65 FLRA No. 133

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1547
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
LUKE AIR FORCE BASE, ARIZONA
(Agency)

0-AR-4354

_____

DECISION

March 21, 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 Paul Eggert filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator denied a grievance concerning a reduction in force (RIF) conducted by the Agency. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

After the Agency conducted a RIF, the Union filed a grievance claiming that the Agency had failed to place four employees in positions to which they were entitled under law, regulations, and the parties' collective bargaining agreement (CBA). *See* Award at 2; Exceptions, Attach. 2, Grievance at 1. The grievance was unresolved and was submitted to arbitration.

Because the parties were unable to agree on a statement of the issue, the Arbitrator framed the issue as follows: "Did the Agency violate the terms of the [CBA] by its handling of the RIFs pertaining to [Employee 1], [Employee 2], [Employee 3] and [Employee 4]?" Award at 2. The Arbitrator found that, in addition to being bound by the CBA, the parties were bound by a related memorandum of understanding (MOU), which states that "RIFs will be run in accordance with applicable laws and regulations." *Id.* Thus, the Arbitrator determined that, "[i]n order to resolve the issue set forth in the [g]rievance, it is necessary to understand the rather complex RIF process set forth in federal statute and regulation and essentially incorporated by reference into the MOU." *Id.*

The Arbitrator explained that the computer-generated "retention register" that the Agency uses to make RIF decisions "ranks each employee in order of their relative job protection status[,]" and divides employees into "subgroups." *Id.* at 3. The Arbitrator stated that, within each subgroup, the retention register lists each employee in order of his or her "service computation date" (SCD), which is based upon an employee's combined government service as a military and/or civilian employee. *Id.*

The Arbitrator found that once an employee is "identified for release[,]" in certain circumstances, the employee may have a right to "bump" or "retreat" to a position for which he or she is qualified. *Id.* The Arbitrator proceeded to apply RIF regulations in order to determine the "retreat" and "bump" rights of each of the grievants. *See id.* at 3-8.

Regarding the right to "retreat[,]" the Arbitrator found that an individual (retreater) seeking to retreat to the position of another employee (retreatee) "must have held the job in question, or one 'essentially identical[,]' at some point in his *civil service* career[.]" *Id.* at 4. In addition, the retreater may retreat only to a position held by an employee in the "exact *same* subgroup[,]" and "[t]he retreater's SCD must trump that of the retreatee[.]" *Id.*

Turning to the specific circumstances of each grievant, the Arbitrator found that Employee 1 could not retreat to an explosives position because it was "undisputed" that he had "never held that grade and position previously in his civilian career." *Id.* Regarding Employee 2, the Arbitrator found that Employee 2's pre-RIF position was coded to signify that only a member of the United States Armed Forces Reserves could hold the position (reserve-membership position). *Id.* at 5. The Arbitrator also found that all of the comparable positions available after the RIF were coded to signify that they did not require reserve membership (non-reserve-membership positions). *Id.* In addition, the

Arbitrator found that "undisputed testimony showed that it [has] 'always' been an [Agency]-wide policy that [reserve-membership] positions not be treated as identical or substantially identical to parallel, [non-reserve-membership] positions in the event of RIFs, because of the reserve-membership difference." *Id.* As a result, the Arbitrator concluded that because Employee 2 "had never held a [non-reserve-membership] position before, and since his [reserve-membership] position was not 'substantially identical' to the [available non-reserve-membership] position[s], one of the conditions for retreat was not met." *Id.* at 6.

Regarding Employees 3 and 4, the Arbitrator found that, prior to the RIF, they both held the same position. *See id.* at 6, 8. Before the Arbitrator, the Union argued that the Agency should have assigned both employees to one of two related positions (proposed positions). *See id.* at 6, 8. The Arbitrator found that Employees 3 and 4 could not retreat to the proposed positions because those positions were not identical to any position that the employees had previously held. *Id.* at 6, 8. In this regard, the Arbitrator found that although the classification of one of the proposed positions appeared identical to that of the grievants' prior position, the duties were "substantially different," and, thus, the positions were not identical for purposes of retreat. *Id.* at 7-8. Regarding the second proposed position, the Arbitrator found that Employee 4 could not retreat because he had never held an identical position. *Id.* at 8. In addition, the Arbitrator rejected Employee 3's "unsupported suggestion" that his experience in a similar Grade 9 position qualified him to retreat to the proposed Grade 10 position. *Id.* at 6-7.

