65 FLRA No. 214

UNITED STATES
DEPARTMENT OF THE ARMY
WOMACK ARMY MEDICAL CENTER
FORT BRAGG, NORTH CAROLINA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1770
(Union)

0-AR-4595

_____

DECISION

July 20, 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 of Arbitrator Edward E. Hales 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 Arbitrator found that the Agency violated the parties' agreement by paying several employees at the General Schedule (GS)-6, rather than GS-7, grade level. For the reasons that follow, we deny the Agency's exceptions and the Union's request for a remand.

II. Background and Arbitrator's Award

The Agency posted vacancies for certain "GS 6/7" positions. Award at 3. The Agency's Human Resources Consultant (the Consultant) offered the positions to five applicants (the grievants) at the GS-7 level, and they accepted the positions at that level. *See id.* at 12-13. However, when the grievants began work, the Agency processed their paperwork and began paying them at the GS-6 level. *See id.* at 13.

Subsequently, the Union filed a grievance on behalf of the five grievants, alleging that they were "improperly downgraded" from the GS-7 level to the GS-6 level "upon commencing their jobs." *Id.* at 1. When the grievance was unresolved, it was submitted to arbitration, where the Arbitrator framed the issues as follows:

> 1. Did the Agency improperly downgrade the [grievants] to the GS-6 grade level, after they applied for and were offered and accepted the . . . position[s] at the [GS]-7 level, as asserted by the Union?
>
> 2. Were the [g]rievants properly hired at the GS-6 grade level, as asserted by the Agency[,] for the . . . position[s] based on their qualifications and after it was determined that they were erroneously offered the position[s] at the GS-7 grade level?

Id. at 11.

As an initial matter, the Arbitrator rejected the Agency's claim that the grievance was not arbitrable because it concerned a classification matter within the meaning of § 7121(c)(5) of the Statute (§ 7121(c)(5)). Specifically, the Arbitrator found that the grievance "d[id] not involve an attempt to reclassify a position[]" and that there was no dispute regarding "whether the wrong job classification was involved for the type of work that the [g]rievants were performing . . . ." *Id.* at 17. Instead, the Arbitrator stated that the grievants "were seeking employment to a position for which they had been qualified . . . by the . . . Consultant[,]" *id.* at 17-18, and that the grievance "concern[ed] whether the [g]rievants were improperly downgraded to the GS-6 grade level[,]" *id.* at 17.

Addressing the merits of the grievance, the Arbitrator found that the evidence supported a conclusion that the grievants were qualified for the GS-7 level. In this regard, the Arbitrator stated that the Agency's argument that they were not qualified at that level was "not persuasive when considering the evidence [that] appears to be to the contrary." *Id.* Specifically, the Arbitrator found that, before offering the grievants the positions, the Consultant had "qualified" them, *id.* at 17, and that the Agency "ha[d] not presented any evidence[] [that] credibly demonstrates that [they] were not qualified for the GS-7 grade level[,]" *id.* at 18. Instead, the Arbitrator found that the Agency "made a tacit decision to process the [g]rievants for employment at the GS-6 grade regardless of their qualifications." *Id.*

The Arbitrator determined that Article 3, Section 1(e)(1) of the parties' agreement (Article 3) requires the promotion of an employee "properly ranked and certified for promotion." *Id.* As the Consultant had determined that the grievants were qualified for the GS-7 level, the Arbitrator found that the Agency violated the agreement by "improperly downgrad[ing] the [g]rievants from the . . . GS-7 grade level to the GS-6 grade level."[1] *Id.* Accordingly, the Arbitrator sustained the grievance and directed the Agency to pay the grievants backpay at the GS-7 level. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency claims that the award is based on two nonfacts. First, the Agency asserts that the Arbitrator erred by finding that "a 'downgrade' had occurred[,]" because, according to the Agency, the grievants were never employed at the GS-7 level. Exceptions at 4. Second, the Agency argues that the award is based on a nonfact because the Arbitrator erred in finding a violation of Article 3. *See id.* at 7-8. In this regard, the Agency contends that Article 3 does not require the Agency to "advance every individual solely because they meet the qualifications[,]" and that the Arbitrator's interpretation of Article 3 "would lead to the untenable situation where the Agency would be forced to hire all qualified candidates regardless of how many vacancies exist." *Id.* at 8.

The Agency also claims that the award is contrary to § 7121(c)(5) because the grievance concerned classification and, thus, was not arbitrable. *See id.* at 2-4. In particular, the Agency contends that, "[i]n order for the [A]rbitrator to claim jurisdiction in this matter[,] he had to rely on the nonfact that a 'downgrade' had occurred." *Id.* at 4.

