

65 FLRA No. 33

UNITED STATES
DEPARTMENT OF THE AIR FORCE
82ND TRAINING WING
SHEPPARD AIR FORCE BASE, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 779
(Union)

0-AR-4455

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DECISION

September 30, 2010

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Before the Authority: Carol Waller Pope, Chairman
and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Harold E. Moore, filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.¹

The Agency temporarily assigned the grievant to a higher-graded position for approximately nineteen months. Near the end of the grievant's assignment, the Agency retroactively detailed the grievant to the higher-graded position. The Arbitrator found that the Agency violated the parties' collective bargaining agreement (CBA) by failing to temporarily promote, rather than detail, the grievant to the position. For the reasons discussed below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency hired the grievant to fill a GS-7 position. Award at 2. The Agency then temporarily

1. The Union's opposition also contained cross-exceptions. However the cross-exceptions were withdrawn and are not before the Authority.

assigned the grievant to a higher-graded position for approximately nineteen months. *Id.* at 2-3. When the grievant was initially assigned to the higher-graded position, a position description classifying the position did not exist at the grievant's facility. *Id.* at 3. The Agency also did not initially document the grievant's temporary assignment as a detail. *Id.*

About fifteen months after the grievant was temporarily assigned to the higher-graded position, the Agency implemented a position description and classified the position at the GS-11 grade level. *Id.* Later, at approximately the eighteenth month of the grievant's temporary assignment, the Agency retroactively documented that it had detailed the grievant to the GS-11 position for the entire period. *Id.*

When the Agency decided to fill the position on a permanent basis, the grievant applied. *Tr.* at 43. However, the Agency hired another individual. *Id.*; Award at 3.

The employee grieved. The grievance alleged that the Agency violated the CBA. The grievance claimed that the Agency should have given the grievant a temporary promotion and paid him the differential between the GS-7 grade and the GS-11 grade. *J. Ex. 2* at 2. When the grievance was not resolved, it was submitted to arbitration.

The Arbitrator adopted both parties' statements of the issues as follows:

Whether [the Agency] violated Article Twenty-two of the [CBA²].

2. The relevant portions of Article 22 state:

Section 8. a. A detail is the temporary assignment of an employee to duties not within his job description. A detail does not change the employee's . . . grade, or pay rate.

b. Details should be on a fair and equitable basis, consistent with employee qualification[s] and skills... [P]rolonged period[s] of details are discouraged.

c. Details in excess of 30 continuous days will be recorded on Standard Form 50

d. Normally, a temporary promotion instead of a detail will be made when: (1) The employee is fully qualified for promotion; and, (2) The assignment [to] a higher graded position is expected to last for more than 90 days.

Award at 2.

Whether the [g]rievant was entitled to have been temporarily promoted under the terms of the [CBA] due to his being temporarily assigned to a higher[-graded] position.

Award at 2.

The Agency argued that the grievant was only eligible for a detail. *Id.* at 4. The Agency took the position that the grievant was not entitled to a promotion because he had not met the regulatory time-in-grade requirement at the next lower grade below GS-11. *Id.* Conversely, the Union contended that the Agency can waive the time-in-grade requirement to avoid inequity to the grievant. *Id.* at 3-4. The Union also pointed out that the grievant was otherwise fully qualified for the job. *Id.* at 3.

The Arbitrator granted the grievance. *Id.* at 5. He ruled that the Agency violated a number of provisions of the CBA. *Id.* For instance, the Arbitrator held that the Agency violated Article 22, § (b), which specifies that details should be assigned on a “fair and equitable” basis. Applying this provision, he found that it was “inconsistent and inequitable” for the Agency to retroactively detail, rather than temporarily promote, the grievant solely because he did not meet the time-in-grade requirement. *Id.* The Arbitrator reasoned that the grievant filled the GS-11 position for more than nineteen months and possessed prior “academic and practical experience” otherwise qualifying him for the position’s duties. *Id.* at 4-5.

The Arbitrator also found that the Agency violated Article 22, § 8(d) of the CBA. *Id.* at 5. Specifically, the Arbitrator found that the grievant satisfied the two provisions of Article 22, § 8(d) mandating a temporary promotion when: “(1) The employee is fully qualified for promotion; and, (2) The assignment to a higher graded position is expected to last for more than 90 days.” *Id.* at 2. In applying the provisions, the Arbitrator found that the grievant, “by the Agency’s stipulation, was qualified for the job, and supervision should have known during a nineteen months . . . period that the job was going to or had lasted more than ninety . . . days.” *Id.* at 5.

As a remedy, the Arbitrator ordered the Agency to properly document the time the grievant spent performing the duties of the GS-11 position, and to pay the grievant the differential between the GS-11 and the grievant’s GS-7 grade for the entire period of his temporary assignment. *Id.* at 6.

