69 FLRA No. 40

ANTILLES CONSOLIDATED
EDUCATION ASSOCIATION
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DOMESTIC DEPENDENT
ELEMENTARY AND SECONDARY SCHOOLS
FORT BUCHANAN, PUERTO RICO
(Agency)

0-AR-5157

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DECISION

April 4, 2016

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

I. Statement of the Case

Arbitrator Charles W. Kohler issued an award finding that the Agency did not violate the parties' collective-bargaining agreement, 5 C.F.R. § 351.201(a)(2), or 10 U.S.C. § 129 when it conducted a reduction in force (RIF). The Arbitrator also found that, in offering a part-time position to an employee displaced by the RIF, the Agency did not violate 5 U.S.C § 3403, part of the Federal Employees Part-Time Career Employment Act (Part-Time Act)[1] and that an alleged past practice did not apply to the grievant. The Union filed an exception to the Arbitrator's award solely challenging the Arbitrator's conclusion concerning the Part-Time Act.

The Union argues that the award is contrary to 5 U.S.C. § 3403(a) and (b). Specifically, the Union argues that the Agency violated § 3403(a) and (b) by "convert[ing] the grievant's full-time position to a part-time position" and "requir[ing the grievant] to accept part-time employment as a condition of continued employment."[2] Because the Arbitrator's factual findings support his legal conclusion that the Agency did not violate § 3403(a) and the Union does not demonstrate that the Agency violated § 3403(b), we deny this exception.

II. Background and Arbitrator's Award

The Agency provides elementary and secondary education to eligible dependents of military members and certain federal civilian employees who reside on military installations in the continental United States or who are assigned to Puerto Rico and Guam. As pertinent here, the Agency operates four schools in Puerto Rico. Due to decreased enrollment in these schools, the Agency initiated a corresponding decrease in staffing in all Puerto Rican schools through a RIF. After exhausting other means of reducing staff, the Agency determined that it needed to eliminate 3.5 full-time equivalent (FTE) positions at the Ramey School. The grievant worked as a Spanish teacher at that school, and her full-time position occupied two half FTEs. Due to the RIF, the Agency eliminated one of the grievant's half FTEs. In a letter, the Agency informed the grievant that the Agency was abolishing her full-time Spanish teacher position, as it was no longer supported by two half FTEs, but offered her a part-time Spanish teacher position in lieu of separation. The Union filed a grievance. The grievance remained unresolved, and the parties submitted the matter to arbitration.

The Arbitrator framed the issues as (1) whether the RIF "was bona fide and conducted" in accordance with the parties' agreement; (2) whether "the conversion of [the grievant] to part-time employment status violate[d]" the Part-Time Act; and (3) whether the Agency violated a past practice.[3]

At arbitration, the Union argued that the Agency failed to meet the requirements of the parties' agreement and federal law when conducting the RIF and that, even if the RIF was proper, the Agency violated a past practice of offering displaced teachers positions as educational aides with saved pay. The Union also argued that, by offering the grievant the option of a part-time position, the Agency violated 5 U.S.C. § 3403. This section of the Part-Time Act prevents agencies from eliminating a full-time position "in order to make the duties of such position available to be performed on a part-time career employment basis" and from requiring a full-time employee to accept a part-time position "as a condition of continued employment."[4]

The Agency argued that, in conducting the RIF, it complied with the parties' agreement and federal law and that there was no past practice between the parties of offering displaced teachers a position as an educational

[1] 5 U.S.C. §§ 3401-3408.
[2] Exceptions at 4.
[3] Award at 7.
[4] 5 U.S.C. § 3403.

aide with saved pay. Additionally, the Agency argued that it did not violate 5 U.S.C. § 3403 because it did not conduct the RIF with the purpose of making the duties of a full-time employee available to a part-time employee.

The Arbitrator first found that "[t]he Agency has established that the RIF was justified by an overall decline in enrollment at [Agency] schools"[5] and that "[t]he Agency has also demonstrated that it followed the [parties' agreement] and the RIF regulations in applying the RIF to the [g]rievant."[6] Furthermore, the Arbitrator found that the past practice alleged by the Union would not apply because the "[g]rievant's situation was not equivalent to that of the teachers who were [previously] offered educational aide positions" and that "even assuming the existence of a binding past practice, the Agency was not required to offer the [g]rievant a position as an educational aide with saved pay."[7]

The Arbitrator also found that the Agency did not violate 5 U.S.C. § 3403. Specifically, the Arbitrator, relying on *Matthews v. EPA*,[8] found that "[t]here is no evidence to show that the Agency imposed the RIF in order to make [the g]rievant's duties 'available to be performed on a part-time career employment basis.'"[9] The Arbitrator then concluded that "[t]here is insufficient evidence to show that the action taken by the Agency with respect to the [g]rievant violated the [Part-Time Act]."[10]

The Arbitrator denied the Union's grievance in its entirety.

The Union filed an exception to the award; the Agency filed an opposition to that exception.

