65 FLRA No. 169

UNITED STATES
DEPARTMENT OF THE AIR FORCE
LUKE AIR FORCE BASE, ARIZONA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1547
(Union)

0-AR-4410

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DECISION

May 11, 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 Richard D. Sambuco 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.

As relevant here, the Arbitrator found that the Agency did not have just cause to remove one of two grievants from his position and ordered the Agency to return the grievant to his former position and to pay the grievant backpay. Award at 36. For the reasons set forth below, we grant the Agency's contrary to law exception and set aside the award.

II. Background and Arbitrator's Award

The grievants were employed by the Agency as temporary security guards. *Id.* at 7, 8. As a condition of their employment, the Agency required the grievants to sign a Statement of Understanding (Statement). *Id.* at 9. The Statement indicated that, as temporary limited employees hired for a period of one year or less, they were "not covered by the adverse action procedures under" 5 U.S.C. § 4303 and 5 U.S.C. § 7511, and could be "terminated at any time upon notice from the [A]gency." *Id.* at 11-12. After the grievants worked for the Agency for approximately two months, the Agency terminated their employment.[1] *See id.* at 9.

The Union filed a grievance on behalf of the grievants. *Id.* at 9-10. The matter was unresolved and was submitted to arbitration. *Id.* at 10. The Arbitrator framed the following issues: whether "the Agency violate[d] the language of the Labor Management Agreement [(parties' agreement)] when it terminated [the grievants]? If [so], what is the remedy?" *Id.*

The Arbitrator found that the Statement constituted an implied contract because it failed to contain an express disclaimer indicating that it was not "an express or implied contract of employment." *Id.* at 15 (internal quotation marks omitted); *see also id.* at 14, 33. The Arbitrator determined that, because the grievants were employed under an implied contract, they were not "at will" employees, and the Agency could terminate their employment only for just cause. *Id.* at 15, 22. The Arbitrator found that, although the first grievant's employment was terminated for just cause, the Agency did not have cause to remove the second grievant. *Id.* at 34-35, 36. The Arbitrator determined that the Agency did not have just cause to remove the second grievant because he did not have a prior disciplinary record, his absences were approved by his supervisor and "ostensibly granted due to [his] attempt to establish a work related injury[,]" and a bargaining unit employee rather than the direct supervisor signed his termination notice. *Id.* at 24; *see also id.* at 34, 36. Additionally, the Arbitrator found that the grievants were entitled to grieve their removals under the parties' agreement because the Union timely notified the Agency of its intent to negotiate a new agreement, and the provision prohibiting temporary employees from grieving their terminations was a

1. The Agency terminated the first grievant's employment because, on separate occasions, he failed to bring his ballistic vest to work, shave before work, and wear his ballistic vest properly, and because he was rude to the public. Award at 7. The Agency removed the second grievant from his position because he failed to bring his ballistic vest to work on two separate occasions and did not report for work on several occasions. *Id.* at 7-8.

permissive subject of bargaining that expired with the agreement.[2] *Id.* at 21-22, 34.

III. Positions of the Parties

A. Agency's Exceptions

The Agency claims that the award is contrary to law because, as temporary employees, the grievants are prohibited from grieving their terminations. Exceptions at 4-5. Moreover, the Agency asserts that the award is contrary to law because temporary employees "may be terminated without cause at any time." *Id.* at 5.

Also, the Agency claims that the Arbitrator exceeded his authority and that the award interferes with management's right to remove employees. *Id.* Specifically, the Agency asserts that the Arbitrator wrongfully concluded that the Statement was an implied contract and that the Agency could terminate the grievants' employment only for just cause. *Id.* According to the Agency, the "award excessively interferes with management's right . . . to terminate an employee not entitled to a hearing by law." *Id.* Moreover, the Agency claims that the Arbitrator exceeded his authority by asserting "jurisdiction over an issue specifically excluded from the grievance procedure" and by administering a remedy that he had no authority to grant under the law. *Id.*; *see also id.* at 6.

B. Union's Opposition

The Union argues that the grievance was properly before the Arbitrator and that the award does not fail to draw its essence from the parties' agreement because temporary employees are not excluded from the bargaining unit and the just cause provisions of the agreement apply to temporary employees. Opp'n at 3, 4-5. Also, the Union contends that the Arbitrator did not exceed his authority because he resolved the issue that was before him, and the issue that he framed corresponded to the statement of the issue in the grievance. *Id.* at 5. According to the Union, the Arbitrator properly found that the Agency did not have just cause to suspend the second grievant. *Id.* at 4-5, 6. Finally, the Union argues that the Agency, in its exceptions, ignores the fact that the provision prohibiting temporary employees from grieving their terminations was a permissive subject of bargaining and expired with the agreement. *Id.* at 3, 6.

