

69 FLRA No. 64

UNITED STATES  
DEPARTMENT OF HOMELAND SECURITY  
FEDERAL EMERGENCY MANAGEMENT AGENCY  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 4060  
(Union)

0-AR-5162

DECISION

June 30, 2016

Before the Authority: Carol Waller Pope, Chairman, and  
Ernest DuBester and Patrick Pizzella, Members  
(Member Pizzella dissenting in part)

**I. Statement of the Case**

Arbitrator Merry C. Hudson found that the Agency improperly failed to promote an employee (the grievant) to a general schedule (GS)-14 contract-specialist position. As a remedy, the Arbitrator awarded the grievant backpay.

The main question before us is whether the Arbitrator exceeded her authority when she allegedly: (1) failed to resolve the stipulated issue and (2) resolved an issue not submitted to arbitration. Because the Arbitrator resolved an issue not submitted to arbitration instead of resolving the stipulated issue, the answer is yes. Accordingly, we set aside the award and remand the matter to the parties for resubmission to the Arbitrator, absent settlement, to resolve the stipulated issue.

**II. Background and Arbitrator’s Award**

The grievant occupied a GS-13 contract-specialist position. The grievant’s supervisor recommended the grievant for a promotion to a GS-14 contract-specialist position, but the Agency denied the promotion.

The Union filed a grievance alleging that the Agency improperly failed to promote the grievant. For support, the grievance cited the Agency’s

upward-mobility program (the mobility program) – a career-advancement program that allows the Agency to fill “upward[-]mobility positions” at a grade level lower than the target level for the position.<sup>1</sup> In this regard, the grievance stated that the grievant was grieving “the inequality [or] non[-]standardization of the within[-]grade promotion standards applied by his management team.”<sup>2</sup>

The grievance was not resolved, and the parties submitted it to arbitration. At arbitration, the parties stipulated to the following issue: “Did the Agency violate . . . [the] [m]obility [p]rogram[] when denying [the grievant’s] promotion . . . ? If so, is [the grievant] entitled to [backpay]?”<sup>3</sup>

Before the Arbitrator, the Agency argued that the mobility program does not apply to the grievant because the mobility program applies only to employees in GS-9 level positions or below. Further, the Agency argued that the stipulated issue’s focus on the mobility program precluded the Arbitrator from a more general review of the Agency’s “promotion procedures,”<sup>4</sup> and that such a review would exceed her authority. In any event, the Agency argued that it properly denied the grievant’s promotion because he was not qualified for the position.

In response, the Arbitrator acknowledged that the grievance and the stipulated issue cited the mobility program, but she found that “review of the Agency’s promotion procedures [was] necessary to resolve the stipulated issue.”<sup>5</sup> In this regard, the Arbitrator found that because the grievance stated that “[the grievant] was grieving the inequality [or] non[-]standardization of the Agency’s within[-]grade promotion standards,” it “[could] not be concluded that the cited reference to the Agency’s [mobility program] preclude[d] consideration of [the Agency’s] promotion procedures.”<sup>6</sup>

Next, the Arbitrator found that the grievant was qualified for the position, and concluded that the Agency’s failure to promote the grievant was “unfair and unwarranted.”<sup>7</sup> To support this conclusion, the Arbitrator made findings about the grievant’s qualifications. However, she did not make findings about, interpret, or otherwise mention the mobility program in her analysis. As a remedy, the Arbitrator awarded the grievant backpay.

The Agency filed exceptions to the award.

<sup>1</sup> Award at 9 (quoting the grievance).

<sup>2</sup> *Id.* (quoting the grievance).

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 8.

<sup>5</sup> *Id.* at 9.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 11.

### III. Analysis and Conclusion: We set aside the award and remand the matter to the Arbitrator.

The Agency contends that the Arbitrator exceeded her authority when she allegedly: (1) failed to “render a decision on the stipulated issue of whether the Agency violated [the mobility program]” and (2) “went outside the stipulated issue” and resolved an issue not submitted at arbitration.<sup>8</sup>

As relevant here, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration,<sup>9</sup> or resolve an issue not submitted to arbitration.<sup>10</sup> However, arbitrators do not exceed their authority when the award is directly responsive to the stipulated issue.<sup>11</sup>

The parties stipulated that the issue before the Arbitrator was: “Did the Agency violate . . . [the] [m]obility [p]rogram[] when denying [the grievant’s] promotion . . . ? If so, is [the grievant] entitled to [backpay]?”<sup>12</sup> The Arbitrator concluded that the Agency’s failure to promote the grievant was “unfair and unwarranted,”<sup>13</sup> and she awarded the grievant backpay. But in her analysis supporting this conclusion, the Arbitrator did not make findings about, interpret, or even mention the mobility program. Further, by conducting a general “review of the Agency’s promotion procedures,”<sup>14</sup> the Arbitrator addressed an issue not before her. Moreover, the Arbitrator’s conclusion that the Agency’s failure to promote the grievant was “unfair and unwarranted”<sup>15</sup> does not directly address the parties’ stipulated issue. Therefore, we find that the Arbitrator exceeded her authority by resolving an issue not submitted to arbitration instead of resolving the stipulated issue.

Where, like here, arbitrators exceed their authority by failing to resolve an issue submitted to arbitration, the Authority will remand the award to the parties for resubmission to the arbitrator, absent

settlement, to resolve the stipulated issue.<sup>16</sup> Accordingly, we set aside the award and remand the matter to the parties for resubmission to the Arbitrator, absent settlement, for the Arbitrator to resolve the stipulated issue. While we regret the need to remand this matter, doing so enables the parties to have their dispute resolved by the individual who they jointly chose to resolve it: the Arbitrator.

