

71 FLRA No. 42

DEPARTMENT OF VETERANS AFFAIRS
EDITH NOURSE ROGERS MEMORIAL
VETERANS AFFAIRS MEDICAL CENTER
BEDFORD, MASSACHUSETTS
(Agency)

and

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R1-32
(Union)

0-AR-5422

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DECISION

July 16, 2019

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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 case, Arbitrator Lawrence T. Holden ordered the Agency to restore an employee to a position she held prior to being reassigned in violation of the parties' agreement. We deny all exceptions.

We deny the Agency's exceptions, in part, because they are unsupported and, in part, because the Agency's argument is inconsistent with the argument it made before the Arbitrator. We further find that the Agency's management rights argument is unavailing.

II. Background and Arbitrator's Award

The grievant worked for many years as a dementia outpatient social worker and admissions coordinator in the Agency's geriatric care facility. The Agency informed the grievant that it was changing her duties to now comprise half-time work in the dementia outpatient clinic and half-time in the home-based primary care program, which required the grievant to travel and treat patients in their homes. She objected and grieved the action.

The Union alleged that the Agency failed to comply with Article 25 of the parties' agreement.

Article 25 concerns details, reassignments, and temporary promotions, and prescribes seniority-based procedures for Agency-initiated reassignments. In an award dated April 24, 2018, the Arbitrator found that the Agency's actions constituted a reassignment. He expressly rejected the Agency's claims that it simply changed the grievant's "functional statement" or job description.¹ He determined that the Agency changed her position from a full-time position in the outpatient clinic to a "half-time" position in the clinic and a "half-time" position in the home-based treatment program.² He also rejected the Agency's argument that the new position was related to "some necessary integration" of job responsibilities.³

The Arbitrator found that the Agency's actions were the result of its need to move a supervisor into a position on campus. Article 25 of the parties' agreement provided that Agency-initiated reassignments would be subject to seniority.⁴ The Arbitrator found that the Agency violated Article 25 when it did not use the procedures.

Turning to remedy, he ordered restoration of any unpaid leave that the grievant used as a result of the reassignment and he noted that the grievant was already working full-time in another position provided as a reasonable accommodation for her physical limitations. If the Agency still had a "compelling reason" to direct a reassignment, then the Arbitrator instructed the Agency to follow Article 25's reassignment procedures.⁵ He retained jurisdiction for sixty days to resolve remedial issues in the event that the parties could not agree whether there was a "compelling rationale" for a reassignment.⁶

The parties were unable to reach an agreement, and the Union timely invoked the Arbitrator's continuing jurisdiction. In a remedial order dated September 20, 2018, the Arbitrator noted that he had already determined that the Agency's actions were a reassignment and that the Agency had violated Article 25 when it failed to comply with the seniority-based procedures for reassignments. He then ordered the grievant to be restored to the position that she held prior to the Agency's improper reassignment.

¹ Award at 4, 8.

² *Id.* at 8-9.

³ *Id.* at 9.

⁴ *Id.* at 10 ("In broad strokes[, Article 25's] procedures contemplate the use of . . . inverse seniority when there are insufficient volunteers and someone must be compelled to accept the reassignment.").

⁵ *Id.*

⁶ *Id.* at 10 n.2.

On October 19, 2018, the Agency filed exceptions to the remedial order, and on October 31, 2018, the Union filed an opposition⁷ to the Agency's exceptions.⁸

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar certain Agency arguments.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations,⁹ the Authority will not consider arguments offered in support of an exception if those arguments differ from, or are inconsistent with, a party's arguments to the arbitrator.¹⁰ The Agency argues that the award violates its management rights to assign work, assign employees, determine its mission, and determine the personnel by which agency operations shall be conducted¹¹ under § 7106(a) of the Federal Service Labor-Management Relations Statute (the Statute).¹² In support of these arguments, the Agency relies heavily on the assertion that the award requires the Agency to recreate the grievant's former full-time, on-site position

and "[t]he job has not existed since the effective date . . . of the . . . functional statement changes."¹³

