

63 FLRA No. 111

BREMERTON METAL TRADES COUNCIL
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND
AEROSPACE WORKERS
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
PUGET SOUND NAVAL SHIPYARD
INTERMEDIATE MAINTENANCE FACILITY
BREMERTON, WASHINGTON
(Agency)

0-AR-4192

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DECISION

May 19, 2009

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Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Harold G. Wren filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The grievance in this case challenged the Agency's failure to compensate the grievant at a higher rate of pay for a period of time during which he allegedly performed higher-graded duties. The Arbitrator found that the grievant did not meet all the qualifications and skills of the higher-graded position, and he denied the grievance. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Union filed a grievance claiming that since July 2001, the grievant, a WG-05 mechanic, had been performing the duties of a WG-08 mechanic, and that, although he had "been periodically rated up to that pay scale," the grievant "ha[d] not been properly or fully paid for his work." Award at 4. The grievance was unresolved and was submitted to arbitration.

At arbitration, the parties did not stipulate to the issues, and the Arbitrator did not expressly set forth the issues to be resolved. However, the Arbitrator stated that the Union's argument concerned the grievant's entitlement to a promotion from WG-05 to WG-08 because the grievant had performed a number of duties of the higher-graded position on a temporary basis. *See id.* at 13. At the hearing, several witnesses testified concerning the skills required to perform, for the WG-05 and the WG-08 positions, and as to whether the grievant had the skills and had performed the duties of the higher-graded position. Also at the hearing, one witness discussed a competency logbook for a "[s]hop 06M production machinery mechanic," which described a four-year apprenticeship program during which an apprentice learns his or her trade. *See id.* at 7. The Arbitrator found that the grievant did not possess all of the qualifications and skills required to perform the WG-08 position. As such, the Arbitrator concluded that the grievant was not entitled to a promotion to the WG-08 level.

III. Preliminary Issue

The Agency asserts that the Authority should dismiss the Union's exceptions because they are not self-contained. An exception must be a self-contained document that sets forth in full "arguments in support of the stated grounds, together with specific reference to the pertinent documents and citations of authorities[.]" 5 C.F.R. § 2425.2(c).

The Union has made it difficult for the Authority to discern the nature of the exceptions and what relief is sought by the Union. The exceptions assert that "the Union is not disagreeing with the [A]rbitrator's decision," but also that the Arbitrator was "wrong with the decision he brought forth" and that he "made numerous mistakes and misrepresentations in rendering his decision." Exceptions at 1, 2 and 6. The Union appears to request that the Authority review and correct the underlying arbitral *record*, which is not a relief that the Authority may grant. *See* 5 U.S.C. § 7122(a). For example, the Union asserts that "the record for this grievance needs to be set strai[gh]t," that certain evidence "should be stricken from the record," and requests that "corrections . . . be made to the information." Exceptions at 1, 3, 6. Despite these infirmities, we find that the Union's exceptions set forth arguments and include pertinent citations in support of some of its arguments. Accordingly, we find that the exceptions meet the requirements of 5 C.F.R. § 2425.2(c). *See, e.g., United States Geological Survey, Water Res. Div, Caribbean Dist.*, 57 FLRA 752 n.1 (2002) (citing *United States Dep't of Veterans Affairs, Fin. Ctr., Austin, Tex.*, 50 FLRA 73, 76 (1994)).

IV. Union's Exceptions

At the outset, and as set forth above, the Union asserts that it does not disagree with the Arbitrator's decision, but that it merely "wishes to point out" several errors that he made. Exceptions at 1. According to the Union, the Arbitrator relied on the competency logbook, and this reliance was "a violation of the Act" and of Article 5 and Article 38 of the "the [w]ritten [a]greement." *Id.* at 1-2.¹

Additionally, the Union claims that the Arbitrator erred by admitting evidence regarding a second, unrelated grievance as well as evidence regarding the classification of the WG-08 position. In addition, the Union challenges the Arbitrator's impeachment of a particular witness' testimony and how the Arbitrator handled other testimony offered at the hearing. The Union further claims that the Arbitrator made "several mistakes." *Id.* at 4. In this connection, the Union argues that the Arbitrator failed to understand the apprenticeship program and erroneously concluded that the Union was seeking a promotion for the grievant when, in fact, it was seeking compensation at the higher rate of pay for the times during which he had performed the duties of the WG-08 position.

V. Agency's Opposition

The Agency claims that the Union's argument regarding the logbook has no merit because the logbook was a document jointly submitted into evidence. The Agency also claims that the Union is attempting to relitigate the merits of the arbitration proceeding and that the issues raised by the Union concerning the admission of evidence lack merit because arbitrators have "liberal authority to admit all evidence and testimony needed." Opposition at 5. With regard to the Union's assertion that the Arbitrator made factual mistakes, the Agency argues that even if there were factual mistakes, the alleged mistakes would not have altered the Arbitrator's final conclusion.²

VI. Discussion

A. The award is not contrary to law.

The Union asserts that the Arbitrator's reliance on the competency logbook was "a violation of the Act[.]" We construe this assertion as a claim that the award is contrary to law. 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*. See *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. See *United States Dep't of Def., Dep'ts of the Army and the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. See *id.* However, where a party fails to specify the law on which that party is relying, the Authority will deny the exception. See *AFGE, Local 2128*, 59 FLRA 406, 407-08 (2003) (*Local 2128*).

