66 FLRA No. 38

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3627
(Union)

and

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS
AND APPEALS
TUPELO, MISSISSIPPI
(Agency)

0-AR-4219

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DECISION

September 29, 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 Williams H. Mills filed by the Agency and the Union 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.[1] The Agency did not file an opposition to the Union's exception.

The Arbitrator found that the Agency violated the parties' collective bargaining agreement (CBA) by not following the procedures outlined in the CBA for filling employment vacancies. The Arbitrator ordered the selections vacated and new selections made by a different selecting official. The Arbitrator also directed that the persons selected be awarded backpay from the date of the original selections.

For the reasons that follow, we dismiss in part and deny in part the Agency's exceptions and deny the Union's exception.

II. Background and Arbitrator's Award

The grievant, a General Schedule (GS)-8 Legal Assistant, has been employed by the Tupelo, Mississippi Office of Hearing and Appeals (Tupelo Office) since 1991. Award at 4.

In 2003, the grievant applied for a GS-9 Paralegal Specialist position in the Tupelo Office. *See id.* at 2, 4. The vacancy announcement, which identified two vacancies, stated that applications would be accepted from current permanent Agency employees nationwide. *Id.* at 3. The announcement also stated that applications "for non-competitive consideration" would be accepted "from certain Agency employees in the area of consideration." *Id.* A "non-competitive" applicant in the circumstances of this case was an individual already working in a position with a classification of GS-9 or higher. *See id.* at 4.

The grievant was one of seven competitive candidates placed on a "well-qualified list" sent to the selecting official. *Id.* One non-competitive applicant was also placed on the list. *Id.*

The grievant was not selected. *Id*. The Union filed a grievance challenging the Agency's selection process. When the grievance was not resolved, it was submitted to arbitration. The Arbitrator framed the issue as: "Did the Agency violate the [CBA] by failing to comply with the [CBA's] requirements and restrictions in the selection process to fill vacanc[ies] in the position of Paralegal Specialist, GS-950-9, at the [Tupelo Office]?" *Id*. at 1.

The Arbitrator found that the Union was not challenging the well-qualified list's preparation, but rather the part of the selection process that followed. *Id*. at 18. In this regard, the Arbitrator noted that the Union claimed that the selection process was "tainted" because the selecting official improperly conferred with and sought information from the supervisors of the candidates on the well-qualified list to assist him in the selection process.[2] *Id.* at 20. As the Arbitrator noted, the Union

[1] Several months after filing its exception, the Union filed a supplemental submission. However, as the Union did not request leave to file its supplemental submission under 5 C.F.R. § 2429.26, we do not consider it. *See* 5 C.F.R. § 2429.26; *U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Fayetteville, N.C.,* 65 FLRA 191, 192 (2010).

[2] The Union also argued before the Arbitrator that the grievant was not selected for the position in reprisal for a previously filed grievance, or because of discrimination based on her union membership and activities. Award at 19. The Arbitrator found no evidence of Agency reprisal for a previously filed grievance, or of discrimination based on the grievant's union membership and activities. *Id.* at 20. The Arbitrator's ruling on this aspect of the case is not before the Authority.

based its claim on Article 26, Section 11(A) of the CBA, which prohibits the selecting official from gathering information about the candidates once a well-qualified list has been established.[3]

The Arbitrator sustained the grievance. The Arbitrator found that the selecting official had gathered information about the candidates after the well-qualified list was established, in a manner that violated the CBA. *Id.* at 21-25. The Arbitrator noted in this regard that Article 26, Section 10E of the CBA includes procedures for a selecting official to obtain information from candidates' supervisors. However, the Arbitrator also found that the provision places limitations on that information and how it may be obtained, and that the selecting official ignored those limitations. *Id.* at 22, 25.[4] The Arbitrator concluded that the selecting official's actions "warrant[] a finding that the selection process was flawed to the extent that remedial action should be taken." *Id*. at 25.

