[v51 p1693]
51:1693(142)AR
The decision of the Authority follows:

51 FLRA No. 142

FEDERAL LABOR RELATIONS AUTHORITY

WASHINGTON, D.C.

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U.S. DEPARTMENT OF DEFENSE

NATIONAL GUARD BUREAU, IDAHO NATIONAL GUARD

ADJUTANT GENERAL, STATE OF IDAHO

(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

LOCAL 3006

(Union)

0-AR-2571

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DECISION

July 31, 1996

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Before the Authority: Phyllis N. Segal, Chair; Tony Armendariz and Donald Wasserman, Members.[(1)]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Thomas Q. Gilson filed by the Agency under section 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 and directed the Agency to provide the grievant, who had been separated from his position as a national guard technician, with severance pay.

We conclude that the award is deficient because it is contrary to agency regulation. Accordingly, we set aside the award.

II. Background and Arbitrator's Award

The grievant was employed by the Agency as a civilian technician. Civilian technicians are required to maintain membership in the national guard as a condition of their employment. The Idaho National Guard limited the grievant's military reenlistment period to 3 years, rather than the 6-year period requested by the grievant, because of several incidents which reflected negatively on the grievant's leadership abilities and performance. Prior to the end of the 3-year reenlistment period, the Idaho National Guard initiated a bar to the grievant's reenlistment.[(2)] The grievant was discharged from the national guard when he was unable to remove the bar to his reenlistment. As a result, the Agency removed him from his civilian technician employment for failing to maintain membership in the national guard.

The Agency denied the grievant's request for severance pay on the basis of Technician Personnel Regulation (TPR) 990-2, which prohibits severance pay to a technician where it can be "reasonably established and documented" that the technician's reenlistment was barred for reason of misconduct, delinquency, or inefficiency.[(3)] The grievant filed a grievance challenging the Agency's denial of severance pay.

The Arbitrator acknowledged that the stated basis for the Agency's denial of severance pay was that the bar to the grievant's reenlistment was for reasons of misconduct, delinquency, or inefficiency. However, he ruled that the Agency had not reasonably established and documented such a basis for the bar. He concluded that the grievant was not given a fair and impartial chance to have the bar removed prior to the expiration of his term of military service. On the basis of the testimony of the grievant's commanding officer, the Arbitrator found that the officer had refused to recommend removal of the reenlistment bar because he had not had an opportunity to sufficiently observe the grievant in a leadership position. The Arbitrator determined that the Agency had put the grievant in an untenable situation by placing him in a position during his evaluation period that did not require leadership and, thereby, by precluding him from showing that he had overcome his deficiencies. Accordingly, the Arbitrator ruled that the grievant's separation from technician employment was involuntary and that he was entitled to severance pay under 5 U.S.C. § 5595(b) and 5 C.F.R. part 550, subpart G.[(4)] In awarding the grievant severance pay, the Arbitrator rejected the Agency's reliance on Jeffries v. Air

Force, 999 F.2d 529 (Fed. Cir. 1993) (Jeffries) and Buriani v. Air Force, 777 F.2d 674 (Fed. Cir. 1985) (Buriani).

III. Exceptions

A. Agency's Contentions

The Agency contends that the award is deficient because the Arbitrator ruled on the substance of the military decision to bar the grievant's reenlistment and substituted his judgment for that of military leadership. The Agency argues that the Arbitrator based the award on testimony that merely explained why the grievant's commanding officer did not recommend removal of the reenlistment bar and that the testimony was unrelated to the merits of the original decision to impose the bar. The Agency also contends that the Arbitrator's award is deficient because it is based on nonfacts and is contrary to TPR 990-2.

B. Union's Opposition

As an threshold matter, the Union contends that the Agency's exceptions should be dismissed for lack of jurisdiction because the award relates to a matter described in section 7121(f) of the Statute. Alternatively, the Union contends that the award is not deficient because the Arbitrator correctly found that the grievant was entitled to severance pay. The Union argues that TPR 990-2 cannot be used by the Agency to deny the grievant severance pay.[(5)]

IV. Analysis and Conclusions

A. The Authority Has Jurisdiction

Section 7122(a) of the Statute provides in pertinent part:

> Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title).

The matters described in section 7121(f) are those matters covered under 5 U.S.C. §§ 7512 and 4303 and similar matters that arise in other personnel systems.[(6)] As raised by the Union, this case presents the jurisdictional issue of whether the Arbitrator's award is "an award relating to a matter described in section 7121(f)[.]"

In American Federation of Government Employees, Local 2986 and U.S. Department of Defense, National Guard Bureau, The Adjutant General, State of Oregon, 51 FLRA No. 126 (1996) (National Guard Bureau), we concluded that awards resolving grievances over denials of severance pay do not relate to any matters described in section 7121(f), within the meaning of section 7122(a) of the Statute. For the reasons stated in National Guard Bureau, we conclude that the Authority has jurisdiction to review the Arbitrator's

award resolving the dispute over severance pay, and we will resolve the Agency's exceptions.

