FEB 10 2012

BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AGENCY EXCEPTIONS TO ARBITRATION DECISION
FMCS CASE No: 03-07743

U.S. Department of Housing and

Urban Development (Agency)

And

American Federation of Government Employees

National Council of HUD Locals 222 (Union)

Arbitrator Dr. Andree McKissick

2808 Navarre Drive

Chevy Chase, MD 20815-3802

Background

The arbitrator dated the award in question (Attachment 1) January 10, 2012 and served the Parties by regular mail. There is no legible postmark. Accordingly, pursuant to Section 2425.2 of the Authority's regulations, exceptions to the award are to be served on the Authority by February 14, 2012.

ANALYSIS OF DEFICIENCIES

The arbitrator's award does not comply with the Authority's decision remanding the case, *65 FLRA NO. 90* (A-2). In that decision, the Authority's direction, in pertinent part, was to "...set

aside the remedy and remand the MA to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy." Rather than formulating one alternative remedy as ordered by the Authority, the Arbitrator rendered four potential alternative remedies each of which is deficient in its own right (A-1 pp 2-4). As the analysis contained below demonstrates, this award is *ultra vires* in that it (1) directs non-competitive promotions, (2) interferes with management rights preserved by the Federal Labor-Management Relations Statute (Statute), (3) improperly expands the authority of the arbitrator, (4) is incomplete, ambiguous and/or contradictory so as to make implementation of the award impossible and (5) does not draw its essence from the Agreement.

At the outset, it is important to note that Article 3, Section 3.01 of the Parties Agreement (Agreement) (A-3) states "In the administration of all matters covered by this Agreement, the parties are governed by existing and future laws, existing Government-wide regulations, and existing and future decisions of outside authorities binding on the Department." This is instructive, initially, with respect to the first paragraph of the arbitrator's Order in this matter. Therein, the arbitrator states that "The Agency also violated Article 13, Section 13.01, as it sought to hire external applicants, instead of promoting and facilitating the career development of internal employees...." The language of Article 13, Section 13.10 does not contain the term "promoting" which the arbitrator quotes in her order (A-1 p 2). Here, then, the arbitrator exceeded her authority as defined by the Agreement in Article 23, Section 23.10 (A-3) which states in pertinent part "The arbitrator shall not have the authority to add to, subtract from or modify any of the terms of this Agreement or any supplement thereto." The arbitrator, exceeding her authority, clearly added to the Agreement giving the reader the impression that

Article 13 requires the Agency to promote from within rather than recruit from without. Thus, the Order is deficient in that it does not draw its essence from the Agreement. Moreover, the Order is contrary to law in that it restricts managements rights under Section 7106(a)(1)(C) (i) and (ii) of the Statute to make selections for appointments from any appropriate source, which is another deficiency.

These exceptions demonstrate that the arbitrator, by issuing the Order, blatantly flaunted this Article 3, Section 3.01 of the Agreement, and the obligation of all arbitrators, in all cases, to honor the terms of the agreements under which they are employed.

Non-competitive Promotions: The award directs non-competitive promotions to the grievants retroactive to 2002. Each of the four alternative remedies, as demonstrated below, produces that same result (A-1 pp. 2-4). Thus it violates the Code of Federal Regulations. Transfer to a position at a higher grade or with more promotion potential than a position previously held on a permanent basis in the competitive service can only be done via competitive procedures pursuant to 5 C.F.R. Section 335.103(c)(v) (A-4). The record demonstrates, as admitted by the arbitrator, that the grievants in this case never held a position higher than the GS-12 level (A-5 pp. 8-9, 12-13, 15-16). Thus, the award conflicts with applicable Federal regulations. The Authority will find an award deficient if it is contrary to law, rule or regulation or on other grounds similar to those applied by Federal courts in private sector labor relations cases. *Defense Mapping Agency and NFFE Local 1827, 43 FLRA No. 14 (1991).* (A-6) In light of the foregoing, the award cannot be allowed to stand.

Alternative Remedy #1: This requires the placement of employees into existing, but unidentified, career ladder positions with promotion potential to the GS-13 level without competition. As noted above, this remedy violates the Code of Federal Regulations (A-4). The Authority will find an award deficient if it is contrary to law, rule or regulation or on other grounds similar to those applied by Federal courts in private sector labor-management relations. *Delaware National Guard and Assn. Of Civilian Technicians, 5 FLRA No. 9 (1981)* (A-7)

Alternative Remedy #2: This directs the grievants to be selected for unidentified vacancies for which they applied and given retroactive grade increases (A-1 p 3). This aspect of the Order, read in conjunction with the arbitrator's defined class of grievants (A-1 p 4) equates to nothing but nonsense. The defined class of grievants is "All bargaining unit employees in a position in a career ladder (including at the journeyman level), where that career ladder lead to a lower journeyman grade than the journeyman (target) grade of a career ladder of a position with the same job series , which was posted between 2002 and present. This includes BUE's (sic) in positions referenced in Joint Exhibits 2, 3, 4, 7G and Union Exhibits 1 and 9." This definition expands the class to an undefined scope beyond employees occupying positions referenced in the record. Neither does the record nor the arbitrator in this matter identify the employees who applied for the positions with GS-13 promotion potential. In her original decision, the arbitrator identified only three employees who applied for the positions with greater promotion potential (A-5 pp 12-13). Thus, this alternative remedy is incomplete to the extent

that it makes implementation of the award impossible. *Delaware National Guard supra.* (A-7) Accordingly, this alternative remedy is deficient.

Alternative Remedy #3: This remedy directs the Agency to set aside selections for positions it made in 2002 and rerun all of the vacancies which were found to have been in violation of the CBA between 2002 and the present. Again, the vacancy announcements are not identified, and, again, the arbitrator exceeded her authority. Here, the arbitrator directs that the original selections be set aside. She did not find, however, that the original selectees could not have been selected if the Agency had followed proper procedures. Thus, the arbitrator exceeded her authority, and, accordingly, this alternative remedy is deficient. *U.S. DOL Mine Safety and AFGE Local 2519, 40 FLRA No.76 (1991).* (A-8)

Alternative Remedy #4: This alternative remedy is nothing more than a reiteration of Alternative Remedy #1. The direction to place unidentified affected BUE's (sic) into unclassified position descriptions is a distinction without a difference in regard to Alternative Remedy #1. It must be noted that both Alternative Remedy #1 and Alternative Remedy #2 direct the placement of employees into positions with greater promotion potential than that for which they ever competed. The only distinction, which is not a difference, is that #1 directs placement into existing career ladder positions while #2 directs the Agency to establish positions and promote employees. As noted above, this is a violation of the Code of Federal Regulations and renders both remedies deficient. The additional deficiency of Alternative

Remedy #4 is that it violates management's rights to determine the organization, numbers, types and grades of positions under Section 7106(a)(1) and (b)(1) of the Statute.

Lastly, the arbitrator exceeded her authority by resolving an issue not before her. The issue in question was an alternative remedy to her initial remedy in this matter which the Authority found to be contrary to law. (A-2) The arbitrator went well beyond that scope, and ordered the Agency to stop advertising positions that require employees to take downgrades to secure greater promotion potential characterizing such as a "constructive demotion". It is well established that an arbitrator exceeds his or her authority by, among other things, resolving an issue not submitted to arbitration. *INS and AFGE, 43 FLRA No. 73 (1992).* (A-9) The Authority's Order referenced nothing regarding the issuance of prospective vacancy announcements by the Agency. Moreover, the concept of "constructive demotion" is nonexistent in Federal Sector personnel law/labor-management relations and the arbitrator cites no authority for creating that alien notion. In this regard, it must be noted that employees must apply for such lower graded positions, and, in so doing seek voluntary downgrades. Accordingly, it must be concluded that the arbitrator based this portion of her award on a nonfact. Thus, this aspect of the arbitrator's Order is deficient and cannot stand. This part of the Order is also based on a nonfact since Agency employees who apply for and are placed in positions at a lower grade in order to acquire greater promotion potential are always granted the "maximum payable rate", and, thus, are never "constructively demoted". *5 C.F.R.531.221-223* (A-10)

CONCLUSION

The foregoing analysis clearly demonstrates that the Order and "Alternative" remedies issued by the arbitrator are replete with deficiencies and must be overturned. Specifically, the arbitrator rendered four remedies while the Authority directed that she only render one. The arbitrator directed non-competitive promotions, in violation of the Code of Federal Regulations. The Order herein interferes with management's reserved rights under the Statute, and the arbitrator improperly expanded her authority by adding to the Parties' Agreement, and deciding an issue which was not before her. Lastly, the Order is incoherent to the extent that its implementation is impossible and did not draw its essence from the Agreement.

In light of the above, the Agency requests that the Authority vacate the Order and multiple remedies issued by the arbitrator in their entirety and order this case finally closed.

