

70 FLRA No. 172

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
MIAMI, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 501
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5313

DECISION

September 28, 2018

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

I. Statement of the Case

Arbitrator Stanley E. Kravit found that the Agency improperly selected an unqualified applicant for a position, granted the grievance, and as a remedy awarded the grievant a promotion, backpay, and attorney's fees under the Back Pay Act (BPA).¹

The main question is whether the award is contrary to the BPA because the Arbitrator awarded the grievant backpay without finding an unjustified or unwarranted personnel action. Because the Arbitrator found that the Agency violated both a government-wide regulation and the parties' agreement, the BPA supports the award.

II. Background and Arbitrator's Award

In March 2012, the Agency announced a vacancy for a sports specialist position with a local commuting area requirement. The Agency created a best-qualified list that included the grievant. The grievant was not selected for the position, and the Union

filed a grievance on his behalf alleging that the selectee was ineligible for consideration because his employment address was outside the local commuting area. The parties could not resolve the grievance and submitted it to arbitration.

The Arbitrator framed the issues as whether the Agency, unlawfully and in violation of the parties' agreement, failed to select the grievant for the sports specialist position, and if so, what is the remedy?

The Union argues that the Agency violated 5 C.F.R. § 351.203 and § 6(a)(3) of the parties' collective-bargaining agreement (agreement) when it selected an applicant that was employed outside the local commuting area. The Agency contends that, in accordance with § 351.203, the selectee was within the local commuting area based upon his residential address, and not where the selectee was employed.

The Arbitrator issued his award on August 15, 2017. As an initial matter, the Arbitrator found that the Agency has the discretion to impose a local commuting area requirement, as defined under 5 C.F.R. § 351.203, in order to limit applicants to those who already reside near the Agency's facility. Section 351.203 defines the local commuting area as "the surrounding localities in which people live and can reasonably be expected to travel back and forth daily."²

The Arbitrator found that the selectee provided a residential address within the local commuting area of the Agency's facility on his application, but an employment address outside the local commuting area. In this regard, the Arbitrator found that the Agency's warden ignored the local commuting requirement when he failed to notice the discrepancy of addresses. The Arbitrator also found that the Agency's human resources manager failed to notice the discrepancy of addresses because its hiring practice verified only "the applicant's [residential] address, [but] not the institution where the [applicant] works."³ As a result, the Arbitrator found that the Agency improperly selected an unqualified applicant. Furthermore, the Arbitrator found that the selection for the position came down to the selectee and the grievant. The Arbitrator concluded that, had the Agency applied its local commuting area requirement, it would have rejected the selectee's application and selected the grievant for the position. Thus, the Arbitrator declared the Agency's appointment of the selectee improper, awarded the promotion to the grievant with backpay, and granted the Union attorney's fees under the BPA.⁴

² Award at 2 (quoting 5 C.F.R. § 351.203).

³ *Id.* at 7.

⁴ *Id.* at 11.

¹ 5 U.S.C. § 5596.

The Agency filed exceptions on September 14, 2017, and the Union filed an opposition on October 19, 2017.

III. Preliminary Matters

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider arguments that could have been,⁵ but were not, presented to the arbitrator.⁶

- A. Sections 2425(c) and 2429.5 of the Authority's Regulations bar the Agency's nonfact exception.

The Agency asserts that, at arbitration, it entered into evidence a list of the five best-qualified candidates for the position. Therefore, the Agency argues the Arbitrator based his finding that the best-qualified applicants were narrowed down to the selectee and the grievant on a nonfact.⁷

The Union argues that the Agency failed to make any arguments before the Arbitrator that a best-qualified candidate other than the grievant could have been selected for the position, and that mere submission of the best-qualified list into the record, without explanation, is insufficient to demonstrate that this argument was raised before the Arbitrator.⁸

At arbitration, the Union argued that the Agency's failure to select the grievant for the position was in violation of 5 C.F.R. § 351.203 and § 6(a)(3) of the parties' agreement.⁹ Therefore, the Agency could have made its argument regarding the possible selection of another best-qualified applicant other than the grievant, and merely providing the Arbitrator with the best-qualified list naming many candidates is insufficient to demonstrate that the Agency presented such an argument to the Arbitrator.¹⁰

We share the concerns of our dissenting colleague that others on the best qualified list might well

have been selected. Meritorious arguments should not be swept aside on the basis of a technicality. However, in this case, we could not find that this argument was sufficiently raised, if at all, to the Arbitrator.¹¹

Accordingly, we find that the Agency failed to raise this argument before the Arbitrator, and we dismiss this exception under §§ 2425.4(c) and 2429.5 of the Authority's Regulations.