In explaining the right to "bump," the Arbitrator found that, first, the individual seeking to bump to a position (bumper) must belong to a higher subgroup than the individual who would be displaced (bumpee). *Id.* at 4. Second, the bumper need not have prior experience in the bumpee's position, but must be "qualified" for the position, which means "capable of performing the job fully at the time of [the] RIF, or within [ninety] days thereafter." *Id.* Finally, according to the Arbitrator, the relative SCDs of the employees are irrelevant for bumping purposes. *Id.*

The Arbitrator found that Employee 1 could not bump to the proposed explosives position because he was not "qualified" for the position within the meaning of the RIF regulations. *Id.* at 4-5. In this regard, the Arbitrator found that: (1) Employee 1's explosives experience was military, rather than civilian; (2) the available position called for "hands-on experience in dealing with explosives" and Employee 1's explosives experience "was more administrative in nature[;]" (3) Employee 1's explosives work was at Grade 8, which indicated "a substantially lesser skill level than that of the Grade 9 position he was seeking[;]" and (4) Employee 1 did not offer "additional, 'higher' experience from another source" or any "substantial detail to support his conclusory testimony that he was qualified." *Id.* at 5. The Arbitrator also found that Employees 2, 3, and 4 could not bump because none of the positions to which they were seeking to bump were held by someone in a subgroup lower than their own. *Id.* at 6, 8.

Based on the foregoing, the Arbitrator denied the grievance. *Id.* at 9.

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that the Arbitrator "failed to properly apply . . . [g]overnment-[w]ide RIF [r]egulations as required by the parties['] MOU." Exceptions at 2. In this regard, the Union asserts that "[i]t was undisputed during the arbitration hearing that the [grievants] . . . were qualified for, previously held, and were coded for each of the respective positions sought[.]" *Id.* With regard to the Arbitrator's findings regarding the right to retreat, the Union contends that each of the employees had previously held the same, or "virtually the same" position as those to which they were seeking to retreat. *See id.* at 2-5. Regarding Employee 2, the Union argues that the "alleged" policy that reserve-membership positions could not be treated as identical to non-reserve-membership positions for purposes of RIF retreat rights "was not presented as evidence or in [any way] substantiated." *Id.* at 3. The Union also argues that the Arbitrator should have placed each of the grievants in the requested positions "instead of retaining less senior employees with lower RIF [SCDs]." *Id.* at 5. With regard to the Arbitrator's findings regarding the right to bump, the Union asserts that the grievants were "qualified for" the positions that they sought.[*] *Id.* at 2; *see also id.* at 3, 4.

*. In addition, the Union argues that the award fails to draw its essence from the parties' agreement because the Arbitrator failed to properly apply RIF regulations and that this failure was "contrary to the spirit of the parties[']" agreement." Exceptions at 3; *see also id.* at 1, 3-4. As the

In addition, the Union argues that the Arbitrator "failed to resolve the issue that was before him in the Union's grievance." *Id.* at 5. In this regard, the Union asserts that the issue, as framed by the Arbitrator, concerned whether the Agency violated the CBA and MOU, but the grievance charged the Agency with violating RIF regulations, which are incorporated by reference into the MOU. *See id.* at 2. The Union also argues that the Arbitrator "exceeded his authority by failing to consider material facts and material evidence." *Id.* at 1. In a related argument, the Union asserts that the Arbitrator failed to conduct a fair hearing by failing to "consider material evidence presented in the arbitration hearing[,]" namely, the arbitration exhibits concerning each employee's relevant work experience and the "computer[-]generated RIF referral printouts from the Agency's . . . RIF computer program." *Id.* at 2.

B. Agency's Opposition

The Agency argues that the award is not deficient. Opp'n at 2-8. In this regard, the Agency contests the Union's claim that it was "undisputed" that each of the four employees was qualified for, previously held, and was coded for each of the positions that the Union sought for them in the grievance. *Id.* at 4. In addition, the Agency argues that the Arbitrator did not fail to resolve the issue before him because "the parties did not submit an agreed-upon statement of issue to the [A]rbitrator, thereby granting the Arbitrator the authority to define the issue." *Id.* at 8. The Agency also argues that the Arbitrator did not fail to consider material facts and evidence. *Id.* at 2.

