65 FLRA No. 177

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
FORT TOTTEN AGENCY
FORT TOTTEN, NORTH DAKOTA
(Agency)

and

INDIAN EDUCATORS FEDERATION
LOCAL 4524
AMERICAN FEDERATION OF TEACHERS
(Union)

0-AR-4281

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DECISION

May 26, 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 Philip K. Kienast 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 concluded that the Agency violated the parties' collective bargaining agreement (CBA) when it separated the grievants from employment in a reduction-in-force (RIF) instead of reassigning them to new, lower-graded positions that the Agency had just created in the same line of work. As a remedy, the Arbitrator ordered the Agency to grant the grievants grade and pay retention in the lower-graded positions, for which the grievants had competed and been selected.

For the reasons set forth below, we dismiss in part and deny in part the Agency's exceptions.

II. Background and Arbitrator's Award[1]

The two grievants were full-time maintenance mechanics. *See* Award at 3. On July 13, 2006,[2] the Agency notified the Union that it would separate the grievants from employment in a RIF. *Id.* The Agency also advised the Union that there were no other positions available at the Agency for which offers could be made to the affected employees. *Id.* Although the Agency stated that there were no other positions available to offer to the affected employees, a proposed organization chart sent to the Union on December 8, 2006, indicated that the Agency planned to change the grievants' positions to lower-graded seasonal maintenance mechanic positions. *Id.*

Subsequently, the Agency notified the two grievants that they would be separated from employment pursuant to a RIF. *Id.* The grievants then applied for, were offered, and accepted lower-graded positions as seasonal maintenance employees. *Id.* The grievants were separated from employment on October 13 and reinstated two weeks later to the new, lower-graded positions. *Id.* at 3-4.

The Union filed a grievance alleging that the Agency violated the CBA. As a remedy, the Union argued that the grievants were entitled to grade and pay retention in their new, lower-graded positions. *Id.* at 2. The grievance was not resolved and was submitted to arbitration. *Id.*

As relevant here, the parties stipulated the issue as: "Are the grievants entitled to grade and pay retention in their new positions?" *Id.* The Arbitrator concluded that the Agency violated the CBA. The Arbitrator found that Article 31 of the CBA requires the Agency to seek "'to avoid the necessity of entering into RIF actions.'"[3] *Id.* at 3 (quoting Article 31). The Arbitrator noted that, at the same time the Agency was telling the Union that there were no other positions available to offer the grievants, the Agency was planning to change the grievants' positions to lower-graded seasonal positions. *Id.* The Arbitrator found that the Agency presented no evidence to explain "why it did not try to avoid the necessity of a RIF by simply reassigning

1. The parties agreed to "expedited arbitration" based on written submissions in lieu of a hearing. Award at 2. The parties stipulated to seventeen joint exhibits. *Id.*

2. Unless otherwise noted, all dates refer to 2006.

3. The pertinent text of Article 31 is set forth in the appendix to this decision.

the grievants to the [lower-graded] positions." *Id.* Determining that the Agency should have reassigned the grievants to the lower-graded positions, the Arbitrator concluded that the Agency violated Article 31 "by first separating the grievants and two weeks later appointing them to fill the new [lower-graded] positions." *Id*. at 3-4.

As a remedy, the Arbitrator ordered the Agency to grant the grievants grade and pay retention in their new, lower-graded positions. *Id.* at 4. The Arbitrator retained jurisdiction "for the . . . purpose of . . . deciding how to implement the grade and pay remedy absent agreement by the parties." *Id.* at 5.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is contrary to law and fails to draw its essence from the CBA.