However, this argument, that the grievant's former, full-time position in the clinic no longer "exists,"¹⁴ is inconsistent with the argument the Agency made before the Arbitrator. In its opening statement, the Agency assured the Arbitrator repeatedly that that was "no change in position" and that the grievant's duties were simply changed.¹⁵ The Agency now takes the contrary stance that the position changed so much that the former position was eliminated.¹⁶ These arguments are inconsistent and thus we do not consider them here.¹⁷

IV. Analysis and Conclusion: The award is not contrary to law.

Finally, the remainder of the Agency's argument that the remedial order excessively interferes with the Agency's management rights is unavailing. Applying the three-part framework articulated in *U.S. DOJ, Federal BOP (DOJ)*,¹⁸ even assuming that the award affects one or more of the cited management rights, we find that the Arbitrator's awarded remedies do not excessively interfere with those rights.

There is no challenge to the Arbitrator's determination that the Agency violated Article 25 of the parties' agreement. Therefore, we proceed to the second question, namely whether the Arbitrator's remedy reasonably and proportionally relates to the violation.¹⁹ Here, the Arbitrator ordered the Agency to restore the grievant to the position she would have been in prior to the Agency's violation and, in the event that the Agency still needed to direct a reassignment, to comply with Article 25's reassignment procedures. The Agency has not persuaded us that this limited remedy is unreasonable or disproportionate to the violation. Thus, the answer to the second question is yes.

The final question is whether the award excessively interferes with the cited management rights.²⁰ Relying on the Authority's decision in *U.S. Dep't of the*

⁷ The Union argues in its opposition that the Agency's exceptions are untimely as they relate to the award. Opp'n at 5-6. Although the Arbitrator determined in the award that the Agency violated Article 25, his award was not final until he completed the process of fashioning a remedy in the remedial order. *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 850 (2012) (holding that an award that directed parties to determine the appropriate remedy was not a final award subject to exception); *U.S. Dep't of the Air Force, Air Force Flight Test Ctr., Edwards Air Force Base, Cal.*, 65 FLRA 1013, 1014 (2011) (finding an award was not final where the arbitrator directed the parties to "attempt to fashion a remedy" and retained jurisdiction in the event they were unable to do so). Upon exercising his retained jurisdiction and ordering reinstatement in the remedial order, the Arbitrator resolved the sole remaining issue: the remedy. Consequently, the remedial order is a final award to which the Agency timely filed exceptions.

⁸ We note that on the exceptions form, as provided through the "efiling" tab on the Authority's website, FLRA.gov, the Agency answered in the affirmative to the query whether it was alleging the arbitrator exceeded his authority. See Exceptions Form at 6. Despite the comments directing the reader to see the "attached Exception," there was no argument in the attached brief addressing an exceeds authority argument. Accordingly, we deny this exception as unsupported. 5 C.F.R. § 2425.6(e)(1) (noting an exception may be subject to dismissal or denial if the excepting party fails to raise and support a ground for review); *NAGE, Local R3-10 SEIU*, 69 FLRA 510, 510 (2016) (denying exception where party alleged arbitrator exceeded his authority but did not support argument).

⁹ 5 C.F.R. §§ 2425.4(c), 2429.5.

¹⁰ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, 69 FLRA 176, 178 (2016) (*BOP Bastrop*); *AFGE, Local 2145*, 69 FLRA 7, 8 (2015) (*Local 2145*).

¹¹ Exceptions Br. at 4-8.

¹² 5 U.S.C. § 7106(a).

¹³ Exceptions Br. at 6.

¹⁴ *Id.* at 8.

¹⁵ Exceptions, Attach. B, Tr. at 24, 29; see also Exceptions, Attach. D, Union's Closing Br. at 13.

¹⁶ Exceptions, Attach. I, Agency's Answer to Union's Request for Arbitrator Assistance at 3.

