65 FLRA No. 96

OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION
LOCAL 2001
(Union)

and

UNITED STATES
DEPARTMENT OF ENERGY
OAK RIDGE OFFICE
OAK RIDGE, TENNESSEE
(Agency)

0-AR-4689

_____

DECISION

January 31, 2011

_____

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 (supplemental award) of Arbitrator Robert G. Williams 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 found that the Agency did not discriminate against the grievant when it failed to select him for a position. For the reasons that follow, we dismiss the Union's exceptions in part and deny them in part.

II. Background and Arbitrator's Award

When the grievant was not selected for a contract specialist position, General Schedule (GS)-1102-13, he filed a grievance that was submitted to arbitration. In an award resolving that grievance (initial award), as relevant here, the Arbitrator framed two issues before him as whether the Agency: (1) violated Office of Personnel Management (OPM) policies and regulations, and certain Agency policies, when it announced and filled the position;[1] and (2) engaged in unlawful discrimination against the grievant on the basis of his age, sex, or Union activity. *See* Initial Award at 2.

With regard to the first issue, the Arbitrator determined that the selection process violated the cited regulations and policies. *See id.* at 62-63, 65. As a remedy, the Arbitrator directed the Agency to redraft and repost the job announcement, and awarded backpay to the individual whom the Agency would ultimately select. *See id.* at 69-70.

With regard to the second issue, the Arbitrator stated that, "[g]iven the remedy ordered for the claims in issue number [one,] any consideration of discrimination claims would be premature until" the new selection process had been completed. *Id.* at 68-69. The Arbitrator determined that "[i]f the [g]rievant is not selected[]" in the new selection process, then the "Union may renew [its] discrimination claims based on evidence in the complying as well as the original erroneous selection process." *Id.* at 69. The Arbitrator "retain[ed] jurisdiction to hear any renewed discrimination claims." *Id.* at 70.

The Agency filed exceptions to the initial award with the Authority, and the Authority found that the Arbitrator's award of backpay was deficient, but otherwise denied the Agency's exceptions.[2] *See U.S. Dep't of Energy, Oak Ridge Office, Oak Ridge, Tenn.*, 64 FLRA 535, 537-39 (2010). After that decision, the Agency reposted the Contract Specialist, GS-1102-13 position and began a new selection process for the position. Supplemental Award at 1-2. The grievant, who is male, applied for the position, but the Agency selected a younger, female applicant (the selectee). *Id.* at 2. The Union then "renewed its discrimination claim first asserted

1. Specifically, the Arbitrator considered whether the Agency failed to comply with: (1) OPM policies when it announced the position, *see* Initial Award at 27, 41, 60; (2) 5 C.F.R. § 335.103(b)(3) by not considering candidates' performance evaluations and incentive awards, *see* Initial Award at 63; and (3) Agency policies, issued pursuant to 41 U.S.C. § 433, by selecting an applicant who did not meet certain experience-related requirements, *see* Initial Award at 43-46, 63-65.

2. Specifically, the Authority found that the Arbitrator exceeded his authority to the extent that his award granted backpay to an individual other than the grievant. *See U.S. Dep't of Energy, Oak Ridge Office, Oak Ridge, Tenn.*, 64 FLRA 535, 538 (2010).

in the original grievance[,]" *id.*, and the Arbitrator issued the supplemental award.

The parties did not stipulate, and the Arbitrator did not expressly set forth, issues to be decided in the supplemental award. *See id.* at 2, 5. The Arbitrator reiterated that he had stated, in the initial award, that he "retained jurisdiction 'to hear any renewed discrimination claims.'" *Id.* at 2 (quoting Initial Award at 70). The Arbitrator then stated that the Union "ha[d] the burden of showing that the Agency's selection of [the selectee] was a pretext to cover . . . discrimination in selecting her over the [g]rievant for the . . . announced position" in the new selection process. *Id.* at 5. Addressing that issue, the Arbitrator determined that the grievant was "unable to cite evidence that would constitute pretext[,]" i.e., evidence that the Agency was "pretending that the selectee's experience, education, or training was more than that of the [g]rievant." *Id.* at 6. As such, the Arbitrator concluded that the grievant was "unable to prove impermissible discrimination[,]" *id.* at 8, and denied the grievance, *see id.* at 5, 8-9.