Additionally, the Agency asserts that the award is contrary to 5 C.F.R. § 300.604(b) because the record evidence does not support a conclusion that the grievants met the requirements for a promotion to the GS-7 level at the time they were hired.[2] *See id.* at 5-6.

Finally, the Agency contends that the award is contrary to the Back Pay Act, 5 U.S.C. § 5596 (the BPA). *See id.* at 6. In this regard, the Agency asserts that classifying the positions at the GS-6 level was not unjustified or unwarranted because the Agency was acting in accordance with 5 C.F.R. § 335.103(b)(3),[3] which requires the Agency to comply with 5 C.F.R. § 300.604(b). *See id.* at 6-7. In addition, the Agency asserts that there was no withdrawal or reduction of the grievants' pay, allowances, or differentials because they were never employed or paid at a level higher than GS-6. *See id.* at 7.

B. Union's Opposition

The Union argues that the award is not based on nonfacts. *See* Opp'n at 8. In this connection, the Union contends that, contrary to the Agency's assertion, the Arbitrator did not find that the Agency must promote and select every individual that is properly ranked and certified. *See id.* at 9.

The Union also argues that the award is not contrary to § 7121(c)(5) because, as the Arbitrator found, the grievance did not attempt to reclassify the positions. *See id.* at 4-5. In addition, the Union contends that the award is not contrary to 5 C.F.R. § 330.604. *See id.* at 5. In this regard, the Union asserts that the Agency's arguments do not take into account 5 C.F.R. § 300.603(b)(1), which provides an exclusion for appointments based on selection from a competitive examination register of eligibles or under

1. We note that the Arbitrator did not find that the grievants were ever actually employed at the GS-7 level, and there is no dispute that they were not employed at that level. In this regard, the Arbitrator appears to have used the term "downgrade" to refer to the grievants being initially processed and paid at the GS-6 level after accepting positions at the GS-7 level. *Cf.* Award at 1 (Arbitrator characterized grievance as alleging that grievants had been "improperly downgraded . . . *upon commencing their jobs.*") (emphasis added). Thus, this case does not involve a "reduction in grade[]" within the meaning of 5 U.S.C. § 7512(3), and § 7122(a) of the Statute does not preclude the Authority from exercising jurisdiction.

2. 5 C.F.R. § 300.604 provides, in pertinent part:

> The following time-in-grade restrictions must be met unless advancement is permitted by § 300.603(b) of this part:
> . . . .
> (b) Advancement to positions at GS-6 through GS-11. Candidates for advancement to a position at GS-6 through GS-11 must have completed a minimum of [fifty-two] weeks in positions:
> . . . .
> (2) No more than one grade lower (or equivalent) when the position to be filled is in a line of work properly classified at [one]-grade intervals . . . .

3. 5 C.F.R. § 335.103(b)(3) provides, in pertinent part, that "[m]ethods of evaluation for promotion and placement[] . . . must be consistent with instructions in part 300, subpart A, of this chapter."

a direct-hire authority.[4] *See id.* at 6. The Union also asserts that 5 C.F.R. § 300.601 states that the regulations are intended to prevent excessively rapid promotions and, because the grievants were initial hires, the regulatory requirements regarding eligibility for promotions are inapposite.[5] *See id.* Even assuming that the regulations apply, the Union contends that the Arbitrator made factual findings that support his legal conclusion that the grievants were qualified at the GS-7 level. *See id.* at 6-7.

Further, the Union argues that the award is consistent with the BPA because the grievants were hired at the GS-7 level and then improperly "downgraded" to the GS-6 level. *Id.* at 7. In addition, the Union asserts that it has not yet requested attorney fees from the Arbitrator, and requests that the Authority remand this case for a decision regarding such fees. *See id.* at 9.

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

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 conclusion. *See U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993). However, the Authority will not find an award deficient on the basis of an arbitrator's determination on any factual matter that the parties disputed at arbitration. *Id.* at 594 (citing *Nat'l Post Office Mailhandlers v. U.S. Postal Serv.*, 751 F.2d 834, 843 (6th Cir. 1985)). Additionally, an arbitrator's interpretation of a collective bargaining agreement does not constitute a matter that can be challenged as a nonfact. *E.g., U.S. DHS, U.S. Immigration & Customs Enforcement*, 65 FLRA 792, 795 (2011) (*ICE*).

The Agency's first nonfact claim is that the Arbitrator erred by finding that "a 'downgrade' had occurred[,]" because the grievants were never employed at the GS-7 level. Exceptions at 4. As noted previously, the Arbitrator did not find that the grievants were ever actually employed at the GS-7 level; rather, the Arbitrator appears to have used the term "downgrade" to refer to the grievants being initially processed and paid at the GS-6 level after accepting positions at the GS-7 level. *See supra*, note 1. There is no basis for finding that the Arbitrator's statement that this action constituted a "downgrade" is a clearly erroneous factual finding, but for which the Arbitrator would have reached a different conclusion. Accordingly, we deny the exception.

