65 FLRA No. 107

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 5
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE LOGISTICS AGENCY
DEFENSE DISTRIBUTION DEPOT RED RIVER
(Agency)

0-AR-4592

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DECISION

February 14, 2011

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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 George E. Larney 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 concluded that, because the Agency failed to consult with the Union in accordance with Article VIII of the parties' collective bargaining agreement (parties' agreement) before transferring one of its bargaining unit General Schedule (GS)-5 Administrative Support Assistants (employee) to a position outside the bargaining unit, it should return that employee to the bargaining unit and place her in "a GS-05 . . . position comparable to her former position of record." Award at 13; *see also id.* at 11. For the reasons set forth below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Agency transferred a bargaining unit employee to the newly created National Security Personnel System (NSPS), non-bargaining unit position of Secretary (Office Automation) without notifying the Union.[1] *Id.* at 6-7. As a result of the transfer, the employee's duties remained the same, but her total salary rose from $38,639.00 to $40,569.00. *Id.* at 6.

After the Union became aware that the employee had been transferred to the NSPS position, it filed a grievance. *Id.* at 6-7. In its grievance, the Union asserted that, in transferring the employee to the NSPS position, the Agency failed to comply with applicable provisions of the parties' agreement and Defense Logistics Agency Regulation (DLAR) 1404.4.[2] *See id.* at 7. The matter was unresolved and was submitted to arbitration. The parties stipulated to the following issue:

> Did the Agency violate DLAR 1404.4[,] Merit Promotion Program[,] and Article XXVI, the Staffing and Merit Promotion clause of the [parties' agreement] [,] . . . when [the Agency] permanently [moved] [reassigned] [the employee] from a GS-303-05 Administrative Support Assistant to a YB-318-01 NSPS pay band position of Secretary (Office Automation)[,] which is equivalent to a GS-06 rated position resulting in a higher rate of pay, without advertising the vacancy? If so, what shall be the proper remedy?[3]

Id. at 5.

The Arbitrator determined that, based on the contractual definition of the word "promotion," the employee received a promotion rather than a reassignment when she was transferred to the NSPS position. *Id.* at 11. According to the Arbitrator,

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1. When the Agency moved the employee into the NSPS position, it eliminated her GS-5 Administrative Support Assistant position. Award at 13.

2. Pertinent sections of DLAR 1404.4 and the parties' agreement are set forth in the attached appendix.

3. The parties were able to agree on the statement of the issue regarding the merits of the dispute with the exception of one word; whereas the Union wanted to use the word "moved" to describe the employee's transfer from the GS-05 Administrative Support Assistant position to the NSPS position, the Agency requested that the transfer be described as a "reassignment." *Id.* at 5.

testimony demonstrated that "the GS Schedule and the NSPS System represent different pay plans/pay method categories and that . . . [the employee] received a higher rate of pay when she was moved from her GS-05 position of record to her new YB-1 rated position under the NSPS pay plan." *Id.* Also, the Arbitrator found that the only legitimate way that the Agency could have transferred the employee to the NSPS position was to honor the Union's national consultation rights by acting in accordance with Article VIII, Section 3 of the parties' agreement. *Id.* The Arbitrator determined that, if the Agency had complied with Article VIII of the parties' agreement, then the Union would have had notice of the proposed change in the employee's conditions of employment and would have had the opportunity to meet with the Agency to discuss the proposed change and to request negotiations and submit counterproposals. *Id.*

However, because the NSPS position was outside the bargaining unit, the Arbitrator noted that the Union was incorrect in arguing that, once the employee assumed the NSPS position, the provisions of the parties' agreement still applied to her. *Id.* Moreover, because the employee's "bargaining unit position was effectively abolished[,] coupled with the fact that negotiations never materialized pursuant to the provisions of" Article VIII, Section 3, the Arbitrator rejected the Union's assertion that the Agency violated Article XXVI and DLAR 1404.4 when it transferred the employee to the NSPS position. *Id.* at 11-12. As a result, the Arbitrator denied part of the Union's proposed remedy requesting that the vacancy be filled competitively pursuant to the provisions of Article XXVI and DLAR 1404. *See id.* 12, 13.

After finding a violation of the parties' agreement, the Arbitrator ordered two alternative remedies. *Id.* at 13. The Arbitrator ordered that the Agency vacate the NSPS position and place the employee in a GS-05 position comparable to her former position of record or, with the Union's consent, comply with Article VIII, Section 3 of the parties' agreement and "enter into negotiations with the Union to determine the disposition of [the employee's] position placement." *Id.*; *see also id.* at 11. Finally, "[g]iven the nature of the resolution of the subject grievance, the Arbitrator [found that he was] without a clear basis to designate a 'losing party' in th[e] proceeding" and that, in accordance with Article XXXI, Section 6 of the parties' agreement, the arbitration costs should be borne equally by the parties. *Id.* at 13.