- B. Sections 2425.4(c) and 2429.5 of the Authority's Regulation bar the Agency's contrary-to-law exception, in part.

Additionally, the Agency argues that the Arbitrator failed to make the requisite finding that the Agency committed an unjustified or unwarranted personnel action as required by the BPA. Instead, the Agency contends that since it was possible for the selectee to commute or split his time between his residence and work, the Arbitrator's findings that the selectee's residential address was false and misleading was a conclusory finding and there is no support in the record for it.¹²

Where a party makes an argument to the Authority that is inconsistent with its position before the arbitrator, the Authority applies §§ 2425.4(c) and 2429.5 to bar the argument.¹³ In its exception, the Agency raises several possible scenarios that would explain how the selectee could have resided within the local commuting area despite working outside the local commuting area.¹⁴ However, the Agency argued at arbitration that the selectee met the local commuting area requirement based entirely on his residential address, and not his employment address.¹⁵ Thus, the Agency's argument that the selectee could have met the local commuting area by commuting or splitting his time between home and work is inconsistent with the position it took before the Arbitrator. Therefore, §§ 2425.4(c) and 2429.5 of the Authority's regulation bar this argument.¹⁶

IV. Analysis and Conclusion: The award is not contrary to the BPA.

An award of backpay is authorized under the BPA only when the Arbitrator finds that: (1) the aggrieved employee was affected by an unjustified and

⁵ 5 C.F.R. §§ 2425.4(c), 2429.5.

⁶ *U.S. Dep't of VA, St. Petersburg Reg'l Benefit Office*, 70 FLRA 1, 3-4 (2016) (citing *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012)).

⁷ Exceptions Br. at 7-9.

⁸ Opp'n at 4-5 (citing *U.S. Dep't of VA, Bos. Healthcare Sys., Bos. Mass.*, 68 FLRA 116, 117 (2014) (*VA, Bos.*)).

⁹ Award at 6; Exceptions, Attach. C, Hearing Tr. at 11.

¹⁰ See *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 176 (2017) (*VA, Biloxi*) (citing *Indep. Union of Pension Emps. for Democracy & Justice*, 69 FLRA 158, 160 (2016) (finding that citing to an executive order before an arbitrator does not thereby raise related arguments)); *VA, Bos.*, 68 FLRA at 117 (merely submitting an agency handbook as part of the record without further explanation is not an argument).

¹¹ See generally *VA, Bos.*, 68 FLRA at 117 (finding that argument requires explanation).

¹² Exceptions Br. at 12.

¹³ *NTEU*, 70 FLRA 57, 59 (2016) (citing *Broad. Bd. Of Governors, Office of Cuba Broad.*, 66 FLRA 1012, 1016 (2012)).

¹⁴ Exceptions Br. at 12-13.

¹⁵ Exceptions, Attach. B, Agency's Closing Br. at 3-4.

¹⁶ 5 C.F.R. §§ 2425.4(c), 2429.5.

unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or the reduction of an employee's pay, allowances, or differentials.¹⁷ We review this exception de novo.¹⁸

With respect to the first requirement, a violation of an applicable law, rule, regulation, or provision of a collective-bargaining agreement constitutes an "unjustified or unwarranted personnel action."¹⁹ As well, an arbitrator's finding of a contract violation satisfies the first requirement even if the arbitrator fails to specify what contract provision was violated.²⁰

The Agency argues that the Arbitrator concluded that the Agency committed an unjustified or unwarranted personnel action without finding a violation of law or provision of the parties' agreement.²¹

