

**71 FLRA No. 93**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 1738  
(Union)

and

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
MEDICAL CENTER  
SALISBURY, NORTH CAROLINA  
(Agency)

0-AR-5440

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DECISION

December 30, 2019

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

Decision by Member Abbott for the Authority

**I. Statement of the Case**

In this case, we deny exceptions challenging the awarded remedy for a contractual violation, despite the fact that the remedy was not the one requested by the grieving party.

Here, Arbitrator Robert S. Adams found that the Agency violated Article 12 of the parties’ agreement when it failed to properly refer the grievant’s selection file to the Professional Standards Board (PSB) in order to effect a permanent promotion. Despite having served in a temporary promotion—and being paid at the higher level—for twelve months, the Agency’s failure resulted in the withdrawal of the grievant’s promotion and revocation of the temporary promotion.<sup>1</sup> As a remedy, the Arbitrator directed the Agency to refrain from collecting “the additional salary and benefits earned” during the temporary promotion.<sup>2</sup>

The Union argues that the remedy is not consistent with the parties’ agreement,<sup>3</sup> and that the

<sup>1</sup> Award at 14-18.

<sup>2</sup> *Id.* at 22.

<sup>3</sup> Exceptions Br. at 4.

Arbitrator’s failure to award backpay and attorney fees is contrary to the Back Pay Act (BPA).<sup>4</sup> Because the Union failed to demonstrate that the remedy is inconsistent with the parties’ agreement, or that the failure to award backpay or attorney fees was contrary to law, we deny the exceptions.

**II. Background and Arbitrator’s Award**

The grievant is a General Schedule (GS)-13 psychologist with the Agency. In August of 2016, the Agency advertised a temporary GS-14 supervisory position, with the possibility of the position becoming permanent; the grievant applied, was selected, began her duties, and was temporarily promoted to the GS-14 level. In November 2016, the Agency notified the grievant that she was permanently promoted. During an audit conducted later, it was found that the human resources department failed to properly submit the grievant’s selection package to a PSB, a technical requirement under Title 38. Because of this defect, the grievant’s promotion was withdrawn, retroactive to August 2017. The Agency also determined that it would have to recover the extra pay and benefits that the grievant earned during that period.<sup>5</sup>

The Union grieved the Agency’s actions that resulted in the revocation of the promotion and invoked arbitration. The Arbitrator found that the Agency violated Article 12<sup>6</sup> of the parties’ agreement when it failed to properly refer the grievant’s selection package to the PSB for required review. According to the Arbitrator, the Agency was at fault for not taking the necessary steps to seek PSB review.<sup>7</sup> The Arbitrator further found that the grievant had earned her GS-14 supervisory salary due to her “excellent work performance” in the position according to her supervisor.<sup>8</sup> Therefore, he determined that while the Agency was entitled to retroactively rescind the promotion, the Agency could not collect the additional compensation and benefits, the grievant had been paid while temporarily promoted.<sup>9</sup>

On December 3, 2018, the Union filed exceptions to the Arbitrator’s award. On February 11,

<sup>4</sup> *Id.* at 3-9.

<sup>5</sup> Award at 16

<sup>6</sup> *Id.* at 9 (Article 12, Section 2(A) provides that “[a] Title 38 or Hybrid Title 38 employee who is detailed to a higher-graded assignment shall be referred, at the effective date of the detail, to a Professional Standards Board [(PSB)] for expedited promotion consideration. The [PSB] will be held within 30 days of the effective date of the detail.”).

<sup>7</sup> *Id.* at 17.

<sup>8</sup> *Id.* at 12.

<sup>9</sup> We note that the Agency concedes that the grievant was entitled to the pay increase while serving in the GS-14 position. Opp’n at 3.

