

73 FLRA No. 45

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 336
(Union)

0-AR-5796

DECISION

September 7, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members

I. Statement of the Case

Arbitrator Joyce M. Klein found that the Agency retaliated against the grievant for engaging in protected activity in violation of Title VII of the Civil Rights Act of 1964 (Title VII)¹ when it failed to renew the grievant's employment for a second year. Among other remedies, the Arbitrator awarded the grievant backpay. The Agency filed exceptions challenging the backpay remedy on contrary-to-law and exceeded-authority grounds. Because the Agency does not demonstrate that the award is deficient on either of these grounds, we deny the exceptions.

II. Background and Arbitrator's Award

The grievant, an African-American employee, worked as a temporary maintenance worker in the Agency's Fort Dupont facility in Washington, DC. The Agency hired the grievant for a one-year term "with the possibility of no more than a one-year extension."²

On June 10, 2019, the grievant's supervisors held a meeting (June meeting) to "solicit questions and

concerns" from employees regarding the Agency's plan to implement a reorganization that would result in certain employees being reassigned to other facilities.³ Before that meeting, the grievant reviewed a copy of the Agency's reassignment chart and gathered that the grievant and certain other employees were being reassigned from the Fort Dupont facility to a different facility. The grievant was unhappy about the reassignment based on his belief that the Fort Dupont facility "offered more favorable career prospects . . . [because] there was more visibility with management . . . and therefore[,] more likelihood of obtaining a permanent job."⁴

At the June meeting, the grievant expressed this concern by asking the supervisors why "all the Caucasian people are getting promoted and all of us brothers get left behind?"⁵ Although the Agency disciplined the grievant based on these comments, it rescinded this discipline after the Union grieved the matter. However, the Agency subsequently determined not to renew the grievant's employment for a second year.

The Union filed a grievance alleging, as relevant here, that the Agency violated Title VII by failing to renew the grievant's employment in retaliation for engaging in protected activity. The parties proceeded to arbitration.

Before the Arbitrator, the Agency argued the Union failed to demonstrate the Agency relied on discriminatory reasons when it decided not to renew the grievant's employment. The Agency also argued that it would have taken the same action in the absence of the grievant's protected activity.⁶ Stating that a "mixed motive analysis must be applied," the Arbitrator first determined that the grievant engaged in protected Equal Employment Opportunity activity at the June meeting by "complain[ing] about a perceived racial disparity" in the Agency's reassignment plan.⁷ Further, the Arbitrator found that the grievant's comments were a "motivating factor" in the Agency's decision not to renew the grievant's term appointment.⁸

Addressing the Agency's arguments, the Arbitrator stated the Agency had "established a legitimate justification for its determination not to renew [the grievant's] appointment for a second one[-]year term and [had] show[n] that it would have taken the same action regardless of the comment."⁹ However, the Arbitrator then determined that the Agency's "proffered valid management reasons"¹⁰ served as "pretext for its

¹ 42 U.S.C. §§ 2000e to 2000e-17.

² Award at 4.

³ *Id.* at 6.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 10.

⁷ *Id.* at 11.

⁸ *Id.* at 13.

⁹ *Id.*

¹⁰ *Id.* at 14.

retaliatory motive.”¹¹ Finding that the Union had “established by the preponderance of the evidence that the Agency was motivated by animus towards [the grievant’s] comment,” and that the Agency’s decision not to renew his employment “was a pretext for retaliating against him” for this comment, the Arbitrator concluded that the grievant was entitled to be made whole for the non-renewal of his contract for a second year.¹²

The Agency filed exceptions on February 25, 2022, and the Union filed an opposition on March 25, 2022.

III. Analysis and Conclusions: The Agency has not demonstrated that the award is deficient.

In its exceptions, the Agency challenges only the remedy, alleging that a backpay remedy is contrary to 42 U.S.C. § 2000e-5(g)(2)(B). This provision states that “[when] a respondent demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor, the court . . . (ii) shall not award damages or issue an order requiring . . . reinstatement, hiring, promotion, or payment”¹³

When an exception involves an award’s consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo.¹⁴ In applying the standard of de novo review, the Authority assesses whether the arbitrator’s legal conclusions are consistent with the applicable standard of law.¹⁵ However, exceptions that are based on

misunderstandings of an arbitrator’s award do not show that an award is contrary to law.¹⁶

The Agency argues that the grievant cannot be awarded backpay under 42 U.S.C. § 2000e-5(g)(2)(B) because the Arbitrator, applying a “mixed motive” analysis, found that the Agency “would have taken the same action [not to renew the grievant’s employment] regardless of the protected activity.”¹⁷ However, reading the Arbitrator’s statement in context, the Agency’s argument mischaracterizes the award.

