70 FLRA No. 64

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2959
(Union)

and

UNITED STATES
SMALL BUSINESS ADMINISTRATION
LITTLE ROCK
COMMERCIAL LOAN SERVICING CENTER
(Agency)

0-AR-5258

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DECISION

August 8, 2017

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Before the Authority: Patrick Pizzella, Acting Chairman, and Ernest DuBester, Member

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the parties' agreement by not selecting the grievant for a position for which she applied. Arbitrator Mark L. Reed sustained the grievance, but did not award backpay under the Back Pay Act (BPA).[1] Moreover, the Arbitrator denied the Union's request for attorney fees.

The first question before us is whether the award's denial of backpay and attorney fees is based on a nonfact. Because the Union does not demonstrate that a central fact underlying the award is clearly erroneous, the answer is no.

The second question before us is whether the award's denial of attorney fees under the BPA is contrary to law. Because the grievant's non-selection for the position for which she applied did not result in the loss of pay, allowances, or differentials – one of the BPA's requirements for an award of attorney fees – the answer is no.

The third question before us is whether the Union supports its contrary-to-agency-regulation, public-policy, and essence exceptions. Because the Union fails to support these exceptions, the answer is no.

II. Background and Arbitrator's Award

The grievant – a general schedule (GS)-7 loan specialist at the Agency's loan-servicing center – applied for a GS-7 computer-assistant position (GS-7 position). The Agency's selecting official found that the grievant's resume contained inaccuracies and, for that reason, the official eliminated her from consideration for the position. The Agency selected another candidate (selectee) to fill the vacancy. In addition, the Agency reprimanded the grievant because she had false information on her resume.

It was later determined that the selectee's resume also contained inaccuracies, and that these inaccuracies could have been discovered during the selection process if the selecting officials had examined the selectee's resume as closely as they examined the grievant's.

The Union filed a grievance challenging the reprimand and the GS-7-position selection process, and invoked arbitration when the parties could not resolve the matter. At arbitration, as relevant here, the Arbitrator framed the issues as: (1) "Did the Agency violate the [parties' agreement] when it did not select the [g]rievant for the [GS-7 position]"; (2) "Did the [g]rievant embellish her resume"; and (3) "Did the Agency have just cause to issue the [g]rievant a [l]etter of [r]eprimand?"[2]

The Arbitrator determined that the Agency's "actions surrounding the non-selection of the [g]rievant for the . . . GS-[]7" position violated the parties' agreement.[3] The Arbitrator found it "ironic" that the selecting official went to great lengths to closely examine the grievant's resume for fictitious information, while overlooking fictitious information on the selectee's resume that was equally discoverable.[4] Further, the Arbitrator concluded that the Agency did not have just cause to discipline the grievant, and set aside the reprimand.

The Arbitrator then considered whether an award of backpay was appropriate under the BPA. Applying the BPA's two-part test, he concluded that the grievant was affected by "an unjustified personnel action" when the Agency violated the parties' agreement, satisfying the BPA's first requirement.[5] However, the Arbitrator also found that "the [g]rievant did not suffer a

[1] 5 U.S.C. § 5596.

[2] Award at 3.
[3] *Id.* at 16.
[4] *Id.*
[5] *Id.*; *see also* 5 U.S.C. § 5596(b)(1).

loss in pay" because the GS-7 "position was a lateral transfer."[6] The Arbitrator therefore did not award backpay, and also denied attorney fees because such an award would "not [be] in conjunction with an award of backpay."[7]

The Union filed exceptions to the Arbitrator's award. The Agency filed an opposition to the Union's exceptions.

