70 FLRA No. 149

UNITED STATES
SMALL BUSINESS ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2959
(Union)

0-AR-5288

_____

DECISION

July 27, 2018

_____

Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members

I. Statement of the Case

The Agency selected the grievant for a promotion, and then rescinded the offer, because it discovered that it had improperly granted the grievant a veterans' preference that had been credited to his application. The Union filed a grievance alleging that the Agency violated the parties' agreement and law by rescinding the grievant's promotion. Arbitrator Dineo Coleman Gary found that the Agency did not violate any law or the parties' agreement. However, the Arbitrator awarded the grievant backpay.

We find that the backpay award is contrary to law because the Arbitrator did not find that the Agency committed an unjustified or unwarranted personnel action.[1]

II. Background and Arbitrator's Award

The Agency hired the grievant as a preference-eligible veteran to work as a Development Specialist in one of the Agency's Texas offices. A few years later, the Agency selected the grievant for a promotion to a management position in the U.S. Virgin Islands using a veterans' preference. When the grievant received an oral offer, the Agency advised him that he was still required to go through the "the suitability process"[2] before the Agency could establish an effective date for the new position.

At first, the grievant's promotion process went smoothly. The Agency sent the grievant to the Virgin Islands for a few days to introduce him to the Agency's Virgin Islands staff and clients. While he was there, the Agency confirmed the grievant's promotion with a "final offer letter."[3] After receiving the offer letter, the grievant sold his house in Texas and purchased a house in the Virgin Islands.

[1] Member Abbott notes, that if he were drafting this decision for the Authority, he would explain for the benefit of the federal labor-management relations community that a series of unfortunate and embarrassing events does not constitute an unjustified or unwarranted personnel action that supports an award of backpay under the Back Pay Act (BPA). This is at least the third case since 2015 in which a bargaining unit employee has claimed some form of extra pay or benefit. *See U.S. Dep't of VA, San Diego Healthcare Sys., San Diego, Cal.*, 70 FLRA 641 (2018) (Member DuBester concurring in part, dissenting in part); *U.S. Dep't of VA, John J. Pershing Med. Ctr., Poplar Bluff, Mo.*, 68 FLRA 852 (2015) (*VAMC Poplar Bluff*) (Member DuBester concurring; Member Pizzella dissenting). In all three cases (including the instant case) three different arbitrators found that the agency did not violate any law, regulation, or provision of the parties' agreement but then, inexplicably, took it upon themselves to award substantial sums of money (in the earlier cases - $5,000 and $24,000) based on nothing more than those arbitrators' own sense of "industrial justice." *VAMC Poplar Bluff*, 68 FLRA at 856 (Dissenting Opinion of Member Pizzella). I agree with the observation made by then-Member Pizzella that awards based on "equitable largesse" – are little more than "what some might call a taxpayer shakedown." *Id.* I trust that our decision today sends (paraphrasing the words of then-Member Pizzella) the "unmistakable message to the federal labor-management relations community, and [to] those arbitrators who adjudicate federal dispute[s], that [they] are [NOT] free to disregard" the BPA or to dispense taxpayer money to grievants when no violation of anything has been clearly established. *Id.*

[2] Award at 9.

[3] *Id.* at 10.

But soon, problems arose. After the grievant returned from the Virgin Islands, and completed his real estate transactions, the Agency advised him that his promotion was "postponed."[4] The Agency explained that because the Agency may have made an error regarding the grievant's eligibility for veterans' preference when it initially hired him, his promotion offer "could be rescinded."[5]

Subsequently, the Office of Personnel Management (OPM) advised the Agency that the grievant was not entitled to veterans' preference, because his entire active duty was in a "student training status."[6] Thus, the Agency rescinded the promotion offer. The Agency's letter formally rescinding the grievant's promotion was issued three days after the grievant completed the sale of his home in Texas.

Thereafter, the Agency submitted a "variance request"[7] to OPM to allow the grievant to retain his current position. Five months later, OPM approved the variance request and authorized the grievant's employment in his Texas position.

