

71 FLRA No. 112

UNITED STATES
 DEPARTMENT OF VETERANS AFFAIRS
 CENTRAL ARKANSAS
 VETERANS HEALTHCARE SYSTEM CENTRAL
 (Agency)

and

AMERICAN FEDERATION
 OF GOVERNMENT EMPLOYEES
 LOCAL 2054
 (Union)

0-AR-5452

DECISION

February 25, 2020

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

Arbitrator William E. Hartsfield found that the grievants were entitled to environmental-differential pay because they worked in close proximity to high-hazard microorganisms. We uphold the award.

The Agency argues that the award is based on nonfacts. Because the Agency fails to demonstrate that a central fact underlying the award is clearly erroneous, such that the Arbitrator would have reached a different conclusion, we deny the Agency's nonfact exception. Second, the Agency argues that the Arbitrator was biased.¹ We find that the Agency was not prejudiced by the Arbitrator's liberal admission of testimony and evidence. Accordingly, we deny this exception. Finally, the Agency also argues that the award is contrary to 5 U.S.C. § 5343(c)(4) and 5 C.F.R. § 532.511. However, the Arbitrator's conclusions are consistent with the

¹ While the Agency indicated in its exceptions that it was claiming that the Arbitrator failed to conduct a fair hearing, its brief solely focuses on the exception that the Arbitrator was biased. *See* Exceptions Form at 28; Exceptions Br. at 16. Therefore, we only address the Agency's claim that the Arbitrator was biased. 5 C.F.R. § 2425.6(e)(1) (stating that an exception may be subject to dismissal if it is not supported).

applicable standard of law and Authority precedent. Therefore, we also deny this exception.

II. Background and Arbitrator's Award

On September 7, 2016, the Union filed a grievance seeking environmental-differential pay for housekeeping aids and laundry employees at the Agency's hospital and medical center. The Union alleged that the employees came into regular contact with high-hazard microorganisms² in the performance of the cleaning services they provided at the Agency's facilities. The matter proceeded to arbitration after the Agency denied the grievance.

The Arbitrator framed the issue as whether the Agency violated the parties' agreement by failing to pay the grievants environmental-differential pay and, if so, what is the remedy?

The Union argued that the grievants are entitled to environmental-differential pay for high-degree hazards because they "are exposed to dangerous microorganisms through blood spills, needle sticks, and sharp cuts that may cause severe illness."³ The Agency argued that the grievants were not entitled to any environmental-differential pay because the grievants were properly trained, the protective equipment practically eliminated exposure to any known risks, and the grievants' position descriptions specified the potential hazards associated with the grievants' duties.

The Arbitrator found that the grievants are exposed to microorganisms with a high degree of hazard. He determined that the testimony of the Agency's witnesses was contradictory and that the Agency exacerbated these contradictions by failing to answer the Union's information request for records concerning work-related injuries at the Agency's hospital and

² Appendix A to 5 C.F.R. § 532.511 provides that employees are entitled to 8% environmental-differential pay for being exposed to high-hazard microorganisms, if they demonstrate that they:

work[] with or in close proximity to micro-organisms which involves potential personal injury such as death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease. These are work situations wherein the use of safety devices and equipment, medical prophylactic procedures such as vaccines and antiserums and other safety measures do not exist or have been developed but have not practically eliminated the potential for such personal injury.

³ Award at 14. The parties' agreement incorporated 5 U.S.C. § 5343(c)(4) and 5 C.F.R. § 532.511 by reference. *Id.* at 2.

medical center. The Arbitrator permitted testimony and evidence over the objections of the Agency's counsel so that both sides had the opportunity to create a full record. He also found that the grievants came into close contact with objects that may contain "microorganisms pathogenic to man," including syringes, scalpels, sharp objects or broken glass, and bags that contain biohazardous material.⁴ Furthermore, the Arbitrator found that the protective equipment did not practically eliminate the potential for injury, that the grievants' training was rushed, and that the training was not taken seriously by its instructors. He also determined that the grievants' position descriptions only listed injuries that may result from "hand and power equipment."⁵ Accordingly, the Arbitrator sustained the grievance and awarded backpay, with interest, dating to March 15, 2011, the effective date of the parties' agreement.

