70 FLRA No. 53

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2302
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY HUMAN RESOURCES COMMAND
(Agency)

0-AR-5261

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DECISION

June 20, 2017

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Before the Authority: Patrick Pizzella, Acting Chairman, and Ernest DuBester, Member

I. Statement of the Case

Arbitrator Joe M. Harris Jr. issued an award denying the Union's non-selection grievance on the merits. He found that the Agency did not violate the parties' agreement, Policy Memorandum CG-50 (CG-50), or any other law, policy, rule, or regulation when the Agency selected two individuals for two supervisory positions. Specifically, the Arbitrator found that the Union's numerous factual challenges to the selection process failed to meet the Union's burden of demonstrating that, but for these violations and incongruities, the grievant would have been selected. The Union filed exceptions.

First, we must decide whether the award is contrary to 5 C.F.R. § 335.103. The Union argues that since the selectee was not qualified to be on the certificate of eligibles, management did not select from among properly ranked and certified candidates for promotion. Because the Union merely reargues factual allegations and alleged incongruities regarding one selectee's answers to the job-vacancy questionnaire that the Arbitrator rejected, the Union fails to demonstrate that the Arbitrator erred, and so, we deny this exception.

Second, we must decide whether the award fails to draw its essence from Article 19 of the parties' agreement. Because the Union does not demonstrate that the Arbitrator's interpretation of the parties' agreement is irrational, unfounded, implausible, or evidences a manifest disregard of the parties' agreement, the answer to this question is no.

Third, we must decide whether the award is based on nonfacts. Because the Union fails to identify what nonfacts the award is based on, the answer to this question is no.

Fourth, we must decide whether the Arbitrator was biased. The Union states that the Arbitrator may have been biased against it because the Union alleges it contacted the Federal Mediation and Conciliation Service (FMCS) after the award was more than five months overdue. Because the Union fails to support this argument, the answer to this question is no.

II. Background and Arbitrator's Award

The Agency posted two vacancy announcements, each for a Supervisory Mortuary Affairs Specialist position. Each vacancy announcement contained a questionnaire that all applicants were required to complete. After the screening and ranking was complete for each vacancy announcement, there were four candidates. Each candidate was interviewed and assigned a total score. The individual with the highest total score was offered one of the two positions, but declined. The individuals who scored second and third both accepted the available positions. The grievant scored fourth.

The Union grieved the selection. The parties could not resolve the grievance, so they proceeded to arbitration.

During arbitration, the Union argued that the Agency did not follow the procedures set forth in Article 19 of the parties' agreement and CG-50. Article 19 contains the procedures regarding merit staffing, and CG-50 is a policy memorandum for civilian hiring, promotion, and selection. The Union also alleged numerous violations and incongruities in the selection process, including disparities between the selectees' responses to the applications' questionnaires and their resumes, the selecting committee's evaluation of applicants, and the scoring of the grievant.

The Arbitrator denied the grievance, finding that the Union failed to meet its burden to demonstrate that the grievant would have been promoted but for the alleged violations and incongruities. The Arbitrator rejected the Union's numerous factual challenges, including challenges to the qualifications of one selectee, the composition of the selection committee panel, and the scoring of the applicants, along with the selecting official's comments, as supervisor, about the grievant.

The Arbitrator concluded that the Union's evidence failed to demonstrate that the Agency violated the parties' agreement, CG-50, "or any other law, policy, rule or regulation"[1] when the Agency selected two individuals for the two supervisory positions over the grievant.

The Union filed exceptions to the award. The Agency filed an opposition.

III. Preliminary Matter: Sections 2425.4 and 2429.5 of the Authority's Regulations bar two of the Union's arguments.

The Union raises two contrary-to-law arguments.[2] First, the Union argues that the award is contrary to 5 C.F.R. §§ 300.604-.605 because responses by one selectee to the job-vacancy questionnaires suggested that the selectee did not satisfy the one-year time-in-grade requirement.[3] Second, the Union argues that the award is contrary to law because the same selectee answered the questionnaire differently between the two vacancy announcements and that these incongruities should be investigated further.[4] However, the Union also admitted that these allegedly questionable responses were entirely contained in documents that were admitted as exhibits during the arbitration hearing and are part of the record.[5]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations,[6] the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[7] Since the Union failed to present both arguments to the Arbitrator, and could have done so, we find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar these arguments, and we dismiss them.[8]

