**66 FLRA No. 126**

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2382
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VA HEALTHCARE SYSTEM
PHOENIX, ARIZONA
(Agency)

0-AR-4798

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DECISION

May 16, 2012

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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 John P. DiFalco 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 Arbitrator found that the Union did not prove that the Agency violated the parties' master collective-bargaining agreement (Master Agreement) by assigning the grievants General Schedule, Grade 4 (GS-4) duties while compensating them at General Schedule, Grade 3 (GS-3) rates. As such, the Arbitrator denied the grievants' requests for retroactive, temporary promotions and backpay. For the reasons that follow, we deny the Union's exceptions.

## II. Background and Arbitrator's Award

The Agency formerly employed file clerks in both GS-3 positions (GS-3 clerks) and GS-4 positions (GS-4 clerks). *See* Award at 3-4. The grievants, as GS-3 clerks, maintained paper medical records for the Agency. *See id.* The job responsibilities of GS-4 clerks differed from those of GS-3 clerks because, among other things, GS-4 clerks scanned documents into the Agency's electronic medical records. *See id.*

The Agency determined that, due to its transition to a primarily electronic medical-records system, the number of remaining paper records would eventually be insufficient to justify the continued employment of GS-3 clerks, such as the grievants. *Id.* at 3. So the Agency "instituted a plan to crosstrain the [grievants] on scanning duties . . . [to] prepare[] [them] to compete for the GS-4 [clerk] positions that would become available." *Id.* at 3-4.

The Union filed a grievance alleging that the crosstraining plan required the grievants to perform GS-4 clerk duties without compensating them at GS-4 pay rates. *Id.* at 4. When the grievance was unresolved, the parties proceeded to arbitration, *see id.* at 5, and, as relevant here, they stipulated to the following issues:

> Did the Agency fail to respond in a timely manner to the Union's Step 2 [g]rievance? If so, are the [g]rievant[s] entitled to the remedies requested in the [g]rievance in accordance with Article 42, Section 9 of the Master Agreement [(Article 42, Section 9)]?[1]
>
> . . . Did the Agency violate the Master Agreement by requiring the [g]rievant[s] to perform GS-4 [d]uties while paying them at the GS-3 rate of pay? If so, what is the appropriate remedy?

*Id.* at 2.[2]

The Arbitrator found that the Agency did not timely respond to the grievance at Step 2. *See id.* at 22, 27. But he also found that, notwithstanding the Agency's failure to timely respond, Article 42, Section 9 permitted him to award only those requested remedies that were "legal and reasonable under the circumstances." *Id.* Citing Article 12, Section 2 of the Master Agreement

[1] Article 42, Section 9 states, in pertinent part: "Should management fail to comply with the time limits for rendering a decision at Step 2 or Step 3, the grievance shall be resolved in favor of the grievant, provided that . . . the remedy requested by the grievant is legal and reasonable under the circumstances." Award at 7 (quoting Art. 42, § 9).

[2] The stipulated issues also included a question regarding the grievability of the dispute. *See* Award at 2. As there are no exceptions to the Arbitrator's resolution of that question, we do not address it further. *E.g.*, *U.S. Dep't of Agric., Food Safety & Inspection Serv.*, 65 FLRA 417, 417 n.2 (2011).

(Article 12, Section 2),[3] the Arbitrator assessed whether the grievants' requests for retroactive, temporary promotions and backpay were "legal and reasonable." *Id.* at 5-6, 22-23. The Arbitrator found that such an assessment required him to determine whether "the Agency was engaged in 'crosstraining' or had . . . detailed . . . or temporarily promoted" the grievants to GS-4 clerk positions. *Id.* at 18.

