

74 FLRA No. 35

UNITED STATES
DEPARTMENT OF THE ARMY
KENTUCKY NATIONAL GUARD
THE ADJUTANT GENERAL,
COMMONWEALTH OF KENTUCKY
(Agency)

and

ASSOCIATION OF
CIVILIAN TECHNICIANS
KENTUCKY LONG RIFLE CHAPTER
(Union)

0-AR-5896

DECISION

March 12, 2025

Before the Authority: Colleen Duffy Kiko, Chairman,
and Anne Wagner, Member

I. Statement of the Case

The Union filed a grievance alleging that the Agency acted arbitrarily and capriciously by not using the grievant's promotion date as the effective date for the grievant's retention incentive. Arbitrator James M. Cooney issued an award sustaining the grievance and finding that the Agency violated the Administrative Procedure Act (APA)¹ when setting the retention incentive's effective date. In its exception to the award, the Agency argues the Arbitrator's conclusion that the Agency acted arbitrarily and capriciously is contrary to the APA. For the following reasons, we agree. Therefore, we grant the exception and set aside the award.

II. Background and Arbitrator's Award

The grievant received a retention incentive while working as an aircraft mechanic at the Agency's Army Aviation Support Facility. On December 4, 2021, the Agency terminated the grievant's retention incentive. Then, on December 5, 2021, the Agency promoted the

grievant to a quality assurance specialist. Following the promotion, the Union asked the Agency to reinstate the grievant's retention incentive because, in the Union's estimation, the grievant qualified for such incentive in his new position. The Kentucky Adjutant General approved the grievant for a retention incentive on March 15, 2022, and the Agency began paying the incentive during the next pay period.

Thereafter, the Union requested that the Agency retroactively pay the grievant's retention incentive from the promotion date, December 5, 2021, to March 15, 2022. According to the Union, a 2018 Agency memorandum authorizing retention incentives for quality assurance specialists entitled the grievant to receive the incentive immediately upon encumbering that position. The Agency denied the request for retroactive incentive pay and, in response, the Union filed a grievance. The Agency denied the grievance, and the matter proceeded to arbitration.

At arbitration, the parties did not stipulate to an issue. In framing the pertinent issue for resolution, the Arbitrator found it undisputed that the Agency had "considered the required regulatory criteria" and had determined that the grievant was "eligible" for a retention incentive.² Therefore, the Arbitrator stated the pertinent issue as "whether the Agency improperly refused to use [the g]rievant's December 5, 2021 promotion date as the effective date of [the grievant's] retention incentive."³

Before the Arbitrator, the Agency argued that 5 C.F.R. § 575.306 authorized setting an effective date later than December 5, 2021. Under § 575.306(a), the Agency "retains sole and exclusive discretion, subject only to [Office of Personnel Management (OPM)] review and oversight" to, as relevant here, "[a]pprove a retention incentive for an employee."⁴ Additionally, § 575.306(b) lists factors that "[a]n agency must consider" when assessing whether a retention incentive is necessary to retain an employee or group of employees.⁵ In support of its § 575.306 argument, the Agency cited OPM interpretive guidance stating that an agency's authorized official "must review and approve" a retention incentive "before the agency pays the incentive to the employee."⁶

Addressing the Agency's argument, the Arbitrator found "no language" in § 575.306 "mandat[ing] the setting of any specific effective dates" or "prohibit[ing] using an employee's prior promotion date as the effective date for an incentive."⁷ Further, the Arbitrator determined the OPM guidance required only that the Agency evaluate

¹ See 5 U.S.C. § 706.

² Award at 13.

³ *Id.*

⁴ 5 C.F.R. § 575.306(a)(3).

⁵ *Id.* § 575.306(b).

⁶ Exception, Ex. 30, OPM, *Retention Incentives likely to leave the Federal service* (OPM Fact Sheet), <https://www.opm.gov/policy-data-oversight/pay-leave/recruitment-relocation-retention-incentives/fact-sheets/retention-incentives-likely-to-leave-the-federal-service/>, (last visited March 11, 2025).

⁷ Award at 13.

the § 575.306(b) criteria before approving the grievant's retention incentive, which the Agency did. In this regard, the Arbitrator found that the OPM guidance permitted the Agency to pay an "incentive retroactive[ly] to coincide with a promotion date," once the Agency completed the required regulatory review.⁸

Ultimately, the Arbitrator concluded that the Agency failed to "cite[] any statute, regulation, policy, or contractual provision that prohibit[ed]" paying the grievant's retention incentive for the December 5, 2021 to March 15, 2022 period.⁹ On this basis, the Arbitrator found that the Agency's actions were "arbitrary, capricious, an abuse of discretion, and therefore in violation of" § 706(2)(A) of the APA.¹⁰ As a result, the Arbitrator sustained the grievance, awarded backpay, directed the Agency to pay seventy-five percent of the parties' arbitration fees, and retained jurisdiction to consider a petition for attorney fees.

