

73 FLRA No. 19

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
CITIZENSHIP IMMIGRATION SERVICES
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3928
NATIONAL CITIZENSHIP
AND IMMIGRATION SERVICES
COUNCIL 119
(Union)

0-AR-5744

DECISION

June 23, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members

I Statement of the Case

The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement (CBA) by failing to retroactively process career-ladder promotions (CLPs) for eligible employees that had been delayed. Arbitrator Richard Van Kalker sustained the grievance and directed the Agency to make the impacted employees whole. The Agency filed exceptions arguing that the award fails to draw its essence from the CBA and that it is contrary to a government-wide regulation, Office of Personnel Management (OPM) authority, and Comptroller General and Authority precedent concerning retroactive promotions.

For the reasons discussed below, we dismiss the Agency's essence exception and deny its exception that that the award is contrary to a government-wide regulation and applicable government-wide authority and case law.

II Background

In June 2020,¹ the Agency faced the prospect of a potential furlough due to a budget shortfall. Therefore, on June 7, the Agency delayed all CLPs. On August 30, after the potential for a furlough had passed, the Agency processed the delayed CLPs for employees who had become eligible between June 7 and August 30, but did not make the CLPs retroactive to the initial dates of eligibility. The Union alleged that the Agency violated Article 43 of the CBA by failing to process the CLPs retroactively and filed a grievance "on behalf of all impacted Nebraska Service Center [(NSC)] bargaining[-]unit employees."² The Union requested that the Agency identify all bargaining-unit employees impacted by the delay and make the CLPs retroactive to the date of eligibility. The Agency denied the grievance. The Agency asserted that CLPs are discretionary personnel actions and that OPM authority states that personnel actions cannot be made effective prior to the date that the "appointing officer" approves the action.³ The Agency argued that, here, because the appointing officer did not approve the CLPs until August 30, the affected employees were not entitled to retroactive CLPs. The matter proceeded to arbitration.

In a June 18, 2021 award, the Arbitrator framed the issue as "[d]id the Agency violate Article 43 of the CBA by failing to timely and retroactively process nondiscretionary [CLPs]?"⁴ The Arbitrator noted that Article 43 provides that:

[CLPs] shall be processed in a timely manner once an employee has met the criteria for promotion eligibility. Once the criteria are met, the promotion will be made effective at the beginning of the following pay period. If the determination is delayed, and that determination is that the employee met the criteria on the date of eligibility, the promotion will be retroactive where allowed by law. Promotions will be processed retroactively if a delay occurs after the supervisor's determination.⁵

The Arbitrator concluded that "the CLPs should have been processed retroactively."⁶ The Arbitrator found that although OPM's Guide to Processing Personnel Actions (GPPA) states that CLPs are not final until an appointing officer approves the action via a signature and thus that generally CLPs cannot be made retroactive absent

¹ All subsequent dates occurred in 2020, unless otherwise indicated.

² Award at 2; *see also* Exceptions, Agency Ex. 2, Union Step II Grievance (Grievance) at 1.

³ Award at 5.

⁴ *Id.* at 2.

⁵ *Id.* at 6.

⁶ *Id.* at 7-8.

such a signature,⁷ OPM's Workforce Reshaping Operations Handbook "makes clear" that OPM policies "do not exist in a vacuum and must be read in conjunction with applicable articles contained in the Agency's [CBAs]."⁸ The Arbitrator stated that although CLPs are generally discretionary on the part of management, bargaining can "change aspects of CLPs . . . to nondiscretionary."⁹ The Arbitrator found that Authority case law provides that retroactive promotions and backpay are authorized when the arbitrator finds that an agency "failed to promote employees in career ladder positions on their eligibility date in violation of [a CBA] and that, but for the violation, the grievants would have been promoted at the appropriate time."¹⁰ In support, the Arbitrator cited several Authority cases, including those relying on decisions of the Comptroller General of the Government Accountability Office (GAO) resolving similar issues, where CLPs became nondiscretionary as a result of provisions that were negotiated into the parties' CBA. The Arbitrator found that, in this case, Article 43's use of the phrases "shall be" and "will be" make CLPs mandatory and nondiscretionary once employees are deemed eligible.¹¹ Therefore, the Arbitrator concluded that Article 43 obligated the Agency to process the CLPs retroactively.

