**67 FLRA No. 32**

UNITED STATES
DEPARTMENT OF DEFENSE
DOMESTIC DEPENDENT ELEMENTARY
AND SECONDARY SCHOOLS
(Agency)

and

FEDERAL EDUCATION ASSOCIATION
STATESIDE REGION
(Union)

0-AR-4893

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DECISION

December 19, 2013

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

## I. Statement of the Case

Arbitrator David P. Clark found that the Agency violated the parties' collective-bargaining agreement (CBA) when it reduced the grievant's pay and informed her that she must return money that the Agency overpaid her.

The substantive issue before us is whether the award is contrary to law. Because the Agency does not show that the Arbitrator's interpretation and enforcement of the CBA is deficient as a matter of law, the answer is no.

## II. Background and Arbitrator's Award

The Department of Defense Education Activity operates two sub-agencies: the Department of Defense Dependents Schools (DoDDS), which educates students overseas, and the Domestic Dependents Elementary and Secondary Schools (Agency), which educates students in the United States. The grievant lived in Germany and taught classes that DoDDS made available to students worldwide through the internet. When the grievant sought to relocate, her DoDDS supervisor contacted the Agency and arranged for the grievant to teach in Alabama. After her relocation in June of 1999, the grievant taught the same online classes she had taught in Germany, and the Agency paid her the same salary that DoDDS would have paid her had she remained in Germany.

In 2005, the Agency investigated whether the grievant's pay was consistent with Article 20, Section 3 (Section 3) of the CBA. Section 3.a. set the pay for employees who were "[c]urrent bargaining[-]unit member[s]" when the CBA took effect on July 4, 1999, whereas Section 3.b. set the pay for bargaining-unit employees "hired after July 4, 1999."[1] The Agency applied Section 3.b. to the grievant, and determined that it had set her salary at an incorrect level when she relocated to Alabama in 1999. The Agency then informed the grievant that it had overpaid her $13,091.58, and deducted that amount from the grievant's salary. The Union filed a grievance, and the matter went to arbitration.

Before the Arbitrator, the Agency argued that it had hired the grievant after July 4, 1999, and that, as a result, the Agency correctly determined her pay under Section 3.b. The Agency acknowledged that the grievant had an oral agreement with her supervisors that she would start work at the Agency earning the same pay she would have received at DoDDS. But the Agency argued that Section 3 – not any oral agreement – governed the grievant's pay.

The Arbitrator found that Section 3.a. of the CBA – rather than Section 3.b. – applied to the grievant. Specifically, the Arbitrator concluded that the grievant was a "[c]urrent bargaining[-]unit member[]" under Section 3.a. when the CBA took effect on July 4, 1999.[2] In support of this conclusion, the Arbitrator found that "the geographical location of . . . teachers determines whether they are paid as DoDDS employees or . . . Agency . . . employees," and that the grievant moved to Alabama from Germany in June of 1999 in order to work at the Agency.[3] The Arbitrator also found that a service-staffing specialist at the Agency had stated in an email on May 14, 1999, that the grievant's "reassignment [would] be effective in conjunction with her travel."[4] As a result, the Arbitrator concluded that the grievant became a unit member upon her relocation in June, 1999.

In so concluding, the Arbitrator rejected the Agency's argument that a Standard Form 50 (SF-50) [5] notification of personnel action that the Agency issued to the grievant established that the grievant became a unit member on a later date. Specifically, he found that the SF-50 indicated "that the Agency considered the

[1] Award at 4.
[2] *Id.*; *see also id.* at 23-24.
[3] *Id.* at 23; *see also id.* at 10, 11.
[4] *Id.* at 10.
[5] An SF-50 is a standard personnel form used across the federal government to record personnel actions.

[g]rievant to be a member of the Union's bargaining unit . . . *at least no later than* [its] . . . effective date" of August 9, 1999, but that the SF-50 "[did] not control the date that the [CBA] applied to the [g]rievant."[6]

In addition, the Arbitrator found that the pay-setting provisions of Section 3.b. for employees "*hired* after July 4, 1999"[7] did not apply because the grievant was "*reassigned*" when she relocated from Germany to Alabama.[8] In support of this conclusion, the Arbitrator noted that the grievant did not apply for a position, was not "selected" as part of any application process, and did not receive an acceptance letter from the Agency.[9] The Arbitrator also noted that the grievant's teaching assignment and supervisors did not change upon her reassignment, and he credited evidence that the Agency never referred to the grievant as – or considered the grievant to be – a new hire. Thus, the Arbitrator concluded that "[b]ecause . . . Section 3.b. only applies under the condition of 'hire,' it follows that the Agency applied the wrong contractual provision to the [g]rievant."[10]

Finally, the Arbitrator concluded that "even if, arguendo, it were determined that the [g]rievant was in fact 'hired' by the Agency," Section 3.b. still would not apply to her because her "employment status changed prior to July 4, 1999."[11] In addition, the Arbitrator found that the "Agency participated in [an] agreement to set the [g]rievant's pay" at her DoDDS level, and that "[i]t should have been clear that the Agency intended to achieve the same effect as [Section 3.a.'s] pay-setting rule when it agreed to accept the [g]rievant's assignment to [Alabama] in 1999 at her same level of pay."[12]

The Arbitrator concluded that the Agency violated the CBA when it applied Section 3.b. to the grievant and reduced her pay. As a remedy, the Arbitrator directed the Agency to reassess the grievant's pay by applying Section 3.a., make appropriate corrections to her pay history, and provide her backpay, with interest, based upon its corrections.

The Agency filed exceptions to the Arbitrator's award.

