69 FLRA No. 2

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
RICHMOND, VIRGINIA
(Agency)

0-AR-5135

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DECISION

October 13, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Since 2008, the Agency had been entering into retention-incentive agreements with nurses in certain specialized fields, which entitled the nurses to a pay premium. In 2014, the Agency discontinued these payments, and the Union filed a grievance contending that the discontinuation was improper. Arbitrator Ira Cure found that, while the grievance was not arbitrable as to registered nurses (RNs), the grievance was arbitrable as to licensed practical nurses (LPNs) and that the Agency violated the LPNs' retention-incentive agreements. The Union filed exceptions to the award as it related to RNs, and the Agency excepted to the award as it related to LPNs.

We must decide whether the Arbitrator's determination that the grievance is arbitrable as to LPNs is contrary to law. Because Office of Personnel Management (OPM) regulations preclude a grievance over the termination of a retention incentive, the answer is yes. Accordingly, we grant the Agency's exceptions and set aside the portion of the award addressing the LPNs.

II. Background and Arbitrator's Award

Title 5, § 5754 and Title 38, § 7410 of the U.S. Code, authorize the Agency to enter into retention-incentive agreements with employees in hard-to-fill positions. Entering into such agreements entitles employees to receive incentive payments above their regular salaries. Since 2008, the Agency had been making such payments to RNs and LPNs in certain specialties. To receive an incentive, the Agency required employees to enter into a retention-incentive agreement annually.

Beginning in May 2014, some employees stopped receiving their incentive payments. The Union inquired about the missing payments with the medical center director, who told the Union that a payroll error had caused the missing payments. But on July 24, 2014, the Agency's chief human-resource officer emailed the Union saying that the Agency would discontinue the payments effective July 27, 2014. The Agency later asserted that it was not authorized to pay incentive payments after March 31, 2014, and that the incentive payments were therefore terminated as of that date. Some employees continued to receive incentive payments after March 31, 2014, but some of those employees later received debt-collection letters from the Agency's payroll processor to collect the erroneous payments.

The Union filed a grievance, which was unresolved, and the parties submitted the matter to arbitration.

Before the Arbitrator, the Agency argued, as relevant here, that the grievance was not arbitrable. According to the Agency, the grievance was not arbitrable as to the RNs because it concerned their compensation, and 38 U.S.C. § 7422(b)(3) precludes grievances over "the establishment, determination, or adjustment of employee compensation." As to the LPNs, the Agency argued that the grievance was not arbitrable because 5 C.F.R. § 575.311(g) provides that "[t]he termination of a retention[-]incentive service agreement or the reduction or termination of a retention incentive under this section is not grievable or appealable."[1] Conversely, the Union argued, as relevant here, that, although the Secretary of Veterans Affairs would have to decide whether 38 U.S.C. § 7422(b)(3) made the grievance non-arbitrable as to the RNs, the Arbitrator should find that the grievance was arbitrable as to the LPNs and, therefore, decide the grievance on the merits. In this regard, the Union acknowledged that the Agency had the right to terminate the incentive payments, but argued that the Agency could not do so retroactively.

[1] 5 C.F.R. § 575.311(g).

The Arbitrator agreed that the grievance was arbitrable as to the LPNs. Although the Arbitrator noted that both 5 C.F.R. § 575.311(g) and the Agency's handbook did not permit grievances over the termination of a retention incentive, the retention-incentive agreements signed by the employees provided that "employees 'will be notified in writing of the reduction or termination of [the] retention incentive and will be entitled to receive incentive payments through the end of the pay period in which the written notice is provided.'"[2] Based on this language, the Arbitrator found that he could interpret, and enforce, the retention-incentive agreements until the Agency terminated them in writing, and that the grievance was therefore arbitrable as to the LPNs. But the Arbitrator found that the grievance was not arbitrable to the extent that it sought relief on behalf of the RNs, based on the Union's "conce[ssion]" that he "d[id] not have the power to award relief to [the] RNs."[3]

On the merits, the Arbitrator found that the LPNs' retention-incentive agreements were valid and enforceable through July 27, 2014. As a remedy the Arbitrator ordered the Agency to make whole any "LPNs who signed retention agreements for any period after March 31, 2014[,] and who were obligated by the Agency to return money to the Agency or who were not paid for a retention incentive for the period [of] April 1, 2014[,] through the pay period ending [on] or including July 27, 2014."[4]

Both the Union and the Agency then filed exceptions to the award. The Union filed an opposition to the Agency's exceptions; however, the Agency did not file an opposition to the Union's exceptions.

