68 FLRA No. 21

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY AVIATION AND
MISSILE RESEARCH DIVISION
REDSTONE ARSENAL, ALABAMA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1858
(Union)

0-AR-5009

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DECISION

December 10, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

Arbitrator Jerome J. La Penna found that the Agency violated the parties' collective-bargaining agreement during the selection process for a position. As remedies, the Arbitrator directed the Agency to promote a particular employee (the grievant) to the position and to pay the grievant backpay.

The questions before the Authority are whether the remedies are contrary to law because they: (1) do not satisfy the requirements of the Back Pay Act (the Act);[1] and (2) violate management's right to select under § 7106(a)(2)(C) of the Federal Service Labor-Management Relations Statute (the Statute)[2] by not being reasonably related to the contractual violations and the harm being remedied. The Arbitrator did not make explicit findings regarding a causal connection between the Agency's unjustified or unwarranted personnel action and the harm suffered by the grievant, as required by the Act, and we are unable to determine whether the Arbitrator credited certain evidence cited by the Union. Consequently, we remand to the parties for resubmission to the Arbitrator for further findings regarding the basis for the award. And because we are remanding the award, it is premature to address whether the award violates management's right to select.

II. Background and Arbitrator's Award

The grievant applied for a promotion, but the Agency did not select him. The Union filed a grievance on his behalf, and the grievance went to arbitration.

At arbitration, the parties did not stipulate to an issue, and the Arbitrator did not frame one. However, the Arbitrator stated that the grievance alleged that the Agency violated Article 29 of the agreement, titled "Merit Promotion," and specifically, Section 4G, which sets forth how interviews are to be conducted and used when making selections for positions.[3] The pertinent wording of Section 4G is set forth below.

The Arbitrator found that, in this case, the Agency used two steps to make a selection for the position at issue. First, a three-person panel assigned points to applicants' resumes using a matrix created by the selecting official and approved by the Agency's human-resources department (the resume step). Second, a panel interviewed the eight applicants whose resumes scored sixty-nine points or higher (the interview step). The Arbitrator found that the parties agreed that the resume step was worth a maximum of 130 points and the interview step was worth a maximum weight of ten points.

According to the Arbitrator, there was no dispute that the grievant scored eighty-nine points on the resume step. The Arbitrator noted that the selectee originally scored forty points on the resume step, which the Agency adjusted upward to seventy points several days later. The Arbitrator stated that no explanation was given for the adjustment. The Arbitrator made no findings regarding the other six applicants.

The Arbitrator found that, during the interview step, the Agency violated the selection procedures set forth in Article 29 of the agreement. According to the Arbitrator, the Agency violated Article 29, Section 4G(3)H because the interview panel consisted of only the selecting official and his supervisor, instead of three members, as Article 29, Section 4G(3)H requires. In addition, the Arbitrator found that the Agency violated Section 4G(3), which provides that interviews "will not be used to test the candidates" and "should not be given undue weight," but "should be combined with the results of other evaluation factors."[4] Specifically, the Arbitrator found that the Agency violated Section 4G(3) by

[1] 5 U.S.C. § 5596.
[2] *Id.* § 7106(a)(2)(C).
[3] Award at 1.
[4] *Id.* at 1-2.

choosing the selectee "based almost[,] if not totally[,] on the interview scores,"[5] and there was no evidence that the selecting official considered any "other" evaluation criteria, such as the scores from the resume step.[6]

The Arbitrator directed the Agency to remove the selectee and retroactively promote the grievant to the position. The Arbitrator also awarded the grievant backpay.

The Agency filed exceptions to the Arbitrator's award. The Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusions

A. We are unable to determine whether the award is contrary to the Act.

The Agency argues that the award is contrary to the Act.[7] An arbitrator may award backpay under the Act only if he or she finds that an agency has committed an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of an employee's pay, allowances, or differentials.[8] The Agency did not file an essence exception challenging the Arbitrator's finding of a contractual violation. And a contractual violation is an unjustified or unwarranted personnel action under the Act.[9] Thus, this requirement of the Act is satisfied.

The Agency argues that the Arbitrator made no finding that its unjustified or unwarranted personnel action resulted in a reduction of the grievant's pay, allowances, or differentials.[10] Specifically, the Agency contends that the Arbitrator made no finding that, but for the Agency's violation of the parties' agreement, the grievant would have been selected for the position.[11]

The Union argues that the Arbitrator implicitly found that the grievant would have been selected because specific references to the resume and interview scores in the award indicate that the Arbitrator "reviewed the evaluation factors that were submitted by the [parties] into the record."[12] Moreover, the Union claims that "objective data" in the record – the score sheets containing the scores from the resume and interview steps[13] – demonstrate that the grievant "would have been the highest-scoring candidate" based on a combination of the resume and interview scores.[14]