Respectfully Submitted,

Norman Mesewicz
Agency Representative

AGENCY EXECPTIONS TO ARBITRATION DECISION
FMCS CASE NO: 03-07743

CERTIFICATE OF SERVICE

I hereby certify that copies of the Agency Exceptions to the above-captioned arbitration decision were served on this 10th day of February 2012, upon the following in the manner indicated:

By Us Mail:

Gina K. Grippando
Chief, Office of Case Intake and Publication
Federal Labor Relations Authority
1400 K Street, NW Suite 201
Washington, DC 20424-0001

Michael J Synider, Esq.
Ari Taragin, Esq.
Snider & Associates, LLC
104 Church Lane, Suite 100
Baltimore, MD 21208

Carolyn Federoff, Esq., Executive Vice President
AFGE Council 222
108 Ashlaud Street
Melrose, MA 02176

Dr. Andree McKissick, Arbitrator
2808 Navarre Drive
Chevy Chase, MD 20815-3802

Norman Mesewicz

Norman Mesewicz,
Agency Representative

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of Arbitration:	
U.S. DEPARTMENT of HOUSING and URBAN DEVELOPMENT	**Re: Fair and Equitable Remedy**
and	**FMCS No: 03-07743**
AMERICAN FEDERATION of GOVERNMENT EMPLOYEES, AFL-CIO	**Remanded from: 59 FLRA 630 65 FLRA 90**

Remanded for Remedy: Dr. Andrée Y. McKissick, **ARBITRATOR**

APPEARANCES:

For Management:
Norman Mesewicz, Deputy Director, LER
James Reynolds, Deputy Director
U.S. Dept. of Housing & Urban Development
451 7th Street, SW
Washington, D.C. 20410

For Union:
Michael Snider, Esquire
Jason I. Weisbrot, Esquire
Jacob Y. Statman, Esquire
Snider & Associates
104 Church Lane, Suite 100
Baltimore, MD 21208

Carolyn Federoff, Esquire, Former President
AFGE Council 222
108 Ashlaud Street
Melrose, MA 02176

DATE OF REMEDY ORDERED: **January 10, 2012**

RE: Article 23, Section 11 of the Agreement between U.S. Department of Housing and Urban Development and American Federation of Government Employees AFL-CIO, effective 1998-present. Exceptions: Where exception is taken to an arbitration award and the Federal Labor Relations Authority (FLRA) sets aside all or a portion of the award, the arbitrator shall have the jurisdiction to provide alternative relief, consistent with the FLRA decision. The arbitrator shall specifically retain jurisdiction where exceptions are taken and shall retain such jurisdiction until the exception is disposed.

PREFACE

Since a settlement was not reached by the parties, this Arbitrator is now formulating an alternative remedy as directed by 65 FLRA, No. 90, dated January 26, 2011.

ORDER

Having read and reviewed all prior submissions of the parties, and FLRA rulings, in light of this Arbitrator's prior findings and rulings, including that the Agency violated Article 4, Sections 4.01 and 4.06. These Grievants were unfairly treated and were unjustly discriminated against, that the Agency violated Article 9, Section 9.01, as classification standards were not fairly and equitably applied. The Agency also violated Article 13, Section 13.01, as it sought to hire external applicants, instead of promoting and facilitating the career development of internal employees, and that but for these violations. The Grievants would have been selected for currently existing career ladder positions with promotion potential to the GS-13 level (See Merits Award (MA) at 15). This Arbitrator finds that all of the below are appropriate remedies and that, if the FLRA finds that any are not appropriate, the next numbered remedy shall apply, and therefore this Arbitrator hereby ORDERS:

1. That the Agency process retroactive permanent selections of all affected BUE's into currently existing career ladder positions with promotion potential to the GS-13 level. Affected BUE's shall be processed into positions at the grade level which they held at the time of the violations noted in my prior findings, and (if they met

time-in-grade requirements and had satisfactory performance evaluations), shall be promoted to next career ladder grade(s) until the journeyman level. The Agency shall process such promotions within thirty (30) days, and calculate and pay affected employees all back pay and interest due since 2002.

2. In the alternative, and only in the event the FLRA vacates ORDER No. 1 above, and pursuant to my finding that "but for" the Agency's violations, the Grievants would have been selected for the subject vacancy for which they applied, this Arbitrator ORDERS that the Agency retroactively select the affected GS-12 employees into the subject vacant career ladder positions with retroactive grade increases. The Agency shall process such selections within thirty (30) days, and calculate and pay affected employees all back pay and interest due since 2002.

3. In the alternative, and only in the event the FLRA vacates ORDER No. 1 and 2 above, this Arbitrator hereby ORDERS that the violative Agency selections from 2002 to present be set aside, that the Agency provide each Grievant with one priority consideration and that the Agency must re-run all of the vacancies which were found to have been in violation of the CBA between 2002 and the present. The Agency should process such selections within sixty

(60) days, and calculate and pay affected employees all back pay and interest due since 2002.

4. In the alternative, and only in the event the FLRA vacates ORDER No. 1, 2 and 3 above, that the Agency retroactively place all affected BUE's into an unclassified position description identical to those of the newly hired current GS-13 employees, which accurately reflects their duties from 2002 to present, and then this Arbitrator ORDERS the Agency to classify and grade those PD's, retroactively placing the Grievants in them effective 2002, with back pay and interest.

The Agency is hereby ORDERED to stop advertising positions in a way that requires current employees to take downgrades in order to secure greater promotion potential. Such action was termed constructive demotion (See MA at 13 and 14). This portion of the Order does not apply to non-status vacancy announcements.

The Class of Grievants subject to the Remedy addressed herein is defined as follows: All Bargaining unit employees in a position in a career ladder (including at the journeyman level), where that career ladder lead to a lower journeyman grade than the journeyman (target) grade of a career ladder of a position with the same job series, which was posted between 2002 and present. These include BUE's in positions referenced in Joint Exhibits 2, 3, 4, 7G and Union Exhibits 1 and 9. Pursuant to Article 23, Section 11

of the Agreement, this Arbitrator hereby retains jurisdiction to provide alternative relief, in the event that any relief provided is found to be inconsistent with law or otherwise not available, and if this decision is set aside or in whole or in part on that basis.

This Arbitrator retains jurisdiction over an award of Attorney Fees upon petition by the Union, which shall be entertained within a reasonable time following receipt of this Award. The Agency shall have a reasonable opportunity to respond.

IT IS SO ORDERED

Date: January 10, 2012

ARBITRATOR

Cc: Michael J. Snider, Esq.
Jason I. Weisbrot, Esq.
Jacob Y. Statman, Esq.
Snider & Associates, LLC
Counsel for the Union

Norman Mesewicz, Deputy Director, LER
Counsel for the Agency

Carolyn Federoff, EVP
AFGW Council 222
Union Representative

FLRA.GOV
Federal Labor Relations Authority

United States Department of Housing and Urban Development (Agency) and American Federation of Government Employees, National Council of HUD Locals 222 (Union)

65 FLRA No. 90

UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL OF HUD LOCALS 222
(Union)

0-AR-4586

DECISION

January 26, 2011

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 Andrée Y. McKissick 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 Union filed a grievance alleging that the Agency violated the parties' agreement by failing to promote the grievants. See U.S. Dep't of Hous. & Urban Dev., 59 FLRA 630, 630 (2004) (HUD). In her merits award (the MA), the Arbitrator sustained the grievance and awarded an "organizational upgrade" to the grievants. MA at 16. For the reasons that follow, we set aside the remedy and remand the MA to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency's advertising and filling of certain positions with promotion potential to General Schedule (GS)-13 deprived employees occupying similar positions with promotion potential to GS-12 of the opportunity to be promoted to GS-13. HUD, 59 FLRA at 630. In response, the Agency asserted, as relevant here, that the grievance was not arbitrable under §|7121(c)(5) of the Statute because it concerned the classification of positions.[1] Id. The parties proceeded to arbitration on the stipulated issue of arbitrability, and the Arbitrator issued an award (First Arbitrability Award, or First AA) finding that the grievance involved "the fairness of advertisements and vacancy announcements, not the proper classification of a position and one's concurrent duties." Id. (citing First AA at 6) (internal quotation marks omitted). Therefore, the Arbitrator found that the grievance was arbitrable.

The Agency filed exceptions to the First AA, and, in HUD, the Authority found that the Agency presented a plausible jurisdictional defect that warranted interlocutory consideration of the exceptions – namely, whether the grievance concerned classification, under §|7121(c)(5) of the

Statute. 59 FLRA at 631. However, the Authority could not determine whether the Arbitrator had found that the grievance concerned "reclassifying the grievants' permanent positions" or "reassigning the grievants to . . . newly-established, already-classified positions[.]" Id. at 632 (emphases added). The Authority stated that the "distinction between the two [findings] is critical because the Arbitrator: (1) would not have jurisdiction over a grievance concerning the promotion potential of employees' permanent positions; but (2) would have jurisdiction over a grievance alleging a right to be placed in previously-classified positions." Id. Accordingly, the Authority remanded the First AA for resubmission to the Arbitrator for clarification of the arbitrability issue. Id. On resubmission, the Arbitrator clarified that she found the "grievance [to be] alleging a right to be placed in previously-classified positions [with promotional potential to GS-13] and . . . thus arbitrable." Second Arbitrability Award (Second AA) (Opp'n, Attach., Ex. 2) at 1; see also id. at 6, 8.[2]

Thereafter, the Arbitrator issued the MA, which resolved the grievance's merits. In that award, the Arbitrator first recounted her earlier finding that the "grievance was arbitrable, as [it] was based upon the right to be placed in previously classified positions." MA at 2. She then stated that the issues for resolution in the MA were: "Whether the Agency violated the [c]ollective [b]argaining [a]greement [(CBA)], [l]aw[, r]ule, or other regulation [by] fail[ing] to treat bargaining unit employees fairly and equitably [at the time it] post[ed] vacancy announcement[s for newly-created positions] . . . until the present? If so, what are the appropriate remedies?" Id. at 3.

