UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

DEFENSE LOGISTICS AGENCY DEFENSE DISTRIBUTION DEPOT RED RIVER TEXARKANA, TEXAS Respondent and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R14-52 Charging Party	Case No. DA-CA-01-0369

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his/her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JUNE 9, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 "K" Street, N.W., 2nd Flr.
Washington, D.C. 20424

PAUL B. LANG
Administrative Law Judge

Dated: May 8, 2003
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: May 8, 2003

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: DEFENSE LOGISTICS AGENCY
DEFENSE DISTRIBUTION DEPOT RED RIVER
TEXARKANA, TEXAS
Respondent

and Case No. DA-CA-01-0369

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES
LOCAL R14-52
Charging Party

Pursuant to section 2423.26(c) of the Rules and Regulations 5 C.F.R. § 2423.26(c), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the Motions for Summary Judgment and other supporting documents filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 03-26
WASHINGTON, D.C.

DEFENSE LOGISTICS AGENCY DEFENSE DISTRIBUTION DEPOT RED RIVER TEXARKANA, TEXAS Respondent and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R14-52 Charging Party	Case No. DA-CA-01-0369

David Dalton, Esquire
For the Respondent

M. Jefferson Euchler, Esquire
For the Charging Party

Stefanie Arthur, Esquire
For the General Counsel

Before: PAUL B. LANG
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

Statement of the Case

This case arises out of an unfair labor practice charge filed by the National Association of Government Employees (NAGE), Local R14-52 (the Union), against the Defense Logistics Agency, Defense Distribution Depot, Red River (DDRT), Texarkana, Texas (the Respondent), on February 6, 2001. On September 20, 2002, the Regional Director of the Dallas Region, Federal Labor Relations Authority issued a Complaint and Notice of Hearing in which it was alleged that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute), by failing to comply with an award of Arbitrator Donald P. Goodman issued on January 22, 2000, in Case Number FMCS 99-07626

(Award).[1] The unfair labor practice is alleged to have occurred on and after October 3, 2000, at which time the Union requested that the Respondent comply with the Award after the Authority denied the Respondent's exceptions on September 13, 2000.

The Respondent filed a Motion for Summary Judgment on January 29, 2003. On February 12, 2003, the General Counsel filed an opposition to the Respondent's motion along with a Cross-Motion for Summary Judgment. The Respondent did not file an opposition to the cross-motion.

Positions of the Parties

The General Counsel maintains that, if the Respondent had fully complied with the Award, Travis Allen (Grievant) would have been selected to fill the position of Motor Vehicle Operator Leader and would have been provided with back pay from November 1, 1998 (when he should have been selected), to the date of his retirement.

The Respondent maintains that it has fully complied with the Award in which the Arbitrator directed it to rerun the selection process using the same criteria as were applied when Cheryl Yount was originally selected for the position. Yount was not to be considered because she was not qualified for the position at the time of the original selection. Norma Jones was also not to be considered because she had previously declined the appointment. The Respondent maintains that the Grievant was not selected because he was not qualified for the position due to his lack of leadership experience and that his non-competitive promotion would have been illegal. Furthermore, the Grievant's selection would have run counter to the language of the collective bargaining agreement which states that an employee selected for a temporary promotion must meet the requirements of the prospective assignment.

Findings of Fact[2]

At some point prior to November 1998, a temporary vacancy for a Motor Vehicle Operator Leader, WL-5703-08, occurred at the Respondent's facility. The vacant position

[1] Although the Regional Director initially dismissed the unfair labor practice charge, the Union's appeal was sustained by the General Counsel and the case was remanded for the issuance of a Complaint and Notice of Hearing.

[2] The parties agree that there is no dispute as to material facts, but only as to the extent of the Respondent's obligation under the Award.

was in the bargaining unit whose members were represented by the Union. The Respondent elected to fill the vacancy by non-competitive means, thereby requiring it to comply with Article XXV, Section 6 of the collective bargaining agreement which states:

> Non-competitive temporary assignments to higher-graded positions will be accomplished on a rotational basis, to the extent practicable from among employees in the normal line of progression (at the next lower Level) in the immediate organizations. Employees selected must meet the requirements of the prospective assignment.[3]

The Grievant, Yount and Jones were among those considered eligible for consideration. At some point Jones stated that she was not interested and her name was removed from consideration. Yount was eventually selected and, on or about November 1, 1998, was given a temporary promotion to the position of Motor Vehicle Operator Leader. The Grievant, directly or through the Union, initiated a grievance in which he alleged that Yount was not qualified for the position because she did not hold a Commercial Driver's License (CDL).[4]