IV. Analysis and Conclusion: The award is contrary to law.

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 Agency asserts that the award is contrary to law because the Arbitrator erroneously found that the grievants were not prohibited from grieving their terminations and could be terminated only for just cause. Exceptions at 4-5. As a general matter, the Authority has found that the termination of a temporary employee is not grievable or arbitrable as a matter of law. *See, e.g., Fed. Deposit Ins. Corp., Div. of Depositor & Asset Servs., Okla. City, Okla.*, 49 FLRA 894, 898 (1994) (finding that temporary employees are prohibited from contesting adverse and performance-based actions through the negotiated grievance procedure); *AFGE, AFL-CIO, Council of Marine Corps Locals, Council 240*, 39 FLRA 839, 846 (1991) (*AFGE, Council 240*); *Fed. Emps. Metal Trades Council*, 38 FLRA 1410, 1428-30 (1991) (*Mare Island*) (determining that an arbitrator is without authority to decide the appropriateness of the termination of a temporary employee based on an alleged failure to afford the employee the protections of 5 U.S.C. §§ 7511(a)(1) and 7513). Moreover, the Authority has determined that agencies retain the right to terminate temporary employees summarily with minimal due process protections. *See Mare Island*, 38 FLRA at 1428-30 (determining that, unlike competitive service employees, temporary employees are not afforded the protections of 5 U.S.C. § 7513 which requires an agency, among other things, to remove an employee "only for such cause as will promote the efficiency of

2. The Arbitrator also found that the Agency violated Article III, Section A of the parties' agreement "when it authorized Team Leaders (non-supervisory bargaining unit employees) to make entries into [their] Supervisor's Employee Work Folder (SEWF)." *Id.* at 35. Because the Agency does not except to this finding, it is not before us, and we do not address it further.

the service"). Consistent with that right, parties are prohibited from establishing any additional procedural protections that apply to the termination of temporary employees. *See AFGE, Council 240*, 39 FLRA at 843, 844-46 (implicitly rejecting the union's argument that temporary employees are not excluded from coverage of 5 U.S.C. §§ 7511 and 4303 in the same manner as probationary employees and finding that the union's proposal allowing temporary employees in the bargaining unit to grieve disciplinary and performance actions was nonnegotiable); *cf. U.S. Dep't of the Air Force, Nellis Air Force Base, Las Vegas, Nev.*, 46 FLRA 1323, 1326-27 (1993) (*Nellis AFB*) (determining that, because agencies retain the right to terminate probationary employees summarily with minimal due process protections, establishment through collective bargaining of any additional procedural protections applying to the termination of probationary employees is barred as inconsistent with law and regulation).

In this case, we find that the award is contrary to law. The Arbitrator's finding that the grievants were entitled to grieve their terminations under the parties' agreement is clearly erroneous because, as a matter of law, temporary employees are prohibited from contesting their terminations through the negotiated grievance procedure. *See, e.g.*, *AFGE, Council 240*, 39 FLRA at 846; *Mare Island*, 38 FLRA at 1428-30. Also, the Arbitrator's determination that the grievants could be terminated only for just cause because they were employed under an implied contract is similarly without merit because agencies have the right to terminate temporary employees summarily, and parties are barred from establishing additional procedural protections that are not provided to terminated, temporary employees by statute.[3] *See AFGE, Council 240*, 39 FLRA at 844-46; *Mare Island*, 38 FLRA at 1428-30; *cf. Nellis AFB*, 46 FLRA at 1326-27.

Accordingly, we grant the Agency's contrary to law exception.

V. Decision

The award is set aside.

3. In view of our conclusion that the award is contrary to law, we find that it is unnecessary to consider the Agency's remaining exceptions. *See, e.g., U.S. Dep't of Transp., Fed. Aviation Admin., Nashua, N.H.*, 65 FLRA 447, 450 n.3 (2011) (finding that it was unnecessary to address the agency's remaining exceptions after setting aside the award as contrary to law); *Soc. Sec. Admin.*, 63 FLRA 313, 315 n.2 (2009) (same).