IV. Analysis and Conclusions

A. The award is not contrary to law, rule, or regulation.

In reviewing arbitration awards for consistency with law, rule, or regulation, the Authority reviews questions of law raised by exceptions to an arbitrator's award de novo. *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 the standard of de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998) (*NFFE*). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.* Thus, exceptions that dispute an arbitrator's factual findings and evaluation of the evidence do not establish that an award is deficient. *See, e.g., U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Louisville, Ky.*, 64 FLRA 70, 72 (2009) (*Veterans Affairs*).

1. The right to retreat pursuant to RIF regulations.

RIF regulations provide that an employee may retreat only to a position that is "held by another employee with lower retention standing in the same tenure group and subgroup" and is "the same position, or an essentially identical position" as one "formerly held by the released employee on a permanent basis as a competing employee in a Federal agency[.]" 5 C.F.R. § 351.701(c).

The Union argues that the Arbitrator should have placed Employee 1 in the Grade 9 explosives position requested in the grievance because he had "previously held" the position. Exceptions at 5. However, the Arbitrator found that it was "undisputed" that Employee 1 had never held that grade and position in his civilian career, making him ineligible to retreat to the explosives position. Award at 4. The Union does not contend that the award is based on a nonfact in this regard and, as stated previously, the Authority defers to an arbitrator's factual findings when assessing whether the award is contrary to law. *See NFFE*, 53 FLRA at 1710. As the Arbitrator's factual findings support his legal conclusion that the Agency did not violate Employee 1's retreat rights under RIF regulations, we find that the award is not contrary to law in this regard.

Similarly, the Union argues that the Arbitrator should have placed Employees 3 and 4 in the proposed positions because it was "undisputed" that the positions sought were "virtually the same" as the positions the grievants previously held. *See* Exceptions at 4. However, the Arbitrator found that the duties of one of the proposed positions were "substantially different" from those of the positions held by the grievants, and, thus, the jobs were not identical for purposes of retreat. Award at 7-8. Regarding the second proposed position, the Arbitrator found that neither grievant had retreat rights because neither employee had held an identical position. *Id.* at 6-7, 8. The Union does not contend

---

Union's essence claim is based on its contrary-to-law claim that the Arbitrator erroneously applied RIF regulations, we do not separately analyze the Union's essence exception. *See, e.g., U.S. Dep't of Agric., Farm Serv. Agency, Kan. City, Mo.*, 65 FLRA 483, 484 n.3 (2011) (declining to separately analyze essence exception that was "substantively the same" as a contrary-to-law exception).

that the award is based on a nonfact in this regard and, as stated previously, the Authority defers to an arbitrator's factual findings when assessing whether the award is contrary to law. *See NFFE*, 53 FLRA at 1710. As the Arbitrator's factual findings support his legal conclusion that the Agency did not violate the retreat rights of Employees 3 and 4 under RIF regulations, we find that the award is not contrary to law in this regard.

In addition, the Union argues that the Arbitrator should have placed Employee 2 in one of the positions that he was seeking despite the fact that Employee 2 held a reserve-membership position prior to the RIF and the available, post-RIF positions were all non-reserve-membership positions. *See* Exceptions at 3-4. However, the Arbitrator found that Agency policy required treating reserve-membership positions as *not* "identical or substantially identical" to non-reserve-membership positions for the purposes of RIF rights. Award at 5. Although the Union argues that this policy was not "presented as evidence[,]" Exceptions at 3, the Arbitrator credited the "undisputed testimony" that the Agency could not treat these positions as identical for retreat right purpose, Award at 5. Further, the Union does not contend that the award is based on a nonfact in this regard and, as stated previously, the Authority defers to an arbitrator's factual findings when assessing whether the award is contrary to law. *See NFFE*, 53 FLRA at 1710. As the Arbitrator's factual findings support his legal conclusion that the Agency did not violate Employee 2's retreat rights under RIF regulations, we find that the award is not contrary to law in this regard.

