65 FLRA No. 86

UNITED STATES
DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL JOINT COUNCIL OF FOOD
INSPECTION LOCALS
(Union)

0-AR-4520

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DECISION

January 7, 2011

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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 Gerard A. Fowler 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 exceptions.

The Arbitrator found that the Agency violated the parties' agreement by failing to temporarily promote the grievant, and he awarded the grievant backpay with interest. For the following reasons, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the grievant, a General Schedule (GS)-8, had performed the duties of a GS-9 twice a week, and that the Agency violated the parties' agreement by failing to compensate the grievant for performing those duties. Award at 2. The grievance was unresolved and submitted to arbitration. *Id.* at 3. At arbitration, the Arbitrator framed the relevant issues as: "Did the Agency violate . . . Article 19, [Sections] 2 and 3 [of the parties' agreement[1]] when it did not promote the [g]rievant . . . when he performed his assigned duties . . . . If so, what is the remedy?" [2] *Id.*

As an initial matter, the Arbitrator set forth several relevant agreement provisions, including Article 21, Section 8, which addresses temporary promotions.[3] *Id.* at 5-6. Next, the Arbitrator found that "[s]ince [the g]rievant was detailed to a GS-9 position consistently and met the minimum qualifications for the GS-9 position, the [parties' agreement] requires [that] he be granted a temporary promotion." *Id.* at 13. He then determined that "[t]he Agency violated [the parties' agreement] and committed an unjustified personnel action when it failed to pay [the g]rievant for work performed at the GS-9 level." *Id.* The Arbitrator also found that the "[g]rievant is eligible for backpay for the period [of] December 2006 . . . through June 2007[,]" but noted that 5 C.F.R. § 335.103(c) "is not applicable in this case" because "the number of days detailed amount[s] to less than 120 days[.]" [4] *Id.* at 12. The Arbitrator further determined that "[t]he Agency must . . . pay [the g]rievant for each day in which he was detailed to a GS-9 position in the relevant time period[,]" and he awarded the grievant backpay with interest. *Id.* at 12, 14.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the Arbitrator exceeded his authority by awarding the grievant a retroactive temporary promotion because he framed the relevant issue as whether the Agency violated Article 19 of

1. Article 19, Section 2 of the parties' agreement states, in relevant part: "The Agency agrees that equal pay for substantially equal work shall be applied to all position classification actions." *Id.* at 4. Article 19, Section 3 of the parties' agreement provides, in pertinent part: "When significant changes in the duties and responsibilities of a position occur, the position description shall be amended or rewritten to accurately describe the assigned duties and responsibilities[.]" Agency's Post-Hearing Brief at 4.

2. The Arbitrator also resolved issues regarding whether the grievance was timely, non-arbitrable and/or non-grievable. Award at 1-2. As there are no exceptions regarding the Arbitrator's resolution of these issues, we do not address them further.

3. The pertinent wording of Article 21, Section 8 is set forth *infra*.

4. The pertinent wording of 5 C.F.R. § 335.103(c) is set forth *infra*.

the parties' agreement, which pertains to classification issues, rather than temporary promotions. Exceptions at 8.

The Agency further asserts that the award conflicts with Article 21, Section 8, which, according to the Agency, unambiguously provides that the Agency is not obligated to temporarily promote employees unless they have been detailed to a higher-graded position for more than sixty consecutive days. *Id.* at 5-6. In this connection, the Agency maintains that the Arbitrator failed to make a necessary finding that the grievant was detailed for more than sixty consecutive days. *Id.* at 6.

In addition, the Agency argues that the award is contrary to the Back Pay Act because "Article 21, Section 8 is the only relevant provision in [the parties' agreement] that addresses temporary promotions for higher graded duty[,]" and the Arbitrator failed to make the requisite findings to support an award of backpay based on that provision -- specifically, that the grievant was detailed for more than sixty consecutive days. *Id* at 7.