III. Preliminary Matter: The Union's exceptions are timely.

The Authority's Office of Case Intake and Publication issued an order to show cause why the Union's exceptions should not be dismissed as untimely.[8]

The time limit for filing exceptions to an arbitration award is thirty days "after the date of service of the award."[9] The date of service is the date that the arbitration award is deposited in the U.S. mail, delivered in person, deposited with a commercial delivery service or, in the case of email or fax transmissions, the date transmitted.[10] Absent evidence to the contrary, an arbitration award is presumed to have been served by mail on the date of the award.[11]

On the Union's exceptions form, filed January 31, 2017, the Union states that it received the award by email on January 1, 2017.[12] But the award is dated December 31, 2016,[13] and the Union's exceptions brief states that the Union is "submit[ting] its exceptions to the December 31, 2016, [a]ward of Arbitrator Mark L. Reed."[14]

In response to the show-cause order, the Union submits the Arbitrator's email transmission dated January 1, 2017, used by the Arbitrator to serve the award.[15] As the Union demonstrates that its exceptions – filed on January 31, 2017 –were filed within thirty days of the award's date of service – January 1, 2017 – we find that the Union's exceptions are timely.[16]

IV. Analysis and Conclusions

Although the Arbitrator's contract-violation and disciplinary-action determinations are not before us, we agree with the Arbitrator that there is a certain "irony" to the Agency's actions in this case. We note in this connection the apparent peculiarity of the Agency's decision to – on the one hand – hire an applicant who falsified his resume, while – on the other hand – to reprimand the grievant for falsifying her resume.

As to the issues this case presents, the Union, having prevailed on the merits, argues that the Arbitrator erred by not granting the grievant backpay, and by not awarding attorney fees. The Union supports its backpay and attorney-fee claims with its nonfact exception, and its attorney-fee claim with its contrary-to-law exception. For the reasons discussed in sections IV.A. and B., below, we deny both exceptions.

A. The award is not based on a nonfact.

The Union argues that the award "should be modified to include"[17] backpay and attorney fees, and that the award should be "remanded back [to the Arbitrator] to ascertain the proper amount of monetary damages suffered by [the g]rievant . . . and reasonable attorney[] fees."[18] Supporting its claims in its nonfact exception, the Union argues that the Arbitrator erred "in finding that [the g]rievant did not suffer[] monetary losses" because the Arbitrator "mistakenly did not consider . . . that the [GS-7] position included a promotion potential to a GS-9."[19]

To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[20]

We reject the Union's claim that the Arbitrator relied on a nonfact in finding that the grievant did not suffer a monetary loss. Although the GS-7 position had a promotion *potential* to a GS-9, that is not the equivalent of being offered a promotion. It is undisputed that the vacancy announcement was for a GS-7 position, and that, if selected, the grievant would have been hired as a GS-7 in a lateral transfer.[21] Therefore, the Union has not demonstrated that a central fact underlying the award is

[6] Award at 16.
[7] *Id.* at 17.
[8] Order to Show Cause at 1-2.
[9] 5 C.F.R. § 2425.2(b).
[10] *Id.* § 2425.2(c).
[11] *Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 32 FLRA 165, 167 (1988).
[12] Exceptions Form at 2.
[13] Award at 17.
[14] Exceptions Br. at 1.
[15] Union's Resp. to Order to Show Cause, Attach. 1 at 1.
[16] 5 C.F.R. § 2425.2(b).
[17] Exceptions Br. at 3.
[18] *Id.* at 13.
[19] *Id.* at 4.
[20] *U.S. Dep't of VA, Med. Ctr., Wash., D.C.*, 67 FLRA 194, 196 (2014) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).
[21] Exceptions, Attach. 1 (GS-7-position vacancy announcement) at 1; Award at 16.

clearly erroneous. Accordingly, we deny the Union's nonfact exception.

