

Office of Administrative Law Judges

WASHINGTON, D.C.

LIBRARY OF CONGRESS

Case No. WA-CA-90069

WASHINGTON, DC

Respondent

and

AMERICAN FEDERATION OF STATE, COUNTY

AND MUNICIPAL EMPLOYEES, LOCAL 2477

Charging Party

Frank Mack, Esquire For the Respondent

Thomas F. Bianco, Esquire Beth Ilana Landes, Esquire For the General Counsel

Barbara Kraft, Esquire For the Charging Party

Before: GARVIN LEE OLIVER Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint in this case alleges that the Library of Congress (Respondent) violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7101 *et seq.*, by refusing to comply with an arbitrator's award as required by 5 U.S.C. §§ 7121 and 7122. Respondent's answer denies that it failed to comply with the terms of the arbitrator's award.

A hearing was held in Washington, DC. The parties were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and the General Counsel filed helpful briefs.

Based on the entire record, including my observation of the grievant and his demeanor as the sole witness called to testify, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The facts of this case are stipulated or undisputed. The grievant, Hussein D. Hassan, has been employed by the Library of Congress in an unskilled Library Technician position within the Congressional Research Service (CRS) since May 2, 1993. In October 1995, the Respondent posted Vacancy Announcement 50902 for a Technical Information Specialist. At the top of the announcement, in capital letters, the Respondent stated that "consideration under this vacancy announcement is limited to the permanent and indefinite staff of the Congressional Research Service Division, due to budgetary constraints."

Mr. Hassan submitted an application for the position in October 1995. According to Mr. Hassan, whose undisputed testimony I credit, in May 1996 he was first informed by Mr. John Moore, Chief of CRS, that he had been selected for the position, but later was advised by Mr. Moore of his "de-selection" because front office management had determined that he was ineligible for the position due to his status as an "indefinite NTE" appointment.

Mr. Hassan then contacted the exclusive representative of his bargaining unit and a grievance was filed on his behalf on May 31, 1996. In due course, the grievance was submitted to Arbitrator Leon B. Applewhaite (the Arbitrator) for a decision.

The Arbitrator issued his Opinion and Award on August 24, 1998, in which he found that the vacancy announcement did not exclude indefinite NTE employees such as Mr. Hassan from being considered for the position, and that his de-selection violated the parties' agreement. More specifically, in his Award, the Arbitrator concluded:

That the Library of Congress violated Article XVII, Section 17 of the Collective Bargaining Agreement by failing to appoint the Grievant, Hussein Hassan, to the . . . position described in Vacancy Announcement 50902.

* * *

That Hussein Hassan is eligible for the position and he met the Eligibility requirements stated in Vacancy Announcement 50902.

That Hussein Hassan is eligible as an indefinite employee for the position stated in Vacancy Announcement 50902 since he met the announcement's stated requirements.

That the Grievant receive back pay and benefits for the position of technical information

specialist, retroactive to May 31, 1996, minus payments he has received in his present position.

By letter dated September 9, 1998, the Union's attorney asked the Respondent's Counsel for Personnel to specify when Mr. Hassan's retroactive appointment to the position would be effectuated and when he would receive back pay and benefits. The Respondent replied on September 16, 1998, that Mr. Hassan would not be appointed to the technical information specialist position because the Arbitrator's Award did not require it. The next day, the Union provided copies of the foregoing correspondence to the Arbitrator along with a request that he clarify his Award.

By letter to the parties dated October 23, 1998, the Arbitrator stated that he no longer had authority or jurisdiction over the matter once he issued his Award. He further opined that the Union was really seeking enforcement rather than clarification of the Award, since there was "no doubt what the decision means," and referred the Union to the legal procedures available for enforcing the Award.

On November 3, 1998, in response to the Union's telephonic inquiry, the Respondent indicated that its position was unchanged and that Mr. Hassan was to receive back pay but not placement as a technical information specialist within CRS.⁽¹⁾ Thereafter, the Union filed an unfair labor practice charge against the Respondent on November 12, 1998, which led to the issuance of the instant complaint.

Conclusions of Law

A. The Applicable Law

Under section 7122(b) of the Statute, an agency must take the action required by an arbitrator's award when that award becomes "final and binding." The award becomes "final and binding" when there are no timely exceptions filed to the award under section 7122(a) of the Statute or when timely exceptions are denied by the Authority. *U.S. Department of the Air Force, Carswell Air Force Base, Texas*, 38 FLRA 99, 104 (1990); *U.S. Department of Health and Human Services, Health Care Financing Administration*, 35 FLRA 491, 494-95 (1990). An agency that fails to comply with a final and binding award violates section 7116(a)(1) and (8) of the Statute. *United States Department of the Treasury, Internal Revenue Service, Austin Compliance Center, Austin, Texas*, 44 FLRA 1306, 1315 (1992) (*IRS Austin*); *U.S. Customs Service, Washington, DC*, 39 FLRA 749, 757-58 (1991).