Finally, the Agency maintains that the award violates 5 C.F.R. § 335.103(c) and *United States Department of Veterans Affairs, Ralph H. Johnson Medical Center, Charleston, South Carolina*, 60 FLRA 46 (2004) (*Johnson Med. Ctr.*), because the Arbitrator directed a temporary promotion and backpay for a period exceeding 120 days. Exceptions at 8-9. In this connection, the Agency asserts that, by finding that the "[g]rievant [wa]s eligible for backpay for the period [of] December 2006 . . . through June 2007[,]" the Arbitrator awarded a temporary promotion without the use of competitive procedures for a period of seven months, and, therefore, in excess of 120 days. *Id.* at 9.

B. Union's Opposition

With regard to the Agency's exceeded authority exception, the Union argues that, at arbitration, the Agency had raised a classification argument, and the Union had argued at arbitration that the grievance "concerned a temporary promotion as opposed to a classification[.]" Opp'n at 10-11. Thus, the Union asserts that "resolution of the classification issue required the [A]rbitrator to consider the temporary promotion" issue, and he did not exceed his authority by addressing it. *Id.*

The Union also argues that the award is not contrary to the Back Pay Act because the Arbitrator "clearly found a causal connection between the Agency's unjustified action and the loss of pay for the grievant." *Id.* at 9. The Union further asserts that the Arbitrator was not required to cite a specific provision in his award because "both parties focused nearly entirely on Article 21 throughout the hearing and [their] briefs[.]" *Id.* at 8.

Finally, the Union contends that the award is not contrary to 5 C.F.R. § 335.103(c) because the Arbitrator "did not grant the grievant a promotion for the full seven months[,]" but rather, "limited the promotion to the specific days [that the grievant] was detailed, which amounted to less than 120 days." *Id.* at 12.

IV. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

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 persons who are not encompassed within the grievance. *See U.S. Dep't of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 307-08 (1995). In the absence of a stipulated issue, an arbitrator's formulation of the issues is accorded substantial deference. *See AFGE, Local 933*, 58 FLRA 480, 482 (2003) (*AFGE*). In addition, an arbitrator does not exceed his or her authority where the award is directly responsive to the formulated issues. *See, e.g., AFGE, Local 4044, Council of Prisons Local 33*, 57 FLRA 98, 99 (2001).

Here, the Arbitrator framed the relevant issues as: "Did the Agency violate . . . Article 19, [Sections] 2 and 3 [of the parties' agreement] when it did not promote the [g]rievant . . . when he performed his assigned duties . . . . If so, what is the remedy?" Award at 2. Thus, the issue of the Agency's failure to "promote" the grievant was expressly included in the issues as the Arbitrator framed them. *Id.* Moreover, the Arbitrator identified Article 21, Section 8 of the parties' agreement as a relevant provision, *see id.* at 5-6, and there is no dispute that, before the Arbitrator, both parties provided arguments regarding that provision. In this regard, in summarizing the Agency's position, the Arbitrator stated that "with regard to the merits, the Agency asserts that [the g]rievant is not entitled to additional pay or to a promotion" and that "the Agency points to Article 21, [Section] 8 of [the parties' agreement]." *Id.* at 8; *accord* Union's Post-Hearing Brief at 16-20 (arguing that the grievant was entitled to a temporary promotion under Article 21, Section 8 because he met

the applicable requirements and was not detailed for a brief period of fewer than sixty consecutive days). Thus, both the Arbitrator and the parties treated Article 21, Section 8 as relevant to the issues before the Arbitrator.[5] Accordingly, we find that the Arbitrator did not address an issue that was not submitted to arbitration, and we deny the exception.

B. The award draws its essence from the parties' agreement.

We construe the Agency's contention that the award conflicts with Article 21, Section 8 of the parties' agreement because the Arbitrator failed to find that the grievant was detailed for sixty consecutive days as a contention that the award fails to draw its essence from the parties' agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id*. at 576.

Article 21, Section 8 of the parties' agreement states, in relevant part: "Except for brief periods, not to exceed sixty (60) consecutive days, employees detailed to a higher grade position shall be given a temporary promotion if the employee meets applicable time in grade and Office of Personnel Management qualifications requirements." Award at 6. Thus, the provision provides that temporary promotions are not mandated when details do not "exceed sixty (60) consecutive days[.]" *Id.* However, the provision does not prohibit temporary promotions for details consisting of numerous nonconsecutive days over a period exceeding sixty days, which is the situation presented here. Thus, the Agency does not demonstrate that it was irrational, unfounded, implausible, or in manifest disregard of Article 21, Section 8 for the Arbitrator to award a temporary promotion in the circumstances of this case. Accordingly, we deny the essence exception.

