

64 FLRA No. 47

NATIONAL LABOR RELATIONS
BOARD UNION
(Union)

and

NATIONAL LABOR RELATIONS BOARD
DETROIT REGIONAL OFFICE
DETROIT, MICHIGAN
(Agency)

0-AR-4250

DECISION

December 7, 2009

Before the Authority: Carol Waller Pope, Chairman,
and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Stanley T. Dobry filed by the Union under § 7122 of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator denied a grievance alleging that the Agency violated the parties' collective bargaining agreement and government-wide regulation by failing to promote the grievant. For the following reasons, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The grievant began work with the Agency as a GS-11 Field Attorney in February 2000. Award at 11. The Agency promoted the grievant to GS-12 in February 2001, and to GS-13 in February 2002. *Id.* Under the parties' agreement, "Field Attorneys who meet the requirements of the performance appraisal system . . . shall be promoted . . . after . . . 36 months as a Grade GS-13 Field Attorney, to the full performance level (Grade GS-14)."¹ *Id.* at 7. Starting in March 2002, the grievant worked three days per week under a part-time work schedule. *Id.* at 11.

Following her appraisal in February 2005, the Agency denied the grievant a promotion to GS-14, stating that the grievant had not "demonstrated the ability to perform the work" of a GS-14 Field Attorney. *Id.* at 12. In response to the grievant's request for a reevaluation in June 2005, the Agency stated that the grievant did not have a sufficient amount of time-in-grade at the GS-13 level to be promoted to GS-14. *Id.* The grievant then filed a Step II grievance challenging the Agency's failure to promote her to GS-14. *See id.* at 3, 12. The parties were unable to resolve the grievance at Step II. *Id.* at 3.

In its response to the grievant's Step III filing, the Agency stated that the grievant did not have enough "specialized" or "qualifying" experience to be eligible for promotion to GS-14 under the parties' agreement. *Id.* at 4. According to the Agency, a GS-13 Field Attorney must gain qualifying experience for promotion to GS-14 by serving as a GS-13 for 36 months. *See id.* at 4. However, the Agency stated, in calculating the amount of qualifying experience a GS-13 has accumulated, the Agency prorates any time a GS-13 serves on a part-time schedule. *See id.* at 5. As the grievant had served on a part-time schedule from March 2002 through June 2005, the Agency determined that the grievant had not accumulated enough qualifying experience to be eligible for promotion to GS-14. *See id.* at 3-5, 12.

The parties did not stipulate the issues to be resolved by the Arbitrator. The Arbitrator framed the issues as follows:

- A. Whether NLRB field attorney . . . met the requirements contained in the collective bargaining agreement and applicable federal regulations so that she was entitled to a promotion from the GS-13 to GS-14 pay level . . . as of June 14, 2005?
- B. Whether the Agency violated the collective bargaining agreement as alleged by not promoting the Grievant . . . in June 2005?

Id. at 6.

The Arbitrator found that the parties' agreement requires that an employee have sufficient "qualifying experience" for promotion, and also found that time accrued on a part-time schedule is prorated when calculating an employee's qualifying experience. *Id.* at 17-18. In this regard, the Arbitrator found that Article 22 of the parties' agreement incorporates a document entitled

1. The pertinent text of the parties' agreement is further set forth in the Appendix.

“Guidelines for Part-Time Employment” (Guidelines).² *See id.* at 17-18. Section 11 of the Guidelines (referring to Article 8 of the parties’ agreement), entitled “Contract Benefits,” states:

All the terms and conditions of the collective bargaining agreement between the General Counsel and the NLRB Union remain fully applicable except:

1. Article 8 (Both Contracts)

The time periods set forth for promotion in these articles shall be extended on a pro-rata basis employee’s regular part-time schedule (e.g. a GS-11 Field Examiner who is regularly scheduled to work 20 hours a week would be eligible for consideration for promotion to GS-12 in 2 years).

Id. at 17-18.

