64 FLRA No. 139

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 200
(Union)

and

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WILLIAM J. HUGHES TECHNICAL CENTER
ATLANTIC CITY INTERNATIONAL AIRPORT
ATLANTIC CITY, NEW JERSEY
(Agency)

0-AR-4574

_____

DECISION

May 11, 2010

_____

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 exceptions to an award of Arbitrator Margery F. Gootnick filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator found that the procedures that the Agency followed in awarding a promotion violated the parties' agreement, Agency policies, and merit-system principles. Although the Arbitrator admonished the Agency to avoid such violations in the future, she determined that none of the Union's requested remedies was appropriate.

For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

When the Agency failed to select an employee for a particular position, the Union filed a grievance on behalf of that employee. The grievance was unresolved and submitted to arbitration, where the parties stipulated to the following issues:

> 1. Whether the grievance was timely filed.
>
> 2. Whether the Agency failed to comply with Articles 15 and 20 of the [parties'] Agreement and, if so,
>
> 3. What the remedy should be.

Award at 6.

At the outset, the Arbitrator noted that the grievance "expressly acknowledged" that, under Article 15, § 6 of the parties' agreement, "non-selection for promotion from among a group of properly ranked and certified candidates is not grievable[,]" although "[t]he procedures utilized are grievable[.]" *Id.* at 3. The Arbitrator also noted that substantively identical wording is contained in Article 20, § 3(d)(6), which excludes from the scope of the grievance procedure "a grievance concerning non-selection for promotion from a group of properly ranked and certified candidates." *Id.* at 4. In view of these provisions, the Arbitrator determined that she could "countenance[] th[e] grievance only insofar as it . . . addressed . . . the [selection] procedures . . . and not . . . the grievant's non-selection or . . . the appointment of the eventual selectee[.]" [1] *Id.*

The Arbitrator concluded that the procedures used in the disputed selection action violated the parties' agreement, Agency policies, and merit-system principles. In particular, the Arbitrator found that the selection process was so "steeped in irregularity and favoritism" that it "cast serious doubt on the integrity and fairness of the Agency's management[.]" *Id.* at 20-21, 17. Accordingly, she sustained the grievance. *Id.* at 20-21.

Nevertheless, the Arbitrator concluded that "[n]one of the remedies requested by the Union is appropriate in this case." *Id.* at 21. As relevant here, she denied the Union's request that the Agency be directed to reopen and rerun the disputed selection process, finding that the grievant "and the Union expressly waived any such remedy[.]" [2] *Id.* at 20. She "admonished [the Agency] to follow its own policies and to avoid future violations of merit principles." *Id.* at 21.

---

1. The Arbitrator also determined, and there is no longer a dispute, that the grievance was timely filed.

2. The Arbitrator also denied the Union's other remedial requests, finding that: (1) "[a] written confession or apology [from management] is an uncommon remedy in labor-management arbitration[,]" *id.* at 18; (2) the "Union can enforce compliance with the existing documented selection process[,]" making an order to document that selection process unnecessary, *id.* at 19; and (3) the Arbitrator has no authority to order the Agency to conduct management training on the selection process. *See id.*

III. Positions of the Parties

A. Union's Exceptions

According to the Union, the Arbitrator erred in finding that the grievant and the Union waived reopening the selection process as a remedy. Exceptions at 1. In support, the Union cites its post-arbitration-hearing brief, in which it requested this remedy. *Id.* at 2. Although the Union acknowledges that the grievant stated that he was not seeking an "automatic promotion for himself[,]" the Union contends that the Arbitrator misconstrued this statement to mean that he "waiv[ed] consideration under a re-compete for the position[.]" *Id.* The Union asserts that, although the Arbitrator "found that the Union proved all charges made against the Agency, [she] failed to make any award." *Id.* at 1.

B. Agency's Opposition

According to the Agency, the Union is merely attempting to relitigate the merits of the parties' dispute because the Union disagrees with the award. Opp'n at 1.

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

We construe the Union's argument that the Arbitrator incorrectly found that the grievant and the Union waived reopening and rerunning the selection process as a claim that the award is based on a nonfact. To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, an arbitrator's conclusion that is based on an interpretation of the parties' collective bargaining agreement does not constitute a fact that can be challenged as a nonfact. *See NLRB*, 50 FLRA 88, 92 (1995).

The Union does not demonstrate that the Arbitrator clearly erred in finding that the grievant and the Union waived the remedy of reopening and rerunning the disputed selection action. In this regard, the Union conceded not only that it was not seeking "an automatic promotion" for the grievant but also that "no corrective action was [requested] regarding the *[s]electee's status*." Exceptions, Attach. C, Post-Arbitration Brief at 3 (emphasis added). Reopening and rerunning the selection action could affect the selectee's status because it could result in the selection of a different employee. Moreover, the Union's post-hearing brief stated that it was "*willing to amend"* its requested remedies to include, "The Agency must reopen competition for the selection of the position in question . . . ." *Id.* at 9 (emphasis added). If, as the Union argues in its exception, this remedy had not been waived, there would have been no need to amend the Union's remedial requests to include it.

Finally, even assuming that the Arbitrator made a clear error regarding remedial waivers, the Union does not demonstrate that, but for such error, the Arbitrator would have reached a different result. In this regard, the Arbitrator found that, under Article 15, §¶6 of the parties' agreement, the Union could grieve only "procedures" for selection, and, consequently, the Union could not invoke the grievance process in order to contest "the grievant's non-selection or . . . the appointment of the eventual selectee." Award at 4. As noted above, the Arbitrator's interpretation of Article 15, §¶6 cannot be challenged as a nonfact. *NLRB*, 50 FLRA at 92. For these reasons, the Union has not established that the award rests upon a clearly erroneous factual finding, but for which the Arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA at 41. Therefore, we deny this exception.

B. The Arbitrator did not exceed her authority.

To the extent that the Union's exception can be construed as arguing that the Arbitrator exceeded her authority by failing to grant any of the Union's requested remedies, the Authority has held that arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). However, an arbitrator is not required to provide a party with a remedy, even when the arbitrator finds that a contractual violation has occurred. *See NFFE, Local 1904*, 56 FLRA 196, 200 (2000); *U.S. Dep't of HHS, SSA, Region X, Office of Hearings & Appeals*, 49 FLRA 691, 696 (1994). In addition, arbitrators have no obligation to grant a remedy after finding that an agency violated merit-system principles. *U.S. Dep't of Def., Army Chem. & Military Police Ctrs., Fort McClellan, Ala.*, 39 FLRA 457, 464 (1991) (*Fort McClellan*). Further, when an arbitrator advises an agency not to commit future contractual violations and thereby puts an agency on "notice . . . that future violations could result" in further corrective action, this "notice" constitutes a remedy, "albeit not the requested remedy[.]" *NFFE, Local 1904*, 56 FLRA at 200.

As the Arbitrator was under no obligation to provide remedies for the Agency's violations, the Union's exception provides no basis for finding the award deficient. *See NFFE, Local 1904*, 56 FLRA at 200; *Fort McClellan*, 39 FLRA at 463-464. In addition, the Arbitrator admonished the Agency to follow its prescribed selection procedures and avoid future violations, thereby putting the Agency on notice that further violations could engender other corrective actions. As in *NFFE, Local 1904*, *supra*, this notice provides the Union with a remedy, even though it is not one of the Union's requested remedies. For the foregoing reasons, the Union has not established that the Arbitrator's remedial determinations exceeded her authority. Accordingly, we deny this exception.

V. Decision

The exceptions are denied.