65 FLRA No. 8

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
SMALL BUSINESS/SELF EMPLOYED
OPERATING DIVISION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 68
(Union)

0-AR-4480

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DECISION

August 25, 2010

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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 Thomas N. Rinaldo 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 Union filed a grievance alleging that the Agency incorrectly set the grievant's rate of pay upon her permanent promotion. The Arbitrator sustained the grievance and directed the Agency to correct the grievant's pay rate and provide a make-whole remedy.

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

II. Background and Arbitrator's Award

The grievant worked for the Agency in a permanent position at General Schedule (GS) grade-level five, step four (GS-05, Step 4). *See* Award at 10. The Agency subsequently granted her a temporary promotion at GS grade-level six, step four (GS-06, Step 4). *See id.* After holding her temporary promotion for more than a year, the grievant received a permanent promotion to a different position. The Agency concluded that the grievant's compensation after permanent promotion should be set at GS grade-level seven, step one (GS-07, Step 1), based on the grievant's previous rate of pay in her position of record, at GS-05, Step 4. *Id.* The Union filed a grievance contending that the Agency had erred in its compensation calculations and that the grievant's pay after permanent promotion should have been set at GS grade-level seven, step three (GS-07, Step 3), based on the grievant's previous rate of pay during her temporary promotion.[1] *Id.* at 2. The grievance went unresolved, and the parties proceeded to arbitration on the following stipulated issue:

> Whether [g]rievant's pay was appropriately set when she was promoted to the GS-07 . . . position . . ., and if not, what shall be the remedy?

Id.

The Agency argued that, in accordance with its standard practice, it had "returned" the grievant from her temporarily promoted position to her "position of record, which was GS-05, Step 4 . . . before promoting her to the GS-07 position." *Id.* at 7. Therefore, the Agency contended that it had: (1) properly identified GS-05, Step 4 as the grievant's existing rate of pay immediately prior to permanent promotion; and (2) correctly applied the "two step promotion rule," 5 U.S.C. § 5334(b), and Agency regulations to calculate the compensation rate for the grievant's permanent promotion.[2] *Id.* Using those calculations, the Agency

1. The table below shows the grievant's positions and their respective compensation ratings, side-by-side:

Grievant's Position	*GS Grade and Step*
pre-promotion	GS-05, Step 4
temporary promotion	GS-06, Step 4
permanent promotion (Agency's calculation)	GS-07, Step 1
permanent promotion (Union's calculation)	GS-07, Step 3

2. The Agency argued that it relied on 5 U.S.C. § 5334(b) and provisions of the Internal Revenue Manual (IRM) to set the grievant's compensation. *See, e.g.*, Exceptions, Attach. E, Agency's Post-Hearing Brief at 3 & n.1, 4-5. Referred to

set the grievant's rate of pay at GS-07, Step 1. *See* Award at 7.

The Union characterized the Agency's claim that it had returned the grievant to a GS-05, Step 4 position before permanently promoting her to the GS-07 position as "pure fiction." *Id.* at 5 (internal quotation marks omitted). According to the Union, the Agency should have identified the grievant's temporary-promotion compensation rate – *i.e.*, GS-06, Step 4 – as the grievant's existing rate of pay immediately prior to permanent promotion, which, after applying the "two step promotion rule," would have resulted in a permanent-promotion compensation rate of GS-07, Step 3. *Id.* at 4-5.

The Arbitrator determined that, "[al]though [the] [g]rievant's Personnel Action Report shows a change to the lower grade GS-05 position, in fact[, the g]rievant was never returned to that position[,] but went from the GS-06[,] Step 4 [temporary-promotion] position to the GS-07 [permanent-promotion] position." *Id.* at 10. Having found that the grievant was not returned to her position of record, the Arbitrator determined that the Agency should have calculated the grievant's permanent-promotion compensation rate using her temporary-promotion rate as her existing rate of pay. *Id.* at 15. Therefore, the Arbitrator sustained the grievance and ordered a make-whole remedy. *Id.* at 16.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is contrary to law because, according to the Agency, the Arbitrator's compensation calculations fail to account for the grievant's "return" to her position of record before her permanent promotion. Exceptions at 3. The Agency asserts that, after it "returned" the grievant to her position of record, it correctly calculated her permanent-promotion compensation rate in accordance with its regulations and applicable statutory authority, including the "two step promotion rule." *Id.* at 3-5, 8 (citing 5 U.S.C. § 5334(b); IRM §§ 6.500.1.4.4(4) & 6.500.1.4.7(1)). In particular, the Agency asserts that: (1) IRM, Section 6.500.1.4.4(4) "does not allow" the Agency to use the grievant's temporary-promotion compensation rate to determine her permanent-promotion rate, Exceptions at 5-6; and (2) IRM, Section 6.500.1.4.7(1)(B) required the Agency to set the grievant's permanent-promotion compensation based on her position of record, *see* Exceptions at 8.[3] Moreover, the Agency argues that its position is supported by decisions of the Comptroller General in similar cases, and that, consequently, the Arbitrator's interpretation of the IRM is "contrary to applicable Comptroller General case law." *Id.* at 8; *see also id.* at 5-6 (citing *Catherine L. Drake*, B-247553, 1992 WL 109481 (Comp. Gen. May 8, 1992); *Benjamin C. Smith*, B-202631, 1982 WL 27213 (Comp. Gen. Aug. 24, 1982)).