In addition to its exceeded-authority claim, the Agency also argues that the award: (1) is based on a nonfact,<sup>17</sup> (2) is contrary to Agency regulation – the mobility program,<sup>18</sup> and (3) fails to draw its essence from the parties’ collective-bargaining agreement.<sup>19</sup> Because we set aside the award on exceeded-authority grounds, we find it unnecessary to address the Agency’s remaining exceptions.<sup>20</sup>

### IV. Decision

We set aside the award and remand the matter to the parties for resubmission to the Arbitrator, absent settlement, to resolve the stipulated issue.

<sup>8</sup> Exceptions at 9.

<sup>9</sup> E.g., *AFGE, Local 1547*, 65 FLRA 91, 95 (2010) (*Local 1547*) (citing *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996) (*Local 1617*)).

<sup>10</sup> E.g., *AFGE, Local 987*, 65 FLRA 411, 412 (2010) (*Local 987*) (citing *Local 1617*, 51 FLRA at 1647).

<sup>11</sup> *AFGE, Local 3911*, 69 FLRA 233, 236 (2016) (citing *U.S. Dep’t of the Treasury, IRS*, 68 FLRA 1027, 1030 (2015)).

<sup>12</sup> Award at 2.

<sup>13</sup> *Id.* at 11.

<sup>14</sup> *Id.* at 9.

<sup>15</sup> *Id.* at 11.

<sup>16</sup> E.g., *Local 1547*, 65 FLRA at 95; cf. *Local 987*, 65 FLRA at 412-13 (citing *U.S. DOD, Dependents Schs.*, 49 FLRA 120, 124 (1994)) (where arbitrator exceeded his authority when he decided an issue not before him and prior to a hearing on the merits, the Authority remanded for arbitrator to conduct a full hearing on the merits of the union’s grievance, including the union’s requested remedies).

<sup>17</sup> Exceptions at 5-6.

<sup>18</sup> *Id.* at 3-4.

<sup>19</sup> *Id.* at 7.

<sup>20</sup> See, e.g., *NLRB, Tampa, Fla.*, 57 FLRA 880, 881 n.2 (2002) (finding it unnecessary to address remaining exceptions where the Authority set aside a portion of the award in connection with an exceeded-authority exception); *U.S. Dep’t of VA, Med. Ctr., St. Albans, N.Y.*, 37 FLRA 1092, 1095 (1990) (same).

**Member Pizzella, dissenting in part:**

This case is not complex and there is no reason to remand. The Arbitrator's award should be vacated in its entirety.

The sole issue the parties presented to the Arbitrator was "whether the [g]rievant was improperly denied promotion under FEMA Manual 3500.3, Upward Mobility Program."<sup>1</sup> But Arbitrator Merry Hudson found a violation of some *other* unspecified "promotion procedures," an issue which was not before her.<sup>2</sup> Thus, Arbitrator Hudson exceeded her authority. On this point, I agree with the majority.

My colleagues, however, go on to conclude that the Arbitrator failed "to resolve [the] issue submitted" to her.<sup>3</sup> On this point, I disagree.

Arbitrator Hudson found that she could "not conclude[] that the cited reference to the Agency's manual precludes consideration of [other unspecified] promotion procedures" and that "review of [those] procedures is necessary to resolve the stipulated issue"<sup>4</sup> (which was properly before her). The Arbitrator finally concluded that the "delayed promotion of [the g]rievant was unfair and unwarranted."<sup>5</sup>

That conclusion is, as the Agency argues, contrary to Agency regulation (FEMA Manual 3500.3, Upward Mobility Program) and is not a reasonable interpretation of Article 16 of the parties' agreement (which incorporates FEMA Manual 3500.3).<sup>6</sup>

Clearly, the Arbitrator's award is contrary to the plain language of the upward-mobility program and thereby is not a reasonable interpretation of Article 16. The grievant is now a GS-14 contract specialist.<sup>7</sup> He is upset because he was not promoted noncompetitively to the GS-14 level as quickly as he would have liked.<sup>8</sup> So, he filed this grievance. The Union argued that the initial denial, and subsequent delay, of promotion somehow violated the upward-mobility program. But here lies the problem – the Agency's upward-mobility program applies *only* to employees at the *GS-9 level and below*.<sup>9</sup> Therefore, the program does not apply to either the grievant (an employee who began his career at the

Agency as a GS-11, was subsequently promoted to GS-13, and then later to GS-14) nor the grade-level (GS-14) to which he wanted to be promoted faster than the Agency thought appropriate.

Accordingly, the resolution of this case is simple. The Arbitrator's award is contrary to FEMA 3500.3 and is not a reasonable interpretation of Article 16.

I would vacate the Arbitrator's award in its entirety. There is nothing to remand.

Thank you.

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<sup>1</sup> Award at 9.

<sup>2</sup> *Id.*

<sup>3</sup> *See* Majority at 3.

<sup>4</sup> Award at 9.

<sup>5</sup> *Id.* at 11.

<sup>6</sup> Exceptions, Ex. 1 at 30.

<sup>7</sup> Exceptions at 4.

<sup>8</sup> *See* Award at 4-6.

<sup>9</sup> Award at 3; *see* Exceptions, Ex. 2 at 5.