

65 FLRA No. 68

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1228
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VA CENTRAL IOWA HEALTH CARE SYSTEM
DES MOINES, IOWA
(Agency)

0-AR-4409

DECISION

December 16, 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 David Gaba 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.

The Union filed a grievance challenging the Agency's failure to temporarily promote the grievant during the period she was performing higher-graded duties prior to her noncompetitive promotion. The Arbitrator found that the parties' collective bargaining agreement (CBA) did not require the Agency to provide retroactive pay for the grievant for the time she spent performing higher-graded duties. He therefore denied the Union's grievance.

For the reasons set forth below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

In 2001, the grievant was hired at the General Schedule (GS)-9 pay level as an addiction therapist for the Agency's Substance Abuse Program. Award at 4. During her years of employment, she took on

many additional duties. In 2006, recognizing the grievant's accretion of duties, her supervisor requested that the Agency's Department of Human Resources review the grievant's position. *Id.* As a result of the review, the grievant was noncompetitively promoted to the GS-11 pay level and received a new position description. *Id.*

The Union subsequently filed a grievance claiming that the Agency failed to temporarily promote the grievant at the time she began accruing duties that were not part of her GS-9 position description, as required by Article 12 of the CBA.* *Id.* at 5. The Union claimed that the Agency should have provided the grievant GS-11 pay retroactive to the date she began to perform higher graded duties. *Id.* The matter was not resolved and was submitted to arbitration.

The parties agreed to the following statement of the issue: "Has the grievant . . . been performing the duties of a readjustment counseling therapist since shortly after she was hired in 2001? Should the grievant be compensated for the performance of these duties?" *Id.* at 2.

At the hearing, the Agency did not dispute that the grievant had accrued additional duties. *Id.* at 5. However, the Agency argued that the Arbitrator did not have jurisdiction to decide the grievance because it concerned the classification of the grievant's position, which was not arbitrable under the parties' CBA. *Id.* at 6.

The Arbitrator found, among other things, that the case law cited by the Union was not applicable because the cited cases covered prohibited personnel practices or situations where the individuals involved were not properly compensated while on detail or temporarily promoted under the governing CBA. *Id.* at 10. In this regard, the Arbitrator found that there was no evidence that the grievant had ever been detailed to a higher-graded position or that the Agency had committed any prohibited personnel practices. *Id.* The Arbitrator further found that the grievant voluntarily took on extra duties to assist her employer in providing better services to veterans. *Id.*

The Arbitrator noted that it would be equitable to make the grievant's promotion to GS-11 retroactive to the date she began to perform the higher graded duties. *Id.* at 11. However, he concluded that his duty was to interpret the CBA as negotiated by the

* The relevant provisions of the parties' CBA are set forth in the appendix to this decision.

parties, and that the CBA did not allow him to order retroactive pay for the grievant. *Id.* Therefore, the Arbitrator denied the grievance.

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the award fails to draw its essence from the CBA. Exceptions at 9-11. Specifically, it asserts that the Arbitrator's award disregards Article 12, Section 2 of the parties' CBA, which requires that employees performing higher graded duties for more than ten consecutive days be temporarily promoted. *Id.* at 11. According to the Union, the Arbitrator found that the grievant began to perform higher-graded duties starting on the day she was hired. Therefore, the Union argues that under Article 12, Section 2 of the CBA, the Arbitrator should have awarded the grievant a temporary promotion. *Id.*

In addition, the Union claims that the award is contrary to the Back Pay Act. *Id.* at 5-9. The Union contends that the Arbitrator's conclusion that he could not award backpay was based solely on his interpretation of the parties' CBA. *Id.* at 8. However, the Union asserts that arbitrators must consider all applicable laws when rendering their awards. Here, the Union claims that the Arbitrator failed to consider the applicability of the Back Pay Act, which authorizes arbitrators to award backpay. *Id.* The Union contends that the requirements of the Back Pay were met, including that there was an unwarranted personnel action. The Union argues that, had the Arbitrator made the appropriate finding under Article 12, Section 2 of the parties' CBA, he would have been required to apply the Back Pay Act. *Id.* at 8-9

B. Agency's Opposition

The Agency argues that the Arbitrator did not disregard the parties' CBA because the Arbitrator did not have before him the issue of whether the grievant received a temporary promotion. Opp'n at 4. In addition, the Agency claims that the facts do not establish that the grievant was ever detailed or temporarily promoted; rather, the facts show that she experienced an accretion of duties, which ultimately required a new position description. *Id.* Therefore, the Agency contends, the Arbitrator's finding that he could not award the grievant a temporary promotion showed a "manifest adherence" to the CBA. *Id.* at 5. The Agency also argues that the Arbitrator's award was consistent with Article 42, Section 2 (B)(5) of

the parties' CBA, which does not permit grievances concerning the classification of any position that does not result in a reduction in grade or pay.

