64 FLRA No. 37

SOCIAL SECURITY ADMINISTRATION
NEWARK, NEW JERSEY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2369
(Union)

0-AR-4291

ORDER DISMISSING EXCEPTION

November 24, 2009

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator David N. Stein 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 exception. [1]

The Arbitrator found that the Agency violated the parties' agreement by failing to select the grievant for a promotion. As a remedy, the Arbitrator ordered the Agency to promote the grievant retroactively. For the reasons set forth below, we dismiss the Agency's exception as barred by § 2429.5 of the Authority's Regulations.

II. Background and Arbitrator's Award

In 2001, the Social Security Administration's New York Region (Region) issued a vacancy announcement for several GS-9 Claims Representative positions. *See* Award at 2. The grievant applied for the GS-9 Claims Representative position at three different field offices. Although rated "well-qualified" by each of the offices, the grievant was not selected for any of the vacant positions. At the time of the announcement, the grievant had been a GS-8 Representative for three years. *See id*. at 2-3.

The Union filed a grievance challenging the Agency's failure to select the grievant. The matter was not resolved and was submitted to arbitration. The parties stipulated to the following issues:

> Was the grievant . . . stagnated in grade in accordance with Article 26, Section 11C of the [parties' agreement]?
>
> If so, was she properly considered for the Claims Representative position . . . for the Paterson, Montclair and Hackensack, NJ District Offices?
>
> If not, what shall be the remedy?

Id. at 1.

The Union claimed that the grievant was stagnated in grade because she had been in her position for several years without advancement. As a result, according to the Union, under Article 26, § 11C of the parties' agreement, the Agency was required to "seriously consider" the grievant for the vacant positions at the Paterson, Montclair, and Hackensack offices. [2] *Id*. at 7. The Agency contended that the grievant was not stagnated in grade, but that, even if she were stagnated, she was less qualified than the employees who had been selected to fill the vacancies. *See id*. at 9-10. The Agency did not raise any other defense.

The Arbitrator concluded that the grievant was stagnated in grade. The Arbitrator noted that the selecting official for the Paterson and Montclair offices (Official F) and the selecting official for the Hackensack office (Official P) "unequivocally testified that [the grievant] had been stagnated in grade." *Id*. at 11. In the absence of any other evidence, the Arbitrator determined that the officials' undisputed testimony bound the Agency. *See id*.

Since the grievant was stagnated in grade, the Arbitrator noted that the selecting officials were required to "seriously consider" the grievant for vacancies. *See id*. The Arbitrator determined that both selecting officials provided the grievant's candidacy "only the most cursory and therefore, unreasonable, review." *Id*. at 12. The Arbitrator found, however, that, whereas Official P provided evidence that the employee selected

1. The Agency filed a supplemental submission to correct an error in its exception. The Agency, however, did not request permission to file its submission under 5 C.F.R. § 2429.26. Accordingly, we will not consider the submission. *See, e.g., NAIL, Local 6*, 63 FLRA 232, 232 n.1 (2009).

2. Article 26, § 11C provides, as relevant, that selecting officials "will seriously consider providing upward mobility for those well-qualified candidates who have been stagnated in grade." Award at 3. As noted previously, the grievant was rated "well-qualified" by the selecting officials.

for the position "possessed 'a substantial greater potential for successful performance' as a Claims Representative" than the grievant, Official F made no such showing. *Id*. at 13. Accordingly, the Arbitrator found that the Official F violated Article 26, § 11C of the parties' agreement. *See id*.

As a remedy, the Arbitrator ordered the Agency to promote the grievant "to the position of Claims Representative retroactive to the date of promotion of the employee promoted to Claims Representative by [Official F] with full back pay and benefits, together with interest at the appropriate rate." *Id*. at 14.