B. The Award is Contrary to TPR 990-2

The substance of a military decision, such as a refusal to accept a reenlistment, is precluded as a matter of law from review outside the military command. Jeffries, 999 F.2d at 530 ("The cancellation of active reserve status is a uniquely military decision and is subject to review only within the military command."). Thus, the propriety of a civilian technician's discharge from the reserves is not reviewable indirectly by an arbitrator in resolving a grievance brought by a technician under the Statute. See id. at 532 (the grounds for discharge from the reserves are not reviewable indirectly through the Merit Systems Protection Board). Moreover, when military department regulations set out grounds on which a military separation will be considered voluntary for purposes of civilian employment, review of such a separation is limited to whether an individual lost reserve status for one of the reasons listed in the regulation. Id. at 530; Buriani, 777 F.2d at 677. Accordingly, such regulations preclude an arbitrator from making any collateral inquiry into the circumstances of the discharge from military service. See Buriani, 777 F.2d at 677 (an Air Force regulation specifying that loss of reserve status for failing to achieve a military promotion is a reason within the individual's control prevents any collateral inquiry into the circumstances of the failure to be promoted).

Based on Jeffries and Buriani, the scope of the Arbitrator's inquiry in this case was limited to whether the grievant had been barred from reenlistment for any of the reasons set forth in TPR 990-2. Once the Arbitrator acknowledged that the stated basis for the grievant's reenlistment bar was for cause, "[t]hat should have ended the inquiry[.]" Buriani, 777 F.2d at 677. However, the Arbitrator proceeded to determine that the Agency had not given the grievant an opportunity to have the bar to his reenlistment removed and that, therefore, his separation was involuntary for purposes of entitlement to severance pay. In making this determination, the Arbitrator collaterally attacked the military decision not to accept the grievant's application for reenlistment. Accordingly, the award is deficient and must be set aside.[(7)]

V. Decision

The Arbitrator's award is set aside.

Dissenting Opinion of Member Armendariz

Consistent with my dissent in American Federation of Government Employees, Local 2986 and U.S. Department of Defense, National Guard Bureau, The Adjutant General, State of Oregon, 51 FLRA No. 126, slip op. at 10-11 (1996), I would find that the Authority is without jurisdiction under section 7122(a) of the Statute to resolve the Agency's exceptions, and would, consequently, dismiss the exceptions. Section 7122(a) of the Statute provides, in relevant part, that "[e]ither party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the

arbitration (other than an award relating to a matter described in section 7121(f) of this title)." The matters described in section 7121(f) include serious adverse actions covered under 5 U.S.C. § 7512, such as removals, and similar actions that arise under other personnel systems. I would find that the Arbitrator's award concerning the grievant's entitlement to severance pay relates to a matter similar to a matter covered under 5 U.S.C. § 7512, which arose in an "other personnel system[]" within the meaning of section 7121(f) of the Statute.

FOOTNOTES:
(If blank, the decision does not have footnotes.)

1. Member Armendariz' dissenting opinion is set forth at the end of this decision.

2. Pursuant to National Guard Regulation 600-200, para. 7-19, a bar to reenlistment is a nonpunitive, probationary device intended to notify soldiers of need for improvement if they are to be retained.

3. TPR 990-2, subchapter S7-4 provides:

> Failure to accept reenlistment. The failure to accept an enlisted technician's reenlistment application is an involuntary separation for severance pay purposes, except when it can be reasonably established and documented that failure to accept the application is for reason of misconduct, delinquency, or inefficiency.

4. To be entitled to severance pay under 5 U.S.C. § 5595(b) the employee must have been "involuntarily separated from service, not by removal for cause on charges of misconduct, delinquency, or inefficiency[.]" To be entitled to severance pay under 5 C.F.R. § 550.704, an employee must be "removed from Federal service by involuntary separation." 5 C.F.R. § 550.703 defines "[i]nvoluntary separation" as a "separation initiated by an agency against the employee's will and without his or her consent for reasons other than inefficiency" and defines "[i]nefficiency" as "unacceptable performance or conduct that leads to a separation under part 432 or 752 of this chapter or an equivalent procedure."

5. In its opposition, the Union also asserts that the Agency's exceptions were not timely filed. However, the Union erred in calculating the due date of the exceptions by failing to include the 5 days permitted under section 2429.22 of the Authority's regulations because of service by mail. See American Federation of Government Employees, Local 1668 and U.S. Department of the Air Force, Elmendorf Air Force Base, Anchorage, Alaska, 51 FLRA 714, 714 n.1 (1995). The Union further asserts that the Agency failed to provide

the Union with the attachments to its exceptions and that its counsel of record were not served with a copy of the Agency's exceptions. By Order, the Authority directed the Agency to serve the Union with a copy of the attachments provided to the Authority with its exceptions and the Agency complied with the Order. In complying with the Authority's Order, the Agency served the Union's counsel of record with a copy of its exceptions.

6. 5 U.S.C. § 4303 covers removals and reductions-in-grade for unacceptable performance. 5 U.S.C. § 7512 covers removals, suspensions for more than 14 days, reductions either in grade or pay, and furloughs of 30 days or less.

7. In light of our conclusion, it is unnecessary to address further the Agency's exceptions. To the extent that the Union argues that the Agency's exceptions should be denied because TPR 990-2 is not controlling, we note that the Authority specifically found it to be controlling in National Guard Bureau and U.S. Department of Defense, National Guard Bureau, Arkansas Army National Guard, North Little Rock, Arkansas and National Federation of Federal Employees, Local 1671, 48 FLRA 480 (1993), and, for the reasons set forth therein, we reject the Union's argument.