As a remedy, the Arbitrator ordered the selections vacated and that a different selecting official make selections from among the candidates on the well-qualified list. *Id.* at 27. The Arbitrator rejected the Union's request that the Arbitrator order the Agency to select the grievant. *Id.* at 25. The Arbitrator found that such a remedy was not appropriate because he had not determined that the "[c]ontract mandate[d] the selection of the [g]rievant." *Id.* The Arbitrator stated that his role was limited to interpreting the CBA and that it was the Agency's role to make the selections. *Id.* He noted that his only finding was that the selection process was "flawed in its execution," which could have affected the selections. *Id.* Therefore, the Arbitrator stated, he would not "decide[] that the [g]rievant, or any other candidate, was entitled to selection." *Id.*

The Arbitrator also rejected the Union's claim that the selection of the non-competitive applicant violated the contract. *Id.* at 26. The Union alleged in this regard that one of the two candidates selected was the non-competitive candidate. *Id.* at 8. The Union argued that the non-competitive candidate's selection did not meet the applicable requirements because the candidate was serving in a position with no career ladder advancement possibility, and the paralegal positions had career ladder potential. *Id.* The Arbitrator rejected the Union's claim because he found a "dearth of evidence" on the issue that made it "impossible" for him to determine whether such a selection would violate the CBA. *Id.* at 26. Noting that "a new [s]electing [o]fficial must be designated and a new selection made," the Arbitrator expressed his "confiden[ce] that any selection made by the newly designated [selecting official] will be made in accordance with all provisions of the [CBA]." *Id*.

Finally, regarding backpay, the Arbitrator directed that the candidates selected be "installed in the position of Paralegal Specialist, GS-9," from the date of the original selection, "with all benefits incidental to being placed in that position as of that date." *Id*. at 27.

III. Positions of the Parties

A. Agency's Exceptions

The Agency makes several claims concerning its management rights. Specifically, the Agency claims that Article 26, Section 11(A) of the CBA is not enforceable because it violates management's rights under § 7106(a)(2)(A), (B), and (C) of the Statute to assign employees and work, and to select employees. Agency's Exceptions at 3-5. The Agency also argues that, even assuming that the award provides a remedy for a violation of a CBA provision negotiated pursuant to § 7106(b), the award fails to reconstruct what the Agency would have done had it not violated the CBA. *Id.* at 4-5. Finally, the Agency argues that the award violates the Back Pay Act, 5 U.S.C. § 5596. *Id.* at 6. According to the Agency, the award does not satisfy the second element of the Back Pay Act because the Arbitrator did not find that, but for the Agency's failure to follow the CBA, the grievant, or any other individual selected for the position, suffered a loss of pay, allowances, or differentials. *Id.* at 6-7.

B. Union's Opposition

The Union claims that the CBA, including Article 26, Section 11(A), is fully enforceable because it was duly negotiated and is consistent with applicable federal law. Union's Opp'n at 2. The Union further argues that the Arbitrator's remedy vacating the previous selections and directing that a new selecting official be designated does not violate management rights. *Id.*

Finally, the Union argues that backpay is an appropriate remedy because, if the Agency had used a "properly drawn list," then whomever it appointed would

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[3] Article 26, Section 11(A) states, in pertinent part: "Once a well qualified list has been established by the Assessment Panel, there will be no other candidate information gathered by the selecting official. However, this does not preclude the selecting official from recontacting the Assessment Panel and/or interviewing all well-qualified candidates." Union's Exception, Attach. 2 at 194.

[4] Article 26, Section 10E states: "When the selecting official has required the inclusion of a supervisory recommendation in the promotion package, the [Assessment Panel] will obtain a managerial recommendation check off sheet with the options which state 'does not recommend', or 'recommend' for each candidate on the well-qualified list. The employee will be provided a copy of the supervisory recommendation." Union's Exception, Attach. 2 at 193.

have received a higher pay rate during the applicable period. *Id*. at 4-5.