C. The award is not contrary to law.

The Agency argues that the award is contrary to the Back Pay Act and 5 C.F.R. § 335.103(c). When a party's exceptions involve an award's consistency with law, the Authority reviews the questions of law raised by the arbitrator's award and the party's exceptions de novo. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. 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. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id*.

1. The Back Pay Act

As a general rule, an employee is entitled only to the salary of the position to which the employee is appointed. *U.S. Dep't of the Army, Fort Polk, La.*, 44 FLRA 1548, 1563 (1992) (*Fort Polk*) (citing *Cassandra G. McPeak and Wayne E. Dabney*, 69 Comp. Gen. 140 (1989) (*McPeak*)). An exception to this general rule exists, permitting compensation for the temporary performance of the duties of a higher-graded position, where, as relevant here, a collective bargaining agreement makes temporary promotions mandatory for details to higher graded positions, thereby establishing a nondiscretionary agency policy that would provide a basis for backpay. *U.S. Dep't of the Army, Army Armament Research, Dev. & Eng'g. Ctr.*, 49 FLRA 562, 565 (1994) (citing *Wilson v. United States*, 229 Ct. Cl. 510 (1981); *McPeak*, 69 Comp. Gen. at 140); *Fort Polk*, 44 FLRA at 1563. Where an arbitrator fails to identify such a non-discretionary agency policy, there is no unjustified or unwarranted personnel action that would entitle the grievant to an award of backpay under the Back Pay Act. *See U.S. Dep't of the Air Force, 81st Training Wing, Keesler Air Force Base, Miss.*, 60 FLRA 425, 429 (2004) (citing *U.S. Dep't of the Army, Headquarters, III Corps & Fort Hood, Fort Hood, Tex.*, 56 FLRA 544, 546 (2000)).

5. Although the Arbitrator did not specifically cite Article 21, Section 8 in finding a violation of the agreement, the parties do not dispute that he found a violation of that provision.

Here, the Agency argues that Article 21, Section 8 is the only relevant provision in the parties' agreement, and that the grievant is not entitled to backpay under that provision because the Arbitrator failed to find that the grievant was detailed for more than sixty consecutive days. Exceptions at 7. The Agency's argument effectively restates the Agency's essence exception, which we have denied. Accordingly, the Agency provides no basis for finding the award contrary to the Back Pay Act, and we deny this exception.

2. 5 C.F.R. § 335.103(c)

The Agency contends that the award is inconsistent with 5 C.F.R. § 335.103(c) because the Arbitrator directed the Agency to grant a temporary promotion without the use of competitive procedures for a period spanning seven months, and therefore, in excess of 120 days. Exceptions at 8-9. The Agency also contends that the award conflicts with the Authority's decision in *Johnson Med. Ctr*, 60 FLRA 46.

5 C.F.R. § 335.103(c)(1)(i) mandates the use of competitive procedures for promotions to higher-graded positions that last "more than 120 days[.]" Consistent with this regulation, the Authority held in *Johnson Med. Ctr.* that an award of a retroactive temporary promotion for a period of over two years violated 5 C.F.R. § 335.103(c)(1)(i). 60 FLRA at 49-50.

Here, the Arbitrator found that "the number of days detailed amount[ed] to less than 120 days" and that the Agency must "pay [the g]rievant for each day [that] he was detailed[.]" Award at 12. In this regard, there is no dispute that the grievant was detailed twice a week during the relevant period. Nothing in *Johnson Med. Ctr.* or 5 C.F.R. § 335.103(c)(1)(i) precludes an agency from noncompetitively, temporarily promoting a grievant for a series of time periods (here, twice a week), even if that series of periods -- when added to intermittent periods where the grievant was not temporarily promoted -- exceeds 120 days. Accordingly, the Agency does not demonstrate that the award is contrary to 5 C.F.R. § 335.103(c), and we deny the exception.

V. Decision

The Agency's exceptions are denied.