Social Security Administration, Baltimore, MD and AFGE, Local 1923

Federal Labor Relations Authority

0-AR-3401; 57 FLRA No. 140; 57 FLRA 690

February 8, 2002

The FLRA denied the agency's exception to the arbitrator's decision awarding the grievant a retroactive temporary promotion with backpay and interest. However, it remanded the portion of the award finding the grievant was entitled to priority consideration for a supervisory position after determining the arbitrator needed to interpret an apparent conflict in the collective bargaining agreement. The grievant applied for two supervisory positions within the Social Security Administration. She was placed on the best qualified list for both positions. However, the agency determined other individuals were more qualified. An arbitrator found no merit in the grievant's subsequent claim she was subjected to discrimination on the basis of sex, race or protected activity. However, he found that, under the parties' CBA, the grievant was entitled to priority consideration for a supervisory position. He cited the parties' EEO and Merit Promotion articles as the basis for his decision. Furthermore, the arbitrator found the grievant was entitled, under the parties' agreement, to a retroactive temporary promotion with back pay and interest because she had been performing higher-graded work. The agency contended that awarding the grievant priority consideration after finding no discrimination was illogical. Further, the agency claimed the arbitrator's interpretation of the contract was erroneous because it failed to address a controlling provision in the CBA, and the position to which the grievant was awarded priority consideration was outside the bargaining unit. The agency also argued the award of a temporary promotion was based on nonfact because the evidence established the grievant was not performing higher-graded duties. The Authority found the arbitrator's award of a priority consideration to a non-bargaining unit position was not prohibited as a matter of law. However, the Authority found the arbitrator did not take into account a conflict between two provisions within the parties' contract. The arbitrator failed to consider a provision that limits the availability of a priority consideration to bargaining unit positions. Accordingly, the Authority set aside the arbitrator's award of priority consideration and remanded the case for an interpretation of the contract. The Authority denied the agency's exception claiming the award of a retroactive temporary promotion was deficient. In making this decision, it rejected the agency's nonfact argument, finding the issue of job duties was a factual matter that was contested during the arbitration.

Before: Cabaniss, Chair; Pope and Armendariz, Members

Decision

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Irwin Kaplan 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 found that while the Agency had not discriminated against the grievant on the basis of sex, race or protected activity as alleged, nonetheless, under the parties' agreement the grievant was entitled to priority consideration. Furthermore, the Arbitrator found that the grievant was entitled under the parties' agreement to a retroactive temporary promotion with backpay and interest. The Agency excepts to both findings.

For the following reasons, we conclude that the issue of whether the Arbitrator's award of a priority consideration is deficient cannot be resolved without additional clarification. Accordingly, we remand this portion of the award consistent with reasoning set forth below. With respect to the award of a retroactive temporary promotion with backpay, we find that the award is not deficient and we deny the Agency's exception.

II. Background

The grievant is employed by the Agency as a Prospectus Development Study Space Planner (PDS)/Master Housing Coordinator, which has been classified as a GS-12 management analyst.1 In 1999, while serving in this capacity, the grievant applied for two supervisory positions within the Agency, one as a building manager and the other as a management analyst. However, despite being placed on the best qualified list for both positions, the Agency determined that other individuals were more qualified and did not select the grievant. Subsequently, the grievant filed this grievance claiming, among other things, that her non-selection was based on either race or gender discrimination. The grievant also argued that since 1996 she was performing the same duties as a co-worker, a GS-13 management analyst, while only being compensated at the GS-12 level.

As relevant here, the parties stipulated to the following issues:

1. Whether the grievances concerning announcement numbers W-1061 and W-1062 are arbitrable as both positions are outside the bargaining unit?

2. Whether the Agency violated the National Agreement or any law, rule or regulation by discriminating against the [g]rievant on any basis in her nonselection to either vacancy announcement number W-1062 or W-1061, and if so, what is the remedy?

. . .

5. Whether the Agency assigned higher graded work to the [g]rievant without proper compensation in violation of the National Agreement or any law, rule or regulation, and if so, what is the proper remedy?

Award at 2-3.