C. Union's Exception

The Union argues that the award does not draw its essence from Article 26, Section 5(B) and (E) of the CBA, which provides that lateral reassignments, or even changes to a lower grade that may result in the eventual attainment of a higher grade, must be competitive actions.[5] Union's Exception at 3. Therefore, the Union argues, the Arbitrator should have addressed whether the position was a career ladder position, *id.* at 1, and whether the non-competitive applicant was on an improperly constituted referral list*.* *Id*. at 4-5.

IV. Preliminary Issue

The Agency's exceptions that the award is deficient because it affects management's rights under § 7106(a)(2)(A), (B), and (C) of the Statute to assign employees and work, and to select, as well as the Agency's exception that the award fails to reconstruct what the Agency would have done had it not violated the CBA, are not properly before the Authority.

Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, raised or presented to the arbitrator.[6] *See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.,* 64 FLRA 841, 843 (2010).

There is no indication in the record that the Agency raised before the Arbitrator, as it does in its exceptions, issues related to its management rights. Further, in its request for a remedy, the Union specifically asked the Arbitrator to vacate the selections made for the paralegal positions and to select the grievant for one of the positions. Award at 8. Therefore, the Agency was on notice that the award might include provisions vacating the selections and establishing procedures for selecting other individuals – but failed to raise any management rights objections as it now does in its exceptions.

Accordingly, as the Authority will not consider issues that could have been, but were not, presented to the Arbitrator, the Agency cannot raise these issues now. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Oakdale, La.,* 63 FLRA 178, 179-80 (2009) (dismissing exceptions where evidence presented at hearing established that agency was aware that resolution of dispute entailed enforcement of a management right limitation but did not raise management right issue before arbitrator). Based on the foregoing, we dismiss the Agency's exceptions alleging a violation of management rights.[7]

V. Analysis and Conclusions

A. The award is not contrary to the Back Pay Act.

An award of backpay under the Back Pay Act is authorized only if an unjustified or unwarranted personnel action has resulted in the withdrawal or reduction of an employee's pay, allowances, or differentials. *U.S. Dep't of Health & Human Servs.*, 54 FLRA 1210, 1218-19 (1998) (*DHHS*). The Agency does not dispute that the award satisfies the Back Pay Act's first requirement, that there be an unjustified or unwarranted personnel action. Rather, the Agency argues, the award does not satisfy the Back Pay Act's second requirement because the Arbitrator did not find that but for the Agency's failure to follow the CBA, the grievant, or any other individual selected for the position, would not have suffered a loss of pay, allowances, or differentials. Agency's Exceptions at 6-7; *see DHHS,* 54 FLRA at 1219.

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[5] Article 26, Section 5(B) and (E) are set forth in the appendix to this decision.

[6] The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Agency's exceptions were filed before that date, we apply the prior Regulations.

[7] For the reasons stated above, Chairman Pope agrees to dismiss, under § 2429.5, the Agency's exceptions alleging that the award improperly: (1) constrains management's right to have the selecting official talk to supervisors; and (2) affirmatively requires the Agency to fill the vacancy. However, she would not dismiss the exceptions regarding the portions of the award directing the Agency to: (1) use the same well-qualified list; and (2) a different selecting official. In the Chairman's view, that the Union requested that the positions be vacated and the grievant selected could not reasonably put the Agency on notice that the Arbitrator could direct these two challenged remedies; the majority's finding to the contrary imposes on the Agency a level of prescience that is not required by § 2429.5. *See, e.g., U.S. DHS, U.S. Customs & Border Prot., U.S. Border Patrol, El Centro Sector*, 65 FLRA 752, 754 (2011) (finding that § 2429.5 did not bar exceptions that arose from issuance of the award). Addressing these two aspects of the remedy on the merits, Chairman Pope would conclude -- in view of the Arbitrator's findings that the grievant was prejudiced when the grievant's supervisor talked to the selecting official and that using a different selecting official was necessary to remedy the violation -- that they are reasonably related to the contractual violation found and the harm being remedied. *See, e.g., U.S. DoJ, Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla.*, 65 FLRA 1040, 1045 n.9 (2011). Accordingly, she would deny these exceptions.