III. Positions of the Parties

A. Agency’s Exceptions

The Agency contends that the award is deficient because: (1) the award is based on nonfacts; and (2) the award is contrary to law.

The Agency asserts that the award is based on nonfacts because the Arbitrator made two factual errors. The Arbitrator’s first alleged error concerned how the Arbitrator understood the nature of the grievance. The Agency claims that the Arbitrator erroneously found that the “gist” of the grievance was that the grievant was not hired for the GS-11 position. Exceptions at 3. The Agency disagrees. Rather, the Agency argues, the grievance concerned the grievant’s entitlement to additional pay and time in grade for the period of his alleged detail. *Id.*

The Arbitrator’s second alleged error concerns the grievant’s qualifications. The Agency argues that the award is based on a nonfact because the Arbitrator erroneously found as the award’s central fact that the grievant was “qualified for the job” based on the Agency’s stipulation. *Id.* at 3. The Agency claims that it never made such a stipulation. *Id.* at 3-4. Instead, the Agency argues, it presented evidence that the grievant was not fully qualified for the GS-11 promotion because he did not meet the requisite time-in-grade requirement. *Id.*

The Agency also makes a number of arguments in support of its contrary to law exception. First, the Agency asserts that the award is deficient because it is contrary to 5 C.F.R. § 300.604(b).³ Specifically, the Agency argues that the grievant did not meet the time-in-grade requirement at the next lower grade below GS-11 so that he could be temporarily promoted to the GS-11 position. *Id.* at 4.

Further, the Agency argues that in any event, the grievant is not entitled to backpay under the Supreme Court’s decision in *United States v. Testan*, 424 U.S. 392 (1976) (*Testan*) and other authority following *Testan*. *Id.* In particular, the Agency argues that an

3. The relevant portion of 5 C.F.R. § 300.604(b) states:

(b) *Advancement to positions at GS-6 through GS-11.* Candidates for advancement to a position at GS-6 through GS-11 must have completed a minimum of 52 weeks in positions:

(1) No more than two grades lower (or equivalent) when the position to be filled is in a line of work properly classified at 2-grade intervals[.]

employee is only allowed to receive the salary of his appointed position, even though the employee performed the duties of another position or claims he should have been classified at a higher grade. *Id.* (citing *Testan*, 424 U.S. at 955). Moreover, the Agency contends that if the grievant is entitled to a temporary promotion, he can seek a remedy under law other than the Back Pay Act. *Id.* at 5.

In addition, the Agency argues that the grievant may not be awarded backpay for misassignments to higher-level duties or improper classifications. *Id.* at 5. In support, the Agency cites authority holding that the Detail Statute, 5 U.S.C. § 3341 and the Federal Personnel Manual “do not require the granting of a temporary promotion for an overlong detail.”⁴

B. Union’s Opposition

The Union contends that the award is not based on nonfacts. Opp’n at 3. It argues that the Arbitrator found and the Agency admitted that the grievant was qualified for the GS-11 position in terms of education and experience. *Id.* Therefore, the issue of whether the grievant was qualified was not disputed at arbitration. *Id.* Instead, the Union contends that the central issue disputed at arbitration was whether the grievant met the requisite time-in-grade requirement to be entitled to a temporary promotion under the CBA. *Id.* at 3-4.

The Union further argues that the award is not contrary to law. *Id.* at 4. With regard to 5 C.F.R. § 300.604(b), the Union contends that a time-in-grade restriction may be waived to avoid

4. There is no evidence that the Agency raised this argument in the proceedings before the Arbitrator. Under § 2429.5 of the Authority’s Regulations, the Authority will not consider issues that could have been, but were not, presented to the arbitrator. *See, e.g., U.S. Dep’t of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008). Accordingly, the Authority will not consider the Agency’s argument.

In addition, the Agency argues that the Award fails to draw its essence from the CBA because the CBA gives the Agency a “permissive right” to assign an employee higher graded duties without temporarily promoting the individual. Exceptions at 4. However, because the Agency fails to identify the basis for its argument in the CBA, the Authority rejects this argument as a bare assertion. *See, e.g., AFGE, Local 1858*, 59 FLRA 713, 715 (2004) (claim that award is inconsistent with collective bargaining agreement rejected as a bare assertion where party failed to explain or provide any support for statement).

undue hardship or inequity when a grievant would otherwise be entitled to a temporary promotion. *Id.* (citing *U.S. Dep’t of Veterans Affairs Med. Ctr. Allen Park, Mich.*, 38 FLRA 688, 695-96 (1990) (VAMC)).

In addition, the Union asserts that *Testan* does not apply. Specifically, the Union points out that, unlike the plaintiffs in *Testan*, the grievant in this case is not seeking a retroactive reclassification of his position, but rather a temporary promotion for the time he performed higher-graded duties. *Id.* at 5. The Union asserts that grievances concerning whether a grievant is entitled under a collective bargaining agreement to compensation at a higher pay rate for performing the duties of a higher-graded position do not involve classification matters. *Id.* at 5-6.

