64 FLRA No. 12

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Union)

0-AR-4165

DECISION

September 22, 2009

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Harvey M. Shrage filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator concluded that the Agency violated a memorandum of understanding (MOU) when it failed to promote the grievant. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The parties negotiated a MOU on the "career development" of engineers. Union's Opposition, Att. 1. As relevant here, the parties established promotion criteria for the noncompetitive career advancement of engineers from level 1 to level 3. Section 2.0 of the MOU provides: "An engineer in the bargaining unit shall be promoted noncompetitively to a fully qualified Engineering Level Three upon meeting these promotion criteria, demonstrating satisfactory performance, and receiving supervisory recommendation." Award at 2 (quoting Section 2.0). A level-2 engineer satisfies the established promotion criteria if the engineer has "104 weeks specialized experience at . . . Engineering Level Two[.]" *Id.* (quoting Section 2.2). When a level-2 engineer with satisfactory performance ratings and 104 weeks of specialized experience at level 2 was not recommended for noncompetitive promotion to level 3 by his supervisor, the Union filed a grievance on his behalf that was submitted to arbitration.

The Arbitrator stated the merits issue as whether the Agency violated the MOU or the parties' collective bargaining agreement when it did not promote the grievant to level 3 after he had completed 104 weeks of specialized experience at level 2. The Agency argued that, under the MOU, it had the discretion to deny the grievant a promotion because he did not receive a supervisory recommendation. The Arbitrator rejected the Agency's position. He interpreted the MOU to provide supervisors with discretion, but concluded that the exercise of such discretion cannot be arbitrary or capricious. He held that supervisors must base their decision of whether to recommend an employee for promotion to level 3 on objective evidence that supports their assessment of the employee. Evaluating the supervisor's decision not to recommend the grievant for promotion, the Arbitrator found that it was not based on objective evidence that supported his assessment. Consequently, the Arbitrator concluded that the Agency violated the MOU when it did not promote the grievant on his completion of 104 weeks of specialized experience at level 2. In regard to the remedy, the Arbitrator noted that the grievant had subsequently been promoted to level 3. Accordingly, the Arbitrator concluded that the grievant was entitled to lost pay and benefits resulting from the Agency's failure to earlier promote him to level 3 on his completion of 104 weeks of specialized experience at level 2.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is contrary to § 7106(a)(2)(C) of the Statute because it impermissibly affects management's right to select. The Agency claims that there is no evidence to suggest that the grievant was "on [a] career ladder." Exceptions at 5. The Agency further claims that the MOU provisions are not enforceable under § 7106(b)(3) because they do not constitute arrangements and because their enforcement by the Arbitrator "abrogates the exercise of the Agency's discretion[.]" *Id.* at 12-13.

Alternatively, the Agency contends that the award of backpay is contrary to the Back Pay Act. In this regard, the Agency claims that, "[b]ecause the failure to promote was based upon an MOU that provided the agency discretion whether to promote or not to promote,

1. Member DuBester did not participate in this decision.

the failure to promote is not an unjustified or unwarranted personnel action." *Id.* at 25-26 (citing *Brown v. Sec'y of the Army*, 918 F.2d 214 (D.C. Cir. 1990) (Brown)). Accordingly, the Agency argues that, without an unjustified or unwarranted personnel action, the award of backpay fails to conform to the Back Pay Act. Additionally, the Agency asserts that, because the award of backpay is not authorized by the Back Pay Act, it is barred by the doctrine of sovereign immunity.

B. Union's Opposition

The Union contends that the award does not affect the exercise of management's right to select under § 7106(a)(2)(C) of the Statute. The Union claims that, under Authority precedent, agreements setting criteria for career-ladder promotions do not affect management rights under § 7106(a). The Union asserts that, in the MOU, the parties specifically established "noncompetitive promotion procedures for promotions up to the 'fully qualified Engineering Level Three' upon meeting certain specified criteria." Opp'n at 5. The Union argues that the undisputed testimony at arbitration demonstrated that the noncompetitive promotion to level 3 advanced the employee to "journey level." *Id.* at 6. The Union maintains that "[t]his is the very definition of a career ladder promotion though the [Agency] has termed it a 'career level' promotion rather than a career ladder." *Id.* Alternatively, the Union contends that the MOU provisions are enforceable as contract provisions negotiated pursuant to § 7106(b)(3).

The Union further contends that the award of backpay is authorized by the Back Pay Act. Contrary to the claim of the Agency, the Union argues that the grievant's noncompetitive promotion was not discretionary. The Union maintains that the MOU provides that the noncompetitive promotion from level 2 to level 3 is mandatory on meeting the established criteria. Consequently, the Union asserts that the Agency's failure to comply with the MOU constituted an unjustified or unwarranted personnel action and supported an award of backpay to make the grievant whole for the loss of pay.

IV. Analysis and Conclusions

A. Standard of Review

The Agency's exceptions challenge the award's consistency with law. When a party's exception challenges an arbitration award's consistency with law, the Authority reviews *de novo* the questions of law raised in the exception and the arbitrator's award. *E.g., NFFE Local 1437*, 53 FLRA 1703, 1709 (1998). In applying a standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.* at 1710.

