70 FLRA No. 141

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1148
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE INFORMATION SYSTEMS AGENCY
DEFENSE ENTERPRISE COMPUTER CENTER
COLUMBUS, OHIO
(Agency)

0-AR-5333

_____

DECISION

July 13, 2018

_____

Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester concurring)

Decision by Member Abbott for the Authority

I. Statement of the Case

In this fact-driven case, we review and deny exceptions to an arbitration award that found that: (1) the supervisor's email, which purportedly "designated"[1] the grievant as a lead, failed to qualify as a promotion;[2] and (2) the grievant was performing the duties of his existing position description.

On November 7, 2017, Arbitrator Langdon D. Bell denied the Union's grievance. He found that the Union had failed to meet its burden to demonstrate that the grievant either was working under an inaccurate position description or was performing substantive, recurring job duties omitted from his current position description.

The Union has filed exceptions to the award, arguing that the award fails to draw its essence from Article 12 of the parties' master and local supplemental agreements, which obliges the Agency to maintain accurate position descriptions. As the Arbitrator found that the grievant's existing General Schedule (GS)-12 position description reflected the duties he was actually performing, the Union has failed to demonstrate that the award is irrational, unfounded, implausible, or in manifest disregard of Article 12, and we deny this exception.

The Union also argues that the award is contrary to 5 U.S.C. § 5107. However, as the Arbitrator made no findings on § 5107, we find that there is nothing for us to review, and also deny this exception.

II. Background and Arbitrator's Award

The Agency's mission is to provide support and situational awareness globally to war fighters. The Agency employs GS-12 and GS-13 information technology (IT) specialists (refered to colloquially as "watch officers" and "battle captains," respectively).[3] The grievant is a GS-12 IT specialist. The Union filed a grievance alleging that the grievant was performing GS-13 work and working under an inaccurate position description.

The Arbitrator framed the issue, in relevant part, as whether the Union established that the grievant was improperly assigned the GS-12 position description and if so, whether he should be assigned the GS-13 position description.

At arbitration, the Union argued that the grievant had been promoted to a 'lead' role in July 2015 and that his supervisor had "admitted . . . that [the g]rievant had an erroneous position description."[4] The Union contended that the grievant's role as a 'lead' corresponded to the GS-13 position.[5] The Agency argued that the grievant's role as a 'lead' fit within his existing GS-12 position description.

The Arbitrator found that, starting in 2014, the Agency determined that 'lead' IT specialists were performing work at the GS-12 level and terminated new GS-13 openings for the positions. However, the Agency allowed those who were GS-13s to continue at that level.[6] Because the substantive job duties performed by employees such as the grievant fell within the existing GS-12 position descriptions, the Agency decided that the

[1] Opp'n, Attach. 9 at 1; *see also* Award at 27 n.6, 38.
[2] Award at 38 ("the evidence indicates [that the grievant's supervisors] were not 'promoting' him to a GS-13 supervisory pay grade, but simply attempting to secure a change in his GS-[]12 classification to reflect his 'lead' status in periodically performing duties not regularly performed by junior GS-[]12 employees while remaining in that same classification").
[3] *Id.* at 36.
[4] *Id.* at 19.
[5] *Id.* at 19, 23-24.
[6] *Id.* at 37.

grievant's work did not warrant a modified GS-12 position description as recommended by his supervisor.

The Arbitrator found that the only distinction between the two IT specialist positions was that those designated as leads "have the responsibility on their designated shift to correct an experienced IT 'outage,' regardless of its level (minor, moderate, or critical) and to simply notify the supervisor of those outages deemed to be 'critical.'"[7] He noted that the Union repeatedly acknowledged that it had no ability to challenge the downgrading of position descriptions to a lower rated classification. Therefore, he concluded that the evidence showed the grievant was never promoted to a GS-13 level, and he denied the grievance.

On December 6, 2017, the Union filed exceptions to the award[8] and on January 5, 2018, the Agency filed an opposition.[9]

III. Analysis and Conclusions

A. The award draws its essence from Article 12 of the master and local agreements.

The Union argues[10] that the award fails to draw its essence from Article 12 of the parties' agreements.[11] Article 12 of the master agreement states, in pertinent part, that "[t]he Agency will maintain an accurate position description for each position which will reflect the significant duties to be performed."[12] Specifically, the Union argues that the grievant did not have an accurate position description because the GS-12 position description did not include the grievant's duties as a lead.[13]

[7] *Id.* at 36.

[8] The Union requested an expedited, abbreviated decision, and the Agency opposes this request. *See* Exceptions at 18; Opp'n at 15. We have determined that an expedited, abbreviated decision is not appropriate in this case and deny the Union's request. *See AFGE, Nat'l INS Council*, 69 FLRA 549, 550 (2016) (denying request for expedited, abbreviated decision).