The Agency's second nonfact claim is that the Arbitrator erred in finding a violation of Article 3. Exceptions at 7-8. As stated above, an arbitrator's interpretation of a collective bargaining agreement does not constitute a matter that can be challenged as a nonfact. *See ICE*, 65 FLRA at 795. Accordingly, we deny the exception.[6]

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

The Authority will find that an arbitration award is deficient as failing to draw its essence from a 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. DoL (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction

4. 5 C.F.R. § 300.603 provides, in pertinent part:

> (a) Coverage. This subpart applies to advancement to a [GS] position in the competitive service by any individual who within the previous [fifty-two] weeks held a [GS] position under nontemporary appointment in the competitive or excepted service in the executive branch, unless excluded by paragraph (b) of this section.
>
> (b) Exclusions. The following actions may be taken without regard to this subpart but must be consistent with all other applicable requirements, such as qualification standards:
>
> (1) Appointment based on selection from a competitive examination register of eligibles or under a direct hire authority. . . .

5. 5 C.F.R. § 300.601 provides, in pertinent part, that "[t]he restrictions in this subpart are intended to prevent excessively rapid promotions in competitive service [GS] positions and to protect competitive principles. . . ."

6. Alternatively, we construe the Agency's claim as arguing that the award fails to draw its essence from the parties' agreement, and we address that issue below. In doing so, we note that the Agency's exceptions were filed prior to the October 1, 2010 effective date of the Authority's revised arbitration Regulations.

of the agreement for which the parties have bargained." *Id.* at 576.

The Agency argues that the Arbitrator erred in finding a violation of Article 3 because that provision does not require the Agency to "advance every individual solely because they meet the qualifications[,]" and that the Arbitrator's interpretation of the provision "would lead to the untenable situation where the Agency would be forced to hire all qualified candidates regardless of how many vacancies exist." Exceptions at 8. However, the Arbitrator did not find that Article 3 requires the Agency to either advance or hire all qualified individuals. Thus, the premise of the Agency's argument is incorrect, and we deny the exception.

C. The award is not contrary to law.

The Agency asserts that the award is contrary to law in several respects. The Authority reviews questions of law 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 a standard of de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. Section 7121(c)(5)

Under § 7121(c)(5), a grievance concerning "the classification of any position which does not result in the reduction in grade or pay of an employee" is removed from the scope of the negotiated grievance procedures. *U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Nw. Div., Portland, Or.*, 59 FLRA 443, 445 (2003) (*Army*). The Authority has viewed the meaning of "classification" under § 7121(c)(5) in the context of 5 C.F.R. chapter 511. *Id.* 5 C.F.R. § 511.101(c) defines classification of a position as "the analysis and identification of a position and placing it in a class under the position-classification plan established by OPM under chapter 51 of title 5, United States Code." Under the system established by OPM, classification entails the identification of the appropriate title, series, grade, and pay system of a position. *See Army*, 59 FLRA at 445 (citing 5 C.F.R. § 511.701(a)).

Where the essential nature of a grievance concerns the grade level of the duties assigned to and performed by the grievant in his or her permanent position, the grievance concerns the classification of a position within the meaning of § 7121(c)(5). *E.g., U.S. Dep't of HUD*, 65 FLRA 433, 435 (2011) (*HUD*). In addition, a grievance concerns classification within the meaning of § 7121(c)(5) if it contends that the grievant's permanent position warrants a change in its journeyman level or promotion potential. *Id.* *See also U.S. DoL*, 63 FLRA 216, 218 (2009).

In contrast, a grievance that alleges a right to be placed in previously classified positions does not concern classification. *See HUD*, 65 FLRA at 436. Similarly, a grievance alleging that an agency failed to promote a grievant under a competitive procedure does not concern classification matters. *Id.* In this regard, the Authority has held that where an arbitrator determines that a grievant is entitled to a career-ladder, temporary, or other noncompetitive promotion based on previously classified duties, the award does not concern a classification matter. *See U.S. Dep't of HUD, Wash., D.C.*, 59 FLRA 630, 631 (2004); *see also U.S. Dep't of HHS, Nat'l Inst. for Occupational Safety & Health, Cincinnati Operations, Cincinnati, Ohio*, 52 FLRA 217, 221 (1996). Further, a grievance concerning a delay in receiving a career-ladder promotion does not concern classification. *See U.S. Dep't of HUD*, 47 FLRA 1053, 1061 (1993).

