64 FLRA No. 198

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1442
(Union)

and

UNITED STATES
DEPARMENT OF THE ARMY
LETTERKENNY ARMY DEPOT
CHAMBERSBURG, PENNSYLVANIA
(Agency)

0-AR-4624

_____

DECISION

July 29, 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 James M. Harkless 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 found that the Union's grievance was not arbitrable. The grievance concerned the procedures the Agency followed in filling certain supervisory positions. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

A. Background

In August and September 2007, the Agency filled two supervisory positions with bargaining unit employees. The Agency asked for volunteers for one of the positions, that of Supervisory Information Technology Specialist. Only one employee volunteered. The Agency subsequently placed the employee in the position on a permanent basis. Award at 6. The Agency filled the second supervisory position, a Supervisory Purchasing Technician, with a bargaining unit employee on a temporary basis. *Id.* at 7.

The Agency did not follow competitive procedures in either case. Rather, viewing the positions as covered by the National Security Personnel System (NSPS), 5 U.S.C. § 9901, the Agency classified both personnel actions as "reassignment[s]." *Id.* at 7.

The Union grieved both actions. The grievance alleged that the Agency violated the parties' Labor-Management Agreement (LMA) when it filled the positions. The Union relied particularly on LMA Articles 19 (Promotions) and 20 (Details). *Id.* at 2, 4-5. The Agency responded that the LMA and its grievance procedure did not apply because the positions were supervisory positions. The Agency also argued that it had not elected to negotiate procedures for selecting bargaining unit employees for non-bargaining unit positions. *Id.* at 3. When the grievance was not resolved, it was submitted to arbitration.

B. Arbitrator's Award

The Arbitrator framed the issues as follows:

> Is the negotiated grievance procedure in Article 42 of the parties' LMA applicable to the complaints set forth in this grievance? If so, did the Agency violate Article 4, Article 19 or Article 20 of the LMA, or Title 5, Section 2301, when it placed [the employees] in non-bargaining supervisory positions covered by the NSPS rules? If so, what is the appropriate remedy?

Id. at 3.

The Arbitrator ruled that the grievance was not arbitrable. In the Arbitrator's view, the grievance involved a matter excluded from the LMA's grievance procedure. *Id.* at 7. The Arbitrator gave a number of reasons for his conclusion. First, the Arbitrator found that the two contested positions were supervisory and thus outside the bargaining unit. *Id.* Further, citing Authority case law, the Arbitrator held that the method an agency uses to fill such supervisory positions does not affect bargaining unit working conditions. *Id.* at 8 (citing *NAGE, Local R1-109*, 61 FLRA 588 (2006); *Antilles Consol. Educ. Ass'n*, 22 FLRA 235 (1986)). In addition, the Arbitrator found "no evidence" that the Agency had elected in negotiations to make the filling of such

positions subject to the LMA. Award at 8. Finding "[a]s a result" that "there is nothing in any of [the LMA's] provisions dealing with the filling of the two supervisory positions," *id.*, the Arbitrator concluded that the grievance was not arbitrable. Consequently, the Arbitrator found no need to address the other issues raised by the Union. *Id.* at 9.

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the award: (1) is contrary to law; and (2) fails to draw its essence from the LMA.

In support of its contrary to law claim, the Union argues that the Arbitrator's finding that the grievance was not arbitrable is contrary to Authority case law. Exceptions at 5-6. According to the Union, under Authority case law, "employees outside the unit can be covered by a grievance if it covers the time they were in the unit." *Id.* at 5 (citing *Int'l Ass'n of Firefighters, Local 13*, 43 FLRA 1012, 1024 (1992) (*Firefighters*)); *Soc. Sec. Admin. Mid-Am. Program Serv. Ctr.*, 26 FLRA 292, 293 (1987) (*SSA*)). The Union argues that, at the time the Agency filled the supervisory positions, "the referenced employees were still members of the bargaining unit," Exceptions at 4, and "the violations of the [LMA] occurred *before* the bargaining unit employees were . . . converted to supervisory positions." *Id.* at 3. Therefore, the Union concludes, it had a legal right to file its grievance.