The Arbitrator found for the Agency except as to two specific matters. First, even though the Arbitrator found that "the record failed to establish that the Agency discriminated against the grievant on the basis of race, gender or protected activities with regard to her nonselection," he awarded the grievant a priority consideration and cited to the parties' EEO and Merit Promotion articles as the basis for his action. Award at 36. Second, the Arbitrator determined that the grievant had been performing higher-graded work since January of 1999 and awarded the grievant a temporary promotion retroactive to that date.

A. Priority Consideration

In footnote 8 of his award, the Arbitrator determined that there had been an under-representation of minorities in the building manager position for which the grievant had applied; the grievant was on the best qualified list for the position; and the Agency never produced a signed or dated application for one of the employees who was selected. The Arbitrator determined that under the circumstances, the grievant was entitled to a priority consideration for a building manager or similar position pursuant to Article 18 and Article 26, Section 13 of the parties, national agreement.2

B. Temporary Promotion

The grievant argued that since 1996 she performed duties equivalent to those of a co-worker, a non-supervisory GS-13 management analyst, but was compensated only as a GS-12. The Arbitrator agreed with the grievant in part and determined that since January of 1999, the grievant had been performing "the grade-controlling duties of a GS-13." Award at 36. The Arbitrator credited the testimony of this co-worker, who testified that the grievant had performed the same complex scope of work that the co-worker routinely performed. Id. at 34. Moreover, the Arbitrator noted that the grievant was regarded as an "expert," dealt with key Agency officials, and was the backup to the co-worker. Id. at 35. The Arbitrator concluded, based on the above and the testimony of an Agency classifier, that the grievant had performed higher graded duties within the meaning of Article 26, Section 16, since 1999.3

The Arbitrator determined that based on these circumstances, the grievant had performed essentially the same higher graded work as the co-worker. Id. at 32-

36. As a result, the Arbitrator determined that the Agency had violated a non-discretionary contract provision, Article 26, Section 16, and awarded the grievant back pay with interest. Id. at 36.

III. Preliminary Matters

A. The Authority Will Not Consider Agency Attachment 5 as it is Untimely

The Union moves that a printout of an e-mail, marked by the Agency as attachment 5 and submitted with its exceptions, is evidence that should have been presented for the first time at the hearing and not on exceptions. As such, the Union argues that the document is "irrelevant, untimely, and should be STRUCK." Opposition at 2. The Agency argues that this attachment pertains to a classification audit of the grievant's position which was litigated at the hearing. Exceptions at 15.

Under § 2429.5 of the Authority's Regulations, the Authority will not consider any evidence that was not presented to an arbitrator.4United States Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tx. 56 FLRA 1057, 1068 n.12 (2001). As the Agency has not shown that this attachment was presented at the time of the hearing, the Authority will not consider this evidence in resolving this matter.

B. The Authority Will Not Dismiss the Agency's Exceptions on the Ground that it Only Submitted a Portion of the Hearing Transcript

The Union moves to dismiss the Agency's exceptions by contending that the Agency should have placed the entire transcript in the record, rather than only submitting a portion of it with its exceptions.5 Opposition at 3-4.

Under 5 C.F.R. § 2425.2, a party is required, when filing exceptions, to submit pertinent documents in support of its exceptions. However, this regulation does not require a party to submit an entire hearing transcript where it only refers to portions of the transcript in its exceptions. As the Union fails to cite a specific regulation which would require a party to submit a document in its entirety, we deny the Union's motion to dismiss.

IV. Positions of the Parties

A. Agency's Exceptions

With respect to the award of a priority consideration, the Agency contends that "[t]he Authority has upheld the principle that a grievance concerning the nonselection of a [g]rievant for a promotion to nonbargaining unit position is not arbitrable under the terms of the Parties collective bargaining agreement." Exceptions at 8. It cites Int'l Fed'n of Prof'l and Technical Engineers, Local 28,

Lewis Engineers and Scientists Ass'n, 50 FLRA 533 (1995) (Local 28); United States Dep't of the Navy, Naval Base, North Island, San Diego, Ca., 39 FLRA 647 (1991) (North Island); AFGE, Local 32, AFL-CIO, 22 FLRA 478 (1986) (AFGE, Local 32) and Nat'l Council of Field Labor Locals, AFGE, AFL-CIO, 3 FLRA 289 (1980) (Field Labor Locals), in support of this assertion.

