

65 FLRA No. 75

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 238
(Union)

0-AR-4418

DECISION

December 21, 2010

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 Frank Silver 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 concluded that the Agency violated agreements the parties had reached concerning employees affected by a reorganization. The Agency had refused to offer the grievant grade and pay retention after she accepted a position at a lower grade. The Agency had made the grievant's original, higher-graded position permanent before the grievant accepted the lower-graded position. The Arbitrator ordered the Agency to grant the grievant grade and pay retention.

For the reasons that follow, we grant the Agency's contrary to law exception and set aside the award.

II. Background and Arbitrator's Award

The grievant was a General Schedule (GS)-11 Management Analyst. Award at 4. A reorganization

left the grievant without a permanent position within the new organization. *Id.* at 3. Consequently, as addressed in a provision of the Restructuring Agreement and Addendum (parties' agreement),¹ the Agency designated the grievant as a "transition employee" and assigned her to continue to perform work at her GS-11 grade and pay until placed in a permanent position. *Id.* at 4. Pursuant to another provision of the parties' agreement,² the grievant then applied for a GS-5 Revenue Officer position as a transition employee with grade and pay retention benefits. *Id.* at 4-5. The GS-5 position had been announced as eligible for transition benefits, including grade and pay retention. *Id.*

While the grievant's application was being processed, the Agency internally decided and advised the Union that all employees whose transition status had not been otherwise resolved would be made permanent in their current positions. *Id.* at 4. The Agency also determined that all transition benefits, including grade and pay retention, would cease. *Id.* at 6.

Shortly thereafter, the Agency notified the grievant that she would be made permanent in her GS-11 position at the same grade and pay level. *Id.* at 6, 11. Because the Agency decided to make the grievant's GS-11 position permanent, it processed the

1. The relevant portions of the parties' agreement provide:

Section 2

When a currently existing organization . . . no longer exists and there remains no organization, current or future, for employees not yet placed . . . [s]uch employees will remain at the same grade and post-of-duty, until placed . . .

.....

V. Temporary Work Assignments While in Transition Status . . . Transition Employees will remain at their current grade and pay until permanently placed.

Award at 2.

2. The relevant portion of the parties' agreement provides:

IV.E. Voluntary Change to Lower Grade . . . In addition, Transition Employees who wish to be considered for voluntary placement in a position at a lower grade may apply for such position(s) as they are announced by the [Agency] . . . If otherwise qualified, said Transition Employee will be placed in said position, with appropriate grade and pay retention . . .

Award at 2.

grievant's application for the GS-5 position competitively. *Id.* at 5.

The Agency then offered the grievant the GS-5 position without grade and pay retention at the GS-11 level. *Id.* at 5-6. While the offer for the GS-5 position was pending, the Agency made the grievant's GS-11 position permanent. *Id.* at 11, 12. Two days after the Agency made the grievant's GS-11 position permanent, she accepted the offer of the GS-5 Revenue Officer position. *Id.* at 6, 11. As the Arbitrator found, the grievant accepted the lower-graded Revenue Officer position because, "[p]resumably, she was influenced by what she considered to be greater promotional opportunities in the [R]evenue [O]fficer job progression." *Id.* at 13.

The Union then filed a grievance claiming that the Agency violated the parties' agreement by failing to offer the GS-5 position with retained grade and pay at the GS-11 level. *Id.* at 7-8; Exceptions at 7-8. When the matter was not resolved, it was submitted to arbitration.

The issue, as framed by the Arbitrator, was: "Did the Agency fail to transition [the grievant] to a permanent . . . position, pursuant to the [parties' agreement]? If so, what is the appropriate remedy? Award at 2.

The Arbitrator held that the Agency's act of making the grievant permanent in her GS-11 position did not divest her of her contractual right under § IV.E of the parties' agreement to be placed in the GS-5 position while retaining GS-11 grade and pay. *Id.* at 14-15. The Arbitrator reasoned that at the time she applied for the GS-5 position, she met all pre-conditions to secure this contractual right. *Id.* at 12-13, 15. As a basis for this determination, he found that she secured this right by applying for and qualifying for the GS-5 position announced as eligible for transition benefits. *Id.* For these reasons, the Arbitrator found that her right to grade and pay retention at the GS-11 level as applied to the GS-5 position vested before she was made permanent in the GS-11 position. *Id.* at 14-15.

As a remedy, the Arbitrator ordered that the Agency provide the grievant with GS-11 grade and pay retention retroactive to the effective date of her placement in the GS-5 position. *Id.* at 15.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the award is contrary to law and fails to draw its essence from the parties' agreement.