B. The award is not contrary to management's right to select.

When a party contends that an award is contrary to management's rights under § 7106(a) of the Statute, the Authority first assesses whether the award affects the asserted rights. *United States Dep't of Veterans Affairs Med. Ctr., Coatesville, Pa.*, 56 FLRA 966, 971 (2000). The Authority has long held that an arbitrator's enforcement of a career-ladder provision in a collective bargaining agreement does not affect management's right to select under § 7106(a)(2)(C) when the grievant has fulfilled all of the requirements of the career ladder for promotion. *E.g., United States Dep't of Education*, 59 FLRA 820, 824 (2004) (*DoE*); *accord AFGE Local 3810*, 61 FLRA 631, 632 (2006). As explained by the Authority, such an award does not affect management's right to select under § 7106(a)(2)(C) because the career-ladder promotion is merely a ministerial act implementing the agency's earlier decision to place employees in a career-ladder position encompassing subsequent noncompetitive promotions. *E.g., NTEU*, 32 FLRA 1141, 1148 (1988). The Authority holds that, although a career-ladder promotion is a ministerial act that does not affect management's rights, employees must satisfy the conditions prescribed by an applicable collective bargaining agreement provision and applicable regulations to be entitled to promotion. *Id.*

The Agency does not address this precedent. Instead, the Agency claims without elaboration that there is no evidence to suggest that the grievant was "on [a] career ladder." Exceptions at 5. The Union argues to the contrary, asserting that, in the MOU, the parties specifically established "noncompetitive promotion procedures for promotions up to the 'fully qualified Engineering Level Three' upon meeting certain specified criteria." Opp'n at 5. As set forth above, the Union maintains that the undisputed testimony at arbitration was that the noncompetitive promotion to level 3 advanced the employee to "journey level." *Id.* at 6. The Union asserts that "[t]his is the very definition of a career ladder promotion though the [Agency] has termed it a 'career level' promotion rather than a career ladder." *Id.*

The Authority has noted that the term "career ladder" has a specialized meaning in the federal sector and has looked to the requirements of Government-wide regulations pertaining to promotion and internal placement in assessing whether a particular program constitutes a career ladder. *E.g., Tidewater Virginia FEMTC*,

42 FLRA 845, 850-51 (1991). However, as the Authority has recognized, as a result of the enactment of the Air Traffic Management System Performance Improvement Act, Pub. L. No. 104-264, 110 Stat. 3213, codified at title 49 of the United States Code, most of the provisions of title 5 of the United States Code do not apply to the Agency, including provisions concerning career-ladder promotions. *See AFGE Local 2703*, 59 FLRA 81, 81 (2003). Accordingly, the career development program of the MOU for engineers must be assessed without regard to the requirements of Government-wide regulations applicable to other agencies. Assessing the MOU career development program in this manner, the Agency's bare assertion that there is no evidence of a career ladder fails to establish that the MOU's program is not the equivalent for purposes of the Agency's personnel system. As argued by the Union, the program provides for noncompetitive promotion procedures for promotions from level 1 up to the journeyman level 3 on satisfying the negotiated criteria and, as such, is the equivalent of a career-ladder program. Therefore, consistent with precedent concerning career ladders, the award does not affect management's right to select because the Arbitrator concluded that the grievant had fulfilled all of the requirements of the career development program and enforced the provision for a noncompetitive promotion. *See AFGE Local 3810*, 61 FLRA at 632-33; *DoE*, 59 FLRA at 823-24.

Accordingly, we deny this exception.

C. The award of backpay is not deficient.

The Agency asserts that the award of backpay is deficient because there was no finding "that the promotion was mandatory and nondiscretionary[.]" Exceptions at 22. The Agency argues that, without such finding, the award of backpay is contrary to the Back Pay Act and is barred by sovereign immunity. *Id.* at 13, 22-23. However, the Agency misconstrues the award. Although the Arbitrator interpreted the MOU to give "significant discretion" to a supervisor in determining whether to recommend an employee for noncompetitive promotion, the Arbitrator rejected the Agency's position that a supervisor has complete discretion. Award at 18. Instead, the Arbitrator specifically interpreted the MOU as precluding the Agency from arbitrarily withholding recommendations. *Id.* at 18, 20. Applying the MOU to the grievance, the Arbitrator determined that the grievant was entitled to have been promoted because he met the negotiated criteria, and the failure of the grievant's supervisor to recommend him for promotion was arbitrary. *Id.* at 20. The Authority has repeatedly held that these types of findings fully satisfy the requirements of the Back Pay Act and that awards of backpay based on such findings are not deficient. *Fed. Energy Regulatory Comm'n*, 58 FLRA 596, 600 (2003); *NFFE Local 2030*, 56 FLRA 667, 673 (2000); *Soc. Sec. Admin.*, 51 FLRA 1700, 1706 (1996) (arbitrator's finding that the agency violated the parties' agreement by failing to grant the grievant a career-ladder promotion when she met the negotiated criteria "satisfies the requirement under the Back Pay Act for an unjustified or unwarranted personnel action but for which the grievant would have been promoted[.]").

For the same reason, the Agency's reliance on *Brown* is misplaced. As the Authority has recognized, the court in *Brown* specifically acknowledged that the Back Pay Act does not preclude an award of backpay in circumstances where, as here, an agency has entered into an agreement entitling employees to promotions under certain circumstances. [2] *United States Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 413, 415 (2003) (citing *Brown*, 918 F.2d at 219-20); *see also United States Dep't of Health and Human Servs*., 54 FLRA 1210, 1222 (1998) (reliance on *Brown* not persuasive when an award supports a finding that the collective bargaining agreement provision violated establishes a mandatory personnel policy).

Accordingly, we deny these exceptions.

V. Decision

The Agency's exceptions are denied.

2. As there is no dispute that the Back Pay Act applies here, and as we find that the award satisfies the requirements of the Act, there is no need to address whether, if the award were inconsistent with the Act, there is another waiver of sovereign immunity that would permit the award of backpay.