65 FLRA No. 108

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 5
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE LOGISTICS AGENCY
DEFENSE DISTRIBUTION DEPOT RED RIVER
TEXARKANA, TEXAS
(Agency)

0-AR-4577

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DECISION

February 14, 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 George E. Larney filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator concluded that, because the Agency failed to consult with the Union in accordance with Article VIII of the parties' collective bargaining agreement (parties' agreement) before transferring a bargaining unit General Schedule (GS)-9 Quality Assurance Specialists (employee) to a supervisory position outside the bargaining unit, it should return that employee to her GS-9 bargaining unit position of record. Award at 35, 47, 48, 49, 50. For the reasons set forth below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Agency temporarily promoted the employee to a GS-11 Distribution Facilities Manager position. *Id.* at 28. Fourteen days after the employee was temporarily promoted, the Agency adopted the National Security Personnel System (NSPS), and, on that date, the GS-11 position was converted into an NSPS position. *Id.*; *see also id.* at 30. When the employee's temporary promotion ended, she was returned to her permanent bargaining unit position of record, the GS-9 Quality Assurance Specialist position. *Id.* at 30. Without notifying the Union, the Agency later transferred the employee to the NSPS supervisory non-bargaining unit position on a permanent basis.[1] *See id.*

After the Union became aware that the employee had been awarded the NSPS position on a permanent basis, it filed a grievance. *Id.* at 34. In its grievance, the Union asserted that the Agency violated its Merit Promotion Program, Defense Logistics Agency Regulation (DLAR) 1404.4, by not "allow[ing] all interested [e]mployees to apply for the position through the Merit Promotion competitive procedures . . . ." *Id.* (emphasis omitted). The matter was unresolved and was submitted to arbitration. *Id.* at 36, 37.

The parties could not agree on a stipulated issue regarding the merits of the case, and the Arbitrator did not frame an issue.[2] *See id.* at 6. The Union's statement of the issue was whether "the Agency violate[d] DLAR . . . 1404.4 . . . and Article XXVI [of the parties' agreement] . . . when [the Agency] permanently moved [the employee] from a GS-1910-09 Quality Assurance Specialist [position] to a GS-2030-11 Supervisory Distribution Facilities Specialist/YA-2030-02 Supervisory Distribution Facilities Specialist [position], resulting in a higher rate of pay without advertising the vacancy?"[3] *Id.* The Agency's statement of the issue was whether it "violate[d] 1404.4 of the [parties' agreement] when it temporarily promoted [the employee] to a GS-11 position, which was converted via NSPS, . . . and later reassigned [the employee] to the Supervisory Distribution Facilities Specialist [position] . . . ?" *Id.*

1. As a result of the employee's placement in the NSPS position, her adjusted basic pay rose from $49,546.00 to $52,023.00. Award at 28, 31.

2. The Agency also raised the issue of whether the grievance was timely filed before the Arbitrator. *Id.* at 5. Because no exceptions were filed regarding the Arbitrator's resolution of this issue, it is not before us.

3. Pertinent sections of DLAR 1404.4 and the parties' agreement are set forth in the attached appendix.

The Arbitrator found the Agency's contention that it merely reassigned the employee when it transferred her to the NSPS position on a permanent basis to be without merit. *Id.* at 46-47. The Arbitrator determined that the Agency disregarded the fact that, when it permanently transferred the employee to the NSPS position, she "continued to be in the status of a bargaining unit employee who had fully completed the initial [Agency] directed personnel action of a 120[-]day temporary promotion and therefore was not a[n] NSPS employee to be reassigned on a permanent basis to perform the duties of a[n] NSPS position." *Id.*

Also, the Arbitrator found that the Agency violated Article VIII of the parties' agreement by awarding the employee the NSPS position on a permanent basis. *Id.* at 47, 49. According to the Arbitrator, Article VIII recognizes that the Union possesses national consultation rights on matters such as promotion procedures, and Article VIII, Section 3 requires that the Agency provide the Union not only with a copy of proposed new and revised regulations impacting unit employees, but also with written notice of proposed modifications in conditions of employment. *Id.* at 47. The Arbitrator found that "once the Agency desired to move [the employee] on a permanent basis to the NSPS . . . position, it was contractually obligated to inform the Union of its desired intention and to furnish the Union with a copy of a proposal to accomplish this move, which represented a change in [the employee's] conditions of employment." *Id.* Moreover, the Arbitrator determined that, if the Agency had complied with Article VIII of the parties' agreement, then the Union would have had notice of the proposed change in the employee's conditions of employment and would have had the opportunity to meet with the Agency to discuss the proposed change and to request negotiations and submit counterproposals. *Id.*

