dennis R. Nolan issued an award finding that the Agency violated Article 12 of the parties' collective-bargaining agreement (Article 12) by failing to temporarily promote an employee (the grievant). As a remedy, the Arbitrator awarded the grievant a temporary promotion with backpay.

The main question before us is whether the award conflicts with the plain wording of Article 12 because the Arbitrator found that the grievant was not performing higher-graded duties, but nonetheless granted the grievant a temporary promotion. The answer is yes. Accordingly, we set aside the award as failing to draw its essence from the parties' agreement.

II. Background and Arbitrator's Award

The grievant, a general schedule (GS)-12 audiologist, established a tinnitus-management program at the Agency. The Union filed a grievance alleging that the grievant's tinnitus-management duties entitled her to a temporary promotion under Article 12. The parties could not resolve the grievance, and the Union invoked arbitration.

At arbitration, the Arbitrator framed the issues as: "Did the Agency violate Article 12 . . . by not temporarily promoting the [g]rievant to a GS-13 [audiologist position]? If so, what shall the remedy be?"¹

As relevant here, Article 12 states that a "GS employee[] who performs the grade-controlling duties of a higher-graded position for at least [twenty-five percent] of his/her time [and] for [ten] consecutive work days . . . shall be temporarily promoted."²

Before the Arbitrator, the parties disputed whether the grievant had spent at least twenty-five percent of her time performing tinnitus-management duties. Additionally, the Agency argued that the grievant did not have sufficient "professional accomplishments" to qualify her tinnitus-management duties as GS-13 work.³

Citing "VA Handbook 5005/38,"⁴ the Arbitrator stated that the grievant was entitled to a temporary promotion if she "performed GS-13 work for more than a quarter of her time through some combination of (1) administrative work on the tinnitus program, which may or may not include work performed during canceled patient appointments, allocated leave time, teaching time, and so on, and (2) specialized clinical work if it is accompanied by certain professional accomplishments."⁵

Regarding the grievant's clinical work, the Arbitrator found that the grievant failed to demonstrate the "professional accomplishments needed to take her tinnitus clinical [duties] from the GS-12 to the GS-13 level."⁶

The Arbitrator went on to address whether the grievant had performed administrative tinnitus-management duties for more than twenty-five percent of her time. Ultimately, the Arbitrator found that the grievant had done so and, based on that finding, he concluded that the Agency violated Article 12 by failing to temporarily promote the grievant.

¹ Award at 1.

² *Id.* at 2 (quoting Collective-Bargaining Agreement (CBA) Art. 12, § 2.A).

³ *Id.* at 7; see also Opp'n, Attach. A, Agency's Post-Hr'g Br. at 3-4 (Agency's Post-Hr'g Br.).

⁴ Award at 3 (noting that VA Handbook 5005/38 contains the qualifications for GS-9 through GS-14 audiologists).

⁵ *Id.* at 6.

⁶ *Id.* (also noting that "professional accomplishments" include external "publications, presentations at national professional meetings[,] or specialty or Board certifications" (citing VA Handbook 5005/38)).

As a remedy, the Arbitrator awarded the grievant a temporary promotion to a GS-13 audiologist, with backpay.

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

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Agency's essence exception.

The Agency argues that the award fails to draw its essence from Article 12 because the grievant was not performing the higher-graded duties of a GS-13 audiologist and, therefore, was not eligible to be temporarily promoted.⁷ In particular, the Agency alleges that the grievant did not have the professional accomplishments necessary to qualify her tinnitus-management duties as GS-13 work.⁸ In response, the Union claims that the Agency failed to make those arguments before the Arbitrator.⁹

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the Arbitrator.¹⁰ As noted above, the Agency argued before the Arbitrator that the grievant did not have the necessary "professional accomplishments."¹¹ Consequently, §§ 2425.4(c) and 2429.5 do not bar the Agency's essence exception.¹²

IV. Analysis and Conclusion: The award fails to draw its essence from Article 12.

As noted above, the Agency argues that the award fails to draw its essence from Article 12.¹³ As relevant here, the Authority has found that an award fails to draw its essence from a collective-bargaining agreement where the award conflicts with the agreement's plain wording.¹⁴

Article 12 explicitly states that a "GS employee[] who performs the grade-controlling duties of a *higher-graded* position for at least [twenty-five percent] of his/her time . . . shall be temporarily promoted."¹⁵ As noted above, the Arbitrator

stated that the grievant could meet Article 12's twenty-five percent threshold only by performing a "combination of" higher-graded administrative work "and" higher-graded clinical work.¹⁶ Despite finding that the grievant failed to demonstrate the "professional accomplishments needed" to qualify her clinical tinnitus-management duties at "the GS-13 level,"¹⁷ the Arbitrator awarded her a temporary promotion.¹⁸

Because the award of a temporary promotion conflicts with the plain wording of Article 12,¹⁹ we set it aside. Consequently, it is unnecessary to address²⁰ the Agency's remaining exceptions.²¹

V. Decision

We set aside the award.

