72 FLRA No. 126

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3917
(Union)

and

UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
(Agency)

0-AR-5735

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DECISION

January 31, 2022

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

I. Statement of the Case

After the grievant worked unsuccessfully to obtain a promotion and compensation for newly assigned duties that were outside the scope of her position description, she resorted to the negotiated grievance procedure in search of relief. Arbitrator Richard L. Ahearn dismissed the grievance as substantively nonarbitrable under § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute),[1] concluding that the essential nature of the grievance concerned classification. The Union has filed several exceptions challenging that conclusion, but we find that they all lack merit, for the reasons explained below.

II. Background and Arbitrator's Award

The grievant occupies a General Schedule, Grade 12 (GS-12) permanent position with the Agency. In 2013, the grievant's supervisor (the supervisor) shifted the grievant's work responsibilities to include only special projects that were outside her GS-12 position description (the new duties). These duties were not part of any existing position description (PD).

Several years after undertaking the new duties, the grievant requested a desk audit. Instead, the Agency's personnel contractor recommended processing an accretion-of-duties promotion. Subsequently, the contractor reversed its recommendation and concluded that an accretion had not occurred because the new duties did not include any of the grievant's old duties, as listed in the grievant's existing GS-12 PD. As an alternative, the contractor proposed that the supervisor submit a PD encompassing the new duties so that it could be classified. The supervisor submitted modifications to two existing GS-14 PDs for higher-level review. After several months, higher-level management informed the grievant, through the supervisor, that the Agency would not adopt a new PD.

The grievant filed a grievance asserting that "her PD d[id] not accurately reflect her duties and that she 'was not promoted to a GS-13 [position,] which more accurately reflect[ed]" the new duties.[2] The grievant also alleged that the Agency's various actions and inactions constituted retaliation for asking for an accurate PD and commensurate compensation. As remedies, the grievance requested "a promotion to GS-14 with a new[, accurate] PD."[3]

The unresolved grievance proceeded to arbitration, and, as relevant here, the Arbitrator framed several issues for resolution:

> 1. Is the grievance substantively non-arbitrable because it concerns classification under . . . § 7121(c)(5) [of the Statute]?
> . . . .
> 3. Assuming that the grievance is properly before me for a decision on the merits, did the Agency violate provisions of the [collective-bargaining agreement], regulations, or statutes in its actions, or failure to act, related to the issues raised by the grievance?
> 4. Did the Agency violate the competitive[-]placement procedures of [the Agency], . . . regulations, or the [agreement]?
> 5. Did the Agency retaliate against [the g]rievant in any of its actions or failures to act?[4]

Beginning with substantive arbitrability, the Union acknowledged before the Arbitrator that the

[1] 5 U.S.C. § 7121(c)(5).

[2] Award at 9 (quoting Step-One Grievance).

[3] *Id.*

[4] *Id.* at 3-4.

assignment of the new duties did "not meet every criterion for a temporary promotion" that would fall outside the bar on classification grievances,[5] under § 7121(c)(5).[6]

Nevertheless, the Union argued that the grievance did not run afoul of § 7121(c)(5) because the Agency could have taken various "corrective actions" that were – according to the Union – lawful grievance remedies.[7] Those actions included: (1) adopting a newly classified PD that encompassed the new duties; (2) awarding the grievant an accretion-of-duties promotion; or (3) providing the grievant relief under Article 24, Section 24.16 of the agreement. That section authorizes "corrective action" for a "violation of . . . competitive[-]placement procedures."[8] In addition, the Union asked the Arbitrator to direct the Agency to "officially assign" the grievant to one of the Agency's existing GS-14 PDs and award backpay for the performance of higher-graded duties since 2013.[9]

Rejecting all of the Union's arguments that the grievance was substantively arbitrable, the Arbitrator found that several features of the current dispute resembled previous cases where the Authority had found that § 7121(c)(5) barred grievances. Specifically, the Arbitrator determined that the grievant was seeking various remedies that § 7121(c)(5) prohibited, like: (1) a position "reclassification . . . due to the alleged performance of higher[-]graded duties";[10] (2) a promotion to a higher grade, even though the Agency had not assigned the grievant the duties of a "*specific* higher[-]graded position";[11] and (3) "a new PD" or reassignment to an existing GS-14 PD.[12] Therefore, the Arbitrator concluded that § 7121(c)(5) barred further processing of the grievance.