The Union also argues that the Arbitrator erred by failing to place the grievants in positions held by employees with lower SCDs. Exceptions at 5. As discussed above, the RIF regulations provide that an employee may retreat only to a position held by an employee with "lower retention standing . . . *and* . . . [a position that is] the same position, or an essentially identical position, [as a position] formerly held by the released employee . . . ." 5 C.F.R. § 351.701(c) (emphasis added). As previously discussed, the Arbitrator found that none of the grievants had previously held positions that were identical, or essentially identical, to the positions to which they sought to retreat. Award at 4, 6, 8. The Union does not contend that the award is based on a nonfact in this regard and, as stated previously, the Authority defers to an arbitrator's factual findings when assessing whether the award is contrary to law. *See NFFE*, 53 FLRA at 1710. As the Arbitrator's factual findings support his legal conclusion that the grievants were not eligible to retreat to the positions that they sought, the allegedly lower SCDs of the employees that the Agency placed in those positions do not establish that the award is contrary to RIF regulations. *See* 5 C.F.R. § 351.701(c). Accordingly, we find that the award is not contrary to law in this regard.

Based on the foregoing, we find that the Union's arguments concerning retreat rights do not provide a basis for setting aside the award as contrary to law, and deny the contrary-to-law exceptions regarding retreat rights.

2. The right to bump pursuant to RIF regulations.

In order to bump to a position, an employee need not have previously held the position, but "[t]he employee must be qualified for the offered position." 5 C.F.R. § 351.701(a). In order to be "qualified" for a position, *id.*, the employee must have "the capacity, adaptability, and special skills needed to satisfactorily perform the duties of the position without undue interruption[,]" *id.* § 351.702(a)(4). RIF regulations define "[u]ndue interruption" to mean "a degree of interruption that would prevent the completion of required work by the employee [ninety] days after the employee has been placed in a different position" pursuant to RIF regulations. *Id.* § 351.203. In addition, RIF regulations provide that an employee may only bump to a position that is "held by another employee in a lower tenure group or in a lower subgroup within the same tenure group[.]" *Id.* § 351.701(b)(1).

The Arbitrator's finding that Employee 1 was ineligible to bump to the explosives position was based on the Arbitrator's findings that Employee 1's previous military, administrative, Grade 8 explosives experience did not "qualif[y]" him for the civilian, "hands-on[,]" Grade 9 explosives position that he was seeking. Award at 4-5. Although the Union disputes the Arbitrator's conclusion that Employee 1 was not qualified for the proposed position, Exceptions at 3, the Union does not dispute any of the Arbitrator's underlying factual findings or contend that the award is based on a nonfact in this regard, and, as stated previously, the Authority defers to an arbitrator's factual findings when assessing whether the award is contrary to law. *See NFFE*, 53 FLRA at 1710. As the Arbitrator's factual findings support his legal conclusion that the Agency did not violate Employee 1's bump rights under RIF regulations, we find that the award is not contrary to law in this regard.

To the extent that the Union's claim that no one with a lower SCD should have been placed in the positions sought by Employees 2, 3, and 4 could be construed as arguing that the Agency violated the bump rights of those grievants, the Arbitrator found that none of the positions to which these grievants proposed to bump were held by employees in a lower subgroup. Award at 6, 8. The Union does not argue that the award is based on a nonfact in this regard, and, as stated previously, the Authority defers to an arbitrator's factual findings when assessing whether the award is contrary to law. *See NFFE*, 53 FLRA at 1710. As discussed above, the absence of a potential bumpee in a lower tenure group or subgroup means that a mandatory precondition for bumping under RIF regulations was not met. *See* 5 C.F.R. § 351.701(b)(1). As the Arbitrator's factual findings support his legal conclusion that the Agency did not violate the bump rights of Employees 2, 3, and 4 under the RIF regulations, we find that the award is not contrary to law in this regard.

Based on the foregoing, we find that the Union's arguments concerning bump rights do not provide a basis for setting aside the award as contrary to law, and deny the contrary-to-law exceptions regarding bump rights.