III. Positions of the Parties

A. Agency's Exception

The Agency argues that the Arbitrator's award of a retroactive promotion for the grievant violates management's right to select under § 7106(a)(2)(C) of the Statute. [3] *See* Exceptions at 3-4 (citations omitted). The Agency further asserts that, because the award affects the exercise of a management right, the Authority should apply the framework set forth in *United States Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C.*, 53 FLRA 146 (1997) (*BEP*). *See id*. at 4. The Agency concedes that the award satisfies prong I of the two-prong test set forth in *BEP* since the Arbitrator concluded that the Agency violated the contract. *See id*. However, the Agency contends that the award fails to satisfy prong II as the Arbitrator did not reconstruct what the Agency would have done in the absence of the contractual violation. *See id*. at 4-5 (citing *SSA*, 61 FLRA 315, 318 (2005) (*SSA*) (then-Member Pope dissenting in part)). The Agency argues that, because the Arbitrator failed to establish that, but for its contractual violation, the Agency would have selected the grievant, the Arbitrator was not legally permitted to award a retroactive promotion. Accordingly, the Agency requests that the Authority set aside the award. *See id*. at 5-6.

B. Union's Opposition

The Union concedes that the Arbitrator's award affects management's right to select and, therefore, is subject to the *BEP* analysis. *See* Opposition at 4. In addition, the Union agrees with the Agency that the Award satisfies prong I of *BEP*; the Union disagrees, however, that the Award fails to satisfy prong II. *See id*. The Union claims that, since the Agency failed "to show that any other candidate exhibited 'substantially greater potential for successful performance,'" the Agency effectively conceded that it would have selected the grievant had she been given serious consideration. *Id*. at 5. The Union also asserts that *SSA* does not control because the Arbitrator's determination in this case that the grievant would have received the position but for the Agency's contractual violation is "far more detailed and specific" than the arbitrator's determination in that case. *Id*. at 6. Alternatively, the Union argues that, if the Authority finds the award deficient under prong II of *BEP*, it should remand the Award for clarification. *See id*.

IV. The Agency's management rights exception is barred by § 2429.5 of the Authority's Regulations

Under 5 C.F.R. § 2429.5, the Authority will not consider issues that could have been, but were not, presented to an arbitrator. *See, e.g., U. S. Dep't of the Treasury, IRS, Andover, Mass.*, 63 FLRA 202, 205 (2009) (*IRS*). In its exception, the Agency argues that the award of a retroactive promotion for the grievant violates management's right to select under § 7106(a)(2)(C) of the Statute.

As set forth above, the parties stipulated to three issues for resolution by the Arbitrator: (1) whether the grievant was stagnated in grade; (2) whether the grievant was properly considered for the vacant positions; and (3) if not, what should the remedy be. *See* Award at 1. The Union specifically requested that, if a violation were found, the Arbitrator should order the Agency retroactively to promote the grievant to a Claims Representative position. *See id*. at 8-9 (Union requesting "that [the grievant] be promoted to Claims Representative . . . with back pay and interest"). Thus, the Agency had notice that the Arbitrator might award a retroactive promotion. However, the record contains no indication that the Agency argued to the Arbitrator that such a remedy would violate management's right to select under § 7106(a)(2)(C) of the Statute.

The Arbitrator's specific order that the Agency retroactively promote the grievant to a Claims Representative position raises the same substantive issue as the Union's requested remedy that the Agency retroactively promote the grievant to a Claims Representative position. Therefore, since the issue concerning management rights could have been, but was not, raised or presented to the Arbitrator, the issue is not properly before the Authority. *See* 5 C.F.R. § 2429.25; *IRS*, 63 FLRA at 205 (dismissing agency's claim that award violated

3. § 7106(a)(2)(C) of the Statute provides, as relevant, that "nothing in this chapter shall affect the authority of any management official of any agency . . . in accordance with applicable laws . . . to make selections for appointments."

management's right to select because agency did not present argument to arbitrator). Accordingly, we dismiss the Agency's exception. [4] *See IRS*, 63 FLRA at 205.

V. Decision

We dismiss the Agency's exception as barred by § 2429.25 of the Authority's Regulations.

4. In view of the above decision, we find it unnecessary to apply the *BEP* framework. *See, e.g., U.S. DOJ, Fed. Bureau of Prisons, Fed. Corr. Complex, Oakdale, La.*, 63 FLRA 178, 180 n.* (2009).