

71 FLRA No. 96

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 10
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
FORT POLK, LOUISIANA
(Agency)

0-AR-5447

DECISION

January 14, 2020

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

I. Statement of the Case

Arbitrator Don E. Williams granted the Agency’s motion to dismiss the Union’s grievance on the ground that the Union was collaterally estopped from arguing that the grievants had been temporarily promoted to GS-12 positions. The Union filed exceptions alleging that the award is based on a nonfact, is contrary to law, fails to draw its essence from the parties’ collective-bargaining agreement, and that the Arbitrator exceeded his authority.

The Union’s nonfact, contrary-to-law, and essence exceptions are all based on the argument that the Arbitrator erred by applying collateral estoppel because the issue in this grievance differed from the issue in a prior grievance. Because the Union does not demonstrate that the issue is different, we deny those exceptions. And because the award responds to the issue framed by the Arbitrator, we deny the Union’s exceeded-authority exception.

II. Background and Arbitrator’s Award

In 2016, the Union filed a grievance (the 2016 grievance) alleging that six employees occupying GS-1910-11 Quality Audit positions (the grievants) had been assigned the higher-graded duties of the GS-1910-12 Quality Assurance Specialist position, and therefore should be “temporarily promoted

with [three] years back pay to the GS-1910-12 position” as required by Article 36, Section 7 of the CBA (Article 36).¹ Article 36 requires that the Agency promote “[e]mployees temporarily assigned by management to perform a grade controlling duty of a higher-graded position . . . when the assignment exceeds thirty (30) days and the employee is qualified for the promotion and meets eligibility standards.”² An arbitrator denied that grievance, and neither party filed exceptions to that arbitrator’s award.

Two months after the arbitrator denied the 2016 grievance, the Union filed a new grievance (the 2017 grievance). The 2017 grievance alleged that the same six employees had been assigned the higher-graded duties of the GS-1101-12 Contracting Officer Representative position daily for “3-5 [plus] years.”³ The Union again claimed that the Agency violated Article 36 and requested that the grievants be “promoted with [three] years back pay,” but to the GS-1101-12 position instead of the GS-1910-12 position.⁴ The parties submitted the 2017 grievance to arbitration.

In response to an Agency motion to dismiss the 2017 grievance, the Arbitrator framed the issue before him as whether the 2017 grievance is “barred by the doctrine of collateral estoppel.”⁵

The Arbitrator concluded that the “previous arbitration was adverse to the Union’s position because the [g]rievants had worked within their assigned duties” in their GS-11 position.⁶ On this point, he found that the prior arbitrator had denied the 2016 grievance because the grievants “had a ‘double-hatted’ responsibility . . . as required by [their] GS-11 position description” which was “part of their normal job, and is

¹ Because there were no GS-12 Quality Assurance jobs at Fort Polk when the 2016 grievance was being arbitrated, the parties agreed to use the position description for the GS-1910-12 Quality Assurance Specialist at the Army’s Fort Hood, Texas facility “as the description against which the incumbents’ duties should be measured to determine the appropriate grade level.” Award at 2-3. In other words, “[t]he parties were contesting the duties at the Fort Polk station . . . but using the Fort Hood description of the duties.” *Id.* at 3.

² *Id.* at 3.

³ *Id.* at 2.

⁴ *Id.* The Union indicates that all but one of the employees originally listed as part of the grievance were withdrawn from the grievance in January 2018. Accordingly, the Union pursued only the one remaining grievant’s claim at arbitration. Exceptions at 3 n.1.

⁵ Award at 3.

⁶ *Id.* at 6.

not a justification for promotion to GS-12.”⁷ He further found that the prior arbitrator “concluded that the grievants were not assigned . . . work” that fell within the GS-12 position description.⁸ Based on these findings, the Arbitrator dismissed the 2017 grievance on the ground that it was barred by collateral estoppel.

On January 28, 2019, the Union filed exceptions to the award. On February 4, 2019, the Agency filed an opposition to the Union’s exceptions.

III. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union argues that the Arbitrator based his decision upon a nonfact for which there is no support in the record.⁹ Specifically, it contends that the Arbitrator erred by finding that the issue presented by the 2016 grievance was identical to the issue before him because the grievances sought temporary promotions to different GS-12 positions.¹⁰

A careful reading of the award shows that the Arbitrator did not base his ruling upon a finding that the grievants were seeking temporary promotions to the same GS-12 positions in each grievance. Instead, the Arbitrator concluded that the grievants are collaterally estopped from succeeding on their temporary promotion claim because the prior arbitrator found that the work they performed was “required by [their] GS-11 position description, and is part of their normal job, and is not a justification for promotion to GS-12.”¹¹ The Arbitrator also concluded that the prior award “was adverse to the Union’s position because the [g]rievants had worked within their assigned duties” in the GS-11 position.¹²

In other words, relying on the prior arbitrator’s undisputed conclusion that the duties at issue were within the grievant’s existing GS-11 positions, the Arbitrator found that the issue previously adjudicated in the 2016 grievance was whether the duties at issue were encompassed by the grievant’s GS-11 position

description. Therefore, the Union’s argument provides no basis for finding that the award is based on a nonfact.

Accordingly, we deny the Union’s nonfact exception.