The Arbitrator also rejected the Agency's argument that it was "prejudiced in that specific grievants were not identified by name in the grievance."¹² Although the Union filed the grievance "on behalf of all impacted Nebraska Service Center bargaining[-]unit employees,"¹³ the Agency argued that the grievance should be limited to "three individuals" named by the Union "early in this grievance."¹⁴ The Arbitrator noted that the Agency failed

to raise this issue prior to arbitration and that the Agency knew which employees became eligible for a CLP during the relevant period.

The Arbitrator concluded that the Agency violated the CBA by not processing the CLPs retroactively and sustained the grievance.

The Agency filed exceptions to the award on July 14, 2021, and the Union filed an opposition to the Agency's exceptions on July 30, 2021.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Agency's exceptions.

The Agency argues that the award fails to draw its essence from the plain wording of the CBA because the Arbitrator concluded that the grievance was procedurally arbitrable even though the Union failed to name specific grievants as required by the CBA.¹⁵ The Agency contends, among several things, that the award "dispenses with the Agency's threshold inarbitrability arguments without analyzing any contract language, or without addressing the Agency's contract-based arguments that the Union had not met its express obligation to name its grievants."¹⁶ In its opposition, the Union asserts that the Agency "never argued to the Arbitrator that the matter was not arbitrable because the Union failed to name the [g]rievants."¹⁷

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.¹⁸ The Agency's entire essence exception

⁷ See Exceptions, Agency Ex. 13, U.S. OPM Operating Manual Update, the Guide to Processing Personnel Actions, Update 69 (January 11, 2015) (GPPA) at Ch. 3, Sub.Ch. 1 § 1-3.a, stating that:

Except as explained in Table 3-A, no personnel action can be made effective prior to the date on which the appointing officer approved the action. That approval is documented by the appointing officer's pen and ink signature or by an approved electronic authentication in block 50 of the Standard Form 50, or in Part C-2 of the Standard Form 52. By approving an action, the appointing officer certifies that the action meets all legal and regulatory requirements and, in the case of appointments and position change actions, that the position to which the employee is being assigned has been established and properly classified.

⁸ Award at 9 (internal quotation omitted); see also Exceptions, Agency Ex. 3, Agency Resp. to Step II Grievance including as an attachment OPM's Workforce Reshaping Operations Handbook, A Guide for Agency Management and Human Resource Offices (Handbook). The Handbook states that its purpose is "to provide assistance to agencies that are considering and/or undergoing

some type of reshaping (e.g., reorganization, management directed reassignments, furlough, transfer of function, reduction in force)" and notes that it should be used in conjunction with "[a]pplicable articles contained in the agency's collective[-]bargaining agreement(s)" in addition to other applicable policies, laws, and regulations. Handbook at 3.

⁹ Award at 9.

¹⁰ *Id.* at 10 (citing *NAGE, Loc. R2-98*, 29 FLRA 1303, 1309 (1987)) (emphasis omitted).

¹¹ *Id.* at 12.

¹² *Id.* at 14.

¹³ *Id.* at 2; Grievance at 1.

¹⁴ Exceptions, Attach., Agency Br. to Arb. (Agency Br. to Arb.) at 31.

¹⁵ Exceptions Br. at 28. The CBA provides that both Step II and Step III grievances "shall state" "the name(s) of the grievant(s)." See Exceptions, Agency Ex. 1, CBA at 46-47. As noted above, the grievance was filed "on behalf of all impacted Nebraska Service Center bargaining[-]unit employees." Award at 2; Grievance at 1.

¹⁶ Exceptions Br. at 28-29.

¹⁷ Opp'n Br. at 12.