Because the Agency did not disclose information, including vacancy announcements, that the Arbitrator had previously directed it to provide to the Union, the Arbitrator drew an adverse inference against the Agency regarding the advertising and selection for newly-created positions with promotion potential to GS-13. Id. at 10-11. The Arbitrator also found that the Agency failed to rebut Union witnesses' testimony that "they were told by their supervisors that their applications to various [advertised, newly-created] positions would be destroyed, or not considered, and they should not apply." Id. at 12. Therefore, the Arbitrator concluded that the "evidence supports the Union's case that the [g]rievants were . . . not considered for selections [and were] dissuaded from applying" for positions with promotion potential to GS-13. Id. at 15.

The Arbitrator concluded that "but for these inequitable and unfair situations . . . , these affected positions [sic] should have been promoted to the journeyman level to GS-13 retroactively . . . ." Id. at 15. The Arbitrator found that the Agency's actions violated the following provisions of the CBA: (1) Article 4, Sections 4.01 and 4.06, "as these [g]rievants were unfairly treated and were unjustly discriminated against[;]" (2) Article 9, Section 9.01, "as classification standards were not fairly and equitably applied[;]" and (3) Article 13, Section 13.01, as the Agency "sought to hire external applicants, instead of promoting and facilitating the career development of internal employees." MA at 15. As for the appropriate remedy, the Arbitrator directed "an organizational upgrade of affected positions by upgrading the journeyman level for all the subject positions to [the] GS-13 level retroactively [.]" Id. at 16.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that, by requiring an "organizational upgrade" of the grievants' positions, the award improperly: (1) classifies positions, in violation of law; (2) awards promotions, in violation of applicable regulations; (3) interferes with management's rights under the Statute; (4) exceeds the authority of the Arbitrator; and (5) violates the CBA. Exceptions at 2. According to the Agency, because the award directs "[t]he elevation of the grade of a position[,]" it "by definition[] requires [the position's] reclassification[,]" contrary to law. Id. at 2, 3 n.1. In addition, the Agency argues that the award provides the grievants with noncompetitive promotions, contrary to 5 C.F.R. §§335.103(c)(1)(v).[3] Id. at 3. Further, the Agency contends that the award "prohibits the Agency from removing duties from the positions encumbered by the grievants" and, consequently, violates its statutory rights to "determine its organization, assign work, and determine the grades of employees assigned to its organization." Id. at 4 (citing 5 U.S.C. §§7106(a), (b)(1)). [4] Moreover, the Agency contends that the award is deficient because the Arbitrator assumed classification authority that she did not possess under law or the CBA. See id. at 2-3 (citing CBA Art. 23, §§23.10(2) (Exceptions, Attach. 3 at 121)).[5] Finally, the Agency asserts that the award grants noncompetitive promotions in violation of the CBA. Id. at 3-4 (citing CBA Art. 13, §§13.09 (Exceptions, Attach. 3 at 58-59) (describing the application process "[t]o be considered for a vacancy")).

B. Union's Opposition

The Union asserts that the exceptions ignore the Arbitrator's clear statement that the MA determined "whether the bargaining unit employees were treated unfairly and inequitably with regard to already classified vacant positions[.]" Opp'n at 7 (citing MA). In this regard, the Union contends that the "remedy does not require [the] reclassification of employees presently at the GS-12 level, but rather [requires] that the Agency promote or reassign bargaining unit employees to the already classified positions."[6] Id. at 8. The Union argues that the remedy can be viewed as "direct[ing] the Agency to permanently[,] retroactively promote all affected [employees] into currently existing career ladder positions[.]" Id. at 16. In addition, the Union argues that an "organizational upgrade" will "remedy the Agency's failure to give the bargaining unit employees . . . proper consideration at the time of the competitive hiring/promotion actions." Id. at 11; see also id. at 9. In the alternative, the Union argues that the awarded "organizational upgrade can also be viewed as an accretion of duties, a valid and lawful remedy." Id. at 11. Finally, the Union contends that the award "is silent as to the prospective treatment of bargaining unit employees[,]" and, thus, does not violate management's rights by prohibiting the Agency from "removing duties from positions encumbered by bargaining unit employees[.]" Id. at 15.

IV. Analysis and Conclusions

The Agency argues that the award is contrary to law because it requires the reclassification of positions. 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.

The Authority has repeatedly held that where the essential nature of a grievance concerns the grade level of the duties assigned to and performed by the grievant in his or her permanent position, the grievance concerns the classification of a position within the meaning of §7121(c)(5) of the Statute. E.g., U.S. Dep't of Labor, Wash., D.C., 64 FLRA 829, 830 (2010) (citing U.S. EPA, Region 2, 61 FLRA 671, 675 (2006) (EPA)); SSA, Balt., Md., 20 FLRA 694, 694-95 (1985). In addition, a grievance concerns classification within the meaning of §7121(c)(5) if it contends that the grievant's permanent position warrants a change in its journeyman level or promotion potential. U.S. Dep't of Labor, 63 FLRA 216, 218 (2009) (DOL) (citing HUD, 59 FLRA at 632). In contrast, "a disputed failure to promote a grievant under a competitive procedure . . . does not concern classification matters." U.S. Dep't of the Air Force, Air Educ. & Training Command, Randolph Air Force Base, San Antonio, Tex., 49 FLRA 1387, 1389 (1994); see also U.S. Dep't of the Army, Fort Campbell, Ky., 37 FLRA 1102, 1107, 1109 (1990).

Where an exception alleges that a grievance or award concerns classification in violation of §7121(c)(5), the Authority may analyze both the nature of the grievance and the nature of the award – including the awarded remedy – in order to determine whether the award is contrary to law. E.g., U.S. Dep't of Veterans Affairs, Med. Ctr., Muskogee, Okla., 47 FLRA 1112, 1117 (1993); U.S. Dep't of Agric., Agric. Research Serv., E. Reg'l Research Ctr., 20 FLRA 508, 509 (1985). In this regard, an award may be contrary to law because it concerns classification within the meaning of §7121(c)(5) based on the remedy. See U.S. Envtl. Prot. Agency, Region 2, 59 FLRA 520, 524-25 (2003) (EPA, Region 2).

In response to the Authority's decision in HUD, the Arbitrator found that the grievants "alleg[ed] a right to be placed in previously-classified positions [.]" Second AA at 1. The Arbitrator identified the previously-classified positions at issue as those newly-created positions – similar to the grievants' positions – with promotion potential to GS-13, and the Arbitrator credited the grievants' unrebutted testimony that they were "told by their supervisors that their applications to [these] various positions would be destroyed, or not considered, and they should not apply." MA at 12. The Arbitrator concluded that, "but for these inequitable and unfair situations[,]" the grievants would have been promoted to positions with GS-13 potential. Id. at 15. These findings support the Arbitrator's determination that the grievance was arbitrable because it did not concern classification within the meaning of § 7121(c)(5).

However, the remedy chosen by the Arbitrator – directing the Agency to perform an organizational upgrade of affected positions by upgrading the journeyman level for all the subject positions to GS-13 retroactively – involves classification. MA at 16 (emphases added); see DOL, 63 FLRA at 218; cf. EPA, Region 2, 59 FLRA at 525 (finding "substance of the grievance . . . [was not] barred by §7121(c)(5)[,]" but setting aside award, in part, because remedial directions concerned classification, in part). In this regard, although the Arbitrator found that the grievance involved "previously-classified positions[,]" Second AA at 1, her remedy directs the Agency to reclassify the grievants' existing positions by raising their journeyman level. As the Authority stated in HUD, the Statute does not authorize the Arbitrator to change the "promotion potential of employees' permanent positions[.]" HUD, 59 FLRA at 632. Moreover, although the Union asserts that a permanent-promotion remedy based on an accretion of duties to the grievants' positions would not involve classification within the meaning of § 7121(c)(5), the Authority has held to the contrary. See, e.g., EPA, 61 FLRA at 675 (citing AFGE, Local 2142, 61 FLRA 194, 196 (2005)). For these reasons, the Arbitrator's remedy is contrary to law because it concerns classification matters, and we set it aside.

In cases where the Authority sets aside an entire remedy, but an arbitrator's finding of an underlying violation is left undisturbed, the Authority remands the award for determination of an alternative remedy. See, e.g., U.S. Dep't of Transp., FAA, Salt Lake City, Utah, 63 FLRA 673, 676 (2009). As we have set aside the MA's entire remedy, we remand the MA to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.[7]

V. Decision

For the foregoing reasons, we set aside the remedy and remand the MA to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.

[1]. Under § 7121(c)(5) of the Statute, a grievance concerning "the classification of any position which does not result in the reduction in grade or pay of an employee" is excluded from the scope of the negotiated grievance procedure. 5 U.S.C. § 7121(c)(5).

[2]. The Agency filed exceptions to the Second AA, but the Authority's Office of Case Intake and Publication dismissed them as untimely filed. See MA at 2.

[3]. 5 C.F.R. § 335.103 provides, in pertinent part:

(c) Covered personnel actions--

(1) Competitive actions. Except as provided in paragraphs (c)(2) and (3) of this section, competitive procedures in agency promotion plans apply . . . to the following actions:

. . . .

