

71 FLRA No. 215

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
POPLAR BLUFF, MISSOURI
(Agency)

0-AR-5503

DECISION

November 20, 2020

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

I. Statement of the Case

Arbitrator Gerard A. Fowler denied the Union’s grievance alleging that the Agency violated the parties’ agreement by failing to provide environmental differential pay (EDP) to bargaining-unit pipefitters (pipefitters). The Union filed exceptions to the award on bias, fair-hearing, nonfact, contrary-to-law, and essence grounds. Because the Union does not establish that the award is deficient on any of these grounds, we deny the exceptions.

II. Background and Arbitrator’s Award

The Union filed a grievance alleging that the Agency violated the parties’ agreement by failing to pay the pipefitters EDP. In relevant part, the grievance stated that:

Currently, Pipefitter (Wage Grade) Employees have not been receiving the required [EDP] for performing work in hazardous conditions. [(the first sentence)]

The pipefitters maintain waste, water[,] and medical systems at the facility that pose hazards to their working conditions. Their duties include, but [are] not limited to

removing clogs from drain and supply piping throughout the facility, including patient room toilets, patient showers, patient sinks, water fountains (currently deemed unsafe for drinking), various types of sinks and drains in lab areas and other areas of the facility, to include hypodermic needles and other dangerous items being found during the performance of their duties.¹

The parties were unable to resolve the grievance and the Union invoked arbitration. The Arbitrator framed the issue as whether the Agency violated the parties’ agreement and 5 CFR Part 532, Subpart E, Appendix A (Appendix A) by denying the grievance.

At arbitration, the parties disputed whether exposure to asbestos was included in the grievance. The Agency asserted that the grievance did not mention asbestos and the parties’ agreement requires that a grievance “must state, in detail, the basis for the grievance.”² The Union argued that “[a]sbestos is one of the many dangerous and hazardous materials that are referenced in the Union’s grievance,”³ and presented evidence on asbestos exposure at the hearing. In his award, the Arbitrator found that, although the Union mentioned an asbestos abatement project in which “certain employees” were exposed to asbestos, the Union did not specifically reference pipefitters as employees concerned about asbestos exposure.⁴

Ultimately, the Arbitrator concluded that the asbestos issue was not properly before him because his authority was limited “by the language of the grievance filed in the case,” and the pipefitters’ exposure to asbestos was not sufficiently raised in the grievance.⁵ Consequently, he found that “the testimony and evidence submitted by the Union pertaining to asbestos cannot be used in the determination of this case.”⁶ He then determined that the “decision shall be limited to the language of the grievance,” which he stated “include[d]” the hazards described in the second quoted paragraph of the grievance.

On the merits, the Arbitrator determined that whether the pipefitters, who are wage-grade employees, are entitled to EDP was governed by 5 U.S.C. § 5345(c)(4). He then considered the pipefitters’ entitlement to EDP based on their exposure to the

¹ Exceptions, Attach. 2, Grievance at 1-2; *see also* Award at 17.
² Award at 11-12 (citing Art. 43, § 7 of the parties’ agreement (internal quotation marks omitted)).
³ Exceptions, Attach 4, Union’s Post-Hr’g Br. at 4-5.
⁴ Award at 5.
⁵ *Id.* at 17.
⁶ *Id.*

hazardous category of “micro-organisms.”⁷ And he found that, to be entitled to EDP, the Union was required to demonstrate that: (1) the pipefitters’ position description failed to specify the hazards associated with the position; (2) the Agency failed to provide adequate training regarding the prevention of exposure to micro-organisms and the use of personal protective equipment (PPE); and (3) PPE did not “practically eliminate[] the threat of injury.”⁸

As to these factors, the Arbitrator found that the position description specifically referenced “frequent exposure to possible ‘infections,’”⁹ and therefore did not fail to specify an exposure to a micro-organism hazard. He also found that the pipefitters overwhelmingly testified that they were aware of PPE, knew how to use it, and that they had training in the prevention of the spread of pathogens and other drug-resistant organisms. The Arbitrator therefore found that there was “ample evidence” demonstrating that the Agency provided adequate training.¹⁰

Additionally, the Arbitrator rejected the Union’s argument that PPE did not completely eliminate all risk of exposure to hazards. Rather, he found that the evidence demonstrated that “the PPE provided to pipefitters practically eliminated the risk of injury related to micro-organisms,”¹¹ which is the standard under Appendix A.

Based on these findings, the Arbitrator concluded that “the Union has failed to present testimony sufficient to entitle pipefitters to [EDP] under Appendix A,” and he denied the grievance.¹²

The Union filed exceptions to the award on April 29, 2019, and the Agency filed an opposition on May 29, 2019.