¹⁸ 5 C.F.R. §§ 2425.4(c), 2429.5; *AFGE, Loc. 3627*, 70 FLRA 627, 627 (2018).

is based upon its contention that it had previously argued that the grievance was procedurally inarbitrable because of the Union's failure to name specific grievants.¹⁹ Upon review of the Agency's brief to the Arbitrator, however, we find that the Agency never raised this argument. Instead, the Agency argued that the Union's requested remedies should be denied because the grievance should be limited to the "three individuals" named by the Union "early in this grievance."²⁰ The Agency cited both the CBA and exceeds-authority case law, warning the Arbitrator about the impropriety of expanding the scope of the grievance beyond the "three named [g]rievants."²¹ Thus, the Agency's argument focused on the remedy and acknowledged three grievants. Nowhere did the Agency clearly make a "threshold inarbitrability" argument asserting that the grievance was completely inarbitrable because of the Union's failure to name its grievants.²² Further, it is clear to us that the Arbitrator did not interpret such an argument, because the Arbitrator made no specific findings as to procedural arbitrability in that regard.²³ Because the Agency could have raised this argument to the Arbitrator, but did not, we dismiss this exception as barred by §§ 2425.4(c) and 2429.5 of the Authority's Regulations.²⁴

IV. Analysis and Conclusion: The award is not contrary to a government-wide regulation or applicable government-wide authority and case law.

The Agency argues that 5 C.F.R. § 250.101 directs agencies to comply with OPM's GPPA, and that the GPPA instructs that no personnel action, including CLPs, can be made effective prior to the date on which the duly-designated appointing officer authorized the action.²⁵ According to the Agency, the promotions at issue here could not be made effective prior to August 30, 2020—the date when the appointing officer approved them—and, therefore, the Arbitrator's award directing the promotions

be made retroactive is contrary to a government-wide regulation²⁶ and several Comptroller General and Authority decisions.²⁷

When an exception involves an award's consistency with regulation, the Authority reviews any questions of law raised by the exception and the award de novo.²⁸ In applying the standard of de novo review, the Authority determines whether an arbitrator's legal conclusions are consistent with the applicable legal standard.²⁹ In making that determination, we defer to the arbitrator's underlying findings of fact.³⁰

The Authority has previously stated that decisions of the Comptroller General are not binding on the Authority.³¹ The Authority has noted that although a Comptroller General opinion serves as an expert opinion that should be prudently considered, it is not one to which the Authority must defer.³² However, in cases where the parties and the arbitrator have examined Comptroller General precedent to address legal questions raised by a grievance, the Authority has assumed the applicability of that precedent when assessing contrary-to-law exceptions to the resulting arbitral award.³³ Here, the parties extensively cited Comptroller General precedent to the Arbitrator, the Arbitrator cited Comptroller General precedent and relied on Authority cases analyzing Comptroller General precedent, and the Agency and Union both cite Comptroller General precedent in the exceptions and opposition, respectively.³⁴ Accordingly, we will examine and apply the relevant decisions of the Comptroller General in resolving the Agency's contrary-to-government-wide-regulation exception to the award.³⁵

Under 5 C.F.R. § 250.101, when an agency takes a personnel action authorized by that chapter, it must comply with, among a number of things, the instructions

¹⁹ See Exceptions Br. at 28-42; Exceptions Form at 11 (explaining that it raised to the Arbitrator the argument that "the grievants were not named, and that this failure rendered the grievance procedurally defective" (internal quotation omitted)).

²⁰ Agency Br. to Arb. at 29-31.

²¹ *Id.*

²² Exceptions Br. at 28; see also Agency Br. to Arb. at 29-31 (a section titled "THE REMEDIES REQUESTED BY THE UNION SHOULD BE DENIED").

²³ See Award at 14 (addressing the Agency's argument that "the Agency was prejudiced in that specific grievants were not identified by name in the grievance").

²⁴ See *AFGE, Loc. 2846*, 71 FLRA 535, 536 (2020) (dismissing exceptions where the excepting party failed to demonstrate that it raised the arguments to the arbitrator); *AFGE, Loc. 2302*, 70 FLRA 202, 203-04 (2017) (same).

