64 FLRA No. 175

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
LOUIS STOKES MEDICAL CENTER
CLEVELAND, OHIO
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 31
(Union)

0-AR-4325

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DECISION

June 24, 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 Hirschel Kasper 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 did not file an opposition to the Agency's exceptions.

The Arbitrator granted the grievance in part, finding that the Agency violated Article 22 of the parties' agreement by failing to provide equitable consideration to internal candidates, and awarded an internal candidate who was not selected, among other things, priority consideration for future postings. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency began to recruit for a Heavy Mobile Equipment Mechanic (the position) by posting an announcement for internal applicants. Award at 2. The announcement provided the duties of, and qualifications for, the position; listed the characteristics upon which applicants would be rated; and noted the closing date for applications. *Id.* Approximately three weeks after the initial posting, no internal applicants had applied. *Id.* at 3. Because the Agency believed that it would not receive at least three qualified applicants from within the facility, the Agency amended the announcement to include all federal employees. *Id.* at 3.[1]

After the posting closed, a human resources specialist reviewed the applications, determined that six candidates met the minimum qualifications for the positions, and forwarded those applications to Engineering Service Management for review. *Id.* The Agency ultimately determined that none of these candidates had the specific experience required for the position. *Id*.

Several months later, the Agency opened recruitment for the position to the general public.[2] *Id.* The Agency then selected a candidate and notified the internal applicants -- including S.C., a member of the bargaining unit -- of their non-selection. *Id.* at 4.

The Union requested an audit of the Agency's Merit Promotion process for the position. *Id.* at 4. After the audit was completed, the Union filed a grievance, claiming that the Agency had violated both the Merit Promotion process and the Delegated Examining Unit (DEU) process when hiring for the position. *Id.* The grievance was denied, and the matter was submitted to arbitration. *Id.* The Arbitrator framed the issue as follows:

> Did the Agency violate the Master Agreement when it failed to select [S.C.] for merit promotion into the vacancy for a Heavy Mobile Equipment Mechanic? If so, what is the proper remedy?

Id. at 2.

As an initial matter, the Arbitrator addressed the Agency's contentions that: (1) the real grievant was the Union, not S.C., because the subject line of the grievance states that it is a "Union Grievance" and does not include S.C.'s name; and (2) if the grievant was S.C., then the grievance was untimely because he

1. The hiring process described in the first paragraph above is known as the "Merit Promotion Process." It restricts applicants to those who have federal status. Award at 3-4.

2. This hiring process is known as the Delegated Examining Unit (DEU) Process. It allows hiring from the general public. Award at 3.

did not file it within thirty days of receiving notice of his non-selection. *Id.* at 13-15. The Arbitrator rejected both contentions. First, the Arbitrator found that, because "the Union is entitled to act for" the employees that it represents, the grievance applied to S.C. The Arbitrator then determined that the Union and S.C. did not have sufficient information to file a grievance until after the audit had been completed. Because the grievance was filed within thirty days of this date, the Arbitrator concluded that it was timely. *Id.* at 13-14.

Addressing the merits of the grievance, the Arbitrator determined that the Agency violated Article 22 of the parties' agreement by failing to provide equitable consideration to S.C.'s application.[3] *Id.* at 19.[4] Accordingly, the Arbitrator directed the Agency to: (1) offer S.C. a "priority consideration" for any position to which he applies; (2) send S.C. all Merit Promotion announcements for bargaining unit jobs that are above his wage rate for one year or until his priority consideration application places him in a new position (whichever is shorter); and (3) offer S.C. sufficient on-the-job training to be selected for the position. *Id.* at 13-14, 19-20.

III. Agency's Exceptions

The Agency asserts that the Arbitrator exceeded his authority by offering relief to a person not named in the Union's grievance, S.C. Exceptions at 16. The Agency contends that it "voiced its opposition to including the issue of non-selection in this case, as it was not cited in the [U]nion's original grievance." *Id.* Moreover, the Agency argues that the Union should be the grievant in this case, not S.C., because S.C. was not "named as such" in the initial grievance. *Id.* The Agency also alleges that the award, by offering relief to S.C., fails to draw its essence from the parties' agreement. *Id.* at 17.

