65 FLRA No. 80

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3380
(Union)

and

UNITED STATES
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
(Agency)

0-AR-4311

_____

DECISION

December 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 Irwin Kaplan 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 exceptions.

As pertinent to the Union's exceptions, the Arbitrator denied the Union's grievance alleging that the Agency, by not selecting the grievant for a promotion, failed to follow merit staffing procedures in violation of the collective bargaining agreement (CBA) and applicable statutes and regulations. For the reasons that follow, the Authority denies the exceptions.

II. Background and Arbitrator's Award

The grievance arises from a vacancy announcement that the Agency posted for two permanent GS-13 Senior Project Manager positions to be filled at the Agency's Baltimore, Maryland; Washington, D.C.; and/or Richmond, Virginia locations. Award at 2. Applicants were instructed to submit one application for each location in which they were interested. *Id.* The grievant applied only for the Richmond location and was one of five applicants who made the best qualified list (BQL) for that location. *Id.* The grievant received the highest score possible under the crediting plan for the position. *Id.* at 4. The grievant then learned that two other applicants on the BQL were selected for the Richmond location. *Id.* at 2, 4. Both selectees received lower scores under the crediting plan than did the grievant. *Id.* at 4. A third applicant, who was on the BQL for the Baltimore location, was selected for that location under the same vacancy announcement. *Id.* at 2. Before the third applicant was selected, the Agency had not notified the grievant or the Union that a third permanent position would be filled. *Id.*

The selecting official, before making her selections, considered the applicants' recent experience in areas relevant to the position. She also consulted with the supervisors who would supervise the positions in Richmond and Baltimore to obtain their input on the applicants on the BQL. *Id.* at 5. The supervisor of the Richmond positions previously had worked with the grievant and gave negative feedback regarding that experience. *Id.* at 9.

The grievant filed a grievance alleging that the Agency failed to follow the merit staffing procedures set out in Article 13 of the CBA when it did not select the grievant for one of the Richmond positions and filled a third position without first notifying the grievant or the Union. *Id.* at 1. When the grievance was not resolved, it was submitted to arbitration, where the issues framed by the Arbitrator were:

> 1. Whether the Agency violated § 13.04 of the CBA, applicable law or regulation by failing to provide notice to the Union of management's intention to fill an additional vacancy that was not previously announced; and
>
> 2. Whether the application of the merit staffing principles/procedures for the position of Senior Project Manager . . . impacted the nonselection of the [g]rievant . . . for the position?

Id. at 3, 13, 15.

The Arbitrator determined that the Agency violated Section 13.04 of the CBA[1], finding its "plain

1. Section 13.04 of the CBA provides that: As a bargaining unit position "becomes available, [the Agency] agrees to notify promptly the Union of its intent to staff or cancel the vacant position." Exceptions, Ex. 2 at 52.

and unambiguous meaning" to be that when a bargaining unit position becomes available, the Agency must promptly notify the Union of its intent to staff or cancel the position. *Id*. at 14. Although the Arbitrator agreed with the Agency that the CBA permitted the Agency to reuse the selection roster for the vacancy announcement to fill the third position, the Arbitrator found that this did not excuse the Agency from the notification requirement. *Id*.

However, the Arbitrator also determined that the grievant's nonselection was not based on any misapplication by the Agency of the merit staffing procedures in Article 13 of the CBA. *Id*. at 16-18. Specifically, the Arbitrator found no violation of the CBA resulting from the selecting official's consideration of the recency of the applicants' relevant experience or her consultation with the supervisors of the Senior Project Manager positions. *Id*. at 16-17. In addition, the Arbitrator rejected the Union's contention that the selection for the Baltimore position impacted improperly on the grievant's nonselection, especially in light of the fact that the grievant had not applied for the Baltimore position. *Id*. at 17-18.

Finally, the Arbitrator rejected the Union's claim that the grievant was harmed because he would have filed an equal employment opportunity (EEO) complaint rather than the instant grievance had the Agency responded more promptly to the Union's request for the rating and ranking worksheet, the selection roster, and the crediting plan. *Id*. at 18. The Arbitrator based this determination on the Union's failure to take any actions to compel the Agency's production of these documents, the grievant's failure to let the Agency know that he was seeking them in contemplation of an EEO action, and the Union's failure to raise a discrimination claim in the arbitration. *Id*. 18-19.

As relief, the Arbitrator ordered the Agency to cease and desist from failing to comply with Section 13.04 of the CBA and to notify the Union in writing that it will comply with the notice requirement therein. *Id*. at 19.

