

64 FLRA No. 177

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Union)

0-AR-4604

—
DECISION

June 24, 2010

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 Luella E. Nelson filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator found that the Agency violated its own regulations by decertifying the grievant from his radar-controller position following an air-traffic incident. For the following reasons, we deny the exceptions.

II. Background and Arbitrator's Award

While working as a radar-controller, the grievant directed two aircraft separated by fewer than five miles onto a collision course. Award at 6. An automated system directed the aircraft to take immediate evasive action, thus avoiding a collision. *Id.* at 6-7.

Following the incident, the Agency decertified the grievant from his position and ordered him to undergo remedial training. *Id.* at 8. The Union filed a grievance (the decertification grievance) seeking expungement of the decertification and make-whole

relief or "[a]ny other remedy deemed appropriate." *Id.* at 9. Several months later, the Union filed a second grievance (the pay-incentive grievance) seeking backpay and make-whole relief for the grievant's loss of consideration for an Operational Success Increase (OSI) or Superior Success Increase (SCI). *Id.* The Agency disputed the timeliness of the pay-incentive grievance and denied it on its merits, and the Union did not advance that grievance to arbitration. *Id.* The decertification grievance was not resolved and submitted to arbitration.

At arbitration, the parties stipulated to the following issue: "Was the decertification of [the grievant] in compliance with [Agency] regulations; and, if not, what shall be the remedy?" *Id.* at 2. The Arbitrator found that, prior to the incident, the grievant had no history of performance issues and received numerous commendations for his work. *Id.* at 9. The Arbitrator also found that the Agency violated its own regulations by decertifying the grievant without any prior history of performance problems.¹ *Id.* at 17. Given the grievant's previously unblemished record, she determined that, but for his improper decertification, the grievant would have received an OSI or SCI. *Id.* at 18. The Arbitrator directed the Agency to: expunge the decertification from all records; denominate his remedial training as skill-enhancement training; and award the OSI/SCI that the grievant would have received but for his improper decertification, with interest. *Id.* at 19.

III. Positions of the Parties**A. Agency's Exceptions**

The Agency argues that the award is contrary to law on two grounds. First, the Agency asserts that the award violates the Back Pay Act by compensating the grievant for the loss of a potential benefit, rather than an actual loss. Exceptions at 6-7. According to the Agency, the grievant was not automatically entitled to an OSI or SCI, and likely would not have received either increase due to his documented error. *Id.* Second, the Agency contends that the award mandates payment of a performance award in violation of 5 U.S.C. § 4505a(a)(1) and its

1. Chapter 5, § 5-1-8(d) of the Agency's regulations states, in pertinent part: "Decertification shall not be based solely on involvement in the [operational error] but rather the employee's overall performance history. [D]ecertification and remedial training shall only be used in cases where an employees' [sic] documented performance history warrants such action. The employee's supervisor . . . determines whether to decertify." Award at 5.

implementing regulation, 5 C.F.R. § 451.104(a)(3), which grant agencies discretion to decide whether to grant performance awards.² *Id.* at 8.

The Agency also argues that the award fails to draw its essence from the parties' agreement, which requires arbitrators to confine themselves to issues submitted for arbitration. *Id.* at 6. Finally, the Agency asserts that the Arbitrator exceeded her authority by considering the claimant's loss of an OSI/SCI because this issue was not raised in the decertification grievance. *Id.* at 4-5. In this connection, the Agency contends that because the pay-incentive grievance was untimely and not advanced to arbitration, the grievant forfeited his right to monetary relief in the form of an OSI/SCI. *Id.*

B. Union's Opposition

With respect to the Agency's contrary-to-law exception, the Union asserts that the Agency cites no law, rule or regulation to support its argument. Opp'n at 6. The Union also argues that the Arbitrator did not exceed her authority by awarding compensation for the grievant's loss of an OSI/SCI because the parties stipulated to the issue of remedy. *Id.* at 7-10. Finally, the Union contends that the Agency has not demonstrated that the award fails to draw its essence from the agreement. *Id.* at 10-11.

IV. Discussion

A. The award is not contrary to law.

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 & 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.*

1. Back Pay Act

Under the Back Pay Act, 5 U.S.C. § 5596, an award of backpay is authorized only when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action directly resulted in the withdrawal or reduction of the grievant's pay, allowances or differentials. See *AFGE, Local 48*, 56 FLRA 1082, 1083 (2001).