(v) Transfer to a position at a higher grade or with more promotion potential than a position previously held on a permanent basis in the competitive service . . . .

5 C.F.R. § 335.103(c)(1)(v).

[4]. The Agency notes that management's rights are incorporated into the CBA, and, therefore, the Agency argues that the award's alleged violations of management's rights contravene both the Statute and the CBA. See Exceptions at 4 (citing CBA Art. 3, §3.06 (Exceptions, Attach. 3 at 7) (CBA provisions restating 5 U.S.C. §7106(a)-(b)).

[5]. Article 23, Section 23.10(2) of the CBA provides, in relevant part, "The Arbitrator shall not have authority to add to, subtract from, or modify any of the terms of th[e CBA], or any supplement thereto." Exceptions, Attach. 3 at 121 (CBA Art. 23, §23.10(2)).

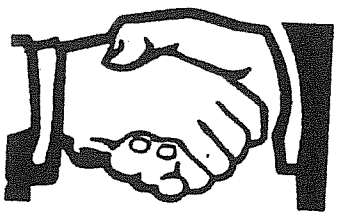
[6]. According to the Union, "[t]his exact same remedy was addressed in the [parties' m]emorandum of [u]nderstanding, where the Agency agreed to the reassignment of employees to reclassified positions." Opp'n at 8.

[7]. Because the Agency's remaining exceptions challenge the remedy that we set aside, they are moot, and we do not address them.

Agreement

between
U.S. Department of Housing
and Urban Development

and
American Federation of
Government Employees
AFL-CIO



A-3

ARTICLE 3
RIGHTS AND OBLIGATIONS OF THE PARTIES

Section 3.01 - Governing Authorities. In the administration of all matters covered by this Agreement, the parties are governed by existing and future laws, existing Governmentwide regulations, and existing and future decisions of outside authorities binding on the Department.

Section 3.02 - Rights of Union Recognition. The Union is the exclusive representative of the employees in the unit and is entitled to act and contract for all employees in the unit. The Union is responsible for representing the interests of all employees in the bargaining unit without discrimination and without regard to labor organization membership. Management shall fulfill any bargaining obligations imposed by law. Soliciting of membership in the Union is internal Union business and is prohibited on official time.

Section 3.03 - Union Presence at Formal Discussions.

(1) The Civil Service Reform Act of 1978 provides that the Union shall be informed of and be entitled to be present at "all formal discussions"[1] between one (1) or more representatives of Management and one (1) or more unit employees, or their representatives, concerning any grievance, personnel policies and practices, and other general conditions of employment. Consistent with the Act, Management will not communicate directly with employees regarding conditions of employment in a manner which under the law will improperly bypass the Union. The Union representative may participate and ask questions, as appropriate.

(2) Meetings held for the purpose of making a statement or announcement and not to engender a dialogue, if they meet the Federal Labor Relations Authority (FLRA) criteria, are formal discussions. It is not necessary that a meeting propose or result in a change in working conditions or personnel policies or practices to be considered a formal meeting. In a number of case decisions, the FLRA has noted several factors relevant to a determination of whether discussions are formal. These factors are:

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[1] In formal discussions, the Union representative may participate and ask questions, as appropriate. In this instance "participate" means the right to comment, speak and make statements.

ARTICLE 13
MERIT PROMOTION AND INTERNAL PLACEMENT

Section 13.01 - General. This Article sets forth the merit promotion and internal placement policy and procedures to be followed in staffing positions within the bargaining unit. The parties agree that the provisions of this Article shall be administered by the parties to ensure that employees are evaluated and selected solely on the basis of merit in accordance with valid job-related criteria. Management agrees that it is desirable to develop or utilize programs that facilitate the career development of the Department's employees. To that end, Management shall consider filling positions from within the Department and developing bridge and/or upward mobility positions, where feasible, to help promote the internal advancement of employees.

Section 13.02 - Equal Employment Opportunity. The parties agree that the staffing of all positions within the bargaining unit shall be accomplished without regard to political, religious, or labor organization affiliation or nonaffiliation, marital status, race, color, sex, national origin, nondisqualifying disability or age.

Section 13.03 - Definitions. The following words and phrases shall have the meanings indicated for the purposes of the application of this Article:

(1) **Position Change.** A promotion, demotion, or reassignment made during an employee's continuous service within the Department.

(2) **Promotion.** The change of an employee, while serving continuously within the Department:

(a) To a higher grade when both the old and new positions are under the General Schedule or under the same type graded wage schedule; or

(b) To a position with a higher rate of pay when both the old and the new positions are under the same type ungraded wage schedule, or in different pay method categories.

(3) **Demotion.** The change of an employee, while serving continuously within the Department:

(a) To a lower grade when both the old and the new positions are under the General Schedule or under the same type graded wage schedules; or

and per diem shall be paid for one (1) witness if the incident giving rise to the grievance occurs at a location other than the location of the hearing.

(4) Either party may request the sequestration of any witness or witnesses during the testimony of other witnesses.

(5) Either party may purchase a stenographic record. If such transcript is agreed by the parties to be, or in appropriate cases determined by the arbitrator to be, the official record of the proceeding, it must be made available to the arbitrator. The total cost of such a record shall be shared equally by those parties that order copies. If only one (1) party orders and purchases a copy of the transcript, it shall be provided to the arbitrator. However, the transcript shall be made available to the other party for inspection for accuracy following the submission of post-hearing briefs.

Section 23.10 - Authority of the Arbitrator.

(1) The parties agree that the jurisdiction and authority of the arbitrator shall be confined to the issue(s) presented in the grievance.

(2) The arbitrator shall not have authority to add to, subtract from, or modify any of the terms of this Agreement, or any supplement thereto. In the case of a back-pay award based on an employee having been affected by an unjustified or unwarranted personnel action, the arbitrator may authorize reasonable attorney's fees in accordance with standards contained in the Back-Pay Act, as amended by the Civil Service Reform Act of 1978, and as interpreted by the Merit Systems Protection Board (MSPB).

(3) Except for decisions to discipline, an arbitrator shall lack authority to determine the appropriateness of a Management decision to exercise any of the rights set forth in Article 3, Section 3.07, which do not amount to a violation of applicable law, regulation, or this Agreement.

(4) An arbitrator shall lack authority to determine the legality or regulatory correctness of any Management decision not impacting personnel policies, practices or matters affecting general conditions of employment.

(5) The arbitrator shall resolve any arbitrability disputes consistent with this Agreement.

5 CFR 335.103 - Agency promotion programs.

Code of Federal Regulations - Title 5: Administrative Personnel

Updated to: January 01, 2011

Linked as: http://cfr.vlex.com/vid/335-103-agency-promotion-programs-19601556

Text

Title 5: Administrative Personnel

CHAPTER I: OFFICE OF PERSONNEL MANAGEMENT

SUBCHAPTER B: CIVIL SERVICE REGULATIONS

PART 335: PROMOTION AND INTERNAL PLACEMENT

Subpart A: General Provisions

335.103 - Agency promotion programs.

(a) Merit promotion plans. Except as otherwise specifically authorized by OPM, an agency may make promotions under ? 335.102 of this part only to positions for which the agency has adopted and is administering a program designed to insure a systematic means of selection for promotion according to merit. These programs shall conform to the requirements of this section.

(b) Merit promotion requirements?(1) Requirement 1. Each agency must establish procedures for promoting employees which are based on merit and are available in writing to candidates. Agencies must list appropriate exceptions, including those required by law or regulation, as specified in paragraph (c) of this section. Actions under a promotion plan?whether identification, qualification, evaluation, or selection of candidates?shall be made without regard to political, religious, or labor organization affiliation or nonaffiliation, marital status, race, color, sex, national origin, nondisqualifying physical handicap, or age, and shall be based solely on job-related criteria.

(2) Requirement 2. Areas of consideration must be sufficiently broad to ensure the availability of high quality candidates, taking into account the nature and level of the positions covered. Agencies must also

ensure that employees within the area of consideration who are absent for legitimate reason, e.g., on detail, on leave, at training courses, in the military service, or serving in public international organizations or on Intergovernmental Personnel Act assignments, receive appropriate consideration for promotion.

(3) Requirement 3. To be eligible for promotion or placement, candidates must meet the minimum qualification standards prescribed by the Office of Personnel Management (OPM). Methods of evaluation for promotion and placement, and selection for training which leads to promotion, must be consistent with instructions in part 300, subpart A, of this chapter. Due weight shall be given to performance appraisals and incentive awards.

(4) Requirement 4. Selection procedures will provide for management's right to select or not select from among a group of best qualified candidates. They will also provide for management's right to select from other appropriate sources, such as reemployment priority lists, reinstatement, transfer, handicapped, or Veteran Recruitment Act eligibles or those within reach on an appropriate OPM certificate. In deciding which source or sources to use, agencies have an obligation to determine which is most likely to best meet the agency mission objectives, contribute fresh ideas and new viewpoints, and meet the agency's affirmative action goals.

(5) Requirement 5. Administration of the promotion system will include recordkeeping and the provision of necessary information to employees and the public, ensuring that individuals' rights to privacy are protected. Each agency must maintain a temporary record of each promotion sufficient to allow reconstruction of the promotion action, including documentation on how candidates were rated and ranked. These records may be destroyed after 2 years or after the program has been formally evaluated by OPM (whichever comes first) if the time limit for grievance has lapsed before the anniversary date.