IV. Analysis and Conclusions

A. The award is not contrary to 5 C.F.R. § 335.103.

The Union argues that the award is contrary to 5 C.F.R. § 335.103 because management did not select from among properly ranked and certified candidates for promotion.[9]

Title 5, § 335.103, of the Code of Federal Regulations provides to federal agencies the requirements for administering agency-specific programs designed to insure the systematic means of selection for promotions according to the merits of the applicants.[10] While the Arbitrator did not specifically cite to this regulation in his award, he concluded that the Union had failed to demonstrate that the Agency had violated "any" rule or regulation.[11]

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.[12] 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.[13] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[14]

First, the Union argues that the selectee was not qualified for the position because the selectee did not have the education or training that he claimed regarding the Mortuary Affairs and Casualty Program, and so, the selectee was not promoted based on merit, which goes "to the heart" of § 335.103.[15] The Arbitrator, in considering the selectee's testimony and job-vacancy questionnaire, found that the selectee had achieved some level of knowledge through self-study that was within a "reasonable meaning of [the] words" "education" and "training."[16] The Arbitrator found that the selectee chose answers that were "as close to accurate as he could" make.[17] Finally, the Arbitrator found that the Union

[1] Award at 31.
[2] Exceptions, Attach. 1, Hand-signed Br. at 1-2.
[3] *Id.* at 1.
[4] *Id.* at 1-2.
[5] *Id.* at 1.
[6] 5 C.F.R. §§ 2425.4(c), 2429.5.
[7] *U.S. Dep't of VA, St. Petersburg Regional Benefit Office*, 70 FLRA 1, 4 (2016) (citing *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012)).
[8] *See, e.g.*, *NTEU, Chapter 83*, 68 FLRA 945, 948 (2015) (dismissing a newly raised argument regarding an interpretation of the parties' agreement that was not raised before the arbitrator and conflicted with interpretations offered at arbitration); *AFGE, Council 215*, 66 FLRA 771, 773 (2012) (dismissing an essence exception that relied on the Privacy Act where Privacy Act issues were raised at arbitration, but the excepting party failed to present the newly raised argument at arbitration).
[9] Exceptions Br. at 1-2.
[10] *See* 5 C.F.R. § 335.103(a).
[11] Award at 31.
[12] *AFGE, Local 3506*, 65 FLRA 121, 123 (2010) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995); *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[13] *U.S. Dep't of the Navy Commander, Navy Region Haw., Fed. Fire Dep't, Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010) (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[14] *AFGE, Nat'l INS Council*, 69 FLRA 549, 552 (2016).
[15] Exceptions Br. at 1.
[16] Award at 17.
[17] *Id.*

failed to meet its burden to show by a preponderance of the evidence that the selectee answered the questionnaire untruthfully.[18] We defer to the Arbitrator's factual findings, as the Union has not successfully challenged them as nonfacts. The Union's restatement of this factual argument here fails to demonstrate that the Arbitrator's legal conclusion violates 5 C.F.R. § 335.103.

Second, and similarly, the Union argues that the selectee is not qualified to be an expert in the area of deoxyribonucleic-acid identification because the selectee's previous work experience was inadequate, and so, the selectee was promoted without merit, which again "goes to the heart of" § 335.103.[19] The Arbitrator discussed, in general, the selectee's testimony and questionnaire answers for questions five to seven, which included the selectee's work experience, and found that the Union did not meet its burden of proof in showing that the selectee was "lying, dishonest, or willfully untruthful"[20] when the selectee answered the questionnaire. The Arbitrator further found that the selectee's answers reflected "careful thought"[21] in filling out the questionnaire. Here, too, we defer to the Arbitrator's factual findings. The Union's restatement of its factual argument fails to demonstrate that the Arbitrator's legal conclusion that the Agency did not violate any rule or regulation violates 5 C.F.R. § 335.103.

Consequently, the Union does not demonstrate that the award is contrary to 5 C.F.R. § 335.103, and we deny this exception.