²⁵ Exceptions Br. at 19-20.

²⁶ *Id.* at 22, 27.

²⁷ *Id.* at 22-26.

²⁸ *U.S. Dep't of the Interior, Nat'l Park Serv., U.S. Park Police*, 71 FLRA 1121, 1122 (then-Member DuBester dissenting on other grounds) (citing *AFGE, Loc. 1633*, 70 FLRA 752, 753 (2018) (*Loc. 1633*)).

²⁹ *Id.* at 1122 n.14 (citing *AFGE, Loc. 1916*, 64 FLRA 1171, 1172 (2010)).

³⁰ *Loc. 1633*, 70 FLRA at 753.

³¹ *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 68 FLRA 976, 979 (2015) (*NOAA I*) (citing *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014) (*NOAA II*); *U.S. Dep't of the Treasury, IRS, Small Bus./Self Employed Operating Div.*, 65 FLRA 23, 26 n.5 (2010)).

³² *Id.*

³³ *Id.* (citing *NOAA II*, 67 FLRA at 358).

³⁴ See Agency Br. to Arb. at 19-29; Exceptions, Union First Br. to Arb. at 9-16; Award at 8-10; Exceptions Br. at 22-26; Opp'n Br. at 10-11.

³⁵ *NOAA I*, 68 FLRA at 979-80.

OPM has published in the GPPA.³⁶ Section 250.101 also provides that an agency must follow the instructions in the GPPA when taking a personnel action resulting from, for example, a decision of the Authority or an arbitral award under a CBA.³⁷ As noted above, the GPPA states, as relevant here, that “no personnel action can be made effective prior to the date on which the appointing officer approved the action.”³⁸ Although this is generally true, numerous Comptroller General decisions analyzing the legality of retroactive promotions make clear that this is the general rule *in the absence of* any nondiscretionary agency regulation, policy, or CBA provision concerning promotions.³⁹ Countless Comptroller General decisions on this point have recognized that certain CBA provisions

may constitute nondiscretionary agency policies, and that retroactive promotions may be appropriate when an agency’s delay in promotion or failure to promote violates such a nondiscretionary CBA provision or agency policy.⁴⁰ Authority decisions concerning retroactive promotions have analyzed Comptroller General precedent on this point and have reached the same conclusion.⁴¹

Here, the Arbitrator determined that Article 43 of the CBA “makes CLPs nondiscretionary once employees have been deemed to be eligible” and “obligate[s]” the Agency “to process CLPs retroactively when there is a delay in the initial processing of the same.”⁴² The Arbitrator concluded that the Agency’s failure to process

³⁶ See 5 C.F.R. § 250.101, stating in full that:

When taking a personnel action authorized by this chapter, an agency must comply with qualification standards and regulations issued by the Office of Personnel Management (OPM), the instructions OPM has published in the Guide to Processing Personnel Actions, and the provisions of any delegation agreement OPM has made with the agency. When taking a personnel action that results from a decision or order of OPM, the Merit Systems Protection Board, Equal Employment Opportunity Commission, or Federal Labor Relations Authority, as authorized by the rules and regulations of those agencies, or as the result of a court order, a judicial or administrative settlement agreement, or an arbitral award under a negotiated agreement, the agency must follow the instructions in the Guide to Processing Personnel Actions and comply with all other relevant substantive and documentary requirements, including those applicable to retirement, life insurance, health benefits, and other benefits provided under this chapter.

³⁷ *Id.*

³⁸ GPPA, Ch. 3, Sub.Ch. 1 § 1-3.a.