With regard to its contrary to law argument, the Agency asserts that the award violates 5 U.S.C. §§ 5361-5365 and 5 C.F.R. §§ 536.101-536.105, which govern grade and pay retention, and that the Agency had no independent contractual authority to provide this retention. Exceptions at 1, 16. Specifically, the Agency argues that it did not have discretion under these statutory and regulatory provisions to grant the grievant grade and pay retention in connection with the GS-5 position. *Id.*

The Agency maintains that the grievant was not entitled to grade retention under 5 C.F.R. § 536.103(b)³ because the grievant's grade was no longer at risk of being reduced as a result of the reorganization after the Agency decided to make her GS-11 position permanent. *Id.* at 16. The Agency also claims that the grievant was not entitled to pay retention under § 536.104(b)⁴ because the grievant's pay was not reduced as a result of a management action. *Id.* at 1, 16.

In addition, the Agency argues that 5 C.F.R. § 536.105(a)(3)⁵ specifically excludes the grievant from grade or pay retention because her reduction in grade and pay was a matter of choice and thus "for personal cause." *Id.* at 1-2. The Agency contends that there is no legal basis that allows for grade and pay retention where the grievant voluntarily applies for and accepts a lower-grade position when she was already permanently assigned at the GS-11 grade and pay level. *Id.*

3. The relevant portion of 5 C.F.R. § 536.103(b) (2003) provides that an "agency may offer grade retention to eligible employees who are or might be reduced in grade as the result of a reorganization . . . announced by management in writing."

4. The relevant portion of 5 C.F.R. § 536.104(b) (2003) provides that an "agency may provide pay retention to eligible employees whose rates of basic pay would otherwise be reduced as the result of management action."

5. The relevant portion of 5 C.F.R. § 536.105(a)(3) (2003) provides that "(a) Grade and pay retention shall not apply to an employee who . . . (3) [i]s reduced in grade or pay for personal cause"

With regard to its essence exception, the Agency contends that the Arbitrator misinterpreted the parties' agreement to require the Agency to provide the grievant with grade and pay retention at the GS-11 level for accepting a GS-5 position. *Id.* at 2. The Agency asserts that the parties' agreement only entitles the grievant to grade and pay retention until the time she was permanently placed at the GS-11 grade and pay level. *Id.* at 15, 18. Therefore, the Agency argues that the Arbitrator wrongly applied the parties' agreement to entitle the grievant to grade and pay retention because the grievant accepted the GS-5 position after she was made permanent in her GS-11 position. *Id.*⁶

B. Union's Opposition

The Union asserts that the Agency's contrary to law claim is without merit. Opp'n at 6-12. Specifically, the Union argues that the issue raised by the contrary to law claim is solely one of contract interpretation because the parties' agreement incorporates regulations governing grade and pay retention. *Id.* at 6-7 (citing *AFGE, Local 2357*, 62 FLRA 375 (2008); *AFGE, Local 2703*, 59 FLRA 81 (2003); *see also*. In addition, the Union claims that the grievant did not accept the GS-5 position voluntarily. *Id.* at 9.

The Union also disagrees with the Agency's essence exception. *Id.* at 10-12.

IV. Analysis and Conclusions

For the reasons set forth below, the Authority grants the Agency's contrary to law exception.

The Agency contends that the Arbitrator's determination that the grievant is entitled to grade and pay retention at the GS-11 level after accepting the GS-5 position is contrary to 5 U.S.C. §§ 5361-5365 and 5 C.F.R. §§ 536.101- 536.105.⁷ When an exception involves an award's consistency with law,

the Authority reviews any question of law raised by the exception and the award de novo. *See 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 assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

Grade and pay retention have a specific statutory foundation. Title 5 U.S.C. §§ 5361-5365 govern the administration of grade and pay retention. In addition, Congress has, in 5 U.S.C. § 5365, authorized the Office of Personnel Management (OPM) to prescribe regulations governing the administration of grade and pay retention in circumstances beyond those specifically addressed in 5 U.S.C. §§ 5361-365.

As relevant here, OPM's regulations provided that an agency's authority to offer grade and pay retention was limited by the "conditions" and "criteria" prescribed in its government-wide regulations. 5 C.F.R. § 536.101. Specifically, § 536.103(b) provided that "the agency may offer grade retention to eligible employees who are or might be reduced in grade as the result of a reorganization" In addition, § 536.104(b) provided that an "agency may provide pay retention to eligible employees whose rates of basic pay would otherwise be reduced as the result of a management action."

Moreover, the Authority has held that government-wide regulations govern a matter in dispute to which they apply, even if the same matter is covered by a collective bargaining agreement under the Statute. *U.S. Dep't of the Army, Ft. Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 FLRA 186, 193 (1990).