The only issue to be decided in an unfair labor practice proceeding to enforce a final and binding arbitration award is whether there has been compliance with the award. *U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois*, 53 FLRA 55, 60 (1997). The Authority's standard for determining whether an agency has complied with a final and binding award is whether the agency's action is consistent with a reasonable construction of the award in its entirety. *Id.*; *United States Department of the Treasury, Internal Revenue Service and United States Department of the Treasury, Internal Revenue Service, Austin Service Center, Austin, Texas*, 25 FLRA 71, 72 (1987); *U.S. Department of Treasury, Customs Service, Washington, DC and Customs Service, Region IV, Miami, Florida*, 37 FLRA 603, 611 (1990).

B. The Award is Final and Binding

The Arbitrator issued his award on August 24, 1998. No exceptions to that award were filed with the Authority. Thus, under section 7122(b) of the Statute, the award became final and binding 30 days after it was served on the parties. This much is undisputed.

C. The Respondent's Action Was Not Reasonable

The parties are in dispute as to what the Arbitrator's final and binding Award required the Respondent to do. The Respondent, in reply to the Union's inquiries and demands, and throughout this proceeding, has maintained that the Award only provides that Mr. Hassan, the employee who is the subject of the grievance, is entitled to (and has received) back pay and benefits but nowhere in the Arbitrator's decision requires his appointment to the position of technical Information Specialist. For the reasons which follow, I conclude that the Respondent's construction of the Award in its entirety is not reasonable.

Mr. Hassan's credited testimony--also presented to the Arbitrator--was that Mr. Moore, the Chief of CRS, had selected him for the vacant position but subsequently "de-selected" him at the direction of front office management on the basis that Mr. Hassan was ineligible for consideration as an "indefinite NTE" appointment. Accordingly, the key issue before the Arbitrator was whether Mr. Hassan was eligible to be considered rather than whether he should have been selected. The Arbitrator decided that nothing in the vacancy announcement precluded Mr. Hassan from applying for the position. Indeed, as quoted above, the announcement specifically stated that consideration would be limited to "the permanent and indefinite staff of the [CRSD]." (emphasis added). The Arbitrator thus concluded in his Award that Mr. Hassan met both the eligibility and the position requirements set forth in Vacancy Announcement 50902. Since Mr. Hassan already had been selected for the position and was "de-selected" only because the Respondent retroactively declared him ineligible to be considered, the Arbitrator's conclusion that Mr. Hassan was in fact eligible resulted in an Award that "the Library of Congress violated . . . the Collective Bargaining Agreement by failing to appoint the Grievant, Hussein Hassan, to the . . . position described in Vacancy Announcement 50902." The Award further directed that Mr. Hassan "receive back pay and benefits for the position . . . retroactive to [the date of his grievance] minus payments he has received in his present position."

In my judgment, it takes sustained willful myopia not to perceive that the Arbitrator clearly intended the Respondent to correct its contractual failure to appoint Mr. Hassan to the vacant position for which he had been selected.⁽²⁾ Indeed, in the absence of such corrective action, there would have been no predicate under the Back Pay Act for the award of back pay and benefits.⁽³⁾ That is, Mr. Hassan was entitled to back pay and benefits under 5 U.S.C. § 5596(b)(1)(A) "on correction of the personnel action" found by an appropriate authority (i.e., the Arbitrator) to have been unjustified or unwarranted and to have resulted in the withdrawal or reduction of the employee's pay, allowances or differentials.⁽⁴⁾ Logically, as well as legally, such corrective action must be taken in order to determine the period for which the Respondent is obligated to accord Mr. Hassan back pay and benefits.⁽⁵⁾ Otherwise, Mr. Hassan, who was found to have been denied the appointment improperly, would be entitled to receive such back pay and benefits in perpetuity even though he is not performing the duties of the higher-graded position of Technical Information Specialist but instead is continuing to serve as a lower-graded "indefinite NTE" Library Technician. In other words, the Respondent could not fully comply with the Arbitrator's award of back pay and benefits by calculating and paying the differential between the two positions from the date of the grievance to the date of the Arbitrator's Opinion and Award. Entitlement to back pay ends when the corrective personnel action has been taken.⁽⁶⁾ Respondent's construction of the Arbitrator's Award in a manner inconsistent with the Back Pay Act's requirements cannot be sustained.⁽⁷⁾

Having concluded that the Respondent's construction of the Arbitrator's Award was unreasonable, it follows that the failure to appoint Mr. Hassan to the position of Technical Information Specialist under Vacancy Announcement 50902 was a failure to comply fully with a final and binding arbitration award within the meaning of section 7122(b) of the Statute and therefore a violation of section 7116(a)(1) and (8) as alleged in the complaint.⁽⁸⁾

