64 FLRA No. 111

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OKLAHOMA CITY, OKLAHOMA
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 45
(Union)

0-AR-4474

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DECISION

March 29, 2010

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

The Arbitrator determined that the Agency improperly terminated the grievant's grade-retention and pay-retention benefits. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The grievant received a reduction-in-force (RIF) notice, which stated that she would be separated from her GS-12 telecommunications specialist position. Several days prior to her scheduled separation, she applied for and was offered a GS-5 secretary position, which she accepted. Award at 5. Before the grievant accepted the position, the Agency's human resources department assured her that she was entitled to grade and pay retention, and a particular Agency official (the associate director) authorized a notification of personnel action (SF 50) that documented the change of position and noted her grade and pay retention. *Id.* at 5-6. Nearly two years later, the Agency notified her that it had mistakenly provided her with grade and pay retention, and the Agency terminated her grade and pay retention. In addition, the Agency notified her that, as a result of the erroneous payment of grade-retention benefits, she owed the Agency $77,788.80. The grievant applied for a waiver of that debt, and the Department of the Treasury agreed to the waiver. *Id.* at 6.

The Union filed a grievance on behalf of the grievant. The grievance was unresolved and submitted to arbitration, where the Arbitrator framed the issue as follows: "Whether the Agency improperly terminated [the] grievant['s] retained grade and retained pay? If so, what is the proper remedy?" *Id.* at 2.

The Arbitrator concluded that the grievant was entitled to grade retention under 5 C.F.R. § 536.103 and pay retention under § 536.104.[1] *Id.* at 12. In concluding that the grievant was entitled to grade retention, and pay retention on the expiration of grade retention, the Arbitrator determined that the grievant met the requirements of § 536.103(a)(1). He also determined that the associate director's provision of grade retention was consistent with § 536.103(b).

In addition, the Arbitrator found that there was an issue "of simple equity." *Id.* at 12. He found that, on a number of occasions, the Agency "committed to [the grievant] that she would receive pay and grade retention." *Id.* In this respect, he found unrefuted the grievant's testimony that, before she accepted the secretary position, an Agency human resources specialist assured her "that if she accepted th[e] position, she would get Grade 12 retained grade and pay." *Id.* at 13. The Arbitrator determined that it was with this assurance that the grievant accepted the secretary position. In addition, he found that the notification of personnel action confirmed grade-retention and pay-retention benefits, and that a subsequent e-mail "bolster[ed] [the Agency's] commitment[.]" *Id.* Specifically, he found that when the grievant had questioned how long she would receive her benefits, the Agency replied by e-mail, stating, in pertinent part: "Employee is currently on grade retention which lasts for 2 years. After grade retention rights terminate, you will be on pay retention for an indefinite time or until you make up your grade and pay." *Id.* According to the Arbitrator, in these circumstances, "[s]imple justice dictates that such clear and definite commitment is to be honored." *Id.* at 13-14.

1. As discussed *infra*, there is no dispute that §§ 536.103-104 were revised prior to the arbitration. The pertinent wording of the current regulations (5 C.F.R. §§ 536.201-202; §§ 536.301-302) is set forth *infra*.

The Arbitrator also addressed Article 19, Section 5(H) [2] of the parties' collective bargaining agreement and the corresponding provision (Article 14(E) [3]) of the parties' agreement pertaining to the disputed RIF (RIF agreement). *Id.* at 10. The Arbitrator stated that "while such documents speak of a selection of a position not more than three (3) grades below [a displaced employee's] current grade for the retention of grade and pay retention, such provisions arguably do not apply here, as that option was not available to [the grievant]. There simply were no positions available three grades below, so she was foreclosed from the ability to exercise the options available under that authority." *Id.*