Regarding its essence argument, the Union claims that the Arbitrator's arbitrability ruling is not a plausible interpretation of the parties' agreement. *Id.* at 7. The Union relies on Articles 19 and 20, which concern promotions and details, respectively.[*] The Union reasons that: (1) its grievance alleged violations of Articles 19 and 20; and (2) Articles 19 and 20 state that "[c]omplaints arising from the application of [those articles] will be processed under the negotiated grievance procedure." *Id.* Therefore, the Union concludes, the Arbitrator erred when he failed to find that the grievance could have been processed under the parties' negotiated grievance procedure.

[*] Relevant portions of Articles 19 and 20 are set forth in the Appendix to this decision.

B. Agency's Opposition

The Agency argues that the Arbitrator's award is not contrary to law. The Agency agrees with the Arbitrator that, under Authority case law, procedures for filling supervisory positions are excluded from the scope of the parties' negotiated grievance procedure unless the parties have negotiated for such coverage. Opp'n at 2, 4. Furthermore, the Agency contends, the Arbitrator correctly determined that the parties had not engaged in those negotiations. *Id.* In addition, the Agency takes the position that the case law cited by the Union is not applicable. Therefore, the Agency concludes, the Union has not shown how the Arbitrator's award is contrary to law.

The Agency also argues that the award does not fail to draw its essence from the LMA. The Agency contends that the Arbitrator's determination that Articles 19 and 20 do not apply to the filling of the two supervisory positions follows from the Arbitrator's correct determination that the filling of supervisory positions is not covered by the LMA. *Id.* at 5. Therefore, the Agency argues, the Arbitrator did not misinterpret or misapply Articles 19 and 20 when he found the grievance not arbitrable. *Id.*

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Union argues that the Arbitrator misapplied Authority case law when he ruled that the grievance was not arbitrable. When an exception challenges an award's consistency with law, the Authority reviews the question of law raised by the exception and the award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995). In applying this standard, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.* Where an arbitrator's substantive arbitrability determination is based on law, the Authority reviews that determination *de novo*. *See NTEU*, 61 FLRA 729, 732 (2006), and cases cited therein.

The Arbitrator's determination that the LMA's negotiated grievance procedure does not cover the filling of supervisory positions is not contrary to law. Under Authority case law, an agency's selections and selection procedures for filling nonbargaining unit positions are not subject to the parties' negotiated

grievance procedure unless the agency has elected in negotiations to agree to their coverage. *See NAGE, Local R1-109*, 61 FLRA 588, 590-91 (2006); *NTEU*, 25 FLRA 1067, 1079 (1987), *aff'd as to other matters*, 848 F.2d 1273 (D.C. Cir. 1988). This longstanding precedent also applies to supervisory or managerial positions filled on a temporary basis. *See, e.g., AFGE, Local 1012 v. FLRA*, 841 F.2d 1165, 1167 (D.C. Cir. 1988) (proposal concerning the filling of supervisory positions, including temporary appointments, is negotiable only at the election of the agency). Consequently, the grievability of disputes over the filling of supervisory positions is ultimately a question of contract interpretation, not law.

The Arbitrator's resolution of the grievability question in this case is consistent with Authority precedent. It is undisputed that the supervisory positions whose filling the Union challenged in its grievance are outside the bargaining unit. Moreover, the Union does not take issue with the Arbitrator's finding that there is "no evidence" that the Agency had elected to make the filling of the contested positions subject to the parties' negotiated grievance procedure. Award at 8. Therefore, the Arbitrator's conclusion, that the Union's grievance is not subject to the negotiated grievance procedure and is not arbitrable, is consistent with Authority case law.

The case law on which the Union relies does not apply. The cases cited by the Union discuss whether former bargaining unit employees may, consistent with the terms of applicable collective bargaining agreements, grieve an action taken while they were members of the bargaining unit. *See, e.g., Firefighters*, 43 FLRA at 1024 (past and present employees entitled under the terms of the contract to pursue grievance regarding overtime pay); *SSA*, 26 FLRA at 293 (grievance of former bargaining unit employee arbitrable under terms of the contract).