The Arbitrator found that the grievants "were not detailed into the higher-level [GS-4 clerk] position" because there were no vacant GS-4 clerk positions during the relevant time period and no "specific documents effecting [any such] detail." *Id.* at 18-19. As for whether the grievants were entitled to retroactive, temporary promotions to GS-4 clerk positions, the Arbitrator found "insufficient evidence in the record that the [grievants] did indeed perform the [duties of the] higher-graded position for at least 25% of the time." *Id.* at 19; *see also id.* at 20. The Arbitrator found further that one of the grievants never performed the higher-graded duties during the relevant time period. *Id.* at 19-20. "[F]rom the record evidence taken as a whole," the Arbitrator determined that "the Union ha[d] not carried [its] . . . burden of proof to demonstrate" a violation of Article 12, Section 2. *Id.* at 20; *see also id.* at 24-27. Rather, the Arbitrator concluded that the grievants' scanning work during the time in question was "crosstraining . . . to prepare them for . . . a promotional opportunity[,] . . . [for] which they did not possess [the necessary skills] prior to the crosstraining." *Id.* at 20; *see also id.* at 27.

The Arbitrator returned to the issue of whether the grievants should nevertheless receive relief under Article 42, Section 9, due to the Agency's failure to timely respond to the grievance at Step 2. *Id.* at 20-22. Because he had rejected the grievants' claims for backpay and retroactive, temporary promotions on their merits, *see id.* at 22, the Arbitrator found that the Union had not demonstrated that awarding such remedies under Article 42, Section 9 would be "legal or reasonable under the circumstances of this case," *id.* at 23. Accordingly, he found that the Agency's failure to timely respond at Step 2 did not provide a basis for awarding the grievants relief under Article 42, Section 9. *See id.* at 23, 25, 27.

For the foregoing reasons, the Arbitrator denied the grievance. *Id.* at 27.

## III. Positions of the Parties

### A. Union's Exceptions

The Union asserts that, for three reasons, the award fails to draw its essence from the Master Agreement. Exceptions at 10-11. First, the Union asserts that the Arbitrator found that "neither a detail nor a temporary promotion can take place unless the Agency has a vacancy open and . . . processes documentation effecting the detail or temporary promotion." *Id.* at 11; *see also id.* at 12-13. The Union contends that the Master Agreement contains no such vacancy or documentation requirements, *id.* at 12, and that the Arbitrator rendered Article 12, Section 2 "meaningless" by finding that it included those requirements, *id.* at 11. Second, the Union contends that the Arbitrator's finding that the Agency crosstrained the employees is deficient because the Master Agreement does not "allow the Agency to endlessly require employees to perform higher[-]graded duties without just compensation." *Id.* at 15. Third, the Union asserts that the Arbitrator's decision to deny the grievants the remedies requested despite the Agency's failure to respond to the grievance at Step 2 fails to draw its essence from Article 42, Section 9. *Id.* at 12-13. In that regard, the Union argues that the Authority has "upheld" awards of retroactive, temporary promotions with backpay and that, consequently, the Arbitrator erred in finding that such remedies were not legal or reasonable in this case. *Id.* at 13-14 (citing *USDA, Food Safety & Inspection Serv.*, 65 FLRA 417 (2011) (*USDA*); *U.S. Dep't of Veterans Affairs, G.V. (Sonny) Montgomery, VA Med. Ctr., Jackson, Miss.*, 65 FLRA 27 (2010) (*VA Jackson*); *U.S. Dep't of the Treasury, IRS, Small Bus./Self Employed, Bus. Div., Fraud/BSA, Detroit, Mich.*, 63 FLRA 567 (2009) (*IRS*); *U.S. Dep't of Veterans Affairs, Med. Ctr., Hous., Tex.*, 57 FLRA 653 (2001) (*VA Hous.*)).

