65 FLRA No. 203

UNITED STATES
DEPARTMENT OF THE ARMY
WOMACK ARMY MEDICAL CENTER
FORT BRAGG, NORTH CAROLINA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1770
(Union)

0-AR-4305

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DECISION

June 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 Michele M. Hoyman filed by the Agency and the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions and the Agency filed an opposition to the Union's exceptions.

The Arbitrator found that the grievant's promotion to General Schedule (GS)-12 was not lawful, but concluded that the Agency's failure to grant a waiver of the money the grievant had been paid improperly was an adverse event and ordered the Agency to grant the grievant a waiver. For the reasons set forth below, we dismiss the Agency's management rights exception, deny the Union's contrary to law exceptions, grant the Agency's exceeds authority exception, and set aside that portion of the award.

II. Background and Arbitrator's Award

The grievant has been employed by the Agency at Womack Medical Center (Womack) as a Registered Nurse (RN) for six years. Award at 3. Before becoming a Labor and Delivery Nurse for the Agency, the grievant gained "considerable experience" in labor and delivery, in the neonatal intensive care unit (NICU), and as a manager at other facilities. *Id.* While working at Womack, the grievant obtained a master's degree in midwifery, in part using the Agency's tuition assistance program. *Id.*

After completing her degree, the grievant responded to a Midwife vacancy announcement that was posted as a GS-11/training 12 position. *Id.* At the time the grievant applied for the position, she was serving at GS-10. The Agency's human resources department found that the grievant was not qualified at GS-12 because she did not have one year of specialized experience at GS-11. *Id.* at 4. The Agency informed the grievant that, because she was currently employed at GS-10 and there was a "ban on jumping one grade," she "might not be able to achieve the GS[-]12." *Id.* at 5. However, the Agency maintained a recruitment policy that allowed it to hire outside midwives at GS-12. *Id.* at 3-4.

After accepting the position at GS-11, the grievant received a Standard Form (SF)-50 Notice of Personnel Action indicating that she was classified at GS-12, Step 6. *Id.* at 6. She received pay at this level for approximately six months, until the Agency processed another SF-50 reclassifying the grievant at GS-11. *Id.* at 6-7. According to the Agency, the grievant had been mistakenly classified at GS-12. *Id.* at 7. After issuing the new SF-50, the Agency sent the grievant a bill for the difference between the GS-11 and GS-12 salary that she had been paid. *Id.* The grievant applied to the Defense Finance and Accounting Service (DFAS) for a waiver of the amount owed, but the waiver had not been granted by the time of the arbitration hearing. *Id.*

The Union presented a grievance alleging that the Agency violated Articles 27, 44, 38, and 2 of the parties' agreement by reclassifying the grievant at GS-11. *Id.* at 8. The matter was not resolved and was submitted to arbitration. The parties stipulated to the following issue: "[w]as the grievant's promotion to GS-12, Step 6 proper?" *Id.* at 2.

The Arbitrator concluded that "the promotion was not proper in the sense of lawful." *Id.* at 11. She also found that the promotion was "proper in the sense of being fair and meritorious on its face[.]" *Id.* The Arbitrator determined that she could not award the grievant a promotion or she would "fall afoul of

the [Code of Federal Regulations (CFR)] and exceed her authority." *Id.* However, the Arbitrator encouraged the parties to achieve the fair result without being "paralyzed by legal technicalities." *Id.*

The Arbitrator found that the grievant accepted the position at GS-11 for three reasons: (1) it was "against regulations" to promote someone to GS-12 who was not at GS-11 for one year; (2) the GS-12 pay scale was only available to new hires according to the Agency's recruitment policy; and (3) the grievant did not qualify for any exceptions to the ban on advancing from GS-10 to GS-12. *Id.* at 5. However, the Arbitrator also found that the Agency could have credited the grievant as having one year of experience equivalent to GS-11 because she had experience as a labor and delivery nurse, experience in the NICU, prior management experience, and specialized skills. *Id.* at 13-14. Thus, the Arbitrator found that the grievant "had the qualifications of a GS-12." *Id.* at 14. Because the Arbitrator found herself limited to lawful remedies, she found that she could not "order the [A]gency to reinstate the [grievant's] GS-12 status . . . ." *Id.* at 16.

The Arbitrator then considered whether the Agency should have granted the grievant a waiver for the bill that DFAS sent her because she was "'mistakenly' given the GS-12." *Id.* at 14. The Arbitrator concluded that, by billing the grievant "for an [A]gency mistake," the grievant "experienced an adverse event which was a violation" of the parties' agreement. *Id.* Therefore, the Arbitrator ordered the Agency to grant a waiver and repay the grievant the money that she had already paid. *Id.* at 16.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that award does not draw its essence from the parties' agreement, that the arbitrator exceeded her authority, and that the award is contrary to law. Agency's Exceptions at 3-4.