Regarding its contrary to law contention, the Agency claims that the award is contrary to 5 U.S.C. §§ 5363(e)[4] and 2105.[5] Exceptions at 4. The Agency asserts that, under 5 U.S.C. § 5363(e), an employee who has a break in service of one workday or more is not eligible for grade and pay retention. The Agency argues that the award is inconsistent with 5 U.S.C. § 5363(e) because the employees had breaks in service of one or more days when they began their new positions following their terminations. Further, relying on 5 U.S.C. § 2105, the Agency asserts that, under 5 U.S.C. § 5363(e), grade and pay retention is limited to an individual who is a federal employee. The Agency argues that the award is inconsistent with 5 U.S.C. § 5363(e) because the grievants were not federal employees within the meaning of § 2105 when they began their new positions following their terminations. *Id.*

Next, the Agency contends that the award is inconsistent with an Office of Personnel Management (OPM) RIF regulation, 5 C.F.R. § 351.201(b),[6] that OPM issued pursuant to 5 U.S.C. § 1302.[7] *Id.* The Agency argues that the award is inconsistent with 5 C.F.R. § 351.201(b) because the Arbitrator found that the Agency erred when it conducted the RIF, even though the Agency complied with all RIF regulations. *Id.* at 6. Further, the Agency argues that the award is inconsistent with 5 C.F.R. § 351.201(b) because the Arbitrator found that the Agency should have reassigned the employees to the new, vacant positions, even though the RIF regulation does not require an agency to fill vacant positions. *Id.* at 6-7.

In addition, the Agency contends that the award is contrary to management's rights under § 7106(a)(1) and (2) of the Statute. *Id.* at 7. The Agency argues that the award "deprives management of its discretion to decide size, composition and location of the workforce." *Id.* at 7-9. The Agency also claims that the award violates purported management rights "to manage its available funds within current budget constraints[,]" *id.* at 9, and "to conduct the RIF according to OPM regulations[,]" *id.* at 10.

Regarding its essence contention, the Agency asserts that the CBA incorporates management's rights and OPM regulations that do not require the Agency to fill vacant positions in a RIF. *Id.* at 6-8. The Agency argues that, by finding that the Agency should have reassigned the riffed grievants to the new, vacant positions, the award not only violates management's rights and 5 C.F.R. § 351.201(b), but also fails to draw its essence from the comparable provisions of the CBA. *Id.* In addition, the Agency argues that Article 31 of the CBA cannot be interpreted to require the Agency to fill all vacant positions, because "[t]hat is not the language of Article 31." *Id.* at 7; *see also id.* at 8.

B. Union's Opposition

The Union contends that the award is not contrary to 5 U.S.C. § 5363(e). Opp'n at 9-10. The Union argues that the Agency intentionally did not reassign the grievants at the time of the RIF to the lower-graded positions to deprive the grievants of grade and pay retention to which they are entitled under RIF regulations. *Id.* at 9. The Union cites

4. The relevant text of 5 U.S.C. § 5363 is set forth in the appendix.

5. The text of 5 U.S.C. § 2105(a) is set forth in the appendix.

6. The relevant portion of 5 C.F.R. § 351.201 provides:

> (b) This part does not require an agency to fill a vacant position. However, when an agency, at its discretion, chooses to fill a vacancy by an employee who has been reached for release from a competitive level for one of the reasons in paragraph (a)(2) of this section, this part shall be followed.

7. Although the Agency cites 5 U.S.C. § 1302, Exceptions at 2, 4, 11, it does not explain how the award violates that provision.

case law in which the Merit Systems Protection Board (MSPB) has enforced a contractual provision requiring the filling of vacant positions in a RIF. *Id.*

Further, the Union contends that the award is not contrary to 5 C.F.R. § 351.201(b). *Id.* at 10-12. The Union argues that there is nothing in OPM regulations that precludes parties from agreeing to include in their collective bargaining agreements a requirement that an agency fill a vacant position during a RIF. *Id.* at 10-11. The Union repeats its assertion that the MSPB has enforced such contractual provisions. *Id.* at 11.

Next, the Union rejects the Agency's contention regarding the Arbitrator's interpretation of Article 31. *Id.* at 11-12, 16. The Union argues that the Arbitrator properly interpreted Article 31 to require the Agency to fill vacant positions in a RIF.

