66 FLRA No. 162

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
MIAMI, FLORIDA
(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Union)

0-AR-4746

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DECISION

August 13, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Dennis R. Nolan 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.[1]

The Arbitrator found that the Agency violated the parties' agreement by constructively removing the grievant when it failed to select him for a support-specialist position, which resulted in the grievant taking another position (automation position) with the Agency. For the reasons set forth below, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievant worked for the Agency as an air-traffic-control specialist (ATCS). Award at 1. The Agency determined that, due to an injury, the grievant was permanently prevented from performing his ATCS duties and was medically disqualified from that position. *Id.* at 2-3. The Agency informed the grievant that he could appeal his permanent disqualification by providing documentation demonstrating that he had sufficient mobility to perform his ATCS duties and that he was not taking certain medication. *Id.* at 2. Because the grievant failed to provide such documentation when he appealed his disqualification, the Agency denied his appeal. *Id.* at 2-3.

The Agency then sent the grievant a proposed removal letter. *Id.* at 3. The letter explained that he had the right to respond to the proposed removal and apprised him of "his options, [namely,] optional retirement, seeking disability retirement, or requesting placement in a vacant position for which he was medically qualified." *Id.* But the grievant did not "seek consideration for permanent reassignment to a position for which he was medically qualified or apply for either type of retirement." *Id.* Instead, he applied for two different positions at the Agency – a support-specialist position and an automation position. *See id.* at 3, 5. The grievant was not selected for the support-specialist position. *See id.* at 5-6. The grievant was selected for the automation position, which he accepted. *Id.* at 3. The Agency canceled the removal action. *Id.*

The Union filed a grievance, which was unresolved and submitted to arbitration. *Id.* at 4. As the parties could not agree on stipulated issues, *see id.* at 6, the Arbitrator framed the following issues: (1) "[d]id the [g]rievant's acceptance of another position moot his claim to improper removal, or was he constructively removed"; (2) "[i]f he was constructively removed, was the removal for the efficiency of the service"; and (3) "[i]f the termination was not for the efficiency of the service, what shall the remedy be?" *Id.* at 7.

The Arbitrator found that the grievant was medically disqualified and could not perform ATCS duties. *Id.* at 9. Similarly, the Arbitrator determined that medical certification was a legitimate requirement for the ATCS position and that, because the grievant lacked the necessary certification, the Agency's proposed removal of the grievant from the ATCS position was for the efficiency of the service. *Id.*

Next, the Arbitrator resolved the issue of whether the Agency should have offered the support-specialist position to the grievant. *Id.* In so doing, the Arbitrator acknowledged that the grievance did not raise this issue, but found that the issue was relevant to the grieved issues because, if the Agency could have "followed a [more efficient] course of action . . . than forcing the [g]rievant out of his regular position, . . . the attempted removal would not [have] be[en] for the efficiency of the service." *Id.* at 7. The Arbitrator found that the Agency did not act "for the efficiency of the

[1] In addition, as discussed further below, the Authority issued an Order to Show Cause why the exceptions should not be dismissed for lack of jurisdiction, to which the Agency filed a response.

service when it constructively [removed] the [g]rievant rather than [select] him [for] the [s]upport[-][s]pecialist position." *Id.* at 11. Specifically, the Arbitrator determined that the Agency failed to demonstrate that the selectee was more qualified than the grievant for that position. *Id.* at 9. The Arbitrator also rejected the Agency's "assertion that maintaining medical certification . . . was an implied requirement" for that position. *Id.* at 10. In this connection, he noted that the vacancy announcement for the position did not list medical certification as a requirement for selection. *Id.* at 5. According to the Arbitrator, "[j]ob vacancy announcements are supposed to contain *all* requirements," and the Agency cited no "authority for the proposition that it could apply unstated job requirements." *Id.* at 10.

The Arbitrator concluded that, by "[f]ailing to base its decision on the efficiency of the service[,] [the Agency] violated the [parties'] [a]greement." *Id. See also id.* at 11 ("The Agency violated the [parties'] [a]greement by not acting for the efficiency of the service when it constructively terminated the [g]rievant rather than retain him in the [s]upport[-][s]pecialist position"). Accordingly, the Arbitrator directed the Agency to assign the grievant to the support-specialist position, and to pay the grievant any lost wages and benefits that "stem[med] from the Agency's breach of the [parties'] [a]greement." *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award is contrary to law in two respects. Exceptions at 3-5. First, the Agency claims that the Arbitrator "misapplied the law concerning constructive removals." *Id.* at 4. (emphasis omitted). Specifically, the Agency contends that, under court and Merit Systems Protection Board (MSPB) precedent, the grievance is moot because the Agency rescinded the grievant's proposed removal before it took effect. *Id.* The Agency further maintains that the grievant voluntarily accepted the automation position, and that the Arbitrator's conclusion that the Agency's removal of the grievant from the ATCS position was for the efficiency of the service conflicts with his determination that the Agency constructively removed the grievant. *Id.* at 4-5. Second, the Agency contends that the award violates management's rights under § 7106 of the Statute by requiring the Agency to select the grievant for a support-specialist position that "does not exist." *Id.* at 5.