The Agency first argues that the award does not draw its essence from Article 39, Section 2 of the parties' agreement, which defines grievance as a complaint that, among other things, concerns a "claim of breach of" the parties' agreement and/or "any claimed violation . . . of any law, rule, or regulation . . . ." *Id.*, Attach. C, Contract Agreement at 60. According to the Agency, because Article 39 of the parties' agreement does not allow "the Arbitrator to make a decision on purely equitable grounds[,]" the award does not draw its essence from the agreement. *Id.* at 5.

The Agency also argues that the Arbitrator exceeded her authority. The Agency contends that the Arbitrator's authority ended when she determined that the promotion was not proper. *Id.* at 6. By then deciding whether the grievant was subject to an adverse action, she decided an issue not submitted to arbitration and exceeded her authority. *Id.* The Agency also argues that the Arbitrator exceeded her authority by finding a violation of the parties' agreement without specifying which provision the Agency had violated or how the Agency had done so. *Id.* at 7. According to the Agency, none of the provisions cited in the award was relevant to the stipulated issue before the Arbitrator. *Id.* at 7-8. Further, the Agency argues that the Arbitrator exceeded her authority by ordering the Agency to grant a waiver, which is in the "purview" of another organization, the DFAS, an entity that is not a party to the parties' agreement. *Id.* at 8-9.

The Agency argues that the award of backpay is contrary to the Back Pay Act. *Id.* at 9. According to the Agency, the Arbitrator did not make a finding that the grievant was subjected to an unjustified or unwarranted personnel action. *Id.* at 10. The Agency contends that, even if the unspecified violation of the parties' agreement is an unjustified personnel action, the Arbitrator has not shown how that action resulted in a loss of pay. *Id.* Further, the Agency argues that, because the Arbitrator "in essence" awarded the grievant a promotion, the award conflicts with 5 C.F.R. § 531.212(a) (§ 531.212(a)), which allows an agency to use its pay-setting authority for a reappointment only after a 90-day break in service or if the employee meets an exception to that requirement.[1] *Id.* at 11. The Agency contends that

[1] 5 C.F.R. § 531.212(a) provides:

> (1) An agency may use the superior qualifications and special needs pay-setting authority . . . for—
> (i) A first appointment . . . ; or
> (ii) A reappointment that is considered a new appointment . . . because it meets the conditions prescribed in paragraph (a)(2) and (3) of this section.
> (2) An agency may use the superior qualifications and special needs pay-setting authority for a reappointment only when the employee has had a break in service of at least 90 days . . . except as provided in paragraph (a)(3) of this section.

the grievant did not have a 90-day break in service or meet any of the exceptions. *Id.* Finally, the Agency argues that the award conflicts with § 7106 of the Statute because it violates management's rights to hire employees, determine a budget, and promulgate a recruitment and retention policy. *Id.* at 12.

B. Union's Opposition

The Union argues that the award draws its essence from the parties' agreement because the grievance procedure is properly used to address claims of unfairness. Union's Opp'n at 5.

The Union also argues that the Arbitrator did not exceed her authority. *Id.* at 5-6. The Union contends that the Arbitrator's use of the term "adverse action" is not a technical term, but, rather, a statement that the grievant experienced a loss of pay adverse to her interest. *Id.* at 6. According to the Union, it was reasonable for the grievant to believe that the Agency had properly granted her the promotion, and it would be unjust to require her to pay the money back to the Agency. *Id.* The Union also asserts that the Arbitrator did not exceed her authority by finding that the Agency violated the parties' agreement because it would be contrary to the parties' agreement to take money from the grievant improperly. *Id.* at 6-7. The Union also argues that the Arbitrator did not exceed her authority by ordering the Agency to reimburse the grievant and grant a waiver of the remaining money that she owed because the Agency can order DFAS to grant the waiver. *Id.* at 7.

The Union argues that the award is not contrary to the Back Pay Act because the grievant was subject to an improper personnel action – either the initial promotion or the Agency's rescission of the promotion – that was the result of an Agency error. *Id.* The Union also contends that the award is not contrary to law; according to the Union, the grievant met the time-in-grade requirement because the Arbitrator found that she had one year of equivalent experience at GS-11. *Id.* at 8. Additionally, the Union asserts that the grievant could have qualified for the exception in § 531.212(a)(3)(ii) for expert positions. *Id.* at 9.

