64 FLRA No. 84

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
ENGINEERS AND ARCHITECTS
(Union)

0-AR-4322

DECISION

February 22, 2010

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 Joseph M. Sharnoff 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 concluded that certain employees were entitled to pay-retention benefits under the Agency's human-resources manual (the Agency regulation). For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency realigned offices and advised affected employees that they would be reassigned, which meant, in many cases, that employees would need to relocate. Some employees (the disputed employees) declined the reassignments and, instead, applied and were selected for lower-paid positions at their respective current locations. Award at 9-10. When the Agency advised that the disputed employees were not entitled to pay retention under the Agency regulation, the Union filed a grievance that was submitted to arbitration. *Id.* at 1-2.

The Arbitrator noted that, in pertinent part, the Agency regulation provides: "Pay retention shall be extended to any employee moving to a [covered position] whose rate of basic pay would otherwise be reduced as the result of . . . reorganization announced by management in writing." *Id.* at 4 (emphasis deleted). The Arbitrator also noted the Agency's position that the disputed actions constituted administrative reassignments and restructuring, rather than a reorganization within the meaning of the Agency regulation. However, the Arbitrator found that the Agency had not supported its position in the reply to the grievance, its opening statement at arbitration, or its post-hearing brief. The Arbitrator further found that the Union relied on Office of Personnel Management (OPM) guidance. *Id.* at 20 (citing Workforce Restructuring Office Restructuring Information (June 1998)). While acknowledging that OPM regulations and guidance do not apply to the Agency, the Arbitrator determined that "there is no Agency-promulgated definition of the term 'reorganization.'" *Id.* at 24. Accordingly, he found it appropriate to apply OPM's definition of "reorganization" to determine entitlement to pay retention under the Agency regulation. *Id.* at 25.

The Arbitrator noted testimony that described the disputed actions as the planned elimination, addition, and redistribution of functions and duties, which "restructured" positions. *Id.* (citing testimony at 14). Assessing the disputed actions, he found that, although the Agency repeatedly referred to the disputed actions as a "restructuring" rather than a reorganization, the restructuring of positions constitutes a "reorganization" under the OPM definition. *Id.* Consequently, the Arbitrator found that the disputed actions constituted a reorganization under the Agency regulation, and he determined that the reduction in the disputed employees' basic rate of pay was a result of the reorganization. As there was no dispute that management's actions were announced in writing, the Arbitrator concluded that the disputed employees were entitled to pay-retention benefits under the Agency regulation.

Accordingly, the Arbitrator sustained the grievance. *Id.* at 26. As a remedy, he directed the Agency and the Union to determine which individuals are entitled to be paid pay-retention benefits retroactively. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is contrary to the Agency regulation. The Agency argues that the Arbitrator applied the term "reorganization," as set forth in the Agency regulation, "contrary to the definition and use of the regulation." Exceptions at 6. In this connection, the Agency asserts that any reduction in the disputed employees' pay was the result of voluntary

choices, not the result of a management-directed action as part of a reorganization. *Id.* The Agency also claims that the Arbitrator erred when he applied the OPM definition of "reorganization," rather than applying the Agency regulation, which the Agency concedes does not define "reorganization." *Id.* at 5. The Agency notes that its interpretation of its regulations is entitled to deference and that, consequently, the award should be found deficient. *Id.* at 7.

The Agency also contends that the award is contrary to the Back Pay Act. Specifically, the Agency asserts that a voluntary demotion is not an unjustified or unwarranted personnel action within the meaning of the Back Pay Act. *Id.*

B. Union's Opposition

The Union contends that the Arbitrator's interpretation of the Agency regulation is consistent with its plain wording and that, in interpreting it, the Arbitrator reasonably applied OPM guidance. Opp'n at 4. As to the Agency's claim that its interpretation of the regulation is entitled to deference, the Union asserts that the Agency has failed to define the term "reorganization," and, thus, there is no interpretation to which the Authority must defer. *Id*. Finally, the Union asserts that the Agency's violation of its regulation constitutes an unjustified or unwarranted personnel action under the Back Pay Act. *Id.* at 9.

IV. Analysis and Conclusions

A. The award is not contrary to Agency regulation.

In the resolution of grievances under the Statute, arbitrators are empowered to interpret and apply agency rules and regulations. *U.S. Dep't of Justice, Immigration & Naturalization Serv., Wash., D.C.*, 48 FLRA 1269, 1275 (1993). An arbitration award that conflicts with a governing agency regulation is deficient under § 7122(a)(1) of the Statute. *Id.* at 1274-75. In reviewing arbitration awards for consistency with agency regulations, the Authority reviews the questions of law raised by the award and the exception *de novo*. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Med. Facility for Fed. Prisons*, 51 FLRA 1126, 1135-36 (1996) (*DOJ*); *accord U. S. Dep't of Transp., Fed. Aviation Admin.*, 56 FLRA 627, 629 (2000) (*FAA*); *U.S. Dep't of Transp., Fed. Aviation Admin., Wash., D.C.*, 58 FLRA 23, 25 (2002) (Chairman Cabaniss dissenting as to other matters) (*FAA, Washington*). In reviewing the award for consistency with agency regulations, the Authority defers to the arbitrator's underlying factual findings. *See FAA, Washington*, 58 FLRA at 25.

