

67 FLRA No. 124

SOCIAL SECURITY ADMINISTRATION
REGION VI
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3506
(Union)

0-AR-4951

DECISION

June 30, 2014

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator J.E. (Jim) Nash concluded that the Agency retaliated against the grievant and violated the parties' collective-bargaining agreement, dated August 15, 2005, when it did not select the grievant for a position for which he had priority consideration due to his involvement in equal employment opportunity (EEO), union, and whistle-blowing activities. The Arbitrator ordered the Agency to retroactively assign the grievant to the position with backpay.

The central issue is whether the Arbitrator's award of a retroactive promotion and backpay is contrary to the Back Pay Act¹ (BPA). Here, the Arbitrator based his remedy on three separate and independent grounds. Because the Agency does not challenge the Arbitrator's finding that the Agency discriminated against the grievant on the basis of his whistle-blowing activities, which provides a separate and independent basis for the remedy, we find that the Agency has not shown that the award is contrary to the BPA.

The Agency also contends that the award fails to draw its essence from the parties' agreement. This exception challenges only the Arbitrator's finding that the grievant was denied bona fide consideration under the parties' agreement. Because the Agency has not established that the Arbitrator erred in finding that the

grievant was discriminated against on the basis of his whistle-blowing activity – a separate and independent ground for the Arbitrator's award – the Agency's essence exception does not provide a basis for setting aside the award.

II. Background and Arbitrator's Award

In 2008, the Union filed a grievance alleging that the grievant was not selected for an Agency vacancy on the basis of "age, disability, union activity, whistle[-]blowing," and EEO retaliation.² An arbitrator concluded that the Agency retaliated against the grievant on the basis of his whistle-blowing activities and awarded him priority consideration for a future vacancy.

In 2010, the grievant applied for an open position (the position), exercising his priority consideration. The selecting officer interviewed the grievant, concluded that he was not qualified for the position, and disqualified him from consideration. The Agency then reviewed the list of applicants eligible for the position under the regular application process. Because the grievant was on that list, the selecting officer re-interviewed the grievant. However, he again concluded that the grievant was unqualified and selected a different applicant.

The Union filed a grievance over the nonselection, alleging discrimination based on age, disability, and reprisal for prior EEO and union activities. The grievance was unresolved, and the parties proceeded to arbitration.

Prior to the arbitration hearing, the Union requested discovery from the Agency regarding the selection process and the grievant's non-selection. The Agency denied the Union's request, explaining that while it "customarily provide[s] such information to the [Equal Employment Opportunity Commission], . . . arbitration procedures are relatively new to the Agency."³ The Union requested that the Arbitrator: (1) prohibit the Agency from relying on information it failed to provide to the Union; and (2) draw an adverse inference against the Agency due to its failure to disclose information. The Arbitrator provisionally allowed the Agency to introduce its exhibits during the hearing, but instructed the parties to "raise objections at the appropriate time."⁴

After the hearing, the Arbitrator concluded that the Agency improperly denied the Union this information. He therefore granted the Union's request for an adverse inference that, if the Agency had provided

² Award at 4.

³ *Id.* at 5.

⁴ *Id.* at 2.

¹ 5 U.S.C. § 5596.

this information to the Union, it “would have been beneficial to the Union and harmful to the Agency.”⁵ He further disallowed “admittance and/or consideration of information requested, not provided, and crucial to the Union argument.”⁶

With respect to the merits of the grievance, the parties framed three issues for the Arbitrator. First, “[d]id the [g]rievant receive a bona fide priority consideration for his application for [the position] . . . ? If not, what shall be the remedy?”⁷ Second, “[w]as the [g]rievant subject to discrimination based on his age . . . , physical disability, and/or retaliation/reprisal for his past EEO activity, . . . [u]nion activities and filing of grievances in the announcement, processing and selection of the [position]? If so, what shall be the remedy?”⁸ Third, “[w]ere the [g]rievant’s whistle[-]blowing activities . . . a contributing factor in the decision not to select him for [the position]? If so, what shall be the remedy?”⁹

The Arbitrator concluded that the grievant did not receive priority consideration as mandated by the parties’ agreement. He noted that the agreement defines priority consideration as “bona fide consideration for non-competitive selection given to an employee on account of previous failure to properly consider the employee for selection because of procedural, regulatory, or program violation.”¹⁰ He found that “[t]he criteri[on] for selection – for purposes of the [parties’] agreement – where the applicant enjoys [p]riority [c]onsideration status is ‘potential for success.’”¹¹ Thus, according to the Arbitrator, if a priority-consideration applicant possesses such potential, the Agency must select that applicant. Accordingly, because the grievant’s qualifications demonstrated that he had the potential for success in the position, his nonselection indicated that he did not receive bona fide priority consideration for the position, as required by the parties’ agreement.