Where an arbitrator fails to make an explicit finding of the causal connection required under the Act, the Authority has stated that "the absence of such language will not be dispositive if the requisite finding of a causal connection is otherwise apparent."[15] However, the Authority has declined to find the required causal connection where, for example, an arbitrator's findings did not include *any* commentary on why the grievant was best qualified for the position,[16] or on what would have happened had the agency not violated the negotiated selection procedures.[17] In this case, the Arbitrator made no findings as to how the grievant – or the rest of the applicants – would have scored if the interviews had been conducted in accordance with the parties' agreement and the interview scores had been properly adjusted to reflect the weight agreed to by the parties.[18] As such, we are unable to determine whether the Arbitrator evaluated the evidence cited by the Union in its opposition. And because the Arbitrator made no explicit finding that the grievant would have been selected, but for the Agency's violations, we are unable to determine whether the award is consistent with the Act.

When the Authority is unable to determine whether an award is contrary to law, the Authority remands the award for further findings by the arbitrator.[19] Consistent with this principle and the discussion above, we remand the case to the parties for resubmission to the Arbitrator, absent settlement, for further findings regarding the basis of the backpay award.

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[5] *Id.* at 9-10.
[6] *Id.* at 11-12.
[7] Exceptions at 4.
[8] *AFGE, Local 3627*, 66 FLRA 207, 209 (2011) (citing *U.S. Dep't of HHS*, 54 FLRA 1210, 1218-19 (1998)).
[9] *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 105 (2012) (*IRS*) (citation omitted).
[10] Exceptions at 4.
[11] *Id.* at 4-5.
[12] Opp'n at 9.
[13] *Id.* at 10 (citing *id.*, Attach., Ex. 5 at 1, 18, 22-23).
[14] Opp'n at 10.
[15] *AFGE, Local 31*, 41 FLRA 514, 518 (1991).
[16] *See, e.g., SSA, Office of Hearings & Appeals, Orlando, Fla.*, 54 FLRA 609, 613-14 (1998) (stating that the arbitrator's finding that the grievant was qualified to do the job for which she applied was insufficient to show that he found that, but for the agency's violation, she would have been selected); *U.S. Dep't of HHS, Family Support Admin., Wash., D.C.*, 42 FLRA 347, 350, 357-58 (1991) (finding no implicit causal connection despite the arbitrator's findings that the agency had violated the parties' agreement and that the selectee was no more qualified than the grievant).
[17] *U.S. Dep't of VA, Cleveland Reg'l Office, Cleveland, Ohio*, 59 FLRA 248, 251 (2003).
[18] Award at 6.
[19] *See, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 66 FLRA 978, 980 (2012).

B. It is premature to determine whether the award violate management's right to select under § 7106(a)(2)(C) of the Statute.

The Agency asserts that the Arbitrator's remedy directing a retroactive promotion of the grievant (the promotion remedy) violates management's right to select[20] under § 7106(a)(2)(C) of the Statute.[21] According to the Agency, its failure to follow the interview procedures in the agreement is not "sufficient to negate management's right to select the best[-]qualified candidate" from among the eight candidates.[22] The Agency maintains that the promotion remedy "is not reasonably related to the severity of the error" because: (1) the number of interview-panel members is not related to the selection of the candidate, and (2) any improper weighting of the interview harmed all applicants equally, not just the grievant.[23] The Agency argues that a proper remedy would have been for the Arbitrator to "either determine[] who was the best qualified of all the candidates, or remand[] back to the Agency to re-run the selection process in compliance with the terms of the parties' agreement."[24]

The Union does not dispute that the award affects a management right, but claims that the Arbitrator was enforcing the agreement.[25] The Union concedes that "if the improper [interview] panel was the only violation . . . found, a retroactive promotion would not be a remedy that is reasonably related to the violation."[26] According to the Union, the promotion remedy is "most related" to the "greater violation" of the agreement – the Agency's alleged failure to combine the interview scores with the "other evaluation factors" – because the grievant was the highest-scoring candidate overall when the interview and resume scores were combined.[27] The Union argues that the Arbitrator found that the only evaluation criteria used by the Agency were the interview scores, and that he "used his remedial authority" to craft an award that was "clearly related" to the Agency's failure to combine the scores from each step of the selection process.[28]

When a party alleges that an arbitrator's award is contrary to a management right under § 7106(a) of the Statute,[29] the Authority first assesses whether the award affects the exercise of the asserted right.[30] If the Authority determines that the award affects the right, or it is undisputed that the award affects the right,[31] then the Authority examines, as relevant here, whether the award provides a remedy for a contract provision negotiated under § 7106(b).[32] The Authority places the burden on the party arguing that the award is contrary to a management right to allege not only that the award affects a right under § 7106(a), but also that the contract provision being enforced is not the type of contract provision that falls within § 7106(b) of the Statute.[33] An award enforcing a contract provision will not be found deficient absent a claim that the provision was not negotiated under § 7106(b) of the Statute[34] or a claim that the arbitrator applied a provision negotiated under § 7106(b) in a way that is not reasonably related to that provision and the harm being remedied.[35]