³⁹ See, e.g., *Matter of Janice Levy: Arbitration Award of Retroactive Promotion and Backpay*, B-190408, 1977 WL 11716, at *7 (Comp. Gen. Dec. 21, 1977) (“[O]ne exception to the rule prohibiting retroactive promotion is where the failure to promote constitutes violation of a nondiscretionary regulation or policy. We have recognized that an agency, by agreeing to a provision of a [CBA] may . . . limit its discretion to such a degree that it becomes mandatory under certain conditions to promote classes of employees.” (all uppercase omitted)); see also *In the Matter of Jonah Cahill – Arbitration Award of Retroactive Promotion and Backpay*, 58 Comp. Gen. 59, 61 (Comp. Gen. Nov. 1, 1978) (since the arbitrator’s award of retroactive promotion and backpay was predicated on administrative error prior to action by the authorized official it was contrary to applicable authorities, “except to the extent that the authorized official’s exercise of discretion to approve or disapprove the grievant’s promotion request is limited by statute, regulation, or collective-bargaining agreement” (all uppercase omitted)).

⁴⁰ See, e.g., *Matter of: Joseph Pompeo, et. al., IRS Agents – Retroactive Promotions*, B-186916, 1977 WL 13058, at *1-2 (Comp. Gen. April 25, 1977) (upholding retroactive CLPs, where the supervisor certified eligibility but failed to further the request for promotion, and where there was a nondiscretionary agency policy requiring promotions); *In the Matter of IRS Employees – Retroactive Promotion with Backpay*, 55 Comp. Gen. 42, 43-44 (Comp. Gen. July 2, 1975) (permitting retroactive promotions where there was a violation of a nondiscretionary CBA provision even though an appropriate agency official had not approved the promotions). We find the Comptroller General decisions cited by the Agency in support of its position to be distinguishable as those decisions do not involve nondiscretionary CBA provisions concerning CLPs. See *Matter of: Marianna Mehtcs*, B-261592, 1995 WL 670133, *2 (Comp. Gen. Nov. 13, 1995); *In the Matter of Douglas C. Butler – Retroactive Promotion*, 58 Comp. Gen. 51, 53 (Comp. Gen. Nov. 1, 1978); *Matter of: Jacque Swain – Admin. Error – Retroactive Promotion*, B-181238, 1974 WL 7335, *1 (Comp. Gen. Nov. 15, 1974).

⁴¹ See, e.g., *NFFE, Loc. 2030*, 56 FLRA 667, 673 (2000) (upholding an award of a retroactive CLP where the arbitrator found that the terms of the CBA entitled the grievant to a nondiscretionary CLP when the requisite conditions were met, and rejecting the agency’s argument that a retroactive CLP was not appropriate because the delay in approving the grievant’s promotion preceded an approval by the properly authorized official); *SSA*, 51 FLRA 1700, 1706-07 (1996) (upholding an award of a retroactive CLP where the arbitrator determined that the CBA made CLPs nondiscretionary upon fulfillment of the qualifications for promotion).

⁴² Award at 12-13.

the CLPs retroactively violated this provision. In its exceptions, the Agency does not challenge the Arbitrator's finding that Article 43 makes CLPs nondiscretionary or dispute the CLP eligibility of any potentially affected employee.⁴³ Consequently, in light of the above discussion, we find that the Arbitrator did not err in directing that the promotions be made retroactive. We deny the Agency's exception.⁴⁴

V. Decision

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

⁴³ The Arbitrator found that “[o]n August 30, 2020, the Agency began processing CLPs for eligible employees.” Award at 4 (emphasis added). The Agency appears to concede that at least some of the impacted employees in this case were already deemed eligible for promotion. See Exceptions Br. at 23 (“There was no evidence in the record that *after the [g]rievants’ first-line supervisors had approved their respective employees as being ‘eligible’ for these promotions*, that only ‘formal, ministerial’ actions remained to be completed in order to effectuate their promotions” (emphasis added)). We recognize that this case is unique and fact-specific, however, in the sense that it does not involve a discussion of the eligibility of the impacted employees.

⁴⁴ See, e.g., *U.S. Dep’t of Educ., Wash., D.C.*, 61 FLRA 307, 312 (2005) (finding that the agency failed to establish that the award was contrary to OPM guidance); *NOAA II*, 67 FLRA at 358-59 (denying the agency’s contrary-to-law argument where it failed to establish that the award was contrary to statute or Comptroller General decisions interpreting the statute).