In addition, the Union contends that the Agency's arguments that the award is contrary to management's rights under § 7106(a) of the Statute are not properly before the Authority under § 2429.5 of the Authority's Regulations. *Id.* at 13. The Union claims that these arguments could have been, but were not, presented to the Arbitrator. *Id.*

IV. Preliminary Matter

The Agency contends that the award is contrary to management's rights under § 7106(a)(1) and (2) of the Statute. Exceptions at 7. The Agency argues that the award "deprives management of its discretion to decide size, composition and location of its workforce." *Id.* at 7-9. The Agency also claims that the award violates its purported management rights to "manage its available funds within current budget constraints[,]" *id.* at 9, and to "conduct the RIF according to OPM regulations[,]" *id.* at 10. The Union contends that the Agency's management's rights arguments are not properly before the Authority under § 2429.5 of the Authority's Regulations. Opp'n at 13.

The Authority's Regulations that were in effect when the Agency filed its exceptions provided that "[t]he Authority will not consider . . . any issue, which was not presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5.[8] Under § 2429.5, the Authority will not consider any issue that could have been, but was not, presented to the arbitrator. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008) (*Customs & Border Prot., JFK Airport*).

There is no evidence in the record that the Agency raised its management rights arguments before the Arbitrator. Award at 3; Exceptions, Attach. 1, Agency's Opening Submission and Argument; Exceptions, Attach. 2, Agency's Response. Moreover, the record reflects that the Agency could have made these arguments below. The Union presented its claim to the Arbitrator that the Agency should have reassigned the grievants to the new, vacant positions. Award at 2. The Agency was therefore on notice of the reassignment issue to which the Agency now objects on management rights grounds. Consequently, the Agency could have presented its management rights arguments to the Arbitrator, but did not. Accordingly, the Authority dismisses this exception under § 2429.5. *See Customs & Border Prot., JFK Airport*, 62 FLRA at 417 (Authority will not consider arguments raised for the first time in exceptions).

V. Analysis and Conclusions

A. The award is not contrary to law.

The Agency contends that by ordering grade and pay retention, the award is contrary to law. Exceptions at 4. 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.*

Grade and pay retention have a specific statutory foundation. 5 U.S.C. §§ 5361-5365 govern the administration of grade and pay retention. In addition, Congress has, in 5 U.S.C. § 5365, authorized OPM to prescribe regulations governing

8. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including 5 C.F.R. § 2429.5, were revised effective October 1, 2010. *See* 75 Fed. Reg. 42,283 (2010). As the Agency's exceptions in this case were filed before that date, we apply the prior Regulations.

the administration of grade and pay retention in circumstances beyond those specifically addressed in §§ 5361-5365.

As relevant here, an employee is entitled to grade and pay retention when "as a result of [RIF] procedures" an employee is placed in a position "which is in a lower grade than the previous position . . . ." 5 U.S.C. § 5362(a)(1); *see also* 5 U.S.C. § 5363; 5 C.F.R. §§ 536.201(a) & 301(a). "[RIF] procedures" are defined as "procedures applied in carrying out any [RIF] due to reorganization, due to lack of funds or curtailment of work, or due to any other factor . . . ." 5 U.S.C § 5361(7). An employee who has a break in service of one workday or more is not eligible for grade and pay retention. 5 U.S.C. § 5363(e). Under applicable regulations, an agency is not required to fill a vacant position in a RIF. 5 C.F.R. § 351.201(b). However, "an agency, at its discretion [may] choose[] to fill a vacancy by an employee who has been reached" in a RIF. *Id.*

1. The award is not contrary to 5 U.S.C. §§ 5363(e) and 2105.

The Agency contends that the remedy of grade and pay retention is inconsistent with 5 U.S.C. §§ 5363(e) and 2105. Exceptions at 4.