The Union has not cited any law with which the award is alleged to conflict. Therefore, the Union provides no basis on which to find that the award is contrary to law. See *id.* As such, we deny this exception.

B. The award does not fail to draw its essence from the agreement.

We construe the Union's argument that the Arbitrator's reliance on the competency logbook violated Article 5 and Article 38 of the "written agreement," as a claim that the award fails to draw its essence from the agreement. Exceptions at 1-2. When reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that Federal courts use in reviewing arbitration awards in the private sector. See 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing 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

2. We note that the Agency also claims in its opposition that the grievance was not arbitrable because it involved the classification of the grievant's position. Although the Agency argued before the Arbitrator that the matter concerned a classification issue, the Arbitrator stated that it was unnecessary to address the Agency's argument because he "ha[d] no power to decide" and because of his finding that the "Agency was correct to reject the Union's grievance that the [g]rievant was entitled to be promoted. . . ." Award at 15. The Agency did not file exceptions to the award, and in any event, the issue before the Arbitrator was whether the grievant was entitled to a temporary promotion, not whether his position should be permanently reclassified. See, e.g., *United States Dep't of Housing and Urban Dev., La. State Office, New Orleans, La.*, 53 FLRA 1611 (1998) (grievance concerned temporary promotion, not classification). For these reasons, the Agency's claim in its opposition does not provide a basis for setting aside the award.

1. We were unable to find the content of Articles 5, paragraph 0501 and 38 in the record, and as discussed below, the Union has not provided a copy of that Article.

the wording and purposes of the collective bargaining 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. *See United States Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

The Union's statement regarding Articles 5 and 38 of the parties' agreement provides no explanation, or support for, any alleged violation of the provisions. In fact, the Union does not provide, and the record does not contain, the wording of these provisions. Accordingly, this claim amounts to nothing more than a bare assertion and provides no basis for finding the award deficient. *See, e.g., Dep't of the Interior, Nat'l Park Serv., Women's Rights Nat'l Historical Park, Northeast Region, Seneca Falls, N. Y.*, 62 FLRA 378 (2008). As such, we deny this exception.

C. The Arbitrator did not deny the parties a fair hearing.

We construe the Union's arguments regarding the Arbitrator's admission of evidence as allegations that the Arbitrator failed to provide a fair hearing. An award will be found deficient on the ground that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole. *See AFGE, Local 1668*, 50 FLRA 124, 126 (1995).

It is well established that an arbitrator has considerable latitude in conducting a hearing, and the fact that an arbitrator conducts a hearing in a manner that a party finds objectionable does not, by itself, provide a basis for finding an award deficient. *See AFGE, Local 22*, 51 FLRA 1496, 1497-98 (1996). In addition, the Authority has held that disagreement with an arbitrator's evaluation of evidence and testimony, including the determination of the weight to be accorded such evidence and testimony, provides no basis for finding the award deficient. *See AFGE, Local 3295*, 51 FLRA 27, 32 (1995). Further, the Authority has long held that the "liberal admission by arbitrators of testimony and evidence is a permissible practice." *United States Dep't of Defense, Def. Mapping Agency, Hydrographic/Topographic Ctr.*, 44 FLRA 103, 109 (1992).

Here, the Union does not assert, and nothing in the record indicates, that the admission of the evidence

related to the prior grievance and of witness testimony regarding the grievant's position classification resulted in any prejudice to the Union.

As such, these contentions do not demonstrate that the award is deficient. *See United States Dep't of Homeland Sec., United States Customs and Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 360 (2008) (award not deficient on ground that arbitrator failed to provide a fair hearing where excepting party fails to demonstrate that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party so as to affect the fairness of the proceeding as a whole). With regard to the Union's argument concerning the impeachment of a witness' testimony, as discussed above, arbitrators have significant discretion in admitting and evaluating evidence. *See AFGE, Local 22*, 51 FLRA at 1497-98.

As the Union has not demonstrated that the Arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced the Union as to affect the fairness of the proceeding as a whole, we find that the Union has not demonstrated that the Arbitrator failed to conduct a fair hearing. Accordingly, we deny the Union's exception. *See AFGE, Local 1668*, 50 FLRA 124, 126 (1995).

D. The award is not based on nonfacts.

To establish that an award is based on nonfacts, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.*

The Union claims that the Arbitrator failed to understand the apprenticeship program, as well as the remedy sought by the Union. Whether the Arbitrator erred in understanding the apprenticeship program, or misunderstood the fact that the grievant was seeking a higher rate of pay for a limited time period rather than a permanent promotion, that does not alter the fact that the Arbitrator found that the grievant did not meet the qualifications of the position for which the grievant sought the temporary promotion. Even assuming that the Arbitrator made the alleged factual errors, the Union has provided no basis for finding that the Arbitrator would have reached a different result but for those alleged errors. *See United States Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993).

As such, the Union has not demonstrated that the award is based on nonfacts, and we deny the exception.

VII. Decision

The Union's exceptions are denied.