

73 FLRA No. 9

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JAMES A. HALEY VAMC
TAMPA, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 547
(Union)

0-AR-5746

DECISION

May 31, 2022

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

I. Statement of the Case

Arbitrator Jeanne Charles issued an award finding that the Agency's rescission of the grievant's contracting warrant authority was arbitrable and that the rescission violated regulations. As a remedy, the Arbitrator reinstated the warrant and awarded backpay. The Agency filed an exception on contrary-to-law grounds. We deny the portion of the exception challenging the arbitrability determination, and dismiss the Agency's management-rights argument for failure to raise below. We grant the exception, in part, because the backpay remedy is contrary to the Back Pay Act (the Act),¹ and set aside that portion of the award.

II. Background and Arbitrator's Award

In January 2011, the Agency issued the grievant a "Certificate of Appointment as a Contracting Officer," which gave the grievant authority to award and administer Agency contracts (warrant authority). In September 2019, the grievant identified and ultimately corrected an error in

a contract. Months later, the grievant's supervisor conducted a desk review and advised the grievant about concerns with the contract at issue, including a \$0.30 calculation error. The supervisor then drafted a memo rescinding the grievant's warrant authority under Agency regulation "due to blatant disregard for adhering to acquisition regulation, policies[,] and procedures."² The Agency's head of contracting activities reviewed the memo and signed it. The grievant's supervisor then notified the grievant of the Agency's decision.

The Union filed a grievance alleging that the rescission violated the parties' agreement, Agency regulations, and law, and requested reinstatement of the warrant. The parties could not resolve the matter and proceeded to arbitration.

The Arbitrator framed the issues as whether the grievance was substantively arbitrable; whether the warrant was rescinded for "blatant disregard of adhering to acquisition regulations and procedures"; and "[w]hat authority does the arbitrator have to reinstate the warrant?"³

The Arbitrator rejected the Agency's argument that the grievance was excluded from the parties' negotiated grievance procedure because it concerned an appointment. Rather, the Arbitrator found that the grievance was not excluded because the matter concerned the rescission, not the appointment, of the grievant's warrant authority. The Arbitrator then sustained the grievance, finding that there was "no evidence that the [g]rievant blatantly disregarded her duties"; the rescission was part of a pattern of harassment by the grievant's supervisor; and the Agency did not follow proper procedures when it rescinded the grievant's warrant.⁴ As a remedy, the Arbitrator directed the Agency to reinstate the warrant, cease the harassment, and make the grievant whole, including backpay.

The Agency filed an exception to the award on April 25, 2021, and the Union filed an opposition on May 25, 2021.

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

The Agency argues in its exception that the award reinstating the grievant's warrant violates management's right to assign work.⁵ The Authority will not consider

¹ 5 U.S.C. § 5596.

² Award at 7 (internal quotation marks omitted); *id.* at 3; *see also* Opp'n, Attach., Joint Ex. 4 at 1 (citing 48 C.F.R. § 801.690-7).

³ Award at 2.

⁴ *Id.* at 9 (citing 48 C.F.R. § 801.690-7(a)(7)); *see also id.* at 10-11.

⁵ Exception Br. at 5-9; *but see* Opp'n Br. at 5 (asserting that the Agency failed to raise a management-rights argument at arbitration).

arguments that could have been, but were not, presented to the Arbitrator.⁶ Because the Union's proposed remedy – reinstatement of the warrant – was before the Arbitrator, the Agency could have raised its argument that such a remedy would violate management's right to assign work.⁷

Although the Agency generally referenced the rights listed in 5 U.S.C. § 7106(a)(2)(B), including the right to assign work, in its post-hearing brief, it did so to support its position that the grievance was not arbitrable because Agency and federal acquisition regulations permitted it to rescind the grievant's warrant.⁸ As such, this reference did not sufficiently raise before the Arbitrator the argument that it now raises in its exception – namely, that a remedy reinstating the warrant would violate the right to assign work.⁹ Because the Agency could have raised this argument to the Arbitrator, but did not, we dismiss it.¹⁰

IV. Analysis and Conclusions

A. The Arbitrator's arbitrability determination is not contrary to law.

The Agency asserts that the award is contrary to 5 U.S.C. § 7121(c)(4).¹¹ 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*.¹² 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.¹³ In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.¹⁴

Section 7121(c)(4) provides that a negotiated grievance procedure may not cover grievances concerning "any examination, certification, or appointment."¹⁵ The Authority "has long held that the terms 'examination,' 'certification,' and 'appointment,' as used in 5 U.S.C. § 7121(c)(4), apply to an individual's initial entry into federal service."¹⁶ Here, the Agency argues that, contrary to the Arbitrator's findings, the grievance "deals with an appointment" because "the rescission naturally flows from the appointment" of the grievant's warrant authority.¹⁷ However, there is no dispute that the appointment of the grievant's warrant authority was not part of the grievant's initial entry into federal service.¹⁸ Therefore, the grievance does not concern an appointment under § 7121(c)(4) and we find that the Agency does not establish that the Arbitrator's arbitrability determination is contrary to law.¹⁹

⁶ *U.S. Dep't of VA*, 72 FLRA 518, 519 (2021) (Chairman DuBester concurring) (citing 5 C.F.R. §§ 2425.4(c), 2429.5; *NATCA*, 72 FLRA 299, 300 (2021) (*NATCA*); *U.S. DOL*, 67 FLRA 287, 288-89 (2014)).