B. The award draws its essence from the parties' agreement.

The Union argues that the award fails to draw its essence from Article 19 of the parties' agreement and CG-50.[22] When a collective-bargaining agreement incorporates the agency regulation with which an arbitration award allegedly conflicts, the matter becomes one of contract interpretation because the agreement, not the regulation, governs the matter in dispute.[23] Since the Union argued that CG-50 was incorporated by reference[24] and the Agency does not dispute this, we find that CG-50 is incorporated into the parties' agreement. Accordingly, we apply an essence analysis to assess the Union's argument regarding CG-50.

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.[25] Under this standard, the appealing party must establish 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.[26]

The Authority defers to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained."[27] The Authority will not find that an award fails to draw its essence from a collective-bargaining agreement when the excepting party fails to establish that the arbitrator's interpretation of that agreement conflicts with its express provisions.[28]

The Union broadly argues that the award fails to draw its essence from the parties' agreement because the Arbitrator "did not look at the procedures"[29] that apply to the proper ranking of the applicants under Article 19 and CG-50. The Arbitrator found that the parties' agreement and CG-50 were central to the issues in this case.[30] Although the Union presents a broad argument that the Arbitrator did not look at Article 19 and CG-50, the Union does not identify any specific contractual wording. Instead, the Union argues generally that the numerous factual incongruities – that it identified and, in turn, argued to the Arbitrator – demonstrate here that the Arbitrator erred by finding no violation of the parties' agreement and CG-50. This reargument is unpersuasive and fails to demonstrate that the Arbitrator's interpretation of the parties' agreement and CG-50 is irrational, unfounded, implausible, or evidences a manifest disregard of the parties' agreement and CG-50.

We therefore deny the Union's exception that the award fails to draw its essence from the parties' agreement and CG-50.

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[18] *Id.* at 15.
[19] Exceptions Br. at 1-2.
[20] Award at 19.
[21] *Id.* at 18.
[22] Exceptions Form at 9; Exceptions Br. at 1.
[23] *AFGE, Local 15*, 68 FLRA 877, 879 (2015).
[24] Exceptions, Attach. 3, Union's Post-Hearing Br. at 1.
[25] *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[26] *U.S. DOD, Def. Contract Audit Agency, Cent. Region, Irving, Tex.*, 60 FLRA 28, 30 (2004) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*DOL*)).
[27] *Id.* (quoting *DOL*, 34 FLRA at 576).
[28] *U.S. Dep't of the Air Force, Edwards Air Force Base, Cal.*, 68 FLRA 817, 819 (2015) (citing *DOL*, 34 FLRA at 575).
[29] Exceptions Br. at 1.
[30] Award at 14.

C. The Union fails to support its nonfact exception.

Section 2425.6(e)(1) of the Authority's Regulations[31] provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground" listed in § 2425.6(a)-(c).[32] Consistent with § 2425.6(e)(1), when a party does not provide any arguments to support its exception, the Authority will deny the exception.[33]

The Union raises a nonfact exception on its exceptions form by answering "[y]es"[34] to whether it is "alleging that the award is based on nonfact(s)."[35] However, the Union fails to identify the specific nonfacts that were central to the award. Therefore, we deny this exception under § 2425.6(e)(1) of the Authority's Regulations.[36]

D. The Union does not demonstrate that the Arbitrator was biased.

The Union states that the Arbitrator may be biased against the Union because the Union allegedly contacted FMCS after waiting over five months for the award.[37] To the extent that the Union intended this statement to be an exception on bias grounds, we deny it because the Union does not support the argument – beyond the above statement – as required by § 2425.6(e)(1) of the Authority's Regulations.[38] Therefore, we deny this exception.

V. Decision

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

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[31] 5 C.F.R. § 2425.6(e)(1).
[32] *NTEU*, 70 FLRA 57, 60 (2016) (quoting 5 C.F.R. § 2425.6(e)).
[33] *Id.* (citing *NTEU, Chapter 67*, 67 FLRA 630, 630-31 (2014)).
[34] Exceptions Form at 8.
[35] *Id.*
[36] *E.g.*, *U.S. Dep't of HHS, Nat'l Inst. of Envtl. Health Sciences*, 68 FLRA 1049, 1051 (2015) (denying a nonfact exception that was not supported with arguments or authority); *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 450 (2014) (denying a nonfact exception that was not supported with arguments or authority).
[37] Exceptions Br. at 1.
[38] *AFGE, Local 2302*, 70 FLRA 202, 204 (2017).