The Agency reposted the Virgin Islands managerial position and the grievant applied again, this time not claiming veterans' preference. The Agency selected the grievant. About seven months after the grievant otherwise would have begun his managerial duties in the Virgin Islands (had he been properly selected under the previous selection process), the grievant began work in that position.

The Union then filed a grievance, alleging that the Agency had violated law and multiple provisions of the parties' collective-bargaining agreement. The parties could not resolve the matter, and invoked arbitration.

Before the Arbitrator, the parties stipulated to the issue as: "Whether the Agency violated the [parties' agreement] or other law when it rescinded the [g]rievant's . . . promotion; and if so, what should be the remedy?"[8] As a remedy, the Union requested reimbursement for real estate transactions costs, to which it claimed the grievant was legally entitled; loss of pay for the time during which he would have served in the managerial positon but for the Agency's allegedly "improper demotion"[9]; and attorney fees.

The Arbitrator concluded that the Agency did not act contrary to law or the parties' agreement. She found that once the Agency discovered that the grievant was "not entitled to" a veterans' preference, the Agency "properly rescinded" the management position offer.[10] The Arbitrator also determined that there was "no testimony or evidence"[11] to support the Union's allegation that the Agency had violated the relevant contract provisions.[12]

Nonetheless, the Arbitrator awarded the grievant backpay, finding that the "issuance of the offer letter before the suitability process was complete . . . triggered the series of events that led to the [g]rievant's delayed promotion and consequent[] loss of income."[13]

The Agency filed an exception to the award on May 26, 2017, and the Union filed an opposition to the Agency's exception on June 30, 2017.[14]

[4] *Id.*
[5] *Id.*
[6] *Id.* at 11.
[7] *Id.*
[8] *Id.* at 8.
[9] *Id.* at 17.
[10] *Id.* at 19.
[11] *Id.* at 24.
[12] These provisions include: (1) Article 22, which provides for "equal employment opportunities"; (2) Article 24, which requires the Agency "to provide the maximum of employment and job advancement to eligible [v]eterans"; (3) Article 30, which "ensure[s] that [m]erit promotion principles [are] applied in a consistent manner . . . and that all employees receive fair and equitable consideration"; and (4) Article 44, which addresses unfair labor practices.
[13] Award at 25.
[14] Additionally, the Union filed exceptions to the award, and the Agency filed an opposition to the Union's exceptions. The Union's exceptions are untimely. The time limit for filing exceptions to an arbitration award is thirty days "after the date of service of the award." 5 C.F.R. § 2425.2(b). Here, any exceptions to the award filed electronically using the Federal Labor Relations Authority's eFiling system had to be filed no later than May 26, 2017. The Union filed its exceptions electronically on May 27, 2017, using the eFiling system. The Authority's Office of Case Intake and Publication issued an order to show cause (order) directing the Union to explain why its exceptions should not be dismissed as untimely. The Union did not respond to the order. In these circumstances and based on the record, we conclude that the Union's exceptions are untimely. Accordingly, we dismiss the Union's exceptions and do not consider the Agency's opposition to those exceptions.

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

The Agency argues that the award is contrary to the Back Pay Act (BPA).[15] Under the BPA, an arbitrator may award backpay only when the aggrieved employee was affected by an unjustified or unwarranted personnel action.[16] A violation of an applicable law, rule, regulation, or provision of a collective-bargaining agreement constitutes an "unjustified or unwarranted personnel action."[17]

The Arbitrator did not find the Agency committed an unjustified or unwarranted personnel action. Therefore, as the Agency argues, the award is contrary to the BPA. Accordingly, we grant the Agency's exception.

IV. Decision

We grant the Agency's exception and set aside the award's backpay remedy.

[15] 5 U.S.C. § 5596(b)(1).
[16] *See U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, 68 FLRA 151, 152 (2014) (citing *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 60 FLRA 728, 730 (2005)).
[17] *Id.* (citing *U.S. DOD, Def. Logistics Agency, Def. Distrib. Region W., Stockton, Cal.*, 48 FLRA 221, 223 (1993)).