Moreover, the Agency argues that the Arbitrator's award fails to draw its essence from the parties' agreement because Section 1 of Article 26 limits the availability of a priority consideration to bargaining unit positions. According to the Agency, the Arbitrator failed to consider this provision in concluding that a priority consideration for a supervisory position was an appropriate remedy.

The Agency also contends that the award fails to draw its essence from the parties' agreement because there was no finding of discrimination under Article 18. Exceptions at 10-11. It states that awarding a priority consideration under Article 18 after finding no discrimination is "illogical" and that finding a violation in the parties' agreement has no legal basis. Id. at 9.

Additionally, the Agency asserts that the Arbitrator's interpretation of the parties' contract was erroneous by arguing that there was no evidence as to "what, if any, specific procedures [under the contract] were violated, by the allegedly unsigned application" of the applicant hired for the position to which the grievant had applied and that the Arbitrator's conclusion that there was an under-representation of minorities in the building manager position was without basis in law or fact. Id. at 7, 9.

Further, the Agency argues that the award of a temporary promotion was based on nonfact. Id. at 11, 15. In this respect, the Agency contends that the Arbitrator ignored the testimony of the grievant's co-worker, a non supervisory GS-13 management analyst, pertaining to the scope of the co-worker's duties. Specifically, the Agency argues that based on this testimony, "the [g]rievant simply did not perform the same duties and responsibilities as [the co-worker]."Id. at 15. In making this assertion, the Agency reiterates testimony of the co-worker and that of the grievant and concludes that the Arbitrator "relied on the parts of [the grievant's] testimony that supported his determination that the [g]rievant performed higher-graded duties and ignored all of [the grievant's] testimony to the contrary."Id.

Finally, the Agency argues that "to the extent that the arbitrator based his decision on the fact that the [g]rievant's duties were equivalent to or as complex as those of another position, he is, in effect making a classification determination as to whether the [g]rievant's duties, as contained in her position description, are properly graded." Exceptions at 12. The Agency adds, "[s]uch a decision is a clear violation of 5 U.S.C. 7121(c)(5) which specifically excludes the classification of an employee's position from coverage under a negotiated grievance procedure."Id.

B. Union's Opposition

The Union asserts that the Agency's arbitrability claim lacks merit, citing Dep't of Health and Human Services, Social Security Admin., 30 FLRA 562 (1987) (SSA). Opposition at 13.

Turning to the Agency's essence argument, the Union argues that while Article 26 on its face does not apply to promotions to non-bargaining unit positions, the Arbitrator had "separate and independent grounds" in the award to grant a priority consideration. The Union argues that the Arbitrator relied on Article 18 of the parties' agreement and contends that an arbitrator has great latitude in fashioning remedies. Opposition at 10; citing United States Dep't of the Air Force, Air Force Logistics Command, Oklahoma City Air Logistics Ctr., Tinker Air Force Base, Ok., 37 FLRA 1049, 1053 (1990). It argues that the Agency is merely disagreeing with the Arbitrator's interpretation and application of the parties' agreement.

Additionally, the Union argues that the Arbitrator's interpretation of the agreement was not "irrational, unfounded, implausible, or manifests a disregard for the agreement." Opposition at 12, citing AFGE, Local 1456, 52 FLRA 94, 97-98 (1996). The Union contends that the Arbitrator found that based on a "totality" of circumstances, including under-representation and the Agency's failure to provide a signed and dated application of the applicant hired for one of the positions the grievant sought, that the grievant was entitled to a priority consideration under the parties, agreement. Id. at 13-14.

Furthermore, the Union argues that the alleged nonfacts were disputed at the hearing. Opposition at 5-6. It also argues that the Agency's contention is yet another attempt to relitigate this matter and should be accordingly denied.