Article 52, Section 52.04 of the agreement states that the "losing party shall pay the arbitrator's fees and expenses," and the "arbitrator shall indicate which party is the losing party."[13] Thus, after finding that the grievance was not substantively arbitrable, the Arbitrator determined that the Union was the "losing party" under Section 52.04.[14]

The Union filed exceptions to the award on May 20, 2021, and the Agency filed an opposition on June 11, 2021.

III. Analysis and Conclusions

A. The substantive-arbitrability finding is consistent with 5 C.F.R. § 511.607(a)(1).

The Union contends that the Arbitrator's substantive-arbitrability finding is contrary to 5 C.F.R. § 511.607(a)(1).[15] The introductory wording of § 511.607(a) says that certain disputes are not appealable to the Office of Personnel Management as part of a classification appeal, but that "[s]uch issues may be reviewed under administrative or negotiated grievance procedures if applicable."[16] Then, subsection (a)(1) identifies "the accuracy" of an employee's PD as a nonappealable issue.[17] The subsection further explains that "[i]f management and the employee cannot resolve their differences informally, the accuracy of the [PD] should be reviewed in accordance with administrative or negotiated grievance procedures."[18] The Union argues that this wording specifically authorizes the use of negotiated grievance procedures to dispute the accuracy of a PD, so the Arbitrator erred in finding that the grievance was not arbitrable.

However, the Union's argument ignores the caveat in the introductory wording of § 511.607(a). That wording clarifies that an employee may seek review under negotiated grievance procedures "*if applicable*."[19] Here, the Arbitrator found that the parties' negotiated grievance procedure was not applicable to the grievant's case.[20] And the Authority has previously denied that § 511.607(a) required an arbitrator to find arbitrable a matter that concerned the "'the classification of any position which does not result in the reduction in

[5] *Id.* at 19.
[6] 5 U.S.C. § 7121(c)(5) (prohibiting the use of a negotiated grievance procedure "with respect to any grievance concerning . . . the classification of any position which does not result in the reduction in grade or pay of an employee").
[7] Award at 19.
[8] Exceptions, Attach., Joint Ex. 1, Collective-Bargaining Agreement (CBA) Art. 24, § 24.16.
[9] Award at 20.
[10] *Id.* at 22 (citing *U.S. DOD, U.S. Marine Corps, Air Ground Combat Ctr., Twentynine Palms, Cal.*, 71 FLRA 173,174 (2019) (then-Member DuBester dissenting)).
[11] *Id.* (emphasis added) (citing *U.S. Small Bus. Admin.*, 71 FLRA 999, 1000 (2020) (*SBA*) (then-Member DuBester dissenting)).
[12] *Id.* at 23.
[13] CBA Art. 52, § 52.04.
[14] Award at 23.
[15] Exceptions Br. at 4-6. The Authority reviews questions of law de novo. *E.g., U.S. Dep't of the Air Force, Scott Air Force Base, Ill.*, 72 FLRA 526, 528 n.22 (2021) (*Air Force*) (Chairman DuBester concurring). In conducting de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *E.g., id.*
[16] 5 C.F.R. § 511.607(a).
[17] *Id.* § 511.607(a)(1).
[18] *Id.*
[19] *Id.* § 511.607(a) (emphasis added).
[20] Award at 22-23.

grade or pay of an employee.'"[21] Consistent with this precedent,[22] we deny the Union's argument that the Arbitrator's substantive-arbitrability finding is contrary to § 511.607(a)(1).

B. The award is not based on nonfacts.

The Union asserts that the award is based on nonfacts.[23] First, the Union asserts that the Arbitrator erroneously concluded that certain previous Authority decisions involving § 7121(c)(5) were governing precedent for the grievant's dispute.[24] Because that assertion challenges a legal conclusion that cannot establish the existence of a nonfact,[25] we deny it.

