65 FLRA No. 147

UNITED STATES
DEPARTMENT OF THE ARMY
HEADQUARTERS, I CORPS
AND FORT LEWIS
FORT LEWIS, WASHINGTON
(Agency)

and

INTERNATIONAL ASSOCIATION
OF MACHINISTS AND
AEROSPACE WORKERS
DISTRICT LODGE 160/282
(Union)

0-AR-4198

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DECISION

March 31, 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 Anthony D. Vivenzio 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 did not file an opposition.

The Arbitrator found that the grievance was procedurally arbitrable. On the merits, the Arbitrator found that, although the Agency did not violate the parties' agreement when it transferred the grievant from the night shift to the day shift, it did violate the agreement by failing to return the grievant to the night shift after he had worked on the day shift for more than six months. For the reasons that follow, we deny the exceptions in part and modify the award in part.

II. Background and Arbitrator's Award

The grievant is a repair operator who worked on the night shift at a wastewater treatment facility. Award at 3. The Agency transferred the grievant to the day shift when it determined that the grievant failed to properly restart the facility after a power outage. *Id.* As a result of the transfer, the grievant no longer earned night differential pay. *See id.* at 21, 28-29. The Union filed a grievance, which was unresolved and submitted to arbitration. *Id.* at 1. The Arbitrator framed the issues before him as whether the grievance was procedurally arbitrable, whether the Agency violated the parties' agreement, and what the remedy should be. *Id.* at 2.

With regard to procedural arbitrability, the Arbitrator found that the Union had failed to request arbitration within the thirty-day limit required by Article 27 of the parties' agreement.[1] *Id.* at 16. The Arbitrator determined, however, that "behaviors of the parties" can indicate a "mutual waiver" of time limitations in a contract. *Id.* at 18. The Arbitrator found that the parties engaged in settlement negotiations and arbitrator selection long after the contractual time limit had expired. *See id.* In light of those actions, the Arbitrator concluded that the parties effectively waived the time limits in the agreement and that the grievance was "not barred for lack of literal compliance with Article 27[.]" *Id.*

With regard to the merits of the grievance, the Arbitrator found that it was "within the discretion of the [Agency]" to transfer the grievant, and that the transfer was a "proper exercise of its authority under Article 2[.]"[2] *Id.* at 26. However, the fact that the grievant had spent eight months on the day shift at the time of the hearing, *see id.* at 1, 26, led the Arbitrator to consider the "ramifications of maintaining the [g]rievant on the day shift" indefinitely. *Id.* at 26. In this connection, the Arbitrator stated that the grievant's "duties and activities underwent significant change as a result of the transfer[,]" as the grievant no longer engaged in activities "'affecting the plant's permit.'" *Id.* at 27 (quoting testimony). The Arbitrator found that the Agency "claimed that the transfer of the [g]rievant" was for the "purpose of improving his performance through closer supervision[,]" *id.*, which would give the grievant an "opportunity to demonstrate his ability to operate the plant for a return to the night shift[,]" *id.* at 28. The Arbitrator determined that "these things never materialized[.]" *Id.* The

1. Article 27 of the parties' agreement states, in pertinent part, that a written request for arbitration "must be submitted not later than thirty (30) calendar days after the fourth step decision letter is issued." Award at 16.

2. Article 2 states, in pertinent part, that "[i]t is the right of Management to . . . assign . . . employees" and "assign work[.]" *Id.* at 4.

Arbitrator stated that a "reassignment should be for a definite period of time if it is to be corrective," *id.* at 27, and concluded that the grievant's placement on the day shift "ripened into an adverse action over time." *Id.* at 28.