The Arbitrator further determined that “the evidence of record was substantial in establishing” that the Agency retaliated against the grievant on the basis of protected EEO and union activity.¹² He found that the selecting officer “was aware of and had discussed” this activity with other Agency officials and that he had “numerous confrontations” with the grievant about the activity.¹³ The Arbitrator did not find the selecting

officer’s explanation for why he disqualified the grievant persuasive, noting that the officer’s testimony “raised concerns about [his] credibility.”¹⁴ According to the Arbitrator, by interviewing the grievant twice, the selecting officer conceded that the grievant possessed the potential for success in the position. Thus, the Arbitrator determined that the grievant “should not have been disqualified during the initial interview.”¹⁵ The Arbitrator further found that the Agency retaliated against the grievant on the basis of his whistle-blowing activities.

The Arbitrator concluded that the grievant was “unjustly denied” the position and that he “would have been assigned” to the position but for the Agency’s prohibited actions.¹⁶ Accordingly, as a remedy for each of the three issues raised in the grievance, the Arbitrator ordered the Agency to retroactively assign the grievant to the position with “back pay, and benefits, and reimbursement for medical expenses.”¹⁷

III. Preliminary Matters

- A. Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar the Agency’s claims that the award is contrary to management rights and that the Arbitrator exceeded his authority.

The Agency contends that the award is contrary to its management rights under § 7106(a) of the Federal Service Labor-Management Relations Statute to determine: (1) the qualifications necessary to do the work of a position; and (2) whether an applicant possesses those qualifications.¹⁸ The Agency asserts that the Arbitrator “impermissibly rejected the qualifications established by the Agency for the . . . position,”¹⁹ and that the selecting officer’s testimony establishes that the grievant is not qualified for the position.²⁰ The Union argues that the Authority should not consider this argument because the Agency did not raise it at arbitration.²¹

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

⁵ *Id.* at 11.

⁶ *Id.*

⁷ *Id.* at 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 5.

¹¹ *Id.* at 9.

¹² *Id.* at 10.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 9; *see also id.* at 10-11.

¹⁷ *Id.* at 9, 10, 11.

¹⁸ Exceptions at 7, 11.

¹⁹ *Id.* at 8.

²⁰ *Id.* at 8-11.

²¹ *See Opp’n* at 1.

not, presented to an arbitrator.²² In *SSA*,²³ for example – which also involved a non-selection grievance – the Authority barred an agency’s argument that the arbitrator’s award violated management rights because that arbitrator did not defer to the agency’s assessment of that grievant’s qualifications. The Authority reasoned that the agency could have presented the argument to the arbitrator, but did not do so.²⁴

In this case, in presenting its case to the Arbitrator, the Agency relied on the selecting officer’s testimony regarding the grievant’s lack of qualifications.²⁵ Although the Agency based its case on this alleged lack of qualifications, the record does not demonstrate that it raised any issue regarding management rights before the Arbitrator.²⁶ As in *SSA*, the Agency could have raised its management-rights claim before the Arbitrator, but failed to do so. Consistent with the holding of *SSA*, therefore, we dismiss this exception under §§ 2425.4(c) and 2429.5.²⁷

The Agency also argues that the Arbitrator exceeded his authority by ordering the Agency to place the grievant in the position. It contends that, even if the Arbitrator were permitted to draw an adverse inference against the Agency, the Arbitrator could not rely on that inference alone to grant the Union its requested remedy.²⁸ The Agency claims that apart from the adverse inference, the “[g]rievant has not shown that, but for an unwarranted personnel action, he would have been selected for the . . . position.”²⁹ Absent such a showing, the Agency asserts, “placement of [the g]rievant in the . . . position is not an appropriate remedy in connection with an adverse inference.”³⁰

Even assuming this is a proper exceeds-authority exception, it is not properly before us. Because the remedy awarded by the Arbitrator is consistent with the relief the Union requested in the grievance,³¹ the Agency was on notice and had the opportunity to present its exceeds-authority argument to the Arbitrator.³² But the record does not demonstrate that the Agency raised this

issue before the Arbitrator. Thus, because this argument was not raised at arbitration, but could have been, we find that the Agency’s exceeds-authority exception is barred by §§ 2425.4(c) and 2429.5.³³

B. The Union’s argument that Agency’s remaining exceptions should be dismissed under §§ 2425.4(c) and 2429.5 or denied under § 2425.6 of the Authority’s Regulations is without merit.