Finally, with respect to the Agency's remaining exception, the Union states that "arbitrators can and will enforce provisions in negotiated agreements which require that employees assigned or detailed to higher-graded positions must be temporarily promoted to those positions." Opposition at 15; citing AFGE, Local 987, 37 FLRA 155 (1990); United States Dep't of Agriculture, Forest Serv., 35 FLRA 542 (1990); Lexington-Blue Grass Army Depot, 32 FLRA 256, 259 (1988). The Union argues that the Arbitrator determined that the grievant was "performing the grade-controlling duties" of a higher graded position. Opposition at 16. Accordingly, it argues that this matter does not concern classification.

V. Analysis and Conclusions

A. The Award of a Priority Consideration to a Non-Bargaining Unit Position is Not Deficient

We construe the Agency's initial exception, that a grievance pertaining to a non-bargaining unit position is not arbitrable, as questioning whether this matter is arbitrable as a matter of law. Section 7122(a)(1) of the Statute provides in pertinent part, that an arbitration award will be found deficient if it conflicts with any law, rule, or regulation. As the exception involves the award's consistency with law, the question of law raised by the Arbitrator's award and the Agency's exception must be reviewed de novo. NTEU, Chapter 24, 50 FLRA 330, 332 (1995) (citing United States Customs Serv. v. FLRA, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law, based on the underlying factual findings. 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.; see also Panama Canal Commission, 56 FLRA 451, 456 (2000) (applying de novo review to contrary to law exception based on the arbitrability of a grievance).

Upon review of the Agency's cited case law, however, we note that these cases concern either an arbitrator's interpretation of a specific collective bargaining agreement, or Authority findings that proposed procedures for filling non-bargaining unit positions are not mandatorily negotiable. See Local 28, 50 FLRA at 536; North Island, 39 FLRA at 648-49, AFGE Local 32, 22 FLRA at 483; Field Labor Locals, 3 FLRA at 292. With respect to our interpretation of the two later cited cases, we note that the D.C. Circuit agreed with the Authority in AFGE, Local 1012, AFL-CIO v. FLRA, 841 F.2d 1165, 1167 (D.C. Cir. 1988), that a proposal concerning the filling of a supervisory position is negotiable at the election of an agency. See also FOP, Lodge #1F, 57 FLRA 373, 380 n.13 (2001). Accordingly, the Arbitrator's award of a priority consideration to a non-bargaining unit position is not prohibited as a matter of law. Therefore, the award is not deficient on this ground.

B. After Review of the Agency's Essence Argument, the Award Needs Further Clarification

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Statute provides that the Authority apply 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). 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 United States 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.

Here, the Agency claims that the Arbitrator failed to address a controlling provision within Article 26. Specifically, it argues that under Section 1 of Article 26 a priority consideration is a remedy only available for "bargaining unit positions."6 Exceptions at 8 (setting forth language from Article 26, Section 1). It contends that the position to which the grievant is being awarded a priority consideration is outside the bargaining unit. Id. at 5.

In awarding a priority consideration for a non-bargaining unit position,7 the Arbitrator relies on Article 26, Section 13 and Article 16 of the parties' agreement. However, the Arbitrator neither sets forth the language in Article 26, Section 13, nor does he discuss the Agency's asserted conflicting language in Article 26, Section 1. Moreover, the Arbitrator does not addresses whether the remedy would be appropriate solely under Article 18 or for other reasons.

The Authority has previously found that where an interpretation of a contract provision appears to conflict with another provision within the same contract, an arbitrator must take this conflict into account. AFGE, Council 220, 54 FLRA 156, 159-60 (1998) (AFGE). Here, as in AFGE, the Arbitrator's award fails to do so. Accordingly, consistent with AFGE, this matter is remanded to the parties for resubmission to the Arbitrator, absent settlement. On remand, the Arbitrator should interpret and apply Article 26, Section 1 and Article 26, Section 13, as well as any other provisions the parties deem relevant, and take whatever action is appropriate on the basis of that interpretation and application. On remand, the Arbitrator should also explain his interpretation of Article 18. We note, in this regard, the apparent inconsistency between the Arbitrator's finding that the Agency did not discriminate against the grievant on the basis of race, gender or protected activity, and his conclusion that the Agency, at least to some extent, violated this portion of the parties' agreement.8

C. The Award of a Temporary Promotion Was Not Based an Nonfact

To establish that an award is deficient as based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. See United States Dep't of the Air Force, Lowry Air Force Base, Denver, Co., 48 FLRA 589, 593 (1993). Moreover, the Authority will not find an award deficient on the basis of an arbitrator's determination on any factual matter that the parties disputed at arbitration. United States Dep't of Health and Human Serv., Denver, Co., 56 FLRA 133, 135 (2000) (Health and Human Services).