⁷ Opp'n, Attach. 2, Grievance at 1 (stating that the "[r]elief[s]ought" included that the "warrant be reinstated").

⁸ See Exception, Attach. 2, Agency Post-Hr'g Br. at 5 (arguing that "issuance and or rescission of a warrant is subject to management rights of determining the personnel by which agency operations shall be conducted" and that Federal Acquisition Regulations and the Agency's acquisition regulations "support [5] U.S.C. [§] 7106 Management Rights which states nothing in section shall effect the authority of any management official of any agency (2)(B) to assign work[], to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted"). Contrary to the Agency's assertion, Exception Form at 3, neither the Agency's pre-hearing brief on arbitrability, Opp'n Attach. 22, nor the hearing transcript, Exception, Attach. 9, demonstrates that the Agency raised the argument that reinstatement of the warrant would impermissibly affect management's right to assign work.

⁹ *E.g.*, *Indep. Union of Pension Emps. for Democracy & Just.*, 69 FLRA 158, 160 (2016) (merely citing law or regulation before an arbitrator does not thereby raise related arguments (citing *U.S. DHS, U.S. CBP*, 68 FLRA 829, 832 (2015)); *U.S. Dep't of VA, Bos. Healthcare Sys., Bos., Mass.*, 68 FLRA 116, 117 (2014) (finding agency failed to raise argument where agency's post-hearing brief only mentioned rules and regulations but did not explain how the rules and regulations specifically relate to the arbitrator's remedial powers or make the arguments raised before Authority).

¹⁰ *NATCA*, 72 FLRA at 300.

¹¹ Exception Br. at 1-4.

¹² *AFGE, Loc. 3954*, 72 FLRA 403, 404 (2021) (Member Abbott concurring) (citing *U.S. Dep't of the Interior, Bureau of Land Mgmt., Eugene Dist. Portland, Ore.*, 68 FLRA 178, 180 (2015) (*Interior*)).

¹³ *Id.* (citing *Interior*, 68 FLRA at 180).

¹⁴ *Id.* (citing *Interior*, 68 FLRA at 180-81).

¹⁵ 5 U.S.C. § 7121(c)(4); *U.S. Dep't of VA, James N. Quillen VA Med. Ctr., Mountain Home, Tenn.*, 69 FLRA 144, 145 (2015) (*VA Quillen*) (Member Pizzella dissenting in part on other grounds) (quoting 5 U.S.C. § 7121(c)(4)).

¹⁶ *VA Quillen*, 69 FLRA at 145 (citing *Suzal v. Dir., U.S. Info. Agency*, 32 F.3d 574, 580 (D.C. Cir. 1994) (*Suzal*) ("[W]e read the word 'appointment' . . . to refer only to initial appointments, not to reappointments."); *USDA, Rural Dev. Centralized Servicing Ctr., St. Louis, Mo.*, 57 FLRA 166, 168 (2001)); see also *Health Care Fin. Admin.*, 56 FLRA 156, 160 (2000) (citing *Suzal*, 32 F.3d at 580; *Brammer v. United States*, 24 Cl. Ct. 487, 492 (1991); *U.S. DOD, Dependent Schs., Kaiserslautern, Ger.*, 51 FLRA 210, 212 (1995); *Nat'l Council of Field Lab. Locs. of the AFGE, AFL-CIO*, 4 FLRA 376, 381 (1980)).

¹⁷ Exception Br. at 4; see also *id.* at 3.

¹⁸ See Award at 4, 9; see also Opp'n, Attach. 13 at 1 (2013 performance appraisal showing grievant was in federal service on December 19, 2010, which was before warrant issuance).

¹⁹ *E.g.*, *VA Quillen*, 69 FLRA at 145 (selection of employee already in federal service for vacancy does not concern an "appointment" within the meaning of 5 U.S.C. § 7121(c)(4)).

B. The backpay award is contrary to the Act.

The Agency argues that the award is contrary to the Act because “the grievant did not sustain a withdrawal or reduction of pay, allowance, or differentials.”²⁰ An award of backpay is authorized under the Act when an arbitrator finds, in relevant part, that an unjustified and unwarranted personnel action resulted in the withdrawal or the reduction of a grievant’s pay, allowances, or differentials.²¹ Here, the Arbitrator did not find that the grievant suffered a reduction of pay, and the Union concedes that there is no backpay at issue.²² Therefore, to the extent that the award directs the Agency to pay backpay, it is contrary to law and we set aside the backpay portion of the remedy.²³

V. **Decision**

We dismiss the exception, in part, deny the exception, in part, and grant it, in part. And we set aside the backpay portion of the award as contrary to law.

²⁰ Exception Br. at 10.

²¹ *U.S. Dep’t of VA, Consol. Mail Outpatient Pharmacy, Leavenworth, Kan.*, 72 FLRA 455, 456 (2021) (*VA Leavenworth*) (Chairman DuBester concurring) (citations omitted).

²² Opp’n Br. at 11.

²³ *VA Leavenworth*, 72 FLRA at 457 (finding award contrary the Act where arbitrator did not find that unwarranted personnel action resulted in a loss of income).