The Agency also argues that the Arbitrator exceeded his authority by deciding an issue not raised in the grievance – specifically, whether the Agency should have selected the grievant for the support-specialist position. *Id.* at 7. In this regard, the Agency asserts that Article 9, Section 12 of the parties' agreement[2] requires arbitrators to confine themselves to the precise issue submitted for arbitration. *Id.*

B. Union's Opposition

The Union argues that the Arbitrator properly applied the law related to constructive removals. Opp'n at 11-12. The Union also argues that the award does not violate management's rights under § 7106 of the Statute, and that the Arbitrator did not exceed his authority. *Id.* at 12-14.

IV. Preliminary Matter: The Authority has jurisdiction to resolve the Agency's exceptions.

The Authority issued an Order to Show Cause (Order) directing the Agency to explain why its exceptions should not be dismissed for lack of jurisdiction because they appeared to concern a removal. Order at 1. In response to the Order (Agency's response), the Agency contends that the Authority has jurisdiction because: (1) the Agency rescinded the proposed removal before it took effect; and (2) no removal occurred because the grievant is still employed by the Agency. Agency's Response at 1-2. In its opposition, the Union argues that the Authority lacks jurisdiction because the award relates to a constructive removal and involves an "involuntary pay reduction." Opp'n at 2.

Under § 7122(a) of the Statute, the Authority lacks jurisdiction to resolve exceptions to awards "relating to" a matter described in § 7121(f) of the Statute. *See U.S. Dep't of Commerce, Patent & Trademark Office, Arlington, Va.*, 61 FLRA 476, 477 (2006). Matters described in § 7121(f) include adverse actions, such as removals, that are covered under 5 U.S.C. § 7512 (§ 7512) and are appealable to the MSPB and reviewable by the United States Court of Appeals for the Federal Circuit (Federal Circuit). *See id.* The Authority will determine that an award relates to a matter described in § 7121(f) when it resolves, or "is inextricably intertwined with," a § 7512 matter. *Id.* The Authority looks to MSPB precedent in determining whether a matter is covered under § 7512. *See U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin.*, 58 FLRA 333, 336 (2003). Moreover, the Authority looks not to the outcome of the award, but to whether the claim advanced in arbitration is one reviewable by the MSPB, and, on appeal, by the Federal Circuit.

[2] Article 9, Section 12 of the parties' agreement provides, in pertinent part: "The arbitrator shall confine himself/herself to the precise issue submitted for arbitration and shall have no authority to determine any other issues not so submitted to him/her." Award at 7.

See AFGE, Local 1013, 60 FLRA 712, 713 (2005) (*Local 1013*).

The MSPB has held that an involuntary, *inter*-agency transfer is tantamount to a removal. *See Roach v. Dep't of the Army*, 86 M.S.P.R. 4, 10 (2000) (emphasis added). Thus, that an employee has not separated from federal service does automatically deprive the MSPB of jurisdiction over an alleged removal action. *Id.* By contrast, a "coerced *intra*-agency reassignment, without a reduction in pay or grade, is not an appealable action because a reassignment, even if involuntary, is not an adverse action." *See Colburn v. Dep't of Justice*, 80 M.S.P.R. 257, 259 n.* (1998) (*Colburn*) (citing *Talley v. Dep't of the Army*, 50 M.S.P.R. 261, 262-63 (1991) (emphasis added)).

Here, the grievant sought a different job within the Agency after receiving the proposed removal letter. *See* Award at 3. Therefore, this case involves an allegedly coerced *intra*-agency change in jobs. *See Colburn*, 80 M.S.P.R. at 259 n.*. Although the Union asserts in its opposition that the grievant suffered an "involuntary pay reduction," Opp'n at 2, the Union does not argue that the claim advanced at arbitration involved a reduction in grade or pay within the meaning of § 7512(3) or (4), respectively. As stated above, what matters for the purposes of the Authority's jurisdiction is the nature of the claim advanced at arbitration. *See Local 1013*, 60 FLRA at 713. As the claim advanced at arbitration concerned an allegedly coerced intra-agency reassignment, and there was no claim before the Arbitrator that this action involved a reduction of grade or pay within the meaning of § 7512(3) or (4), respectively, we find that we have jurisdiction to resolve the Agency's exceptions.

