

70 FLRA No. 116

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 12
(Union)

and

UNITED STATES
DEPARTMENT OF LABOR
(Agency)

0-AR-5310

DECISION

May 10, 2018

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the parties' agreement by failing to pay the grievant for temporarily performing higher-graded duties of a different position. Arbitrator Malcolm L. Pritzker denied the grievance. We must decide two main, substantive questions.

The first question is whether the Arbitrator exceeded his authority by failing to resolve an issue that was before him or resolving an issue that was not before him. The award is directly responsive to the issue, and only the issue, before the Arbitrator. Therefore, the answer is no.

The second question is whether the award is based on a nonfact. Because the Union's nonfact argument constitutes a mere disagreement with the Arbitrator's evaluation of the evidence, the answer is no.

II. Background and Arbitrator's Award

The grievant is a General Schedule (GS)-14 industrial hygienist in the Agency's Metal and Nonmetal Health (MNH) Division. From November 2013 to December 2015, the MNH Division's GS-15 supervisory industrial hygienist position (GS-15 position) was vacant. During that period, a supervisor from another division "acted as the rating official and performed supervisory

functions"¹ for the industrial hygienists, including the grievant. And, on several occasions, the grievant, and other nonsupervisory employees, filled in for that supervisor when the supervisor was absent.

The Union filed a grievance alleging, as relevant here, that the Agency violated a provision of the parties' agreement requiring "equal pay for substantially equal work."² The Union argued that the Agency failed to pay the grievant for performing the GS-15 position's supervisory duties while that position was vacant. The grievance asserts that during the relevant period "over [twenty-five percent] of the work [the grievant] performed was at the GS-15 level."³ When the parties could not resolve the matter, they invoked arbitration.

The Arbitrator framed the issue as: "Did the Agency violate the terms of the [parties' agreement] by not paying the grievant at the GS[-]15 level for the work he performed between November 4, 2013 and October 4, 2015? If so, what shall the remedy be?"⁴

The Arbitrator found that, during the relevant period, the grievant did not spend over twenty-five percent of his time performing the GS-15 position's duties.⁵ Comparing the grievant's work, based on testimonial evidence, with the GS-15's "supervisory duties" delineated in the GS-15 position description, the Arbitrator determined that the grievant had not performed the "majority of the [GS-15's] supervisory duties."⁶ And, he found that the grievant had not performed GS-15 "supervisory and other duties" at least "twenty[-]five percent of his time."⁷ Based on these findings, the Arbitrator denied the grievance.

On September 7, 2017, the Union filed exceptions to the Arbitrator's award. The Agency filed an opposition to the Union's exceptions on October 10, 2017.

III. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Union asserts that the Arbitrator exceeded his authority by failing to resolve the issue before him – whether the grievant was entitled to backpay for performing higher graded work – and instead, made a determination on a classification issue that is excluded

¹ Award at 1.

² Opp'n, Joint Ex. 1, Collective-Bargaining Agreement at 63.

³ Award at 2.

⁴ *Id.* at 1.

⁵ *Id.* at 2.

⁶ *Id.*

⁷ *Id.*

from the grievance procedure.⁸ As relevant here, an arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration or resolves an issue not submitted to arbitration.⁹ In the absence of a stipulation by the parties of the issue to be resolved, an arbitrator's formulation of the issues is given substantial deference.¹⁰

The Arbitrator framed the issue as: "Did the Agency violate the terms of the [parties' a]greement by not paying the grievant at the GS[-]15 level for the work he performed between November 4, 2013 and October 4, 2015?"¹¹ Responding to the framed issue, the Arbitrator compared the grievant's work performed during the relevant period with the GS-15's position description.¹² Based on this comparison, the Arbitrator determined that the grievant was not entitled to backpay because he had not performed the GS-15 position's duties at least twenty-five percent of the time.¹³ This determination is directly responsive to the issue, and only the issue, that the Arbitrator framed.¹⁴ Therefore, the Union's argument lacks merit.

The Union also argues that the Arbitrator exceeded his authority by relying on position descriptions more than testimony and actual duties performed.¹⁵ This challenges the Arbitrator's evaluation of, and the weight he accorded, the evidence, and is not a ground demonstrating that the award is deficient.¹⁶

Accordingly, as the Union has not demonstrated that the Arbitrator exceeded his authority, we deny the exception.¹⁷

B. The award is not based on a nonfact.

The Union argues that the award is based on a nonfact.¹⁸ To establish that an award is based on a nonfact, 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.¹⁹ Further, disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, does not provide a basis for finding that an award is based on a nonfact.²⁰

The Union argues that the Arbitrator failed to "fully assess all the relevant supervisory factors" listed under the GS-15 position description compared to the duties the grievant performed.²¹ Had the Arbitrator conducted this assessment, the Union argues, the Arbitrator would have concluded that the grievant performed most of the GS-15 supervisory duties.²²

This nonfact exception merely challenges the Arbitrator's evaluation of the evidence; specifically, evidence of the duties that the grievant performed. Because disagreement with an arbitrator's evaluation of evidence does not provide a basis for finding that an award is based on a nonfact,²³ we deny this exception.

IV. Decision

We deny the Union's exceptions.

⁸ Exceptions Br. at 3.

⁹ *U.S. DOD, Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996) (*DOD*).

¹⁰ *AFGE, Local 987*, 50 FLRA 160, 161-62 (1995).

¹¹ Award at 1; *see DOD*, 51 FLRA at 1378 (absent parties' stipulation of issue, arbitrator may frame issue).

¹² Award at 2.

¹³ *Id.*

¹⁴ *AFGE, Nat'l Border Patrol Council, Local 2724*, 65 FLRA 933, 935 (2011) (exceeded authority exception denied where arbitrator's determination was responsive to issue as framed).

¹⁵ Exceptions Br. at 6-7.

¹⁶ *See U.S. Dep't of VA, VA Med. Ctr., Louisville Ky.*, 64 FLRA 70, 72 (2009).

¹⁷ In its exceptions form, the Union also alleges that the award is contrary to an Agency-wide regulation, Exceptions Form at 5, but it does not identify any such regulation or present any support for that assertion. Accordingly, we deny this exception, as unsupported. *See* 5 C.F.R. § 2425.6(e)(1) ("[a]n exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support" its argument); *see also AFGE, Local 2152*, 69 FLRA 149, 151 (2015).

¹⁸ Exceptions Br. at 9.

¹⁹ *U.S. Dep't of VA, Bd. of Veterans Appeals*, 68 FLRA 170, 172 (2015); *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).

²⁰ *E.g., U.S. Dep't of the Air Force, Whiteman Air Force Base, Mo.*, 68 FLRA 969, 971 (2015) (*Air Force*).

²¹ Exceptions Br. at 11.

²² *Id.* at 10-22.

²³ *Air Force*, 68 FLRA at 971.