Here, there is no dispute that the journeyman level of the grievants' positions is GS-7. In addition, the grievance did not challenge the journeyman level of the positions or require the Arbitrator to assess the grade level of the duties assigned to and performed by the grievants in those positions. Instead, it argued that the Agency erred by processing the grievants' paperwork, and paying them, at the GS-6 level, rather than the full journeyman level of GS-7. As such, the grievance is more analogous to a grievance alleging a right to be placed in a previously classified GS-7 position, or a grievance challenging a delay in a career-ladder promotion, than it is to a grievance alleging that a position is improperly classified. Accordingly, we find that the grievance did not involve classification within the meaning of § 7121(c)(5), and we deny the exception.

2. 5 C.F.R. § 300.604(b)

5 C.F.R. § 300.604(b) provides, in pertinent part, that "[c]andidates for advancement to a position at GS-6 through GS-11 must have completed a minimum of [fifty-two] weeks in positions . . . [n]o more than one grade lower (or equivalent) when the position to be filled is in a line of work properly classified at [one]-grade intervals[.]" 5 C.F.R. § 300.604(b)(2). The Agency asserts that the award

is contrary to this regulation because the record evidence does not support a conclusion that the grievants were qualified for promotions to the GS-7 level at the time they were hired. *See* Exceptions at 5-6.

Even assuming that 5 C.F.R. § 300.604(b) applies to the hiring of the grievants,[7] the Arbitrator found that the evidence supported a conclusion that the grievants were qualified at the GS-7 level when they were hired, and that the Consultant had made such a determination. The Agency provides no basis for concluding that the Arbitrator erred in making these findings. Thus, the premise of the Agency's exception regarding 5 C.F.R. § 300.604(b) is incorrect, and we deny the exception.

3. The BPA

An award of backpay is authorized under the BPA when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action has resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. *E.g., U.S. Dep't of the Army, Headquarters, I Corps & Fort Lewis, Fort Lewis, Wash.*, 65 FLRA 699, 703 (2011). A violation of a collective bargaining agreement constitutes an unjustified or unwarranted personnel action under the BPA. *Id.*

The Arbitrator found that the Agency violated the parties' agreement, which supports a conclusion that the Agency committed an unjustified and unwarranted personnel action. *See id.* Although the Agency argues that its action was not unjustified or unwarranted because it was complying with 5 C.F.R. § 335.103(b)(3), which requires the Agency to comply with 5 C.F.R. § 300.604(b), we have rejected the Agency's claim that the award is contrary to 300.604(b). As such, the premise of the Agency's claim -- that 5 C.F.R. § 300.604(b) compelled the Agency's action -- is unfounded.

With regard to whether the violation resulted in the withdrawal or reduction of the grievants' pay, allowances, or differentials, the Agency argues that the grievants did not suffer such a loss because they were never paid at the GS-7 level. However, the Arbitrator found that the Agency improperly "downgraded" the grievants from GS-7 to GS-6. Award at 18. Thus, he implicitly found that, but for the Agency's improper action, the grievants would have been paid at the GS-7 level. This finding supports a conclusion that the violation resulted in the withdrawal or reduction of the grievants' pay, allowances, or differentials.

For the foregoing reasons, the Arbitrator's findings support a conclusion that the award is consistent with the BPA, and we deny the BPA exception.

D. We deny the Union's request for a remand.

The Union acknowledges that it has not yet requested attorney fees from the Arbitrator, but requests that the Authority remand the award for a determination regarding such fees. Under 5 C.F.R. § 550.807(a), an award of attorney fees is premised on the request of a grievant or a grievant's representative. *U.S. Dep't of the Army, Corps of Eng'rs, Huntington Dist., Huntington, W. Va.*, 59 FLRA 793, 799 (2004). Such a request must be made to the arbitrator, who is the "appropriate authority" under 5 C.F.R. § 550.807(a) to render such an award in the case of an arbitration proceeding. *Id.* Further, there is no legal requirement that arbitrators issue a fee award at the time that they issue an award on the merits of the grievance. *Id.* Rather, the BPA confers statutory jurisdiction on an arbitrator to consider an attorney-fee request filed after the arbitrator's decision awarding backpay. *Phila. Naval Shipyard*, 32 FLRA 417, 421 (1988).

As the BPA confers statutory jurisdiction on the Arbitrator to resolve any Union request for attorney fees, there is no need for the Authority to remand the matter for a determination of fees. Accordingly, we deny the Union's request for a remand.

V. Decision

The Agency's exceptions and the Union's request for a remand are denied.

7. As noted previously, 5 C.F.R. § 300.604(b) applies to "*[a]dvancement*" of employees, and 5 C.F.R. § 300.601 pertinently provides that the restrictions in 5 C.F.R. § 300.604(b) "are intended to prevent excessively rapid *promotions* . . . ." (emphases added). The plain wording of these regulations suggests that 5 C.F.R. § 300.604(b) does not apply to the grievants, who were initial hires.