However, contrary to the Union's contention, the Arbitrator found that that the Agency did not violate either Article XXVI of the parties' agreement or DLAR 1404.4. *Id.* at 47-48, 49. The Arbitrator determined that the Agency did not violate DLAR 1404.4 because, when the Agency adopted the NSPS system and "reassigned [the employee] while only a week into her initial 120[-]day temporary promotion[,] . . . [it] also converted the GS-11 bargaining unit position to the NSPS personnel system, placing it into the YA-2 pay band." *Id.* at 47. According to the Arbitrator, once the employee's 120-day temporary promotion ended, and she was returned to her GS-09 position of record, "there no longer existed the GS-11 bargaining unit position to which she was promoted and therefore, there no longer existed a vacancy in that GS-11 bargaining unit position to be filled . . . through competitive procedure by either [the employee] or any other bargaining unit employee." *Id.* at 47-48. Moreover, the Arbitrator noted that, although the Union claimed that the Agency's action violated Article XXVI of the parties' agreement and DLAR 1404.4, the facts demonstrated that the Agency violated Article VIII of the agreement. *Id.* at 49.

Also, the Arbitrator denied part of the Union's proposed remedy requesting that the vacancy be filled competitively pursuant to the provisions of Article XXVI and DLAR 1404.4. *See id.* at 47-48, 49. The Arbitrator determined that the only remedy available to the Union was to return the employee to her GS-9 position of record, and he, ultimately, ordered "the Agency to fill the subject vacant NSPS position in an appropriate manner consistent with the prevailing Final NSPS Rules." *Id.* at 49; *see also id.* at 48, 50.

Finally, "[g]iven the nature of the resolution of the subject grievance, the Arbitrator [found that he was] without a clear basis to designate a 'losing party' in this proceeding[,]" and that, in accordance with Article XXXI, Section 6 of the parties' agreement, the arbitration costs should be borne equally by the parties. *Id.* at 50; *see also id.* at 48.

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that the award fails to draw its essence from the parties' agreement, that the award is based on a nonfact, and that the award is contrary to applicable law or regulation. Exceptions at 3.

The Union claims that, although the Arbitrator correctly set aside the employee's promotion, the Arbitrator incorrectly found that the Agency's personnel action did not violate Article XXVI, Section 4 of the parties' agreement and DLAR 1404.4. *Id.* at 4-5. According to the Union, testimony demonstrates that the NSPS pay band system and GS salary schedule are different pay method categories and that the employee received a higher rate of pay as an NSPS Supervisory Distribution Facilities Specialist than as a GS-9 Quality Assurance Specialist. *Id.* at 6-7. Moreover, the Union claims that, because the employee received

a promotion rather than a reassignment, the Arbitrator should have found that the Agency was obligated to follow the procedures set forth in Article XXVI of the parties' agreement and DLAR 1404.4 in order to competitively fill the NSPS position. *See id.* at 7-8. The Union notes that, because the Agency failed to follow the procedures set forth in Article XXVI and DLAR 1404.4, "bargaining unit members had no opportunity to apply for consideration for placement into the position based upon their qualifications." *Id.* at 8.

Also, the Union asserts that the Arbitrator erred in requiring both the Union and the Agency to split the arbitration costs. *Id.* According to the Union, because the Agency's improper personnel action was reversed, "the Union should be considered the winning party, and as the losing party, the [A]gency should be ordered to pay the entire [A]rbitrator's fee and expenses pursuant to Article XXXI, Section 6 of the [parties' agreement]." *Id.*

Finally, the Union claims that the Arbitrator erred in finding that the vacant NSPS position should be filled in accordance with the prevailing NSPS rules. *Id.* at 8-9. The Union asserts that the vacant NSPS position "should be filled in accordance with Article XXVI of the [parties' agreement] and DLAR 1404.4, since these were the governing provisions at the time of the promotion[,] . . . rather than [the] Final NSPS rules[,] which were not in effect at the time of the improper personnel action." *Id.* at 9.