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the award fails to draw its essence from Article 13 of the CBA, which it interprets as prohibiting selecting officials from seeking feedback from other officials on an applicant's suitability for a position without the candidate's prior knowledge. Exceptions at 3-4. In support of its argument, the Union cites Section 13.10 of the CBA, which governs the evaluation phase of the selection process.[2] The Union notes that Section 13.10, which limits the information on which a candidate is to be rated and ranked to specific sources, does not include feedback from officials consulted without the candidate's knowledge. *Id*. at 3. The Union, while recognizing that the limitation on sources of information in Section 13.10 explicitly applies only to the evaluation phase, asserts that the selecting official is bound by it

2. Section 13.10 of the CBA provides, in pertinent part, that:

> Section 13.10 – Evaluation of Candidates.
>
> . . . . .
>
> (2) Criteria for Evaluation of Candidate Qualifications. The evaluation process shall be based on a comparison of the qualified candidates' qualifications against a set of job-related criteria that have been developed for the position to be filled.
>
> . . . . .
>
> (d) A candidate's rating shall be determined on the basis of relevant job-related information derived from a specified combination of the following sources:
> Appropriate application;
> Supplemental Qualifications Statements;
> Supervisory Appraisals;
> Structured interviews; and
> Written aptitude/ability tests (if required by the Office of Personnel Management).
>
> (3) Rating and Ranking of Candidates and Certificates.
>
> . . . . .
>
> (d) Merit Staffing Panel
>
> . . . . .
>
> 2. Members of the panel must evaluate candidates in accordance with the applicable crediting plan. They must take into consideration all job-related information derived from the application forms, supplemental qualifications statements, supervisory appraisals; and, if used, structured interviews and/or written tests.

Exceptions, Ex. 2 at 59-61.

because "the actual selection of an applicant is the end of the continuum of the evaluation process." *Id*.

The Union contends that the award also fails to draw its essence from the CBA to the extent that the Arbitrator found that it was appropriate for the selecting official to consider the recency of relevant experience of the applicants on the BQL for the Richmond location when recent experience was not listed as a selective placement factor in the vacancy announcement. *Id*. at 4-5.

Next, the Union contends that the Arbitrator exceeded his authority when he determined that it was not improper for the selecting official to have selected other candidates over the grievant for the Richmond positions based on the recency of relevant experience or to have consulted with the supervisors for the Senior Project Manager positions. *Id*. at 5-6. Further, the Union contends that the Arbitrator based his award on the "non-fact" that "the identity of the incumbent supervisor" for the position was a selective placement factor. *Id*. at 6. In this regard, the Union asserts that if the Arbitrator's finding that it was not improper for the Agency to unilaterally add or modify placement factors is allowed to stand, it would infringe upon the Union's rights under § 7106(b)(1) of the Statute to negotiate over the technology, methods, and means of performing work. *Id*.

Finally, the Union contends that the Agency's "illegal" delay in providing to the Union the rating and ranking worksheet, the selection roster, and the crediting plan harmed the grievant because it kept him from filing a timely discrimination complaint. *Id*. at 8. The Union claims it was only after the grievant received the documents that he realized that he had a basis for a discrimination complaint. *Id*.

B. Agency's Opposition

The Agency argues that the selecting official's consultations with the supervisors who actually would be supervising the successful applicants did not violate Section 13.10 of the CBA because that section governs only the rating and ranking stage of the selection process, and not the actions of the selecting official. Opp'n at 4. Nor, the Agency argues, did the consultations violate Section 13.11, the CBA provision governing the procedures to be followed by the selecting official. *Id*. at 5.[3] The Agency notes that all Section 13.11 contains is a provision that the selecting official may select, or not select, any candidate on the competitive placement certificate and a requirement that if one candidate on the certificate is interviewed, then all must be interviewed. *Id.* Therefore, the Agency contends, the Arbitrator's interpretation of the CBA as permitting the consultations was fair and rational. *Id*.

As for the Union's contention that the Arbitrator should have found it inappropriate for the selecting official to consider and compare the candidates' recency of relevant experience, the Agency argues that the selecting official acted appropriately even though recency of experience was not a selective placement factor per se. *Id*. at 9. If the Arbitrator were to find otherwise, the Agency argues, the selecting official would be precluded from drawing distinctions between candidates on the BQL if the distinctions were based on attributes, such as possession of an advanced degree, that were not listed as selective placement factors in the vacancy announcement. *Id*.[4]

The Agency contends that the Arbitrator did not exceed his authority when he determined that it was

---

3. Section 13.11 of the CBA provides, in pertinent part that:

> Section 13.11 Selection Consideration.
> . . . . .
> (1) Action by Selecting Official. The selecting official is entitled to select, or not select, any of the candidates on the Competitive Placement Certificate.
> (2) Interviewing Candidates.
> (a) The selecting official or a designee shall interview all or none of the BEST QUALIFIED candidates referred.
> (b) Telephone interviews are acceptable for candidates located outside of the local commuting area.