In addition, the Union argues that the award is contrary to law because the Arbitrator found that: (1) "if an agency . . . does not process documentation" for a detail, then "the agency is allowed to . . . assign[] higher[-]graded duties without compensation"; and (2) a "retroactive[,] temporary promotion is not allowed even when the Agency violated the law and a collective bargaining agreement." *Id.* at 9. For support, the Union cites decisions in which the Authority resolved exceptions to arbitration awards granting temporary promotions. *See id.* (citing *U.S. Dep't of Veterans*

[3] Article 12, Section 2 provides, in relevant part:

> Employees detailed to a higher[-]grade position for a period of more than ten (10) consecutive work days must by 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. . . . For purposes of this section, a General Schedule employee who performs the grade-controlling duties of a higher-graded position for at least 25% of his time . . . shall be temporarily promoted.

Award at 6 (quoting Art. 12, § 2).

*Affairs, Med. Ctr., Asheville, N.C.*, 59 FLRA 605, 608 (2004) (*VA Asheville*); *U.S. Dep't of Health & Human Servs., Pub. Health Serv., Navajo Area Indian Health Serv.*, 50 FLRA 383, 385-86 (1995) (*HHS*); *U.S. Dep't of Veterans Affairs, W.L.A. Med. Ctr., L.A., Cal.*, 46 FLRA 853, 860 (1992) (*VA W.L.A.*)). *See also id.* at 13-14 (citing *USDA*, 65 FLRA 417; *VA Jackson*, 65 FLRA 27; *IRS*, 63 FLRA 567; *VA Hous.*, 57 FLRA 653).

Further, the Union argues that the award is based on nonfacts in two respects. *Id.* at 15. First, the Union asserts that the Arbitrator clearly erred in finding "insufficient evidence in the record that the employees did indeed perform" GS-4 clerk duties for at least 25% of their work time and that, but for that error, the Arbitrator would have reached a different result. *Id.* (quoting Award at 19). In this regard, the Union contends that there was no dispute at arbitration that the grievants performed grade-controlling "scanning duties" for more than 25% of their duty time. *Id.* at 15-16. Second, the Union asserts that the Arbitrator clearly erred in finding that one of the grievants never performed higher-graded duties during the relevant period. *Id.* at 16-17. Specifically, the Union asserts that the grievant testified that she did perform those duties during the relevant period and that the Agency's witness "agreed" with her testimony. *Id.* (citing Tr. at 126-27, 173-74).

B. Agency's Opposition

The Agency asserts that the award does not fail to draw its essence from Article 12, Section 2, *see* Opp'n at 5-7; or Article 42, Section 9, *see id.* at 10-11; and that it is not contrary to law, *see id.* at 13-16. Moreover, the Agency contends that the Union's nonfact exceptions impermissibly challenge the Arbitrator's assignment of the parties' burdens and his weighing of evidence. *Id.* at 11-12.

## IV. Analysis and Conclusions

### A. The award draws its essence from the Master Agreement.

The Union argues that the award fails to draw its essence from Article 12, Section 2 and Article 42, Section 9. Exceptions at 11-13. In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, 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) (*OSHA*). 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. Exceptions based on a misunderstanding of an arbitrator's award do not provide a basis for finding that an award fails to draw its essence from the parties' agreement. *See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 66 FLRA 335, 339 (2011) (*Homeland*) (citing *NAGE, Local R4-45*, 55 FLRA 789, 793-94 (1999)). Moreover, where an arbitrator interprets an agreement as imposing a particular requirement, the fact that the agreement is silent with respect to that requirement does not, by itself, demonstrate that the arbitrator's award fails to draw its essence from the agreement. *See U.S. Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 413, 414 (2003) (*Johnson Med. Ctr.*).