The Agency asserts that, under 5 U.S.C. § 5363(e), an employee who has a break in service of one workday or more is not eligible for grade and pay retention. The Agency argues that the award is inconsistent with 5 U.S.C. § 5363(e) because the grievants had a break in service of one or more days when they began their new positions as a consequence of their terminations. Further, relying on 5 U.S.C. § 2105, the Agency asserts that, under 5 U.S.C. § 5363(e), grade and pay retention is limited to an individual who is a federal employee. The Agency argues that the award is inconsistent with 5 U.S.C. § 5363(e) because the grievants were not federal employees within the meaning of § 2105 when they began their new positions following their terminations. *Id.*

With regard to saved grade and pay, the Arbitrator ordered the Agency to "pay the grievants at the grade of their old positions for two years from the date of their placement in the new [lower-graded] seasonal maintenance positions." Award at 4. However, the Arbitrator did not specify how the parties were to implement the remedy. Instead, the Arbitrator returned the matter to the parties to "meet and attempt to agree on how the [grade and pay retention] remedy . . . is to be implemented." *Id.* at 5. Moreover, the Agency does not claim that the award requires it to take particular personnel actions that are contrary to law or regulation, or that it is impossible to implement the remedy in a manner consistent with legal requirements. *See generally* OPM Guide to Processing Personnel Actions, ch. 3, subch. 2-2(a)(3) (discussing OPM's instructions on cancelling personnel actions and taking retroactive personnel actions "to implement," inter alia, "an arbitral award").

Accordingly, because the Agency's argument fails to take account of actions the Agency might take to lawfully implement the award, the argument fails to demonstrate that the award is contrary to 5 U.S.C. §§ 5363(e) and 2105.

For the foregoing reasons, we deny this exception.[9]

2. The award is not contrary to 5 C.F.R. § 351.201(b).

The Agency contends that the award is inconsistent with an OPM RIF regulation, 5 C.F.R. § 351.201(b), that OPM issued pursuant to 5 U.S.C. § 1302. Exceptions at 4-7. The Agency makes two arguments.

The Agency argues that the award is inconsistent with 5 C.F.R. § 351.201(b) because the Arbitrator

[9] Chairman Pope agrees with the decision to deny this exception but does not join in the majority's reasoning for doing so. In this regard, it is true enough that, as the majority states, "the Arbitrator did not specify how the parties were to implement the remedy." Majority Op. at 6. However, as the Arbitrator clearly awarded grade and pay retention, Chairman Pope would find that the lack of specificity as to "how" the award should be implemented is not relevant to the Agency's claim that the award is contrary to §§ 5363(e) and 2105. Addressing that issue, Chairman Pope would reject the Agency's claim -- that the grievants had a legitimate break in service -- on the grounds that: (1) the Arbitrator effectively found that the break in service was not legitimate because the Agency should have reassigned the grievants prior to that break; and (2) there is no dispute that, had the grievants been reassigned, they would have received grade and pay retention. In short, but for the Agency's contractual violation, the grievants would have received grade and pay retention. In these circumstances, the remedy is not contrary to law. *Cf. U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 62 FLRA 4, 7-8 (2007) (awards of overtime compensation warranted despite fact that employees did not actually work, where failure to work was due to agency's contract violation).

found that the Agency erred when it conducted the RIF, even though the Agency complied with all RIF regulations. *Id.* at 6. The Agency's contention is based on a misunderstanding of the award. The Arbitrator did not find that the Agency violated RIF regulations. Rather, the Arbitrator found that the Agency violated the CBA. Award at 3-4. Because this Agency argument neither addresses the Arbitrator's finding of a contract violation, nor asserts that the CBA is inconsistent with the cited regulation, the argument does not provide a basis for finding the award deficient as contrary to law.

Further, the Agency argues that the award is inconsistent with 5 C.F.R. § 351.201(b) because the Arbitrator found that the Agency should have reassigned the employees to the new, vacant positions, even though the RIF regulation does not require an agency to fill vacant positions. Exceptions at 5-7. The Agency's reliance on 5 C.F.R. § 351.201(b) is misplaced. Although 5 C.F.R. § 351.201(b) does not require an agency to fill a vacant position with an employee who has been reached for release in a RIF, the regulation also does not bar an agency from taking such an action. Indeed, the regulation specifically recognizes that "an agency, at its discretion [may] choose[] to fill a vacancy by an employee who has been reached for release" in a RIF. 5 C.F.R. § 351.201(b). Thus, the regulation does not preclude parties from entering into an agreement that obligates an agency to fill a vacant position in such circumstances. *See U.S. Dep't of Navy, U.S. Marine Corps*, 56 FLRA 265, 266 (2000) (where an agency has discretion under applicable law and regulation over a matter affecting conditions of employment, agency is obligated under Statute to exercise that discretion through bargaining unless governing law or regulation specifically requires that only agency may exercise that discretion). In this case, the award concludes that the Agency failed to exercise discretion that it possessed consistent with its valid contractual obligations. Therefore, the Agency's contention that the award is inconsistent with 5 C.F.R. § 351.201(b) because the Arbitrator found that the Agency should have reassigned the grievants does not provide a basis for finding the award deficient.