The Union also contends that the Agency’s remaining exceptions should be dismissed under §§ 2425.4(c) and 2425.9 of the Authority’s Regulations because they could have been raised at arbitration.³⁴ But the Agency’s remaining contrary-to-law exception and its essence exception *were* raised at arbitration.³⁵ Thus, we find that the Union’s contention is misplaced. Similarly, the Union asserts that these exceptions should be barred because they raise arguments concerning management rights that could have been raised.³⁶ But the Agency’s remaining exceptions do not raise management-rights arguments. Accordingly, we find that this claim is also without merit.

The Union additionally argues that these exceptions should be dismissed because they are not supported by admissible evidence. Specifically, the Union claims that the exceptions are grounded in Agency documents and testimony that the Arbitrator struck at arbitration.³⁷ The Union identifies only three instances in which the Agency’s exceptions rely upon a stricken document.³⁸ Even assuming that a party’s exceptions must be supported by admissible evidence, in each of these instances, the Agency also relies on witness testimony to support its arguments.³⁹ Therefore, the Agency has support for its arguments separate and apart from the stricken documents. And, contrary to the Union’s claim, the Arbitrator did not strike the testimony of Agency witnesses.⁴⁰ Indeed, he discussed it in his award.⁴¹ Thus, we find that the Agency’s remaining exceptions are supported by admissible evidence.

Finally, the Union alleges that the exceptions are subject to denial under § 2425.6(e)(1) of the Authority’s Regulations. According to the Union, although the

²² 5 C.F.R. §§ 2425.4(c), 2429.5; *see, e.g., AFGE, Local 3571*, 67 FLRA 218, 219 (2014) (citing *U.S. DHS, CBP*, 66 FLRA 495, 497 (2012)).

²³ *SSA*, 65 FLRA 544, 546 (2011) (*SSA*).

²⁴ *See id.*

²⁵ *See, e.g., Opp’n, Attach., Agency’s Post-Hr’g Br.* at 13-16.

²⁶ *See, e.g., id.*

²⁷ *See SSA*, 65 FLRA at 546; *see also AFGE, Local 3571*, 67 FLRA at 219.

²⁸ Exceptions at 18-19.

²⁹ *Id.* at 19.

³⁰ *Id.*

³¹ Exceptions, Joint Ex. 4 at 1; *see also Opp’n* at 14.

³² *U.S. Dep’t of the Air Force, Grissom Air Reserve Base, Ind.*, 67 FLRA 302, 303 (2014).

³³ *See id.*

³⁴ *See Opp’n* at 1.

³⁵ *See id., Attach., Agency’s Post-Hr’g Br.* at 5-16.

³⁶ *Opp’n* at 3-4.

³⁷ *Id.* at 7 (citing Exceptions at 3, 8, 10-11).

³⁸ *See id.*

³⁹ *See Exceptions* at 3, 9-10.

⁴⁰ *See Opp’n* at 6.

⁴¹ *See Award* at 9-10.

exceptions “articulate grounds,”⁴² the Agency does not support those grounds because it relies on evidence that was either inadmissible or rejected by the Arbitrator as not credible.⁴³ Section 2425.6(e)(1) provides that exceptions “may be subject to dismissal or denial if . . . [t]he excepting party fails to . . . support a ground” listed in 5 C.F.R. § 2425.6(a)-(c).⁴⁴ Thus, if an excepting party does not support its exception with arguments, that exception is subject to denial.⁴⁵

The Agency cites to evidence in the record to support its remaining contrary-to-law and essence exceptions. Further, the Union cites no legal authority for the proposition that a party fails to support an exception if it relies upon arguments that were rejected at arbitration. Thus, we find that the Agency’s essence and remaining contrary-to-law exceptions are not subject to denial under § 2425.6(e)(1) of the Authority’s Regulations.

- C. The Authority will not consider the Union’s supplemental submission.

After filing its opposition to the Agency’s exceptions, the Union filed a supplemental submission regarding the current status of the position. However, the Union did not request leave to file this document. Section 2429.26(a) of the Authority’s Regulations states, in pertinent part, that the “Authority . . . may in [its] discretion grant leave to file other documents as [it] deem[s] appropriate.”⁴⁶ When parties have not requested leave to file supplemental submissions, the Authority has not considered those submissions.⁴⁷ Accordingly, because the Union has not requested leave under § 2429.26(a) to file its submission, we will not consider it.

IV. Analysis and Conclusions

- A. The Agency has failed to establish that the award is contrary to the BPA.