2019, the Agency filed its opposition to the Union's exceptions.<sup>10</sup>

### III. Analysis and Conclusion

#### A. The award draws its essence from the parties' agreement.<sup>11</sup>

The Union argues that the award fails to draw its essence from the parties' agreement. Specifically, the Union claims that the "Arbitrator act[ed] contrary to the plain language of the [parties' agreement] when he provide[d] a remedy that . . . is not consistent with the remedy for a violation of the provision."<sup>12</sup> That argument, however, is merely dissatisfaction with the remedy the Arbitrator fashioned. The Authority has held that a party's pursuit of a particular remedy does not restrict an arbitrator's ability to fashion what he or she deems to be an appropriate remedy.<sup>13</sup> Here, the Union takes issue with the awarded remedy—an order directing the Agency to refrain from rescinding or collecting the additional salary and benefits earned<sup>14</sup>—because it believes the Arbitrator should have awarded the grievant a "series of 120 day temporary promotions."<sup>15</sup> Because the Union has not demonstrated that the contract required the Arbitrator to award the Union's preferred remedy, we deny the essence exception.

#### B. The award is not contrary to the BPA.

The Union also argues that the award is contrary to the BPA. Specifically, the Union claims that the award is contrary to law because the Arbitrator did not provide the grievant with backpay.<sup>16</sup> The Authority reviews questions of law de novo.<sup>17</sup> As relevant here, the BPA provides:

An employee of any agency who . . . is found by appropriate authority under applicable law, rule, regulation, or collective[-]bargaining agreement, to have been affected by an unjustified or unwarranted personnel action *which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials* of the employee . . . [is entitled to back pay].<sup>18</sup>

While the Arbitrator found that the Agency violated the parties' agreement,<sup>19</sup> he concluded that the grievant did not suffer a withdrawal or reduction in pay, allowances, or differentials.<sup>20</sup> The Authority has held that "to find that a personnel action resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials, there must be an *actual loss* suffered by the grievant."<sup>21</sup> Here, the grievant did not experience an *actual loss* because she was paid at the GS-14 pay rate throughout the period in question.<sup>22</sup> An arbitrator is not required to award backpay under the BPA to remedy a violation of the parties' agreement.<sup>23</sup> Therefore, the award is consistent with the BPA, and we deny the Union's exception.

<sup>10</sup> We have considered the Agency's opposition because it was postmarked within the 30 days of service of the exceptions, despite the mailing being later returned to sender. See 5 C.F.R. § 2429.21(b)(1)(i); *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 71 FLRA 304, 305 (2019) (finding that exceptions to an arbitration award were timely even though the Authority received them late due to unknown error on the part of the U.S. Postal Service because the party showed that the exceptions were postmarked within the time limit provided by 5 U.S.C. § 7122(b)).

<sup>11</sup> The Authority will find an arbitration award is deficient as failing to draw its essence from a collective bargaining agreement when the excepting 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 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. *Library of Cong.*, 60 FLRA 715, 717 (2005) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

<sup>12</sup> Exceptions Br. at 4. In this regard, the Union claims that Article 12 of the parties' agreement "requires that an employee be temporarily promoted and paid whenever they do such duties for such a lengthy time." *Id.* at 3.

<sup>13</sup> *Dep't of the Air Force, Scott Air Force Base, Ill.*, 51 FLRA 675, 687 (1995) (citation omitted).

<sup>14</sup> Award at 22.

<sup>15</sup> Exceptions Br. at 6.

<sup>16</sup> *Id.* at 4-6.

<sup>17</sup> *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)). In conducting a de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. See *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party established that they are nonfacts. See *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014).

<sup>18</sup> 5 U.S.C. § 5596(b)(1) (emphasis added).

<sup>19</sup> Award at 14-18.

<sup>20</sup> *Id.* at 20.

<sup>21</sup> *NAIL, Local 15*, 66 FLRA 817, 818 (2012); see also *U.S. Dep't of the Air Force, Warner Robins Air Force Base, Ga.*, 56 FLRA 541, 543 (2000); *AFGE, Local 4015*, 52 FLRA 82, 84 (1996); *GSA*, 20 FLRA 794, 795-96 (1985).

<sup>22</sup> Award at 20-22.

<sup>23</sup> *NTEU, Chapter 98*, 60 FLRA 448, 450 (2004) (Chairman Cabaniss dissenting on other grounds); see also *AFGE, Local 916*, 57 FLRA 715, 717 n.7 (2002) (finding the BPA does not require a monetary award for every unjustified or unwarranted personnel action).

