

64 FLRA No. 104

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3506
(Union)

and

SOCIAL SECURITY ADMINISTRATION
DALLAS, TEXAS
(Agency)
0-AR-4309

—
DECISION

March 22, 2010
—

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 John B. Barnard filed by the Union under § 7122 (a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator denied a grievance alleging that the Agency did not select the grievant for a Paralegal Specialist position because of her race, prior union and whistle-blowing activities, and "believed handicapped condition." Award at 4. For the reasons that follow, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for clarification.

II. Background and Arbitrator's Award

The Agency posted a vacancy announcement for two Paralegal Specialist positions in the Agency's North Dallas Hearing Office. Award at 4. The grievant, a senior case technician and union steward, applied for the positions and was one of thirty applicants who were listed on the well qualified eligible list. *Id.* The Regional Chief Administrative Law Judge decided not to make a selection from the list, and the position was not filled. *Id.*

The Union filed a grievance alleging that the Agency had refused to select the grievant on the basis of her race, prior union and whistleblowing activities, and

"believed handicapped condition."¹ *Id.* at 4. The grievance was unresolved and was submitted to arbitration. The parties did not stipulate to the issues, and the Arbitrator did not frame an issue. The Agency proposed the following issue:

Did the Agency violate the 2000 National Agreement (CBA) between the Agency and the AFGE when it non-selected the grievant, or any other applicant, for the paralegal specialist position Vacancy Announcement (VA) 260-04 in the North Dallas Hearing Office? If so, what is the appropriate remedy?

Award at 2. The Union proposed the following issue:

Did the Agency violate Articles 1, 2, 3, 18, or 26 of the National Agreement in any aspect of vacancy announcement 260-04? If so, what shall the appropriate remedy be?

Id.

Before making his determination, the Arbitrator noted that the "Union's frustrations in this case are evident." *Id.* at 10. The Arbitrator found that the Union was particularly frustrated by the "supposed reason" that the Agency provided for not filling the position. *Id.*

Although he noted that "such frustrations and argument could possibly be a valid consideration" in other cases, the Arbitrator held that "such consideration cannot be entertained in this case as the Agency has the right to make a non-selection." *Id.* The Arbitrator found that, under § 16.1.3 of the parties' Merit Promotion Plan² and Management Rights, Section 1, Statutory Rights of the parties' agreement,³ a selecting official has the right not to select anyone to fill a vacancy. *Id.* at 10. As a result, the Arbitrator denied the grievance. *Id.* at 11.

III. Positions of the Parties**A. Union's Exceptions**

The Union argues that the award failed to "address[] any of the matters which the Union placed

1. At the hearing, the grievant withdrew her reference to race from the grievance. Award at 5.

2. Section 16.1.3 states that "a selecting official has the option of deciding not to make a selection from among the candidates identified through posting procedures." Award at 10.

3. The language of Management Rights, Section 1, Statutory Rights of the parties' agreement is set forth in the attached appendix.

before him” Exceptions at 4. The Union asserts that “Management always has the right to make a non-selection unless there is a violation of the contract, discrimination, or a violation of merit principles.” *Id.* at 5. Accordingly, the Union asserts that the Arbitrator exceeded his authority by finding that the Agency had a right to make such a non-selection without examining the motive of the selecting official. *Id.* at 6. In addition, the Union contends that the Arbitrator failed to consider the provisions provided in the Union’s statement of the issue. *Id.* at 10.

The Union also argues that the award is contrary to law. According to the Union, the Agency failed to meet its burden of establishing a legitimate justification for its actions or show that it would have taken the same action if the grievant had not been a Union steward. *Id.* at 3.

B. Agency’s Opposition

The Agency contends that it sufficiently established that its decision not to select anyone for the position was proper and did not violate the parties’ agreement. Opposition at 1. The Agency argues that, contrary to the Union’s claims, the record reflects that the Agency would have taken the same action had the grievant not been a Union steward or whistleblower, and had the grievant been without a believed handicapped condition. *Id.* at 1, 4. The Agency argues that a review of the record shows that several other individuals on the well qualified list who were not Union stewards were also not selected. *Id.*

The Agency argues that it acted within its management rights under § 7106(a) of the Statute in choosing not to select anyone to fill the position. *Id.* at 2. The Agency also contends that, under the Agency’s Merit Promotion Plan, the selecting official has the right to determine whether to select anyone for the vacancy and how to best utilize its resources. *Id.* at 3. The Agency argues that, because it did not violate the parties’ agreement or discriminate against the grievant in deciding not to select anyone for the position at issue here, the Arbitrator’s award is not deficient. *Id.* at 5.

