

**63 FLRA No. 110**

UNITED STATES DEPARTMENT  
OF VETERANS AFFAIRS  
VETERANS AFFAIRS LONG BEACH HEALTH-  
CARE SYSTEM  
LONG BEACH, CALIFORNIA  
(Agency)

and

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES  
LOCAL 1203  
(Union)

0-AR-4236

—————  
DECISION

May 19, 2009

Before the Authority: Carol Waller Pope, Chairman and  
Thomas M. Beck, Member

Decision by Chairman Carol Waller Pope for the  
Authority

**I. Statement of the Case**

This matter is before the Authority on exceptions to an award of Arbitrator John D. Perone filed by the Agency under § 7122 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 found that the Agency violated the parties' collective bargaining agreement by failing to select the grievant for either of two posted vacancies. For the reasons discussed below, we grant the Agency's exceptions in part, dismiss them in part, and modify the Arbitrator's award to eliminate the portions related to the San Diego-La Jolla Medical Center and the change in supervision.

**II. Background and Arbitrator's Award**

The Union filed a grievance on behalf of the grievant alleging that the Agency violated the parties' agreement by twice failing to select the grievant for a position, which previously he had filled voluntarily, after it was upgraded to the GS-11 level. When the grievance was not resolved, it was submitted to arbitration.

At arbitration, the parties were unable to agree on a statement of the issue. Award at 2. As framed by the Arbitrator, the issue was: "Did the Agency violate the [parties' agreement] when it failed to select the [g]rievant for either of the two positions in vacancy announcement[s] 04-43 and 05-39. If so, what is the proper remedy?" *Id.* at 3.

The Arbitrator found that the Agency hired the grievant as a GS-9 medical technologist (MT) on the evening shift at the Long Beach Medical Center. Shortly thereafter, the grievant agreed to a six-month detail as an MT on the midnight shift at the same location. *Id.* After failing to find a permanent replacement, management asked the grievant to extend his detail to the midnight shift. The Arbitrator found that the grievant requested a return to the evening shift, but indicated that he would consider staying on the midnight shift if the position were upgraded to a higher GS level. Although there were "several discussions" between the grievant and his supervisor about upgrading the position, the grievant continued working the midnight shift as a GS-9 MT for approximately twelve more months. *Id.* at 3-4, 9.

After the Agency received approval to upgrade the midnight shift position to GS-11, it returned the grievant to the evening shift without notifying him of the upgrade and provided him with a \$250 monetary award for performing the detail. *Id.* at 4. When the grievant became aware of a vacancy announcement regarding two GS-11 MT positions on the midnight shift, he applied and was certified for the positions but was not interviewed and was not notified of his non-selection. *Id.* at 4-5. After learning three months later that the positions had been filled, the grievant filed a grievance. *Id.*

While this grievance was being processed, one of the individuals who had been selected for a position under the vacancy announcement resigned. *Id.* at 5. The Agency requested that a GS-7 employee postpone his retirement for six months, in exchange for a \$10,000 bonus, to temporarily fill the vacated position. The Agency then posted a new vacancy announcement for the position. Selection for this position was made by a performance-based interview panel, which was presided over by the Business Manager. The appellant applied, but was not selected, for this position. *Id.* at 6.

The Arbitrator determined that the Agency violated the parties' agreement by failing to select the grievant for any of the announced vacancies. *Id.* at 11. In this regard, the Arbitrator concluded that the record showed "a systematic pattern of behavior on the part of

[the Agency] to improperly exclude [the grievant] from promotion to positions he had successfully held for an extended period of time.” *Id.* The Arbitrator found it relevant that the Agency did not notify the grievant when the position was upgraded to GS-11 and did not notify him when the first vacancies were announced. *Id.* at 12. The Arbitrator also concluded that the involvement of the grievant’s supervisor and the Business Manager in the selection process violated Article 22 of the parties’ agreement.<sup>1</sup> In this connection, the Arbitrator determined that the testimony of the Agency witnesses was not credible as to their actions and motives. *Id.* at 12-13. The Arbitrator noted, in particular, that the supervisor’s testimony was “vacillating” and that the Business Manager’s testimony was “inconsistent.” *Id.* The Arbitrator found that, in addition to not being given a “fair opportunity” to apply for the position that he held for an extended period of time, the Agency treated the grievant in a “degrading” manner by offering him a bonus of only \$250 for filling the midnight shift position for over eighteen months when it was willing to offer a bonus of \$10,000 to another, lower-graded, employee to fill the same position for six months. *Id.* at 13.