## III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Agency's contrary-to-law exceptions.

The Agency asserts that the award is contrary to "Office of Personnel Management (OPM) regulations."[13] Specifically, the Agency cites the "OPM Guide to Processing Personnel Actions" to argue that an employee's appointment cannot be effective prior to the date of the appointing officer's approval, as documented in the SF-50.[14]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[15] Before the Arbitrator, the Agency argued that the date of the SF-50 established that Section 3.b. applied to the grievant.[16] But the Agency does not claim, and nothing in the record demonstrates, that the Agency cited the "OPM Guide to Processing Personnel Actions" or any other "OPM regulations" to the Arbitrator.[17] Because the Agency could have, but did not, cite this authority to the Arbitrator, it may not do so now. Consequently, we dismiss this exception under §§ 2425.4(c) and 2429.5 of the Authority's Regulations.[18]

## IV. Analysis and Conclusions: The Agency has not demonstrated that the award is contrary to law.

The Agency asserts that the award is contrary to law. When an exception involves an award's consistency with law, the Authority reviews any question of law de novo.[19] In conducting de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[20] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[21] Further, a party contending that an award is deficient because it is contrary to law bears the burden of ensuring that the record contains sufficient information for the Authority to render a decision on that issue.[22] And, as relevant here,

[6] *Id.* at 24 (emphasis added).
[7] *Id.* at 25 (emphasis added) (quoting Section 3.b.) (internal quotation marks omitted).
[8] *Id.* at 26 (emphasis added) (quoting email) (internal quotation marks omitted).
[9] *Id.* (internal quotation marks omitted).
[10] *Id.* at 25.
[11] *Id.* at 27.
[12] *Id.*
[13] Exceptions at 15.
[14] *Id.*
[15] 5 C.F.R. §§ 2425.4(c), 2429.5.
[16] Award at 20.
[17] Exceptions at 15.
[18] *See, e.g., AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012).
[19] *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)).
[20] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[21] *Id.*
[22] *See U.S. Dep't of the Army, Fort Campbell Dist., Third Reg., Fort Campbell, Ky.*, 37 FLRA 186, 195 n.2 (1990) (*Fort Campbell*).

the party must specifically address how provisions of an applicable collective-bargaining agreement conflict with the cited authority.[23]

The Agency argues that the award is contrary to law because, in determining that the Agency should not have applied Section 3.b. to the grievant, the Arbitrator "ignore[d]" the date on the grievant's SF-50 and determined the grievant's "effective date of appointment with [the Agency] based on an oral or quasi contract for employment."[24] In particular, the Agency argues that the grievant is entitled to "derive the benefits . . . of [her] position[] [only] from appointment rather than from any contractual or quasi-contractual relationship with the government."[25] As Department of Defense Education Activity teachers are appointed pursuant to the authorizing statutes of either DoDDS or the Agency – 10 U.S.C. § 2164 and 20 U.S.C. §§ 921-932, respectively[26] – the Agency contends that the Arbitrator erred by relying on evidence of an informal "agreement" to determine the grievant's date of appointment.[27]

The Arbitrator found, among other things, that Section 3.b. applies only to an employee who is "hired" after July 4, 1999.[28] And the Arbitrator found that the grievant was not "hired" within the meaning of Section 3.b. of the CBA when she was reassigned from DoDDS to the Agency.[29] There is no dispute that both DoDDS and the Agency are components of the Department of Defense Education Activity. And although the Agency cites the statutes authorizing the Secretary of Defense to appoint teachers for DoDDS and the Agency,[30] these statutes do not establish that the grievant was "hired" within the meaning of Section 3.b. when she went from working for one Department of Defense Education Activity component to another.[31] In addition, although the Agency relies on the grievant's SF-50 to argue that her appointment to the Agency was effective on August 9, 1999, "the SF-50 is not a legally operative document controlling on its face an employee's status and rights."[32] Thus, the Agency provides no basis for finding, as a matter of law, that the grievant was "hired" for purposes of Section 3.b.,[33] rather than "reassigned," as the Arbitrator found.[34] Accordingly, the Agency does not satisfy its burden of showing that Section 3, as interpreted and enforced by the Arbitrator, is contrary to law.[35]

For the foregoing reasons, we deny the Agency's contrary-to-law exceptions.

## V. Decision

We dismiss in part and deny in part the Agency's exceptions.

[23] *See id.*
[24] Exceptions at 14.
[25] *Id.* at 13-14 (citing *United States v. Hopkins*, 427 U.S. 123 (1976); *Hamlet v. United States*, 63 F.3d 1097 (Fed. Cir. 1995)).
[26] *Id.* at 13.
[27] *Id.* at 14.
[28] Award at 25 (quoting Section 3.b.).
[29] *Id.* at 25-27.
[30] Exceptions at 13 (citing 10 U.S.C. § 2164; 20 U.S.C. §§ 921-932).
[31] Award at 4 (quoting Section 3.b.).
[32] *Grigsby v. U.S. Dep't of Commerce*, 729 F.2d 772, 776 (Fed. Cir. 1984); *see also Hunt-O'Neal v. OPM*, 116 M.S.P.R. 286, 290-91 (2011) (Merit Systems Protection Board (MSPB) will not rely solely on SF-50, but will examine "the totality of the circumstances to determine the actual dates of . . . appointment and removal."); *Scott v. Dep't of the Air Force*, 113 M.S.P.R. 434, 438 (2010) (MSPB will not rely solely on SF-50, but will examine "the totality of the circumstances in determining the nature of the appointment.").
[33] Award at 25 (quoting Section 3.b.) (internal quotation marks omitted).
[34] *Id.* at 26 (quoting email) (internal quotation marks omitted).
[35] *See Fort Campbell*, 37 FLRA at 195 n.2.