C. Union's Exceptions

The Union argues that the Arbitrator's failure to grant the grievant a promotion to GS-12 is contrary to law. Union's Exceptions at 4. According to the Union, the grievant met the time in grade requirements because the grievant had one year of equivalent experience at GS-11. *Id.* at 4-5. The Union also contends that the grievant could have been hired at GS-12 even though the vacancy announcement listed the position at GS-11. *Id.* at 5.

The Union also argues that the grievant could have been hired at GS-12 because she met the exception in § 531.212(a)(3)(ii) for expert positions. *Id.* According to the Union, the grievant could have been qualified as an expert because she had "greater skill than a normal employee in that field" on the basis of her past private sector experience. *Id.* The Union contends that it does not need to show that the Agency would have been required to hire the grievant at the GS-12 level, but only that the Agency could have done so. *Id.* at 5-6.

D. Agency's Opposition

The Agency argues that the award is not contrary to law because the Union has failed to cite any provision of law with which the award conflicts. Agency's Opp'n at 2. Further, the Agency argues that the Arbitrator's refusal to grant a promotion is not contrary to any law or regulation. *Id.* at 2-3. According to the Agency, its recruitment policy forbids "any jump over a grade" without a 90-day break in service, which reflects the policy in § 531.212(a) that the Agency's pay-setting authority applies only to a reappointment after a break in service of 90 days. *Id.* at 3 (quoting Award at 12). The Agency contends that, because it is undisputed that the grievant was at GS-10 and had no break in service, the failure to grant her a promotion to GS-12 was not contrary to law. *Id.* at 3-4.

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(3) An agency may use the superior qualifications and special needs pay-setting authority for a reappointment without requiring a 90-day break in service if the candidate's civilian employment with the Federal Government during the 90-day period immediately preceding the appointment was limited to one or more of the following:

. . . .

(ii) Employment under an appointment as an expert or consultant under 5 U.S.C. [§] 3109 and 5 CFR part 304[.]

The Agency also argues that the grievant does not meet the definition of expert in § 531.212(a)(3)(ii). *Id.* at 4. According to the Agency, the regulation requires that, for the 90 days immediately preceding her appointment as a midwife, the grievant have served "under an appointment as an expert or consultant" pursuant to 5 U.S.C. § 3109 and 5 C.F.R. part 304. 5 C.F.R. § 531.212(a)(3)(ii). The Agency asserts that the grievant was serving as a GS-10 RN, not as an expert under § 3109. *Id.* at 4-5.

IV. Preliminary Issues

A. The Authority has jurisdiction to resolve the exceptions.

Under § 7122(a) of the Statute, the Authority lacks jurisdiction to resolve exceptions to awards "relating to" a matter described in § 7121(f) of the Statute. Matters described in § 7121(f) include adverse actions, such as removals, that are covered under 5 U.S.C. § 7512 and are appealable to the Merit Systems Protection Board (MSPB) and reviewable by the United States Court of Appeals for the Federal Circuit (Federal Circuit). *See, e.g., U.S. Dep't of Commerce, Patent & Trademark Office, Arlington, Va.*, 61 FLRA 476, 477 (2006).

The Authority directed the parties to show cause why their exceptions should not be dismissed for lack of jurisdiction pursuant to § 7122(a) of the Statute because the award "concerns a matter that related to a reduction in grade." *See* Order to Show Cause at 2. In its response, the Agency argues that the Authority has jurisdiction because 5 U.S.C. § 4303 and § 7512 cover only reductions in pay or grade that are based on "unacceptable performance" or qualify as an "adverse action." Agency's Response at 3. The Agency contends that, because the reduction in grade was the correction of an administrative error, it was not an adverse action and would not be covered under § 4303 or § 7512. *Id.* The Union, in its response, agrees that the Authority has jurisdiction because the issue before the Arbitrator was the propriety of the promotion, not the subsequent demotion. Union's Response at 2.

The Authority will determine that an award relates to a matter described in § 7121(f) "when it resolves, or is inextricably intertwined with," a § 7512 matter. *See AFGE, Local 1013*, 60 FLRA 712, 713 (2005). In making that determination, the Authority looks not to the outcome of the award, but to whether the claim advanced in arbitration is one reviewable by the MSPB, and, on appeal, by the Federal Circuit. *See id.* The Authority looks, therefore, to MSPB precedent for whether a matter is covered under § 7512. *See U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin.*, 58 FLRA 333, 336 (2003). The MSPB has found that, among other things, where an agency reduces an employee's grade or pay from a rate that would be "contrary to law or regulation[,]" the action is not an adverse personnel action under § 7512. *Gessert v. Dep't of the Treasury*, 113 M.S.P.R. 329, 332 (2010); *Deida v. Dep't of the Navy*, 110 M.S.P.R. 408, 412 (2009).