V. Analysis and Conclusions

A. The award is not contrary to law.

The Agency argues that the award is contrary to law in two respects. Exceptions at 4-5. 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.* We address the Agency's two contrary-to-law arguments separately below.

1. Court and MSPB precedent

The Agency's first contrary-to-law argument is that the Arbitrator misapplied court and MSPB precedent concerning constructive removals. Exceptions at 4-5. Where an arbitrator resolves a purely contractual issue, he or she is not required to apply statutory standards. *See AFGE, Local* 2018, 65 FLRA 849, 851 (2011) (*Local 2018*). In this situation, the alleged misapplication of statutory standards does not provide a basis for finding the arbitrator's award deficient. *See id.* (citing *Soc. Sec. Admin.*, 65 FLRA 286, 288 (2010)).

Here, the Arbitrator resolved the issue of whether the Agency violated the parties' *agreement*, rather than whether there was a constructive removal within the meaning of § 7512. *See* Award at 11. In this regard, the Arbitrator determined that, by "[f]ailing to base its decision on the efficiency of the service[,] [the Agency] violated the [parties'] [a]greement." *Id.* at 10. He also directed a remedy that specifically addressed losses "stemm[ing] from the Agency's breach of the [parties'] [a]greement." *Id.* Because the Arbitrator resolved a contractual issue, he was not required to apply statutory standards regarding constructive removals. *See Local 2018*, 65 FLRA at 851. Thus, his alleged misapplication of precedent concerning constructive removals does not provide a basis for setting aside the award. *Id.* Accordingly, we deny this exception.

2. Section 7106 of the Statute

The Agency's second contrary-to-law argument is that the award violates management's rights under § 7106 of the Statute. Exceptions at 5. But the Agency makes no claim that the agreement provisions enforced by the Arbitrator were not negotiated under § 7106(b). Absent such a claim, the Agency provides no basis for finding that the award is contrary to management's rights under § 7106 of the Statute. *See U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Louisville Dist., Louisville, Ky.*, 66 FLRA 426, 428 (2012) (citing *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 66 FLRA 335, 338 n.10 (2011)). Accordingly, we deny this exception.

B. The Arbitrator did not exceed his authority.

The Agency argues that the Arbitrator exceeded his authority by deciding an issue not raised in the grievance – specifically, whether the Agency should have selected the grievant for the support-specialist position. Exceptions at 7. In this regard, the Agency asserts that Article 9, Section 12 of the parties' agreement requires arbitrators to confine themselves to the precise issue submitted for arbitration. *Id.*

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 AFGE, Local 1547*, 59 FLRA 149, 150 (2003) (*Local 1547*). In the absence of a stipulation of the issues by the parties, the Authority accords substantial deference to the arbitrator's formulation of the issues. *Id.* In addition, where there is no stipulation, the fact that an arbitrator's formulation of an issue differs from the issues presented in the grievance does not provide a basis for finding that an arbitrator exceeded his or her authority. *See id.* at 151.

Because the parties did not stipulate the issues to be resolved at arbitration, the Arbitrator formulated the issues, which included whether the grievant was removed for the efficiency of the service. Award at 6-7. Although the Arbitrator acknowledged that the grievance did not raise the issue of whether the Agency should have selected the grievant for the support-specialist position, he found that issue relevant to the efficiency-of-service issue. *Id.* at 7. Specifically, he stated that if the Agency had available to it actions other than "forcing the [g]rievant out of his regular position," then "the attempted removal would not [have] be[en] for the efficiency of the service." *Id.* The mere fact that the grievance did not raise the issue concerning the support-specialist position does not demonstrate that the Arbitrator exceeded his authority by addressing it. *See Local 1547*, 59 FLRA at 151. In addition, the Agency does not establish that Article 9, Section 12 of the parties' agreement in any way precluded the Arbitrator from addressing this issue in the absence of a stipulation by the parties. Accordingly, that provision does not provide a basis for finding the award deficient on exceeded-authority grounds.

For the foregoing reasons, we deny the Agency's exceeded-authority exception.

VI. Decision

The Agency's exceptions are denied.