¹⁷ 5 C.F.R. §§ 2425.4(c) (prohibiting exceptions that rely on arguments that could have been, but were not, presented to the arbitrator), 2429.5 (noting the Authority will not consider such arguments); *BOP Bastrop*, 69 FLRA at 178; *Local 2145*, 69 FLRA at 8 (Authority will not consider arguments different from or inconsistent with a party's arguments to the arbitrator).

¹⁸ 70 FLRA 398, 405-06 (2018) (Member DuBester dissenting).

¹⁹ *DOJ*, 70 FLRA at 405.

²⁰ *Id.* at 405-06.

Treasury, IRS (IRS),²¹ the Agency argues that the award is contrary to § 7106(a) of the Statute because, “[t]o comply with the Award[,] the Agency would have to re-create the position[,] dismantle the realignment[,] and do this without creating a new [full-time equivalent] position.”²²

This reliance on *IRS* is unavailing. In *IRS*, the Authority vacated an Arbitrator’s award that ordered an Agency to re-create a position that no longer existed and assign the grievant to it.²³ In the instant case, the Agency argued that the change to the grievant’s position was merely a change in duties, not a reassignment.²⁴ The Arbitrator did not find that the grievant’s position was eliminated and did not order the Agency to recreate a position that no longer existed.²⁵ Consequently, we defer to the Arbitrator’s factual findings on the issues that were properly before him.²⁶ As we have already refused to consider the Agency’s assertion that the former position no longer exists, the remainder of its argument amounts to little more than a reargument of its case and disagreement with the ordered remedy.²⁷ Therefore, we deny the exception.

V. Decision

We deny the Agency’s exceptions.

²¹ 70 FLRA 792 (2018) (Member DuBester dissenting).

²² Exceptions Br. at 6.

²³ *IRS*, 70 FLRA at 794.

²⁴ Exceptions, Attach. E, Agency’s Brief on Arbitrability at 6-7; Exceptions, Attach. B, Tr. at 26 (detailing Agency plans to restructure duties in order to increase the care provided in patients’ homes); *see also* Exceptions, Attach. B, Tr. at 29 (“There’s no new -- there’s no job position”).

²⁵ The Agency contends that during the arbitration hearing the Arbitrator “conceded regarding the [dementia outpatient clinic] position, ‘Yes, well that job does not exist currently.’” Exceptions Br. at 6. (quoting Exceptions, Attach. B, Tr. at 234). The Agency cites no authority, and we are aware of none, to suggest that an Arbitrator’s oral remark during a hearing is anything other than dictum, particularly where it is not supported by the Arbitrator’s written award.

²⁶ When an exception involves an award’s consistency with law, the Authority reviews the award de novo. 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. In making that assessment, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party establishes that they are nonfacts. *U.S. Small Bus. Admin.*, 70 FLRA 895, 895 n.6 (2018) (Member DuBester dissenting) (setting forth deference owed to arbitrator’s factual findings); *see also U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (Member Pizzella concurring) (citing *U.S. Dep’t of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012)).

²⁷ As Member Abbott has previously noted, “parties are subject to, and may not simply walk away from, the choices they make at the bargaining table.” *AFGE, Local 3294*, 70 FLRA 432, 436 n.47 (2018) (Member DuBester concurring).

Member DuBester, concurring:

Essentially, for reasons expressed in *U.S. DOJ, Federal BOP*¹ and subsequent cases,² I would agree that the award does not impermissibly encroach on a management right. Accordingly, I concur in the decision to deny the Agency's exceptions.

¹ 70 FLRA 398, 409-12 (2018)
(Dissenting Opinion of Member DuBester).

² *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 70 FLRA 596, 598-99 (2018)
(Dissenting Opinion of Member DuBester); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Big Spring, Tex.*, 70 FLRA 442, 445 (2018) (Concurring Opinion of Member DuBester).