(c) Covered personnel actions?(1) Competitive actions. Except as provided in paragraphs (c)(2) and (3) of this section, competitive procedures in agency promotion plans apply to all promotions under ? 335.102 of this part and to the following actions:

(i) Time-limited promotions under ? 335.102(f) of this part for more than 120 days to higher graded positions (prior service during the preceding 12 months under noncompetitive time-limited promotions and noncompetitive details to higher graded positions counts toward the 120-day total). A temporary promotion may be made permanent without further competition provided the temporary promotion was originally made under competitive procedures and the fact that might lead to a permanent promotion was made known to all potential candidates;

(ii) Details for more than 120 days to a higher grade position or to a position with higher promotion potential (prior service during the preceding 12 months under noncompetitive details to higher graded positions and noncompetitive time-limited promotions counts toward the 120-day total);

(iii) Selection for training which is part of an authorized training agreement, part of a promotion program, or required before an employee may be considered for a promotion as specified in ? 410.302 of this chapter;

(iv) Reassignment or demotion to a position with more promotion potential than a position previously held on a permanent basis in the competitive service (except as permitted by reduction-in-force regulations);

(v) Transfer to a position at a higher grade or with more promotion potential than a position previously

held on a permanent basis in the competitive service; and

(vi) Reinstatement to a permanent or temporary position at a higher grade or with more promotion potential than a position previously held on a permanent basis in the competitive service.

(2) Noncompetitive actions. Competitive procedures do not apply to:

(i) A promotion resulting from the upgrading of a position without significant change in the duties and responsibilities due to issuance of a new classification standard or the correction of an initial classification error; and

(ii) A position change permitted by reduction-in-force procedures in part 351 of this chapter.

(3) Discretionary actions. Agencies may at their discretion except the following actions from competitive procedures of this section:

(i) A promotion without current competition of an employee who was appointed in the competitive from a civil service register, by direct hire, by noncompetitive appointment or noncompetitive conversion, or under competitive promotion procedures for an assignment intended to prepare the employee for the position being filled (the intent must be made a matter of record and career ladders must be documented in the promotion plan);

(ii) A promotion resulting from an employee's position being classified at a higher grade because of additional duties and responsibilies;

(iii) A temporary promotion, or detail to a higher grade position or a position with known promotion potential, of 120 days or less;

(iv) Promotion to a grade previously held on a permanent basis in the competitive service (or in another merit system with which OPM has an interchange agreement approved under ? 6.7 of this chapter) from which an employee was separated or demoted for other than performance or conduct reasons;

(v) Promotion, reassignment, demotion, transfer, reinstatement, or detail to a position having promotion potential no greater than the potential of a position an employee currently holds or previously held on a permanent basis in the competitive service (or in another merit system with which OPM has an interchange agreement approved under ? 6.7 of this chapter) and did not lose because of performance or conduct reasons; and

(vi) Consideration of a candidate not given proper consideration in a competitive promotion action.

(vii) Appointments of career SES appointees with competitive service reinstatement eligibility to any position for which they qualify in the competitive service at any grade or salary level, including Senior-Level positions established under 5 CFR Part 319?Employment in Senior-Level and Scientific and Professional positions.

(d) Grievances. Employees have the right to file a complaint relating to a promotion action. Such complaints shall be resolved under appropriate grievance procedures. The standards for adjudicating complaints are set forth in part 300, subpart A, of this chapter. While the procedures used by an agency to identify and rank qualified candidates may be proper subjects for formal complaints or grievances, nonselection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance. There is no right of appeal of OPM, but OPM may conduct

investigations of substantial violations of OPM requirements.

[59 FR 67121, Dec. 29, 1994, as amended at 63 FR 34258, June 24, 1998; 70 FR 72067, Dec. 1, 2005]

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of Arbitration:	]	
U.S. DEPARTMENT of HOUSING and URBAN DEVELOPMENT	]	
and	]	**FMCS No: 03-07743**
AMERICAN FEDERATION of GOVERNMENT EMPLOYEES, AFL-CIO	]	

OPINION AND AWARD: Dr. Andrée Y. McKissick, **ARBITRATOR**

APPEARANCES:

For Management:

Walter C. Vick Jr., Labor Relations Specialist
Joann T. Robinson, Esquire
U.S. Dept. of Housing & Urban Development
451 7th Street, SW, Room 2150
Washington, D.C. 20410

For Union:

Michael Snider, Esquire
Ari Taragin, Esquire
Snider & Associates
104 Church Lane, Suite 100
Baltimore, MD 21208

Carolyn Federoff, Esquire, Former President
AFGE Council 222
108 Ashlaud Street
Melrose, MA 02176

DATES AND PLACE OF HEARING:

July 15, 2008 and August 28, 2008
U.S. Dept. of Housing and Urban Development
451 7th Street, SW, Room 2150
Washington, D.C. 20410

POST-HEARING BRIEFS:

December 1, 2008

PROCEDURAL POSTURE

The Union filed this grievance on November 13, 2002. The Agency denied this grievance based upon its position that it was not arbitrable pursuant to § 7121 (c) (5) of the Federal Service Labor Management Statute. Subsequently, this grievance was submitted to arbitration on the sole issue of arbitrability. At that juncture, this Arbitrator found that the subject matter of this grievance, based upon the failure to treat employees fairly and equitably, to be arbitrable on June 23, 2003.

The Agency filed exceptions to this Award the same day. The Federal Labor Relations Authority (FLRA) remanded the Award to the parties and ordered that it be resubmitted to this Arbitrator for clarification of the jurisdictional issue on February 11, 2004. The Union's request for a hearing was granted. It was held on June 23, 2006, where additional evidence and arguments were made. On June 24, 2007, this Arbitrator clarified the Award on remand. This Arbitrator found that this grievance was arbitrable, as the grievance was based upon the right to be placed in previously classified positions. In addition, this Arbitrator ruled that there were several possible remedies pursuant to Section 22.11 of the Agreement, consistent with the FLRA's decision.

The record further reflects that on March 1, 2007, the Agency filed exception to the January 24, 2007 Award. On March 22, 2007, the Union filed an Opposition to the Agency's Exceptions. Subsequently, the FLRA issued a Show Cause Order as to why the Agency's Exceptions should not be dismissed as untimely. Thereupon, the FLRA ruled that the Exceptions were untimely and dismissed them on August 3, 2007.

The Union then filed a Motion to Compel the Production of Documents on March 14, 2007, explaining the history of its request for documents commencing from October 2002. This

information request was based on 5 USC 7114, drafted by Carolyn Federoff, Esquire and then President of Council 222. The record reflects that the documents requested for the purpose of amending the grievance were not forthcoming. Instead, the Agency denied the grievance, as stated earlier, based on its position that this grievance was not arbitrable. Based upon the Motion to Compel, this Arbitrator ruled that the Agency must comply with the request for information immediately, but no later than "June 30, 2008". Since the information requested was still not forthcoming, this Arbitrator ruled that an adverse inference can be made based upon the unreleased information. The record further reflects that some documents were later released, but the information was largely insufficient. Based upon the foregoing, this current arbitration hearing was held on July 15, 2008 and continued on August 28, 2008.

STIPULATED ISSUES:

1. **Whether the Agency violated the Collective Bargaining Agreement, Law Rule, or other regulation when it failed to treat bargaining unit employees fairly and equitably in posting vacancy announcement from May 2002 until the present?**

2. **If so, what are the appropriate remedies?**

RELEVANT PROVISIONS

The central controversy of this grievance lies within the applicability of the contractual provisions of the Agreement between the U.S. Department of Housing and Urban Development and the American Federation of Government Employees (AFL-CIO) (CBA - Joint Exhibit I), effective 1998 thru present.

COLLECTIVE BARGAINING AGREEMENT
(CBA - Joint Exhibit I)

ARTICLE 4-EMPLOYEE RIGHTS/STANDARDS OF CONDUCT

Section 4.01- General. Employees have the right to direct and to pursue their private lives consistent with the standards of conduct, as clarified by this Article, without interference, coercion or discrimination by Management. Employees shall be treated fairly and equitably in the administration of this Agreement and in policies and practices concerning conditions of employment, and may grieve any matter relating to employment.

Section 4.06- Morale. Recognizing that productivity is enhanced when their morale is high, managers, supervisors, and employees shall endeavor to treat one another with the utmost respect and dignity, notwithstanding the type of work or grade of jobs held.

ARTICLE 9-POSITION CLASSIFICATION

Section 9.01- General. Classification standards shall be applied fairly and equitably to all positions. Each position covered by this Agreement that is established or changed must be accurately described, in writing, and classified as to the proper title, series, and grade and so certified by an appropriate Management official. A positions description does not list every duty an employee may be assigned but reflects those duties which are series and grade controlling. The phrase "other duties as assigned" shall not be used as the basis for the assignment to employees of duties unrelated to the principal duties of their position, except on an infrequent basis and only under circumstances in which such assignments can be justified as reasonable.

