70 FLRA No. 52

UNITED STATES
DEPARTMENT OF TRANSPORTION
FEDERAL AVIATION ADMINISTRATION
MIKE MONRONEY AERONAUTICAL CENTER
(Agency)

and

PROFESSIONAL ASSOCIATION
OF AERONAUTICAL
CENTER EMPLOYEES
(Union)

0-AR-5268

_____

DECISION

June 8, 2017

_____

Before the Authority: Patrick Pizzella, Acting Chairman, and Ernest DuBester, Member

I. Statement of the Case

Arbitrator Stephen Crable found that the Agency violated the parties' collective-bargaining agreement (agreement) when it failed to fully counsel the grievant, prior to his acceptance of a term instructor position at the FAA Academy, of his return rights, benefits, and obligations. After the parties were unable to reach an agreeable remedy, the Arbitrator directed the Agency to reinstate the grievant's original level of pay retention, thereby adjusting his pay to the amount as it existed immediately prior to the grievant's acceptance of the instructor position.

The first question is whether the Arbitrator exceeded his authority when he found that the Agency violated Article 49, Section 5.B.4 of the agreement (Section 5) because this issue was allegedly not submitted to arbitration. Because the Arbitrator's findings directly respond to the issues before him, the answer is no.

The second question is whether the Arbitrator's remedy of restoration to the original level of pay-retention protection is contrary to agency-wide regulation. Because the agreement – and not the Agency's internal regulation – governs the Arbitrator's remedy, the answer is no.

II. Background and Arbitrator's Award

The grievant was an airway transportation system specialist for the Agency with a pay grade of "H" in Tulsa, Oklahoma. He was also the beneficiary of a level of pay-retention protection that had already been in place for many years. The grievant was selected for a three-year tour to be a radar-concept instructor (instructor position) for the FAA Academy. Prior to accepting this assignment, the grievant underwent a briefing, required under the agreement, as to his return rights, benefits, and obligations. Only after this briefing did the grievant accept the instructor position.

Near the completion of this tour, the grievant applied for a second tour but was denied. The Agency then offered the grievant a list of ten vacancies (field positions) for his return from the FAA Academy; he selected a position as a specialist in Dallas, Texas. While his new position offered the same pay grade level H, the base pay was less than his previous position as an instructor. The Union filed a grievance alleging that the Agency violated the agreement when it offered the grievant a base salary that was less than his base salary as an instructor. The Agency denied the grievance, and the parties submitted the matter to arbitration.

As relevant here, the parties disagreed on the issues, so the Arbitrator framed them as: (1) whether the Agency violated Article 49, Section 11 of the agreement when it offered a lower base salary to the grievant upon his return to a field position; (2) whether the Agency violated Section 5 of the agreement by "failing to fully counsel [the g]rievant regarding his return rights" prior to accepting the instructor position; and (3) what should be the appropriate remedy if the Agency violated the agreement.[1]

The Arbitrator issued a preliminary award granting, in part, and denying, in part, the grievance. Specifically, the Arbitrator found that the Agency did not violate the agreement when it offered the grievant a lower base salary than what he received as an instructor because "Article 49, Section 11 speaks to the [g]rievant's 'grade/level,' [and] not the [g]rievant's base pay. Accordingly, the [a]greement did not require the [Agency] to pay the [g]rievant the [same] amount of base pay he was making at the Academy."[2] However, the Arbitrator found that the Agency violated the agreement when it failed to fully counsel the grievant of his return rights prior to his acceptance of the instructor position. The Arbitrator remanded the issue to the parties to reach an agreeable remedy and retained jurisdiction to issue a final award if the parties did not reach an agreement.

[1] Preliminary Award at 3.
[2] *Id.* at 21.