B. Union's Opposition

The Union opposes the Agency's exceptions because, according to the Union, they constitute "no[thing] more than disagreement with the Arbitrator's findings of fact and conclusions drawn from those facts." Opp'n at 4.

IV. Analysis and Conclusions

When an exception involves an award's consistency with law, rule, or regulation, 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) (*Ala. Nat'l Guard*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

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as the "two step promotion rule," *e.g.*, Exceptions, Attach. F at 6 (quoting IRM § 6.500.1.4.7(4)(B)), 5 U.S.C. § 5334(b) provides, in pertinent part:

> (b) An employee who is promoted . . . to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted[.]

5 U.S.C. § 5334(b).

The pertinent provisions of the IRM are set forth *infra* Part IV.B.

3. The IRM provisions, as well as the Agency's contentions regarding their application to the grievant's circumstances, are set forth *infra* Part IV.B.

A. The award is not contrary to 5 U.S.C. § 5334(b).

The Agency alleges that the "two step promotion rule," 5 U.S.C. § 5334(b), "does not prohibit the Agency from returning [g]rievant to her position of record on paper . . . prior to her permanent[] promot[ion.]" Exceptions at 8. However, the award does not hold to the contrary. Rather, the Arbitrator relied on 5 U.S.C. § 5334(b) to support his finding that "a promotion can occur . . . from 'a grade held under temporary promotion'" – a proposition that the Agency does not dispute. Award at 14. Thus, the Agency has not established that the award is contrary to 5 U.S.C. § 5334(b), and we deny the exception. *See Ala. Nat'l Guard*, 55 FLRA at 40.

B. The award is not contrary to the IRM.

The Agency contends that the Arbitrator misinterpreted the IRM when he determined that the "'mere chang[ing] of an employee's status on the Personnel Action Report[,]' as was done [in the grievant's case], cannot suffice for a 'return'" to the grievant's position of record, prior to her permanent promotion. *See* Exceptions at 8-9. The Agency asserts that a paper-record notation is sufficient to effect a "return," and the Arbitrator erred in finding that provisions of the IRM require anything more than a return "on paper only." *Id.* at 8. We construe the Agency's argument as a claim that the award is deficient because the Arbitrator did not defer to the Agency's interpretation of its own regulations.

In the resolution of grievances under the Statute, arbitrators are empowered to interpret and apply agency rules and regulations. *See U.S. Dep't of Justice, Immigration & Naturalization Serv., Wash., D.C.*, 48 FLRA 1269, 1275 (1993). In this regard, an agency's prior interpretation of its own regulation is controlling unless it is "plainly erroneous or inconsistent" with the language of the regulation. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Med. Facility for Fed. Prisons*, 51 FLRA 1126, 1136 (1996) (*DOJ*) (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, the Authority declines to defer to an agency's "litigative positions." *Id.* (quoting *FLRA v. Treasury*, 884 F.2d at 1455)). 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)). In circumstances where an agency fails to establish that deference is due to its interpretation of its regulation, the Authority independently assesses whether the arbitrator's interpretation of the regulation is consistent with its provisions. *U.S. Dep't of Transp., Fed. Aviation Admin.*, 56 FLRA 627, 630 (2000) (*FAA*); *DOJ*, 51 FLRA at 1137.

First, the Agency asserts that IRM, Section 6.500.1.4.4 "does not allow" the Agency to use the grievant's temporary-promotion compensation rate to determine her permanent-promotion rate. Exceptions at 5-6. Section 6.500.1.4.4 provides, in pertinent part:

> **Maximum Payable Rate Rules**
> . . . .
> 4. The maximum payable rate rule, considering an employee's highest previous rate, will not be used to set the pay of an employee who is [returned] to lower grade as the result of the termination or expiration of a temporary promotion when the employee is likely to be promoted within 6 months of the date of the [return] to lower grade.

Id., Attach. F at 4-5 (quoting IRM § 6.500.1.4.4(4)).