The Arbitrator expressly found that the selection process was flawed to the extent that remedial action should be taken. Award at 25-26. Because of the irregularities, the Arbitrator ordered the selections vacated and the selection process rerun in accordance with the CBA and with a different selecting official. *Id*. at 27. In ordering the process rerun, he further ordered that the selections be made from among the original candidates. *Id*. Thus, the Arbitrator has ordered the original selection rerun in such a manner that the candidates selected will be the candidates that would originally have been selected but for the irregularities of the original selection process. Consequently, the Arbitrator has assured that the candidates to whom he has awarded backpay are the candidates who lost the pay of the GS-9 position as a direct result of the irregularities of the original selection action. *Cf. AFGE, Local 31*, 41 FLRA 514, 518-19 (1991) (upholding backpay award where direct causal connection between unjustified and unwarranted personnel action and the grievant's non-selection for a promotion was implicit from record and award).

For these reasons, the Agency fails to establish that the award of backpay is contrary to the Back Pay Act, and we deny this exception.

B. The award draws its essence from the CBA.

The Union argues that the award does not draw its essence from Article 26, Section 5(B) and (E) of the CBA, which provide that lateral reassignments, or even changes to a lower grade that may result in the eventual attainment of a higher grade, must be competitive actions. Union's Exception at 3. Therefore, the Union argues, the Arbitrator should have addressed whether the position was a career ladder position, *id.* at 1, and whether the non-competitive applicant was on an improperly constituted referral list. *Id*. at 4-5.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review 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. *See* *U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*). 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.

Contrary to the Union's claim, the Arbitrator acknowledged the issue of irregularities concerning the selection of a non-competitive candidate for a position where there was a career ladder opportunity. Award at 26. However, in assessing the validity of the Union's claim under Article 26 of the CBA, he found that the "dearth of evidence" presented to him on this issue made it impossible to determine whether any of the Agency's selections violated the CBA on this basis. *Id*. Furthermore, the Arbitrator stated that he was "confident" that any selection made by the new selecting official would be made in accordance with the CBA. *Id.* Consequently, in these circumstances, the Union's exception does not establish that the award is implausible, irrational, or unconnected to the wording and purpose of the CBA. *OSHA*, 34 FLRA at 575. Accordingly, for the reasons expressed above, we deny the Union's exception.

VI. Decision

The Agency's exceptions are dismissed in part and denied in part, and the Union's exception is denied.

APPENDIX

Article 26 -- Merit Promotion

Section 5 - Applicability of Competitive Procedures

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B. Reassignments/Changes to Lower Grade - Any selection to a position that provides specialized experience as defined in the OPM Qualification Standards 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 promotional potential must be made on a competitive basis.

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E. Appointments - Competitive procedures apply to the transfer of a Federal employee or to the reinstatement of a former Federal employee to a position above the highest grade previously held permanently (unless the position is a higher-graded successor position as described in Section 6 D 5) or to a position at or below that grade if the position has promotional potential above the highest grade previously held permanently. The employee must not have been demoted or separated for personal cause from the higher grade(s) and, when competitive procedures apply, be identified as a well-qualified candidate with eligible SSA employees to be eligible for appointment. To the extent feasible, the same qualification standards and the same methods of evaluation will be applied to both SSA employees and persons being considered for appointment to higher-graded positions above the highest grade previously held permanently by transfer or reinstatement. If it is determined that these methods are not feasible, the parties will meet and confer on the methods to be utilized.

Union’s Exception, Attach. 2.