We read the award quite differently. The Arbitrator cited to 5 C.F.R. § 351.203 and the grievant's right to be treated fairly under § 6(a)(3) of the parties' agreement.²² The Arbitrator found that the Agency's human resources manager failed to notice the discrepancy of the selectee's addresses because its hiring practices verified only the applicant's residential address, and the warden "simply ignored his own commuting area requirements."²³ As a result, the Arbitrator found that the Agency improperly selected an unqualified applicant. Thus, read in context, the reasonable reading of the award is that the Arbitrator found the Agency's failure to implement its own local commuting area requirement violated 5 C.F.R. § 351.203 and the grievant's right to be treated fairly under § 6(a)(3) of the parties' agreement.²⁴ Therefore, the award satisfies the first requirement of the BPA.²⁵

With respect to the second requirement, the Agency argues that the backpay award is deficient because there is no causal connection between the Agency's selection and grievant's reduction of pay. In the Agency's view, the grievant did not suffer any monetary loss when he was not promoted because the warden could have selected a candidate from the best-qualified list other than the grievant.²⁶ As discussed in the preliminary matter, we note that there is no evidence that the Agency raised such an argument at arbitration; and merely providing the best-qualified list to the Arbitrator does not thereby raise related arguments, especially a speculative one, of the selection of another candidate.²⁷ Accordingly, we find that §§ 2425.4(c) and 2429.5 of the Authority's regulations bar the Agency's argument that another allegedly best-qualified applicant other than the grievant could have been selected for the position.²⁸

The second BPA requirement is satisfied if there is a showing of a causal connection between the unjustified or unwarranted personnel action and the withdrawal or reduction of the grievant's pay.²⁹ In this regard, the Authority has stated that a causal connection finding may be implicit in the record and the award.³⁰

Here, the Arbitrator found that the sports specialist position came down to the selectee and the grievant, and "[h]ad the local commuting area requirement been applied, [the grievant] would have been selected" for the *promotional* sports specialist position.³¹ The Arbitrator found that the position at issue was a "promotion." We defer to the Arbitrator's factual findings in the absence of a successful nonfact exception.³² Thus, the Arbitrator's findings satisfy the requisite causal connection, had the Agency applied its local commuting area requirement, the grievant would have been selected for the promotion and been entitled to promotion pay.³³

With regard to whether a loss of promotion pay qualified as a reduction of pay under the BPA, the Authority has found that an arbitrator's award ordering

¹⁷ 5 U.S.C. § 5596(b)(1); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 60 FLRA 728, 730 (2005).

¹⁸ *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)).

¹⁹ *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, 68 FLRA 151, 152 (2014) (*DOJ*) (citing *U.S. DOD, Def. Logistics Agency, Def. Distrib. Region W., Stockton, Cal.*, 48 FLRA 221, 223 (1993)).

²⁰ *E.g., Fed. Energy Regulatory Comm'n*, 58 FLRA 596, 600 (2003) (*FERC*) (citing *U.S. DOD, Army & Air Force Exch. Serv., Dall., Tex.*, 49 FLRA 982, 991-93 (1994)); *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla.*, 42 FLRA 1342, 1347 (1991).

²¹ Award at 10-11.

²² *Id.* at 4-6.

²³ *Id.* at 7.

²⁴ *U.S. Dep't of the Treasury, IRS*, 68 FLRA 145, 147 (2014) (when evaluating exceptions to an arbitration award, the Authority considers the award and record as a whole and interprets the award in context).

²⁵ *AFGE, Local 2608*, 56 FLRA 776, 777 (2000).

²⁶ Exceptions Br. at 16.

²⁷ *See VA, Biloxi*, 70 FLRA at 176 (citing *IUPEDJ*, 69 FLRA at 160 (finding that citing to an executive order before an arbitrator does not thereby raise related arguments)).

²⁸ *AFGE, Emp. Council of Prison Locals, Council 33*, 70 FLRA 191, 192 (2017) (citing *U.S. DOJ, Fed. BOP, Wash., D.C.*, 64 FLRA 1148, 1152 (2010)).