With regard to the first requirement, a violation of a governing agency regulation constitutes an "unjustified or unwarranted personnel action" within the meaning of the Back Pay Act. *U.S. Dep't of Transp., Fed. Aviation Admin., Airways Facility Serv., Nat'l Airway Sys., Eng'g Div., Okla. City, Okla.*, 60 FLRA 565, 569 (2005). The Arbitrator found, and the Agency does not dispute, that the Agency violated an Agency regulation. Thus, the first Back Pay Act requirement is satisfied.

With regard to the second requirement, the Authority has also held that "it will not look behind an arbitrator's award in cases where the requisite 'but for' finding is made" and is supported by other factual findings. See *U.S. Dep't of Health & Human Servs.*, 54 FLRA 1210, 1219 n.9 (1998) (citing *U.S. Dep't of Commerce, Patent & Trademark Office*, 52 FLRA 358, 369 (1996)). Here, the Arbitrator specifically found that the grievant would have received an OSI/SCI for the relevant year "but for his improper decertification." Award at 18. For support, she cited her factual finding that the grievant had a very positive performance record and received several commendations prior to the decertification. *Id.* The Agency does not dispute the Arbitrator's finding regarding the grievant's performance record or provide any other basis for finding that the Arbitrator erred in her "but for" determination.³ The Arbitrator's factual findings support her conclusion that the violation of the Agency regulation directly resulted in the grievant's failure to receive an OSI/SCI. Thus, the second Back Pay Act

2. 5 U.S.C. § 4505a(a)(1) provides, in relevant part: "An employee whose most recent performance rating was at the fully successful level or higher (or the equivalent thereof) may be paid a cash award under this section." 5 C.F.R. § 451.104(a)(3) states, in pertinent part: "An agency may grant a cash, honorary, or informal recognition award . . . to an employee . . . on the basis of [p]erformance as reflected in the employee's most recent rating of record . . . provided that the rating . . . is at the fully successful level[.]"

3. We note that the Agency does not argue that the award is based on a nonfact.

requirement is satisfied, and there is no basis for finding the award contrary to the Back Pay Act.

Accordingly, we deny the exception.

1. 5 U.S.C. § 4505a(a)(1) and 5 C.F.R. § 451.104(a)(3)

Under 5 U.S.C. § 4505a(a)(1) and 5 C.F.R. § 451.104(a)(3), an agency has discretion to grant performance awards to employees who perform at a “fully successful level[.]” Here, the Arbitrator effectively found that, absent the violation of Agency regulations, the Agency would have exercised this discretion and granted the grievant an OSI/SCI. The Agency provides no basis for reaching a contrary conclusion. Thus, there is no basis for finding the award contrary to U.S.C. § 4505a(a)(1) and 5 C.F.R. § 451.104(a)(3). Accordingly, we deny the exception.

- B. The award draws its essence from the parties’ agreement and the Arbitrator did not exceed her authority.

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.

The Agency asserts that the Arbitrator violated the parties’ agreement, which states that “[t]he arbitrator shall confine himself/herself to the precise issue(s) submitted for arbitration and shall have no authority to determine any other issue(s) not so submitted to him/her.” Exceptions at 6. Here, as previously discussed, the parties stipulated to the

following issue: “Was the decertification of [the grievant] in compliance with [Agency] regulations; and, if not, what shall be the remedy?” Award at 2. In the decertification grievance, the parties expressly stipulated that the Arbitrator could craft a remedy for a finding of improper decertification. *Id.* The Authority has held that arbitrators enjoy broad discretion in fashioning remedies, particularly where, as here, the parties specifically authorize the arbitrator to determine the appropriate remedy for a violation. *See U.S. Dep’t of Homeland Sec., U.S. Customs & Border Prot.*, 62 FLRA 59, 62 (2007). Given this broad remedial discretion, the Agency provides no basis for finding that, by awarding an OSI/SCI, the Arbitrator failed to comply with the agreement by failing to confine herself to issues submitted to arbitration. Accordingly, we deny the Agency’s essence exception.

The Agency’s exceeded-authority exception is also based on its claim that, by awarding an OSI/SCI, the Arbitrator resolved an issue not submitted to arbitration. When the Authority denies an essence exception, and an exceeded-authority exception reiterates the same arguments as the essence exception, the Authority denies the exceeded-authority exception. *AFGE, Local 3354*, 64 FLRA 330, 334 (2009) (citing *NTEU*, 62 FLRA 45, 48 (2007)). As the Agency’s exceeded-authority exception is based on the same premise as its essence exception, we deny the exceeded-authority exception.

V. Decision

The Agency’s exceptions are denied.