⁷ Exceptions Br. at 5-6; Exceptions Form at 10.

⁸ Exceptions Br. at 4, 6; Exceptions Form at 10.

⁹ Opp'n Br. at 6; Opp'n Form at 6-7.

¹⁰ 5 C.F.R. §§ 2425.4(c), 2429.5.

¹¹ Award at 7; see also Agency's Post-Hr'g Br. at 3-4.

¹² See *AFGE, Local 916*, 68 FLRA 457, 458 (2015).

¹³ Exceptions Br. at 5-6; Exceptions Form at 10.

¹⁴ *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993) (*Tinker*).

¹⁵ Award at 2 (emphasis added) (quoting CBA Art. 12, § 2.A).

¹⁶ *Id.* at 6.

¹⁷ *Id.*

¹⁸ *Id.* at 9.

¹⁹ See *Tinker*, 48 FLRA at 348 (finding that an award evidenced a manifest disregard of an agreement where the arbitrator's interpretation was "not compatible with" the "plain wording" of that agreement); see also *U.S. Small Bus. Admin.*, 55 FLRA 179, 182 (1999) (award deficient because arbitrator's interpretation of agreement was incompatible with the agreement's plain wording).

²⁰ See *U.S. DOD, Def. Logistics Agency Aviation, Richmond, Va.*, 70 FLRA 206, 207 (2017) (citation omitted).

²¹ See Exceptions Br. at 6-7 (arguing that the Arbitrator exceeded his authority); *id.* at 7-8 (arguing that the award is based on a nonfact); Exceptions Form at 8-9 (nonfact); *id.* at 11 (exceeded authority).

Member DuBester, dissenting:

The majority's conclusion that the award fails to draw its essence from the parties' agreement rests on a misunderstanding of the Arbitrator's findings.

As the Arbitrator finds, citing the Agency's own contention, "this case is at heart a calculation matter;"¹ if the grievant spent at least twenty-five percent of her time performing higher-graded duties, she was entitled to a temporary promotion under Article 12.

The only higher-graded work time that matters in the award is the grievant's tinnitus-program administrative work time. In this regard, the award identifies two potential sources of higher-graded work: first, "administrative work on the tinnitus program," and second, "specialized clinical work if [that work] is accompanied by certain professional accomplishments."² The Arbitrator concludes that the grievant failed to perform any work in the "specialized clinical work" category.³

But the Arbitrator finds that the grievant spent over twenty-five percent of her time, for more than ten consecutive days, on tinnitus program administrative work – a higher-graded duty.⁴ The Arbitrator begins with "the Agency's revised calculations" concerning the grievant's higher-graded tinnitus-program administrative work time, and concludes that "the [g]rievant's [tinnitus-program] administrative work at the GS-13 level was just under the [twenty-five percent] bar."⁵ The Arbitrator then makes additions and adjustments in three areas. Specifically, the Arbitrator credits additional administrative work time for appointment-cancellation time and teaching-related time.⁶ And he finds that the Agency failed to properly account for the grievant's leave time.⁷ The Arbitrator concludes that making these additions and adjustments "bring[s] the total percentage of the [g]rievant's time spent on tinnitus administration over [twenty-five percent] of her time for more than [ten] consecutive workdays[,] . . . establish[ing] a violation of Article 12."⁸

Misinterpreting the Arbitrator's findings, the majority, mistakenly, applies a requirement that the grievant's *administrative work* on the tinnitus program be

accompanied by "professional accomplishments."⁹ But the "professional accomplishments" requirement only applies to the grievant's performance of "specialized *clinical* work."¹⁰ As the majority acknowledges, the "professional accomplishments" requirement was only "needed[] to qualify her *clinical* tinnitus-management duties."¹¹ Moreover, "specialized clinical work" is not part of the Arbitrator's calculation finding that the grievant exceeded the twenty-five percent bar.¹² The majority's core rationale and conclusion are therefore incorrect.

Accordingly, I dissent from the majority's disposition of the case, and would reach the Agency's remaining exceptions.

¹ Award at 4.

² *Id.* at 6.

³ *Id.*

⁴ *Id.* at 8.

⁵ *Id.* at 7.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 8.

⁹ Majority at 2.

¹⁰ Award at 6.

¹¹ Majority at 3-4 (emphasis added).

¹² Award at 6-8.