B. Agency's Opposition

The Agency argues that, notwithstanding the Union's exceptions, the Authority should uphold the award. Opp'n at 7. The Agency contends that the Union's exceptions are not supported by the evidence. *Id.* According to the Agency, "it [is] quite clear that the Arbitrator's various findings and conclusions are definitively predicated upon record evidence of facts, law[,] and regulations, and that the Arbitrator's . . . [a]ward draws it essence from and cites to applicable provisions of the [parties' agreement]." *Id.* Moreover, the Agency contends that the Union's exceptions constitute mere disagreement with the award and that the Union has failed to provide evidence and arguments to support each basis for finding the award deficient. *Id.*

IV. Analysis and Conclusions

A. The award does not fail to draw its essence from the parties' agreement.

The Union asserts that the Arbitrator incorrectly found that the Agency's personnel action did not violate Article XXVI, Section 4 of the parties' agreement. Exceptions at 4-8. Moreover, the Union claims that, because the Agency's action constituted a promotion under Article XXVI of the parties' agreement, the Arbitrator should have found that the Agency was obligated to follow the procedures set forth in Article XXVI of the parties' agreement in order to competitively fill the NSPS position. *Id.* at 6-8. We construe this argument as a claim that the award fails to draw its essence from the agreement. *AFGE, Local 476*, 60 FLRA 41, 43 (2004) (construing the union's argument that the arbitrator erred in concluding that Article 13 of the parties' agreement excluded the remedies sought by the union as a claim that the award failed to draw its essence from the agreement).

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). 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 Union has failed to establish that the award fails to draw its essence from the agreement under any of the above tests. In this case, the Arbitrator reviewed the parties' agreement in its entirety and determined that, based on the facts of the case, Article VIII rather than Article XXVI was at issue. Award at 47, 49. The Union has not demonstrated why Article XXVI applies considering that, in this case, the Agency transferred a bargaining unit

employee to a supervisory non-bargaining unit position. Exceptions at 6-8 (arguing only that Article XXVI is applicable because the employee's transfer constitutes a promotion); *see Nat'l Ass'n of Indep. Labor, Local 5*, 65 FLRA No. 107 (2011) (*NAIL*); *Nat'l Fed'n of Fed. Emps., Local 1442*, 64 FLRA 1132, 1133, 1134-35 (2010) (*Local 1442*) (upholding the arbitrator's determination that Article 19, titled "Promotion," was inapplicable to the filling of two supervisory non-bargaining unit positions). Moreover, an arbitrator's failure to set forth specific findings, or to specify and discuss all allegations in a grievance, does not provide a basis for finding an award deficient. *See, e.g., U.S. Dep't of Commerce, Patent & Trademark Office*, 41 FLRA 1042, 1049 (1991). Consequently, the Union has failed to prove that the Arbitrator's interpretation of the parties' agreement as applied to the facts of the case is irrational, implausible, unfounded, or in manifest disregard of the agreement. *See U.S. Dep't of Transp., FAA*, 63 FLRA 15, 18 (2008); *cf. Local 1442*, 64 FLRA at 1135 (finding that the award did not fail to draw its essence from the agreement because there was no evidence that the agency had elected to negotiate over the application of the parties' agreement to the filling of the two supervisory non-bargaining unit positions, and the arbitrator's conclusions were supported by controlling Authority case law).

Also, the Union asserts that it should be designated as the winning party, and, as the losing party, the Agency should be ordered to pay all arbitration costs in accordance with Article XXXI, Section 6 of the parties' agreement. Exceptions at 8. We construe this argument as a claim that the award fails to draw its essence from the agreement. *See Nat'l Ass'n of Indep. Labor, Local 11*, 64 FLRA 709, 711-12 (2010) (construing the union's argument that the agency, as the losing party, should bear the costs of arbitration in accordance with the agreement as an allegation that the award failed to draw its essence from the agreement).

