

73 FLRA No. 145

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 2338  
(Union)

and

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
JOHN J PERSHING VA MEDICAL CENTER  
POPLAR BLUFF, MISSOURI  
(Agency)

0-AR-5906

DECISION

December 11, 2023

Before the Authority: Susan Tsui Grundmann,  
Chairman, and Colleen Duffy Kiko, Member

## I. Statement of the Case

An employee (the grievant) filed a grievance alleging the Agency violated the parties' agreement and law by discriminating against the grievant based on a disability and by retaliating against him for his union activity. The parties informally resolved several issues, while others went to arbitration. Arbitrator Elizabeth C. Simon issued an award limited to any remaining, unresolved claims for compensation, which she denied. The Union filed exceptions, alleging: (1) the award is ambiguous or contradictory, is contrary to law, and fails to draw its essence from the parties' agreement; and (2) the Arbitrator exceeded her authority. For the reasons explained below, we deny the exceptions.

## II. Background and Arbitrator's Award

The grievant informed his supervisor that he was scheduled to have surgery on April 2, 2021,<sup>1</sup> and a second surgery approximately six to twelve weeks later. He asked the supervisor to approve a temporary telework agreement at least through the date of the second surgery, and until any medical restrictions were lifted. He also requested one week of official time for the week following his first surgery – the week of April 5.

The grievant's physician released the grievant for work on Monday, April 5, with restrictions. On April 7 – after being informed that the grievant was at another location, meeting with an employee who requested union assistance – the supervisor sent the grievant a note asking him why he was not at work. On April 9, the supervisor denied the grievant's telework request, stating that his job duties required him to work onsite but that the Agency would provide an interim, onsite accommodation. Upon checking his leave and earnings statement, the grievant learned that the supervisor had denied his official-time request and marked him absent without leave (AWOL), and that the Agency did not compensate him for the dates on which he was marked as AWOL.

Also on April 9, the grievant filed a "Step 3 grievance," alleging the Agency discriminated against him because of his medical condition and as retaliation for union activity.<sup>2</sup> The grievance requested: removal of the AWOLs from the grievant's personnel record, and repayment for time lost; approval of a temporary telework agreement; financial compensation for the actions to which he was allegedly subjected; and discipline of his supervisor.

The parties engaged in informal discussions to resolve the grievance. On May 17, the Agency: signed a temporary telework agreement for the grievant; reimbursed him for an additional seventy-two hours of pay, for the pay period ending April 24; and corrected his leave and earning statements to remove the AWOLs. The grievant also requested that the Agency pay him: (1) interest on backpay; and (2) approximately \$12,000 for assets he allegedly sold – on April 15, 17, and 23 – to earn money during the time when he lost pay. The grievant provided the Agency with a spreadsheet that allegedly summarized the asset sales, but later sent the Agency a second spreadsheet and acknowledged the first spreadsheet was incorrect.

The Agency denied the requests for those additional remedies, and the Union invoked arbitration. In her award, the Arbitrator stated: "[T]he Union conceded that only two narrowly-defined issues remained," dealing "solely with whether [the grievant] was entitled to compensation in addition to what he received as part of the grievance[-]resolution process."<sup>3</sup> The parties did not stipulate the issues, and the Arbitrator framed the relevant issues as whether "the Agency wrongfully withh[e]ld compensation due to the [g]rievant related to his claims of discrimination, denial of a reasonable accommodation[,] and retaliation arising out of his . . . grievance" and, "if so, what is the proper remedy."<sup>4</sup>

<sup>1</sup> All dates are 2021, unless otherwise stated.

<sup>2</sup> Award at 3.

<sup>3</sup> *Id.* at 10.

<sup>4</sup> *Id.* at 2.