Here, there is no claim that the contract provisions enforced by the Arbitrator do not fall within § 7106(b) of the Statute. Rather, the Agency argues that the promotion remedy is not reasonably related to the Agency's violations of Article 29, Section 4G. As discussed in Section III.A., above, in fashioning the remedies, the Arbitrator made no explicit finding that the grievant would have been selected but for the Agency's contractual violations. We are remanding regarding the remedy issue under the Act so that the Arbitrator can address the issue of whether, but for the Agency's contractual violations, the grievant would have been selected. If, on remand, the Arbitrator finds the necessary causal connection as required by the Act, then the promotion remedy would be reasonably related to the contractual provisions violated and the harm to be remedied because both involve selection.[36]

On remand, the Arbitrator may make findings that will clarify how the promotion remedy relates to the violations found. Given this, we find that it is premature for us to resolve, at this time, whether the remedies are

[20] Exceptions at 5.
[21] 5 U.S.C. § 7106(a)(2)(C).
[22] Exceptions at 6.
[23] *Id.*
[24] *Id.*
[25] Opp'n at 2-3.
[26] *Id.* at 14.
[27] *Id.*
[28] *Id.* at 15.
[29] 5 U.S.C. § 7106(a).
[30] *U.S. EPA*, 65 FLRA 113, 115 (2010) (*EPA*) (Member Beck concurring).
[31] *See, e.g.*, *IRS*, 67 FLRA at 105; *U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Louisville Dist., Louisville, Ky.*, 66 FLRA 426, 428 (2012).
[32] *EPA*, 65 FLRA at 115.
[33] *E.g.*, *U.S. DHS, U.S. CBP*, 66 FLRA 634, 638 (2012) (stating that without an allegation that the contract provision was not negotiated under § 7106(b), "management-rights exceptions fail as a matter of law").
[34] *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 107 (2010) (Chairman Pope concurring in part).
[35] *Id.*
[36] *See SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 603 (2014) (Member Pizzella dissenting).

reasonably related to the violated provisions and the harm being remedied.[37]

While the dissent cites *SSA*[38] in support of its argument that the *only* appropriate remedy would be for the Arbitrator to direct the Agency to rerun the selection process,[39] that decision does not support the dissent's contention. In *SSA*, the Authority held, in part, that the remedy chosen by the arbitrator to rectify the agency's contractual violation (failing to give the grievant priority consideration in accordance with a prior arbitration award), was not contrary to law insofar as it required the agency to remove the selectees and rerun the selection process.[40] Contrary to the dissent's assertion, the Authority did not hold in *SSA* that, as a matter of law, "where an agency fails to properly run a selection process, as required by the parties' agreement,"[41] the *only* available remedy is to direct the agency to rerun the selection. Thus, *SSA* does not support finding that, as a matter of law, the Arbitrator's remedy is deficient.

IV. Decision

We remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further findings and clarification of the basis of the award, consistent with this decision.

Member Pizzella, dissenting:

I disagree with the majority insofar as they conclude that it is "premature"[1] to declare the Arbitrator's award contrary to law. I would conclude that the Arbitrator's award is contrary to management's right to select from "properly ranked and certified candidates for promotion."[2] I also do not agree that, even if a remand was appropriate, the Arbitrator has any authority to determine whether the grievant was the most-qualified candidate and to direct the Agency to select him to Lead Aerospace Engineer. That is a right that is specifically reserved for the Agency under 5 U.S.C. § 7106(a)(2)(C).

The majority mischaracterizes the Agency's arguments in two respects.

First, my colleagues mistakenly infer that the Agency did not "challenge[]" Arbitrator Jerome La Penna's finding of a "contractual violation."[3] Stuck in a proverbial catch-22, the Agency argued that "the Arbitrator's factual findings *were incorrect* [because] the Agency did not use the interview results disproportionately." But, in order to argue that Arbitrator La Penna's award is contrary to law, the Agency had no choice but to reluctantly *acquiese* to the Authority's harsh precedent that "factual matters . . . disputed before the Arbitrator . . . present no basis for exception," so it *could argue* that Arbitrator La Penna's award is contrary to law.[4] In other words, the Agency deferred to the Authority's precedent, on this point, but it never agreed that it violated the parties' agreement in how it used the interview results. That is an important distinction. Recognizing Authority precedent is not the same as not "challenging"[5] an Arbitrator's erroneous finding.