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Agency’s first nonfact argument is that the Arbitrator erred when he found that the grievance concerned the Agency’s hiring of another individual to fill the permanent GS-11 position. Exceptions at 3. To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*NFFE*). Moreover, the Authority will not find that an award relies on a nonfact based simply on the Arbitrator’s allegedly erroneous determination of any factual matter that the parties disputed at arbitration. *Id.*

The Agency’s argument does not establish that the award is based on a nonfact. Although the Arbitrator mentions that the grievant’s nonselection for the GS-11 position generated the grievance, Exceptions at 3, the Agency does not explain how this finding is a central fact underlying the award. *See id.* Similarly, the Agency does not argue, *id.*, that the Arbitrator would have reached a different result but for this alleged error. *See AFGE, Local 1395*, 64 FLRA 622, 626 (2010) (award not based on nonfact where party failed to establish that arbitrator’s reliance on erroneous fact, even if true, would have resulted in a different outcome). The Authority therefore rejects the Agency’s nonfact assertions relating to how the Arbitrator characterized the grievance.

The Agency’s second nonfact contention also lacks merit. The Agency contends in this connection

that the Arbitrator's findings concerning the grievant's qualifications were erroneous. Exceptions at 3-4. In particular, the Agency argues that the Arbitrator erroneously found that the Agency stipulated that the grievant was qualified for the job. Exceptions at 3. However, even assuming that the Arbitrator erred concerning the Agency's stipulation, the Agency also points out that it argued that the grievant was not qualified for the temporary GS-11 position at arbitration. *Id.* at 4. As the Agency's nonfact argument relies on the Arbitrator's allegedly erroneous determination of a factual matter that was disputed at arbitration, the argument fails to demonstrate that the award is deficient on that basis. *See NFFE*, 56 FLRA at 41.

Accordingly, we deny the Agency's nonfact exceptions.

B. The award is not contrary to law.

The Agency claims that the award is contrary to a government-wide personnel regulation, 5 C.F.R. § 300.604(b), and to the Supreme Court's decision in *Testan*, 424 U.S. 392. 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*. *See 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)). In applying this standard, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. The award is not contrary to 5 C.F.R. § 300.604(b).

The Agency argues that the award is contrary to 5 C.F.R. § 300.604(b) because the grievant did not meet the regulation's time-in-grade requirements to qualify for a temporary promotion. Exceptions at 4. As indicated previously, *see note 3, supra*, § 300.604(b) imposes a 52-week time-in-grade requirement at the GS-9 level for promotions to GS-11. However, a waiver of time-in-grade restrictions in temporary promotion cases is permissible under 5 C.F.R. § 300.603(b)(7) and Authority precedent. *See, e.g., U.S. Dep't of Veterans Affairs, W. L.A. Med. Ctr., L.A., Cal.*, 46 FLRA 853, 861 (1992) (VA). Under 5 C.F.R. § 300.603(b)(7), time-in-grade requirements may be waived "to avoid hardship to an agency or inequity to an employee[.]"

The Arbitrator explicitly found that the Agency had treated the grievant inequitably when it assigned him to the GS-11 position for more than nineteen months. Award at 4-5. The Agency does not argue, and it is not otherwise apparent, that applicable law or regulation would prevent the Agency from waiving § 300.604(b)'s time-in-grade requirements in reliance on § 300.603(b)(7) and complying with the award. The Authority therefore rejects the Agency's contrary to law exception pertaining to regulatory time-in-grade requirements.

2. The award is not contrary to the Supreme Court's decision in *Testan*.

The Agency contends that the award is deficient because the Supreme Court's decision in *Testan* bars a back pay remedy for the grievant. Exceptions at 4. However, the Agency's reliance on *Testan* and its progeny is misplaced.

Unlike this case, *Testan* dealt with employees' claims that their positions were wrongly classified. *See* 424 U.S. at 405-06. The Supreme Court ruled that federal employees are entitled to receive only the salary of the position to which they are appointed, even though they may have performed the duties of another position or claimed that they should have been placed in a higher grade. *See Testan*, 424 U.S. at 406. The Court concluded that "neither the Classification Act nor the Back Pay Act creates a substantive right in the respondents to backpay for the period of their claimed wrongful classifications." *Id.* at 407. Because this case does not involve any classification issues, *Testan* does not apply. *See U.S. Dep't of the Air Force, Warner Robins Air Force Logistics Ctr, Robins Air Force Base, Ga.*, 37 FLRA 155, 159 (1990) (*Testan* not applicable because grievant was not seeking reclassification of her position, but rather a temporary promotion for time in which she performed duties of a higher-graded position). The Authority therefore rejects the Agency's contrary to law exception based on *Testan*.

Accordingly, we deny the Agency's contrary to law exceptions.

V. Decision

The Agency's exceptions are denied.