Section 5 of the Guidelines similarly states that “[p]art-time experience is credited on a pro-rata basis according to the relation it bears to a full work-week.” *Id.* at 17. In contrast, Section 4 states that an employee’s part-time schedule may not be prorated when calculating an employee’s time-in-grade, requiring that “part-time employees receive a full year of service credit for the purpose of computing . . . time in grade restrictions on advancement[.]” *Id.*

The Arbitrator noted that under Section 4 of the Guidelines, part-time work may not be prorated for determining an employee’s time-in-grade, but that Sections 5 and 11 of the Guidelines refer to the proration of an employee’s part-time work. In these circumstances, the Arbitrator determined that Sections 5 and 11 must refer to a promotion requirement other than the time-in-grade requirement. According to the Arbitrator, an employee needs to satisfy both the time-in-grade requirement and a qualifying experience requirement to be eligible for promotion to GS-14. *See id.* at 17-18, 20. The Arbitrator concluded that “pursuant to [the Guidelines], the Agency may prorate the work time of part-time employees for purposes of meeting a . . . qualification standard” and credited the testimony of an Agency witness to find that it had been the Agency’s past practice to require that an employee accumulate 36 months of qualifying experience to be eligible for promotion to GS-14.³ *Id.* at 18.

2. The pertinent text of the document entitled “Guidelines for Part-Time Employment” (Guidelines) is further set forth in the Appendix.

As to government-wide regulations, the Arbitrator noted that, pursuant to an Office of Personnel Management (OPM) document, entitled “Part-Time Employment and Job Sharing Guide,” (OPM Guide), the Guidelines state that the Agency “cannot prorate an employee’s work time for purposes of meeting . . . time-in-grade requirements.”⁴ *Id.* at 20. However, the Arbitrator found that the OPM Guide “[is] not intended to do away with the ability to require proration of part-time work *as it might relate to experience.*” *Id.*

Finding that the grievant had not accumulated a sufficient amount of qualifying experience to be entitled to a promotion under the parties’ agreement, the Arbitrator denied the grievance. *Id.* at 21-22.

III. Positions of the Parties

A. Union’s Exceptions

The Union asserts that the award fails to draw its essence from the parties’ agreement. Exceptions at 5. Contrary to the Arbitrator’s determination, the Union claims that the parties’ agreement does not contain a qualifying experience requirement. *See id.* at 1-2, 7. Additionally, the Union contends that the Arbitrator erroneously determined that it was the Agency’s past practice to require that a GS-13 obtain 36 months of qualifying experience to be eligible for promotion to GS-14. *Id.* at 7-11.

The Union further argues that the award is contrary to government-wide regulation. *Id.* at 12. The agreement, the Union contends, contains only a time-in-grade promotion requirement. *See id.* at 2, 4, 6-7, 13-14. Therefore, the Union asserts, the Agency’s proration of the grievant’s service was necessarily conducted for the purpose of calculating her time-in-grade. *See id.* at 13-14. As such, according to the Union, the Agency’s proration of the grievant’s service conflicts with the OPM Guide. *See id.* at 14.

B. Agency’s Opposition

The Agency argues that the award does not fail to draw its essence from the parties’ agreement. Opposition at 11-12. Specifically, the Agency contends that the Guidelines section entitled “Crediting Experience for Qualification Requirements,” makes clear that the par-

3. The Arbitrator noted that the Agency may waive the requirement if the Agency is “satisfied that the experience was extraordinary and the merit great.” Award at 21 n.15.

4. The pertinent text of the document entitled “Part-Time Employment and Job Sharing Guide” (OPM Guide) is set forth in the Appendix.

ties' agreement contains a qualifying experience requirement. *See id.* at 13. Moreover, the Agency asserts, the Guidelines require that the Agency prorate a part-time employee's time served for the purpose of determining when such an employee may be promoted. *See id.* The Agency thus argues that the award is a reasonable interpretation of the parties' agreement and draws its essence from the parties' agreement. *Id.* at 15. The Agency further contends that the Arbitrator correctly determined that it had been the past practice of the Agency to require that an employee complete a requisite amount of qualifying experience before being promoted. *See id.* at 18.