The Agency filed exceptions to the award on December 31, 2018 and the Union filed an opposition on January 30, 2019.

III. Analysis and Conclusions

A. The award is not based on nonfacts.

The Agency argues that the award is based on nonfacts because the Arbitrator relied on testimony regarding a *laundry* employee when he found that housekeepers are potentially exposed to high-degree hazards.⁶ To establish that an award is deficient because it 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.⁷

However, the Agency has failed to show that the Arbitrator's finding with regard to housekeepers is a clearly erroneous central fact.⁸ In his award, the Arbitrator cited testimony from *both* housekeepers and laundry employees when he found that housekeepers were exposed to high-degree hazards.⁹ Consequently, the Arbitrator *also* relied on the testimony of a housekeeper when he found that housekeepers are potentially exposed to microorganisms with high-degree hazards.¹⁰ Therefore, the Agency's citation to the laundry

employee's testimony has not demonstrated that the Arbitrator erred in concluding that housekeepers are exposed to hazards, such that the Arbitrator would have reached a different conclusion about their entitlement to environmental-differential pay.¹¹ Accordingly, we deny this exception.

B. The Arbitrator was not biased.

The Agency claims that the Arbitrator was biased because he admitted testimony and evidence over the objections of the Agency's counsel.¹² The Authority will find that an arbitrator is biased where the excepting party demonstrates that there was partiality or corruption on the part of the arbitrator.¹³ Therefore, an agency's identification of several arbitral determinations that did not favor it does not, by itself, show bias.¹⁴ An arbitrator also has considerable latitude in conducting a hearing.¹⁵

The Authority has previously held that an arbitrator's liberal admission of testimony and evidence is permissible.¹⁶ Additionally, the Agency has failed to demonstrate that the Arbitrator's admission of the disputed evidence prevented the Agency from presenting its case in full to the Arbitrator or otherwise affected the fairness of the proceeding.¹⁷ Rather, the Agency claims that it was prejudiced by the mere admission of evidence and testimony.¹⁸ Because the record demonstrates that the Arbitrator impartially permitted testimony and evidence from both parties,¹⁹ we deny this exception.²⁰

¹¹ Local 933, 70 FLRA at 509 ("With regard to the Union's claim that housekeepers were exterminating bedbugs, the Union does not demonstrate that, in characterizing the housekeepers' duties, the Arbitrator made a clearly erroneous factual finding.").

¹² Exceptions Br. at 16.

¹³ U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Austin, Tex., 70 FLRA 924, 929-30 (2018) (Member DuBester concurring, in part, and dissenting, in part) (citing AFGE, Local 3438, 65 FLRA 2, 3 (2010)).

¹⁴ *Id.*

¹⁵ U.S. Dep't of Transp., FAA, 65 FLRA 806, 807 (2011) (citations omitted).

¹⁶ U.S. Dep't of HUD, Denver, Colo., 53 FLRA 1301, 1318 n.8 (1998).

¹⁷ *Id.*

¹⁸ Exceptions Br. at 16.

¹⁹ Tr. at 48.

²⁰ AFGE, Local 3495, 60 FLRA 509, 512 (2004) ("As arbitrators have considerable latitude in conducting arbitration hearings and there has been no showing that the Arbitrator's conduct of the hearing was improper or prejudiced the Union, we deny the exception.").

⁴ Award at 22.

⁵ *Id.* at 23.

⁶ Exceptions Br. at 14-15.

⁷ U.S. Dep't of VA, VA Pittsburgh Healthcare Sys., 60 FLRA 516, 518 (2004).

⁸ AFGE, Local 933, 70 FLRA 508, 509 (2018) (Local 933).