First, the Union asserts that the Arbitrator found that "neither a detail nor a temporary promotion can take place unless the Agency has a vacancy open and . . . processes documentation effecting the detail or temporary promotion." Exceptions at 11. Although the Arbitrator found that all *details* "must" be evidenced by documentation and a position vacancy, Award at 18-19, he did not make a similar finding regarding all *temporary promotions*, *see id.* at 19-20. The Union's misunderstanding of that aspect of the award does not demonstrate that the award is deficient. *See Homeland*, 66 FLRA at 339. As for the Union's contention that Article 12, Section 2 does not require documentation or a vacancy to establish the existence of a detail, *see* Exceptions at 11-13, the Master Agreement's silence with respect to those requirements does not, by itself, demonstrate that the arbitrator's award fails to draw its essence from the agreement. *See Johnson Med. Ctr.*, 58 FLRA at 414. Therefore, we deny this exception.

Second, the Union contends that the Arbitrator's finding that the Agency crosstrained the employees prior to promoting them to GS-4 clerk positions fails to draw its essence from the Master Agreement because the agreement does not "allow the Agency to endlessly require employees to perform higher[-]graded duties without just compensation." Exceptions at 15. The Arbitrator found that the period of time during which the grievants were acquiring the skills necessary to qualify for a GS-4 clerk position constituted crosstraining, rather than a detail or temporary promotion. Award at 25-27. Although the Union makes a broad claim that that finding fails to draw its essence from the Master Agreement, *see* Exceptions at 15, the Union does not identify any

specific contractual wording to establish that the finding is irrational, unfounded, implausible, or in manifest disregard of the Master Agreement, *see OSHA*, 34 FLRA at 575. *Accord U.S. Dep't of Veterans Affairs, Montgomery Reg'l Office, Montgomery, Ala.*, 65 FLRA 487, 489 n.4 (2011) (where challenge to arbitrator's interpretation of agreement did not "identify any contractual language" supporting exception, Authority denied it as bare assertion). Consequently, we deny this exception.

Third, the Union argues that the Authority has denied exceptions to awards of retroactive, temporary promotions and backpay and that, consequently, the Arbitrator erred in finding that such remedies were not "legal or reasonable" under Article 42, Section 9. *See* Exceptions at 13-14 (citing *USDA*, 65 FLRA 417; *VA Jackson*, 65 FLRA 27; *IRS*, 63 FLRA 567; *VA Hous.*, 57 FLRA 653). As a general matter, arbitration awards are not precedential, *see, e.g.*, *AFGE, Local 2459*, 51 FLRA 1602, 1606 (1996) (*Local 2459*), so an arbitrator is not bound to follow previous arbitration awards, even if they involve issues similar to those before the arbitrator, *see AFGE, Local 916*, 46 FLRA 1316, 1320 (1993) (*Local 916*) (citing *U.S. Dep't of the Air Force, Okla. City Air Logistics Ctr., Tinker Air Force Base*, 43 FLRA 963, 967 (1992) (*Tinker AFB*)). Notwithstanding the Authority's denial of exceptions to arbitration awards in other cases, the awards in those cases remain nonprecedential. They do not establish that the award in this case is irrational, unfounded, implausible, or in manifest disregard of Article 42, Section 9. *See OSHA*, 34 FLRA at 575. As such, we deny this exception.

B. The award is not 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. *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.*, as well as the arbitrator's interpretation and application of the parties' agreement, *see, e.g.*, *Prof'l Airways Sys. Specialists*, 56 FLRA 124, 125 (2000) (*PASS*). Exceptions based on misunderstandings of an arbitrator's award do not demonstrate that the award is contrary to law. *See Sport Air Traffic Controllers Org.*, 66 FLRA 552, 554 (2012) (*SATCO*) (citing *AFGE, Nat'l Joint Council of Food Inspection Locals*, 64 FLRA 1116, 1118 (2010)).