The Agency filed an exception to the award on June 20, 2023, and the Union filed an opposition on July 18, 2023.

III. Analysis and Conclusion: The award is inconsistent with the APA.

Citing its reliance on § 575.306 and related OPM guidance to justify its actions, the Agency argues that the award is contrary to law.¹¹ According to the Agency, the Arbitrator's conclusion that the Agency violated the APA is unlawful in the absence of any "statut[ory] or regulatory guidance" requiring the Agency to retroactively pay the retention incentive to align with the grievant's promotion date.¹² When an exception challenges an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.¹³ 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.¹⁴

Section 706(2)(A) of the APA provides that reviewing courts shall "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, [or] an abuse of discretion."¹⁵ "Arbitrary and capricious review, at its core, measures if an agency action was irrational."¹⁶ To survive arbitrary-and-capricious review under § 702(2)(A) of the APA, "an agency action must be the product of reasoned decisionmaking."¹⁷ This standard of review is "highly deferential, with a presumption in favor of finding the agency action valid."¹⁸ In applying arbitrary-and-capricious review, a reviewing court decides "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."¹⁹ As neither party disputes that § 706(2)(A) applies to a grievance arbitrated under the parties' negotiated grievance procedure, we assume, for purposes of this decision, that it does.²⁰

⁸ *Id.* at 14.

⁹ *Id.*

¹⁰ *Id.* The pertinent wording of § 706(2)(A) is set forth below.

¹¹ Exception at 4.

¹² *Id.*

¹³ *AFGE, Loc. 506*, 74 FLRA 201, 202 (2025) (citing *U.S. DOJ, Fed. BOP, U.S. Penitentiary McCreary, Pine Knot, Ky.*, 73 FLRA 865, 867 (2024)).

¹⁴ *Id.*

¹⁵ 5 U.S.C. § 706(2)(A).

¹⁶ *Mandan, Hidatsa & Arikara Nation v. U.S. Dep't of the Interior*, 95 F.4th 573, 579 (8th Cir. 2024) (citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (*State Farm*)).

¹⁷ *Fox v. Clinton*, 684 F.3d 67, 74-75 (D.C. Cir. 2012).

¹⁸ *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 753 (4th Cir. 2019) (quoting *Ohio Valley Env't Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009)); see also *Ass'n of Civilian Technicians, Ky. Long Rifle Chapter 83*, 73 FLRA 812, 814 n.30 (2024) (*ACT*) ("As the Authority has recently recognized, the standard that courts use to assess whether an agency action is arbitrary and capricious under [§] 706(2)(A) is

'highly deferential,' and an agency's action is presumed valid if a rational basis for the action exists." (quoting *U.S. DOL, Off. of Lab. Mgmt. Standards, Div. of Enf't, Tracy Shanker, Chief*, 73 FLRA 573, 577 (2023))). We note that, in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) (*Loper Bright*), the U.S. Supreme Court held that "courts must exercise independent judgment in determining the meaning of statutory provisions." *Id.* at 394. However, post-*Loper Bright*, courts continue to apply the deferential arbitrary-and-capricious standard in cases that do not involve disputes about the meaning of statutory language. See, e.g., *Airlines for Am. v. Dep't of Transp.*, 127 F.4th 563, 579 n.13 (5th Cir. 2025). As the case before us does not involve a dispute regarding the meaning of a statutory provision, we find that the deferential arbitrary-and-capricious standard applies here.

¹⁹ *State Farm*, 463 U.S. at 43 (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys.*, 419 U.S. 281, 285 (1974)) (internal quotation mark omitted).

²⁰ See *ACT*, 73 FLRA at 814 (where "neither party raise[d] the extent to which [§] 706(2)(A) is properly applied in an arbitral context," the Authority "d[id] not address that matter").

Here, the Arbitrator required the Agency to identify authority barring it from retroactively paying the grievant's retention incentive.²¹ Finding that the Agency had "not cited any statute, regulation, policy, or contractual provision that *prohibits* the setting of a retroactive effective date for payment of a retention incentive," the Arbitrator concluded that the Agency's actions were "arbitrary, capricious, an abuse of discretion, and therefore in violation of" the APA.²² But whether the Agency *could* have effectuated the retention incentive on the grievant's preferred date, December 5, 2021, is not the relevant question in assessing whether the Agency acted arbitrarily and capriciously within the meaning of the APA. Rather, the sole issue for the Arbitrator to resolve was whether the Agency's decision to pay the grievant's retention incentive effective March 15, 2022 was the product of reasoned decisionmaking.