Based on the foregoing, the Arbitrator sustained the grievance and ordered that the grievant's grade-retention and pay-retention benefits be restored retroactively and that she otherwise be made whole. *Id.* at 14.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is contrary to 5 C.F.R. §§ 536.201-203 and §§ 536.301-302, pertaining to grade and pay retention, respectively (which are set forth *infra*). In particular, the Agency maintains that the grievant was not entitled to either mandatory grade retention under § 536.201 or optional grade retention under §§ 536.202-203. *Id.* at 10. As to optional grade retention, the Agency argues that the grievant was not provided grade retention by "an authorized agency official[,]" as required by § 536.202(a)(1). *Id.* at 11. The Agency claims that the associate director "only had the authority to effect this personnel action within the constraints of Agency policy[,]" which the Agency contends is set forth in the RIF agreement and reiterated in a policy issuance of the Agency's human capital office. [4] *Id.* at 12. According to the Agency, under the RIF agreement and the policy statement, the associate director's actions could not be viewed as authorizing grade retention because the position accepted by the grievant was more than four grades below her position at the time of the RIF. *Id.* The Agency also asserts that the Arbitrator could not rely on the SF 50 to find the grievant entitled to grade and pay retention. *Id.*

The Agency also contends that the Arbitrator "erred in finding that the grievant was entitled to grade and pay retention as a matter of simple justice and equity." *Id.* at 15. The Agency asserts that this finding is essentially a determination "that the Agency is estopped from correcting the Grievant's payroll error because Agency employees provided misinformation to the Grievant." *Id.* The Agency argues that, under *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) (*Richmond*), "the Arbitrator's finding fails as a matter of law." *Id.* at 16 (citing *Zervas v. U.S.*, 30 Fed. Cl. 443 (1994) (*Zervas*)).

The Agency further contends that the award fails to draw its essence from the RIF agreement because the award is implausible and manifestly disregards the agreement. In this connection, the Agency asserts that Article 14(E) clearly states two alternatives for how to set the grade and pay of displaced employees and that, because the grievant selected a position four grades below her previous grade, Article 14(E) required that her salary be set using her highest previous rate. *Id.* at 17-19.

B. Union's Opposition

The Union concedes that §§ 536.103-104, on which the Arbitrator relied, were superseded prior to the arbitration and that the grievant is not entitled to mandatory grade retention under the current provisions of § 536.103. Opp'n at 6, 14. However, the Union contends that the award is not deficient because, consistent with the Arbitrator's findings, the grievant was entitled to optional grade retention under § 536.202 and pay retention under § 536.301. *Id.* at 7-8, 14. The Union asserts, in this regard, that the associate director was an "authorized agency official[,]" within the meaning of § 536.202. The Union also contends that the Agency misconstrues the award as it pertains to the Arbitrator's

2. Article 19, Section 5(H) provides, in pertinent part:

> Any displaced or surplus employee, selected for a position not more than three (3) grades below their current grade, and who elects to participate in the Agency's Priority Placement Program (IRSPPP), will receive grade and pay retention. Employees who decline to participate in the IRSPPP will receive pay retention only. Displaced or surplus employees, selected for a position four (4) grades or more below their current grade, will have their salary set using highest previous rate[.]

Award at 2.

3. Article 14(E) provides:

> Any displaced or surplus employee, selected for a position not more than three (3) grades below their current grade, will receive grade and pay retention . . . . Displaced or surplus employees, selected for a position four (4) grades or more below their current grade, will have their salary set using highest previous rate[.]

Id. at 3.

4. Human Capital Office Policy 74 provides, in pertinent part, that grade and pay retention will apply to any employee who "voluntarily applies and is selected for a change to a lower-graded position no lower than 3 grade levels or 3 grade intervals below an employee's position of record." Exceptions at 12 (quoting policy).

use of the term "[s]imple justice[.]" *Id.* at 14. In this regard, the Union claims that the award is properly based on the Arbitrator's conclusion that an authorized Agency official provided the grievant grade and pay retention and that the reference to "[s]imple justice[]" is in the context of that approval and commitment by the Agency. *Id.* at 14-15. Finally, the Union contends that the award does not fail to draw its essence from the RIF agreement because the Arbitrator essentially determined that part 536, rather than Article 14(E), controlled. [5] *Id.* at 16.