Second, the Union contends that the award is based on the nonfact that the grievant's performance of higher-graded duties was merely an allegation, rather than an undisputed fact.[26] Whether the grievant's performance of higher-graded duties was merely alleged or was undisputedly established, the Arbitrator concluded that § 7121(c)(5) prohibited the *remedies* that the grievant sought,[27] and the purported nonfact played no role in that conclusion. Accordingly, we find that this alleged nonfact is not central to the award.[28]

Third, the Union argues that the award is based on the nonfact that the grievant sought only remedies that § 7121(c)(5) prohibits.[29] The Union notes that the grievance also requested "any and all remedies allowed by law."[30] Even assuming that this argument concerns a factual finding, the grievance's generic request for "any and all remedies allowed by law"[31] did not undermine the Arbitrator's conclusion that the *specific* remedies requested in the grievance[32] showed that its essential nature concerned classification.[33]

For these reasons, we deny the Union's nonfact exception.

C. The Arbitrator was not required to address the competitive-placement and retaliation issues.

Two of the issues that the Arbitrator framed, but did not address, were whether the Agency violated competitive-placement procedures or retaliated against the grievant.[34] The Union contends that the Arbitrator was required to address those issues.[35] As relevant here, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration.[36]

[21] *AFGE, Nat'l Council of Educ. Locs., Council 252, Loc. 2607*, 43 FLRA 820, 822 (1991) (quoting parties' CBA § 37.02); *id.* at 825 (finding that § 511.607(a) did not make matter grievable where arbitrator found § 37.02 of parties' agreement excluded matter from parties' negotiated grievance procedure).
[22] *Id.* at 822, 825.
[23] 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. *E.g., U.S. Dep't of VA, VA Reg'l Office, St. Petersburg, Fla.*, 70 FLRA 799, 800 (2018) (*VA*). But an award is not deficient as based on a nonfact where the excepting party challenges an arbitrator's legal conclusions. *E.g., Air Force*, 72 FLRA at 531 n.60.
[24] Exceptions Br. at 6-7.
[25] *Air Force*, 72 FLRA at 531 n.60.
[26] Exceptions Br. at 6-7 (challenging Arbitrator's statement that the grievance "allege[d] that the [g]rievant was performing duties higher than the assigned pay grade" (quoting Award at 22)); *id.* at 7 ("This grievance did not allege higher[-]graded duties . . . .").
[27] Award at 21-23.
[28] *See VA*, 70 FLRA at 800.
[29] Exceptions Br. at 9.
[30] *Id.*
[31] *Id.*
[32] For example, the grievance sought: (1) an accretion-of-duties promotion, *e.g.*, Award at 19; *see U.S. Dep't of the Army, U.S. Army Med. Dep't Activity, Fort George G. Meade, Md.*, 71 FLRA 368, 369 (2019) (then-Member DuBester concurring) (§ 7121(c)(5) bars grievance seeking accretion-of-duties promotion); (2) a position reclassification, Award at 22; *see SBA*, 70 FLRA at 730 & n.7 (§ 7121(c)(5) bars grievance seeking the reclassification of an employee's position based on alleged classification errors); and (3) a noncompetitive promotion to GS-14 based on performing duties that were not part of any existing PD, Award at 5; *see SBA*, 70 FLRA at 730-31 (§ 7121(c)(5) bars grievance seeking temporary promotion or compensation for performing duties that were not part of a specific, established, already classified PD).
[33] *See* Award at 21-23.
[34] *Id.* at 3-4.
[35] Exceptions Br. at 11-12.
[36] *E.g., AFGE, Loc. 1822*, 72 FLRA 595, 596 (2021) (*Loc. 1822*) (Chairman DuBester concurring).

The series of issues that the Arbitrator framed included several merits questions.[37] But the Arbitrator framed the merits issues to be addressed only in the event that the grievance was arbitrable,[38] so the finding that the grievance was not arbitrable rendered it unnecessary to address the merits issues. We disagree with the Union's contention otherwise,[39] and we deny the exceeded-authority exception.

D. The award draws its essence from the agreement's provisions on competitive-placement procedures and challenging PD accuracy.

The Union argues that the award fails to draw its essence from two provisions of the agreement – Article 24, Section 24.16;[40] and Article 25, Section 25.02.[41]

Section 24.16 authorizes "corrective action" for a "violation of . . . competitive[-]placement procedures."[42] According to the Union, Section 24.16 "specified a path forward . . . that did not require any classification issue to be considered."[43] However, the "*competitive*[-]placement procedures" in the agreement would not apply to the grievant's situation,[44] as the grievant did not *compete* to receive the assignment of the new duties.[45] Moreover, the Union asked the Arbitrator to direct the Agency "to officially assign" the grievant to a GS-14 PD *without* competition.[46] Indeed, the agreement expressly excludes permanent position changes – such as those that the grievance sought – from the coverage of the agreement's competitive-placement procedures.[47] Since the Union has failed to establish the applicability of Section 24.16 to this dispute, the award does not fail to draw its essence from that section.