²⁹ *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008) (citing *GSA*, 55 FLRA 493, 496 (1999)).

³⁰ *U.S. Dep't of the Navy, Naval Air Depot Cherry Point, N.C.*, 61 FLRA 38, 40 (2005) (*Cherry Point*).

³¹ Award at 7 (emphasis added).

³² *See AFGE, Local 1164*, 66 FLRA 74, 78 (2011).

³³ *Cherry Point*, 61 FLRA at 40; *FERC*, 58 FLRA at 600.

retroactive promotion with backpay satisfied the requirements of the BPA when an arbitrator finds that the grievant would have been promoted but for the Agency's violation of the grievant's priority consideration under a collective-bargaining agreement.³⁴ Because the Arbitrator found, and the Agency concedes,³⁵ that the sports specialist position was a *promotional* position for the grievant,³⁶ the Arbitrator thus found a direct causal connection between the Agency's violation of § 351.203 and the grievant's loss of promotion pay. Therefore, the second requirement of the BPA is satisfied.³⁷

Accordingly, the Agency's argument provides no basis for finding the award contrary to law and we deny the Agency's exception.

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

³⁴ *U.S. Dep't of the Treasury, IRS*, 60 FLRA 742, 745 (2005) (citing *U.S. DOL, Wash., D.C.*, 59 FLRA 560, 563 (2004)).

³⁵ Exceptions Br. at 8 (refers to sports specialist position as a retroactive promotion).

³⁶ See Award at 1 (Issue: Filling a promotional vacancy); 8 (selectee's promotion violated the law and the contract); 9 (an arbitrator has the authority to set aside an improper promotion); see also Exceptions, Attach. C, Tr. at 19 ("It's still a correctional officer [position] . . . once you get to a Grade 7, you have to [apply] for a promotion").

³⁷ *NLRB Union, Local 19*, 7 FLRA 21, 25 (1981) (when an arbitrator finds an employee has been denied a promotion as a result of a violation of a collective-bargaining agreement, an award of backpay is clearly consistent with the employee's statutory entitlement to receive backpay for the period that the unjustified and unwarranted personnel action was in effect).

Chairman Kiko, dissenting:

For the following reasons, I respectfully disagree with my colleagues and would set aside the award as contrary to the Back Pay Act (BPA).¹

Before the Arbitrator, the Agency proffered testimony that the selecting official could have selected someone from one of several best-qualified lists (BQLs),² which contained individuals other than the grievant and the selectee. Given that testimony, I disagree with the majority's finding that the Agency may not argue, on exceptions, that the universe of candidates included individuals other than the grievant and the selectee. And, with its exceptions, the Agency has submitted copies of those various BQLs, and the BQL from which the selecting official made the selection *did not even include the grievant's name*.³

In my view, for a party to recover backpay under the BPA, that party has the burden to clearly establish that an employee actually lost pay, allowances, or differentials – money to which the employee was legally entitled.⁴ In the context of this case, that means that the Union had the burden to clearly establish that, but for the allegedly unjustified or unwarranted personnel action at issue, the Agency would have selected the grievant for the position. Given the state of the record, I do not believe that the Union has met that burden here. Therefore, there is no lawful basis for backpay, and I would set aside the award as contrary to the BPA.⁵

¹ 5 U.S.C. § 5596.

² Exceptions, Attach. C, Tr. at 128 (witness responding affirmatively when asked, “[C]an the selecting official select any of the applicants listed on any of these [BQLs]?”).

³ See Exceptions, Attach. D at 1 (BQL containing the selectee and another individual). I note that, even if only the grievant's and the selectee's names *had* been before the selecting official, I would not agree with the Arbitrator's presumption that the selecting official would necessarily have selected the grievant; he could have chosen to select *neither*.

⁴ See, e.g., *Fraternal Order of Police, Lodge No. 168*, 70 FLRA 338, 339 (2017) (“The causal connection between the violation and a loss of pay, allowances, or differentials must be ‘clear.’” (citation omitted)).

⁵ Consequently, I need not, and do not, express any view on whether the Arbitrator correctly found an unjustified or unwarranted personnel action.