III. Analysis and Conclusion: The award is not contrary to 5 U.S.C. § 3403.

The Union alleges that the award is contrary to the Part-Time Act.[11] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception de novo.[12] 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.[13] In making this assessment, the Authority defers to the arbitrator's underlying factual findings.[14]

The Union contends that by (1) abolishing an encumbered full-time position and making the duties of that position available to be performed on a part-time basis, and (2) "requir[ing the grievant either] to accept part-time employment as a condition of continued employment"[15] or to separate from federal service, the Agency "violated *both* explicit prohibitions contained in [5 U.S.C.] § 3403."[16]

In order to increase part-time opportunities in the federal government,[17] Congress passed the Part-Time Act. To address concerns that the promotion of part-time employment would threaten federal employees in full-time positions,[18] Congress included 5 U.S.C. § 3403, placing limits on the creation of part-time positions. As part of the Part-Time Act, § 3403 states that:

> (a) An agency shall not abolish any position occupied by an employee in order to make the duties of such position available to be performed on a part-time career employment basis.
>
> (b) Any person who is employed on a full-time basis in an agency shall not be required to accept part-time employment as a condition of continued employment.[19]

Therefore, the first subsection, § 3403(a), prevents an agency from eliminating an encumbered full-time position in order to create a part-time position with the same duties, while the second subsection, § 3403(b), prevents an agency from circumventing the first subsection by coercing an employee out of a full-time position into a part-time position "as a condition of continued employment."[20]

Considering the text and the legislative history of 5 U.S.C. § 3403, we find that the Arbitrator did not err in concluding that the Agency did not violate this statute. As noted above, in order to violate § 3403(a), an agency

[5] Award at 20.
[6] *Id.* at 21.
[7] *Id.* at 24.
[8] 18 M.S.P.R. 533, 536-37 (1984) (*Matthews*).
[9] Award at 22 (quoting 5 U.S.C. § 3403).
[10] *Id.*
[11] Exceptions at 4-7.
[12] *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)).
[13] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[14] *Id.*
[15] Exceptions at 4.
[16] *Id.* at 5.
[17] S. Rep. No. 95-1116, at 1 (1978) (Senate Report); Exceptions at 4 (citing Senate Report).
[18] Senate Report at 16.
[19] 5 U.S.C. § 3403.
[20] *Id.*

must eliminate an encumbered full-time position with the intent "to make the duties of such position available to be performed on a part-time career employment basis."[21] However, the Arbitrator did not find that the Agency eliminated the grievant's position with the intent to make the duties of the grievant's full-time position available as a part-time position. The Arbitrator found – and the Union does not challenge as a nonfact – that "[t]here is no evidence to show that the Agency imposed the RIF in order to make [the g]rievant's duties 'available to be performed on a part-time career employment basis.'"[22] On the contrary, the Arbitrator found that "the RIF was justified by an overall decline in enrollment."[23] Because a decline in overall enrollment – not an intent to convert the grievant's full-time position into a part-time position – prompted the Agency to eliminate the grievant's position, the Agency lacked the intent required to violate 5 U.S.C. § 3403(a).[24]

Additionally, the Agency did not violate 5 U.S.C. § 3403(b). The restriction in § 3403(b) applies where an agency coerces[25] an employee that is "employed on a full-time basis in an agency" into a part-time position.[26] As noted above, this subsection operates to prevent an agency from forcing a full-time employee out of his or her position and into a part-time position. However, the Arbitrator found that the Agency eliminated the grievant's full-time employment through a valid RIF and then offered her the option of a part-time position. Because the Agency eliminated the grievant's full-time position, the grievant was no longer a "person who is employed on a full-time basis in" the Agency, and § 3403(b) did not apply.

Furthermore, the Arbitrator did not find that the Agency coerced the grievant out of her full-time position. Instead, the Arbitrator found that the Agency "*offered* the part-time position to the [g]rievant,"[27] and "gave the [g]rievant the *option* of accepting or declining the part-time position";[28] the Arbitrator also found that the grievant "*elected* to accept the offer of the part-time position."[29] Because the Agency did not coerce the grievant out of her full-time position, it did not violate 5 U.S.C. § 3403(b).

Consequently, the Union does not demonstrate that the award is contrary to 5 U.S.C. § 3403(a) or (b). Therefore, we deny this exception.

IV. Decision

We deny the Union's exception.

[21] *Id.*
[22] Award at 22 (quoting 5 U.S.C. § 3403(a)).
[23] *Id*. at 20.
[24] *See Matthews*, 18 M.S.P.R. at 536-37 ("[T]he agency established that its actions were motivated by a legitimate management consideration . . . . The RIF was undertaken due to a decreased allocation for full[-]time positions. . . . The abolishment of appellant's position was not prompted by an intent to make the duties of appellant's position available to a part-time employee, and thus 5 U.S.C. § 3403 was not violated.").
[25] Senate Report at 2 ("The legislation also provides that no full-time employee can be coerced into taking a part-time position as a condition of continued employment.").
[26] 5 U.S.C. § 3403(b).
[27] Award at 24 (emphasis added).
[28] *Id.* at 23 (emphasis added); *see also id.* at 5 ("The Agency issued a letter that *offered* [the g]rievant the *choice* of either being separated from the Agency, or being placed in a part-time teaching position. (emphases added)).
[29] *Id.* at 24 (emphasis added).