Section 9.05- Resolution of Discrepancies. Employees shall be encouraged to discuss any position description change or inaccuracy with the supervisor, who shall also maintain a continuing view of duties. Disputes involving the qualitative or quantitative value of tasks performed by the employees which affect the grading of a job may be appealed to the Department and /or other appropriate authorities. This does not preclude the filing of a grievance where the loss of a grade is involved. The following issues may be appealed through the Grievance Procedure, Article 22:

1. **Accuracy of the Official Position Description including the inclusion or exclusion of a major duty.**

2. **An assignment or detail out of the scope of normally performed duties outlined in the Official Position Description.**

3. **The accuracy, consistency, or use of agency supplemental classification guides.**

4. **The title of the position unless a specific title is authorized in a published Office or Personnel Management classification standard or guide, or title reflects a qualification requirement or authorized area of specialization.**

ARTICLE 13- MERIT PROMOTION AND INTERNAL PLACEMENT

Section 13.01- General. This Article sets forth the merit promotion and internal placement policy and procedures to be followed in staffing positions within the bargaining unit. The parties agree that the provisions of this Article shall be administered by the parties to ensure that employees are with valid job-related criteria. Management agrees that it is desirable to develop or utilize programs that facilitate the career development of the Department's employees. To that end, Management shall consider filling positions from within the Department and developing bridge and/ or upward mobility positions, where feasible, to help promote the internal advancement of employees.

ARTICLE 22- GRIEVANCE PROCEDURES

Section 22.01- Definition and Scope. This Article constitutes the sole and exclusive procedure for the resolution of grievances by employees of the bargaining unit and between the parties. This grievance procedure replaces Management's administrative procedure for employees in the bargaining unit only to the extent of those matters which are grievable and arbitrable under this negotiated Agreement. A grievance means any complaint by:

1. **Any employee concerning any matter relation to his/her employment; or**
2. **The Union concerning any matter relating to the employment of any employee; or**
3. **Any employee, the Union, or Management concerning:**
    a. **The effects or interpretation, or claim of breach, of this collective bargaining agreement; or**
    b. **Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.**

Section 22.02- Statutory Appeals. Adverse actions consist of:

1. **Reduction in grade or removal for unacceptable performance;**
2. **Removals for misconduct;**
3. **Suspensions for more than fourteen (14) days; and**
4. **Furloughs for thirty (30) days or less.**

Adverse actions may, in the discretion of the aggrieved employee, be raised under either:

1. **The appropriate statutory procedures; or**

2. **Under the negotiated grievance procedure, but not both.**

ARTICLE 3- RIGHTS AND OBLIGATIONS OF THE PARTIES

Section 3.06- Managements Rights. Nothing in this Agreement shall affect the authority of Management:

1. **To determine the mission, budget, organization, number of employees, and internal security practices of the agency; and**

2. **In accordance with applicable laws and its duty to bargain on such matters, to the extent provided by law:**

    a. **To hire, assign, direct, lay off, and retain employees in the agency; or to suspend, remove, reduce, in grade or pay; or take other disciplinary action against such employees;**

    b. **To assign work, to make determinations with respect to contracting out and to determine the personnel by which agency operations shall be conducted;**

    c. **With respect to the filling of positions, to make selections for appointments from:**

        i. **Among properly ranked and certified candidates for promotion; or**

        ii. **Any other appropriate source.**

    d. **To take whatever actions may be necessary to carry out the agency mission during emergencies.**

POSITIONS OF THE PARTIES

It is the position of the Agency that the grievance is in contravention of federal regulations as well as the collective bargaining agreement because it pertains to classification issues which did not result in the reduction in grade or pay of any employees.

Specifically, the Agency maintains that only the Office of Personnel Management (OPM) has the authority to classify or reclassify positions, after consultation with the Agency. The

Agency asserts that Article 13.03 (9) sets forth three modes for non-competitive promotions. Although the Union would argue that (b) of Article 13.03 (9) is applicable, the Agency retorts that the Union did not show that the Grievants performed work at a higher grade or that such higher graded work even existed at that time.

The Agency asserts that the grievance, dated November 13, 2002, lists six (6) job series and eighteen (18) vacancy announcements. However since that time, the Agency asserts that the grievance has exponentially expanded to include many more Grievants. The Agency also contends that the grievance was never amended to include these alleged additional violations, as it promised to do. Most importantly, the Agency points out that the Union never requested the sixteen (16) announcements. Thus, the Agency argues these announcements are not subject to negative inferences, as the Union urges. The Agency admits that four (4) of the announcements requested by the Union, that had a series of six (6) sequential even numbers, were among the documents that the Agency could not locate. However, the Agency notes that these announcements were for intern positions only, based on the numerical sequence.

The Agency stringently argues that the positions of the grieving parties were not the same as those positions listed in the 2002 vacancy announcements on the date of the grievance. That is, the Agency argues that the Union failed to show that the positions were identical in every way to the current duties, responsibilities, job descriptions, experience requirements, general qualifications, education, and level of responsibilities. Thus, the Agency reasons that the Union failed to establish its prima facie case. In addition, the Agency further asserts no substantive evidence was presented such as: classification studies, desk audits, or copies of the job announcement listed in the grievance.

Moreover , the Agency further points out that there are but four (4) areas, outlined in Article 9.05, which are classification-related issues that are grievable. However, the Agency notes that the grievance does not fall within the ambit of these delineated categories of Article 9.05 of the Agreement.

The Agency contends that promoting Grievants or increasing their non-competitive promotion potential would constitute a violation of 5 USC § 7106 (c) (5) as well as Article 3.06 of the Agreement, as both interfere with Management's right to determine the numbers, types, and grades of employees or positions within its organizational subdivisions.

In response to the remedy of retroactive promotion with back pay and interest suggested by the Union, the Agency counters that if the Arbitrator decides to sustain this grievance that a desk audit is the appropriate remedy. That is, the Agency argues that any more relief would be windfall for the Union, and would be punitive. The Agency further argues that no unwarranted personnel action has occurred here, a prerequisite for both back pay as well as attorney's fees, as the Union urges.

Lastly, the Agency points out that the Union's proposed remedy would award Grade 13 promotions without a showing that (1) the individual performed, or would perform, Grade 13 work; (2) the individual could perform Grade 13 work; or (3) there was any Grade 13 work at the individuals location. Based on all of the above, the Agency requests that the Arbitrator deny this grievance in its entirety, as the Union failed to meet its burden of proof.

On the other hand, it is the Union's position that the Agency had advertised a number of positions with a maximum grade potential of GS-13. However, in contrast, current employees who occupied these exact same positions had, and have, only a maximum potential to the GS-12 level. Specifically, the Union asserts that the Agency would hire someone at the entry level (GS-

7, 9, or 11). Subsequently, these new employees were trained and mentored by other existing employees in the same position. Nonetheless, the Union maintains that these employees who trained and mentored only had career ladder potential to the GS-12 level. However, the Union asserts that the new trainees would eventually become GS-13 employees.

In addition, the Union contends that although there were postings both internally and externally for vacancies, the internal announcements were subsequently cancelled. Thus, the Union argues that the current employees were discouraged from applying. The Union also alleges that current employees were told that their applications would be thrown out. Other current employees, the Union alleges, were told they were ineligible to apply for vacancies, but were told to train and mentor new trainees who "leapfrogged" them to become GS-13 journeyman level employees.

Another example the Union points out as being exemplary of inequitable and unfair treatment was when a vacancy announcement required that a current employee take a constructive demotion to GS-7 level with maximum career ladder potential to GS-13 level.

Still another example, the Union contends was demonstrative of unfair treatment was when a current employee was told that she was not selected for a position because she was retirement-eligible, yet she trained the actual selectees. Based upon the foregoing, the Union asserts that Articles 4.01, 4.06, 9.01, and 13.01 of the Agreement were violated.

In response to the Agency's argument regarding the Union's omission to amend this grievance, the Union counters that the Agency never presented the necessary documents that it needed to amend the grievance.

In response to the Agency's argument that the missing announcements dealt exclusively with the intern positions, the Union rebuts that is an untruthful assessment of the situation.

In addition, the Union reminds the Arbitrator of her prior adverse inference regarding the missing documents as it relates to the Union's Motion to Compel the Production of Documents on March 14, 2007. Based on the foregoing, the Union requests that this Arbitrator sustain this grievance.

In regards to the appropriate remedy, the Union offers the Arbitrator multiple creative options. However, the Union strongly asserts its right to be compensated by retroactive promotions with back pay and interest. The Union also concurrently requests that the Arbitrator retains jurisdiction in this matter.

FINDINGS AND DISCUSSION

After careful review of the record in its entirety and having had the opportunity to weigh and evaluate the testimony of witnesses, this Arbitrator finds that this grievance should be sustained for the following reasons.

First, in response to the Union's request for a specific adverse inference regarding the numbered series vacancy announcements that were not provided to the Union, case law is replete with poignant instances of spoliation. That is, the failure to preserve property for the other party's use "as evidence in pending or reasonable foreseeable litigation." (See Zubulake ag. UBS Warburg, LLC, 229 FRD 422, July 20, 2004) Clearly, there is a right to an adverse inference because there is duty to preserve and protect pertinent and relevant documents, as here. It is important to note that there does not have to be a showing of willful or intentional conduct for this inference to be made. That is, mere ordinary negligence is sufficient for this doctrine to be viable, as here. (See "Adverse Inference Spreadsheet", U-1)

In response to the Agency's argument that the missing announcements were for intern positions only, this apparently means that such positions were temporary as opposed to being career conditional. Thus, intern positions simply do not have promotion potential to the GS-13 level, even if converted such positions are prohibited from going higher than GS-12. However, evidence presented by the Union was incongruent with the Agency's assessment. (See U-7(G) and U-3) Such evidence was exemplary of a marked-up numbered vacancy announcement and a full-time permanent position, only open at GS-7 level with promotion potential to the GS-13 level. Again, this Arbitrator has right to an adverse inference that the missing documents would have been unfavorable to the possessor of these germane documents, the Agency.