In addition, the Agency argues that, if S.C. is the grievant, then the grievance was untimely. According to the Agency, the parties' agreement provides that grievances must be filed within thirty days of the date the "employee or the Union became aware or should have become aware of the act or occurrence[.]" *Id.* Under this standard, the Agency contends, S.C. should have filed his grievance within thirty days of the date that he was informed of his non-selection. *Id.* at 17-18. Because the grievance was not filed within that time limit, the Agency contends that the grievance was untimely. *Id.*

The Agency further contends that the award fails to draw its essence from the parties' agreement because it directs the Agency to: (1) offer S.C. "priority consideration" for any position for which he applies; and (2) send S.C. all Merit Promotion announcements for bargaining unit jobs that are above his wage rate for one year or until his priority consideration application places him in a new position (whichever is shorter).[5] *Id.* at 18. The Agency argues that these remedies are contrary to Article 22, Section 13 of the parties' agreement. *Id.* at 18- 20. According to the Agency, Article 22, Section 13 limits S.C. to *one* priority consideration in an "appropriate vacancy" -- i.e., "one for which the employee is interested, is eligible, and which leads to the same grade level as the vacancy for which priority consideration was not given." *Id.* at 19-20. The Agency also contends that this provision does not require the Agency to notify S.C. of all announcements for bargaining unit jobs that are above his wage rate. *Id.* at 20.

IV. Preliminary Issue

The Authority generally will not find an arbitrator's ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the procedural arbitrability ruling itself. *See AFGE, Local 3882*, 59 FLRA 469, 470 (2003). However, the Authority has stated that a procedural arbitrability determination may be found deficient on the ground that it is contrary to law. *See id.* (citing *AFGE, Local 933*, 58 FLRA 480, 481 (2003)). In addition, the Authority has stated that a procedural arbitrability determination may be found deficient on grounds that do not directly challenge the determination itself, which include claims that an arbitrator was biased or that the arbitrator exceeded his or her authority. *See id; see also U.S. Equal Employment Opportunity Comm'n*, 60 FLRA 83, 86 (2004) (citing *AFGE, Local 2921*, 50 FLRA 184, 185-86 (1995)).

The Agency claims that the award fails to draw its essence from the parties' agreement because the award offers relief to S.C. Exceptions at 16-18.

3. The relevant language of Article 22 is set forth in the attached appendix.

4. Although the Union alleged that the Agency violated seven different sections of the parties' agreement, *see* Award at 17, we discuss only the Union's allegations regarding Article 22 because it is the only section relevant to the Agency's exceptions.

5. The Agency notes that it is not opposed to offering S.C. training for the position at issue. Exceptions at 20.

Such contention directly challenges the Arbitrator's procedural arbitrability determination regarding whether S.C. was a proper grievant. *See AFGE, Local 1931*, 50 FLRA 279, 281 (1995) (arbitrator's finding that grievance was not arbitrable because the grievant did not fall within the contractual definition of employee under the parties' negotiated grievance procedure was a procedural arbitrability determination and did not provide a basis for finding the award deficient). Accordingly, this exception does not provide a basis for finding the award deficient.

The Agency further asserts that the Arbitrator exceeded his authority by offering relief to a person not named in the Union's grievance, S.C. Exceptions at 16. This exception also involves the Arbitrator's procedural arbitrability determination regarding whether S.C. was a proper grievant. The Authority has previously noted that exceptions to the award on the grounds that an arbitrator exceeded his or her authority will be considered only regarding arguments that "do not directly challenge the [procedural-arbitrability] determination itself[.]" *AFGE, Local 104*, 61 FLRA 681, 683 (2006). *See also U.S. Dep't of Transp., Fed. Aviation Admin., Portland, Me.*, 64 FLRA 772, 773 (2010) (agency's exception that arbitrator exceeded his authority not considered because based on grounds that directly challenge the arbitrability determination). Here, the Agency's assertion that the Arbitrator exceeded his authority directly challenges the Arbitrator's procedural conclusion that he had the ability to grant relief to S.C. Consequently, this exception does not provide a basis for finding the award deficient.

Moreover, the Agency contests the Arbitrator's finding that the grievance was timely filed. This contention also directly challenges the Arbitrator's procedural arbitrability determination. *See AFGE, Local 1501*, 56 FLRA 632, 636 (2000) (finding arbitrator's determination regarding the timeliness of a grievance constitutes a determination regarding the procedural arbitrability of that grievance). As a result, this argument does not provide a basis for finding the award deficient. *See U.S. Dep't of the Air Force, Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 42 FLRA 680, 684 (1991) (citing NTEU, 35 FLRA 501, 512 (1990) (an arbitrator's determination that a grievance was timely filed concerns a matter of procedural arbitrability and disagreement with that determination provides no basis for finding an award deficient)).