⁹ Award at 22 (citing the testimony of a housekeeper who testified that he regularly handled receptacles that contain biohazardous materials).

¹⁰ See *id.*

C. The award is not contrary to law.²¹

The Agency argues that the award is contrary to 5 U.S.C. § 5343(c)(4) and 5 C.F.R. § 532.511 because the Arbitrator found that the protective equipment and training that the Agency provided did not practically eliminate the potential for injury.²² In particular, the Agency claims that the training and protective equipment met the standards promulgated by the Occupational Safety and Health Administration (OSHA) and, therefore, meet the standard of *practically* eliminating the threat of high-degree exposure under 5 C.F.R. § 532.511.²³ The Agency also argues that the backpay award is “disproportionate to the violation.”²⁴

²¹ The Agency claims that the Arbitrator misinterpreted the grievant’s position descriptions and that the award is, therefore, contrary to management’s right to assign work under § 7106(a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute). Exceptions Br. at 5, 9-11. The Agency further argues that the backpay award violates management’s rights under the three-part test in *U.S. DOJ, Fed. BOP*, 70 FLRA 398, 405-06 (2018) (Member DuBester dissenting). Exceptions Br. at 6-11. It also claims that the award is contrary to management’s right to assign work because the Arbitrator did not consider whether the grievants are entitled to 4% environmental-differential pay for being exposed to microorganisms with a low degree of hazard. *Id.* at 8-9; 5 C.F.R. Pt. 532, Subpt. E, App. A. Under 5 C.F.R. § 2429.5, an issue that could have been but was not presented before an arbitrator will not be considered by the Authority. *U.S. DHS, U.S. CBP, JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008) (*JFK Airport*) (citation omitted). The sparse record provided by the Agency reflects that these arguments were never made before the Arbitrator. See Opp’n Br. at 2, 5. The record indicates that the Union consistently claimed high-degree environmental-differential pay and the Agency only argued before the Arbitrator that the grievants were not entitled to *any* environmental-differential pay under 5 U.S.C. § 5343(c)(4) and 5 C.F.R. § 532.511. Award at 3, 14-19. Moreover, there is no indication that the Agency raised management’s rights under § 7106(a) of the Statute before the Arbitrator. Accordingly, we dismiss the Agency’s management rights exception. *JFK Airport*, 62 FLRA at 417.

²² Exceptions Br. at 12-13.

²³ *Id.* at 13. When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by the exception de novo. *AFGE Local 1633*, 71 FLRA 211, 212 n.12 (2019) (*Local 1633*) (Member Abbott concurring; Member DuBester concurring in part and dissenting in part). In reviewing de novo, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the applicable standard of law. *Id.* In making that assessment the Authority defers to the arbitrator’s underlying factual findings unless the excepting party establishes that they are nonfacts. *Id.* Section 7122(a)(1) of the Statute provides that an arbitration award will be found deficient if it conflicts with any rule or regulation. 5 U.S.C. § 7122(a)(1). For purposes of § 7122(a)(1), the Authority has defined rule or regulation to include both government-wide and governing agency rules and regulations. *Local 1633*, 71 FLRA at 212 n.12.

²⁴ Exceptions Br. at 7-8.

In its exceptions, the Agency fails to demonstrate how the protective equipment and training met OSHA standards.²⁵ Rather, the Arbitrator found that the grievants’ training, protective equipment, and position descriptions are deficient.²⁶ In particular, several grievants testified that they are frequently exposed to needles and other sharp objects.²⁷ Furthermore, the Agency has failed to successfully challenge any of the Arbitrator’s factual findings as nonfacts.²⁸ The Agency’s contrary-to-law exception merely challenges the weight that the Arbitrator ascribed to evidence and testimony.²⁹ Additionally, even if the Agency’s training and protective equipment met OSHA standards, the Agency fails to demonstrate that this would render the award contrary to law. That is, the Agency fails to prove that compliance with OSHA requirements would show that the Arbitrator erred in finding that the training and equipment nevertheless failed to “practically eliminate” the potential for injury within the meaning of the regulations.³⁰ Consequently, we uphold the Arbitrator’s finding that the grievant are owed high-degree environmental-differential pay.

