

70 FLRA No. 180

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
U.S. BORDER PATROL, LAREDO SECTOR
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2455
NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-5362

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DECISION

October 24, 2018

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

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, the grievant appealed the Agency's denial of his compassionate transfer request, but he ultimately received the requested transfer remedy before the arbitrator issued an award. Therefore, we find the underlying dispute is now moot, and set aside the award.

Arbitrator Michael Anthony Marr found that the Agency violated the compassionate transfer policy when it denied the grievant's transfer request, and ordered the Agency to place him on the transfer list. However, one month before the award issued, the grievant was offered, and accepted, a transfer to the requested duty station, but neither party notified the Arbitrator.

In its exceptions, the Agency argues that the awarded remedy is impossible to implement because the grievant has already accepted a transfer to the requested duty station. Therefore, according to the Agency, the award is moot. Because the transfer has irrevocably eradicated the effects of the Agency's denial, we find that the underlying dispute is moot and vacate the award.

II. Background and Arbitrator's Award

The grievant was a border patrol agent in Texas. Upon his son's diagnosis of a developmental disorder, the grievant applied for a compassionate transfer to his hometown in New York. The Agency's review committee considered the grievant's request but found that the grievant's circumstances did not qualify as a "dire emergency," a prerequisite under the Agency's compassionate transfer policy.¹ The Agency denied the request. The Union filed a grievance, but it was unresolved and the parties submitted it to arbitration.

After the arbitration hearing, but one month before the award was issued, the grievant applied for a position through a vacancy announcement to the duty station in his hometown and was selected. Neither party informed the Arbitrator of this development. In his award, the Arbitrator found that the grievant's circumstances constituted a "dire emergency" under the Agency policy and that the grievant was entitled to a compassionate transfer.² As a remedy, the Arbitrator ordered the Agency to place the grievant on the transfer list to various duty stations in New York.

On March 28, 2018, the Agency filed exceptions to the award. On May 11, 2018, the Union filed an opposition.

III. Preliminary Matter: The complaint is a grievance under the Statute.

The Agency argues that the Arbitrator erred when he found that the grievance was substantively arbitrable because compassionate transfer requests are not a condition of employment under the Statute.³

The Authority has previously found that matters relating to employee reassignments concern conditions of employment because they directly affect where the employee will report for duty.⁴ Similarly here, the

¹ Under the Agency's compassionate transfer policy, an employee may request a transfer to another duty location by demonstrating that the employee or a member of his or her family has a "dire emergency." Exceptions, Attach. 2, Compassionate Transfer Fact Sheet at 1. A review committee will consider the request based on the merits and make a recommendation to the Agency to either grant or deny the transfer. *Id.* at 1-3.

² Award at 33.

³ Exceptions at 4-5 (citing 5 U.S.C. § 7103(a)(9)(A)-(C)).

⁴ See generally *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 501, 503-04 (2018) (*El Paso*) (Member DuBester dissenting); *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 37 FLRA 1423, 1430 (1990) (matters relating to employee reassignments are mandatory subjects of bargaining); see also *El Paso*, 70 FLRA at 503 (citing *Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 645 (1990)).

Agency's decision, under the compassionate transfer policy, determines whether the grievant will perform his duties in Texas or New York. Thus, the alleged violation of the policy concerns a "violation . . . of a[] law, rule, or regulation affecting conditions of employment."⁵ Accordingly, we find that the grievance was substantively arbitrable.