After determining that the grievant’s comment in the June meeting was a motivating factor in the Agency’s decision, the Arbitrator found that the Agency had “offered sufficient evidence to show that it had decided not to extend [the grievant’s] temporary appointment for [a] valid management reason.”¹⁸ And, as noted, the Arbitrator then determined that those reasons were pretext for the Agency’s retaliatory action.¹⁹ While the award does state, “The Agency has established a legitimate justification for its determination not to renew . . . and [has] show[n] that it would have taken the same action regardless of the comment[.]”²⁰ an examination of the entire award demonstrates that the Arbitrator did not actually conclude that the Agency would have taken the same action regardless of the grievant’s protected activity.

The Agency has not otherwise challenged the Arbitrator’s findings and conclusions. Because the Agency’s apparent misunderstanding of the award does not provide a basis for finding that the award is contrary to law,²¹ we deny the Agency’s exception.²²

¹¹ *Id.* at 16.

¹² *Id.* at 15-16.

¹³ 42 U.S.C. § 2000e-5(g)(2)(B).

¹⁴ *AFGE, Council 222*, 73 FLRA 54, 55 (2022) (citing *U.S. Dep’t of the Interior, Bureau of Land Mgmt., Eugene Dist., Portland, Ore.*, 68 FLRA 178, 180 (2015) (*Interior*)).

¹⁵ *Id.* (citing *Interior*, 68 FLRA at 180).

¹⁶ *GSA, E. Distrib. Ctr., Burlington, N.J.*, 68 FLRA 70, 73 (2014) (*GSA*) (Member Pizzella dissenting on other grounds) (citing *SPORT Air Traffic Controllers Org.*, 66 FLRA 552, 554 (2012) (*SPORT*)).

¹⁷ Exceptions at 6-7.

¹⁸ Award at 14.

¹⁹ *Id.* (“While I find the Agency proffered valid management reasons for its determination that [the grievant] would not be renewed for an additional one[-]year term, I also find that these reasons were pretextual.” (emphasis added)); see also *id.* at 15-16 (“while the Agency had legitimate management reasons not to renew [the grievant’s] contract for a second one[-]year term, those reasons served as pretext for its retaliatory motive”).

²⁰ *Id.* at 13.

²¹ *GSA*, 68 FLRA at 73 (citing *SPORT*, 66 FLRA at 554).

²² The Agency bases its exceeded-authority exception on the same argument as its contrary-to-law exception – that Title VII

prohibits the Arbitrator from awarding the grievant with backpay in these circumstances. See Exceptions at 8-9. Because we have denied the Agency’s contrary-to-law exception, we deny the Agency’s exceeded-authority exception. See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Guaynabo, P.R.*, 72 FLRA 636, 638 (2022) (Member Abbott dissenting on other grounds); *U.S. DHS, U.S. CBP, Savannah, Ga.*, 68 FLRA 319, 322-23 (2015) (denying exceeded-authority exception premised on the same argument raised in a denied contrary-to-law exception); see also *U.S. DHS, U.S. CBP*, 66 FLRA 838, 844 (2012) (denying exceeded-authority claim based on misinterpretation of award). Additionally, because we find that the Agency’s exceptions are based on a mischaracterization of the award, we find it unnecessary to address the Union’s argument that the Agency could have, but did not, argue to the Arbitrator that the Agency had mixed motives for its decision not to renew the grievant’s employment. Opp’n at 7. See *Indep. Union of Pension Emps. for Democracy & Just.*, 73 FLRA 65, 66 n.7 (2022) (citing *U.S. Dep’t of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project*, 65 FLRA 5, 6 n.2 (2010) (Member Beck dissenting on other grounds) (finding it unnecessary to address the parties’ remaining arguments when dismissing exceptions)).

IV. Decision

We deny the Agency's exceptions.