Regarding the Union's claim that the award is contrary to government-wide regulation, the Agency contends that the Union's assertion that the agreement does not contain a qualifying experience requirement is erroneous. *See id.* at 19. Because the OPM regulations forbid the proration of time in calculating only the time-in-grade requirement, and because the award finds that the Agency did not prorate the time in calculating the grievant's time-in-grade requirement, the Agency contends that the award is not contrary to government-wide regulation. *Id.*

IV. Analysis and Conclusions

A. The award does not fail to draw its essence from the parties' agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing 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 collective bargaining 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. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

In this case, the Arbitrator interpreted Articles 8 and 22 (incorporating the Guidelines into the parties'

agreement) and the Guidelines, as well as the Agency's past practice, to conclude that the Agency's proration of the grievant's part-time service did not violate the parties' agreement. The Arbitrator found that the Guidelines require that a GS-13 must have a sufficient amount of qualifying experience to be eligible for promotion to GS-14, and also found that the Guidelines require that an employee's part-time work schedule be prorated for the purpose of calculating an employee's qualifying experience. Additionally, the Arbitrator found that the Agency demonstrated a past practice of requiring a GS-13 accumulate 36 months of qualifying experience in order to be eligible for promotion to GS-14, stating that the Agency's "proofs on the use of a 36-month time-in-grade experience requirement for a promotion from GS-13 to GS-14 were un rebutted." Award at 18-19. The Arbitrator thus determined that the Agency did not violate the parties' agreement. The Arbitrator's interpretation and application of the agreement does not disregard the agreement and is not irrational, unfounded, or implausible. *See, e.g., NATCA*, 51 FLRA 102, 110 (1995) (award finding grievant failed to satisfy training requirement for promotion did not fail to draw its essence from the parties' agreement). As such, we conclude that this exception provides no basis for finding the award deficient.

B. The award is not based on a nonfact.

The Union contends that the Arbitrator erred in finding that the Agency had a past practice of requiring GS-13 Field Attorneys accumulate 36 months of qualifying experience to be eligible for promotion to GS-14. In this regard, the Union claims that "[t]he Arbitrator deemed [the Agency's] conclusory testimony sufficient to establish a past practice, even though the Agency did not provide a single concrete example of a situation where it actually imposed and prorated a 36-month qualification standard for the promotion of a part-time field attorney." Exceptions at 9. The Union further claims that "[t]he Arbitrator's legal conclusion — that the Agency could meet its burden of showing a past practice solely by conclusory testimony without a specific example of the practice or evidence that the Union had consented to the practice — is incorrect as a matter of law." *Id.* at 11.

We construe the Union's claim that the Arbitrator erred in finding a past practice as an argument that the award is based on a nonfact. *See, e.g., AFGE, Local 1441*, 61 FLRA 201, 203 (2005) ("[W]here a party challenges an arbitrator's determination that a past practice exists, the Authority construes that challenge as raising a nonfact argument.").

To establish that an award 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. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.* In addition, an arbitrator's conclusion that is based on an interpretation of the parties' collective bargaining agreement does not constitute a fact that can be challenged as a nonfact. *See NLRB*, 50 FLRA 88, 92 (1995).

Here, the Union disputes the Arbitrator's factual finding, based on evidence presented at arbitration, that the Agency has required that GS-13 Field Attorneys gain 36 months of qualifying experience to be eligible for promotion to GS-14. *See* Exceptions at 9, 11. As the Union's nonfact argument relies on the Arbitrator's factual determination that was disputed at arbitration, the Union has not demonstrated that a central fact underlying the award is clearly erroneous, but for which the Arbitrator would have reached a different result. *See, e.g., U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Tucson, Ariz.*, 63 FLRA 241, 243 (2009). Therefore, we deny this exception.

C. The award is not contrary to law.

The Union contends that the award permits the Agency to prorate the time an employee working on a part-time schedule accumulates for the purpose of calculating the employee's time-in-grade. Exceptions at 14. Therefore, the Union claims, the award conflicts with a government-wide regulation — the OPM Guide — which states that a "part-time employee earns a full year of service for each calendar year worked (regardless of schedule) for the purpose of computing dates for . . . time-in-grade restrictions on advancement." *Id.* (emphasis omitted).