These cases have no application here. There is no issue in this case concerning the grievance rights of former unit employees; i.e., the employees who were chosen to fill the supervisory positions in dispute. Rather, the grievance was filed by the Union. Moreover, the grievance was filed to vindicate the interests of current unit employees, not the former unit employees who had moved to positions outside the unit.

In addition, the principle that the Arbitrator relied on is not addressed by these cases. Specifically, the Arbitrator's substantive arbitrability ruling hinged on the Arbitrator's finding that the parties' negotiated grievance procedure did not cover the filling of the supervisory positions at issue. This subject is not addressed by the Authority decisions on which the Union relies. Therefore, the case law on which the Union relies is inapposite, and does not provide any basis for finding that the award is contrary to law.

B. The award does not fail to draw its essence from the LMA.

Citing specific contract language, the Union argues that the award fails to draw its essence from the LMA. 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, e.g., U.S. Dep't of Labor* (*OSHA*), 34 FLRA 573, 575 (1990). This standard and the private sector cases from which it is derived make clear that an arbitrator's award will not be found to fail to draw its essence from the agreement merely because a party believes that the arbitrator misinterpreted the agreement. *See id.* at 575-76. The courts defer to the arbitrator's interpretation of the collective bargaining agreement "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

As discussed previously, extending a negotiated grievance procedure's scope to cover the filling of supervisory positions is a permissive subject of bargaining. *See, e.g., NAGE, Local R1-109*, 61 FLRA at 590-91. Further, the Arbitrator's finding that there is no evidence that the Agency had elected to negotiate for such coverage is unchallenged. Consequently, the Arbitrator's conclusion that the parties' grievance procedure does not cover the filling of supervisory positions does not fail to draw its essence from the parties' agreement.

The Union argues that the award fails to draw its essence from Articles 19 and 20 of the LMA, concerning promotions and details, respectively. The

Union claims that the award does not represent a plausible interpretation of these provisions because the provisions clearly state that "complaints arising from the application of [the articles] *will be processed under the negotiated grievance procedure*." Exceptions at 7 (emphasis added); *see also id.* at 8. In the Union's view, because the grievance alleged violations of Articles 19 and 20, it constituted a "[c]omplaint arising from the application of " the articles. *Id.* at 7-8.

The Union's essence argument, relying on the premise that the grievance "aris[es] from the application of [Articles 19 and 20]," does not have merit. *Id.* at 7. Contrary to the Union's claim, the Arbitrator determined that the Union's grievance does *not* arise from the application of either article because "there is nothing in any of [the agreement's] provisions dealing with the filling of the two supervisory positions[.]" Award at 8. The Arbitrator also found support for that determination in his analysis of controlling Authority case law. *See id.* at 7-8. As discussed above, the Arbitrator's conclusions are consistent with Authority precedent. Accordingly, because the premise for the Union's essence argument is faulty, the Union cannot persuasively claim that the award does not represent a plausible interpretation of the parties' agreement.

V. Decision

The Union's exceptions are denied.

APPENDIX

ARTICLE 19

PROMOTIONS

Section 1. The Employer will endeavor to utilize, to the extent possible, the skills and talents of the employees to achieve their highest potential. All personnel actions offering career progression for Letterkenny employees shall be consonant with the spirit and intent of the merit system and equal employment opportunity (EEO).

Exceptions, Attach. C, LMA at 34.

ARTICLE 20

DETAILS

Section 1. A detail is the temporary assignment of an employee to a different position or set of duties for a specified period without change in pay status with the employee returning to his regular duties at the end of the detail.

Section 2. Detail assignments of more than 30 consecutive days duration will be made in the following manner when mission requirements permit:

a. An initial effort will be made to detail an employee of the same grade to the vacancy until a permanent placement action is completed.
b. If no employee of equal grade to the position is available or if the mission requirements preclude such a detail, all employees within the wok unit at the next lower grade in the normal line of progression will be given the opportunity to accept the detail. . . .
c. If more than one employee volunteers for the detail, every effort will be made to divide the anticipated period of time the position will be vacant equally among all interested employees. . . .

Id. at 38.