

71 FLRA No. 183

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 547
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JAMES A. HALEY HOSPITAL AND CLINICS
TAMPA, FLORIDA
(Agency)

0-AR-5494

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DECISION

September 2, 2020

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

I. Statement of the Case

Arbitrator Alexander E. Wilson III found that the grievant's nonselection for a position outside of the bargaining unit was not substantively arbitrable under the parties' collective-bargaining agreement. The Union filed exceptions on the ground that the award is contrary to law. Because the Union does not demonstrate that the Arbitrator's substantive-arbitrability determination violates any law, rule, or regulation, we deny the Union's exception.

II. Background and Arbitrator's Award

The grievant applied for the non-bargaining unit position of Administrative Officer (AO). The Agency's Policy Memorandum 05-14 (merit promotion plan) sets forth the procedures for filling vacancies in non-bargaining unit positions. Under the merit promotion plan, all "same type" applicants should be interviewed, if available.¹

After receiving a "best qualified" list of fifteen candidates, the selecting official delegated the task of reducing the candidates for interviews to the incumbent AO.² The incumbent AO used a rating system

that showed a clear distinction between the top two, top four, and top nine candidates. The selecting official only interviewed the top four candidates, which did not include the grievant.

On April 11, 2018,³ the Agency informed the grievant of her nonselection for the AO position. The next day, the grievant requested information regarding the selection process for the position. Pursuant to her request, the grievant met with the selecting official a month later. The day after their meeting, the grievant wrote to the selecting official, stating in relevant part, "thank you for meeting with me and explaining to me that it was your previous AO, . . . who picked the four individuals from the certification list and rated them according to the criteria list that she created. . . . Did you review and approve the criteria list that [the AO] created?"⁴ The selecting official responded that he had approved the criteria.

On May 11, the Union filed a Step 3 grievance alleging that the Agency violated Article 23 of the parties' agreement (Article 23), the VA Handbook, and law by using improper hiring practices to fill the AO vacancy. After the Agency requested three extensions of time to respond to the grievance, the Union invoked arbitration.

The Arbitrator framed the issues, in pertinent part, as:

(1) Whether the grievance is procedurally non-arbitrable because it was improperly filed at Step 3 and/or because of its failure to adequately describe the basis for the grievance and the corrective action desired.

(2) Whether the subject matter of this grievance, the denial of promotion to a non-bargaining unit position, is properly the subject of the grievance and arbitration procedures of the [parties'] [a]greement.

(3) If the subject matter of the grievance is not properly the subject of grievance and arbitration under the [parties'] [a]greement, whether the Agency has waived its right to raise the substantive arbitrability issue by failing to do so no later than the Step 3

¹ Award at 7.

² *Id.*

³ Unless otherwise noted, all dates hereafter occurred in 2018.

⁴ Award at 2.

decision as required by Article 43, Section 4 of the [parties'] [a]greement.⁵

As relevant here, the Arbitrator concluded that the grievance was procedurally arbitrable. However, he found that the grievance was substantively non-arbitrable because it challenged the promotion of a bargaining-unit employee to a position outside of the bargaining unit. Citing Authority precedent, the Arbitrator noted that “the consistent principle . . . is that an agency is not required to arbitrate an issue concerning a promotion outside of the bargaining unit unless [the] evidence shows that the agency has agreed to arbitrate such an issue.”⁶ He found that there was “no evidence of any negotiation between the Agency and Union to bring issues arising under the . . . [m]erit [p]romotion [p]lan within the scope” of the parties’ negotiated grievance procedure.⁷

The Arbitrator also rejected the Union’s argument that Section 4(r) of the merit promotion plan and two directives in VA Handbook 5021 (the two directives) permit bargaining-unit employees to use the negotiated grievance procedure to challenge hiring practices for non-bargaining unit positions. Section 4(r) provides that, “[a] complaint will be processed under the provisions of the VA grievance procedure contained in VA Handbook 5021, Employee/Management Relations.”⁸ The two directives both state, in relevant part, that “a bargaining unit employee may elect to use the VA grievance procedure . . . or the negotiated grievance procedure, but not both, in the case of a disciplinary or major adverse action . . . which does not involve a question of professional conduct or competence.”⁹