V. The award does not fail to draw its essence from the parties agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor* (*OSHA*), 34 FLRA 573, 575 (1990) (*OSHA*). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

The Agency contends that the award fails to draw its essence from the parties' agreement because it directs the Agency to: (1) offer S.C. "priority consideration" for any position for which he applies; and (2) send S.C. Merit promotion announcements for all bargaining unit jobs that are above his wage rate for one year or until his priority consideration application places him in a new position (whichever is shorter). The Agency asserts that Article 22, Section 13 of the agreement limits S.C. to *one* priority consideration in an "appropriate vacancy" -- i.e., "one for which the employee is interested, is eligible, and which leads to the same grade level as the vacancy for which proper consideration was not given." Exceptions Attach., Parties' Agreement at 84. The Agency also argues that this provision does not require the Agency to notify S.C. of all announcements for bargaining unit jobs that are above his wage rate.

Article 22, Section 13 of the parties' agreement provides that an employee will receive "*one* priority consideration for each instance of improper consideration." Exceptions, Attach., Parties' Agreement at 84 (emphasis added). Article 22, Section 13 further provides that priority consideration is to be given only for "*appropriate* vacanc[ies]." *Id.* (emphasis added). An "appropriate vacancy" is one for which "the employee is interested, is eligible, and which leads to the same grade level as the vacancy

for which proper consideration was not given." *Id.* The Arbitrator ordered the Agency to offer S.C. "*a* 'priority consideration' for any position to which he applies[.]" Award at 19-20 (emphasis added). Thus, by its terms, the Arbitrator's award limits S.C. to *one* priority consideration. Moreover, there is no indication that the award is intended to encompass an inappropriate vacancy. In these circumstances, the Agency has not demonstrated that this interpretation is implausible, unfounded, irrational, or in manifest disregard of the agreement. *See OSHA*, 34 FLRA at 575.

Article 22, Section 13 also states that:

> Employees will be notified in writing by the authorized management official of entitlement to each priority consideration. Such notice will advise employees that if a vacancy is announced and posted and the employee wishes to exercise their priority consideration, the employee should submit the necessary application to HRMS with a written request that they use priority consideration for the vacancy.

Exceptions, Attach. J, Parties' Agreement at 84. The Arbitrator required the Agency to notify S.C. of "all Merit Promotion announcements for bargaining unit jobs that pay above his wage rate." Award at 20. While the language of Section 13, provides that an employee will be notified of the process to be followed if he or she wishes to exercise his or her priority consideration, the provisions does not exclude the Agency from notifying the employee of other vacancies. The Agency, thus, has failed to show that the Arbitrator's interpretation of the parties' agreements is irrational, implausible, unfounded, or in manifest disregard of the parties' agreements. *See U.S. Dep't of Transp., Fed. Aviation Admin.*, 63 FLRA 15, 18 (2008).

Accordingly, we find that the award does not fail to draw its essence from the parties' agreement and deny the Agency's exception.

VI. Decision

The Agency's exceptions are denied.

APPENDIX

Article 22, "Merit Promotion," of the parties' agreement provides, in relevant part:

> Section 8 – Vacancy Announcements and Areas of Consideration
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> . . . .
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> B. Prior to considering candidates from outside the . . . bargaining unit, the Employer agrees to first consider internal candidates for selection.
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> C. Areas of Consideration:
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> The areas of consideration will be:
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> FIRST – Facilitywide (including satellites) except:
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> 1. This area may be more narrow or expanded through mutual agreement.
>
> 2. Where evidence suggests that the area of consideration is not expected to produce at least three qualified candidates, it may be expanded. The vacancy announcement will identify the expanded area of consideration.
>
> . . . .
>
> Section 12 – Selection
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> D. Management recognizes that it is important for maintaining high morale to try to select from within the facility when the candidates are equally qualified to those candidates available from outside sources. Thus, management will agree to look closely at the relative qualifications of candidates from outside and within and shall exercise good faith in the selection.
>
> Section 13 – Priority Considerations
>
> A. Definition – For the purpose of this article, a priority consideration is the bona fide consideration for noncompetitive selection given to an employee as the result of a previous failure to properly consider the employee for selection because of procedural, regulatory, or program violation. Employees will receive one priority

consideration for each instance of improper consideration.

B. Processing – The procedures for processing a priority consideration shall be:

1. Employees will be notified in writing by the authorized management official of entitlement to each priority consideration. Such notice will advise employees that if a vacancy is announced and posted and the employee wishes to exercise their priority consideration, the employee should submit the necessary application to HRMS with a written request that they wish priority consideration for the vacancy.

2. Priority consideration is to be exercised by the selecting official at the option of the employee for an appropriate vacancy. An appropriate vacancy is one for which the employee is interested, is eligible, and which leads to the same grade level as the vacancy for which proper consideration was not given.

Exceptions, Attach., Parties' Agreement at 76, 83-84.