As remedy, the Arbitrator ordered that the grievant be “immediately placed on a GS-11 pay schedule, with back pay to [the date the first vacancies were filled], and that he be given sole consideration for an MT GS-11 position at the San Diego-La Jolla [Medical Center], on a shift of his preference.” *Id.* The Arbitrator further ordered that the grievant be temporarily reassigned to different supervision in his current position at the Long Beach Medical Center. *Id.* at 14.

### III. Positions of the Parties

#### A. Agency’s Exceptions

The Agency asserts that the remedial portion of the award violates management’s rights, is contrary to regulations and case law regarding “make whole” awards,

1. The relevant portions of Article 22 provide:

Subsection C – Interviews: If interviews are used, they must be job-related, reasonably consistent, and fair to all candidates. Also, if interviews are used, all candidates must be interviewed if reasonably available in person or by telephone . . . .

Subsection D: Prior to considering candidates from outside the [Union] Bargaining Unit, the Employer agrees to first consider internal candidates for selection.

Subsection E: Any selection to a position that provides specialized experience that the Employee does not already have, and is required for subsequent promotion to a designated higher grade position and/or to a position with known promotion potential, must be made on a competitive basis.

Award at 10-11.

fails to draw its essence from the parties’ agreement, and is based on a nonfact.

In regard to its management’s rights argument, the Agency asserts that the grievant’s promotion to GS-11 and reassignment to different supervision affect management’s rights to hire and assign work. Exceptions at 2. Therefore, according to the Agency, Authority precedent requires the use of the two-prong set forth in *United States Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C.*, 53 FLRA 146 (1997) (*BEP*). The Agency states that the award satisfies prong I of *BEP* because it provides a remedy for violation of the parties’ agreement. *Id.* at 3. However, the Agency argues that the award does not satisfy prong II of *BEP* because it does not reconstruct what the Agency would have done had it not violated the parties’ agreement. *Id.* In this regard, the Agency maintains that the “correct remedy was to award the [g]rievant the job for which he was not selected.” *Id.* at 4. The Agency argues that the record does not support the possibility that it would have, or could have, assigned the grievant to a position in San Diego-La Jolla, which is an entirely different medical center, or that the grievant’s supervision would have changed. *Id.*

The Agency further argues that the award is contrary to Authority precedent regarding “make whole” awards. The Agency states that, to be made whole, the grievant was entitled only to the job advertised in the vacancy announcements. According to the Agency, to award the grievant a position on a shift of his preference in San Diego, where he lives, rather than in Long Beach, where the positions for which he applied are located, would make him better off rather than making him whole. *Id.* at 5-6 and 6 n.1. The Agency argues that the “appropriate remedy for a non-selection is to be given the same job, plus any back pay.” *Id.* at 6.

The Agency also asserts that the Arbitrator’s award should be set aside because it is based on the nonfact that the Agency could place the grievant in a position at a different facility. In this connection, the Agency states that the San Diego-La Jolla Medical Center is not a party to the grievance. *Id.* at 5. The Agency further argues that the award violates Article 40, § 2G of the parties’ agreement because it goes beyond the “local medical center” to involve a separate facility.<sup>2</sup> *Id.*

2. Article 40, § 2G provides, in relevant part: “An arbitrator’s award shall have only local application unless it was a national level grievance or the matter was elevated to the national level . . . .” Exceptions at 5.