The Arbitrator noted that the two directives specifically limited their scope to cases of “disciplinary or major adverse action,”¹⁰ which are defined as “suspensions (including indefinite suspension), transfer, reduction in grade, reduction in basic pay, and discharge based on conduct or performance.”¹¹ Therefore, he concluded that neither directive could be “reasonably read” as permitting an employee to elect the negotiated grievance procedure to grieve a promotion issue arising under the merit promotion plan.¹²

The Union also asserted that 5 C.F.R. § 300.104(c)(2) supported its position that a grievant could use the negotiated grievance procedure when “an employment practice which was applied to him or her and which is administered or required by the agency violates a basic requirement in [5 C.F.R.] § 300.103.”¹³ The Arbitrator noted that 5 C.F.R. § 300.104(c)(2) stated that such a “grievance shall be filed and processed under an agency grievance system, if applicable, or a negotiated grievance system as applicable.”¹⁴ Therefore, he examined the language of the parties’ agreement to determine if the negotiated grievance procedure was “applicable.”¹⁵

The Arbitrator considered Article 23, because it was the only provision cited by the Union in its grievance. Article 23 states, in relevant part, “[t]his article sets forth the merit promotion system, policies, and procedures applicable to bargaining unit positions in the [d]epartment.”¹⁶ The Arbitrator found that Article 23 specifically limits its applicability to “bargaining unit positions.”¹⁷ Because Article 23 excluded the subject matter of the grievance and there is “no provision in the [parties’ agreement] pertaining to promotions to non-bargaining unit positions,”¹⁸ the Arbitrator found that 5 C.F.R. § 300.104(c)(2) did not serve to otherwise widen the scope of the negotiated grievance procedure.

Finally, the Arbitrator concluded that the Agency had not waived its right to contest the issue of subject matter arbitrability. He noted that “applicable legal principles establish that noncompliance with a grievance procedure time limitation cannot serve to allow the arbitrator to make a decision on the merits of a case in which the arbitrator has no jurisdiction to act.”¹⁹ Consequently, the Arbitrator found that the grievance is not substantively arbitrable and denied it.

⁵ *Id.* at 3.

⁶ *Id.* at 17 (citing *AFGE, Local 1667*, 70 FLRA 155 (2016) (*Local 1667*); *NFFE, Local 1442*, 64 FLRA 1132, 1333-34 (2010) (*Local 1442*); *NAGE, Local R1-109*, 61 FLRA 588, 590 (2006)).

⁷ *Id.* at 18.

⁸ *Id.* at 19 (quoting merit promotion plan, § 4(r)).

⁹ *Id.* (quoting VA Directive 5021/3, § (B)(1)(b)(2) and VA Directive 5021/10, Part IV, Chapter 3, § 1(b)(2)).

¹⁰ *Id.*

¹¹ *Id.* (quoting VA Directive 5021/10, Part II, Chapter 1).

¹² *Id.* at 20.

¹³ *Id.* (quoting 5 C.F.R. § 300.104(c)(2)).

¹⁴ *Id.* (quoting 5 C.F.R. § 300.104(c)(2)).

¹⁵ *Id.* at 20-21.

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 20 (quoting Article 23).

¹⁸ *Id.* at 22.

¹⁹ *Id.* at 26; see also *id.* at 23-26 (discussing *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960); *Devine v. Levin*, 739 F.2d 1567, 1570 (Fed Cir. 1984); *U.S. DOJ, U.S. Marshals Serv.*, 66 FLRA 531, 532 (2012); *AFGE, Local 1923*, 66 FLRA 424, 425 (2012); *USDA, Food & Consumer Serv., Dallas, Tex.*, 60 FLRA 978, 981 (2005)).

On April 10, 2019, the Union filed exceptions to the award.²⁰

III. Analysis and Conclusions: The award is not contrary to law.

The Union argues that the award is contrary to law for several reasons.²¹ When an exception challenges an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.²² 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.²³ In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.²⁴

First, the Union asserts that the Authority has held that "agencies can agree to include promotion to non-bargaining unit jobs in the bargaining agreement's grievance and arbitration procedure," and that the Agency has done so in this case.²⁵ The Authority has held that the grievability of disputes over the filling of non-bargaining unit positions is a matter of contract interpretation.²⁶ Here, the Arbitrator found that the parties had not negotiated to include nonselection for non-bargaining unit positions in their negotiated grievance procedure,²⁷ a finding that the Union does not challenge. Consequently, the Union provides no basis for finding that the Arbitrator erred, as a matter of law, in finding that the parties had not agreed to include such disputes in their negotiated grievance procedure.