In its opposition, the Union raises a threshold argument that where the parties' agreement incorporates regulations governing a particular matter, the appropriate analysis is one of contract interpretation. Opp'n at 7. However, the Union's argument is unsupported. The Union relies on cases where the collective bargaining agreement incorporates agency, not Government-wide,

6. Because, for the reasons below, the Authority concludes that the award is contrary to law, it is unnecessary for the Authority to address the Union's additional exception that the award fails to draw its essence from the parties' agreement.

7. We apply the versions of 5 U.S.C. §§ 5361-5365 (2003) and 5 C.F.R. §§ 536.101- 536.105 (2003) in effect at the time of the actions giving rise to the grievance, rather than the revised versions of the code and regulations that subsequently went into effect.

regulations.⁸ Here, the Agency argues that the award conflicts with Government-wide regulations. The cases on which the Union relies are therefore inapposite. Accordingly, we proceed to consider the Agency's contrary to law claim.

The award is inconsistent with § 536.103(b), as set forth above, by requiring the Agency to provide grade retention in conditions that do not meet the regulatory "conditions" and "criteria." The plain language of § 536.103(b) limits an agency's authority to offer grade retention "to employees who are or might be reduced in grade as the result of a reorganization" See *AFGE, Local 1709*, 57 FLRA 453, 455 (2001) (relying upon plain language to resolve a matter of statutory interpretation). Based on the Arbitrator's findings, shortly after the grievant applied for the GS-5 position, the Agency decided to make all remaining transition employees permanent in their current positions and so notified the Union, and later, the employee. It follows that when the Agency took these actions, the grievant, a transition employee, was no longer in a situation where she might be reduced in grade as a result of a reorganization. Award at 4. At that point, the "conditions" and "criteria" that govern grade retention ceased to exist. Therefore, when the Agency offered the grievant the GS-5 position after the Agency decided to make her GS-11 position permanent, and had so notified her, the Agency had no legal basis for providing grade retention. Accordingly, the Arbitrator's conclusion that the grievant is entitled to grade retention as applied to the GS-5 position is inconsistent with § 536.103(b).

Similarly, the award is inconsistent with § 536.104(b), also as set forth above, by requiring the Agency to provide pay retention. The plain language of § 536.104(b) limits an agency's authority to provide pay retention "to employees whose rates of basic pay would otherwise be reduced as the result of a management action." 5 C.F.R. § 536.104(b). As applied here, there is no indication that the grievant's pay would otherwise be reduced as the result of a management action. *Id.* Indeed, as indicated previously, shortly after the grievant applied for the GS-5 position, the Agency processed her application as ineligible for transition benefits because it intended to make transition employees permanent in their positions. Therefore, management never took any action to reduce her pay. To the contrary, as the result of "management[']s action," her rate of basic pay at the GS-11 level remained unchanged. *Id.*

8. See cases Union relies on *supra* Part III.B.

Therefore, the grievant's rate of basic pay was not at risk of being otherwise reduced when the Agency offered her the GS-5 position. Moreover, the grievant became permanent in her GS-11 position two days before she accepted the GS-5 position. Accordingly, the Arbitrator's conclusion that the Agency had the discretion to provide the grievant with pay retention at the GS-11 level for accepting the GS-5 position is inconsistent with § 536.104(b).⁹

Therefore, the award is contrary to 5 C.F.R. §§ 536.103(b) and 536.104(b)(2003). Accordingly, we grant the Agency's contrary to law exception and set aside the award.¹⁰

V. Decision

The Agency's contrary to law exception is granted and the award is set aside.

9. The Authority's decision in *United States Department of the Treasury, Internal Revenue Service, Oklahoma City, Oklahoma*, 64 FLRA 615 (2010) (*IRS*) is distinguishable from this case. In *IRS*, the Authority upheld an award of grade and pay retention for an employee who accepted a lower-graded position based on the agency's assurances that she would retain grade and pay. In addition, the agency in *IRS* not only offered grade and pay retention, but permitted the grievant to receive retained pay for two years before it recognized an error and initiated actions to recoup the retained pay in a collection action. *IRS* is distinguishable because, *inter alia*, it involved a different version of the regulations regarding grade and pay retention; a much narrower agency argument (specifically, that a particular agency official was not an "authorized agency official" within the meaning of the regulations) than the broader arguments presented here; and an arbitration award that, unlike the award at issue here, was based in part on equitable estoppel.

10. The Agency asserts that the award is contrary to 5 C.F.R. § 536.105(a)(3), which sets forth certain exclusions for providing employees with grade and pay retention. Because the award is contrary to the regulations discussed above, it is unnecessary to address whether the award is also contrary to 5 C.F.R. § 536.105(a)(3).