IV. Analysis and Conclusion: The underlying dispute is moot.

The Agency argues that the award is moot because the grievant was offered, and accepted, a transfer to the requested duty station.⁶ The Union argues that the award is not moot because it will have an impact on future compassionate transfer requests.⁷

An underlying dispute becomes moot when the parties no longer have a legally cognizable interest in the dispute.⁸ When a party argues that a matter is moot, it must demonstrate: (1) that there is no reasonable expectation that the alleged violation will recur; and (2) events have completely or irrevocably eradicated the effects of the alleged violation.⁹ The Authority will set aside an award if the underlying dispute is moot.¹⁰

The grievant was offered, and accepted, a transfer before the award was issued. Thus, there is no reasonable expectation that the grievant will request another compassionate transfer from Texas to New York. Although the Union argues that the award is not moot because it will define what circumstances constitute a "dire emergency" in the future, this argument is unpersuasive because the Union only challenged the Agency's denial of this grievant's request. Also, as a general matter, arbitration awards are not precedential.¹¹

⁵ 5 U.S.C. § 7103(a)(9)(C)(ii).

⁶ Exceptions at 6; Exceptions, Attach. 5, Agency's Mot. to Vacate Arbitration Award.

⁷ Opp'n at 6.

⁸ *IAMAW Dist. Lodge 776*, 63 FLRA 93, 94 (2009) (citing *AFGE, Local 171, Council of Prison Locals 33*, 61 FLRA 661, 663 (2006)); *Ass'n of Civilian Technicians, Show-Me Army Chapter*, 59 FLRA 378, 380 (2003) (*Army*) (citing *SSA, Bos. Region (Region 1), Lowell Dist. Office, Lowell, Mass.*, 57 FLRA 264, 268 (2001) (*SSA*)).

⁹ *Army*, 59 FLRA at 380.

¹⁰ *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 60 FLRA 966, 967 (2005) (*IRS*) (setting aside the award where the issue in the grievance was fully resolved and the parties had no cognizable legal interest in the dispute).

¹¹ *E.g., U.S. Dep't of the Air Force, Warner Robins Air Logistics Complex, Robins Air Force Base, Ga.*, 68 FLRA 102, 106 (2014) (arbitration awards are not precedential); *AFGE, Council 236*, 49 FLRA 13, 16-17 (1994) (citing *U.S. Dep't of the Treasury, IRS, Se. Region, Atl., Ga.*, 46 FLRA 572, 577 (1992)) (arbitrator is not bound to follow previous arbitration

Therefore, this argument provides no basis for finding that the underlying dispute is not moot.¹²

Furthermore, the Arbitrator ordered the Agency to place the grievant on the transfer list to the exact duty station in New York where the grievant has already transferred.¹³ Therefore, we find that the grievant no longer has a legally cognizable interest in the underlying dispute because he has received the desired transfer. Thus, this transfer has eradicated any effects of the Agency's initial denial.¹⁴

For the foregoing reasons, we conclude that the underlying dispute is moot and so, we vacate the award.¹⁵

V. Decision

We vacate the award.

awards with similar issues when deciding a dispute before him or her).

¹² *See U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 352, 354 (2005) (denying the union's claim that the alleged precedential value of arbitration awards under the parties' agreement could provide a basis for the Authority to resolve a moot dispute).

¹³ Award at 36.

¹⁴ The Union argues that the underlying dispute is not moot despite the grievant's transfer. Opp'n at 6. However, the case that the Union cites is distinguishable because, there, the Authority found a "real possibility" that the supervisor in that case could be called upon to supervise the grievant again. *SSA*, 57 FLRA at 268; *see also Army*, 59 FLRA at 380 (finding that a future possibility of reselection was insufficient to overcome the conclusion that the dispute was not moot).

¹⁵ *U.S. Dep't of VA, VA Long Beach Healthcare Sys., Long Beach, Cal.*, 63 FLRA 332, 334 (2009) (holding that arbitration matters are moot when the parties no longer have a legally cognizable interest in a dispute); *IRS*, 60 FLRA at 967 (setting aside the award where the issue in the grievance was fully resolved and no cognizable legal interest remained in the dispute).

Member DuBester, concurring:

I agree that the grievance was arbitrable, but that, without the Arbitrator's knowledge, the underlying dispute became moot before he issued his award. Accordingly, I also agree with the determination to vacate the award.