Second, in response to the Agency's argument that the Union failed to amend this grievance, it is well established that the exclusive representative is entitled to necessary information to enable one to effectively carry out one's representational duties. These duties include the acquisition of information which will assist in the "investigation, evaluation, and processing of a grievance." (See U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 37 FLRA 515 (1990); also see National Park Service, National Capital Region, U.S. Park Service and Police Association of the District of Columbia, 38 FLRA 1037, December 18, 1990).

Applying this case law to this grievance, the requested documents were necessary for the Union to amend the grievance. However, such necessary and pertinent materials were not forthcoming. Thus, the Union was unable to amend this grievance due to the Agency's omission to furnish such needed materials.

Third, in response to the request for an adverse inference regarding the absence of Agency's witnesses, it is well recognized that the failure of one party to call sufficient witnesses

to rebut the other party's case allows this Arbitrator to make an adverse ruling. (See Internal Revenue Service, Philadelphia Center and National Treasury Employees Union, 54 FLRA 674, July 31, 1998; Bureau of Engraving and Printing and Lodge 2135, International Association of Machinists and Aerospace, Workers, 28 FLRA 796, August 31, 1987).

Applying this case law to this grievance, the Agency only presented one witness. That is, the Agency did not present the persons who posted the vacancy announcements nor any supervisor in the various divisions to rebut the plethora of Union witnesses' testimony. Thus, the record reflects that evidence presented by the Union was largely unrebutted. Specifically, the Agency failed to present evidence via witnesses to rebut the Union's GS-12 witnesses' testimony that they performed the same work as the GS-13 employees and they trained employees who subsequently leapfrogged them to the GS-13 level. Still further, the Agency failed to present witnesses to rebut that they were told by their supervisors that their applications to various positions would be destroyed, or not considered, and they should not apply.

Fourth, this Arbitrator was persuaded by the testimonies of the following witnesses: Bonnie Lovorn, Public Housing Revitalization Specialist, GS-12, Lynn Schonert, Public Housing Revitalization Specialist, GS-12, Monica Randolph-Brown, Public Housing Revitalization Specialist in the Public and Indian Housing Office, Victoria Reese Brown, Public Housing Revitalization Specialist, and Melanie Hertel, Contractor Industrial Relations Specialist in the Office of Labor Relations.

Specialist Lovorn, GS-12, testified that she applied for both the internal and external announcement for a GS-13 but was not selected. Nonetheless, she testified that she performed the same identical work as the GS-13, selectee, Gloria Smith. [TR-72-74]

Specialist Schonert, GS-12, testified that she applied for two internal vacancy positions in 2002, as a Facilities Management Specialist as well as a Financial Analyst. Although these vacancy announcements were posted internally and externally, she was not selected for either position. Specialist Schonert was told by her supervisor that it was in the best interest of the Agency to make external selections to promote growth in the Agency. [TR-177-181]

Specialist Randolph-Brown, GS-12, now retired, testified that she applied for a GS-13 level position in 2002, but was not selected because she was retirement-eligible. However, she trained the actual selectees. Interestingly, Randolph-Brown testified that at the time of her retirement there were other employees who were GS-13 except for her. However, she also added that she was fully qualified for the positions and had already performed the higher graded work as well as received fully successful performance appraisals. [TR-199-204]

Specialist Reese Brown, GS-12, also President of Local 3980, testified that the Agency posted a vacancy announcement for a GS-7 Financial Analyst position, yet the same announcement had a promotion to GS-13 level for three (3) or four (4) other offices, but with identical duties. (See U-7(G) and TR-213-14) Specifically, on the handwritten notation on the vacancy announcement indicated that a constructive demotion was necessary, from a GS-7 level with the maximum career ladder potential to GS-13 level. This assessment was confirmed by Administrative Officer Whitehouse.

Specialist Hertel, GS-13, testified that the Agency posted her same position with a promotion potential to GS-13 level, but she was maxed out at GS-12 at that juncture. However, she further testified that she was discouraged from applying, as her Supervisor Herald stated that new external recruits were needed. Thus, Specialist Hertel did not apply because she believed

that her application would not be considered. [TR-227-232] This Arbitrator credits this testimony of the above witnesses on these issues.

Fifth, the Agency's sole witness, Specialist Lyman, a Supervisor in Human Resources, but who was a Position Classification Specialist for approximately thirty (30) years, made several admissions of irregularities by the Agency.

Specifically , when asked on cross-examination about dual postings of internal and external vacancy announcements and an internal cancellation, he responded as follows:

> "It would seem to go against [this] simultaneous consideration clause."
>
> [TR-99]

Still further, he explains what he means regarding the "simultaneous consideration" in direct examination as follows:

> "If you're advertising externally to HUD, you also do an ad internal to HUD to permit you know, HUD staff...to apply."
>
> [TR-19]

Moreover, he testified that such contravention, the cancellation of an internal advertisement, was "bizarre". [TR-99]

Another example of Specialist Lyman's admission is when posed with still another hypothetical question regarding a vacancy with two different growth potentials. He responded on cross-examination that he would not do such a thing. [TR-104-105]

When questioned about the process of constructive demotion, where a position which is only available at GS-7 level but later expands to a GS-13 level, Specialist Lyman responded that this arrangement was "odd". [TR-109] He further added the following:

"Because many HUD employees who are
GS-12's would obviously not be interested
in applying even though the job...grew to 13."

[TR-109] also see [TR-115]

Based on the foregoing, Specialist Lyman admitted that such irregularities would be violative of the Agreement.

Accordingly, this Arbitrator finds that the Agency violated Article 4, Sections 4.01and 4.06 as these Grievants were unfairly treated and were unjustly discriminated against, as delineated above. In addition, this Arbitrator finds that the Agency violated Article 9, Section 9.01, as classification standards were not fairly and equitably applied. Lastly, this Arbitrator finds that the Agency also violated Article 13, Section 13.01, as it sought to hire external applicants, instead of promoting and facilitating the career development of internal employees.

Sixth, in response to the Agency's argument that this grievance is precluded from coverage because there is no reduction in the grade or pay of any employee, this Arbitrator disagrees. The evidence supports the Union's case that the Grievants were: (1) not considered for selections; (2) dissuaded from applying; (3) external applicants were given priority over internal employees; (4) GS-12 journeyman employees must train, tutor, and perform the same work as GS-13 journeyman employees in the same position. Thus, but for these inequitable and unfair situations delineated above, these affected positions should have been promoted to the journeyman level to GS-13 retroactively to 2002. The basis for this organizational upgrade is because the Agency failed to follow the procedures set forth the Agreement which

correspondingly resulted in the loss of pay, had these Grievants been promoted to the GS-13 level at the time of this occurrence.

Seventh, in response to what is an appropriate remedy, it would seem to this Arbitrator that an organizational upgrade of affected positions by upgrading the journeyman level for all the subject positions to GS-13 level retroactively to 2002 is the fair and equitable solution. Pursuant to the Agreement, an Agency supervisor would have the final determination as to whether the affected employee has performed the duties of one's position satisfactorily.

AWARD

Accordingly, this Arbitrator finds that the Agency violated Article 4, Section 4.01 and 4.06, Article 9, Section 9.01, and Article 13, Section 13.01 for the aforementioned reasons. The appropriate remedy is an organizational upgrade of affected positions by upgrading the journeyman level for all the subject positions to GS-13 level retroactively from 2002. Pursuant to the Agreement, a supervisor would have the final determination as to whether the affected employees have performed the duties of one's position satisfactorily. In addition, this Arbitrator shall maintain jurisdiction of this matter for implementation of this Award

_____

ARBITRATOR

DATE OF AWARD: September 29, 2009

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Federal Labor Relations Authority

43:0147(14)AR - - Defense Mapping Agency, Aerospace Center, St. Louis, MO and NAGE Local 1827 - - 1991 FLRAdec AR - - v43 p147

[v43 p147]
43:0147(14)AR
The decision of the Authority follows:

43 FLRA No. 14

FEDERAL LABOR RELATIONS AUTHORITY

WASHINGTON, D.C.

U.S. DEPARTMENT OF DEFENSE

DEFENSE MAPPING AGENCY

AEROSPACE CENTER

ST. LOUIS, MISSOURI

(Agency)

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES

LOCAL 1827

(Union)

0-AR-1880

DECISION

November 20, 1991

Before Chairman McKee and Members Talkin and Armendariz.

I. Statement of the Case

This case is before the Authority on an exception to an award of Arbitrator Mark W. Suardi filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Rules and Regulations. The Agency filed an opposition to the Union's exception.

The Arbitrator denied the Union's grievance, which claimed that the Agency violated the parties' collective bargaining agreement by unilaterally changing a past practice involving the computation and payment of overtime under the Fair Labor Standards Act, 29 U.S.C § 207 (FLSA). For the reasons explained below, we will remand the case to the parties for further processing consistent with our decision.