At arbitration, the parties did not dispute that the governing regulation, 5 C.F.R. § 575.306, "sets forth specified criteria" that an agency must consider "prior to authorizing a retention incentive for an individual employee."²³ However, there is no dispute that § 575.306 does not describe how an agency is to calculate the effective date for a retention incentive once approved. OPM's interpretive guidance is also silent on this subject, providing only that an employee may not receive a retention incentive until an "authorized agency official" first "review[s] and approve[s] the retention[-]incentive determination."²⁴ The Agency interpreted § 575.306's and the guidance's silence on the timing of retention incentives as authorizing it to effectuate the grievant's retention incentive only after the Adjutant General's review and final approval. Accordingly, the Agency promptly effectuated the retention incentive in the first pay period following that approval. Although the Arbitrator concluded that the Agency's cited authorities did not "*prohibit*[]" the setting of a retroactive effective date,"²⁵ it

is equally true that those authorities did not "*mandate*[]" the setting of any specific effective dates for payment of incentives."²⁶ The Arbitrator's finding that the Agency "misapplied" § 575.306 and OPM guidance²⁷ in choosing an effective date – absent a requirement that the Agency select a particular date – does not demonstrate that the Agency acted arbitrarily or capriciously under § 706(2)(A).²⁸

In its opposition, the Union claims that the Agency considered an "irrelevant and impermissible" factor by using the "paperwork approval date" in determining when to begin paying the grievant's incentive.²⁹ Contrary to the Union's claim, the OPM guidance expressly states that an "authorized agency official must review and approve the retention[-]incentive determination *before* the agency pays the incentive to the employee."³⁰ The Union also asserts that the 2018 retention-incentive memorandum, which authorizes specific positions and employees to receive retention incentives, "entitled [the grievant] to a retention incentive *upon becoming*" a quality assurance specialist.³¹ However, the Union does not explain how – and the Arbitrator did not find that – the memorandum required the Agency to make incentive payments retroactive to an employee's promotion to a qualifying position. In sum, the Union's mere disagreement with the Agency's decision provides no basis for finding that the Agency acted arbitrarily and capriciously within the meaning of the APA.³²

For these reasons, we find the Arbitrator erred, as a matter of law, in finding that the Agency acted arbitrarily and capriciously within the meaning of the APA.³³

²¹ Award at 14.

²² *Id.* (emphasis added).

²³ *Id.* at 13.

²⁴ OPM Fact Sheet at 1.

²⁵ Award at 14 (emphasis added).

²⁶ *Id.* at 13 (emphasis added).

²⁷ *Id.* at 14.

²⁸ See *LaRouche's Comm. for a New Bretton Woods v. FEC*, 439 F.3d 733, 739 (D.C. Cir. 2006) (finding agency's action was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under APA, where petitioner "did not carry its burden of showing that" agency "failed to consider relevant factors or made a clear error in judgment" (internal quotation marks omitted)); see also *Atieh v. Riordan*, 797 F.3d 135, 138 (1st Cir. 2015) (holding that a reviewing body "may not substitute its judgment for that of the agency, even if it disagrees with the agency's conclusions" (quoting *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 114 (1st Cir. 2009) (internal quotation marks omitted))).

²⁹ Opp'n Br. at 2-3.

³⁰ OPM Fact Sheet at 1 (emphasis added).

³¹ Opp'n Br. at 3.

³² See *Cal. by & through Becerra v. Azar*, 950 F.3d 1067, 1102 (9th Cir. 2020) (rejecting argument that agency relied arbitrarily on certain authorities as "little more than [a] claim that [the agency] should have adopted plaintiffs' preferred regulatory approach"); see also *Fed. Energy Regul. Comm'n v. Elec. Power Supply Ass'n*, 577 U.S. 260, 292 (2016) (holding that when applying the APA's arbitrary-and-capricious standard, "[a] court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives").

³³ See *AFGE, Loc. 3954*, 73 FLRA 39, 44 (2022) (finding award contrary to law, in part, where arbitrator's findings "d[id] not satisfy" statutory standard, and "[a]rbitrator made no additional findings that would satisfy the . . . standard"); *U.S. Dep't of the Treasury, U.S. Customs Serv., Port of N.Y. & Newark*, 57 FLRA 718, 720-21 (2002) (setting aside portion of award where arbitrator's misapplication of applicable statutory authority was fatal to his legal conclusion).

Accordingly, we grant the Agency's exception and set aside the award.³⁴

IV. Decision

We grant the Agency's contrary-to-law exception and set aside the award.

³⁴ Because we have set aside the award as contrary to § 706(2)(A) of the APA, we need not address the Agency's remaining contrary-to-law argument. Exception at 4 (arguing award is contrary to the Agency's "sole[-]and[-]exclusive discretion" under 5 C.F.R. § 575.306(a)); see *NLRB Pro. Ass'n*, 73 FLRA 50, 53 n.44 (2022) (finding it unnecessary to address additional arguments after setting aside award based on one argument).