### B. Union's Opposition

The Union asserts that the portion of the award entitling the grievant to a GS-11 position with backpay should be implemented because the Agency did not challenge it. Opposition at 3. The Union also asserts that events subsequent to the issuance of the award have affected its implementation. In this regard, according to the Union, the grievant “waived” the offer of “‘Priority Consideration’ at another facility” and the Agency “followed through” with the portion of the award regarding change of the grievant’s supervision.<sup>3</sup> *Id.*

The Union argues initially that, under Authority precedent, the Arbitrator’s award of promotion to a GS-11 position is not deficient under § 7106(a)(2)(c) of the Statute because it is a “proper reconstruction of what the Agency would have done had it not violated the parties’ agreement[.]” *Id.* at 5. The Union also contends that the Agency’s exceptions related to the remainder of the award are moot. In this regard, the Union asserts that exceptions related to the San Diego-La Jolla Medical Center are moot because that “portion of the remedy is waived per [the g]rievant.” *Id.* at 3, 5-6. The Union further argues that the exception related to the grievant’s supervision is moot because the supervisory changes ordered by the award have already been implemented. *Id.* at 3 (citing a memorandum, dated May 15, 2007, with the subject line “Temporary Change in Supervision”).

## IV. Discussion

### A. The exceptions are not moot in part.

The Union argues that the Agency’s exceptions are moot because of subsequent actions taken by both the grievant and the Agency. The Authority holds that an arbitration matter becomes moot when the parties no longer have a legally cognizable interest in the dispute. *See, e.g., AFGE, Local 171, Council of Prison Locals 33*, 61 FLRA 661, 663 (2006) (*AFGE, Local 171*) (Authority dismissed as moot a union exception regarding arbitration fees where agency had paid the disputed fees).

The Agency raises exceptions to two portions of the Arbitrator’s award. First, the Agency contends that the requirement that the grievant be offered a position at

the San Diego-La Jolla Medical Center is contrary to law and the parties’ agreement, and is based on a non-fact. However, in its Opposition, the Union states that “[t]his portion of the remedy is waived per [the g]rievant.” Opposition at 3. Consistent with the record, we interpret this “waiver” as the Union’s agreement that the Arbitrator’s specification of a posting at the San Diego-La Jolla Medical Center is unenforceable. Therefore, neither party has a “legally cognizable interest in the dispute” over whether a position at the San Diego-La Jolla Medical Center is an appropriate remedy. *See AFGE, Local 131*, 61 FLRA at 663; *see also United States Dep’t of Justice, INS, Jacksonville, Fla.*, 36 FLRA 928, 932 (1990) (the Authority found agency exception moot where the union agreed with the agency’s interpretation of the arbitration award as set forth in that exception). Accordingly, we find that the exceptions related to placement of the grievant at the San Diego-La Jolla Medical Center are moot and dismiss them.

Second, the Agency argues that the portion of the Arbitrator’s award related to the grievant’s supervision is contrary to management’s rights. Exceptions at 4. The Union asserts that this exception is also moot because the Agency has already assigned the grievant to a different supervisor. Opposition at 6. Contrary to the Union’s assertion, however, in previous cases concerning arbitration awards directing a change of supervision, the Authority has held that the issue of management’s rights is not moot merely because the agency made changes to supervision following issuance of the award. *See, e.g., United States Dep’t of Justice, Fed. Bureau of Prisons, Metro. Det. Ctr., Guaynabo, P.R.*, 59 FLRA 787, 790 (2004) (*BOP, Guaynabo*); *Soc. Sec. Admin., Boston Region (Region 1), Lowell Dist. Office, Lowell, Mass.*, 57 FLRA 264, 268 (2001) (Member Wasserman dissenting in part) (*SSA, Boston*). In this regard, the Authority has held that evidence of voluntary changes to a grievant’s supervision does “not establish that the [a]gency no longer has a legally cognizable interest in the disputed requirement of the [a]ward” because “a real possibility exists that the supervisor could, in the future, be called upon to supervise the grievant again.” *SSA, Boston*, 57 FLRA at 268; *see also BOP, Guaynabo*, 59 FLRA at 790. Likewise, in the present case, there is no evidence that a change in supervision, which was made pursuant to a memorandum with the subject line “Temporary Change in Supervision[.]” is permanent. Opposition at 3. As this change in supervision may be altered at any time, both parties may still have a legally cognizable interest in the dispute. Accordingly, we find that the portion of the management’s rights exception related to supervision is not moot and address it below.