III. Preliminary Matters: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Union's exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations,[5] the Authority will not consider arguments offered in support of an exception if those arguments differ from, or are inconsistent with, a party's arguments to the arbitrator.[6]

Here, the Union argues that the Arbitrator exceeded his authority by determining that the grievance was not arbitrable as to the RNs and that this determination was contrary to law.[7] But the Arbitrator found that the Union "conceded that the [Arbitrator] d[id] not have the power to award relief to [the] RNs,"[8] and the Union does not challenge this finding as a nonfact.[9] Accordingly, §§ 2425.4(c) and 2429.5 bar the Union's exceptions to the Arbitrator's determination that the grievance was not arbitrable as to the RNs, and we therefore dismiss the Union's exceptions.

IV. Analysis and Conclusions: The Arbitrator's determination that the grievance was arbitrable as to the LPNs is contrary to law.

The Agency argues that, with respect to the LPNs, the Arbitrator's arbitrability determination is contrary to 5 C.F.R. § 575.311.[10] 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.[11] 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.[12] In making that assessment, the Authority defers to the arbitrator's underlying factual findings[13] unless a party demonstrates that the findings are nonfacts.[14]

Title 5, § 575.311(g) of the Code of Federal Regulations provides that "[t]he termination of a retention[-]incentive service agreement or the reduction or termination of a retention incentive under this section is not grievable or appealable." Likewise, 5 C.F.R. § 575.308(a) provides that the establishment of a retention incentive is within "[an agency's] sole and exclusive discretion, subject only to OPM review and oversight." Thus, the Agency argues that, based on these regulations, the grievance is non-grievable and non-arbitrable as a matter of law.[15] Conversely, the Union claims that "[t]he [a]ward does not conflict with the [A]gency's right to provide or discontinue incentives but simply finds . . . that the [A]gency awarded the

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[2] Award at 18 (quoting Agency Exceptions, Attach. 9) (alteration in original).
[3] *Id.* at 15.
[4] *Id.* at 22-23.
[5] 5 C.F.R. §§ 2425.4(c), 2429.5.
[6] *E.g.*, *U.S. Dep't of VA, Bos. Healthcare Sys., Bos., Mass.*, 68 FLRA 116, 118 (2014) (citing *AFGE, Council of Prison Locals, Local 405*, 67 FLRA 395, 396 (2014)).
[7] Union Exceptions at 4-5.
[8] Award at 15.
[9] *See U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Forrest City, Ark.*, 68 FLRA 672, 673 (2015). *C.f. U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010) (setting aside award based on nonfact that "[a]gency had admitted favoritism").
[10] Agency Exceptions at 4.
[11] *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)).
[12] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998) (*NFFE*)).
[13] *Id.* (citing *NFFE*, 53 FLRA at 1710).
[14] *E.g.*, *NAGE, Local R4-17*, 67 FLRA 4, 6 (2012) (citing *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008)).
[15] Agency Exceptions at 4-5.

incentives and did not terminate them until July 2014[,] and that the employees are entitled to the payments until they were terminated."[16]

This case concerns the Agency's purported retroactive termination of grievants' retention-incentive agreements. And, regardless of whether the retroactive termination of the retention-incentive agreements is consistent with the terms of the retention-incentive agreements themselves, it is, by definition, a "termination of a retention incentive."[17] Accordingly, the grievance is not arbitrable under 5 C.F.R. § 575.311(g).

As such, the Arbitrator's determination that the grievance was arbitrable as to the LPNs is contrary to law, and we therefore set aside that portion of the award. In light of this determination, we need not address the Agency's argument that the award is contrary to its right to retain employees under § 7106(a)(2)(A) of the Federal Service Labor-Management Relations Statute.[18]

V. Decision

We grant the Agency's exceptions and set aside the portion of the award addressing the LPNs. We dismiss the Union's exceptions.

[16] Union Opp'n at 5.
[17] 5 C.F.R. § 575.311(g).
[18] 5 U.S.C. § 7106(a)(2)(A).