Noting the "history of the [g]rievant in this workplace" and "examining the range of previous reassignments," the Arbitrator determined that the "line" as to when the grievant's day-shift assignment became an adverse action "is to be drawn at six months." *Id.* The Arbitrator concluded that after the grievant had spent six months on the day shift, the "continuation of the reassignment of the [g]rievant to the day shift was . . . an adverse action, in violation of Article 18, Sections 1 and 2, of the [parties' agreement (Article 18)]."[3] *Id.*

To remedy the violation, the Arbitrator directed the Agency to reassign the grievant to the night shift and the duties that he previously had performed on that shift. *Id.* at 29. In addition, the Arbitrator found that the Agency's violation of Article 18 was an "unwarranted" personnel action that resulted in the withdrawal or reduction of the grievant's pay, allowances, and differentials. *Id.* at 28. The Arbitrator awarded the grievant backpay, without interest, for the time in excess of six months that the grievant had worked on the day shift. *Id.* at 29.

III. Agency's Exceptions

The Agency argues that the Arbitrator's procedural arbitrability determination is contrary to public policy. *See* Exceptions at 11. In this regard, the Agency argues that the award effectively punishes the Agency for having attempted to settle the grievance. *Id.* The Agency also argues that the award implies that the Agency should have refused to select an arbitrator, even though such a refusal "could have resulted in an unfair labor practice." *Id.*

With regard to the Arbitrator's resolution of the merits of the grievance, the Agency asserts that the award fails to draw its essence from the parties' agreement, arguing that the Arbitrator "mistakenly determined that the loss of night differential . . . constituted an adverse action under" Article 18. *Id.* at 7. In this connection, the Agency argues that Federal Personnel Manual (FPM) Chapter 752, referenced in Article 18, indicates that the grievant's transfer was not an adverse action because FPM Chapter 752 "excludes . . . from the definition of adverse action" a "'[r]eduction of an employee's rate of pay from a rate which is contrary to law or regulation to a rate which is required or permitted by law or regulation.'" *Id.* (quoting FPM Chapter 752).

The Agency also asserts that the award is contrary to 5 U.S.C. § 7512 (§ 7512) and 5 C.F.R. § 752.401 (§ 752.401). According to the Agency, the Authority should apply statutory standards to the Arbitrator's interpretation of Article 18 because the Authority has "applied statutory standards in assessing the application of contract provisions that mirror, or are intended to be interpreted in the same manner as, the Statute." *Id.* at 4 (quoting *AFGE*, 59 FLRA 767, 769 (2004) (Chairman Cabaniss concurring and then-Member Pope dissenting)). The Agency claims that the definition of "adverse action" under Article 18 "mirrors" the definitions of "adverse action" in § 7512 and § 752.401.[4] *Id.* at 4. The Agency argues that an adverse action did not occur under § 7512 because that section defines an adverse action as a reduction in pay, i.e., a reduction in basic pay, and not as a loss of night differential pay. *See* Exceptions at 5-6. For support, the Agency cites: *Spinks v. U.S. Postal Serv.*, 621 F.2d 987 (9th Cir. 1980) (*Spinks*), and *Allen v. Department of the Navy*, 13 M.S.P.R. 521 (1982) (*Allen*), *overruled in part by Robinson v. Department of the Army*, 21 M.S.P.R. 270, 272 & n.3 (1984). Alternatively, the Agency argues that the award is contrary to § 752.401 because the grievant's loss of night differential constituted a reduction in pay from a rate

[3] Article 18 states, in pertinent part:

> Section 1. Adverse actions are defined as suspensions for more than fourteen (14) days, removal, reduction in grade or pay, and furlough for thirty (30) days or less taken against career or career-conditional employees not serving a probationary . . . period. Excluded are those actions excluded under [Federal Personnel Manual (FPM)] Chapter 752.
> Section 2. Adverse actions will only be taken for just cause[.]

Award at 6.