The Union's assertion is without merit. Article XXXI, Section 6 of the parties' agreement states that "[t]he Arbitrator's fees and expenses shall be borne by the losing party. The Arbitrator shall determine the losing party. If there is a split decision in which neither party can be designated as the losing party, the costs shall be borne equally." Exceptions, Attach. 4 at 48. In this case, the Arbitrator interpreted the provision and, pursuant to the discretion expressly granted him by Article XXXI, Section 6 of the parties' agreement, determined that neither party was the losing party. Award at 50 (finding that, "[g]iven the nature of the resolution of the subject grievance, [he was] without a clear basis to designate a 'losing party' in this proceeding"). Although the Arbitrator sustained the grievance, he disagreed with the Union that the Agency violated Article XXVI and DLAR 1404.4 and denied part of the Union's proposed remedy. *Id.* at 47-48, 49. Consequently, given the discretion permitted under the provision, the Union has not established that the award cannot in any rational way be derived from the parties' agreement, evidences a manifest disregard of the agreement, or represents an implausible interpretation of the agreement. *See, e.g., NAGE, Local R4-27*, 60 FLRA 14, 16 (2004) (determining that, because the arbitrator had discretion under the agreement to split costs in the event that neither party could be designated as the losing party, the agency failed to establish that the award was irrational, implausible, or unconnected with the language of the agreement); *U.S. Dep't of the Air Force Headquarters, 92nd Air Refueling Wing, Fairchild Air Force Base, Wash.*, 59 FLRA 434, 435 (2003) (citing *NFFE, Local 2030*, 56 FLRA 667, 670 (2000)) (finding that, by splitting the fees, the arbitrator interpreted the agreement provision concerning the splitting of fees and, pursuant to the discretion expressly granted him by the agreement, determined that neither party was the clear losing party).

Accordingly, we deny the Union's exceptions.

B. The award is not contrary to law, rule, or regulation.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See 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 assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Union asserts that the Arbitrator should have found that the Agency violated DLAR 1404.4 when it transferred the employee from her GS-09 position of record to the NSPS supervisory non-bargaining unit position. Exceptions at 4-8. We construe the

Union's argument as a claim that the award is contrary to law, rule, or regulation. *See AFGE, Local 476*, 60 FLRA at 43.

The Union's assertion that the award is contrary to DLAR 1404.4 is without merit. In this case, the Arbitrator determined that DLAR 1404.4 did not apply because there was no vacant GS position to fill competitively. *See* Award at 47-48. An examination of DLAR 1404.4 does not establish that the Arbitrator erred in doing so. *See U.S. Dep't of the Air Force, San Antonio Air Logistics Ctr., Kelly Air Force Base, Tex.*, 51 FLRA 1624, 1628 (1996) (finding that an examination of the regulations that the union cited did not establish that the arbitrator was required to find that the grievant would have been selected for the improperly filled position). The purpose and scope of DLAR 1404.4 is to establish policy and procedures necessary "to ensure a systematic means of selection for promotion in the competitive service (GS/GM-15 and below)." Exceptions, Attach. 6 at 1. Because the vacant position at issue is an NSPS position rather than a GS/GM position, the Union has not established that the award is inconsistent with DLAR 1404.4.

Also, the Union claims that, rather than ordering that the newly vacant NSPS position be filled using the prevailing NSPS Rules that were not in effect at the time the personnel action took place, the Arbitrator should have ordered that the position be filled in accordance with Article XXVI of the parties' agreement and DLAR 1404.4. Exceptions at 8-9. We construe the Union's argument as a claim that the award is contrary to law.

This contention is without merit. The Union has not demonstrated that Article XXVI of the parties' agreement is applicable in filling the vacancy because the NSPS position is a supervisory position outside of the bargaining unit. *See NAIL*, 65 FLRA No. 107, slip op. at 5; *Local 1442*, 64 FLRA at 1133, 1134-35 (upholding the arbitrator's determination that article 19 titled promotion was inapplicable to the filling of two supervisory non-bargaining unit positions). Moreover, the Union has failed to demonstrate that DLAR 1404.4 is relevant in filling the vacant NSPS position because, as noted previously, the regulation's applicability is limited to GM/GS-15 positions and below.[4] Exceptions, Attach. 6 at 1.

Accordingly, we deny the Union's exceptions.

V. Decision

The Union's exceptions are denied.