III. Analysis and Conclusions

A. The Arbitrator was not biased and did not deny the Union a fair hearing.

The Union challenges the Arbitrator’s procedural-arbitrability determination that the grievance did not include the pipefitters’ alleged exposure to asbestos on grounds that that the Arbitrator was biased¹³

and failed to conduct a fair hearing.¹⁴ In support of its bias exception, the Union notes that the Arbitrator failed to recite the first sentence of the Union’s grievance in his award. And on this basis, it alleges that the Arbitrator “purposely cut off [the first] sentence of the grievance to obtain the result he wanted.”¹⁵ Similarly, in support of its fair-hearing exception, the Union asserts that the Arbitrator “discarded the term of ‘performing work in hazardous conditions’”¹⁶ that was part of the first sentence to “discard[] the Union reference to asbestos and the use of asbestos in the [p]ipefitters[] environment.”¹⁷

To demonstrate that an award is deficient because of bias on the part of the arbitrator, a party must show that the award was procured by improper means, that there was partiality or corruption on the part of the arbitrator, or that the arbitrator engaged in misconduct that prejudiced the rights of the party.¹⁸ In reviewing awards under these standards, the Authority has repeatedly held that an assertion that an arbitrator’s findings were adverse to the excepting party, without more, does not establish bias.¹⁹

Additionally, the Authority will find that an arbitrator failed to conduct a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence.²⁰ Disagreements with an arbitrator’s evaluation of evidence, including the determination of the weight to be accorded such evidence, provide no basis for finding an award deficient on this ground.²¹

Here, the Arbitrator found that the Union’s evidence regarding employee exposure to asbestos did not specifically include pipefitters’ exposure. Moreover, he found that he was limited “by the language of the grievance filed in the case,” which did not allege exposure to asbestos as a basis for EDP with the specificity required by the parties’ agreement.²²

Thus, the Arbitrator articulated the reasons for excluding any asbestos-related claim from the Union’s

⁷ *Id.* at 18-19.

⁸ *Id.* at 18.

⁹ *Id.* at 19.

¹⁰ *Id.* at 20.

¹¹ *Id.* at 21.

¹² *Id.*

¹³ Exceptions at 8.

¹⁴ *Id.* at 10, 12 (arguing that the Arbitrator disregarded “conclusive [evidence] that [pipefitters] work in a hazardous work environment,” when he “purposely” omitted the first sentence of the grievance “to prevent important evidence [of asbestos exposure] from being considered”).

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 12.

¹⁷ *Id.*

¹⁸ *NTEU, Chapter 299*, 68 FLRA 835, 839 (2015) (citing *AFGE, Local 1938*, 66 FLRA 741, 743 (2012)).

¹⁹ *Id.*

²⁰ *AFGE Local 3294*, 70 FLRA 432, 435 (2018) (*Local 3294*) (Member DuBester concurring).

²¹ *Id.*

²² Award at 17.

grievance,²³ and the Union presents no evidence that this conclusion did not result from a neutral assessment of the grievance or the evidence presented at the hearing.²⁴ Moreover, the Authority has held that an award's failure to mention a particular evidentiary item or argument does not demonstrate that the arbitrator refused to consider it or failed to provide a fair hearing.²⁵ Consequently, the Union has failed to demonstrate that the Arbitrator was biased or failed to conduct a fair hearing.

The Union also argues that it was denied a fair hearing because the evidence does not support the Arbitrator's finding that PPE practically eliminated the pipefitters' exposure to micro-organisms.²⁶ However, the Union's mere disagreement with the Arbitrator's evaluation of the evidence does not provide a basis for finding the Union was denied a fair hearing.²⁷

Accordingly, we deny these exceptions.

B. The award is not based on a nonfact.

The Union argues that the award is based on a nonfact because the Arbitrator did not understand the terms "micro-organisms" and "hazardous conditions."²⁸ To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.²⁹ The Union's conclusory assertion does not explain either how the Arbitrator misunderstood the cited terms or how any central fact underlying the award is clearly erroneous. Therefore, the Union fails to support its nonfact exception, and we deny it.³⁰

²³ *Id.*

²⁴ See *AFGE, Local 3947*, 47 FLRA 1364, 1371 (1993) (denying bias exception).

²⁵ *AFGE, Local 836*, 69 FLRA 502, 506 (2016) (Member Pizzella dissenting) (citing *AFGE, Local 3438*, 65 FLRA 2, 3-4 (2010)).

²⁶ Exceptions at 12-13.

²⁷ *Local 3294*, 70 FLRA at 432, 435-36.

²⁸ Exceptions at 13-14. The Union also alleges that if the Arbitrator had not disregarded the first sentence of the grievance, he would have understood the term "performing work in hazardous conditions." *Id.* at 14. Because we have rejected the Union's argument that the Arbitrator improperly disregarded this sentence, we do not address this argument further.

²⁹ *NLRB Prof'l Ass'n*, 68 FLRA 552, 554 (2015) (citing *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 623 (2014); *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)).