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *See 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 applying the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army and the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

Assuming that the OPM Guide constitutes a government-wide regulation, the Union has failed to demonstrate that the award is contrary to the OPM Guide. By its terms, the section of the OPM Guide cited by the Union prohibits the proration of an employee's part-time scheduled service for the purpose of calculating an employee's time-in-grade. However, this section of the OPM Guide does not prohibit the proration of an employee's part-time scheduled service for the purpose of calculating an employee's qualifying experience. *Cf. U.S. Dep't of Transp., Fed. Aviation Admin., Jacksonville Ctr., Jacksonville, Fla.*, 60 FLRA 165, 167 n.7 (2004) (Chairman Cabaniss concurring) (even if agency memorandum cited by excepting party constitutes an agency rule or regulation, excepting party fails to show that the award is contrary to the terms of the memorandum). Therefore, we deny this exception.

V. Decision

The exceptions are denied.

APPENDIX

COLLECTIVE BARGAINING AGREEMENT (PARTIES' AGREEMENT)

Article 8: Promotion and Internal Placement Policy

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Section 3 Timing of Noncompetitive Promotions for Attorneys. (a) The full performance level is currently established at grade GS-14. Consistent with this Article . . . promotions up to the full performance level will be based upon the incumbent's development and performance. The time policy and time periods set forth herein are not to be interpreted to imply automatic promotion but merely establish a progression rate whereby employees who have demonstrated their ability to perform work of the next higher grade level will be promoted.

(b) Attorneys shall be eligible for consideration for promotion to the next higher grade upon the completion of 1 year in grade as a Law Clerk and Field Attorney with the Agency, and annually thereafter until they reach Grade GS-13, and after 36 months as a Grade GS-13 Field Attorney, to the full performance level (Grade GS-14).

Field Attorneys who meet the requirements of the performance appraisal system (including having demonstrated their ability to perform the work of the next higher grade level) shall be promoted to the next higher grade level after 1 year in grade as a Law Clerk and Field Attorney with the Agency and annually thereafter until they reach Grade GS-13, and after 36 months as a Grade GS-13 Field Attorney, to the full performance level (Grade GS-14).

....

Article 22: Part-Time Employment

Section 6. The General Counsel agrees there will be no discrimination in the selection, reclassification, promotion, transfer, or reassignment of employees or in any other terms and conditions of employment because of an employee's part-time schedule. However, if the employee's part-time schedule reasonably warrants treatment different from that accorded full-time employees, that difference in treatment shall not constitute discrimination. In addition, it is recognized by the parties that, consistent with "Guidelines for Part-Time Employment" part-time employees may be treated differently from full-time employees in certain respects.

Award at 7-8.

GUIDELINES FOR PART-TIME EMPLOYMENT (GUIDELINES)

Effects of Converting to Regularly Scheduled Part-Time Work

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4. Service Credits:

Permanent part-time employees receive a full year of service credit for the purpose of computing:

- retirement
- date of career tenure
- completion of probationary period
- within-grade increases
- change in leave category
- time in grade restrictions on advancement

5. Crediting Experience for Qualification Requirements:

Part-time experience is credited on a pro-rata basis according to the relation it bears to a full work-week.

....

11. Contract Benefits:

All the terms and conditions of the collective bargaining agreements between the General Counsel and the NLRB Union remain fully applicable except:

a) Article 8 (Both Contracts)

The time periods set forth for promotion in these articles shall be extended on a pro-rata basis employee's regular part-time schedule (e.g. a GS-11 Field Examiner who is regularly scheduled to work 20 hours a week would be eligible for consideration for promotion to a GS-12 in 2 years).

Award at 9 (emphasis omitted).

PART-TIME EMPLOYMENT AND JOB SHARING GUIDE (OPM GUIDE)

Service Credit

A part-time employee earns a full year of service for each calendar year worked (regardless of schedule) for the purpose of computing dates for the following:

- retirement eligibility;
- career tenure;
- completion of probationary period;
- within-grade pay increases;
- change in leave category; and
- time-in-grade restrictions on advancement.

Exceptions, Exhibit 6