

72 FLRA No. 144

FEDERAL EDUCATION ASSOCIATION
STATESIDE REGION
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
EDUCATION ACTIVITY
DOMESTIC DEPENDENT
ELEMENTARY AND SECONDARY SCHOOLS
(Agency)

0-AR-5738

DECISION

March 31, 2022

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

I. Statement of the Case

Arbitrator Ira B. Lobel denied a grievance alleging that the Agency violated the parties’ collective bargaining agreement regarding reduction-in-force (RIF) procedures and vacancy-notice requirements when the Agency reassigned employees. The Union filed exceptions on nonfact, contrary-to-law, and essence grounds. Because the Union failed to demonstrate that the award is deficient on any of these grounds, we deny the exceptions.

II. Background and Arbitrator’s Award

The Agency employs teachers who provide education to its employees’ dependents on domestic military installations. In January 2019, the Agency announced that for the 2019-2020 school year (the school year) it would increase class sizes – resulting in more students per teacher – and eliminate the elementary foreign language program. Both actions would require fewer teachers for the school year. The Agency offered, and several teachers took advantage of, incentives to voluntarily separate from service before the school year. The remaining teachers either continued in their positions, or were reassigned to positions within their teaching certifications for the school year.

In May 2019, the Union filed a grievance alleging, as relevant here, that the Agency violated the parties’ agreement by failing to follow the RIF procedures in Article 23 and the vacancy-notice requirements in Article 22 when it reassigned the teachers. The Agency denied the grievance, and the Union invoked arbitration. The parties stipulated to the issue, as relevant here, as whether the Agency’s actions violated the parties’ agreement.

Article 23, Section 1 (Section 1) states that a RIF occurs when an “employee is released from his/her competitive level by . . . reassignment requiring displacement.”¹ The Arbitrator concluded that a RIF had not occurred because: (1) teachers were not released from their competitive level, and (2) enough employees had voluntarily separated through the incentives that the reassignments did not displace any employees.

Regarding the “competitive level,” the Arbitrator found that Article 23, Section 6 (Section 6) did not support the Union’s argument that the levels were divided by subject and grade level.² Rather, the Arbitrator found that Section 6 defined “competitive level” broadly and, therefore, “teaching” positions were within the same competitive level because they “have the same pay scale”; “classification series, position category[,] and certification”; and “are similar enough in duties, qualification requirements, pay schedules, and working conditions so that an incumbent in one position can be assigned to another position without undue interruption.”³

Regarding the “reassignment requiring displacement,” the Arbitrator found that “no jobs were lost” and rejected the Union’s argument that employees were forced to separate from the Agency to create vacancies for the reassignments.⁴ And the Arbitrator found that the reassignments were “lateral transfer[s].”⁵ Therefore, the Arbitrator concluded that the conditions

¹ Award at 4 (quoting Collective-Bargaining Agreement Art. 23, § 1).

² *Id.* at 12 (reciting Union’s argument that competitive levels were “pre-K and kindergarten, first/second/third [grades], fourth/fifth [grades], P[hysical] E[ducation] high school, P[hysical] E[ducation] middle school, P[hysical] E[ducation] elementary, social studies, mathematics, [and other subject areas]”); *id.* at 25. Section 6 defines “competitive level” as “all positions . . . which are in the same pay plan, at the same grade, grade equivalency or occupational level; are in the same classification series[,] position category[,] and certification; and which are similar enough in duties, qualification requirements, pay schedules, and working conditions so that an incumbent of one position can be reassigned to another position without undue interruption.” *Id.* at 6.

³ *Id.* at 24-25.

⁴ *Id.* at 26; *see also id.* at 24, 28.

⁵ *Id.* at 25.

necessary to trigger the RIF procedures under Article 23 were not met, and Article 23 did not apply.

The Arbitrator also found that the Agency had not violated Article 22's vacancy-notice requirements because the type of reassignments used by the Agency did not trigger the notice provisions. Specifically, the Arbitrator found that the reassignments were "not caused by a vacant position" but rather, "by a rearrangement of staff to avoid the need to have a [RIF]."⁶ Thus, the Arbitrator denied the grievance.

On May 27, 2021, the Union filed exceptions to the award. On June 29, 2021, the Agency filed an opposition to the Union's exceptions.