The parties were unable to reach an agreement, and the Arbitrator issued a final award that directed the Agency to adjust the grievant's pay to the amount that reflected the level of pay retention he received prior to accepting his instructor position. The Arbitrator also found that since the "grievance concern[ed] a reduction in pay . . . it [wa]s within [his] authority to remedy the reduction in pay by ordering retained pay for [the grievant] going forward."[3] In determining the appropriate remedy, the Arbitrator stated:

> Had the [Agency] met its contractual obligations to "thoroughly and completely" make [the g]rievant aware of his return rights, benefits, and obligations, including the possibility of . . . a large pay cut upon leaving the [FAA] Academy, [the g]rievant could have declined the assignment or knowingly undertook the risk of a $13,000 pay cut.[4]

The Agency filed exceptions to the Arbitrator's final award, and the Union filed an opposition.

III. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Agency claims that the Arbitrator exceeded his authority.[5]

An arbitrator exceeds his or her authority when, as relevant here, the arbitrator resolves an issue not submitted to arbitration.[6] Where the parties fail to stipulate the issue, the arbitrator may formulate the issue on the basis of the subject matter before him or her, and this formulation is accorded substantial deference.[7] In those circumstances, the Authority examines whether the award is directly responsive to the issue the arbitrator framed.[8]

The Agency argues that the Arbitrator erred when he found that the Agency violated Section 5 of the agreement because this issue was not submitted to arbitration. The Agency asserts that the question before the Arbitrator was solely whether the Agency violated Article 49, Section 11 of the agreement, whereas Section 5 was not presented before the Arbitrator during the hearing or prior to the preliminary award.[9] Thus, the Agency argues that it did not have the opportunity to present arguments before the Arbitrator against a monetary remedy prior to the final award.[10]

We find the Agency's argument unpersuasive because the Arbitrator clearly specified in the preliminary award that the issues before him included whether the Agency violated Section 5 by failing to fully counsel the grievant of his return rights prior to accepting the instructor position.[11] Further, the Agency's own supplemental briefing to the Arbitrator, submitted after the merits award, discussed the parties' failed attempts to reach an agreed-upon remedy and included explicit references to disagreement as to how to remedy a Section 5 violation.[12] As explained in *NTEU*, where the parties fail to stipulate the issue, the arbitrator may formulate the issue on the basis of the subject matter before him or her and this formulation is accorded substantial deference.[13] Moreover, in such circumstances, the Authority examines whether the award is directly responsive to the issue the arbitrator framed.[14]

Addressing the framed issue, the Arbitrator first found that Section 5 "imposes a significant burden on the [Agency] to educate an [e]mployee of his employment rights prior to" acceptance of the instructor position.[15] Second, the Arbitrator found that "[g]iven the pay-retention protection which [the g]rievant enjoyed for several years . . . it was not immediately obvious . . . that [the g]rievant would lose his pay retention protection upon accepting a position at the Academy."[16] Finally, Section 5, as interpreted by the Arbitrator, supports the Arbitrator's conclusion that the Agency failed to fully counsel the grievant, and the Agency does not challenge the Arbitrator's interpretation or application of that provision on essence grounds.

Given that the Arbitrator formulated this issue in his preliminary award and fashioned a remedy in his final award after the parties were unable to reach an agreeable remedy, the Agency's assertion that the Arbitrator resolved an issue not submitted to arbitration provides no basis for finding the award deficient.[17]

---

[3] Final Award at 4.
[4] *Id*. at 9.
[5] Exceptions Form at 11-12.
[6] *AFGE, Council of Prison Locals #33, Local 0922*, 69 FLRA 351, 352 (2016) (*Local 0922*) (citing *U.S. DOD, Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996)).
[7] *Id*. (citing *AFGE, Local 522*, 66 FLRA 560, 562 (2012) (*Local 522*)).
[8] *Id*.
[9] Exceptions Form at 11-12.
[10] *Id.* at 12.
[11] Preliminary Award at 3.
[12] Exceptions, Attach. 6, Summary of Affirmative Findings and Applicable Limitations to Arbitrator Authority Br. at 2.
[13] 70 FLRA 57, 58 (2016) (citing *Local 522*, 66 FLRA at 562).
[14] *Id.*
[15] Preliminary Award at 23.
[16] *Id.*
[17] *NTEU*, 70 FLRA at 58.