To the extent that the Agency’s argument about the “disproportionate” nature of the remedy constitutes a

²⁵ *Id.* at 11-13; see also 5 C.F.R. § 2425.6(e)(1); *U.S. Dep’t of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 n.13 (2017) (stating that exceptions are subject to denial under § 2425.6(e)(1) of the Authority’s regulations if they fail to support arguments that raise recognized grounds for review).

²⁶ Award at 21-27.

²⁷ *Id.* at 9-11.

²⁸ See *supra* Part III.A.

²⁹ *Local 1633*, 71 FLRA at 213 (“The [a]gency’s argument that its training and protective equipment are sufficient to eliminate the threat of potential injury merely challenges the weight that the Arbitrator gave to the evidence and does not establish that the award is contrary to § 5343(c)(4) or Appendix A.”); *Local 933*, 70 FLRA at 510 (“The [a]rbitrator’s findings support his conclusion that the grievants were not entitled to environmental differential pay. Consequently, the Union has failed to demonstrate that the award violates 5 U.S.C. § 5343(c)(4) and 5 C.F.R. § 532.511, and we deny this exception.”).

³⁰ See Award at 22, 25-26; 5 C.F.R. Pt. 532, Subpt. E, App. A. In this regard, we note the Agency’s reliance on § 5343’s direction that the Office of Personnel Management (OPM) determine pay differentials “by applying occupational safety and health standards consistent with the permissible exposure limit promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970.” Exceptions Br. at 12 (quoting 5 U.S.C. § 5343(c)(4)). But this wording does not demonstrate that compliance with OSHA training and equipment recommendations guarantees that the risk of injury has been “practically eliminated” for purposes of entitlement to environmental differential pay under OPM’s regulations.

claim that the award violates the Back Pay Act (BPA),³¹ 5 U.S.C. § 5596(b)(4) provides that: “[I]n no case may pay, allowances, or differentials be granted under this section for a period beginning more than [six] years before the date of the filing of a timely appeal[.]” The Authority has held that arbitrators do not violate the BPA when they award backpay for the entire six-year period prior to the filing of a grievance.³² Furthermore, the Arbitrator awarded backpay *for the time period that the employees were exposed to high-hazard microorganisms at the Agency’s facilities.*³³ Consequently, the Agency’s exceptions incorrectly interpret the award insofar as they claim that the Arbitrator awarded (1) “seven years” of backpay to all affected employees,³⁴ and (2) backpay to laundry employees during a time period when the Agency alleges laundry was processed offsite by contractors.³⁵ Due to the fact that the grievance in this case was filed on September 7, 2016,³⁶ the Arbitrator did not err when he awarded backpay to March 15, 2011.³⁷ Accordingly, the Agency’s exception to the Arbitrator’s backpay award is denied.

IV. Decision

We deny the Agency’s exceptions.

Member DuBester, concurring:

I agree with the Decision to deny the Agency’s exceptions.

³¹ As previously noted, the Agency’s management rights exception is dismissed because it was not presented before the Arbitrator. *Supra* note 21.

³² U.S. DHS, CBP, 65 FLRA 978, 985 (2011) (CBP).

³³ Award at 3, 23-24, 26.

³⁴ Exceptions Br. at 7-8.

³⁵ *Id.* at 8. Identifying which employees were exposed, and for what duration, is a compliance matter. Here, the BPA’s requirements are satisfied by the Arbitrator’s sufficiently specific identification of the “category of employees” entitled to backpay. See, e.g., AFGE, Local 1034, 68 FLRA 718, 720 (2015) (Member DuBester dissenting, in part, on other grounds).

³⁶ Award at 3.

³⁷ CBP, 65 FLRA at 985.