Finally, the Agency argues that the Arbitrator did not ignore the requirements of the Back Pay Act. The Agency claims that the Arbitrator correctly found that the Back Pay Act applied only if the grievant suffered a prohibited personnel practice or if she was not properly compensated while on a detail. *Id.* at 3. As neither of these situations was present here, the Agency asserts that the Arbitrator correctly found that he could not award backpay.

IV. Analysis and Conclusions

A. The award does not fail to draw its essence from the CBA.

The Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. See U.S. Dep't of Labor (OSHA), 34 FLRA 573, 575 (1990) (*Dep't of Labor*). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

The Union argues that the award fails to draw its essence from the agreement because the award "disregards" Article 12, Section 2 of the parties' CBA, which provides that employees detailed to a higher-graded position for a period of more than ten consecutive work days must be temporarily promoted. Exceptions at 11. In the Union's view, the Agency had a contractual obligation to temporarily promote the grievant because she worked at a higher-graded position for more than ten consecutive work days. *Id.*

Contrary to the Union's claim, we find that the Arbitrator did not "disregard" Article 12, Section 2 of the parties' CBA. Although the Arbitrator found that the grievant performed higher-graded duties, he found that those duties were "voluntarily assumed[.]" and that there was a "lack of evidence" that the grievant was "ever detailed to a higher[-] graded position[.]". Award at 10 (internal quotations

omitted). Because the Arbitrator found that the grievant was not actually detailed to a higher graded position, there was no basis for the Arbitrator to interpret Article 12, Section 2 of the parties' CBA as requiring the Agency to grant the grievant a temporary promotion. As such, the Union has failed to establish that the Arbitrator disregarded Article 12, Section 2 of the parties' CBA.

Consequently, the Union has not provided a basis for finding that the Arbitrator's interpretation of the parties' CBA is irrational, unfounded, implausible, or evidences a manifest disregard of the parties' CBA. *See AFGE, Local 217*, 60 FLRA 459, 461 (2004) (exception denied where union failed to show that arbitrator's award denying grievant's promotion was deficient on essence grounds). Accordingly, we deny the Union's essence exception.

B. The award is not contrary to law.

The Authority reviews questions of law raised by exceptions to an arbitrator's 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.*

An award of backpay is authorized under the Back Pay Act only when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or the reduction of an employee's pay, allowances, or differentials. *U.S. Dep't of the Air Force, Warner Robins Air Force Base, Ga.*, 56 FLRA 541, 543 (2000) (citing *U.S. Dep't of Health & Human Servs.*, 54 FLRA 1210, 1218-19 (1998)).

The Union argues that the Arbitrator's conclusion that he could not award backpay was based solely on his interpretation of the parties' CBA and that the Arbitrator failed to consider the applicability of the Back Pay Act, which authorizes arbitrators to award backpay. Exceptions at 8. The Union further argues that, had the Arbitrator made the appropriate finding under Article 12, Section 2 of the parties' CBA, then he would have been required to apply the Back Pay Act. *Id.*

However, the Arbitrator did not find that the grievant was affected by an unjustified or unwarranted personnel action. Award at 10. Absent such a finding, there was no legal requirement for the Arbitrator to apply the Back Pay Act. Therefore, without a finding that the grievant was affected by an unjustified or unwarranted personnel action, we agree with the Arbitrator's conclusion that he did not have the authority to grant backpay under the Back Pay Act. *See AFGE, Nat'l Border Patrol Council, Local 2455*, 62 FLRA 37, 40 (2007) (award of back pay not authorized by Back Pay Act where arbitrator did not find that grievant was affected by an unjustified or unwarranted personnel action). Accordingly, the Arbitrator's conclusion that he was not authorized to award the grievant backpay is fully consistent with the requirements of the Back Pay Act. Consequently, we deny the Union's exception that the award is contrary to law.

V. Decision

The Union's exceptions are denied.

APPENDIX**Article 9 – Classification****Section 1 – General**

Employees dissatisfied with the classification of their positions should first discuss the problem with their supervisors. If a supervisor is unable to resolve the issue to the employee's satisfaction, the employee can discuss the matter with the Human Resources Manager or appropriate staff member who will explain the basis for the classification/job grading. An employee and/or the Local, upon request, will have access to the position description, evaluation report, if available, organizational and functional charts and other pertinent information directly related to the classification of the position. . . . When a desk audit is conducted, it will be completed within 90 days of the Union or employee request. . . . If the employee still believes there is an inequity, an appeal may be filed with the [Agency] or [the Office of Personnel Management] as appropriate. . . .

Award at 3.

**Article 12 – Details, Reassignments and
Temporary Promotions****Section 2 – Temporary promotions**

Employees detailed to a higher graded position for a period of more than ten (10) consecutive days must be temporarily promoted. The employee will be paid for the temporary promotion beginning the first day of the detail. The temporary promotion should be initiated at the earliest date it is known by management that the detail is expected to exceed ten (10) consecutive work days.

Id.

Article 42 – Grievance Procedure**Section 2 – Definitions**

....

This Article shall not govern a grievance concerning: the classification of any position which does not result in the reduction in grade or pay of an employee.

Id. at 3-4.