III. Positions of the Parties

A. Union's Exceptions

The Union alleges that the Arbitrator exceeded his authority by not considering whether the Agency discriminated against the grievant during the *original* selection process. Exceptions at 3, 6, 12. The Union contends that the Arbitrator thereby failed to address the Union's claim that the Agency violated 5 U.S.C. § 2302(b)(6) during that process, *see* Exceptions at 5, 9, when it "rewr[ote]" the specialized experience requirements, *id.* at 4, and when the selecting official "prejudg[ed]" the grievant by determining prematurely not to select him,[3] *id.* at 9.

With regard to the new selection process, the Union asserts that although the selecting official from the original selection process was not the selecting official in the new selection process, her bias against the grievant nonetheless influenced the new selection process, in violation of § 2302(b)(6). *See id.* at 9-10. Additionally, the Union argues that the Arbitrator did not address the Union's argument that the new selection process violated 5 U.S.C. § 2301(b)(1) (§ 2301(b)(1)).[4] *Id.* at 7-8. In this connection, the Union asserts that the Agency was biased in favor of the selectee, given that choosing her allegedly would reduce the Agency's backpay liability with regard to grievances filed by the selectee and the grievant. *Id.* at 7. Further, the Union argues that the Agency violated 5 C.F.R. § 335.103(b)(3) (§ 335.103(b)(3)) by failing to consider applicants' performance evaluations and incentive awards.[5] *See* Exceptions at 11.

B. Agency's Opposition

The Agency contends that the Arbitrator did not exceed his authority because he resolved the issue before him of whether the grievant was discriminated against during the new selection process. *See* Opp'n at 5-7. As to the original selection process, the Agency argues that the Arbitrator's direction to "vacate the [original] selection decision and rerun the vacancy announcement . . . rendered it unnecessary for the Arbitrator to resolve the issue of discrimination as it related to the [original] selection action." *Id.* at 6. In addition, the Agency asserts that the Authority should not consider whether the Agency violated §§ 2301 and 2302 because the Union failed to argue those claims to the Arbitrator.

3. Section 2302(b)(6) states, in pertinent part, that any employee who has authority to take any personnel action shall not "grant any preference or advantage not authorized by law . . . to any . . . applicant for employment . . . for the purpose of improving or injuring the prospects of any particular person for employment[.]"

4. Section 2301(b) states, in pertinent part:

> Federal personnel management should be implemented consistent with the following merit system principles:
>
> (1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

5. Section 335.103(b) states, in pertinent part:

> Merit promotion requirements--
> . . . .
> . . . To be eligible for promotion or placement, candidates must meet the minimum qualification standards prescribed by the [OPM]. Methods of evaluation for . . . placement . . . must be consistent with . . . this chapter. Due weight shall be given to performance appraisals and incentive awards.

See Opp'n at 9-11 (citing 5 C.F.R. § 2429.5).[6] Alternatively, the Agency asserts that the Arbitrator was not obligated to consider those issues because the parties did not stipulate that the Arbitrator would consider them. *See* Opp'n at 9-12. Finally, the Agency disputes the Union's claim that the Agency violated § 335.103 by not considering the grievant's performance appraisals during the new selection process. *See id.* at 13.

IV. Analysis and Conclusions

A. Preliminary Matter: 5 C.F.R. § 2429.5 bars the Union's argument regarding 5 U.S.C. § 2301(b)(1), and bars one of the Union's arguments regarding 5 U.S.C. § 2302(b)(6).

The Authority's Regulations that were in effect when the Union filed its exceptions provided that "[t]he Authority will not consider . . . any issue[] which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5 (§ 2429.5).[7] Under § 2429.5, the Authority will not consider any issue that could have been, but was not, presented to the arbitrator. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008).

With regard to the Union's claim that the Agency violated § 2301(b)(1) during the new selection process, the Union did not argue to the Arbitrator that the Agency violated § 2301(b)(1). *See* Exceptions, Attach. 3, Letter from [Union] to Arbitrator (May 26, 2010) (May 26 Letter); Exceptions, Attach. 4, Letter from [Union] to Arbitrator (June 1, 2010) (June 1 Letter). As the Union could have, made that argument, we dismiss the Union's exception under § 2429.5.