The Respondent's position, as stated in the Award, was that, at the time of Yount's promotion, the position of Motor Vehicle Operator Leader did not require a CDL and that, as a practical matter, an employee in a WL-08 position is rarely required to operate a semi. The most important qualification for the position is the ability to lead; Yount had experience as a leader. The requirement of a CDL was imposed after Yount was promoted, at which time she, the Grievant and certain other employees obtained the license. The Respondent also contended that the Grievant would not have been selected in any case because he would have been third in line for promotion if all eligible employees had been in the rotational pool.

The Arbitrator found that, in selecting Yount, the Respondent had acted contrary to the language of Article XXV, Section 6 because Yount was not fully qualified

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[3] This language has been taken from the Award (G.C. Ex. 3; Resp. Ex. 1). Neither the collective bargaining agreement itself, nor any part thereof, has been offered as an exhibit by either party.

[4] A CDL is required in order to drive a semi-detached tractor-trailer rig (semi).

for the position at the time of her selection.[5] In so ruling, the Arbitrator distinguished the circumstances of the grievance from the facts in *National Labor Relations Board and National Labor Relations Board Union*, 54 FLRA 56, 62 (1998), in which the Authority held that an arbitration award was contrary to law because it infringed upon the exercise of a management right within the meaning of §7106 (a) of the Statute. According to the Arbitrator, the Union was not contesting the right of the Respondent to determine the qualifications and method of selection for the position of Motor Vehicle Operator Leader. The Arbitrator further stated that the thrust of the Union's position was that, once having exercised its management rights, the Respondent was obligated to implement its decision in accordance with the collective bargaining agreement. This meant that the Respondent should not have waived the CDL requirement after it had been imposed. Moreover, the Respondent was not entitled to consider the relative merits of the various applicants in view of the contractual requirement that non-competitive temporary assignments be made on a rotational basis. In other words, the only legitimate question was whether the employee next in line for consideration met the minimum requirements for the vacant position.

Contrary to the urging of the Union, the Arbitrator did not order the Respondent to place the Grievant in the position of Motor Vehicle Operator Leader along with back pay from November 1, 1998, to the date of his retirement. Instead, the Arbitrator accepted the Respondent's argument that there was no proof that "only"[6] the Grievant would have been selected. Instead, the Arbitrator ruled that:

> The selection process will be rerun using the same criteria as was used at the time Yount was selected. Jones will not be considered as she declined the appointment. Yount will not be considered as she was not qualified at the time the vacancy was filled. Should the Grievant be selected he shall be entitled to retroactive pay from November 1, 1998 until the date of his retirement. (G.C. Ex. 3 at 9).

In *U.S. Department of Defense, Defense Logistics Agency, Defense Distribution Center, Defense Distribution Depot, Red River, Texarkana, Texas and NAGE, Local R14-52*,

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[5] The Arbitrator determined that a CDL was required at the time of Yount's selection.

[6] The inclusion of this word appears to have been a typographical error.

56 FLRA 637 (2000) (DoD), issued on September 13, 2000, the Authority denied the Respondent's exceptions to the Award, thus rendering the Award final and binding pursuant to §7122 of the Statute.

By memorandum dated October 2, 2000, Charles W. French, Chief of the Respondent's Storage and Major Items Division, requested that, in accordance with the Award, Steven Carney of the Personnel Office provide him with a list of Repromotion Eligible employees[7] for consideration for promotion to the WL-5703-08 Motor Vehicle Operator Leader position; Yount was to be excluded from consideration and the candidates, if any, were to be obtained solely from DDRT-S[8] (Resp. Ex. 3). By e-mail on the same date, Carney informed French that there were no repromotion eligible employees in DDRT-S to be considered for the vacant position (Resp. Ex. 4).

On October 10, 2000, French informed Carney that, had he known when the vacancy first occurred that there were no qualified repromotion eligible employees, he would have requested that the vacancy be filled through the Merit Promotion Program.[9] French further stated that he had decided not to fill the vacancy at that time since the need for another Motor Vehicle Operator Leader had been eliminated by the assignment of three supervisors to the Tuesday-Saturday tour (Resp. Ex. 5). By letter dated October 11, 2000, the Respondent informed the Union that it had implemented the Award and enclosed a copy of French's October 10 memorandum to Carney (Resp. Ex. 6).

