65 FLRA No. 125

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
NORTHERN PUEBLOS AGENCY
(Agency)

and

AMERICAN FEDERATION OF TEACHERS
INDIAN EDUCATORS FEDERATION
LOCAL 4524
(Union)

0-AR-4269

DECISION

February 28, 2011

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 Bennett S. Aisenberg 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.

The Arbitrator sustained the Union's grievance finding that the Agency breached Article 31 of the parties' collective bargaining agreement (CBA) when it conducted a reduction-in-force (RIF) of the Northern Pueblo Agency (NPA) Hotshot Crew (NPA Crew). For the reasons set forth below, we dismiss the Agency's exceptions in part and deny them in part.

II. Background and Arbitrator's Award

At the beginning of 2005, the NPA Crew, a group of firefighters, "was designated as trainees." Award at 1. In a memorandum dated January 4,[1] the Director of Fire Management (the Director) for the Bureau of Indian Affairs (BIA) stated that all trainee crews within the BIA must become certified pursuant to the National Interagency Hotshot Crew process by September 30. *Id*. On June 21, the Agency sent a follow-up memorandum reiterating that, if any trainee crew did not have its certification by September 30, its funding would be terminated and the crew would be disbanded.
Id. at 2.

On August 1, the NPA Superintendent requested certification of the NPA Crew. On November 4, the NPA Crew was notified that it would not be recommended for certification because it lacked: (1) a Type 4 incident commander because the Assistant Superintendent failed to qualify for that position and (2) a squad boss because one resigned effective August 31. *Id*.

The Agency later notified the NPA Crew that it would be disbanded and that the employees would be terminated in a RIF. Exceptions at 2-3. The Union then filed a grievance. *Id*. at 3. The grievance was unresolved, and the matter was submitted to arbitration. The parties stipulated to the following issues:

1. Did [the Agency] breach Article 31[2] of the [CBA] when it conducted the [RIF] affecting the [NPA Crew] in 2006?

2. Was the 2006 [RIF] affecting the [NPA Crew] bona fide and conducted for a legitimate [m]anagement reason?

1. All dates refer to 2005 unless indicated otherwise.

2. Article 31, Section 1 of the CBA states:

> Through careful planning and use of other administrative techniques, to the extent it determines practicable and in the public interest, [Agency] officials at all organizational levels should seek to avoid the necessity of entering into a formal [RIF] action. Management will conduct a RIF only when the release is necessary for the reasons specified in [Office of Personnel Management] regulations, 5 CFR, which includes lack of work, shortage of funds, insufficient personnel ceilings, reorganizations, reclassify-cation due to a change in duties, or the exercise of reemployment rights or restoration rights.

Award at 3.

3. If the answer to issue 1 or issue 2 is favorable to the Union, what shall the remedy be?

Award at 3-4.

The Arbitrator found that Article 31, Section 1 of the CBA "places restrictions on the Agency's right to engage in a" RIF. *Id*. at 4. Specifically, the Arbitrator found that management must "seek to avoid the necessity of entering into formal [RIF] action through careful planning and use of other administrative techniques" and "will conduct a RIF only when the release is necessary for the reasons specified in OPM regulations," which includes, among other things, lack of work and shortage of funds. *Id*.

The Arbitrator observed that, even assuming that the Agency had the right to require the NPA Crew to obtain certification by September 30, "what followed . . . was totally under the control of [Agency] personnel, and the hotshot crew was solely at the [sic] their mercy." *Id*. He reasoned that certification could have occurred if the Agency had filed for certification earlier in May or June when there was a full complement of supervisory staff, and the question of whether the Assistant Superintendent was qualified for his position could have been resolved in favor of the NPA Crew. *Id*. at 4-5. The Arbitrator noted that either the Agency could have made a definitive determination that the Assistant Superintendent achieved Type 4 Incident Commander status, or it could have allowed him to achieve Type 4 Incident Commander status in the time allotted. *Id*. at 4-5. Instead, the Arbitrator pointed out, there was no testimony to indicate that the Agency ever made the NPA Superintendent or the NPA Crew aware that, as early as June, it considered the NPA Crew to have a supervisory deficiency. *Id*. at 5. The Arbitrator concluded that "it is clear" that the NPA Crew "had no control over the events that led to the denial of certification, and that [m]anagement did not satisfy the requirements of Article 31, [Section] 1." *Id*.

Finally, the Arbitrator found that, although the Agency had designated its employment action as a RIF, it had the characteristics of a disciplinary or adverse action, and the employees of the NPA Crew became the victims of the Agency's failure to follow the provision of Article 31, Section 1. *Id*. at 6. He stated that, although it is arguably proper under the CBA to conduct a RIF when there is a shortage of funds, he was "not convinced, based on the testimony, that there was an actual shortage of funds," noting that the Director testified that the half million dollars allotted to the NPA Crew was used elsewhere. *Id*. The Arbitrator concluded, however, that, even if there were a shortage of funds, "the Agency did not use careful planning and other administrative techniques to seek to avoid the necessity of entering into the [RIF]." *Id*.

Accordingly, the Arbitrator ordered the Agency to offer to all employees affected by the RIF reinstatement to their former positions, with back pay, including any proven lost premium pay. *Id*. The Arbitrator retained jurisdiction to resolve any disputes with regard to the remedy and to entertain any application for attorney fees. *Id*.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award fails to draw its essence from the CBA. Specifically, the Agency argues that Article 31, Section 1 places no restrictions on management with regard to its ability to conduct a RIF, and that the Arbitrator's reliance on Article 31, Section 1 as a basis for overturning the RIF is contrary to the plain language of the provision. Exceptions at 7-8.