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that the award fails to draw its essence from the parties' agreement, that the award is based on a nonfact, and that the award is contrary to applicable law or regulation. Exceptions at 4.

The Union claims that, although the Arbitrator correctly set aside the employee's promotion, the Arbitrator incorrectly found that the Agency's personnel action did not violate Article XXVI, Section 4 of the parties' agreement and DLAR 1404.4. *Id.* at 5-6. According to the Union, "the [A]gency's action . . . permanently transferring [the employee] to a position with a higher rate of pay from the [GS] pay method category to the YB pay method category under NSPS" constitutes a promotion under Article XXVI of the parties' agreement. *Id.* at 7; *see also id.* at 8. Moreover, the Union claims that, because the employee received a promotion rather than a reassignment, the Agency was obligated to competitively fill the position, following the procedures set forth in Article XXVI of the agreement and DLAR 1404.4. *See id.* at 8-9. The Union notes that, because the Agency failed to follow the procedures set forth in Article XXVI and DLAR 1404.4, "bargaining unit members had no opportunity to apply for consideration for placement into the position based upon their qualifications." *Id.* at 9

Also, the Union asserts that the Arbitrator erred in requiring the Union and the Agency to split the arbitration costs. *Id.* According to the Union, because the Agency's improper personnel action was reversed, "the Union should be considered the winning party, and[,] as the losing party, the [A]gency should be ordered to pay the entire [A]rbitrator's fee and expenses pursuant to Article XXXI, Section 6 of the [parties' agreement]." *Id.*

Finally, the Union claims that the Arbitrator erred in finding that the vacant NSPS position should be filled in accordance with the prevailing NSPS rules. *Id.* at 9-10. The Union asserts that the vacant NSPS position "should be filled in accordance with Article XXVI of the [parties' agreement] and DLAR 1404.4, since these were the governing provisions at the time of the promotion[,] . . . rather than [the] Final NSPS rules which were not in effect at the time of the improper personnel action." *Id.* at 10.

B. Agency's Opposition

The Agency argues that, notwithstanding the Union's exceptions, the Authority should uphold the award. Opp'n at 8. The Agency contends that the Union's exceptions are not supported by the evidence. *Id.* According to the Agency, " it [is] quite clear that the Arbitrator's various determinations are detailed and definitively predicated upon record evidence of facts, law[,] and regulations, and that the Arbitrator's . . . [a]ward is not based on nonfact, [and] draws its essence from and cites to applicable provisions of the [parties' agreement]." *Id.* at 9. Moreover, the Agency contends that the Union's exceptions constitute mere disagreement with the award and that the Union has failed to provide evidence and arguments to support each basis for finding the award deficient. *Id.*

IV. Analysis and Conclusions

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

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the 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 collective bargaining 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. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context because it is the arbitrator's construction of the agreement for which the parties have bargained. *Id.* at 576.

The Union asserts that the Arbitrator incorrectly found that the Agency did not violate Article XXVI, Section 4 of the parties' agreement. Exceptions at 5-9. Moreover, the Union claims that, because the Agency's action constituted a promotion under Article XXVI of the parties' agreement, the Arbitrator should have found that the Agency was obligated to follow the procedures set forth in that provision to competitively fill that position. *Id.* at 7-9. We construe this argument as a claim that the award fails to draw its essence from the agreement. *See AFGE, Local 476*, 60 FLRA 41, 43 (2004) (construing the union's argument that the arbitrator erred in concluding that Article 13 of the parties' agreement excluded the remedies sought by the union as a claim that the award failed to draw its essence from the agreement).

The Union has failed to establish that the award fails to draw its essence from the agreement under any of the above tests. The Arbitrator reviewed the parties' agreement in its entirety and determined that, because Article XXVI was inapplicable, the Agency could not have violated that provision when it transferred the employee to the NSPS position. *See* Award at 11-12. The Union has not demonstrated why Article XXVI applies given that, in this case, the Agency transferred a bargaining unit employee to a non-bargaining unit position. Exceptions at 7-9 (arguing only that Article XXVI applies because the employee's transfer constitutes a promotion); *see Nat'l Fed'n of Fed. Emps., Local 1442*, 64 FLRA 1132, 1133, 1134-35 (2010) (*Local 1442*) (upholding the arbitrator's determination that Article 19, titled "Promotion," was inapplicable to the filling of two supervisory non-bargaining unit positions). Consequently, the Union has failed to prove that the Arbitrator's interpretation of the parties' agreement as applied to the facts of the case is irrational, implausible, unfounded, or in manifest disregard of the agreement. *See U.S. Dep't of Transp., FAA*, 63 FLRA 15, 18 (2008).

