70 FLRA No. 158

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2328
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
(Agency)

0-AR-5348

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DECISION

August 29, 2018

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

I. Statement of the Case

The Union argues that certain employees worked duties which entitle them to temporary promotions. In an award dated December 29, 2017, Arbitrator William K. Strycker found that the employees were not entitled to temporary promotions and denied the Union's grievance.

The Union argues that the award does not draw its essence from the parties' agreement, that the Arbitrator was biased, and that the award is contrary to law. We deny the Union's exceptions.

II. Background and Arbitrator's Award

The grievants are GS-4 and GS-5 medical support specialists (MSAs) at the John J. Pershing VA Medical Center in Poplar Bluff, Missouri. MSAs manage patient records and appointments. According to the Union, the grievants performed higher-graded duties which warrant temporary promotions under Article 12, Section 2(A) of the parties' agreement (Article 12).[1]

The Arbitrator framed the issue as whether the Agency failed "to properly compensate the grievants for the work that was performed . . . [and i]f so, what is the appropriate remedy?"[2]

The Union argued that the grievants performed the grade-controlling duties of a GS-6 MSA and are entitled to temporary promotions. The Agency argued that the grievants did not perform GS-6 duties because they were not assigned to a patient aligned care team (PACT)—the central duty distinguishing GS-6 MSAs from lower-graded MSAs.

The Arbitrator agreed with the Agency that the grievants had not been temporarily promoted. In reaching that determination, he considered an earlier, controlling settlement agreement between the parties' national representatives which stipulated that in order for an MSA to be a GS-6, the MSA must be assigned to a PACT because PACT participation drives "the entire scope of the higher-level duties which are crucial to a GS-6" MSA.[3]

The Arbitrator concluded that although the grievants performed certain overlapping GS-6 duties, none of the grievants were part of a PACT or performed PACT-driven higher level duties. Therefore, the Arbitrator denied the grievance because the grievants did not temporarily perform GS-6 grade-controlling duties.

On January 29, 2018, the Union filed exceptions to the award. The Agency did not file an opposition.

III. Analysis and Conclusions

A. The award draws its essence from the parties' agreement.

The Union argues that the award fails to draw its essence from Article 12 because the grievants "satisfied the basic requirements of a GS-6."[4]

The Union's argument is without merit. Article 12 is clear that employees are only entitled to a temporary promotion if they perform "the grade-controlling duties of a higher-graded position."[5] Here, the Arbitrator found that "being a member of a PACT" drives the grade-controlling duties of a GS-6 MSA.[6] The Arbitrator also found that the grievants did

[1] Award at 32. Article 12, Section 2(A) provides that employees who perform duties of a higher graded position for at least twenty-five percent (25%) of their time for ten consecutive work days shall be temporarily promoted.

[2] *Id.* at 2.

[3] *Id.* at 43. These GS-6 higher-level duties include participating in team meetings to manage and plan patient care, setting patient priorities and deadlines, adjusting flow and sequencing to meet patient and clinic needs, monitoring pre-appointment requirements, and providing input on operation issues or procedures.

[4] Exceptions Br. at 11.

[5] Award at 5.

[6] *Id.* at 43.

not perform these PACT-driven higher-level duties[7]—a finding the Union does not challenge as a nonfact.[8]

Accordingly, we deny the Union's essence exception.[9]

B. The Arbitrator was not biased.

The Union also claims that the Arbitrator was biased because he disregarded testimonial evidence and engaged in ex parte communications with the Agency.[10] To establish bias, the excepting party must demonstrate, as relevant here, that the arbitrator engaged in misconduct that prejudiced the rights of the party.[11]

The Union's allegations—that the Arbitrator "completely disregarded the testimony of all the witnesses"[12] and engaged in ex parte communications by emails with the Agency—are without merit. The former is nothing more than disagreement with the Arbitrator's findings. As to the latter, the Union does not explain how the content of the emails demonstrate that ex parte communications occurred.

Accordingly, we deny the Union's bias exception.[13]

C. The Union fails to support its contrary-to-law exception.

Section 2425.6(e)(1) of the Authority's regulations[14] provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to . . . support a ground" listed in § 2425.6(a)-(c).[15] Consistent with § 2425.6(e)(1), when a party does not provide any arguments to support its exception, the Authority will deny the exception.[16]

The Union contends that the award is contrary to law because the Arbitrator "failed to consider any of the case law" provided in its post-hearing brief.[17] However, the Union merely lists and summarizes cases it cited to the Arbitrator, without any explanation or argument about the cases' applicability to this matter.[18]

Accordingly, we deny this exception as unsupported under § 2425.6(e)(1) of the Authority's Regulations.[19]

IV. Decision

We deny the Union's exceptions.

[7] *Id.* at 45-46.
[8] *See* Exceptions Br. at 3; *see also AFGE, Local 933*, 70 FLRA 508, 511 (2018) (in the absence of a successful nonfact exception, we defer to the Arbitrator's factual findings).
[9] *AFGE, Local 1148*, 70 FLRA 712, 713-14 (2018) (Member DuBester concurring).
[10] Exceptions Br. at 3
[11] *AFGE, Local 1938*, 66 FLRA 741, 743 (2012) (*Local 1938*).
[12] Exceptions Br. at 3.
[13] *See Local 1938*, 66 FLRA at 743; *see also, e.g., U.S. Dep't of the Air Force, Air Force Logistics Command, Hill Air Force Base, Utah*, 34 FLRA 986, 990 (1990) (finding award not deficient where ex parte communication between agency and arbitrator had occurred, and union failed to show arbitrator bias).
[14] 5 C.F.R. § 2425.6(e)(1).
[15] *NTEU*, 70 FLRA 57, 60 (2016) (quoting 5 C.F.R. § 2425.6(e)(1)).
[16] *NTEU, Chapter 67*, 67 FLRA 630, 630-31 (2014) (citing *AFGE, Nat'l Border Patrol Council, Local 2595*, 67 FLRA 361, 366 (2014)).
[17] Exceptions Br. at 4.
[18] The Union's cited cases include four arbitration awards. However, arbitration awards are not precedential, and arbitrators are not bound to follow them. *E.g., U.S. Dep't of the Air Force, Warner Robins Air Logistics Complex, Robins Air Force Base, Ga.*, 68 FLRA 102, 106 (2014) (stating that arbitration awards are not precedential); *AFGE, Council 236*, 49 FLRA 13, 16-17 (1994) (citing *U.S. Dep't of the Treasury, IRS, Se. Region, Atlanta, Ga.*, 46 FLRA 572, 577 (1992)) (arbitrator is not bound to follow previous arbitration awards with similar issues).
[19] 5 C.F.R. § 24256(e)(1); *see U.S. Dep't of VA, Gulf Coast Veterans Health Care Sys.*, 69 FLRA 608, 610 (2016) (citing *NAGE, Local R3-10, SEIU*, 69 FLRA 510, 510 n.11 (2016)).