64 FLRA No. 59

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
TUSCALOOSA, ALABAMA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 131
(Union)

0-AR-4240

DECISION

December 31, 2009

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator William H. Holley, Jr. 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 properly consider the grievant for a higher-graded position and directed the Agency to return to the status quo that existed when the vacancy was posted and to re-run the selection.

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

II. Background and Arbitrator's Award

The Agency posted an internal vacancy announcement for a Wage Leader (WL)-8, Gardener Leader position. The Agency expanded the announcement to permit external candidates. The grievant, an internal candidate, and an external candidate were interviewed for the position. Award at 2. The external candidate was selected. *Id.*

The Union filed a grievance alleging that the Agency had violated Article 22 of the parties' agreement and sought an "[u]pgrade" for the grievant to a WL-8 salary or equivalent. [2] *Id.* In response, the Agency acknowledged that it had committed a procedural error in violation of Article 22. To remedy the error, the Agency agreed to grant the grievant priority consideration for the next promotional opportunity up to the rate of a WL-8 or equivalent for which he is qualified and wishes to be considered. *Id.* at 3.

The Union invoked arbitration and the parties stipulated to the following issue: "[w]hether there was a violation of Article 22 of the [parties'] agreement . . . [,] in particular, Section 8, paragraph C and Section 12, paragraph D." *Id*. at 6.

The Arbitrator considered this case to be "unusual" as the Agency admitted that it had committed a procedural error and agreed to provide the grievant with priority consideration to remedy the error. *Id.* at 20-21. The Arbitrator reviewed Article 22, Section 13 of the parties' agreement and found that "[t]he parties have negotiated and agreed to [the provision]," which provides "a potential remedy for a contractual violation (procedural error)." *Id.* at 22. The Arbitrator further found that, where there are procedural errors and where it is not clear whether the grievant would have been selected but for the error, "a common remedy is to declare the position vacant and order management to reevaluate all candidates." *Id.* (citation omitted).

The Arbitrator concluded that the Agency violated Article 22, Sections 7, 8, and 12 of the parties' agreement when it committed a procedural error in filling the Gardener Leader position. As a remedy, the Arbitrator directed the Agency to return to the status that existed prior to the filling of the vacant position and to re-run the selection in accordance with Article 22. *Id.* at 22-23.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award fails to draw its essence from Article 22, Section 13 of the parties' agreement. Exceptions at 1. The Agency alleges that, under that provision, the remedy for employees who fail to receive proper consideration for selection due to "procedural, regulatory, or program violation" is priority consideration for a future vacancy. *Id.* The Agency

1. Member Beck's basis for dissent is set forth at footnote 4.

2. The relevant provisions of the parties' agreement are set forth in the appendix at the end of this decision.

argues that the language of the parties' agreement is clear and that there is no need to look outside the four corners of the provision to ascertain the parties' intentions. *Id.* at 2. The Agency asserts that, as the Arbitrator found that the grievant failed to receive proper consideration for selection, he should have ordered priority consideration. *Id.*

The Agency also alleges that the award is "too ambiguous [as] to make compliance possible." *Id.* at 2. Further, the Agency contends that the award is contrary to law – specifically, 5 U.S.C. §§ 7513, 4303, or 3502 – because the Agency has no authority to either return the selectee to his former position or involuntarily separate him. [3] *Id.* at 1.

B. Union's Opposition

The Union rejects the Agency's claim that the Agency does not have the authority to implement a *status quo ante* remedy and argues that "[s]imply claiming that [it] cannot undo [its] error" does not provide a basis for overturning the award. Opp'n at 1.

With respect to the Agency's essence exception, the Union argues that priority consideration is a "contractually justified remedy" only if the Agency exercised good faith in the commission of the procedural errors. *Id.* at 2. The Union also contends that the award should be upheld because the grievant was equally qualified for the position as the selectee. *Id.*

IV. Analysis and Conclusions

A. Essence

The Authority may set aside arbitration awards only on certain specified grounds, including, as relevant here, "grounds similar to those applied by Federal courts in private sector labor-management relations[.]" 5 U.S.C. § 7122(a)(2). The Federal courts' standard in reviewing arbitral contract interpretations is highly deferential, as evidenced by the Supreme Court's statement that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious errors does not suffice to overturn his [error]." *United Paperworkers Int'l Union, AFL-CIO v. Misco*, 484 U.S. 29, 38 (1987).

Consistent with these principles, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' agreement only 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 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). 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.

The Agency cites Article 22, Section 13 of the parties' agreement, which provides, in pertinent part: "For the purpose of this article, a priority consideration is the bona fide consideration for noncompetitive selection given to an employee as the result of a previous failure to properly consider the employee for selection because of procedural, regulatory, or program violation." Award at 8. The Arbitrator interpreted this wording as providing priority consideration as "a *potential* remedy" — i.e., not the sole remedy — for a contractual violation of procedural error." Award at 22 (emphasis added). Nothing in Article 22, Section 13 states that priority consideration is the only remedy available or that rerunning a selection action is not a permissible remedy. As such, the Agency does not demonstrate that the award is irrational, unfounded, implausible, or in manifest disregard of the agreement. Accordingly, we deny the Agency's essence exception. [4]