4. Because the Union provides no evidence to support its claim that the award is based on a nonfact and fails to identify any nonfact, we reject its claim as a bare assertion. *See AFGE, Local 405*, 63 FLRA 149, 152 n.9 (2009) (rejecting the union's nonfact exception as a bare assertion because it did not provide evidence to support its claim that the award was based on a nonfact); *AFGE, Local 446*, 64 FLRA 15, 16 (2009) (denying the union's nonfact exception as a bare assertion because it failed to make arguments to support its claim that the award was based on a nonfact).

APPENDIX

Article VIII – Matters Appropriate for Consultation or Negotiation

> Section 1. Matters subject to consultation or negotiation are personnel policies and practices and matters affecting working conditions of unit employees which are within the discretion of the Employer so far as may be proper under applicable laws and regulations. These matters may include, but are not limited to, safety, training, labor-management relations, employee services, welfare and pay practices, methods of adjusting grievances, appeals, leave, promotion procedures, demotion practices, RIF practice, and hours of work.
>
> Section 2. Upon request, the parties will negotiate:
>
> (a) *at the election of the Employer*, on the numbers types and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
>
> (b) procedures which management officials of the agency will observe in exercising any authority under the law; or
>
> (c) appropriate arrangements for employees adversely affected by the exercise of any authority under the law by such management officials.
>
> Section 3. The Employer will provide the Union with a copy of proposed new and revised regulations affecting unit employees and provide written notice of proposed changes in conditions of employment. *Upon request, the employer will schedule a meeting with the Union to discuss management's proposed regulations/ changes and intentions. After the meeting is held,* a reasonable amount of time, but not less than fifteen days, will be permitted to the Union to request negotiations and to submit written counter proposals. If written proposals are not received within the allocated time frame, it will be considered that the Union is in agreement with the proposal and the proposal will be implemented.

Exceptions, Attach. 4 at 12.

Article XXVI – Staffing and Merit Promotion

> Section 1. The Employer recognizes the importance of, and benefits to be derived from, giving promotion opportunity to DDRT employees. *All vacant positions will be advertised except reassignments and those positions filled by re-promotion and/or reinstatement eligibles.* The initial area of consideration for a vacancy announcement will include the minimum area, DDRT.
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> Section 2. This agreement provides for concurrent consideration of DDRT employees, but does not restrict the right of the employer to fill positions by methods other than promotion.
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> . . . .
>
> Section 4. Promotion is the change of an employee to a higher grade when both the old and the new positions are under the General Schedule, or under the same type graded wage schedule, or to a position with a higher rate of pay when both the old and new positions are under the same ungraded wage schedule or in different pay method categories.
>
> Section 5. The Union and the Employer agree that the purpose of the local Merit Promotion Plan are [sic] to insure that employees are given full and fair consideration for advancement and to insure selection from among the best qualified candidates. It is further agreed that these procedures must be administered in such a way as to develop maximum employee confidence and to achieve the purpose of the plan as simply and as efficiently as possible.
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> . . . .

Id. at 38.

DLAR 1404.4 – Merit Promotion Program

> I. *PURPOSE AND SCOPE.* This DLAR establishes the policy and procedures

designed to ensure a systematic means of selection for promotion in the competitive service (GS/GM-15 and below). It implements Title 5, Code of Federal Regulations (CFRs), Part 335, and Federal Personnel Manual (FPM) chapter 335. It is applicable to HQ DLA, all DLA field activities, and Federal activities serviced by a DLA Office of Civilian Personnel (OCP). It does not apply to matters covered by Article 13 of the Master Agreement between DLA and the DLA Council of American Federation of Government Employees Locals.

A. Personnel Actions Covered. The competitive procedures of this DLAR must be applied to the following actions:

1. Temporary Promotions of More than 120 Calendar Days.

. . . .

3. Details of more than 120 calendar days to higher grade positions or to positions with known promotion potential.

. . . .

6. Transfer to a higher graded position.

. . . .

B. Personnel Actions Not Covered. The competitive requirements of this DLAR do not apply to the following actions:

. . . .

11. Transfer at the grade presently held on a permanent basis to a position at the same grade and with promotion potential that is no higher than that of the present position.

. . . .

II. *POLICY*

A. All positions which are required to be filled competitively under the provisions of this DLAR must be advertised by a JOA. JOAs may pertain to more than one position, may advertise open continuous announcements, and may be used to establish registers from which covered vacancies may be filled over a period of time.

. . . .

Exceptions, Attach. 6 at 1-2.