Discussion and Analysis

Summary Judgment is Appropriate

In *Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee*, 50 FLRA 220, 222 (1995), the Authority held that the criteria for evaluating

[7] The Grievant was considered to be repromotion eligible because he had been demoted from a WG-10 to a WG-08 position through no fault of his own.

[8] DDRT-S apparently denotes the organization within the Respondent in which the vacancy existed. Since the Union has not challenged the limitation of the search to that organization it may be assumed that the Grievant had been assigned to DDRT-S.

[9] The Grievant could have applied if the vacancy had been advertised on a competitive basis.

motions for summary judgment under §2423.27 of the Rules and Regulations of the Authority are identical to those used by federal courts with regard to motions filed under Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c) provides that summary judgment:

> . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

Although not all of the exhibits to the motions have been verified under oath, their veracity has not been challenged and the General Counsel agrees with the Respondent that there are no genuine issues of material fact (G.C. Cross-Motion at 3). Thus, although the parties take diametrically opposite views of the legal conclusions which should be drawn from the facts, they do not dispute the proposition that summary judgment in some form is appropriate.

A review of the arguments and exhibits presented by the parties in their motions indicates that there is no dispute as to the events leading up to the underlying grievance, the text of the Award and the action taken by the Respondent to effectuate the Award. I have therefore determined that this case can and should be resolved by means of summary judgment.

The Award Does Not Require the Grievant's Promotion

In determining the adequacy of the Respondent's compliance with the Award, it must first be determined whether its construction of the Award is reasonable. That determination depends upon whether the construction is consistent with the entire award and with applicable rules and regulations. See, *Oklahoma City Air Logistics Center, Oklahoma City, Oklahoma*, 46 FLRA 862, 868 (1992) (*Oklahoma City*).

Perhaps the most significant aspect of the Award is the remedy. Contrary to the urging of the Union, the Arbitrator did not direct the Respondent to place the Grievant in the position of Motor Vehicle Operator Leader. He merely directed the Respondent to rerun the selection process as it was originally run, but with the elimination of Yount, who was determined not to have been qualified, and Jones, who had declined the position. In doing so, the Arbitrator

accepted the position of the Respondent that a retroactive promotion with back pay would have been inappropriate inasmuchas there was no proof that the Grievant would have been selected. The Grievant was to receive back pay from November 1, 1998, to the date of his retirement only if he were selected (G.C. Ex. 3 at 9).[10]

An examination of the Award leaves no doubt that the Arbitrator based his conclusions on the proposition that Yount was not qualified. In doing so, the Arbitrator rejected the Respondent's contention that Yount's experience as a leader made up for the fact that she was not licensed to drive a semi. In its presentation to the Arbitrator, the Respondent did not challenge the Grievant's qualifications for the vacant position other than with regard to his lack of a CDL at the time of Yount's selection.[11] However, the Respondent's attempt to justify Yount's selection on the basis of her past performance as a leader indicates that the issue of leadership experience is not an afterthought.

The prosecution of the grievance by the Union is a tacit acceptance of the Respondent's position that not all repromotion eligible employees are qualified to fill all vacancies. That position is consistent with the clear language of Article XXV, Section 6 of the collective bargaining agreement. The Union did not allege that Yount was not repromotion eligible, but rather that her lack of a CDL disqualified her from the specific position of Motor Vehicle Operator Leader. The Arbitrator also recognized that the Union was not challenging the Respondent's exercise of its management right to set the qualifications for that position.

The Award reflects the Arbitrator's conclusion that §7106 of the Statute did not preclude him from granting relief from the Respondent's erroneous application of the qualifications for the position of Motor Vehicle Operator Leader (G.C. Ex. 3 at 8). Simply stated, the Respondent was entitled to require a CDL for that position, but could not subsequently waive the requirement when filling a vacancy.

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[10] The Respondent did not propose this remedy if the Union prevailed. Rather, the Respondent maintained that there was no remedy available which would have benefitted the Grievant.

[11] The Respondent also contended that the Grievant would not have been selected because he was third in line in the rotation. That contention, whether or not accurate, may explain why the Respondent did not mention the Grievant's lack of leadership experience.