Addressing those issues, the Arbitrator found the Union “failed to establish that [the grievant was] entitled to compensation over and above what he received in 2021 as part of the grievance[-]resolution process.”<sup>5</sup> In this regard, the Arbitrator stated that a “prerequisite to recovery under the Back Pay Act [(the Act)] is an administrative determination (which includes a decision related to a grievance) that there was ‘an unjustified or unwarranted personnel action’ which resulted in a reduction of pay, allowances[,] or differentials of the employee.”<sup>6</sup> Although the Union “[s]ought such a finding,” the Arbitrator stated that making such a finding “would undermine the language and intent of the grievance procedure outlined in Article 43.”<sup>7</sup> In this connection, she found Article 43, Section 1 (Section 1) provides that the primary intent of the parties’ negotiated grievance procedure is “to provide a mutually acceptable method for prompt and equitable settlement of grievances.”<sup>8</sup> She also found Article 43, Section 6 (Section 6) reinforces that intent by stating “every effort will be made to settle grievances at the lowest possible level.”<sup>9</sup> According to the Arbitrator, the Agency attempted to comply with those provisions by “promptly and equitably” granting most of the grievant’s requested remedies.<sup>10</sup>

By contrast, she found the Union did not attempt to comply with those provisions. The Arbitrator stated that,

[although] the Union certainly had a right to carry the remaining unresolved portions of the grievance forward to arbitration, that does not mean it is entitled to a finding of retaliation or discrimination when the specific Agency actions [the grievant] complained of were addressed and the remaining allegations are conclusory and unsupported by evidence.<sup>11</sup>

In this regard, the Arbitrator found there were “no outstanding [backpay] issues and no legal authority under

the . . . Act or the [parties’ agreement] that would support the type of compensatory damages” the grievant sought.<sup>12</sup>

The Arbitrator also determined that “significant credibility issues” undermined the grievant’s claims.<sup>13</sup> The Arbitrator found the request for interest was “unsupported by verifiable calculations or a final administrative decision.”<sup>14</sup> With regard to reimbursement for sale of his assets, the Arbitrator expressed skepticism about the grievant’s claim that he was “forced to sell [those] assets to assure that there was sufficient food to feed his family.”<sup>15</sup> Further, the Arbitrator found the grievant failed to provide the Agency with credible documentation verifying the asset sales, “especially considering [his] written admission . . . that the first spreadsheet he sent . . . was incorrect.”<sup>16</sup> Accordingly, the Arbitrator denied the grievance.

The Union filed exceptions to the award on July 21, 2023, and the Agency filed an opposition on August 9, 2023.

### III. Analysis and Conclusions

A. The Union fails to support its ambiguous-and-contradictory exception.

The Union claims the award is “ambiguous and contradictory.”<sup>17</sup> However, the Union provides no supporting arguments for this claim. Section 2425.6(e)(1) of the Authority’s Regulations states that an exception “may be subject to . . . denial if . . . [t]he excepting party fails to . . . support” the exception.<sup>18</sup> As the Union’s claim is unsupported, we deny it under § 2425.6(e)(1).<sup>19</sup>

B. The award is not contrary to the Act.

The Union argues the Arbitrator “issued an award contrary to what the . . . Act prescribes.”<sup>20</sup> Specifically, the Union contends that the Agency admitted committing unjustified or unwarranted personnel actions, and that the

<sup>5</sup> *Id.* at 10.

<sup>6</sup> *Id.* (quoting 5 U.S.C. § 5596).

<sup>7</sup> *Id.*

<sup>8</sup> Exceptions, Attach. 11, Collective-Bargaining Agreement (CBA) at 228.

<sup>9</sup> *Id.* at 230.

<sup>10</sup> Award at 11.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (noting that the alleged asset sale concerned significantly more money than the lost pay, took place before some of the Agency’s alleged violations, and that the grievant was not without his pay for long as the Agency promptly reimbursed him).

<sup>16</sup> *Id.*

<sup>17</sup> Exceptions Br. at 8.

<sup>18</sup> 5 C.F.R. § 2425.6(e)(1).

<sup>19</sup> See *U.S. Dep’t of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 498, 500 (2023) (*Poplar Bluff*) (denying exceptions under § 2425.6(e)(1) when the party failed to provide supporting arguments).

<sup>20</sup> Exceptions Br. at 17; see also *id.* at 16 (stating that the Arbitrator “decided to refuse to comply with the statutory requirements under the . . . Act”).