4. As relevant here, § 7512 defines an adverse action as a removal, suspension for more than fourteen days, reduction in grade, reduction in pay, or furlough of 30 days or less. 5 U.S.C. § 7512. The version of § 752.401(a) in effect at the time of the actions giving rise to the grievance defined an adverse action similarly. *See* 5 C.F.R. § 752.401(a) (2006). Additionally, as relevant here, the version of § 752.401(b) in effect at the time of the actions giving rise to the grievance stated that actions excluded from the definition of adverse action include a "[r]eduction of an employee's rate of basic pay from a rate that is contrary to law or regulation." 5 C.F.R. § 752.401(b)(15) (2006).

that is contrary to law or regulation, and that such a reduction is not an adverse action under § 752.401(b)(15).[5] *See* Exceptions at 5.

Further, the Agency alleges that the remedy is contrary to § 7106 of the Statute because "moving the grievant to the night shift, and requiring the assignment of particular duties to the grievant, violates the exercise of management's rights to assign work and employees."[6] *Id.* at 10 (citing *Int'l Bhd. of Police Officers*, 47 FLRA 397, 404 (1993), and *AFGE, Local 1698, Local 1156*, 61 FLRA 615, 617 (2006)).

Finally, the Agency maintains that the award is contrary to the Back Pay Act because the Agency "did not violate" Article 18, Exceptions at 9, and, therefore, did not commit an unjustified or unwarranted personnel action, *id.* at 8. The Agency also asserts that the Arbitrator's award of backpay without interest is contrary to the Back Pay Act, but states that it will pay interest if the Authority upholds the award of backpay. *Id.* at 9 (citing *Nat'l Border Patrol Council, Local 2913*, 48 FLRA 657 (1993)).

IV. Analysis and Conclusions

A. The Arbitrator's procedural arbitrability determination is not deficient.

The Authority generally will not find an arbitrator's ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the procedural-arbitrability ruling itself. *AFGE, Local 933*, 65 FLRA 9, 11 (2010) (*Local 933*). An arbitrator's determination regarding the timeliness of a grievance constitutes a determination regarding the procedural arbitrability of that grievance. *Id.* Additionally, questions of whether the "'preliminary steps of the grievance procedure have been exhausted or excused'" are questions regarding the procedural arbitrability of a grievance. *AFGE, Local 1815*, 65 FLRA 430, 431 (2011) (quoting *Fraternal Order of Police, N.J. Lodge 173*, 58 FLRA 384, 385 (2003) (Chairman Cabaniss dissenting)). The Authority has stated that a procedural arbitrability determination may be found deficient on grounds that do not challenge the determination itself, which include claims that an arbitrator was biased or that the arbitrator exceeded his or her authority. *Local 933*, 65 FLRA at 11.

By arguing that the Arbitrator's procedural arbitrability determination is contrary to public policy, the Agency directly challenges the procedural arbitrability ruling itself. *See id.* Accordingly, consistent with the foregoing, we deny the exception.

B. 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 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. *U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*). 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.

Article 18 of the parties' agreement states, in pertinent part, that "[a]dverse actions are defined as . . . [a] reduction in . . . pay[.]" Award at 6. The Agency claims that the Arbitrator erred in finding an adverse action under Article 18 because Article 18 excludes from the definition of adverse action any actions excluded in FPM Chapter 752, including a

5. In addition, the Agency claims that if the Authority were to find that an adverse action had occurred under § 7512, then the Authority would lack jurisdiction to resolve this dispute under 5 U.S.C. § 7121(f) (§ 7121(f)) and § 7122(a). *See* Exceptions at 6-7. Under § 7122(a), the Authority lacks jurisdiction to review an arbitration award "relating to a matter described in § 7121(f)[.]" The matters described in § 7121(f) include adverse actions, such as removals, which are covered under 5 U.S.C. § 4303 or § 7512 and are appealable to the Merit Systems Protection Board. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Det. Ctr., Miami, Fla.*, 57 FLRA 677, 678 (2002) (Member Armendariz concurring). Based on the fact, explained below, that the Arbitrator did not find an adverse action under § 7512, we find that §§ 7121(f) and 7122(a) do not prevent the Authority from considering the exceptions.