Second, my colleagues also mistakenly assert that the "Agency argues that a proper remedy"[6] for a violation of the "interview procedures [provided for] in the agreement" is "either"[7] for the Arbitrator to "determine the best-qualified candidate or [to] remand back . . . to rerun the selection process with the interview-step deficiencies corrected."[8] Contrary to that assertion, the Agency specifically argues that "the Arbitrator's remedy *does not relate* to the contractual violations"[9] and "*must be set aside or modified to direct a*

[37] *E.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Allenwood, Pa.*, 65 FLRA 996, 1001 (2011); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Terre Haute, Ind.*, 58 FLRA 327, 330 (2003) (explaining that when an issue is dependent on findings made on remand, addressing that issue prior to the remand would be premature and an advisory opinion).
[38] 58 FLRA 739 (2003).
[39] Dissent at 8.
[40] *SSA*, 58 FLRA at 741-42.
[41] Dissent at 8.

[1] Majority at 6.
[2] 5 U.S.C. § 7106(a)(2)(C)(i).
[3] Majority at 3.
[4] Exceptions at 2.
[5] Majority at 4.
[6] *Id.* at 5.
[7] *Id.*
[8] *Id.* at 4.
[9] Exceptions at 6 (emphasis added).

re-running of the [selection] process that is in compliance with the terms of the parties' agreement."[10]

In this respect, the Agency hits the nail on the head – insofar as Arbitrator La Penna ordered the Agency to retroactively promote the grievant to the position of Lead Aerospace Engineer position – the award is contrary to law. The only remedy that could possibly be appropriate, for the purported violations encountered in the selection process, is to correct those deficiencies and to rerun the selection process itself.

The right to select from "properly ranked and certified candidates for promotion"[11] is a right that belongs solely and exclusively to the Agency, and no one else, including AFGE, Local 1858, the Arbitrator, or, for that matter, the Federal Labor Relations Authority. In *SSA*, the Authority held that in those circumstances where an agency fails to properly run a selection process, as required by the parties' agreement, the appropriate remedy is to "rerun[] the selection action,"[12] not to direct the selection of the grievant.

I cannot agree with the majority insofar as they would permit the Arbitrator, on remand, the latitude to award a remedy that is clearly contrary to law. I am even reluctant to join my colleagues' decision to remand the matter for any purpose. As I have previously noted, I am perplexed when my colleagues are willing to "fill in the gaps that are left open" by an Arbitrator's deficient award.[13] And, it makes no more sense to me that we should remand this matter to the Arbitrator to give him a second chance to correct an Award that is so clearly contrary to law. Undoubtedly, the Arbitrator benefits from the remand, but the parties do not. They have to jointly pay for the Arbitrator's second chance to get it right. And, ultimately, taxpayers foot the bill for the entire cost.[14]

When, as here, there is just one appropriate remedy – a rerun of the selection process − a remand does nothing to "contribute[] to the effective conduct of [the government's] business"[15] or to promote "the amicable settlement[] of disputes."[16]

I would, therefore, vacate the Arbitrator's deficient award and direct the Agency to rerun the selection process in a manner that comports with the parties' agreement.[17]

On a side note, I once again disagree with my colleagues insofar as they refuse to consider the Agency's contrary-to-law argument because the Agency does not argue that "the contract provisions enforced by the Arbitrator do not fall within § 7106(b) of the [Federal Service Labor-Management Relations Statute] (the Statute)."[18] I have previously noted that the Authority's decisions in *FDIC, Division of Supervision & Consumer Protection, San Francisco Region*[19] and *U.S. EPA*[20] do not require an Agency, "in every case, no matter how inconsistent or illegal is the arbitrator's award"[21] to argue that the provision enforced by the Arbitrator "is not the type of contract provision that falls within § 7106(b) of the Statute."[22]

Thank you.

[10] *Id*. at 7 (emphasis added).
[11] 5 U.S.C. § 7106(a)(2)(C)(i).
[12] 58 FLRA 739, 743 (2003).
[13] *U.S. DHS, U.S. CBP, Brownsville, Tex*., 67 FLRA 688, 693 (2014) (Concurring Opinion of Member Pizzella).
[14] *U.S. DHS, U.S. CBP*, 67 FLRA 107, 112 (2013) (Concurring Opinion of Member Pizzella).
[15] *AFGE, Local 3571*, 67 FLRA 218, 220 (2014) (Concurring Opinion of Member Pizzella) (quoting 5 U.S.C. § 7101(a)(1)(B)).
[16] *Id*. (quoting 5 U.S.C. § 7101(a)(1)(C)).
[17] *See SSA*, 58 FLRA at 743.
[18] Majority at 5.
[19] 65 FLRA 102 (2010) (Chairman Pope concurring).
[20] 65 FLRA 113 (2010) (Member Beck concurring).
[21] *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La*., 67 FLRA 597, 605 (2014) (Dissenting Opinion of Member Pizzella).
[22] *Id*. (emphasis omitted).