For the foregoing reasons, we deny this exception.

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

The Agency argues that the award fails to draw its essence from the CBA. 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 Agency asserts that the CBA incorporates management's rights and OPM regulations that do not require the Agency to fill vacant positions in a RIF. Exceptions at 5, 6-7. The Agency argues that, as the award violates management's rights and the referenced RIF regulations, the award also fails to draw its essence from the CBA. *Id.* at 8. As discussed previously, the Agency's management's rights arguments are not properly before the Authority. In addition, as also discussed, the award is not contrary to 5 C.F.R. § 351.201(b). Consistent with those conclusions, the Agency has not established that the award fails to draw its essence from the CBA for these reasons.

In addition, the Agency argues that Article 31 of the CBA cannot be interpreted to require the Agency to fill all vacant positions because "[t]hat is not the language of Article 31." *Id.* at 7; *see also id.* at 8. As pertinent here, Article 31 states that "management officials . . . should seek 'to avoid the necessity of entering' into a RIF action." Award at 3 (quoting Article 31). The Arbitrator concluded that the Agency violated Article 31 when it separated the grievants from employment through a RIF instead of reassigning them to the new, lower-graded positions that the Agency had just created. *Id.* at 3-4.

The Agency does not demonstrate that the Arbitrator's finding that the Agency violated Article 31 when it riffed the grievants rather than reassign them fails to draw its essence from the CBA. In this connection, nothing in the language of Article 31 precludes such an interpretation. Further, the

Agency does not explain why the Arbitrator should be barred from interpreting the provision. *See, e.g.*, *AFGE, Council 220*, 65 FLRA 596, 599-600 (2011) ("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.'" (quoting *U.S. Dep't of Labor (OSHA)*, 34 FLRA at 576)). Finally, the Agency does not explain why the Arbitrator's interpretation is irrational, unfounded, implausible, or evidences a manifest disregard of the CBA. Therefore, the Agency has not established that the award fails to draw its essence from the CBA for this reason.

For the foregoing reasons, we deny this exception.

VI. Decision

The Agency's exceptions are dismissed in part and denied in part.

APPENDIX

Article 31 provides, in pertinent part:

> Section 1. Policy
>
> Through careful planning and use of other administrative techniques, to the extent it determines practicable and in the public interest, management officials at all organizational levels should seek to avoid the necessity of entering into a formal reduction-in-force (RIF) action. Management will conduct a RIF only when the release is necessary for the reasons specified in OPM regulations, 5 CFR, which includes lack of work, shortage of funds, insufficient personnel ceilings, reorganizations, reclassification due to a change in duties, or the exercise of reemployment rights or restoration rights. Office of Personnel Management (OPM) regulations will be observed by Management and the Union in carry out their responsibilities throughout the RIF process. The provisions of this Article will apply to all RIF or transfer of function actions affecting unit employees under 5 CFR.

Award at 2.

The relevant portion of 5 U.S.C. § 5363 provides:

> (e) This section shall not apply, or shall cease to apply, to an employee who . . . (1) has a break in service of 1 workday or more . . . .

5 U.S.C. § 2105(a) provides, in pertinent part:

> (a) For the purpose of this title, "employee," except as otherwise provided by this section or when specifically modified, means an officer and an individual who is--
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> (1) appointed in the civil service by one of the following acting in an official capacity--
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> (A) the President;
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> (B) a Member or Members of Congress, or the Congress;
>
> (C) a member of a uniformed service;
>
> (D) an individual who is an employee under this section;
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> (E) the head of a Government controlled corporation; or
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> (F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;
>
> (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
>
> (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.