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Library of Congress, Washington, DC, shall:

1. Cease and desist from:

(a) Failing and refusing to comply with the August 24, 1998, final and binding award of Arbitrator Leon B. Applewhaite or with any arbitrator's award issued pursuant to the Statute.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Comply with the August 24, 1998, final and binding award of Arbitrator Leon B. Applewhaite by appointing Mr. Hussein Hassan to the position of Technical Information Specialist, in the Congressional Research Service Division of the Library of Congress, pursuant to Vacancy Announcement 50902, and by paying him backpay and benefits from May 31, 1996, to the date of his appointment, minus payments he has received for that period from his present position as a Library Technician and any backpay or benefits he may have received in partial compliance with the Arbitrator's Opinion and Award.

(b) Post at the Library of Congress, Washington, DC, where bargaining unit employees represented by the American Federation of State, County and Municipal Employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Librarian of Congress, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Washington Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, November 23, 1999.

GARVIN LEE OLIVER

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Library of Congress, Washington, DC, has violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

We hereby notify our employees that:

WE WILL NOT fail and refuse to comply with the August 24, 1998 final and binding Award of Arbitrator Leon B. Applewhaite or with any arbitrator's award issued pursuant to the Federal Service Labor-Management Relations Statute.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured them by the Statute.

WE WILL comply with the August 24, 1998, final Award of Arbitrator Leon B. Applewhaite by appointing Mr. Hussein Hassan to the position of Technical Information Specialist in the Congressional Research Service Division of the Library of Congress pursuant to Vacancy Announcement 50902 and by paying him back pay and benefits from May 31, 1996, to the date of his appointment, minus payments he has received for that period from his present position as a Library Technician and any backpay or benefits he may have received in partial compliance with the Arbitrator's Opinion and Award.

(Activity)

Date: _____ By: _____

(Signature)

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate with the Regional Director, Washington Regional Office, Federal Labor Relations Authority, whose address is: 800 "K" Street, N.W., Tech World Plaza, Suite 910, Washington, DC 20001, and whose telephone number is: (202)482-6700.

1. Mr. Hassan testified that he received payments from the Respondent purporting to be his back pay entitlement, but the amount of such payments to him was deemed irrelevant to this proceeding because the only non-compliance with the Arbitrator's Award alleged in the complaint was Respondent's refusal to appoint Mr. Hassan to the advertised position.

2. Of course, it would have been preferable for the Arbitrator to have added another paragraph to his Award explicitly requiring the Respondent to appoint Mr. Hassan to the position for which he applied and had been selected because such action likely would have obviated the instant proceeding. Additionally, it appears that the Arbitrator properly could have clarified his Award when the Union so requested. *See National Treasury Employees Union, National Treasury Employees Union Chapter 33 and U.S. Internal Revenue Service, Phoenix District*, 44 FLRA 252, 266-68, 279 (1992). Nevertheless, the Arbitrator's intent is clearly discernible. After all, the Respondent's failure to appoint Mr. Hassan to the position was the unjustified or unwarranted personnel action which led to the grievance and the Arbitrator's finding of a contractual violation. The Arbitrator's refusal to "clarify" the Award when the Union so requested signifies nothing more than that the Arbitrator believed he was no longer empowered to do so even if he had felt it necessary. Clearly, the Arbitrator further believed (and expressly stated) that the Award needed no clarification.

3. The Statute also directly ties the back pay remedy to an award of reinstatement. *See Department of the Army v. FLRA*, 56 F.3d 273, 278 (D.C. Cir. 1995).

4. There is no dispute that the Arbitrator's finding of a contractual violation when the Respondent failed to appoint Mr. Hassan to the position constituted an unjustified or unwarranted personnel action, or that the failure to appoint him thereto directly resulted in his loss of pay and benefits.

5. OPM's Back Pay Act implementing regulations require the correction of the unjustified or unwarranted personnel action which resulted in the denial of pay otherwise due the employee as part of the process of

computing the amount of back pay due. See 5 C.F.R. §§ 550.804(d) and 550.805(a).

6. Respondent cites two unpublished ALJ decisions which may suggest, without expressly stating, that back pay sometimes can be appropriate without first placing an employee into a specific position. Those decisions were never appealed to the Authority and therefore have no precedential significance. Accordingly, they will not be discussed herein.

7. For example, *see IRS Austin*, 44 FLRA at 1320-21, 1324 (an agency fails to comply with an arbitration award requiring back pay if its actions are inconsistent with the Back Pay Act and implementing regulations).

8. In so concluding, I note that Mr. Hassan has been available to receive such appointment at all times material herein. Of course, where an employee's conduct (such as conviction of a crime resulting in incarceration) makes it impracticable to take corrective personnel action, the employee's entitlement to back pay would cease at the point where such corrective action became impossible.