Arbitrator found the Agency committed the actions alleged in the grievance.<sup>21</sup>

The Authority resolves questions of law raised by arbitration exceptions de novo.<sup>22</sup> In applying a standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law, based on the underlying factual findings.<sup>23</sup> In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are based on nonfacts.<sup>24</sup>

Under the Act, entitlement to backpay requires a finding that an agency committed an unjustified or unwarranted personnel action, such as by violating the law or a collective-bargaining agreement.<sup>25</sup> The Arbitrator expressly declined to find an unjustified or unwarranted personnel action, and she made no finding that the Agency conceded it committed such an action. Therefore, the Union's arguments provide no basis for finding the award contrary to the Act, and we deny the contrary-to-law exception.

C. The Arbitrator did not exceed her authority.

The Union argues the Arbitrator exceeded her authority by failing to resolve its claims of discrimination, denial of reasonable accommodation, retaliation, and anti-union animus, which the Union asserts were "brought forward during the . . . grievance and during the . . . hearing."<sup>26</sup> Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration.<sup>27</sup> When parties do not stipulate to the issues, arbitrators have the discretion to frame them,<sup>28</sup> and the Authority accords the arbitrator's formulation substantial deference.<sup>29</sup> Where an arbitrator has framed the issues, the Authority examines only whether the award is directly responsive to the issues as framed by the arbitrator.<sup>30</sup>

The parties did not stipulate to the issue, so the Arbitrator framed them and limited her award to considering only whether the Agency wrongfully withheld compensation from the grievant.<sup>31</sup> In fact, the Arbitrator found the Union "conceded" the only remaining issues to be resolved were the claims for interest and reimbursement.<sup>32</sup> The award directly responds to the issues as the Arbitrator framed them.<sup>33</sup> Therefore, the Union's argument provides no basis for finding the Arbitrator exceeded her authority.<sup>34</sup>

The Union also claims the Arbitrator exceeded her authority by failing to comply with the Act's requirements.<sup>35</sup> This claim raises the same issues as the Union's contrary-to-law argument, which we rejected above. As such, we do not separately address the merits of this exceeded-authority argument.<sup>36</sup>

We deny the exceeded-authority exception.<sup>37</sup>

<sup>21</sup> Exceptions Br. at 16-17.

<sup>22</sup> *AFGE, Loc. 3184*, 73 FLRA 715, 716 (2023).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *NFFE, Loc. 1998*, 73 FLRA 143, 145 n.24 (2022).

<sup>26</sup> Exceptions Br. at 14-20.

<sup>27</sup> *AFGE, Loc. 2338*, 73 FLRA 522, 523 (2023) (*Loc. 2338 I; Fraternal Ord. of Police, DC Lodge 1*, 73 FLRA 408, 411 (2023) (*Police*)).

<sup>28</sup> *Loc. 2338 I*, 73 FLRA at 523; *Police*, 73 FLRA at 411.

<sup>29</sup> *Loc. 2338 I*, 73 FLRA at 523.

<sup>30</sup> *Id.*

<sup>31</sup> Award at 2.

<sup>32</sup> *Id.* at 10.

<sup>33</sup> See *id.* at 10-11 (explaining her finding that "the Union has failed to establish that [the grievant] is entitled to compensation over and above what he received in 2021 as part of the grievance resolution process").

<sup>34</sup> See, e.g., *Loc. 2338 I*, 73 FLRA at 523.

<sup>35</sup> Exceptions Br. at 16.

<sup>36</sup> See *U.S. Dep't of VA, Bos. Healthcare Sys., Bos., Mass.*, 68 FLRA 116, 119 (2014) ("Because this claim raises the same issues as the contrary-to-law exception that we denied above, the Authority need not address the merits of this [exceeded-authority] exception separately."):

<sup>37</sup> The Union also claims the award is deficient on "other grounds" because the Arbitrator failed to address the issue of anti-union animus. Exceptions Form at 7-8. Because this exception merely restates portions of the Union's exceeded-authority exception, rejected above, we deny it. See *AFGE, Nat'l Council of Field Lab. Locs.*, 71 FLRA 1180, 1182 n.26 (2020) (denying exception claiming the award was deficient on "other grounds not listed in the Authority's Regulations" because it was premised on exceptions the Authority had already denied).