The Agency argues that the grievant could not have been promoted to GS-12 without spending one year at GS-11. Agency's Response at 5, 7. The Union argues that, to meet the time-in-grade requirements, the grievant only needed to have been in a GS-11 *equivalent* position for one year. Union's Exceptions at 4. A candidate for promotion must have spent fifty-two weeks "in a grade equivalent to or no more than one grade lower than the position for which the candidate is applying." *NATCA*, 51 FLRA 102, 107 (1995) (citing 5 C.F.R. § 300.604). 5 C.F.R. § 300.605, which explains what service is creditable for time-in-grade purposes, limits creditable service to the grade level of the "position[] to which [the employee is] appointed *in the Federal civilian service* . . . ." 5 C.F.R. § 300.605(a) (emphasis added). Once an employee accepts a GS position, that employee becomes "bound by the advancement restrictions contained in [§ 300.604]." *Ibrahim v. United States*, 26 Cl. Ct. 359, 363 (Cl. Ct. 1992).

It is undisputed that, at the time of her promotion, the grievant was at GS-10 and had never served at GS-11. As noted above, § 300.605(a) limits creditable experience for time-in-grade purposes to federal service and, thus, the grievant's previous private sector experience cannot be used to meet the time-in-grade requirements. *See* 5 C.F.R. § 300.605(a). Additionally, the grievant's federal experience must be credited at the grade level of position to which she was appointed; accordingly, the grievant could not have been credited with GS-11 experience while serving at GS-10. *Id.* Therefore, we find that, because the grievant did not meet the time-in-grade requirements of § 300.604, the grievant's promotion to GS-12 would have been contrary to law or regulation.[2]

2. In so finding, the Authority does not address the Arbitrator's factual finding that the grievant had one year of equivalent experience at GS-11. Award at 13-14. To be

Because the grievant's promotion would have been contrary to law or regulation, the Agency's correction of that mistake was not an adverse action covered under § 7512. *See White v. Dep't of the Air Force*, 32 M.S.P.R. 590, 592-93 (1987) (finding no jurisdiction over a reduction in pay action where the original promotion was unlawful). Accordingly, we find that the award does not relate to a matter described in § 7121(f) of the Statute and that the Authority has jurisdiction to resolve the exceptions. *See AFGE, Local 2986*, 51 FLRA 1549, 1154-55 (1996) (Member Armendariz dissenting).

B. The Agency's management rights exception is barred by § 2429.5.

Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, presented to the arbitrator.[3] *See, e.g., U.S. Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 59 FLRA 542, 544 (2003).

The Agency argues that the award conflicts with § 7106 of the Statute because it violates its management rights to hire employees, determine a budget, and promulgate a recruitment and retention policy. Agency's Exceptions at 12. There is no indication in the record that the Agency argued to the Arbitrator that a promotion would violate its management rights, even though the stipulated issue before the Arbitrator directly concerned the propriety of the promotion. Therefore, because the Agency could have raised, but did not raise, this issue before the Arbitrator, we find this exception is barred by § 2429.5 of the Statute and dismiss the Agency's exception. *See Soc. Sec. Admin., Newark, N.J.*, 64 FLRA 259, 260-61 (2009) (dismissing a management's rights exception where the agency did not make a management's rights argument to the arbitrator and where the agency was aware that the arbitrator might award a promotion).

V. Analysis and Conclusions

A. The Arbitrator exceeded her authority.

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. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue the same substantial deference that it accords an arbitrator's interpretation and application of a collective bargaining agreement. *See U.S. Info. Agency, Voice of Am.*, 55 FLRA 197, 198 (1999).

The Authority has held that, when an arbitrator decides the merits of a dispute and finds no violation of law or contract, the arbitrator has no authority to issue a remedy. *See Soc. Sec. Admin., Balt., Md.*, 64 FLRA 516, 518 (2010) (citing *NLRB, Tampa, Fla.*, 57 FLRA 880, 881 (2002)). As noted, the parties stipulated that the issue before the Arbitrator was whether "the grievant's promotion to GS-12, Step 6 [was] proper[.]" Award at 2. The Arbitrator resolved the stipulated issue by finding "that the promotion was not proper in the sense of lawful." *Id.* at 11. Even though the Arbitrator also found that the promotion was "proper" in the sense of "fair[,]" *id.*, she clearly found that "she cannot order the [A]gency to reinstate the GS-12 status for the grievant[,]" *id.* at 16. At that point, the Arbitrator had decided the merits of the dispute, found no violation of law or contract, and therefore possessed no authority to issue a remedy. *See U.S. Dep't of the Treasury, Internal Revenue Serv., Ogden Serv. Ctr., Ogden, Utah*, 63 FLRA 195, 197 (2009).