3. The pertinent wording of 5 U.S.C. §§ 7513, 4303, and 3502 is set forth *infra*.

4. For the following reason, Member Beck disagrees with the Majority that the Agency's essence exception should be denied. The remedial language in Article 22, Section 13 is specific and mandatory in setting forth the remedy for an employee who is not properly considered for selection: "For the purpose of this article, a priority selection is the bona fide consideration for noncompetitive selection given to an employee as the result of a previous failure to properly consider the employee for selection . . . ." Award at 8 (emphasis added). With this language, the parties contemplated that mistakes might sometimes be made in selecting employees for higher-graded positions and expressly stated what the remedy should be in such instances. The Arbitrator's remedy is incompatible with the plain wording of the provision and does not represent a plausible interpretation of the agreement. *See, e.g., SSA, Office of Labor Mgmt. Relations*, 60 FLRA 66, 67 (2004) (award deficient as not representing plausible interpretation of agreement); *U.S. Small Bus. Admin.*, 55 FLRA 179, 182 (1999) (award deficient because arbitrator's interpretation of agreement was incompatible with its plain wording); *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993) (award deficient because arbitrator's interpretation of agreement was incompatible with its plain wording).

For this reason, Member Beck would grant the Agency's essence exception and find it unnecessary to address the remaining exceptions. *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, Metro Det. Ctr., Guaynabo, P.R.*, 58 FLRA 553, 554 n.3 (2003); *United States Dep't of Justice, Immigration & Naturalization Serv., Del Rio Border Patrol Sector, Tex.*, 45 FLRA 926, 933 (1992).

B. Incomplete, Ambiguous, or Contradictory

The Agency also alleges that the award is "too ambiguous as to make compliance possible." Exceptions at 2. We construe this as a claim that the award is incomplete, ambiguous, or contradictory. The Authority will find an award deficient when it is incomplete, ambiguous, or so contradictory as to make implementation of the award impossible. *See, e.g., U.S. Dep't of Labor, Mine Safety & Health Admin., S.E. Dist.*, 40 FLRA 937, 943 (1991).

The Arbitrator directed the Agency to return to the status quo that existed prior to the filling of the vacant position and to re-run the selection in accordance with Article 22 of the parties' agreement. Award at 22-23. The Agency provides no basis for finding that this direction is incomplete, ambiguous, contradictory, or impossible to implement. Accordingly, the Agency has not demonstrated that the award is deficient on this ground, and we deny the exception.

C. Contrary to Law

The Agency contends that the award is contrary to 5 U.S.C. §§ 7513, 4303, and 3502. When a party's exceptions challenge an award's consistency with law, the Authority reviews the 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 the standard of *de novo* review, the Authority evaluates whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that evaluation, the Authority defers to the arbitrator's underlying factual findings. *Id*.

5 U.S.C. § 7513 establishes that adverse actions such as removals, suspensions for more than 14 days, reductions in grade or pay, or furloughs for 30 or fewer days must be based on "such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a). The Authority has held that neither vacating a selection nor rerunning a selection action constitutes an adverse action within the meaning of § 7513. *See SSA*, 58 FLRA 739, 742 (2003). Consistent with this precedent, § 7513 does not apply in this case, and the Agency's reliance on it provides no basis for finding the award deficient.

5 U.S.C. § 4303 addresses "[a]ctions based on unacceptable performance" and provides, in pertinent part, that "an agency may reduce in grade or remove an employee for unacceptable performance." 5 U.S.C. § 4303. The award does not concern unacceptable performance. Specifically, it neither directs the Agency to take any actions based on unacceptable performance nor precludes the Agency from taking such actions. Accordingly, the Agency provides no basis for finding the award contrary to 5 U.S.C. § 4303.

Finally, 5 U.S.C. § 3502 concerns the "[o]rder of retention" that applies when agencies conduct reductions-in-force (RIFs). This case does not involve a RIF, and there is no basis for finding that 5 U.S.C. § 3502 applies here. Accordingly, the Agency's reliance on that statute provides no basis for finding the award contrary to law.

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

V. Decision

The exceptions are denied.

APPENDIX

Article 22, "Merit Promotion," of the parties' agreement provides, in relevant part:

Section 8 – Vacancy Announcements and Areas of Consideration

. . . .

C. Areas of Consideration:

The areas of consideration will be:

First – Facilitywide . . .

1. This area may be more narrow or expanded through mutual agreement.

2. Where evidence suggests that the area of consideration is not expected to produce at least three qualified candidates, it may be expanded. The vacancy announcement will identify the expanded area of consideration.

3. For VA Headquarters unit positions, GS-12 and above, the area of consideration may be expanded.

However, in all cases, (1, 2, and 3 above), first and full consideration shall be given to any best qualified candidates within the facility (or more narrow area).

Second – Any other promotion candidate or candidates required to compete from other VA facilities.

Third –

1. Reassignments/demotions to positions with higher known promotion potential.

2. Reinstatements to positions at a higher grade or with higher known potential.

3. Transfers to positions at a higher grade or with higher known potential.

. . . .

Section 12 – Selection

D. Management recognizes that it is important for maintaining high morale to try to select from within the facility when the candidates are equally qualified to those candidates available from outside sources. Thus, management will agree to look closely at the relative qualifications of candidates from outside and within and shall exercise good faith in the selection.

Section 13 – Priority Considerations

A. Definition – For the purpose of this article, a priority consideration is the bona fide consideration for noncompetitive selection given to an employee as the result of a previous failure to properly consider the employee for selection because of procedural, regulatory, or program violation. Employees will receive one priority consideration for each instance of improper consideration.

Award at 6-8.