

73 FLRA No. 40

UNITED STATES
DEPARTMENT OF STATE
PASSPORT SERVICE
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1998
(Union)

0-AR-5805

DECISION

August 29, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members

I. Statement of the Case

Arbitrator Phyllis N. Harris found that the Agency violated the parties' collective-bargaining agreement by denying the grievant a career-ladder promotion from General Schedule, Grade 9 (GS-9) to GS-11. For the reasons provided below, we dismiss, in part, and deny, in part, the Agency's essence exception to the award.

II. Background and Arbitrator's Award

Some of the Agency's employees occupy "career ladder[s]," which are noncompetitive-promotion plans for their positions.¹ When the Agency selects an employee for a career-ladder position, the employee starts working in that position at a particular GS grade level. Later, if the employee satisfies certain performance and timing requirements, then the Agency promotes the employee to successively higher GS grade levels, until the

employee reaches the maximum grade level in the career ladder.

The grievant worked as a passport specialist in a career-ladder position that began at GS-5 and advanced at two-grade-level increments until it reached a maximum of GS-11.

While the grievant was working at the GS-9 level of her position, her mid-year performance reviews did not rate her fully successful in all of her critical elements. Nevertheless, during that same period, the grievant received an award recognizing "her exemplary ability to process a record number of . . . cases . . . , all while providing excellent customer service."² By the end of the same performance year, the grievant's annual performance review rated her fully successful in all critical elements.

During the month that followed the annual performance review, the Agency informed the grievant that she had not demonstrated the ability to perform at the level required to receive a career-ladder promotion to GS-11. As an example, the Agency stated that the grievant still needed to demonstrate that she could handle complex cases. The Union filed a grievance over the Agency's decision not to promote the grievant, and the unresolved grievance went to arbitration.

The Arbitrator framed the issue as whether the Agency violated the parties' agreement or law by denying the grievant a career-ladder promotion from GS-9 to GS-11. Article 15, Section 7 of the parties' agreement (Section 7) contains several requirements for obtaining a career-ladder promotion.³ Because the Agency asserted that the grievant had not demonstrated the ability to perform at the GS-11 level, the Arbitrator focused on that requirement.

The Arbitrator found that not only had the grievant obtained a fully-successful rating as a GS-9, but also the accompanying narrative from her supervisor was "favorable and complimentary"⁴ – going so far as to describe the grievant's work as "admirable."⁵ The Arbitrator also found that the grievant's production numbers as a GS-9 were "above average."⁶ Further, the Arbitrator noted that, in several critical elements that were common to both the GS-9 and GS-11 levels, the grievant's GS-9 performance exceeded the "accuracy rate" that GS-11 work required.⁷

¹ Opp'n, Attach. 6, Collective-Bargaining Agreement (CBA) Art. 15, § 7.

² Award at 10.

³ *E.g.*, CBA Art. 15, § 7(e) (requiring fifty-two weeks' performance at the previous grade level of the career ladder, "a rating of fully successful (or higher) on the most recent rating of record," and a "demonstrated . . . ability to perform at the next higher grade level").

⁴ Award at 8.

⁵ *Id.* at 9 (emphasis omitted).

⁶ *Id.*; *see also id.* at 15 ("Some of [the grievant's] production numbers were equal to[] and greater than those required by GS-11 . . .").

⁷ *Id.* at 14.

The Arbitrator characterized the grievant's work on complex cases as "[a]llegedly the primary stumbling block" to a GS-11 promotion.⁸ However, the Arbitrator observed that Section 7 obligated the Agency to "assign[] to each employee in a career[-]ladder position" adequate work "to allow the employee to demonstrate" performance at the "next higher level in the career ladder."⁹ In that regard, the Arbitrator found that the Agency did not "give [the grievant] any complex cases,"¹⁰ and the office in which the grievant worked did not "receive[] a regular number of complex cases."¹¹ Thus, the Arbitrator found that it was improper for the Agency to "hold[] the [g]rievant back for not performing at the next level" when the Agency failed to give the grievant "the opportunity" to adjudicate complex cases.¹²

Overall, the Arbitrator concluded that, by the time the grievant received her annual performance rating, she had demonstrated her ability to perform at the GS-11 level. Accordingly, the Arbitrator determined that the Agency's failure to promote the grievant to GS-11 violated the parties' agreement. To remedy that contractual violation, the Arbitrator directed the Agency to grant the grievant a retroactive promotion to GS-11, as well as other relief associated with that promotion.

The Agency filed an exception to the award on April 21, 2022, and the Union filed an opposition on May 16, 2022.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Agency's essence arguments.

Initially, the Agency argues that the award fails to draw its essence from the agreement because the

Arbitrator "ignored management's right to determine the grievant's promotion potential";¹³ failed to defer to management;¹⁴ and failed to interpret Section 7 to reflect the parties' intent.¹⁵ As the Union correctly observes,¹⁶ the Agency did not present these arguments at arbitration. Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.¹⁷ Because the parties argued at arbitration about how to apply the agreement to the grievant's particular circumstances, the Agency could have presented – but did not present – its management-right, deference, and intent arguments below. As such, §§ 2425.4(c) and 2429.5 bar these arguments, and we dismiss them accordingly.¹⁸

IV. Analysis and Conclusion: The award draws its essence from Section 7.

In addition to the barred arguments, the Agency contends that the award fails to draw its essence from Section 7 because the Arbitrator found "that the grievant was automatically eligible for promotion when she received a [f]ully[-]successful performance rating."¹⁹ However, the Arbitrator did *not* make such a finding. Besides considering the grievant's performance rating, the Arbitrator also found that the grievant had earned an award,²⁰ received supervisory comments about her "admirable" work,²¹ achieved above-average production numbers,²² and exceeded some GS-11 metrics while still a

⁸ *Id.* at 15.