- D. The award draws its essence from the parties' agreement.

The Union argues that, for several reasons, the award fails to draw its essence from the parties' agreement.<sup>38</sup> The Authority will find an arbitration award fails to draw its essence from a collective-bargaining agreement when the appealing party establishes 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.<sup>39</sup>

The Union challenges the Arbitrator's statement that finding an unjustified or unwarranted personnel action would undermine the language and intent of Article 43, including Sections 1 and 6.<sup>40</sup> According to the Union, the Arbitrator found the Agency admitted to and took unjustified and unwarranted personnel actions, and, "[t]herefore," the Arbitrator erred "by utilizing Article 43 . . . in an attempt to circumvent the Union from bringing unresolved issues in front of the [A]rbitrator."<sup>41</sup> In this regard, the Union contends Article 43 "is supposed to be utilized prior to moving a case in front of an arbitrator," but "[o]nce the case is in front of the arbitrator, Article 44 of the . . . [a]greement applies."<sup>42</sup>

As an initial matter, contrary to the Union's claim, the Arbitrator did *not* find the Agency admitted to or took unjustified personnel actions against the grievant; in fact, she expressly declined to find an unjustified or unwarranted personnel action.<sup>43</sup> Further, the Arbitrator did *not* rely on Article 43 to preclude the Union from bringing any unresolved issues to arbitration; in fact, she expressly stated that "the Union certainly had a right to carry the remaining unresolved portions of the grievance forward to arbitration."<sup>44</sup> However, she then found the "remaining allegations [were] conclusory and unsupported by evidence."<sup>45</sup> Further, the Union does not cite any specific provisions of Article 44 or explain how the award fails to draw its essence from that article.<sup>46</sup> Therefore, we reject these arguments.

In addition, citing Sections 1 and 6, the Union asserts that, "if the matter moves to arbitration[,] the merits should be ruled on regardless of the procedural issues."<sup>47</sup> The Union also contends that "this has been ruled on a variety of times," and cites another arbitrator's award as an example.<sup>48</sup>

Sections 1 and 6 pertinently provide, respectively, that: (1) the purpose of the parties' negotiated grievance procedure "is to provide a mutually acceptable method for prompt and equitable settlement of grievances";<sup>49</sup> and (2) "[t]he parties agree that every effort will be made to settle grievances at the lowest possible level."<sup>50</sup> Nothing in either Section 1 or Section 6 states that the merits of a grievance must be ruled on "regardless of the procedural issues."<sup>51</sup> Moreover, the Union's reliance on another arbitrator's award is misplaced, as arbitration awards are non-precedential.<sup>52</sup> Thus, we also reject these arguments.

Finally, the Union claims that Articles 43 and 44 set out an informal, "lay person's process,"<sup>53</sup> and that the agreement does not impose specific evidentiary requirements on the parties.<sup>54</sup> According to the Union, by rejecting the Union's claims as unsupported, the Arbitrator "inserted . . . new requirement[s] regarding evidence" into the agreement,<sup>55</sup> and those requirements "directly conflict[]" with the agreement.<sup>56</sup> For support, the Union cites Section 1<sup>57</sup> as well as Article 43,

<sup>38</sup> Exceptions Br. at 8-14.

<sup>39</sup> *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Victorville, Cal.*, 73 FLRA 624, 625-26 (2023).

<sup>40</sup> Exceptions Br. at 8-9.

<sup>41</sup> *Id.* at 9.

<sup>42</sup> *Id.*

<sup>43</sup> Award at 10.

<sup>44</sup> *Id.* at 11.

<sup>45</sup> *Id.*

<sup>46</sup> Article 44 is the "Arbitration" provision of the parties' agreement. CBA at 234.

<sup>47</sup> Exceptions Br. at 13.

<sup>48</sup> *Id.*

<sup>49</sup> CBA at 228.

<sup>50</sup> *Id.* at 230.