6. Section 7106 of the Statute states, in pertinent part that, "nothing . . . shall affect the authority of any management official . . . in accordance with applicable laws . . . to . . . assign . . . employees[,]" § 7106(a)(2)(A), or "assign work," § 7106(a)(2)(B).

reduction in an employee's "rate of pay." *See* Exceptions at 7-8. Article 18 does not define the terms "reduction in pay" or "rate of pay," and the Agency does not demonstrate that the Arbitrator erred by effectively finding that the grievant's loss of night differential pay was a reduction in pay -- and thus was an adverse action under Article 18 -- as opposed to a reduction in rate of pay within the meaning of FPM Chapter 752.[7] As the Agency has not shown that the Arbitrator's interpretation was irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, we deny the exception.[8]

C. The award is contrary to law in part.

When a party's exceptions involve an award's consistency with law, the Authority reviews the questions of law raised by the arbitrator's award and the party's exceptions de novo. *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 a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. The award is not contrary to §§ 7512 or 752.401.

Previously, the Authority has denied exceptions to an arbitrator's contract interpretation where the exceptions alleged that the arbitrator misinterpreted a law or regulation. For example, when considering exceptions to an arbitrator's award interpreting the meaning of the term "detail" under a contract, the Authority found, in *AFGE, Local 779*, 64 FLRA 672 (2010) (*Local 779*), that an exception that claimed that the arbitrator failed to consider Office of Personnel Management regulations was misplaced. *See id.* at 674. Here, the Arbitrator interpreted Article 18, and not §§ 7512 or 752.401, to find that an adverse action occurred. *See* Award at 28. As such, *Local 779* supports a conclusion that the Agency's exceptions do not demonstrate that the award is contrary to §§ 7512 or 752.401. *See Local 779*, 64 FLRA at 674.

Although the Agency acknowledges that the Arbitrator resolved the matter based on his interpretation of Article 18, the Agency contends that the Authority should apply statutory standards because the "definition of adverse actions in [Article 18] mirrors the definition of adverse actions in both . . . § 7512 and . . . § 752.401." Exceptions at 4. As an initial matter, it is not clear that Article 18 mirrors, or was intended to be interpreted in the same manner as, §§ 7512 and 752.401, as Article 18 does not specifically reference or incorporate § 7512 or § 752.401. *See* Award at 6. Moreover, while the Authority has applied statutory standards to contract provisions that "mirror . . . *the Statute*[,]" *AFGE*, 59 FLRA at 769 (emphasis added), neither § 7512 nor § 752.401 is part of the Statute, i.e., part of chapter 71, title 5 of the United States Code. Moreover, the Arbitrator did not find that Article 18 mirrored, or was intended to be interpreted in the same manner as, §§ 7512 and 752.401. *See* Award at 26-28. In these circumstances, we do not apply statutory standards to resolve the Arbitrator's interpretation of Article 18. As such, the decisions cited by the Agency, which apply to § 7512 and/or Merit Systems Protection Board precedent, *see Spinks*, 621 F.2d at 988-89; *Allen*, 13 M.S.P.R. at 525 & n.4, do not apply here.

Based on the foregoing analysis, the Arbitrator's finding of an adverse action under Article 18 is not contrary to law.

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7. We note that the FPM, referenced in Article 18, was abolished on December 31, 1994. *See, e.g., Int'l Ass'n of Machinists & Aerospace Workers, Dist. Lodge 725, Local Lodge 726*, 60 FLRA 196, 197 n.2 (2004). However, there is no contention that the abolishment of FPM Chapter 752 is relevant to the issue before us.

8. Member Beck agrees that the "essence" exception, as framed by the Agency, should be denied. He notes that the Agency chose not to offer an "essence" argument that might have been more successful.