³⁰ Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to . . . support a ground" listed in § 2425.6(a)-(c). 5 C.F.R. § 2425.6(e)(1). Consistent with

C. The award is not contrary to law.

The Union argues that the award is contrary to Appendix A, Part II, § 6.³¹ In support of this argument, the Union contends that the Arbitrator misinterpreted the job description.³² The Union also argues that the Arbitrator erroneously concluded that the pipefitters were provided adequate training, and mistakenly found that the pipefitters' PPE practically eliminated the hazard.³³

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception de novo.³⁴ In reviewing de novo, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.³⁵ In making that assessment the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.³⁶

Relying on our decision in *U.S. Department of VA, San Diego Healthcare System, San Diego, California (Veterans Affairs)*,³⁷ the Union argues that the Arbitrator "misinterpreted" the pipefitter's position description when he concluded that, because the description lists risk of "infection," it designated a job hazard.³⁸ However, the Union has not demonstrated how our decision in

§ 2425.6(e)(1), when a party does not provide any arguments to support its exception, the Authority will deny the exception. *Bremerton Metal Trades Council*, 71 FLRA 569, 570 (2020) (a "conclusory statement" is insufficient to support a recognized ground for review); see also *NAIL, Local 5*, 65 FLRA 495, 499 n.4 (2011) (citing *AFGE, Local 405*, 63 FLRA 149, 152 n.9 (2009); *AFGE, Local 446*, 64 FLRA 15, 16 (2009)) (rejecting nonfact claim as a bare assertion because union provided no evidence to support its claim).

³¹ Exceptions at 6.

³² *Id.*

³³ *Id.* at 4, 6 (citing "5 C.F.R. Part 532, Subpart E, Schedule of Environmental Differentials Paid to Various Degrees of Hazards 6"). The Union also contends that the award is contrary to 5 U.S.C. § 5343(c)(4) and 5 C.F.R. § 532.511(a), but provides no argument regarding how the award conflicts with either provision. Therefore, we deny these claims as unsupported. 5 C.F.R. § 2425.6(e)(1).

³⁴ *AFGE, Local 1633*, 71 FLRA 211, 212 n.12 (2019) (*Local 1633*) (Member DuBester concurring in part, dissenting in part on other grounds) (citing *AFGE, Local 933*, 70 FLRA 508, 510 n.13 (2018) (*Local 933*)).

³⁵ *Id.*

³⁶ *Id.*

³⁷ 65 FLRA 45 (2010).

³⁸ Exceptions at 6.

Veterans Affairs renders the award contrary to the applicable law.³⁹

The Union also alleges that the evidence does not support the Arbitrator's findings that the pipefitters received adequate training and that their PPE practically eliminated "the severe hazards [they] encounter."⁴⁰ However, the Union does not explain how the Arbitrator's findings on these issues,⁴¹ which it does not challenge as nonfacts,⁴² are contrary to law. The Authority has long held that disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be accorded such evidence, provides no basis for finding the award deficient.⁴³

Accordingly, we deny the Union's contrary to law exception.⁴⁴

IV. Decision

We deny the Union's exceptions.

Member Abbott, dissenting in part:

I agree with the majority in denying the Union's exceptions and concluding that the grievants are not entitled to environmental differential pay concerning the exposure to micro-organisms and infections.

However, I do not agree with the determination that the scope of the grievance can be read so narrowly as to exclude the Union's claim concerning exposure to "asbestos."¹ Although the Union does not use the term "asbestos" in the grievance document, I believe supporting documentation and the language of the grievance demonstrates that asbestos exposure was part of the Union's grievance and should have been addressed.

The Union points to, and the Arbitrator notes, communications between the Union and the Agency concerning asbestos leading up to the formal filing of the grievance. Also, the grievance asserts that the grievants "perform[] work in hazardous conditions," and that "[t]heir duties include, but [are] not limited to [certain hazardous activities]."² Thus, I would conclude that the references to micro-organisms and infections are examples of, not an exclusive list of, the scope of the Union's grievance.

Therefore, I would remand the matter to the Arbitrator to address the claims concerning exposure to asbestos.

³⁹ *Id.* at 48-49 (Unlike § 5545(d), § 5343(c)(4) does not disqualify an employee from earning the pay differential just because the position's classification factored in exposure to hazards.); *see also Local 1633*, 71 FLRA at 212 n.12 (citing *Local 933*, 70 FLRA at 510 n.13); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Tucson, Ariz.*, 65 FLRA 267, 269 n.2, 270 (2010).

⁴⁰ Exceptions at 7.

⁴¹ Award at 20-21.

⁴² *Local 1633*, 71 FLRA at 212 n.12 (citing *Local 933*, 70 FLRA at 510 n.13) ("the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts").

⁴³ *E.g., U.S. Dep't of the Navy, Military Sealift Command Atl. Region, Hampton, Va.*, 65 FLRA 583, 586-87 (2011) (citing *AFGE, Local 3295*, 51 FLRA 27, 32 (1995)).

⁴⁴ The Union also argues that the award fails to draw its essence from Article 29 by reiterating its arguments that the Arbitrator did not consider the first sentence of the grievance. Exceptions at 16. However, other than expressing disagreement with the Arbitrator's conclusions, the Union does not explain how the award is irrational, implausible, or in manifest disregard of the agreement. Therefore, we deny the Union's essence exception as unsupported. *See* 5 C.F.R. § 2425.6(e)(1).

¹ Award at 17; *see also* Exceptions, Attach 4, Union's Post-Hr'g Br. at 4-5.

² Exceptions, Attach. 2, Grievance at 2.