3. The Union makes several references to the grievant’s waiver of the Arbitrator’s asserted award of “Priority Consideration.” *See, e.g.,* Opposition at 3. As the context of this and other references makes clear that the Union is referencing the Arbitrator’s award of “sole consideration” for a GS-11 position at the San Diego-La Jolla Medical Center, we have so interpreted it.

B. The award is contrary to management's rights under § 7106 of the Statute.

The Agency's management's rights exception challenges the award's consistency with law. The Authority reviews the question of law raised by the exception and the Arbitrator's award *de novo*. See *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a *de novo* standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. See *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. See *id.*

To resolve an assertion that an arbitrator's award violates management's rights, the Authority first determines whether the award affects management's rights. See *United States Small Bus. Admin.*, 55 FLRA 179, 184 (1999). The Authority has held that precluding a supervisor from performing certain duties affects management's right to assign work. *AFGE, Local 3529*, 56 FLRA 1049, 1051 (2001). The Arbitrator's award precludes certain management officials from supervising the grievant. Therefore, we find that the award affects management's right to assign work.

Where an award affects management's rights under § 7106, the Authority assesses the legality of the award under a two-prong test. *BEP*, 53 FLRA at 153-54. The *BEP* test provides as follows:

Under prong I, the Authority examines whether the award provides a remedy for a violation of either an applicable law, within the meaning of § 7106(a)(2) of the Statute, or a contract provision that was negotiated pursuant to § 7106(b) of the Statute. If the award provides such a remedy, the Authority will find that the award satisfies prong I of the framework and will then address prong II. Under prong II of the *BEP* framework, the Authority considers whether the arbitrator's remedy reflects a reconstruction of what management would have done if management had not violated the law or contractual provision at issue. If the arbitrator's remedy reflects such a reconstruction, then the Authority will find that the award satisfies prong II. An award that fails to satisfy either prong I or prong II will be set aside or remanded to the parties, as appropriate.

*SSA, Boston*, 57 FLRA at 268-69 (citations omitted).

There is no dispute that the Arbitrator's award satisfies prong I of *BEP*. Exceptions at 3. Under prong II, the Agency states that, in accordance with the Arbitrator's findings, if it had complied with Article 22 of the parties' agreement, then it would have selected the grievant for one of the vacant positions that were the subject of the grievance. The Agency argues, however, that it would not have changed the grievant's supervision, which was the same for both the position he had and the ones for which he applied. Exceptions at 4.

This case is similar to *SSA, Boston*, in which the arbitrator found that the agency failed to treat the grievant with dignity, courtesy, and respect, as required by the parties' agreement, and ordered the agency to reassign the grievant to a different supervisor. *SSA, Boston*, 57 FLRA at 269. The Authority found that this remedy failed to satisfy prong II of *BEP* because none of the contractual provisions that the agency violated had any relation to supervisory assignment. *Id.* Likewise, here, the contractual provisions violated by the Agency involve candidate selection guidelines, and not supervisory assignment. Award at 12. Additionally, there is no indication from the record or the Arbitrator's findings that the Agency would have placed the grievant under different supervision if he had been selected for a GS-11 MT position. Therefore, we find that the portion of the Arbitrator's award addressing the grievant's supervision fails to meet prong II of *BEP*. As it is deficient, we set aside that portion of the award. See *United States Dep't of Agric., Fed. Grain Inspection Serv., Grain Inspection, Packers & Stockyards Admin.*, 58 FLRA 98, 100 (2002) (where Authority set aside portion of award, but left other remedies undisturbed, there was no need for remand).

## V. Decision

We grant the Agency's exceptions in part and dismiss them in part, consistent with the findings above. We modify the Arbitrator's award to the extent required to eliminate the portions related to assignment at the San Diego-La Jolla Medical Center and change in supervision.