Accordingly, we deny the Agency's exceeds-authority exception.[18]

B. The award is not contrary to agency-wide regulation.

The Agency contends that the remedy's inclusion of pay retention is contrary to an agency-wide regulation. Section 7122(a)(1) of the Statute provides that an arbitration award will be found deficient if it conflicts with any law, rule, or regulation.[19] For purposes of § 7122(a)(1), the Authority has defined rule or regulation to include both government-wide and "governing" agency regulations.[20] However, collective-bargaining agreements, rather than agency-wide regulations, govern the disposition of matters to which they both apply.[21]

The Agency argues that the award of restoration to the grievant's original level of pay retention conflicts with the Agency's Human Resource Policy Manual (HRPM) Volume 2, Comp-2.11C, Section 8.[22] According to the Agency, the HRPM lists all of the qualifying events that would entitle an employee to be restored to pay retention, and none of them are applicable to the grievant.[23] In addition, the Agency argues that the grievant had lost his entitlement to pay retention in 2012 when he accepted the instructor position.[24]

Here, the Agency has not demonstrated that the HRPM governs over the matter in dispute. Specifically, the Agency does not challenge the Arbitrator's finding that the grievant's circumstances do not qualify as an involuntary management action "to trigger the [pay]-retention protection" provided in Section 8 of the HRPM.[25] Rather, the Arbitrator relied on his authority as an arbitrator to fashion a remedy when he ordered the Agency to return the grievant's pay to the amount it was immediately prior to his acceptance of the instructor position "subject to pay-retention protection until changed, adjusted, or eliminated consistent with Agency rules, regulations, and applicable law."[26] The award to restore the grievant's pay-retention protection addressed the harm caused by the Agency's failure to make the grievant fully aware of his return rights, benefits, and obligations so that the grievant could have declined the assignment or knowingly undertook the risk.[27] Accordingly, the Agency has not shown that the award is contrary to the HRPM.[28]

Finally, the Agency notes that the award is in "direct conflict" with Article 67 of the agreement.[29] However, the Agency fails to support this part of its exception with any arguments. Section 2425.6(e)(1) of the Authority's Regulation provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground" listed in § 2425.6(a)-(c).[30] And, consistent with § 2425.6(e)(1), when a party does not provide any arguments to support its exception, the Authority will deny the exception.[31] Accordingly, we deny this exception under § 2425.6.[32]

Therefore, because the Agency fails to demonstrate that the Arbitrator's remedy of awarding pay retention is contrary to an agency-wide regulation, we deny the Agency's exception.

IV. Decision

We deny the Agency's exceptions.

[18] *Local 0922*, 69 FLRA at 352.
[19] 5 U.S.C. § 7122(a)(1).
[20] *IBEW, Local 2219*, 68 FLRA 448, 449 (2015) (citing *USDA, Forest Serv., Monongahela Nat'l Forest*, 64 FLRA 1126, 1128 (2010)).
[21] *Id*.
[22] Exceptions Form at 5.
[23] *Id*.
[24] *Id*.
[25] Preliminary Award at 20.
[26] Final Award at 11.
[27] *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 68 FLRA 960, 966 (2015) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Or.*, 68 FLRA 388, 391 (2011) (arbitrators have broad discretion to fashion remedies and agency provided no basis for setting remedy aside that addressed the harm caused by agency's non-compliance with previous award)).
[28] *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 178 (2017) (*VA*) (denying exception where agency failed to establish arbitrator's interpretation of the agreement was contrary to agency regulation).
[29] Exceptions Form at 6.
[30] 5 C.F.R. § 2425.6(e)(1).
[31] *VA*, 70 FLRA at 176 (citing *NTEU, Chapter 67*, 67 FLRA 630, 630-31 (2014)).
[32] *NLRB Prof'l Ass'n*, 68 FLRA 552, 554 (2015).