C. The denial of attorney fees is not contrary to the BPA.<sup>24</sup>

The Union argues that the denial of attorney fees is contrary to the BPA.<sup>25</sup> Regrettably, it is the plain language of the statute that constrains us here. The BPA requires<sup>26</sup>—and the Authority has held<sup>27</sup>—that to qualify for attorney fees, there must be an award of backpay, allowances, or differentials. Here, the Agency paid the grievant a GS-14 salary while she served in the supervisory position<sup>28</sup>—an action the Agency would have undone but for the Arbitrator’s award. Because the grievant was paid, there was not an award of backpay, and therefore, an award of attorney fees under the BPA is not permitted. Unlike *AFGE, Local 2145*, where the Authority held that the denial of attorney fees under the BPA was premature because the Arbitrator did not allow the Union to file a fee request despite awarding compensatory time,<sup>29</sup> here, the denial of attorney fees was proper because there was not a backpay award. Accordingly, we deny the Union’s exception.<sup>30</sup>

IV. Order

We deny the Union’s exceptions.

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<sup>24</sup> We note that the Union only petitions for attorney fees pursuant to the BPA, 5 U.S.C. § 5596(b)(1)(A)(ii). Award at 10; Exceptions Br. at 7. For further guidance on attorney fees, see *AFGE, Local 1633*, and *AFGE, Local 2076*. *AFGE, Local 1633*, 71 FLRA 211, 216-17 (2019) (Member DuBester concurring in part and dissenting in part) (finding, in arbitration cases where the grieved action is not disciplinary in nature, petitions for attorney fees analyzed under the “interest of justice” standard should focus on whether (a) the agency “knew or should have known,” at the time that it denied the grievance, that it would not prevail at arbitration; or (b) prior to the close of the record at arbitration, compelling evidence that the agency’s position was “clearly without merit” made the agency’s prolonging of proceedings blameworthy); see *AFGE, Local 2076*, 71 FLRA 221, 223 (2019) (Member DuBester concurring in part and dissenting in part) (clarifying how, in minor disciplinary cases, *Allen* factor (5)—whether the Agency “knew or should have known” that its action would not be sustained—applies by evaluating the nature and strength of the evidence that was available to the agency and assessing whether its penalty determination was reasonable in light of that information).

<sup>25</sup> Exceptions Br. at 7.

<sup>26</sup> 5 U.S.C. § 5596(b)(1).

<sup>27</sup> *AFGE, Local 216, Nat’l Council of EEOC Locals*, 42 FLRA 319, 320 (1991) (citing *Health Care Fin. Admin., Dep’t of HHS*, 35 FLRA 274, 290 (1990)); see also *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Beckley, W.V.*, 64 FLRA 775, 776 (2010) (finding attorney fees can be awarded under the BPA only in conjunction with an award of backpay).

<sup>28</sup> Award at 20.

<sup>29</sup> 71 FLRA 346, 348 (2019) (Member DuBester concurring); see also *AFGE, Local 2002*, 69 FLRA 425, 426 (2016) (finding the denial of attorney fees under the BPA was contrary to law because the Arbitrator did not allow the Union to file a fee request when backpay was awarded); *AFGE, Local 2415*, 67 FLRA 438, 439 (2014) (Member Pizzella concurring) (finding the denial of attorney fees contrary to law when the

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Arbitrator awarded backpay but failed to allow the prevailing party to file a fee request).

<sup>30</sup> See also *NTEU*, 66 FLRA 835, 837 n.2 (2012) (citing *Fraternal Order of Police, Lodge No. 158*, 66 FLRA 420, 423 (2011)) (finding it unnecessary to address an exception regarding attorney fees that was based on an assumption denied in a previous exception).

**Member DuBester, concurring:**

I agree that the award's denial of back pay and attorney fees is not contrary to law. Additionally, consistent with the broad discretion afforded to arbitrators to fashion remedies under the essence standard,<sup>1</sup> I agree that the award draws its essence from the parties' agreement.

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<sup>1</sup> *U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 387, 393 (2019) (Separate Opinion of Member DuBester); *see also United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (arbitrators bring their "informed judgment to bear in order to reach a fair solution to a problem [which] is especially true when it comes to formulating remedies [where] the need is for flexibility in meeting a wide variety of situations").