The Agency also argues that the Arbitrator exceeded his authority by reviewing management's actions with respect to its denial of the NPA Crew's certification. *Id.* at 9-11. According to the Agency, once an agency shows that its decision to conduct a RIF is in accordance 5 C.F.R. § 351.201(a)(2), an arbitrator, in reviewing the RIF, has no authority to review management considerations that underlie management's discretion. *Id*. at 10-11. The Agency argues that, because the RIF at issue here was conducted due to a shortage of funds and for a reorganization, the Arbitrator had no authority to review management's considerations underlying its discretion to effect the RIF. *Id*. at 11-12. Moreover, as part of this argument, the Agency challenges the Arbitrator's statements that the RIF had "'the characteristics of discipline or adverse action'" and that "'a RIF may not be a disguised adverse or performance[-]based action to remove an employee,'" asserting that such statements have no basis in fact. *Id*. at 11-12 (quoting Award at 6 & n.1).

Finally, the Agency contends that the award is contrary to law because it impermissibly interferes

with management's rights as defined by § 7106(a)(2)(A) of the Statute.[3] Exceptions at 12-14. According to the Agency, "[b]y ruling that the employees are to be reinstated to their former positions with backpay, the Arbitrator effectively abrogate[d] management's rights – i.e.[,] the decisions that management made concerning" the NPA Crew. *Id*. at 14.

B. Union's Opposition

In its opposition, the Union moves to dismiss the Agency's exceptions. The Union contends that the Agency's exceptions should be dismissed because they contain arguments that could have been, but were not, presented to the Arbitrator. The Union contends that the Agency never argued before the Arbitrator or in its post-hearing brief that Article 31, Section 1 should be interpreted as placing no restriction on management's right to conduct a RIF. Opp'n at 20-21. Similarly, the Union contends that the Agency never raised below its argument that the Arbitrator had no authority to review whether the RIF was for bona fide reasons. *Id*. at 23. Finally, the Union argues that the Agency did not contend before the Arbitrator that the Union's grievance, its interpretation of Article 31, or the relief that it requested impermissibly interfered with management's rights under the Statute. *Id.* at 24-25.

As for the Award's merits, the Union argues that, even if the Agency argued below that the language of Article 31 did not place restrictions on management's right to conduct a RIF, the Agency's disagreement with the Arbitrator's interpretation of the language is not a basis for finding that the award failed to draw its essence from the CBA or for finding that the Award is otherwise deficient under the Statute. *Id*. at 22. The Union also contends that the Arbitrator did not exceed his authority when he reviewed whether the RIF was bona fide and accomplished for legitimate management reasons under OPM regulations, as well as whether the RIF independently violated the CBA. *Id*. at 23-24. Finally, the Union argues that the language of Article 31, Section 1 and the Arbitrator's interpretation of that provision does not impermissibly interfere with management's rights and notes that the Authority has upheld similar provisions previously. *Id*. at 25-26.

IV. Analysis and Conclusions

A. Preliminary Matter: 5 C.F.R. § 2429.5 bars certain of the Agency's arguments.

The Authority's Regulations that were in effect when the Agency filed its exceptions provided that "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5.[4]

As set forth above, the parties asked the Arbitrator to resolve two issues: (1) whether the Agency breached Article 31 of the CBA when it conducted the RIF and (2) whether the RIF was bona fide and conducted for a legitimate management reason. Accordingly, the Agency had the opportunity to raise before the Arbitrator its arguments that Article 31, Section 1 places no restrictions on management's rights to conduct a RIF; that the Arbitrator had no authority to review either the "certification of th[e] crew as it relates to the reason for th[e] RIF" or whether the RIF was for bona fide reasons, *see* Exceptions at 12; and that Article 31, Section 1, if interpreted as argued by the Union at arbitration, as well as the remedy requested by the Union, improperly interfered with management's rights as defined by § 7106(a)(2)(A) of the Statute. However, there is no evidence in the record that the Agency did so.

The case law interpreting 5 C.F.R. § 2429.5 makes clear that the Authority will not consider a contention that could have been, but was not, presented to the Arbitrator. *See U.S. Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 59 FLRA 542, 544 (2003). Because there is no evidence in the record that the Agency raised any of these arguments before the Arbitrator, we conclude that these exceptions are not properly before the Authority.

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3. Section 7106(a)(2)(A) of the Statute provides, in pertinent part:

> Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency . . . to hire, assign, direct, layoff, and retain employees in the agency . . . .

5 U.S.C. § 7106(a)(2)(A).

4. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including 5 C.F.R. § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). Because the Agency's exceptions in this case were filed before that date, we apply the prior Regulations.

Based on the foregoing, we dismiss these exceptions.

B. The award is not based on a nonfact.

The Agency contends that Arbitrator's statements that the RIF had "the characteristics of discipline or adverse action" and that "a RIF may not be a disguised adverse or performance-based action to remove an employee" have no basis in fact. Exceptions at 11-12 (quoting Award at 6 & n.1). To the extent that these contentions could be construed as alleging that the Arbitrator's award is based on nonfacts, the Agency does not explain how these findings are central facts underlying the award. As a result, the Agency has failed to establish that the award is based on a nonfact. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000) ("To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which a different result would have been reached by the arbitrator."). Accordingly, we deny this exception.

V. Decision

The Agency's exceptions are dismissed in part and denied in part.