An agency's interpretation of its own regulations is controlling unless it is "plainly erroneous or inconsistent" with the language of the regulation. *DOJ*, 51 FLRA at 1136 (quoting *FLRA v. U. S. Dep't of the Treasury, Fin. Mgmt. Serv.*, 884 F.2d 1446, 1454 (D.C. Cir. 1989)) (*FLRA v. Treasury*). However, consistent with the approach of the courts, the Authority declines to defer to an agency's "litigative position[]." *Id.* (quoting *FLRA v. Treasury*, 884 F.2d at 1455)). In this regard, the Authority has explained that such positions may not reflect the views of the agency head and may have been developed "hastily, or under special pressure, or without an adequate opportunity for presentation of conflicting views." *Id.* Accordingly, for an agency's interpretation to be entitled to deference, the interpretation asserted in exceptions must have been publicly articulated prior to "litigation[.]" *Id.* (quoting *Nordell v. Heckler*, 749 F.2d 47, 48 (D.C. Cir. 1984)).

As an initial matter, the Agency asserts that the Arbitrator applied the term "reorganization" contrary to its definition and use in the Agency regulation, but concedes that the Agency regulation does not define "reorganization." More generally, the substance of the Agency's exception is that any reduction in disputed employees' pay was the result of the employees' voluntary choice, not the result of a management-directed action as part of a reorganization. To the extent that the Agency is now arguing that situations involving employees' voluntary choices do not constitute "reorganizations" within the meaning of the Agency regulation, the Agency does not assert that this interpretation of the regulation reflects the views of the Agency head rather than the litigative position of the Agency before the Authority. *See FAA, Washington*, 58 FLRA at 25-26; *FAA*, 56 FLRA at 630. There is also no indication that this interpretation was developed in a manner that reflects deliberate consideration, or that it was previously publicly articulated. *See DOJ*, 51 FLRA at 1136 (citing *FLRA v. Treasury*, 884 F.2d at 1455). As such, the Agency has not established that its interpretation of the regulation is entitled to deference. *See FAA, Washington*, 58 FLRA at 26; *FAA*, 56 FLRA at 630; *DOJ*, 51 FLRA at 1136.

In circumstances where an agency fails to establish that deference is due its alleged interpretation of an agency regulation, the Authority independently assesses whether the arbitrator's interpretation of the regulation is consistent with its provisions. *See FAA*, 56 FLRA at 630; *DOJ*, 51 FLRA at 1137. As discussed above, the Arbitrator noted testimony that described the disputed actions as the planned elimination, addition, and redistribution of functions and duties, which "restructured"

positions. Assessing the disputed actions, he noted that, although the Agency repeatedly referred to the disputed actions as a "restructuring" rather than a reorganization, the restructuring of positions constitutes a "reorganization" under the OPM definition. *Id.* Consequently, the Arbitrator found that the disputed actions constituted a reorganization under the Agency regulation.

The Agency provides no support for its assertion that this interpretation and application of the term "reorganization" is contrary to its use in the Agency regulation. *Cf. DOJ*, 51 FLRA at 1137 (agency provided no basis for finding an award contrary to agency regulation when the regulation did not define the term in dispute). The Agency also provides no support for its claim that the reorganization did not result in the reductions in pay. In this connection, there is no dispute that the disputed employees sought new, lower-paying positions as the result of the Agency's decision to restructure.

For the foregoing reasons, we deny this exception.

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

The Agency contends that there was no unjustified or unwarranted personnel action within the meaning of the Back Pay Act. A violation of an agency regulation constitutes an "unjustified or unwarranted personnel action" within the meaning of the Back Pay Act. 5 C.F.R. § 550.803; *U.S. Dep't of Transp., Fed. Aviation Admin., Airways Facility Serv., Nat'l Airways Sys., Eng'g Div., Oklahoma City, Okla.*, 60 FLRA 565, 569 (2005). As discussed above, the Arbitrator found that the Agency violated the Agency regulation, and we have concluded that the award is not deficient in that regard. Consistent with the above-cited precedent, we conclude that the Agency committed an unjustified or unwarranted personnel action within the meaning of the Back Pay Act, and we deny this exception.

V. Decision

The Agency's exceptions are denied.