Exceptions, Ex.2 at 61-62.

4. The Agency also contends that the Union is raising, for the first time before the Authority, the issue of whether recency of relevant experience should have been a selective placement factor. Exceptions at 6-7. But, the Union is not raising that issue before the Authority. The Union's contention is not that recency of relevant experience should have been listed as a selective placement factor but that because it was not, a non-selection based on that factor resulted in a unilateral modification of the selective placement factors. *See id.* at 4-7. This contention, which the Union raised before the Arbitrator, Award at 16, is addressed below in Section IV.A.

appropriate for the selecting official to consult with the supervisors because this determination was in direct response to issues before him, specifically, whether the selection procedures used were permissible and whether they affected the grievant's nonselection. *Id.* at 12. As for the Union's argument that the Arbitrator's purported approval of the Agency's unilateral addition or modification of selective placement factors interfered with the Union's rights under § 7106(b)(1) of the Statute, the Agency notes that the Arbitrator made no factual finding that the Agency took such actions. Therefore, the Agency contends, this exception amounts to nothing more than a factual disagreement. Finally, the Agency contends that the Union fails to articulate how the Arbitrator's determination that the grievant was not harmed by the timing of the Agency's document production is contrary to any law, rule, or regulation. *Id.* at 15.

IV. Analysis and Conclusions

A. The award does not fail to draw its essence from the CBA.

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 Arbitrator determined that the selecting official did not act contrary to Article 13 of the CBA when she considered the relative recency of the experience of the candidates for the Richmond positions and consulted with the supervisors. Award at 17. This determination is consistent with Section 13.11 of the CBA, which does not expressly prohibit a selecting official from considering candidates' relative experiences or consulting with their prospective supervisors. The Union has not explained how this determination is irrational, unfounded, implausible, or in manifest disregard of the CBA. Accordingly, the Authority denies this exception.

B. The Arbitrator did not exceed his authority.

Arbitrators exceed their authority when they resolve an issue not submitted to arbitration. *U.S. Dep't of the Interior, Nat'l Park Serv., Golden Gate Nat'l Recreation Area, S.F., Cal.*, 55 FLRA 193, 194 (1999). However, arbitrators do not exceed their authority by addressing an issue that is necessary to decide a stipulated issue, *NATCA, MEBA/NMU*, 51 FLRA 993, 996 (1996), or by addressing an issue that necessarily arises from issues specifically included in a stipulation. *See Air Force Space Div., L.A. Air Force Station, Cal.*, 24 FLRA 516, 519 (1986). In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue, or the arbitrator's formulation of an issue to be decided in the absence of a stipulation, the same substantial deference that it accords an arbitrator's interpretation and application of a collective bargaining agreement. *See U.S. Info. Agency, Voice of Am.*, 55 FLRA 197, 198 (1999).

The Union contends that the Arbitrator exceeded his authority when he determined that it was not improper for the selecting official to favor other candidates over the grievant or for her to consult the supervisors. Exceptions at 5. However, this determination was necessary to resolve what the Arbitrator identified as the principal stipulated issue, that is, whether the Agency's application of the merit staffing procedures impacted the grievant's nonselection. *See* Award at 3. Accordingly, the Authority denies this exception.

C. The award is not based on a nonfact.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.*

The Union contends that the Arbitrator based his award on the "non-fact" that "the identity of the

incumbent supervisor" for the position was a selective placement factor. Exceptions at 6. Stated otherwise, the Union contends that the Arbitrator erred when he determined that it was not improper for the selecting official to consider feedback from the incumbent supervisor even though she favored the selectees over the grievant. To the extent that the Arbitrator made a factual finding, the issue of whether the supervisor's feedback should have been requested and considered was disputed at the arbitration and, therefore, it cannot form a basis for finding the award deficient.

Similarly, whether the timing of the Agency's response to the Union's information request harmed the grievant was a factual matter disputed at the arbitration. Thus, this matter also cannot form a basis for finding the award deficient. Accordingly, the Authority denies this exception.

D. The award is not 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 Union contends that the Agency "illegally" denied the grievant a right to file an employment discrimination complaint because it took too long to respond to the Union's document request. Exceptions at 8. The Union also contends that the Arbitrator erred in finding that the grievant was not harmed by the timing of the Agency's document production. *Id*. However, the Union identifies no law with which the Arbitrator's finding is inconsistent. Accordingly, the Authority denies this exception.

V. Decision

The Union's exceptions are denied.