Here, after reviewing the Agency's arguments, it is apparent that these facts, including the scope of both the grievant's and the co-worker's job duties, were contested at the hearing.9 Award at 32-36. As such, because the Authority will

not find an award deficient on the basis of an arbitrator's determination on any factual matter that the parties disputed at arbitration, the Agency's exception is denied. See Health and Human Services, 56 FLRA at 135.

D. Section 2429.5 of the Authority's Regulations Bars the Agency's Remaining Claim

Turning to the Agency's remaining contention, i.e., that the Arbitrator's award is contrary to law because he made a classification determination, the record does not show that this issue was argued before the Arbitrator as it has been in this exception. The Authority has previously determined that where an issue relates to the arbitrability of a grievance, it must be first raised before the Arbitrator as required by § 2429.5 of our Regulations. As this issue was not first raised before the Arbitrator, we are barred from considering it. See United States Dep't of the Interior, National Park Serv., Golden Gate National Recreation Area, San Francisco, Ca., 55 FLRA 193, 195 (1999).

VI. Decision

Based on the foregoing, we deny the Agency's exception claiming that the Arbitrator's award of a retroactive temporary promotion was deficient. We remand the portion of the award concerning priority consideration for action consistent with this decision.

Appendix

Article 18

Equal Employment Opportunity

Section 3

Should adverse EEO impact be evidenced pursuant to the Affirmative Employment Program Plan, specific and measurable objectives shall be set to correct the conditions. Those objectives will include but not be limited to:

A. Validating existing selection procedures or;

B. Modifying or substituting selection procedures to alleviate adverse impact.

1 The Arbitrator generally summarized the grievant's space management duties as including "planning, coordinating, exchanges of information with the components that were scheduled to move and dealing with contractors and architects." Award at 33.

2 The Arbitrator did not include the wording of Article 26, Section 13 in his award. However, the Agency states that under this section a priority consideration may be awarded where there is a "failure to properly consider the employee for selection because of procedural, regulatory, or program violation." Exceptions at 7, quoting a portion of Article 26, Section 13. The Arbitrator did set forth Article 18, Section 3, which is found in the Appendix.

3 Article 26, Section 16 reads:

Temporary Promotions

When employees are temporarily assigned to a position of a higher grade for a period in excess of 30 days, the assignment must be made via temporary promotion effective the first day of the assignment.

Award at 14.

4 5 C.F.R. 2429.5 states, "the Authority will not consider evidence offered by a party, or any issue, which was not presented in the proceedings before the. . .arbitrator."

5 The Agency supported its exceptions, in part, with selected pages of the hearing transcript. The Union does not question the authenticity of these attached pages.

6 The Agency also argues that the Arbitrator "exceeded his authority in awarding the [g]rievant a priority consideration" and that "[a]warding a priority consideration under article 18 after he specifically found no discrimination is illogical and inconsistent with well-settled case law." Exceptions at 11, 9. However, as these arguments are restatements of the Agency's essence claims, we will not address them separately.

7 See Opposition at 14 (Union acknowledgment that the award of priority consideration was for a "non-bargaining unit position.")

8 That Article, by its terms, allows for remedial action "[s]hould adverse EEO impact be evidenced pursuant to the Affirmative Employment Program Plan." Award at 13.

9 While making this argument, the Agency also states that the Arbitrator "exceeded his authority." Exceptions at 11. However, the Agency does not otherwise support this contention. Accordingly, as the exception constitutes nothing more than a bare assertion, it must be denied. See Social Security Admin., 57 FLRA 530, 537 n.16 (2001).