IV. Analysis and Conclusions

A. The award is not contrary to 5 C.F.R. part 536.

The Authority reviews questions of law or regulation raised by exceptions to an arbitrator's award *de novo*. In applying a standard of *de novo* review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law or regulation. *E.g., NFFE Local 1437*, 53 FLRA 1703, 1709-10 (1998).

There is no dispute that the Arbitrator erred in relying on §§ 536.103-104, as these provisions were superseded prior to the arbitration. There also is no dispute that the grievant is not entitled to mandatory grade retention under the current provisions of § 536.103. Rather, the parties dispute whether the award is consistent with the regulations governing optional grade retention.

Section 536.202(a), which governs optional grade retention, provides, in pertinent part, that "[s]ubject to the requirements in §§ 536.102 and 536.203, an authorized agency official may provide grade retention to an employee moving from a position under a covered pay system to a lower-graded position under a covered pay system[.]" The Agency's only argument regarding optional grade retention is that the associate director was not "an authorized agency official[,]" within the meaning of § 536.202(a). In making this argument, the Agency relies on Article 14(E) of the RIF agreement and its restatement in the Agency policy. However, neither Article 14(E) of the RIF agreement nor the Agency policy addresses which Agency officials are authorized to provide optional grade retention. In addition, the Agency effectively concedes that the associate director has actual authority to provide optional grade retention under § 536.202, by arguing only that she failed to exercise her actual authority consistent with Article 14(E) of the RIF agreement and the Agency policy. As Article 14(E) and the Agency policy are not specified or referenced in § 536.202, the Agency provides no basis for finding that the award of grade retention is contrary to 5 C.F.R. part 536.

With regard to the award of pay retention, under § 536.301(a)(1), an agency "must provide pay retention to an employee . . . whose payable rate of basic pay otherwise would be reduced . . . as the result of—[t]he expiration of the 2-year period of grade retention[.]" The Agency does not separately contest the provision of pay retention, and it is undisputed that, under § 536.301(a)(1), the grievant would have been provided pay retention on the expiration of her 2-year period of grade retention. Consistent with the Agency's failure to establish that the retroactive restoration of grade retention is contrary to 5 C.F.R. part 536, no basis is provided for finding the award of pay retention deficient.

For the foregoing reasons, we deny this exception.

B. The award is not contrary to law.

There is no dispute that the Arbitrator's order to restore the grievant's grade-retention and pay-retention benefits on the basis of "[s]imple equity[,]" Award at 12, and "[s]imple justice[,]" *id.* at 13, constitutes the application of the doctrine of equitable estoppel. The Authority has upheld arbitration awards that relied on principles of equitable estoppel. For example, in *OEA*, 29 FLRA 240, 244 (1987), the agency granted the grievant a transportation agreement, but later denied that agreement on the basis that it had made a mistake. The arbitrator concluded that, under the doctrine of equitable estoppel, the grievant was entitled to the agreement. The Authority denied the agency's exception that the award was contrary to law, relying on *General Accounting Office v. General Accounting Office Personnel Appeals Board*, 698 F.2d 516 (D.C. Cir. 1983) (*GAO*), in which the court concluded that "[i]t is clear that '[t]he fundamental principle of equitable estoppel applies to government agencies, as well as private parties[,]'" *GAO*, 698 F.2d at 526 n.57 (quoting *Investors Research Corp. v. SEC*, 628 F.2d 168, 174 n.34 (D.C. Cir. 1980)).