B. The Arbitrator did not exceed his authority.

We construe the Union's assertion that the Arbitrator "failed to resolve the issue that was before him in the Union's grievance" as a claim that the Arbitrator exceeded his authority. Exceptions at 5; *see also id.* at 2. In addition, the Union argues that the Arbitrator "exceeded his authority by failing to consider material facts and material evidence." *Id.* at 1. Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to persons who are not encompassed within the grievance. *See U.S. Dep't of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 307-08 (1995). Where, as here, the parties fail to stipulate the issue for resolution, "the fact that the formulated issue[] differ[s] from the issue[] presented in the grievance provides no basis for finding that the award was in excess of the arbitrator's authority." *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 435 (2010). *See also AFGE, Local 933*, 58 FLRA 480, 482 (2003) (in the absence of a stipulated issue, an arbitrator's formulation of the issue is accorded substantial deference).

The Arbitrator stated, and the Union did not dispute, that the parties "were unable to agree on a statement of the issue in this matter[,]" which resulted in the Arbitrator framing the issue as whether the Agency had violated the CBA. Award at 2. The Arbitrator found that, in addition to being bound by the CBA, the parties were bound by the MOU's statement that "RIFs will be run in accordance with applicable laws and regulations." *See id.* As a result, the Arbitrator determined that, "[i]n order to resolve the issue set forth in the [g]rievance, it is necessary to understand the rather complex RIF process set forth in federal statute and regulation and essentially incorporated by reference into the MOU." *Id.* Thus, the Arbitrator expressly applied RIF regulations in order to determine the RIF rights of each of the four grievants, and, after analyzing the rights of each grievant to bump or retreat, the Arbitrator concluded that the Agency did not violate the RIF rights of any of the grievants. *See id.* at 5, 6, 8. Accordingly, the Union has not established that the Arbitrator failed to resolve the issue that was before him, and, thus, we deny the Union's exception claiming that the Arbitrator exceeded his authority in this regard.

The Union's argument that the Arbitrator "exceeded his authority by failing to consider material facts and material evidence" does not contend that the Arbitrator failed to resolve an issue submitted to arbitration, resolved an issue not submitted to arbitration, disregarded specific limitations on his authority, or awarded relief to persons who were not encompassed within the grievance. *See* Exceptions at 1. Rather, the Union's exceeded authority argument challenges the Arbitrator's evaluation of the evidence, and, as such, does not establish that the award is deficient. *See Veterans Affairs*, 64 FLRA at 72. Accordingly, we deny the exception.

C. The Arbitrator did not fail to conduct a fair hearing.

The Authority will find an award deficient on the ground that an arbitrator failed to conduct a fair hearing when it is demonstrated that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding prejudiced a party so as to affect the fairness of the proceeding as a whole. *AFGE, Local 1668*, 50 FLRA 124, 126 (1995). However, an arbitrator has considerable latitude in the conduct of a hearing and the fact that an arbitrator conducted a hearing in a manner that one party finds objectionable does not provide a basis for finding an

award deficient. *AFGE, Local 22*, 51 FLRA 1496, 1497-98 (1996). In this regard, disputes over 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. *Veterans Affairs*, 64 FLRA at 72. In addition, a party's unsubstantiated allegation that an arbitrator failed to consider evidence cannot establish that the arbitrator denied it a fair hearing. *See AFGE, Local 1547*, 59 FLRA 149, 151 (2003) (*Local 1547*). Further, an arbitrator is not required to specify or discuss specific items of evidence on which an award is based or that otherwise were considered by the arbitrator. *See id.*

As an initial matter, although the Union asserts that the Arbitrator "failed to consider material evidence presented in the arbitration hearing" concerning the grievants' work experience and the Agency's computer-generated RIF reports, Exceptions at 2, the Union has not cited any evidence in the record supporting these allegations. In addition, the Arbitrator expressly refers to the computer-generated retention register, and discusses each grievant's experience, in the award. *See* Award at 3, 4-8. Thus, the Union's unsubstantiated allegation that the Arbitrator failed to consider material evidence does not establish that the Arbitrator denied it a fair hearing. *See Local 1547*, 59 FLRA at 151. In any event, the Arbitrator was not required to specify or discuss specific items of evidence that he may have considered in formulating his award, *see id.*, and to the extent that the Union is challenging the Arbitrator's evaluation of evidence and determinations regarding the weight to be accorded such evidence, the Union does not provide a basis for finding that the Arbitrator denied the Union a fair hearing. *See Veterans Affairs*, 64 FLRA at 72. Consequently, we deny the exception.

V. Decision

The Union's exceptions are denied.