Additionally, the Authority has held that, where an arbitrator decides the merits of a stipulated issue, "the arbitrator has no authority to decide an issue not submitted to arbitration." *U.S. EPA, Region 2, N.Y.C., N.Y.*, 63 FLRA 476, 479 (2009) (citations omitted) (*EPA*). Notwithstanding the Arbitrator's conclusion regarding the grievant's promotion, the Arbitrator then determined that the Agency's billing

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eligible for a promotion in the competitive service, an employee must meet both the Office of Personnel Management (OPM's) qualification standards and the time-in-grade requirements. *See U.S. Dep't of Veterans Affairs, Alaska Health Care Sys., Anchorage, Alaska*, 57 FLRA 590, 591 (2001). Equivalent experience may be used to satisfy OPM's qualification standards, but may not be used to meet time-in-grade requirements. *See* 5 C.F.R. § 300.604. Therefore, in finding that the grievant had one year of equivalent experience at GS-11, the Arbitrator could have found that the grievant met OPM's qualification standards, but not the time-in-grade requirements.

3. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including 5 C.F.R. § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Agency's exceptions in this case were filed before that date, we apply the prior Regulations.

the grievant for an Agency mistake was "an adverse event which was a violation of the [parties'] agreement . . . ." Award at 14. However, the issue of the waiver of the money the grievant owed was not before the Arbitrator. Rather, the only issue before her was whether the promotion was proper. Therefore, by deciding an issue not submitted to arbitration, the Arbitrator exceeded her authority. *See EPA*, 63 FLRA at 479 (finding that the arbitrator exceeded his authority by considering a different issue after resolving the stipulated issue).

Accordingly, we find that the Arbitrator exceeded her authority in finding that the Agency violated the parties' agreement, grant the Agency's exception, and set aside that portion of the award.[4]

B. The Union has failed to establish that the award is contrary to law.

The Union argues that the award is contrary to law because the grievant could have been properly promoted and because she was an expert under § 531.212(a)(3)(ii). Union's Exceptions at 4-5. 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.*

The Union argues that the award is contrary to law and that the Agency could have properly promoted the grievant to GS-12 because the grievant had one year of equivalent experience at GS-11. Union's Exceptions at 4-5. In making this argument, the Union fails to cite any law, rule, or regulation with which the Arbitrator's award conflicts. A general assertion is not sufficient to support a contention that an award is contrary to law. *See U.S. Dep't of Veterans Affairs, Montgomery Reg'l Office, Montgomery, Ala.*, 65 FLRA 487, 489 (2011). However, to the extent that the Union is asserting that the grievant satisfied the time-in-grade requirements, the Union's argument is without merit. As stated above, the grievant did not meet the time-in-grade requirements and, thus, was not entitled to a promotion to GS-12. Therefore, we find that the award is not contrary to law and deny this exception.

The Union also argues that the award is contrary to law because the grievant was an expert for purposes of the exception in § 531.212(a)(3)(ii). Union's Exceptions at 5. The Union asserts that the grievant was qualified as an expert because a "certified nurse midwife" is in the nursing series but is required to have additional education and expertise, and the grievant had additional expertise "based on her past private sector experience." *Id.* at 5, 6. However, the Union's argument is without merit. The exception in § 531.212(a)(3)(ii) requires an employee to have been actually appointed as an expert, and does not refer simply to those who have additional experience in their field. *See* 5 C.F.R. § 304.103. Additionally, the time served as an expert must have been "during the 90-day period immediately preceding the appointment" as a midwife; accordingly, the grievant's past private sector experience is irrelevant. 5 C.F.R. § 531.212(a)(3). Therefore, we find that the grievant did not qualify as an expert under the exception in § 531.212(a)(3)(ii) and deny this exception.

VI. Decision

The Agency's management rights exception is dismissed, the Union's contrary to law exceptions are denied, the Agency's exceeds authority exception is granted, and that portion of the award is set aside.

4. In light of our decision, we find that it is unnecessary to address the Agency's remaining exceptions. *See EPA*, 63 FLRA at 479 n.5.