According to the Agency, it had already selected the grievant for her permanent-promotion position when it "end[ed]" her temporary promotion "on paper[,]" Exceptions at 3, and, therefore, the Agency argues that it properly considered the grievant "likely to be promoted within 6 months" of her "return . . . on paper" to her position of record, *id.* at 5-6. Given those circumstances, the Agency asserts that: (1) it acted as required by Section 6.500.1.4.4(4), *supra*, in declining to apply the "maximum payable rate rule" to set the grievant's compensation when the Agency "returned" her to her position of record "on paper[;]" and (2) the Arbitrator's finding to the contrary is erroneous. *Id.* at 4.

Second, the Agency asserts that its actions in setting the grievant's compensation were consistent with IRM, Section 6.500.1.4.7(1), which states:

> **Promotions and Transfers**
>
> 1. As provided by 5 U.S.C. [§] 5334(b), upon promotion[,] the pay of a [GS] employee will be set at the lowest step of the higher grade that exceeds the employee's existing rate of basic pay by the value of two steps of the grade held immediately before the promotion.

> A. This includes a grade held under a temporary promotion if the promotion action is effected from the temporarily held grade.
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> B. If the employee is returned to the lower permanent grade before the subsequent action is processed, the promotion action must be based on the lower grade.

Exceptions, Attach. F at 5 (quoting IRM § 6.500.1.4.7(1)).

In particular, the Agency contends that the grievant's situation is governed by § 6.500.1.4.7(1)(B), *supra*, because, according to the Agency, the grievant was returned "on paper" to her "lower permanent grade" before her subsequent permanent promotion was processed. *See* Exceptions at 8. The Agency maintains that the Arbitrator "ignored" the aforementioned IRM provisions – i.e., §§ 6.500.1.4.4(4) and 6.500.1.4.7(1) – when he interpreted the word "return" and found that the grievant had not been "returned" to her position of record prior to her permanent promotion. *See id.*

Although the Agency asserts that a notation in the grievant's Personnel Action Report constitutes a "return" to her position of record, the Agency does not cite, and the IRM provisions on which the Agency relies do not contain, a regulatory definition of "return." *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). Moreover, the Agency provides no evidence that it formally promulgated or otherwise publicly announced its interpretation of the IRM's use of the word "return" prior to the instant dispute. Therefore, the Agency's interpretation of "return" is not entitled to deference. *See id.* at 1136 (citing *FLRA v. Treasury*, 884 F.2d at 1455); *cf. United States v. Paddack*, 825 F.2d 504 (D.C. Cir. 1987) (Foreign Service Grievance Board did not err in refusing to accord deference to agency's interpretation of regulation issued only after formal grievance litigation was commenced).

Thus, in accordance with Authority precedent on *de novo* regulatory interpretation, we independently assess whether the Arbitrator's interpretation of "return" is consistent with the text of the relevant IRM provisions. *See FAA*, 56 FLRA at 630. As mentioned above, the IRM does not define "return." In addition, the IRM expressly recognizes that the Agency may use an employee's temporary-promotion compensation rate to set the employee's pay upon promotion. *See supra* IRM § 6.500.1.4.7(1)(A). In these circumstances, we find no inconsistency between the text of the IRM and the Arbitrator's conclusion that a "return" requires more than a mere paper-record notation. Accordingly, we deny the Agency's exception.

> C. The award is not inconsistent with Comptroller General decisions.

The Agency further asserts that the Arbitrator's interpretation of "return" is inconsistent with certain decisions of the Comptroller General – namely, *Catherine L. Drake* and *Benjamin C. Smith*. *See* Exceptions at 5-6. However, neither of those decisions dealt with interpretations of the IRM. *Cf. DOJ*, 51 FLRA at 1136 (responding to agency's assertion that its interpretation of regulation was consistent with certain court decisions, and noting that "[n]one of the cases cited by the Agency concerns an interpretation" of the regulation in dispute). Moreover, neither of those decisions held that, in every circumstance involving the "two step promotion rule," a purported change in an employee's position "on paper only" would establish, as a matter of law, that the affected employee had "returned" to the position indicated.[4] Thus, the Agency has failed to establish that the award is contrary to law due to inconsistency with *Catherine L. Drake* or *Benjamin C. Smith*.[5] Consequently, we deny the exception.

V. Decision

The Agency's exceptions are denied.

4. The word "return" does not even appear in *Catherine L. Drake*; in addition, the agency in that dispute had no written policy or regulation regarding the compensation matter at issue. *See id.*, B-247553, 1992 WL 109481, at *2. Similarly, in *Benjamin C. Smith*, the claimant-employee's agency had no written policy regarding the compensation matter in dispute. *See id.*, B-202631, 1982 WL 27213, at *2. As neither decision concerned a written policy or regulation, neither involved an interpretation of the word "return."

5. We note that, in any event, decisions of the Comptroller General are not binding on the Authority. "Although a Comptroller General opinion serves as an expert opinion that should be prudently considered, a prior assessment of the Comptroller General is not one to which deference must be given." *AFGE, Local 1458*, 63 FLRA 469, 471 (2009) (citations omitted).