The Union also asserts that it should be designated as the winning party, and, as the losing party, the Agency should be ordered to pay all arbitration costs in accordance with Article XXXI, Section 6 of the parties' agreement. Exceptions at 9. We construe this argument as a claim that the award fails to draw its essence from the agreement. *See Nat'l Ass'n of Indep. Labor, Local 11*, 64 FLRA 709, 711-12 (2010) (construing the union's argument that the agency, as the losing party, should bear the costs of arbitration in accordance with the agreement as an allegation that the award failed to draw its essence from the agreement).

The Union's assertion is without merit. Article XXXI, Section 6 of the parties' agreement states that "[t]he Arbitrator's fees and expenses shall be borne by the losing party. The Arbitrator shall determine the losing party. If there is a split decision in which neither party can be designated as the losing party,

the costs shall be borne equally." Exceptions, Attach. 5 at 48. In this case, the Arbitrator interpreted the provision and, pursuant to the discretion expressly granted to him by Article XXXI, Section 6 of the parties' agreement, determined that neither party was the clear losing party. Award at 13 (finding that, "[g]iven the nature of the resolution of the subject grievance, [he was] without a clear basis to designate a 'losing party' in this proceeding"). Although the Arbitrator sustained the grievance, he disagreed with the Union that the Agency violated Article XXVI and DLAR 1404.4 and denied part of the Union's proposed remedy. *Id.* at 11-12, 13. Consequently, given the discretion permitted under the provision, the Union has not established that the award cannot in any rational way be derived from the parties' agreement, evidences a manifest disregard of the agreement, or represents an implausible interpretation of the agreement. *See, e.g., NAGE, Local R4-27*, 60 FLRA 14, 16 (2004) (determining that, because the arbitrator had discretion under the agreement to split costs in the event that neither party could be designated as the losing party, the agency failed to establish that the award was irrational, implausible, or unconnected with the language of the agreement); *U.S. Dep't of the Air Force Headquarters, 92nd Air Refueling Wing, Fairchild Air Force Base, Wash.*, 59 FLRA 434, 435 (2003) (citing *NFFE, Local 2030*, 56 FLRA 667, 670 (2000)) (finding that, by splitting the fees, the arbitrator interpreted the agreement provision concerning the splitting of fees and, pursuant to the discretion expressly granted him by the agreement, determined that neither party was the clear losing party).

Accordingly, we deny the Union's exceptions.

B. The award is not contrary to law, rule, or regulation.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. 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 U.S. Dep't of Def., Dep'ts of the Army & 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 should have found that the Agency violated DLAR 1404.4 when it transferred the employee from her GS-05 position of record to the NSPS non-bargaining unit position. Exceptions at 5-9. We construe the Union's argument as a claim that the award is contrary to law, rule, or regulation. *See AFGE, Local 476*, 60 FLRA at 43.

The Union's assertion that the award is contrary to DLAR 1404.4 is without merit. In this case, the Arbitrator found that, because DLAR 1404.4 was inapplicable, the Agency could not have violated that regulation when it transferred the employee to the NSPS position. *See* Award at 11-12. Moreover, an examination of DLAR 1404.4 does not establish that the Arbitrator erred. *See U.S. Dep't of the Air Force, San Antonio Air Logistics Ctr., Kelly Air Force Base, Tex.*, 51 FLRA 1624, 1628 (1996) (finding that an examination of the regulations that the union cited did not establish that the arbitrator was required to find that the grievant would have been selected for the improperly filled position). The purpose and scope of DLAR 1404.4 is to establish policy and procedures necessary "to ensure a systematic means of selection for promotion in the competitive service (GS/GM-15 and below)." Exceptions, Attach. 7 at 1. Because the vacant position at issue is an NSPS position rather than a GS/GM position, the policies and procedures contained in DLAR 1404.4 are not applicable to the vacant NSPS position. Consequently, the Union has not established that the award is inconsistent with DLAR 1404.4.

Also, the Union asserts that, rather than ordering the Agency to fill the newly vacant NSPS position in accordance with the prevailing NSPS Rules that were not in effect at the time the personnel action took place, the Arbitrator should have ordered that the position be filled in accordance with Article XXVI of the parties' agreement and DLAR 1404.4. Exceptions at 9-10. We construe the Union's argument as a claim that the award is contrary to law, rule, or regulation.

The Union's assertion is without merit. In his award, the Arbitrator did not require the Agency to fill the vacant NSPS position in accordance with prevailing NSPS rules; in fact, he did not address how the position should be filled. Instead, the Arbitrator simply ordered the Agency to comply with one of two alternative remedies. Award at 13. He determined that the Agency could either remove the employee from the NSPS position and place her into a GS-05 position comparable to her position of

record or, after obtaining the Union's consent, comply with Article VIII of the parties' agreement and "enter into negotiations with the Union to determine the disposition of [the employee's] position placement." *Id.* at 13; *see also id.* at 11. Consequently, the Union has not established that the award is contrary to law.[4]

Accordingly, we deny the Union's exceptions.