The Union also claims that: (1) the selecting official was biased against the grievant during the original selection process; (2) the Agency violated § 2302(b)(6) during the original selection process; and (3) the Agency violated § 2302(b)(6) during the new selection process. *See* Exceptions at 5, 9-10; Opp'n at 11. Contrary to the Agency's assertion, the Union argued that the selecting official had "pre-nonselected" the grievant during the original selection process, May 26 Letter, and that the Agency violated § 2302(b)(6) during the original selection process, *see* June 1 Letter. However, the record indicates that the Union could have, but did not, argue to the Arbitrator that the Agency violated § 2302(b)(6) during the new selection process. *See* May 26 Letter; June 1 Letter. Accordingly, we will resolve the Union's exception alleging that the Agency violated § 2302(b)(6) in the original selection process, but, pursuant to § 2429.5, we dismiss the Union's exception alleging that the Agency violated § 2302(b)(6) during the new selection process.

B. The Arbitrator did not exceed his authority.

As relevant here, an arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration. *U.S. Dep't of Transp., FAA*, 64 FLRA 680, 684 (2010). Where the parties have not stipulated, and the arbitrator has not expressly set forth, an issue to be decided, the Authority will look to the award to determine whether the issue is nevertheless apparent from the award. *See, e.g., U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Louisville, Ky.*, 64 FLRA 70, 72-73 (2009) (although arbitrator did not frame issues, purpose of arbitration hearing clear from record); *U.S. Dep't of the Navy, Navy Pub. Works Ctr., Norfolk, Va.*, 54 FLRA 338, 342 (1998) (Member Wasserman dissenting in part as to other matters) (issue "clear from the award as a whole") (*Navy*); *U.S. Dep't of Veterans Affairs, Med. Ctr. Providence, R.I.*, 49 FLRA 110, 116 (1994) (issue clear from award) (*Veterans*). Where parties have not stipulated to an issue to be decided, the Authority accords an arbitrator's formulation of the issues the same substantial deference accorded to an arbitrator's interpretation of the collective bargaining agreement. *Ass'n of Civilian Technicians, N.Y. State Council*, 61 FLRA 664, 665 (2006) (*ACT*). The Authority accords such deference even where the arbitrator has not expressly set forth the issue. *See Veterans*, 49 FLRA at 116 (deferring to arbitrator's apparent formulation of the issue before him). Further, when deferring to an arbitrator's formulation of the issues in the absence of a stipulation, the Authority grants an arbitrator "substantial discretion to . . . decline to consider issues[,]" *ACT*, 61 FLRA at 665, even if the Arbitrator's decision not to address certain issues is implicit in the award, *see Veterans*, 49 FLRA at 116 (arbitrator implicitly determined that an issue was not before him).

As discussed previously, the parties did not stipulate, and the Arbitrator did not expressly set forth, an issue for the Arbitrator to decide.

6. The pertinent wording of 5 C.F.R. § 2429.5 is set forth below.

7. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Union's exceptions were filed before that date, we apply the earlier Regulations.

See Supplemental Award at 2, 5. The Arbitrator stated that the Union "ha[d] the burden of showing that the Agency's selection of [the selectee] was a pretext to cover . . . discrimination in selecting her over the [g]rievant for the . . . announced position" in the new selection process. *Id.* at 5. This statement, and the supplemental award as a whole, *see id.* at 8-9, support a conclusion that the Arbitrator viewed the issue before him as involving whether the Agency discriminated against the grievant during the new selection process. They also support a conclusion that the Arbitrator implicitly determined that the issues of whether the Agency discriminated against the grievant during the original selection process, and whether the Agency violated §§ 2302(b)(6) or 335.103(b) during that process, were issues that were not before him. *See* Supplemental Award at 5, 8-9. *Cf. Veterans*, 49 FLRA at 116. Because the Authority grants arbitrators substantial discretion to decline to consider issues when the parties have not stipulated to the issues to be decided, the Arbitrator's failure to consider issues regarding the original selection process is not a basis for finding that the award is deficient. *See ACT* 61 FLRA at 665-66. Therefore, we find that the Arbitrator did not exceed his authority by failing to resolve issues regarding the original selection process.

With regard to the claim that the Arbitrator did not address the Union's argument that the Agency was biased in favor of the selectee in the new selection process because choosing her allegedly would reduce the Agency's backpay liability, Exceptions at 7, the Authority has held that an arbitrator's failure to address every specific argument raised by a party does not render an award deficient. *See, e.g., AFGE, Local 3911*, 64 FLRA 686, 687 (2010). Thus, in resolving the issue of unlawful discrimination in the new selection process, the Arbitrator was not required to address the specific argument about backpay-motivated bias. Accordingly, we deny the exception.

For the foregoing reasons, we deny the Union's exceeded authority exceptions.

V. Decision

The Union's exceptions are dismissed in part and denied in part.