B. The award is not contrary to law.

Reiterating its nonfact argument that the issue in the two grievances differed, the Union contends that the Arbitrator erred as a matter of law by finding that the grievance was barred by collateral estoppel.¹³

Collateral estoppel (also known as “issue preclusion”) prevents a second litigation of the same issues of fact or law in connection with a different claim or cause of action.¹⁴ The doctrine applies to bar subsequent litigation when, as relevant here, the same issue was involved in an earlier proceeding.¹⁵ The Authority has held that an arbitrator has discretion to apply collateral estoppel and give preclusive effect to other arbitrators’ prior awards.¹⁶ The Authority normally defers to those determinations¹⁷ “because the arbitrator is ‘making determinations that constitute factual findings and reasoning.’”¹⁸

As discussed above, the issue adjudicated in the prior arbitration was whether the grievants were entitled to temporary promotions because they were performing duties that were not part of their GS-11 positions.¹⁹ The Arbitrator found that the prior arbitrator had concluded that the grievants were not performing duties outside their GS-11 position.²⁰

The Union has not challenged – either on exceptions to the 2016 grievance award or the award before us – the finding that the alleged higher-graded duties are part of the grievants’ normal GS-11 job

⁷ *Id.* Because neither party submitted a copy of the 2016 grievance award, we rely upon the Arbitrator’s characterization of the prior arbitrator’s findings.

⁸ *Id.*

⁹ Exceptions at 8. To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010) (citing *NFFE, Local 1984*, 56 FLRA 38, 41 (2000)).

¹⁰ Exceptions at 8-9.

¹¹ Award at 6.

¹² *Id.*

¹³ Exceptions at 7.

¹⁴ *AFGE, Local 2258*, 70 FLRA 210, 211 (2017) (citing *AFGE, Council of Prison Locals, Local 4052*, 68 FLRA 38, 41 (2014)).

¹⁵ *Id.*

¹⁶ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 69 FLRA 197, 205 (2016) (citing *AFGE, Local 2459*, 51 FLRA 1602, 1607 n.5 (1996)).

¹⁷ *Id.*

¹⁸ *U.S. DOJ, Fed. BOP*, 68 FLRA 311, 314 (2015) (quoting *U.S. Dep’t of VA, Med. Ctr., Richmond, Va.*, 64 FLRA 619, 621 n.2 (2010)).

¹⁹ Award at 6.

²⁰ *Id.*

duties.²¹ Nor has the Union asserted that the grievants performed different duties than the ones at issue in the 2016 grievance. Because the same GS-11 job duties were at issue in both grievances, the Arbitrator did not err in exercising his discretion to find the prior arbitration award binding and, consequently, that the 2017 grievance is barred by collateral estoppel.

Accordingly, we deny the Union's contrary to law exception.

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

The Union argues that the award does not draw its essence from Article 36.²² Specifically, the Union alleges that because the position descriptions in the two grievances are different, the Arbitrator's collateral estoppel determination improperly barred the grievants from enforcing a contractual right to a temporary promotion.²³

This argument simply reiterates the Union's argument in support of its nonfact and contrary to law exceptions. Because the Union has not demonstrated that the Arbitrator erred in finding that the issues in the grievances were the same – and that the 2017 grievance was therefore barred – it has similarly failed to demonstrate that the Arbitrator was required to address the claims under Article 36.²⁴

Accordingly, we deny the Union's essence exception.

- D. The Arbitrator did not exceed his authority.

The Union argues “to the extent that the Arbitrator may have dismissed the case on the grounds of res judicata,” he exceeded his authority.²⁵ As relevant

²¹ *U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 57 FLRA 72, 76 (2001) (citing *U.S. Dep't of HHS, Navajo Area Indian Health Serv., Window Rock, Ariz.*, 56 FLRA 1035, 1038 (2000)) (“where a party fails to except to arbitral findings on a particular issue, the party cannot, in exceptions to a later award, collaterally attack the previously-unexcepted-to findings”).

²² Exceptions at 9.

²³ *Id.*

²⁴ *Nat'l Nurses United*, 70 FLRA 166, 168 (2017) (denying essence exception where arbitrator did not discuss or interpret the cited contract provisions and the union did not allege that the dispositive finding conflicted with the cited provisions); see also *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 63 FLRA 553, 557 (2009) (argument that arbitrator failed to find contractual violations does not raise essence exception where arbitrator did not interpret or apply the cited provisions).

²⁵ Exceptions at 8.

here, arbitrators exceed their authority when they resolve an issue not submitted to arbitration.²⁶

Here, the Arbitrator framed the issue as whether the 2017 grievance is barred by collateral estoppel.²⁷ Although the Arbitrator discussed both collateral estoppel and res judicata and found that the grievance would be barred under either doctrine,²⁸ he focused on the collateral estoppel requirement that the issue must be the same in both cases.

Therefore, the award is directly responsive to the issue framed by the Arbitrator, regardless of any additional findings he made regarding whether res judicata could also apply to bar the grievance.²⁹ Consequently, we find that the Arbitrator did not exceed his authority, and deny this exception.

IV. Decision

We deny the Union's exceptions.

²⁶ *AFGE, Local 3254*, 70 FLRA 577, 578 (2018) (citing *U.S. DOJ, Fed. BOP, Metro. Det. Ctr. Guaynabo, P.R.*, 68 FLRA 960, 966 (2015) (*Guaynabo*); *SSA, Office of Disability Adjudication & Review, Springfield, Mass.*, 68 FLRA 803, 806 (2015)).

²⁷ Award at 3.

²⁸ *Id.* at 6.

²⁹ *E.g., U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Ore.*, 66 FLRA 388, 391 (2011); *AFGE, Local 900*, 63 FLRA 536, 540 (2009); *U.S. Dep't of the Air Force*, 61 FLRA 797, 801 (2006) (citing *AFGE, Local 1203*, 55 FLRA 528, 530 (1999)).