IV. The record is insufficient for a determination as to whether the award is contrary to law.

When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by the exception and award *de novo*. See *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of *de novo* review, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the applicable

standard of law. See *United States Dep’t of Defense, Dep’ts of the Army and the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator’s underlying factual findings. See *id.*

The Union asserts that the Arbitrator’s award is contrary to law. Exceptions at 2-4. According to the Union, the Agency failed to meet its burden of establishing a legitimate justification for its nonselection or showing that it would have taken the same action if the grievant had not been a Union steward. *Id.* at 3. For the reasons set forth below, we find that the record does not permit us to resolve this issue; accordingly, we remand the award for clarification.

To begin, it is unclear whether the issues before the Arbitrator involved solely contractual, or also statutory, rights. In this regard, the Arbitrator did not frame an issue, and, although the parties proposed issues regarding contractual violations, some of the cited contractual provisions appear to mirror statutory provisions. See Award at 2-3.⁴ The Authority has held that, where contractual provisions are intended to mirror statutory provisions, statutory standards apply. See, e.g., *U.S. Dep’t of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla.*, 63 FLRA 351, 354 (2009). The Arbitrator did not address, and it is unclear, whether the parties intended their agreement to mirror the Statute or whether the grievance otherwise involved statutory issues.

To the extent that statutory issues were before the Arbitrator, if the Agency failed to promote the grievant for engaging in legally protected activities, then the failure to promote her would be unlawful. See, e.g., *U.S. Dep’t of Veterans Affairs, Golden Gate Nat’l Cemetery, San Bruno, Cal.*, 59 FLRA 956, 959-60 (2004) (nonselection on the basis of protected activity violated the Statute). The Arbitrator did not make findings regarding the Agency’s motivation for failing to promote the grievant, nor did he find that the parties’ agreement waived or modified any pertinent statutory rights. In these circumstances, it is unclear whether any statutory issues that may have been before the Arbitrator were resolved in any manner that is consistent with law.

Where an arbitrator has not made sufficient factual findings for the Authority to assess or determine an Arbitrator’s legal conclusions, and those findings cannot be derived from the record, the Authority will remand the award to the parties for further action. See, e.g.,

4. The relevant provisions are set forth in the attached Appendix.

AFGE, Local 2054, 63 FLRA 169, 172 (2009); *U.S. Dep't of Transp., Maritime Admin.*, 61 FLRA 816, 822 (2006); *NFFE, Local 1437*, 53 FLRA 1703, 1710-11 (1998). Accordingly, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for clarification as to whether the issues involve statutory rights, and if so, whether the Agency has violated those rights.

V. Decision

The case is remanded to the parties, for resubmission to the Arbitrator, absent settlement, for further action consistent with this decision.⁵

APPENDIX

Management Rights

Section 1 Statutory Rights

- A. Subject to subsection (B) of this section, nothing in this Agreement shall affect the authority of any management official of any agency,
1. to determine the mission, budget, organization, number of employees and internal security practices of the agency, and
 2. in accordance with applicable laws,
 - a. to hire, assign, direct, layoff and retain employees in the agency or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees,
 - b. to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted,
 - c. with respect to filling positions, to make selections for appointments from,

1. among property ranked and certified candidates for promotion, or
2. any other appropriate source, and,
- d. to take whatever action may be necessary to carry out the agency mission during emergencies.

Article 2 Union Rights and Responsibilities

- B. The Administration shall not restrain, interfere with, or coerce representatives of the Union in the exercise of their rights under 5 U.S.C. 71 and this agreement.

Article 3 Rights and Unionism

Section 1 Rights to Unionism

Each employee shall have the right to join or assist the Union...freely and without fear of penalty or reprimand, and each employee shall be protected in the exercise of such right...

Section 3 Whistle Blower Protection

Employees shall be protected against reprisal for the lawful disclosure of information which the employee believes evidence a violation of law, rule, or regulation...

Award at 2-3.

5. As it is unclear whether the Union's other exceptions are inextricably intertwined with the issue of whether the award is contrary to law, we find it unnecessary to address those exceptions at this time.