Section 25.02 outlines a process to follow when an employee questions "the accuracy of the [employee's] official [PD]."[48] The concluding sentence states, "If the matter cannot be resolved and the employee wishes to pursue the matter further, the employee or their representative may file a grievance . . . ."[49] According to the Union, this sentence obligated the Arbitrator to find the grievance substantively arbitrable.[50] But the Arbitrator found that § 7121(c)(5) required finding the grievance substantively nonarbitrable, and the Union has not filed an exception contending that the award is contrary to § 7121(c)(5). Further, nothing in Section 25.02 could alter the requirements of § 7121(c)(5).[51] Thus, the award draws its essence from

[37] Award at 3-4.
[38] *Id.* at 3 ("[a]ssuming that the grievance is properly before me for a decision on the merits," the Arbitrator would address merits issues).
[39] As part of its exceeded-authority exception, the Union also contends that the Arbitrator erred by allowing the Agency to question a witness about whether the grievant's duties were included in any existing PD. This contention does not address the standard for determining whether arbitrators exceeded their authority – namely, whether they failed to resolve an issue submitted to arbitration, resolved an issue not submitted to arbitration, disregarded specific limitations on their authority, or awarded relief to persons not encompassed by the grievance. *E.g.*, *Bremerton Metal Trades Council, Dist. 160, Loc. 282*, 72 FLRA 43, 43 n.5 (2021) (*Loc. 282*) (Member Abbott concurring). Thus, we deny this contention as well.
[40] Exceptions Br. at 10. The Authority will find that 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. *E.g.*, *Loc. 282*, 72 FLRA at 43 n.5.
[41] Exceptions Br. at 5-6.
[42] CBA Art. 24, § 24.16.
[43] Exceptions Br. at 11.
[44] *Id.* (emphasis added).
[45] Award at 5 (noting that the supervisor assigned the new duties to the grievant, without mentioning a competitive process).
[46] *Id.* at 20.
[47] CBA Art. 24, § 24.07(2)(b)-(c) (excluding from competitive-placement procedures any "[p]romotion resulting from the upgrading of a position without significant changes in the duties and responsibilities due to issuance of a new classification standard or the correction of an initial classification error" and any "[p]romotion resulting from an employee's position being reclassified at a higher grade because of additional duties and responsibilities").
[48] CBA Art. 25, § 25.02.
[49] *Id.*
[50] Exceptions Br. at 5-6.
[51] *See AFGE, Loc. 2006*, 58 FLRA 297, 298 (2003) (where separation of a probationary employee was nonarbitrable as a matter of law, arbitrator correctly held that general procedural protections in parties' agreement did not permit finding a grievance concerning a probationary employee's separation arbitrable).

Section 25.02, and we deny the Union's essence exception.[52]

IV. Decision

We dismiss, in part, and deny, in part, the Union's exceptions.

Chairman DuBester, concurring:

I agree with the Decision to dismiss, in part, and deny, in part, the Union's exceptions.

[52] In the event that all other arguments in the Union's exceptions are denied – which they have been – the Union asserts that the award fails to draw its essence from Article 51, Section 51.15 of the agreement: "If the issue of arbitrability is raised at the arbitration stage, then *the party raising the issue (if successful) will pay all arbitration costs* . . . ." Exceptions Br. at 13 (quoting CBA Art. 51, § 51.14). The Arbitrator held the Union responsible for fees and expenses as the "losing party" under Article 52, Section 52.04 of the agreement. Award at 23. The Union admits that it did not raise Section 51.15 below, Exceptions Br. at 14, and, under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the Arbitrator, 5 C.F.R. §§ 2425.4(c), 2429.5. As the Union knew that both Sections 51.15 and 52.04 dealt with arbitration costs, the Union could have argued below for the Arbitrator to apply Section 51.15. Because the Union did not do so, §§ 2425.4(c) and 2429.5 bar this essence argument, and we dismiss it.