B. The Arbitrator's denial of attorney fees is not contrary to law.

The Union argues that the Arbitrator's denial of attorney fees under the BPA is contrary to law.[22] 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.[23] 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.[24] In making that assessment, the Authority defers to the arbitrator's underlying factual findings,[25] unless a party demonstrates that the findings are deficient as nonfacts.[26]

Entitlement to attorney fees under the BPA requires two findings: (1) an employee has been "affected by an unjustified or unwarranted personnel action;" and (2) the action "resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials."[27]

Regarding the BPA's first requirement, it is well settled that a violation of a collective-bargaining agreement is an unjustified or unwarranted personnel action within the meaning of the BPA.[28] Thus, the Arbitrator's finding that the Agency violated the parties' agreement when it failed to select the grievant for the GS-7 position satisfies the BPA's first requirement.[29]

Regarding the BPA's second requirement, the Arbitrator found that because the GS-7 "position was a lateral transfer, the [g]rievant did not suffer a loss in pay"[30] qualifying her for backpay and attorney fees under the BPA. The Union disagrees, arguing that the grievant suffered a loss in pay because the GS-7 position had a promotion potential to a GS-9.[31]

We do not find the Union's argument persuasive. It is well established that to find that a personnel action resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials, a grievant must suffer an *actual* – not merely a *potential* – monetary loss.[32] The Arbitrator found that, if selected, the grievant would have been hired at the GS-7 grade and pay.[33] Therefore, as the grievant did not suffer an *actual loss* of pay, but rather only a *potential loss* of pay, the second requirement of the BPA is not satisfied.[34]

As there is no basis for an attorney-fee award under the BPA,[35] we do not address the Union's remaining contrary-to-law arguments. Accordingly, we deny the Union's contrary-to-law exception.

C. The Union fails to support its three remaining exceptions.

In addition to the exceptions discussed above, the Union claims that the award is contrary to an Agency-wide regulation, contrary to public policy, and fails to draw its essence from the parties' agreement. As discussed below, because the Union fails to support these exceptions, we deny them.

Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground" listed in § 2425.6(a)-(c).[36] Consistent with § 2425.6(e)(1), when a party does not provide any arguments to support its exception, the Authority will deny the exception.[37]

The Union responds "Yes" to the questions on the Authority's exceptions form asking whether the award: (1) is contrary to an agency-wide regulation;[38] (2) is contrary to public policy;[39] and (3) fails to draw its essence from the parties' agreement.[40] But the Union fails to provide any explanation in support of these assertions. Specifically, it fails to, respectively: (1) cite

[22] Exceptions Br. at 6-11.
[23] *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[24] *See U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[25] *U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010) (citation omitted).
[26] *NAGE, Local R4-17*, 67 FLRA 4, 6 (2012) (citing *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008)).
[27] *NFFE, Local 405*, 67 FLRA 352, 353 (2014).
[28] *NAGE, SEIU, Local 551*, 68 FLRA 285, 289 (2015).
[29] Award at 16.
[30] *Id.*
[31] Exceptions Br. at 4; GS-7-position vacancy announcement at 1.
[32] *U.S. Dep't of the Air Force, Warner Robins Air Force Base, Ga.*, 56 FLRA 541, 543 (2000) (*Air Force*); *see U.S. Dep't of State*, 59 FLRA 129, 130 (2003) (*Dep't of State*).
[33] Award at 16.
[34] *Air Force*, 56 FLRA at 543; *see Dep't of State*, 59 FLRA at 130.
[35] *AFGE, Local 1156*, 68 FLRA 531, 533 (2015) ("[A]ttorney fees may not be awarded if backpay is not awarded." (quoting *U.S. Dep't of VA Med. Ctr., Detroit, Mich.*, 60 FLRA 306, 310 (2004))).
[36] 5 C.F.R. § 2425.6(e)(1).
[37] *NTEU, Chapter 67*, 67 FLRA 630, 630-31 (2014) (citing *AFGE, Nat'l Border Patrol Council, Local 2595*, 67 FLRA 361, 366 (2014)).
[38] Exceptions Form at 5.
[39] *Id.* at 7.
[40] *Id.* at 9.

any Agency-wide regulation with which the award allegedly conflicts, or explain why such a conflict exists; (2) identify a law, regulation, or legal precedent that provides a basis for its argument that the award violates public policy; or (3) identify any provision of the parties' agreement with which the award allegedly conflicts.

Accordingly, we deny these exceptions as unsupported under § 2425.6(e)(1) of the Authority's Regulations.

V. Decision

We deny the Union's exceptions.