[9] The Agency argues that we should not consider certain Union exhibits, referred to broadly as training documents ("U29" and "U30"), and the Union's contrary-to-law argument that cites 5 U.S.C. § 5107, because they were not presented to the Arbitrator until the Union's post-hearing brief. Opp'n at 3, 8. Regarding § 5107, because the Union relied on that statute in its arguments to the Arbitrator in its post-hearing brief, we consider its § 5107 argument here. Exceptions, Attach. 1, Union's Post-Hr'g Br. at 6; *see also U.S. Dep't of the Treasury, IRS, Ogden Serv. Ctr.*, 69 FLRA 599, 601 (2016) (considering arguments raised in party's post-hearing brief to arbitrator); *AFGE, Nat'l Council 118*, 69 FLRA 183, 186 (2016) (same); *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Lexington, Ky.*, 68 FLRA 932, 935 (2015) (same). Regarding the challenged exhibits, the Agency asserts that the Arbitrator had prohibited the parties from submitting any "new documents" with their post-hearing briefs. Opp'n at 3. As the Arbitrator did not refer to the challenged exhibits, and we find it unnecessary to rely upon them in order to resolve the Union's exceptions, we find no indication the Agency was prejudiced by their submission.

[10] Exceptions at 12-13.

[11] When 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. 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." 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 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. *U.S. Dep't of the Treasury, IRS*, 70 FLRA 539, 542 n.24 (2018) (*IRS*) (Member DuBester concurring) (citing *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014)). Additionally, challenges to an arbitrator's evaluation of the evidence, including determinations as to the weight to be accorded such evidence, do not demonstrate that an award fails to draw its essence from the parties' agreement. *NTEU, Chapter 299*, 68 FLRA 835, 838 (2015) (*NTEU*). In the absence of a successful nonfact exception, the Authority defers to an arbitrator's factual findings. *AFGE, Local 933*, 70 FLRA 508, 511 (2018) (*Local 933*); *AFGE, Local 3740*, 68 FLRA 454, 455 (2015); *U.S. DHS, U.S. CBP, Savannah, Ga.*, 68 FLRA 324, 326 (2015).

[12] Exceptions at 13 (quoting Art. 12, § 2); *see also id.* ("Each employee will be furnished a copy of his/her current job description." (quoting Supp. Art. 12, § 2)).

[13] *Id.* at 14-15.

However, the Arbitrator found that the grievant was not promoted because the supervisor's email, which purportedly "designated"[14] the grievant as a lead, failed to qualify as a promotion.[15] The Arbitrator determined after a thorough discussion of the duties of and differences between the two position descriptions that the GS-12 position description included all the substantive, recurring duties performed by the grievant when he served as a lead.[16] The Union's argument that the lead role is a separate position warranting its own description merely reargues its case at hearing. Therefore, we deny the Union's exception.[17]

B. The award is not contrary to 5 U.S.C. § 5107.

The Union argues that the award is contrary to 5 U.S.C. § 5107, which pertains to the classification of positions.[18] In support, the Union repeats the same arguments that it raised in its essence exception.[19]

In his award, the Arbitrator framed the issue as what was the appropriate position description for the grievant and he did not discuss or make any findings regarding § 5107. Accordingly, the Union's contrary-to-law exception challenges conclusions that the Arbitrator did not make. Therefore, the exception is denied.[20]

IV. Decision

We deny the Union's exceptions.

Member DuBester, concurring:

I agree with the decision to deny the Union's exceptions. The Union challenges the Arbitrator's interpretation of the parties' collective-bargaining agreement, claiming that the award fails to draw its essence from agreement.[1] But the Arbitrator, finding that "the Union has failed to carry its burden of proof,"[2] resolved the contract-interpretation issue by "focusing simply on the established facts in this case."[3] And the Union does not challenge, as nonfacts, any of the Arbitrator's factual determinations that underlie his contract interpretation.[4] Because the Arbitrator relied on factual determinations, and the Union does not challenge them, the Union does not demonstrate that the award is deficient.

[14] Opp'n, Attach. 9 at 1; *see also* Award at 27 n.6, 38.
[15] Award at 38 ("the evidence indicates [that the grievant's supervisors] were not 'promoting' him to a GS-13 supervisory pay grade, but simply attempting to secure a change in his GS-[]12 classification to reflect his 'lead' status in periodically performing duties not regularly performed by junior GS-[]12 employees while remaining in that same classification").
[16] *Id.* at 37, 39.
[17] *IRS*, 70 FLRA at 542; *Local 933*, 70 FLRA at 511; *NTEU*, 68 FLRA at 838.
[18] Exceptions at 4; *but see id.* at 5 ("classification actions are not grievable").
[19] *Id.* at 4-7.
[20] *Local 933*, 70 FLRA at 510; *see also Indep. Union of Pension Emps. for Democracy & Justice*, 68 FLRA 999, 1010 (2015) (denying exceptions that are premised on arguments previously denied).

[1] Exceptions at 11-12.
[2] Award at 40.
[3] *Id.* at 34.
[4] *See* Exceptions at 11; *cf. AFGE, Local 1802*, 50 FLRA 396, 398 (1995) (claims that an award's contract interpretation fails to draw its essence from the parties' agreement, and that an award is deficient because the award's contract interpretation is based on nonfacts, raise distinct legal issues).