⁹ CBA Art. 15, § 7(c); Award at 19 (citing CBA Art. 15, § 7(c)); *see also id.* at 13-14 (finding that Section 7(d) likewise required the Agency to "provide the [g]rievant with the opportunity to demonstrate the ability to perform at the higher GS-11 level").

¹⁰ Award at 18.

¹¹ *Id.* at 13.

¹² *Id.* at 14.

¹³ Exception Br. at 5; *see also id.* at 6 ("The Arbitrator[] . . . reject[ed] management's right to determine the employee's ability to perform at the next higher grade."), 7 ("It is management's right to make the determination as to whether the employee is eligible for promotion.").

¹⁴ *Id.* at 7.

¹⁵ *Id.*

¹⁶ Opp'n Br. at 11-14.

¹⁷ 5 C.F.R. §§ 2425.4(c), 2429.5.

¹⁸ The Union asks that we dismiss the entire exception because the Agency inaccurately reported that it raised all of its essence arguments below. Opp'n Br. at 19-20 (citing Exception Br. at 8). We deny this request because §§ 2425.4(c) and 2429.5 bar only those arguments not raised below, *e.g.*, *Bremerton Metal Trades Council*, 73 FLRA 90, 92 (2022) (barring a portion, but not all, of a party's contrary-to-law exception), and the Union does not cite any authority for applying the bar more broadly.

¹⁹ Exception Br. at 5. The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the excepting 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 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. *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*).

²⁰ Award at 10, 19.

²¹ *Id.* at 9 (emphasis omitted), 19 (emphasis omitted).

²² *Id.* at 9.

GS-9.²³ The Agency does not challenge any of those additional findings. Thus, we deny the Agency's contention.²⁴

Finally, the Agency argues that the Arbitrator "effectively negate[d]" Section 7's requirement that the grievant demonstrate the ability to perform at the GS-11 level in order to be promoted.²⁵ In fact, the Arbitrator repeatedly mentioned that requirement²⁶ and dedicated most of the award to analyzing whether the grievant had satisfied it.²⁷ As one aspect of that analysis, the Arbitrator found that the Agency breached its commitment under Section 7 to provide the grievant complex cases to adjudicate.²⁸ Based primarily on that finding, the Arbitrator rejected the Agency's assertion that the grievant had not demonstrated an ability to handle complex cases at a higher level.²⁹ The Agency has failed to establish that the Arbitrator's analysis or application of Section 7 was irrational, unfounded, implausible, or in manifest disregard of the parties' agreement.³⁰ Therefore, we deny this final argument as well.³¹

In sum, because the Agency has failed to establish any inconsistency between the award and Section 7,³² we deny the essence arguments that were not already barred.

IV. Decision

We partially dismiss and partially deny the Agency's exception.

²³ *Id.* at 14.

²⁴ *See, e.g., AFGE, Loc. 1441*, 70 FLRA 161, 163 (2017) (denying exception that was based on mischaracterization of award); *U.S. Dep't of HHS, Nat'l Insts. of Health*, 64 FLRA 266, 269 (2009) (same).

²⁵ Exception Br. at 6.

²⁶ Award at 13 ("[T]he [g]rievant . . . demonstrated that she was . . . able to advance to the next level."), 14 ("Grievant's . . . appraisal indicated that she could perform at the next level."), 15 ("[T]he [g]rievant demonstrated . . . her ability to perform at the next higher grade level, in this case[,] GS-11."), 20 ("[T]here is evidence the [g]rievant could do the work at the level of GS-11.").

²⁷ *See id.* at 9-15, 17-20.

²⁸ *Id.* at 13-14, 19; *see also id.* at 11 ("The Agency did not submit valid evidence as to why the promotion was denied . . ."), 18 ("The reasons given by the Agency were not persuasive.").

²⁹ *Id.* at 13-15, 18-19.

³⁰ *See OSHA*, 34 FLRA at 575.

³¹ In its opposition, the Union asks that we "intervene[] and . . . order the Agency" to pay fees owed to the Arbitrator. Opp'n Br. at 7-8. To the extent that the Union's request is an exception to the award, we dismiss it as untimely. *See* 5 C.F.R. § 2425.2(b) (time limit for filing exceptions to an arbitration award is thirty days after the award's service date); *U.S. Dep't of the Army, U.S. Army Garrison, Fort Drum, N.Y.*, 66 FLRA 402, 402 n.1 (2011) (dismissing opposition's request for interest on backpay as untimely exception).

³² *See Int'l Bhd. of Boilermakers, Loc. 290, Bremerton Metal Trades Council*, 72 FLRA 694, 696 (2022) (denying essence exception because excepting party failed to establish that award was inconsistent with the wording of the parties' agreement).