III. Analysis and Conclusions

A. The award is not based on nonfacts.

The Union contends that the award is based on nonfacts.⁷ 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.⁸ However, neither legal conclusions nor conclusions based on the interpretation of a collective-bargaining agreement may be challenged as nonfacts.⁹

First, the Union argues that the Arbitrator erroneously found that all teachers are in the same competitive level.¹⁰ However, the Arbitrator concluded that "[t]eachers all have the same pay scale[,] and according to the law, they are in the same competitive level as defined by [Section 6] and 5 C.F.R. § 351.403, even if teaching widely different subjects."¹¹ Therefore, the Union's argument challenges the Arbitrator's legal conclusions and interpretation of the parties' agreement,

and does not demonstrate that the award is based on a nonfact.¹²

The Union also contends that the Arbitrator's conclusion that Article 22 was inapplicable is based on the nonfact that there were no vacancies because no employee left an encumbered position.¹³ According to the Union, vacancies were created when employees retired, resigned, or otherwise separated through, or without the use of, incentives.¹⁴ However, it is clear that the Arbitrator made the statement that there were "no vacancies" in the context of discussing how the reassignments were not caused by the type of "vacancy" that would trigger the notice requirements under Article 22.¹⁵ Because the Union's nonfact exception challenges the Arbitrator's interpretation of Article 22, it provides no basis for finding the award deficient.¹⁶ Consequently, we deny this exception.

B. The award is not contrary to 5 C.F.R. § 351.403.

The Union argues that the Arbitrator's conclusion that teachers are in the same competitive level is contrary to 5 C.F.R. § 351.403.¹⁷ The Authority reviews questions of law de novo.¹⁸ In conducting a de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law.¹⁹ In making that assessment, the Authority defers to the arbitrator's underlying factual

⁶ *Id.* at 29. The Arbitrator noted that the parties disputed whether the 2005 or 2019 agreement governed this dispute. *Id.* at 2. Article 22 in the 2005 agreement states, in pertinent part, that vacancy notices "are not required" when a "vacancy is required . . . to preclude the need for use of RIF procedures." *Id.* at 3. The 2019 agreement states that vacancy notices are not required in various scenarios, including a "[m]anagement[-]directed [r]eassignment." *Id.* at 4. After noting that the parties agreed that any differences in the contract language between the agreements did not "substantially impact the operation" of the relevant provisions of Article 22, *id.* at 2, the Arbitrator found that the same conclusion would apply to both versions of the agreement. *Id.* at 28-29.

⁷ Exceptions Br. at 7-13.

⁸ *AFGE, Loc. 2516*, 72 FLRA 567, 568 (2021).

⁹ *SSA*, 71 FLRA 580, 582 n.22 (2020) (*SSA*) (then-Member DuBester concurring); *NTEU*, 69 FLRA 614, 619 (2016) (*NTEU*).

¹⁰ Exceptions Br. at 7.

¹¹ Award at 24.

¹² *SSA*, 71 FLRA at 582 n.22; *NTEU*, 69 FLRA at 619.

¹³ Exceptions Br. at 12-14.

¹⁴ *Id.* at 13.

¹⁵ Award at 29-30.

¹⁶ *SSA*, 71 FLRA at 582 n.22; *NTEU*, 69 FLRA at 619.

¹⁷ Exceptions Br. at 16-18. Section 351.403(a)(1) provides that "each agency shall establish competitive levels consisting of all positions in a competitive area which are in the same grade (or occupational level) and classification series, and which are similar enough in duties, qualification requirements, pay schedules, and working conditions so that an agency may reassign the incumbent of one position to any of the other positions in the level without undue interruption." In addition, 5 C.F.R. § 351.403(a)(2)(i) provides that "competitive level determinations are based on each employee's official position of record (including the official position description), not the employee's personal qualifications."

¹⁸ *U.S. DOD, Domestic Dependent Elementary & Secondary Schs.*, 72 FLRA 601, 603 n.18 (2021).

¹⁹ *AFGE, Loc. 2076*, 71 FLRA 1023, 1026 n.26 (2020) (then-Member DuBester concurring) (citing *AFGE, Loc. 933*, 70 FLRA 508, 510 n.13 (2018)); *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998).

findings unless the excepting party establishes that they are nonfacts.²⁰

The definition of an employee's competitive level under 5 C.F.R. § 351.403 falls under a larger regulatory scheme set out in Part 351 of Title 5, titled "Reduction in Force." Under this Part, an employee's competitive level is only relevant if RIF procedures have been triggered. Therefore, we begin our analysis by assessing whether the Arbitrator correctly determined that the Agency's actions did not trigger compliance with RIF procedures under Part 351.²¹

Under 5 C.F.R. § 351.201(a)(2), an agency must comply with Part 351's RIF procedures "when it releases a[n] . . . employee from his or her competitive level by furlough for more than 30 days, separation, demotion, or reassignment requiring displacement."²² In other words, a release from a competitive level only triggers RIF procedures under the regulations if it is caused by one of the agency actions enumerated in § 351.201(a)(2). As relevant here, an agency's reassignment of an employee only triggers RIF procedures *if* the reassignment requires displacement of a different employee.²³

Here, the Arbitrator found, separate from the findings regarding teachers' competitive level, that because enough employees had voluntarily separated through the incentives, the reassignments did not displace

any employees.²⁴ The Union does not challenge this determination on exceptions. And because the Arbitrator found no employees were displaced, the conclusion that RIF procedures were not triggered by the reassignments is consistent with 5 C.F.R. § 351.201(a)(2). Therefore, it is unnecessary to determine whether the Arbitrator correctly applied 5 C.F.R. § 351.403's definition of "competitive level."²⁵

Consequently, we deny this exception.