<sup>51</sup> Exceptions Br. at 13.

<sup>52</sup> *AFGE, Loc. 2338*, 73 FLRA 510, 512 (2023) (*Loc. 2338 II*).

<sup>53</sup> Exceptions Br. at 9.

<sup>54</sup> *Id.* at 10.

<sup>55</sup> *Id.* at 11.

<sup>56</sup> *Id.* at 10.

<sup>57</sup> *Id.* at 13. The pertinent wording of Section 1 is set forth above.

Sections 2.A.,<sup>58</sup> 7.A.,<sup>59</sup> and 7.B. (through Step 2 of the grievance procedure).<sup>60</sup> According to the Union, Articles 43 and 44 do not “require[] the Union to have an attorney represent them at a grievance meeting nor at arbitration.”<sup>61</sup>

Nothing in the cited provisions of Article 43 precluded the Arbitrator from rejecting the Union’s claims as unsupported, and there is no basis for finding the Arbitrator improperly added evidentiary requirements to the parties’ agreement. Further, the Arbitrator did not find

that either Article 43 or Article 44 required the Union to have an attorney present during the grievance-arbitration process. Therefore, we reject these arguments as well.

None of the Union’s arguments demonstrate the award is irrational, unfounded, implausible, or in manifest disregard of the parties’ agreement. Accordingly, we deny the essence exception.<sup>62</sup>

<sup>58</sup> See Exceptions Br. at 9, 11-12. Article 43, Section 2.A. provides:

A grievance means any complaint by an employee(s) or the Union concerning any matter relating to employment, any complaint by an employee, the Union, or the [Agency] concerning the interpretation or application of this Agreement and any supplements or any claimed violation, misinterpretation or misapplication of law, rule, or regulation affecting conditions of employment. The Union may file a grievance on its own behalf, or on behalf of some or all of its covered employees.

CBA at 228.

<sup>59</sup> See Exceptions Br. at 12. Article 43, Section 7.A. provides:

Grievance meetings under this procedure will be face-to-face at the location of the grievant. By mutual agreement, the parties to the grievance may agree to teleconference the grievance meeting. The Union is entitled to have an equal number of representatives at all steps of the grievance procedure as the [Agency].

CBA at 230.

<sup>60</sup> See Exceptions Br. at 12-13. The Union does not cite Steps 3 and 4 of the grievance procedure. The cited portions of Article 43, Section 7.B. provide:

Employees and/or their representatives are encouraged to informally discuss issues of concern to them with their supervisors at any time. Employees and/or their representatives may request to talk with other appropriate officials about items of concern without filing a formal grievance if they choose. In the event of a formal filing of a grievance, the following steps will be followed.

*Step 1.*

An employee and/or the Union shall present the grievance to the immediate or acting supervisor, in writing, within [thirty] calendar days of the date that the employee or Union became aware, or should have become aware, of the act or occurrence; or, anytime if the act or occurrence if of a continuing nature. The immediate or acting supervisor will make every effort to resolve the grievance immediately but must meet with the employee/representative and provide a written answer within [fourteen] calendar days of receipt of the grievance. If there is to be more than one [Agency] official involved in the grievance meeting, the Union will be so notified in advance.

*Step 2.*

If the grievance is not satisfactorily resolved at Step 1, it shall be presented to the Service/Division Chief, or other equivalent [Agency] official or designee within seven calendar days of the Step 1 supervisor’s written decision letter. The recipient of the grievance shall sign and date the grievance. The Step 2 grievance must state, in detail, the basis for the grievance and the corrective action desired. If there is to be more than one [Agency] official involved in the grievance meeting, the Union will be so notified in advance. The Step 2 official will provide the Step 2 answer within [ten] calendar days from receipt of the grievance.

CBA at 230-31.

<sup>61</sup> Exceptions Br. at 9.

<sup>62</sup> See *Loc. 2338 II*, 73 FLRA at 512 (denying essence exception where it failed to demonstrate arbitrator’s award was irrational, unfounded, implausible, or in manifest disregard of agreement).

**IV. Decision**

We deny the Union's exceptions.