Similarly, in *United States Department of Transportation, Federal Aviation Administration*, 63 FLRA 15 (2008) (*FAA*), the arbitrator sustained a grievance concerning the agency's denial of reimbursement of moving expenses, concluding that, under the doctrine of detrimental reliance, the grievants had the right to rely on the agency's assurance that they were entitled to

5. Alternatively, the Union argues that the Agency entered into an individual agreement with the grievant on grade and pay retention that the Union adopted by filing a grievance on the grievant's behalf. Opp'n at 16-17.

reimbursement of moving expenses if they relocated. The Authority denied the agency's exception, which relied on *Richmond*, where the Court held that the federal government cannot be compelled to make expenditures of funds unless the expenditure is authorized by statute. *Richmond*, 414 U.S. at 426. The Authority concluded that the agency did not argue, much less establish, that payment of the disputed expenses violated any federal appropriation law, and the Authority denied the exception. *FAA*, 63 FLRA at 19.

Consistent with *OEA* and *FAA*, we conclude that the Agency provides no basis for finding that the award is contrary to law. As in *OEA,* the Agency fails to establish that equitable estoppel does not apply to government agencies. As in *FAA*, the Agency does not argue, much less establish, that the provision of grade-retention and pay-retention benefits violates any federal appropriation law. Thus, for the same reasons set forth in *FAA*, the Agency's reliance on *Richmond* is misplaced. With regard to the Agency's reliance on *Zervas*, in that decision, the court found that "the relevant statute and regulations bar[red the] employee from receiving grade and pay retention benefits[.]" *Zervas*, 30 Fed. Cl. at 449. Here, consistent with our conclusion that the Agency has not demonstrated that the provision of grade and pay retention is contrary to regulation, we also conclude that the Agency's reliance on Zervas misplaced.

For the foregoing reasons, we deny this exception.

C. The Agency's essence exception does not provide a basis for finding the award deficient.

In addressing the Agency's claim that the grievant was not entitled to grade and pay retention under Article 14(E) of the RIF agreement, the Arbitrator stated that the provisions of the RIF agreement "arguably do not apply." Award at 10. In this regard, the Arbitrator emphasized the number of occasions on which the Agency committed to the grievant that she would receive grade and pay retention and the grievant's unrefuted testimony that it was with this assurance that she accepted the secretary position. According to the Arbitrator, the grievant's reliance on the Agency's commitment and assurance of grade and pay retention "dictates that such clear and definite commitment is to be honored." Award at 14. Interpreting the award as a whole, we conclude that the Arbitrator found that equitable principles provided a separate basis for sustaining the grievance, without regard to the terms of the RIF agreement. So interpreted, the Agency's alleged misinterpretation of that agreement does not provide a basis for finding the award deficient.[6] *See U.S. Dep't of Def., R.I. Nat'l Guard, Cranston, R.I.*, 57 FLRA 594, 598 (2001) (even if disputed findings of the arbitrator were erroneous, the errors were not dispositive in view of an independent finding of the arbitrator); *AFGE Local 1857*, 53 FLRA 1353, 1356-57 (1998) (focusing on the arbitrator's treatment of an issue that is separate from an expressed basis for the award cannot establish that the award is deficient); *Indian Educators Fed'n, N.M. Fed'n of Teachers*, 53 FLRA 352, 361 (1997) (exception denied where appealing party failed to explain how the award would have been different even if the Authority agreed with the exception).

Accordingly, we deny this exception.

V. Decision

The Agency's exceptions are denied.

6. Accordingly, it is unnecessary to address whether the award fails to draw its essence from the RIF agreement. However, even if it were necessary to address that issue, we would deny the essence exception. In this connection, the Arbitrator examined Article 14(E) and found that it "arguably" did not apply because the grievant was not given the "option" in Article 14(E) of applying for a position that was three or fewer grades below her previous position. Award at 10. This finding is not directly contrary to any wording in Article 14(E), as nothing in Article 14(E) states that it applies in situations where employees have no options. In addition, nothing in Article 14(E) precludes the Agency from exercising its regulatory authority to grant optional grade or pay retention beyond the terms of Article 14(E). Accordingly, the Arbitrator's determination that Article 14(E) does not apply is not irrational, unfounded, implausible, or in disregard of the agreement. *See, e.g., U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990).