The Union argues that the award is contrary to law because the Arbitrator found that "if an agency . . . does not process documentation" for a detail, then "the agency is allowed to . . . assign[] higher[-]graded duties without compensation." Exceptions at 9. The Arbitrator found that the Agency had not detailed the grievants under the terms of Article 12, Section 2, and he based that finding, in part, on the absence of documentary evidence for such details. Award at 18-19; *see PASS*, 56 FLRA at 125 (Authority defers to arbitrator's contractual interpretation when conducting contrary-to-law analysis). The Union has not identified a law, rule, or regulation that prohibited the Arbitrator from interpreting Article 12, Section 2 to require that details be substantiated by documentation. *See AFGE, Local 779*, 64 FLRA 672, 674 (2010) (denying a contrary-to-law exception because it was based on the arbitrator's interpretation of the parties' agreement). *Cf. Tinker AFB*, 43 FLRA at 966-67 (denying contrary-to-regulation exception to arbitrator's finding that "'neither documented [n]or convincing evidence[]'" established that details occurred (alternations in original)). As such, we deny this exception.

The Union also argues that the Arbitrator found that "retroactive[,] temporary promotion is not allowed even when the Agency violated the law and a collective bargaining agreement." Exceptions at 9. However, this exception reflects a misunderstanding of the award because the Arbitrator did not find that the Agency violated the law or the Master Agreement. *See SATCO*, 66 FLRA at 555. In addition, for the reasons stated in the preceding section, we have rejected the Union's argument that the Arbitrator should have found that the Agency violated the Master Agreement. *See PASS*, 56 FLRA at 125 (Authority defers to arbitrator's contractual interpretation when conducting contrary-to-law analysis). Further, the Authority decisions on which the Union relies do not demonstrate that the award is contrary to law. *See* Exceptions at 9 (citing *VA Asheville*, 59 FLRA at 608; *HHS*, 50 FLRA at 385-86; *VA W.L.A.*, 46 FLRA at 860); *id.* at 13-14 (citing *USDA*, 65 FLRA 417; *VA Jackson*, 65 FLRA 27; *IRS*, 63 FLRA 567; *VA Hous.*, 57 FLRA 653). As mentioned earlier, arbitration awards are not precedential. *See Local 2459*, 51 FLRA at 1606; *Local 916*, 46 FLRA at 1320. Thus, the Authority's decisions denying exceptions to other arbitration awards did not require the Arbitrator, as a matter of law, to reach a particular result in this case. Consequently, we deny this exception.

C. The award is not based on nonfacts.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000)

(*Local 1984*). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.* Moreover, the Authority has long held that disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be accorded such evidence, provides no basis for finding the award deficient. *See AFGE, Local 3295*, 51 FLRA 27, 32 (1995). *See also Tinker AFB*, 43 FLRA at 966 (existence of testimony by "numerous witnesses . . . favor[ing] the grievant" did not establish deficiency in arbitration award that denied grievant's request for retroactive promotion and backpay).

The Union's first nonfact claim is that the Arbitrator erroneously found "insufficient evidence in the record that the employees did indeed perform" GS-4 clerk duties for at least 25% of their work time. Exceptions at 15 (quoting Award at 19). As stated previously, disagreement with an arbitrator's evaluation of evidence provides no basis for finding the award deficient as based on a nonfact. *See AFGE, Local 3295*, 51 FLRA at 32; *Tinker AFB*, 43 FLRA at 966. Thus, we deny this exception.

The Union's second nonfact claim is that the Arbitrator wrongly found that one of the grievants never performed GS-4 clerk scanning duties prior to her promotion to GS-4 clerk. *See* Exceptions at 16-17. But the record establishes that the parties disputed this matter below. *See* Tr. at 124-29 (testimony of grievant); *id.* at 173-77 (testimony of Agency's witness regarding the grievant). Contrary to the Union's assertion that both parties' witnesses agreed on this point, the testimony of the Agency's supervisory witness indicates that the parties disputed whether and when the grievant performed GS-4 clerk duties. *See id.* at 176-77 (Agency witness testified that grievant did not perform "full range of GS-4 scanning duties" and was not "capable of doing" them prior to promotion). As the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration, *see Local 1984*, 56 FLRA at 41, we deny this exception.

## V. Decision

The Union's exceptions are denied.