The Arbitrator explicitly found that the Agency's reassignment of the Grievant from the night shift to the day shift was not an adverse action and not subject to any arbitral remedy. Award at 26 ("The assignment of the Grievant to the day shift … was within the discretion of the Employer and a proper exercise of the authority under Article 2 of the contract. The assignment was not … arbitrary and capricious … nor in violation of any other element of the contract.").

The "adverse action" the Arbitrator purported to remedy was the Agency's failure to transfer the Grievant from the day shift to the night shift at an arbitrary point in time that the Arbitrator conjured from thin air. But there is no plausible reading of Article 18 that makes this an "adverse action." An agency's decision not to transfer an employee from one shift to another cannot be considered a "suspension[] … removal, reduction in pay or grade, [or] furlough." *Id.*, Article 18, Section 1 (explicitly defining what constitutes an "adverse action"). The Arbitrator treated as an "adverse action" something that the parties chose to exclude from the contractual definition of that term.

2. The award is not contrary to § 7106 of the Statute.

The Agency argues that the remedy is contrary to management's rights to assign work and employees under § 7106. The Authority recently revised the analysis that it will apply when reviewing management rights exceptions to arbitration awards. *See U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102 (2010) (Chairman Pope concurring) (*FDIC*). Under the revised analysis, the Authority will first assess whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115. If an award affects the exercise of the asserted management right, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b).[9] *See id.*

Where the Authority has found that an arbitrator was enforcing an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute, the Authority has assumed, without deciding, that the award affected the management rights as claimed by the excepting party. *See U.S. Dep't of the Army, Fort Huachuca, Ariz.*, 65 FLRA 442, 443-46 (2011) (*Fort Huachuca*). In addition, the Authority has repeatedly found that contract provisions requiring agencies to take certain actions only for just cause are appropriate arrangements within the meaning of § 7106(b)(3). *See Fort Huachuca*, 65 FLRA at 445-46; *U.S. Dep't of Transp., FAA*, 63 FLRA 383, 385 (2009); *SSA, Balt., Md.*, 53 FLRA 1751, 1754 (1998). As Article 18 requires that actions covered therein will only be taken for just cause, and as the Authority has found that just cause provisions are appropriate arrangements under § 7106(b)(3), we find that the Arbitrator's interpretation and application of Article 18 was not contrary to § 7106.

3. The award is contrary to the Back Pay Act in part.

An award of backpay is authorized under the Back Pay Act when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action has resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. *See, e.g., U.S. Dep't of Health & Human Servs.*, 54 FLRA 1210, 1218-19 (1998). The Authority has held that a violation of a collective bargaining agreement constitutes an unwarranted personnel action under the Act. *See id.* at 1218-19. In addition, under the provisions of the Back Pay Act, "interest must be paid" on backpay awards. *E.g., Nat'l Air Traffic Controllers Ass'n*, 64 FLRA 906, 907 (2010) (*NATCA*).

The Agency's first Back Pay Act exception asserts that the Agency did not violate Article 18 and, thus, that the Arbitrator awarded backpay without finding an unjustified or unwarranted personnel action. However, as the Arbitrator determined that the Agency violated Article 18, and as we have denied the Agency's essence exception challenging that determination, we find that the Agency has failed to demonstrate that the Arbitrator awarded backpay without finding an unjustified or unwarranted personnel action.

The Agency's second Back Pay Act exception asserts that the award is contrary to the Act because the Arbitrator awarded backpay without interest. *See* Exceptions at 9; Award at 28-29. As interest is required under the Act (and the Agency so concedes), *see NATCA*, 64 FLRA at 907, we modify the award to include an award of interest on the backpay.

V. Decision

For the foregoing reasons, we deny the Agency's exceptions in part and modify the award in part.

9. When an award affects a management right under § 7106(a)(2) of the Statute, the Authority may also examine whether the award enforces an applicable law. *EPA*, 65 FLRA at 115 n.7.