V. Decision

The Union's exceptions are denied.

4. Because the Union provides no evidence to support its claim that the award is based on a nonfact and fails to identify any nonfact, we reject its claim as a bare assertion. *See AFGE, Local 405*, 63 FLRA 149, 152 n.9 (2009) (rejecting the union's nonfact exception as a bare assertion because it did not provide evidence to support its claim that the award was based on a nonfact); *AFGE, Local 446*, 64 FLRA 15, 16 (2009) (denying the union's nonfact exception as a bare assertion because it failed to make arguments to support its claim that the award was based on a nonfact).

APPENDIX

Article VIII – Matters Appropriate for Consultation or Negotiation

> Section 1. Matters subject to consultation or negotiation are personnel policies and practices and matters affecting working conditions of unit employees which are within the discretion of the Employer so far as may be proper under applicable laws and regulations. These matters may include, but are not limited to, safety, training, labor-management relations, employee services, welfare and pay practices, methods of adjusting grievances, appeals, leave, promotion procedures, demotion practices, RIF practice, and hours of work.
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> Section 2. Upon request, the parties will negotiate:
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> (a) *at the election of the Employer*, on the numbers types and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
>
> (b) procedures which management officials of the agency will observe in exercising any authority under the law; or
>
> (c) appropriate arrangements for employees adversely affected by the exercise of any authority under the law by such management officials.
>
> Section 3. The Employer will provide the Union with a copy of proposed new and revised regulations affecting unit employees and provide written notice of proposed changes in conditions of employment. *Upon request, the employer will schedule a meeting with the Union to discuss management's proposed regulations/ changes and intentions. After the meeting is held,* a reasonable amount of time, but not less than fifteen days, will be permitted to the Union to request negotiations and to submit written counter proposals. If written proposals are not received within the allocated time frame, it will be considered that the Union is in agreement with the proposal and the proposal will be implemented.

Exceptions, Attach. 5 at 12.

Article XXVI – Staffing and Merit Promotion

> Section 1. The Employer recognizes the importance of, and benefits to be derived from, giving promotion opportunity to DDRT employees. *All vacant positions will be advertised except reassignments and those positions filled by re-promotion and/or reinstatement eligibles.* The initial area of consideration for a vacancy announcement will include the minimum area, DDRT.
>
> Section 2. This agreement provides for concurrent consideration of DDRT employees, but does not restrict the right of the employer to fill positions by methods other than promotion.
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> . . . .
>
> Section 4. Promotion is the change of an employee to a higher grade when both the old and the new positions are under the General Schedule, or under the same type graded wage schedule, or to a position with a higher rate of pay when both the old and new positions are under the same ungraded wage schedule or in different pay method categories.
>
> Section 5. The Union and the Employer agree that the purpose of the local Merit Promotion Plan are [sic] to insure that employees are given full and fair consideration for advancement and to insure selection from among the best qualified candidates. It is further agreed that these procedures must be administered in such a way as to develop maximum employee confidence and to achieve the purpose of the plan as simply and as efficiently as possible.
>
> . . . .

Id. at 38.

DLAR 1404.4 – Merit Promotion Program

> I. *PURPOSE AND SCOPE.* This DLAR establishes the policy and procedures

designed to ensure a systematic means of selection for promotion in the competitive service (GS/GM-15 and below). It implements Title 5, Code of Federal Regulations (CFRs), Part 335, and Federal Personnel Manual (FPM) chapter 335. It is applicable to HQ DLA, all DLA field activities, and Federal activities serviced by a DLA Office of Civilian Personnel (OCP). It does not apply to matters covered by Article 13 of the Master Agreement between DLA and the DLA Council of American Federation of Government Employees Locals.

A. Personnel Actions Covered. The competitive procedures of this DLAR must be applied to the following actions:

1. Temporary Promotions of More than 120 Calendar Days.

. . . .

3. Details of more than 120 calendar days to higher grade positions or to positions with known promotion potential.

. . . .

6. Transfer to a higher graded position.

. . . .

B. Personnel Actions Not Covered. The competitive requirements of this DLAR do not apply to the following actions:

. . . .

11. Transfer at the grade presently held on a permanent basis to a position at the same grade and with promotion potential that is no higher than that of the present position.

. . . .

II. POLICY

A. All positions which are required to be filled competitively under the provisions of this DLAR must be advertised by a JOA. JOAs may pertain to more than one position, may advertise open continuous announcements, and may be used to establish registers from which covered vacancies may be filled over a period of time.

. . . .

Exceptions, Attach. 7 at 1-2.