Nevertheless, the Union asserts that because the Agency failed to challenge the substantive arbitrability of the grievance at Step 3,²⁸ it waived its right to challenge the grievance's arbitrability.²⁹ However, the case relied upon by the Union does not address the issue of waiver of substantive arbitrability.³⁰ And the Union provides no other basis for finding that the Arbitrator was required to find, as a matter of law, that the Agency waived its right to contest the arbitrability of the grievance because it had not raised it in a Step 3 grievance decision.

Next, the Union contends that the award is contrary to 5 C.F.R. § 300.104(c)(2), the merit promotion plan, and the two directives because it "denies employees the ability to file grievances [over nonselection to non-bargaining unit positions] when they believe an employment practice which was applied to the employee"³¹ was "administered or required by the agency in an unlawful manner."³² According to the Union, the Arbitrator "mistakenly" found that "the use of the term 'disciplinary or major adverse action'" in the

²⁰ The Agency's opposition was due on May 10, 2019, but the Agency did not file it until May 24, 2019. The Authority Office of Case Intake and Publication issued an Order to Show Cause (order) requiring the Agency to show why its opposition should not be rejected as untimely. In response, the Agency conceded that it miscalculated the due date for filing its opposition and did not allege an "extraordinary circumstance" warranting waiver of the expired time limit. 5 C.F.R. § 2429.23(b); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 67 FLRA 632, 633 (2014). Accordingly, we do not consider the Agency's untimely opposition or any additional arguments raised in its response to the order.

²¹ Exceptions Br. at 3-10.

²² *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)).

²³ See *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).

²⁴ See *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014).

²⁵ Exceptions Br. at 3.

²⁶ *Local 1667*, 70 FLRA at 157 (citing *AFGE, Local 200*, 68 FLRA 549, 550 (2015) (*Local 200*)); see also *Local 1442*, 64 FLRA at 1133-34.

²⁷ Award at 21.

²⁸ Exceptions Br. at 5.

²⁹ *Id.* at 6.

³⁰ *Id.* (citing *Local 200*, 68 FLRA at 550). In *Local 200*, the Authority denied a union's exceptions challenging an arbitrator's award that found that the negotiated grievance procedure did not cover non-selection to supervisory positions. See *Local 1442*, 64 FLRA at 1134.

³¹ Exceptions Br. at 4 (citing 5 U.S.C. § 2302(b)(12); 5 C.F.R. § 300.104(c)(2)).

³² *Id.* at 7 (citing 5 C.F.R. § 300.104(c)(2)). The Union also asserts that the Agency's hiring process was a prohibited personnel practice under 5 U.S.C. § 2302(b). *Id.* at 9-10. However, the Union does not demonstrate how this statute required the Arbitrator to find that the grievance was substantively arbitrable under the parties' negotiated grievance procedure.

two directives meant that the merit promotion plan is not “within the scope” of the parties’ agreement and, therefore, he “created a circumstance where no employee can ever challenge any promotion actions.”³³

However, the award does not deny employees “the ability to file grievances”; it simply finds that “complaints relating to the [m]erit [p]romotion [p]lan will be processed under the [Agency] grievance procedure.”³⁴ Contrary to the Union’s argument, the Arbitrator did not find that only adverse actions can be brought under the Agency’s grievance procedure. Rather, he considered the two directives cited by the Union, and found that, because they concerned adverse actions, *those* directives did not apply to the nonselection at issue. The Union provides no basis for finding that the Arbitrator erred, as a matter of law, in finding that the cited regulation, merit promotion plan, and two directives do not widen the scope of the negotiated grievance procedure or that his finding that the parties’ negotiated grievance procedure was not “applicable” to the nonselection is contrary to law.³⁵

Accordingly, we find that the award is not contrary to law.

IV. Decision

We deny the Union’s exception.

³³ Exceptions Br. at 7-8.

³⁴ Award at 20.

³⁵ *Id.* at 21.