The Agency argues that the Arbitrator’s award of a retroactive assignment to the position with backpay and benefits is contrary to the BPA. An award of backpay is authorized under the BPA when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified and unwarranted personnel action; and (2) the

personnel action resulted in the withdrawal or reduction of an employee’s pay, allowances, or differentials.⁴⁸

An award is based on separate and independent grounds when more than one ground independently would support the remedies that the arbitrator awards.⁴⁹ The Authority has recognized that, when an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient in order to have the award found deficient.⁵⁰ In those circumstances, if the excepting party has not demonstrated that the award is deficient on one of the grounds relied on by the Arbitrator, and the award would stand on that ground alone, then it is unnecessary to address exceptions to the other grounds.⁵¹

As noted above, the Arbitrator awarded the grievant a retroactive assignment to the position with “back[pay], and benefits, and reimbursement for medical expenses”⁵² on three bases: (1) the Agency failed to give the grievant bona fide consideration;⁵³ (2) the Agency discriminated against the grievant on the basis of his EEO and Union activities;⁵⁴ and (3) the Agency discriminated against the grievant on the basis of his whistle-blowing activities.⁵⁵ These three bases constitute separate and independent grounds for the Arbitrator’s remedy.⁵⁶

Although the Arbitrator relied on three separate and independent grounds in awarding the grievant retroactive assignment to the position with backpay and benefits, the Agency does not challenge the Arbitrator’s finding that the Agency discriminated against the grievant on the basis of his whistle-blowing activities. Because this finding provides a separate and independent basis for the Arbitrator’s remedy, and the Agency has not demonstrated that the finding is deficient, it is unnecessary to resolve the Agency’s other arguments as to why it believes the award is deficient under the BPA.⁵⁷ We therefore deny the Agency’s contrary-to-law exception.

⁴² Opp’n at 16 n.1.

⁴³ *Id.* at 1, 15, 16 n.1.

⁴⁴ 5 C.F.R. § 2425.6(e)(1); *AFGE, Local 405*, 66 FLRA 437, 437 n.1 (2012).

⁴⁵ *E.g.*, *AFGE, Local 405*, 66 FLRA at 437 n.1.

⁴⁶ 5 C.F.R. § 2429.26(a).

⁴⁷ *See, e.g.*, *U.S. Dep’t of Energy, Oak Ridge Office, Oak Ridge, Tenn.*, 64 FLRA 535, 535 n.1 (2010).

⁴⁸ *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 66 FLRA 737, 739 (2012).

⁴⁹ *U.S. DOJ, Fed. BOP, Metro. Det. Ctr. Guaynabo, San Juan, P.R.*, 66 FLRA 81, 86 (2011) (*Guaynabo*).

⁵⁰ *Id.*; *see also U.S. Dep’t of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000).

⁵¹ *U.S. Dep’t of the Air Force, 442nd Fighter Wing, Whiteman Air Force Base, Mo.*, 66 FLRA 357, 364-65 (2011).

⁵² Award at 9, 10, 11.

⁵³ *Id.* at 9.

⁵⁴ *Id.* at 10.

⁵⁵ *Id.* at 11.

⁵⁶ *See Guaynabo*, 66 FLRA at 86; *see also U.S. DOJ, Fed. BOP, Wash., D.C.*, 64 FLRA 559, 561 (2010).

⁵⁷ *U.S. DHS, ICE*, 66 FLRA 880, 885 (2012).

- B. The Agency's essence exception does not provide a basis for setting aside the award.

The Agency also claims that the award fails to draw its essence from the parties' agreement. The Agency argues that the Arbitrator "misunderstood and misapplied" the parties' agreement by equating the grievant's placement on the "well qualified list" for the position with having satisfied the Agency's "potential for success" standard for evaluating a candidate with priority consideration under its Management Officials Promotion Plan.⁵⁸ In addition, the Agency alleges that the Arbitrator misrepresented an Agency witness's testimony when he said that she "conceded that there is a requirement to assign the [p]riority [c]onsideration applicant to a vacancy where that applicant has the potential for success."⁵⁹

This exception challenges only the Arbitrator's finding that the grievant was denied bona fide consideration under the parties' agreement. As noted above, the Agency does not challenge the Arbitrator's finding that the grievant was discriminated against on the basis of his whistle-blowing activities – a separate and independent ground for the award. Because we have found that the Agency has not established that the Arbitrator erred in this determination, the Agency's essence exception does not provide a basis for setting aside the award. We therefore deny this exception.⁶⁰

V. Decision

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

⁵⁸ Exceptions at 15 (internal quotation marks omitted).

⁵⁹ *Id.* at 16 (internal quotation marks omitted).

⁶⁰ *Union of Pension Emps.*, 67 FLRA 63, 66 (2012).