In dismissing the Respondent's exceptions, the Authority determined that the Award passed the two-prong test set forth in *U.S. Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C. and NTEU, Chapter 201*, 53 FLRA 146 (1997). The first prong is that the Award affects management rights under §7106 of the Statute. The second prong is that the Award properly reconstructs what the Respondent would have done had it complied with the collective bargaining agreement. *See*, *DoD*, 56 FLRA at 642.

The Respondent Properly Implemented the Award

The determination as to whether the Respondent has adequately complied with the Award depends upon the clarity of the Arbitrator's ruling. *United States Department of the Treasury, Internal Revenue Service, Austin Compliance Center, Austin, Texas*, 44 FLRA 1306, 1315 (1992). Once the Award is final it may not be changed either by the parties or by the Authority. *U.S. Department of the Air Force, Carswell Air Force Base, Texas*, 38 FLRA 99, 104 (1990); *Oklahoma City, supra*.

The General Counsel maintains that both the Arbitrator and the Authority specifically found that the Grievant was qualified for the position of Motor Vehicle Operator Leader. That contention is not borne out by a review of either the Award or the decision of the Authority. The most that can be said is that neither the Arbitrator nor the Authority specifically determined that the Grievant was *not* qualified for the position.[12] It is safe to assume that the Grievant was primarily concerned with the fact that he had not been promoted. Nevertheless, both the Union and the Respondent, as well as the Arbitrator, focused their attention on the related but separate issue, of Yount's qualifications and the impact of the grievance on management rights.[13]

If the Respondent had raised the issue of the Grievant's alleged lack of leadership experience the Arbitrator might have more clearly addressed the impact of

[12] The General Counsel contends that, if the Arbitrator had not determined that the Grievant was qualified for the vacancy he would not have provided for back pay if the Grievant were selected (G.C. Cross-Motion at 10). On the contrary, that portion of the remedy merely leaves open the possibility that the Grievant might be qualified.

[13] The language of the Award speaks for itself. Neither the Respondent's exceptions nor the Union's response suggest that the Arbitrator misstated their respective positions.

the Award on the Grievant. However, the Respondent's silence on that issue cannot reasonably be construed as a waiver of its right to establish job qualifications, especially since it attempted to justify Yount's selection by reference to her experience as a leader. In any event, the Award must stand as written.

The General Counsel also implies that the Respondent's construction of the Award runs counter to the Arbitrator's intent since it does not benefit the Grievant. That argument is unpersuasive. The thrust of the Award is that the Respondent may not set job qualifications and then disregard them. This precedent will undoubtedly benefit members of the bargaining unit other than the Grievant. It may be assumed that, in taking the grievance to arbitration, the Union was concerned with the effect of the Respondent's actions on the bargaining unit as a whole.

Briefly stated, the Respondent determined that the Grievant lacked the necessary leadership experience to be a Motor Vehicle Operator Leader. Furthermore, the Respondent concluded that it could not lawfully promote the Grievant to a WL-08 position by a non-competitive process because such a promotion would result in a higher hourly rate ($14.34) than the rate for the WG-10 position ($14.01) from which he had been demoted. It is not necessary to review that rationale in detail. It is only necessary to determine whether, in view of the language of the Award, the Respondent's action was consistent with its reasonable construction.

When viewed in the context of the Award, the Respondent's actions to put it into effect were entirely reasonable. The Arbitrator's rationale in sustaining the grievance was that Yount's selection was a violation of Article XXV, Section 6 of the collective bargaining agreement. If the Grievant lacked the necessary leadership experience for the position of Motor Vehicle Operator Leader[14], his non-competitive selection for the vacancy would have been a contractual violation identical to that which was set aside by the Arbitrator. Therefore, the selection of the Grievant would not have been a reasonable implementation of the Award.

For the foregoing reasons, I have concluded that the Respondent did not commit an unfair labor practice in violation of §7116(a)(1) and (8) of the Statute.

[14] The General Counsel has not disputed the proposition that leadership experience was a prerequisite for non-competitive selection or that the Grievant lacked such experience.

Consequently, the Respondent's Motion for Summary Judgment is granted and the General Counsel's Cross-Motion for Summary Judgment is denied.

I therefore recommend that the Authority issue the following Order:

ORDER

IT IS HEREBY ORDERED that the Complaint be, and hereby is, dismissed.

Issued, May 8, 2003, Washington, D.C.

PAUL B. LANG
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by PAUL B. LANG, Administrative Law Judge, in Case No. DA-CA-01-0369, were sent to the following parties:

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_____
CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: MAY 8, 2003
WASHINGTON, DC