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

The Union argues that the award fails to draw its essence²⁶ from Section 6's definition of "competitive level" because the Arbitrator omitted the requirement that employees must be in the same "position category and certification."²⁷ As noted, the Arbitrator considered Section 1's definition of a RIF and Section 6's definition of "competitive level" – both of which effectively mirror the requirements and operation of 5 C.F.R. §§ 351.201(a)(2) and 351.403 in all relevant respects – and found that a RIF did not occur.²⁸ The Union's essence claim essentially reiterates its contrary-to-law claim, which we have rejected.²⁹ The Authority does not analyze separately an essence exception that is substantively the same as a rejected

²⁰ *U.S. Dep't of VA, Veterans Health Admin., Consol. Mail Outpatient Pharmacy, Leavenworth, Kan.*, 72 FLRA 606, 607 (2021) (Chairman DuBester concurring; Member Abbott concurring) (citing *U.S. Dep't of State, Bureau of Consular Affs., Passport Servs. Directorate*, 70 FLRA 918, 919 (2018)); *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (Member Pizzella concurring).

²¹ When preparing for a RIF, an agency is required to establish competitive levels in order to create retention registers to identify the order in which employees may be released from positions during a RIF. 5 C.F.R. § 351.404; *see also Summary of Reduction in Force Under OPM's Regulations*, OPM, available at <https://www.opm.gov/policy-data-oversight/workforce-restructuring/reductions-in-force/#url=Summary> (last visited Feb. 4, 2022).

²² 5 C.F.R. § 351.201(a)(2) (titled "Use of regulations").

²³ *See, e.g., Thomas v. United States*, 709 F.2d 48, 50 (Fed. Cir. 1983) (*Thomas*) (finding that because employee was reassigned to vacant position and no displacement was required, employee "simply does not qualify as a released employee" and RIF procedures did not apply); *Ditmore v. Dep't of HHS*, 31 M.S.P.R. 31, 31 n* (1986) (citations omitted) ("An employee's reassignment outside his competitive area to a vacant position not involving displacement of another employee is not required to be effected under [RIF] procedures.").

²⁴ Award at 24-27; *see also OPM, supra* note 21 ("The agency has the right to avoid a RIF action by simply reassigning an employee to a vacant position at the same grade or pay without regard to the employee's rights under the RIF regulations. The vacant position may be in the same or in a different classification series, line of work, and/or geographic location.").

²⁵ *See Thomas*, 709 F.2d at 50; *Brunjes v. Dep't of the Army*, 2 M.S.P.R. 189, 190 (1980) (finding employee's release from competitive level did not trigger RIF procedures because employee's reassignment did not require displacement).

²⁶ When reviewing an arbitrator's interpretation of an 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 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. *SSA, Off. of the Gen. Couns.*, 72 FLRA 554, 555 (2021).

²⁷ Exceptions Br. at 15 (arguing that the "Arbitrator's assertion that the [agreement] requires all teachers be classified in the same competitive level reads out the explicit requirement that competitive levels be in the same position category and certification").

²⁸ Award at 24-27.

²⁹ *See* Exceptions Br. at 15 (Union asserting that the parties' agreement "contains a definition of 'competitive levels' that mirrors the definition contained in [5 C.F.R. § 351.403]").

contrary-to-law exception.³⁰ Accordingly, for the same reasons we deny the Union's contrary-to-law exception, we deny this exception.

IV. Decision

We deny the Union's exceptions.

³⁰ *U.S. DOJ, Fed. BOP, Fed. Corr. Ctr., Petersburg, Va.*, 72 FLRA 477, 480 n.30 (2021) (Chairman DuBester concurring; Member Abbott concurring) (denying essence claim that reiterated a previously denied contrary-to-law claim (citing *U.S. DHS, U.S. CBP, Savannah, Ga.*, 68 FLRA 319, 322-23 (2015) (denying exceeded-authority exception premised on the same argument raised in a denied contrary-to-law exception); *NFFE, Loc. 376*, 67 FLRA 134, 136 (2013) (same))).