II. Background and Arbitrator's Award

The Defense Mapping Agency acts as paymaster for the 3600 employees located at the Aerospace Center in CCO Louis. The Agency uses the U.S. Air Force automated pay system for processing its payroll. The pay system is a computerized system under which pay data for each employee is entered into the system and paychecks are printed by computer. The record indicates that although all bargaining unit employees are covered by the overtime provisions of 5 U.S.C. § 5542, some employees are also covered by the overtime provisions of the FLSA.(1)

For ten or more years before November 1988, the Agency utilized a key punch system to process the employees' time and attendance cards. The Agency also performed manual FLSA overtime computations which allowed the Agency to include the full amount of any overtime compensation due an employee in the first paycheck issued after the close of the pay period in which the overtime was worked. In November 1988, the Agency replaced the key punch

system with an optical mark reader (OMR) system, which electronically scans the time and attendance forms and automatically calculates both the base pay and the Title 5 overtime from these readings. However, with this new system, the payroll office was no longer able to perform the manual FLSA overtime computations in time to include the full amount of the FLSA overtime in an employee's next check. Consequently, employees only received their Title 5 overtime in their first check after the close of the relevant pay period. Employees who earned overtime at a greater rate under the FLSA than under Title 5 were paid the "overage" or additional amount in a future check. The grievance arose from this delay in the payment of the FLSA overtime.

Before the Arbitrator, the Union argued that: (1) the Agency could have bargained over the impact and implementation of the OMR system and there was no evidence that modification of the system was beyond the Agency's control; (2) the grievance was timely filed, as the change affecting the payment of FLSA overtime was continuing in nature; and (3) the Agency's previous method of paying FLSA overtime became a condition of employment and ripened into a binding past practice.

The Agency contended that the grievance was neither grievable nor arbitrable because it had no discretion to deviate from the Air Force's OMR system. The Agency argued that it had not intended to change the manner of FLSA overtime payment and only discovered that there was a problem when the Agency's payroll office tried to prepare the payroll using the OMR system. The Agency argued, further, that the grievance was untimely filed because the Union learned of the FLSA overtime payment change in late March or early April but did not file the grievance until after the 21-day filing period provided for in the parties' agreement.

The Agency asserted to the Arbitrator that the Union's reliance on the overtime provision of the parties' agreement was inapposite because FLSA overtime was being calculated and paid in accordance with applicable laws and regulations. The Agency also argued that it had the reserved right, under the management rights provisions of the agreement and section 7106(a) of the Statute, to delay the payment of FLSA overtime. In this connection, the Agency urged that it had the right to change past practices where, as here, such practices conflict with the Agency's reserved rights under the agreement. Finally, the Agency contended that the change in paying FLSA overtime had not had any real effects on employees and the Union's requested remedy was not possible with the current technology.

The Arbitrator stated that the issues in the case were: (1) whether the grievance was arbitrable; (2) if the grievance was arbitrable, whether the Agency violated the past practice provision and overtime provisions of the parties' collective bargaining agreement; and (3) if these contract sections were violated, what was the appropriate remedy.[2]

In addressing the grievance, the Arbitrator first responded to the Agency's contentions that the grievance was not timely filed and that it concerned a matter beyond the control of the Agency. The Arbitrator rejected these arguments finding, first, that the grievance was timely filed because it concerned a matter which was continuing in nature. Second, the Arbitrator found that the facts and exhibits presented did not establish that the grievance concerned a matter beyond the Agency's control.

The Arbitrator then addressed the merits of the grievance. The Arbitrator found that "both the Agency and the Union seem to agree that a binding past practice existed on the subject prior to November, 1988." Award at 18. The Arbitrator then determined that the question was whether the Agency could legitimately change the practice by its unilateral action. The Arbitrator concluded that the Agency did not violate the agreement and denied the grievance.

In reaching this conclusion, the Arbitrator found that the existence of a past practice under section 7-2 of the parties' agreement was "conditioned on there being no conflict with this agreement." Id. The Arbitrator then examined the management rights provisions of the agreement, which are contained in sections 5-1 and 5-2 of the parties' agreement.[3] The Arbitrator found that "the Agency's rights under Section 5.1 and 5.2 are inconsistent with the Union's claim for relief." Id. at 19 (emphasis in original). The Arbitrator concluded, therefore, that the past practice provision did not limit the Agency's right to unilaterally change the manner in which FLSA overtime previously had been paid. In making his findings as to the management rights provisions of the agreement, the Arbitrator stated that, in his opinion, the case before him was analogous to National Association of Government Employees, Local R14-89 and Headquarters, U.S. Army Air Defense Artillery Center and Fort Bliss, Fort Bliss, Texas, 32 FLRA 392 (1988) (Fort Bliss), which the Agency had cited in support of its position. In Fort Bliss, the Authority found that a proposal to maintain a pay lag at 6 days, rather than the agency's proposed 12 days, was nonnegotiable on the basis that the proposal interfered with the exercise of various management rights. The Arbitrator found that Fort Bliss did much "to resolve the question of the Agency's right to introduce the delay in payments here challenged." Award at 19.

The Arbitrator further held that, at that time, there would be no workable way for the Agency to grant the Union's requested relief without expending added time and manpower in the Agency's payroll office. The Arbitrator found that the requested relief would infringe on the Agency's rights under Article 5 of the agreement.

Finally, the Arbitrator found that the Agency's decision to delay the payment of FLSA overtime did not violate any law or regulation such as would give rise to a violation of the overtime provision of the parties' agreement and, further, that the processing of overtime did not violate 5 U.S.C. § 5542. Accordingly, the Arbitrator denied the grievance.

III. Positions of the Parties

A. The Union's Exception

The Union contends that the award is deficient because the Arbitrator used the wrong standard in reaching his decision. The Union states that if the resolution of a dispute involves a negotiability determination, as it does here, an arbitrator is required to apply the standards in National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA 24 (1986) (Kansas Army National Guard). The Union states that the

Arbitrator failed to consider and apply Kansas Army National Guard. The Union also asserts that in deciding that Fort Bliss was analogous to the instant case, the Arbitrator did not consider the significant differences in the circumstances between the instant case and those in Fort Bliss. Finally, the Union states that the Arbitrator's finding, that there was no way to accommodate the Union's requested relief without an additional expenditure of time and resources, is based on facts that were not in evidence.

B. The Agency's Opposition

The Agency contends that the Union's exception constitutes mere disagreement with the Arbitrator's award and fails to establish a ground for review under section 2425.3 of the Authority's Rules and Regulations. The Agency maintains, contrary to the Union, that the Arbitrator did not make a negotiability determination but reasoned that if management in Fort Bliss had a reserved management right under the Statute to increase its pay lag from six to twelve days, then the Agency had a reserved management right under sections 5-1 and 5-2 of the parties' agreement to increase the delay in the payment of FLSA overtime. In this regard, the Agency refers to its closing argument before the Arbitrator, in which it stated that

> [a] comparison of Sections 5-1 and 5-2 of the [agreement] with Section 7106(a) makes it clear that the Agency's reserved rights under the [agreement] are coextensive with its reserved rights under the Statute. In fact, the reference to Title VII, Public Law 95-454 is the public law citation to the Statute.

Enclosure 3 to Union's Exception at 15.

The Agency also maintains that the test for determining whether a proposal constitutes an appropriate arrangement set forth in Kansas Army National Guard is not applicable to the arbitration of the instant grievance because the grievance does not involve a bargaining proposal. In this connection, the Agency states that the Union's right to bargain over the impact and implementation of the change in FLSA overtime payment procedures was not an issue submitted to the Arbitrator. Finally, the Agency contends that the Arbitrator's findings of fact were based on the evidence presented and that the Union's disagreement with such findings does not constitute a basis for review.

IV. Analysis and Conclusions

The Authority will find an award deficient if it is contrary to law, rule or regulation or on other grounds similar to those applied by Federal courts in private sector labor relations cases. In this case, we are unable to determine whether the Arbitrator's award is deficient. Consequently, we will remand the case to the parties for further processing, as explained below.

As a general proposition, we will not disturb an award that is based solely on a contract interpretation. However, where, as here, that contract provision is a reiteration of the management rights provision of the Statute, we must exercise care to ensure that the interpretation is consistent with the Statute, as well as the parties' agreement. If parties intend that a contractual management rights provision which is identical to the language set forth in section 7106 of the Statute be interpreted in a manner that differs from, but is not inconsistent with, the Statute, that should be made known to the arbitrator, who can then clearly specify the basis for an award. The Authority would uphold the award insofar as it is not otherwise inconsistent with law, rule or regulation. In this case, we find that the Arbitrator did not interpret the parties' agreement so as to restrict the exercise of management's rights in a manner that is inconsistent with the Statute. Consequently, the Arbitrator's award, to this extent, is not inconsistent with the Statute. However, such a finding does not end our inquiry.

As noted, the Arbitrator found that the Agency did not violate the parties' agreement concerning the change in the timing of FLSA overtime payments. He reached that result based on an examination of the management rights provisions of the agreement, among others, and an application of the Authority's decision in Fort Bliss. The Union excepts to the award on the basis that the Arbitrator incorrectly applied Authority case precedent. After reviewing the award, and the basis for the Arbitrator's decision, it is not clear to us whether the Arbitrator was resolving the dispute based solely on an interpretation of the agreement or whether his award was based on an interpretation of the Statute and Authority case law defining an agency's rights under section 7106 of the Statute.

In this connection, we note that the management rights provision of the parties' agreement is a restatement of sections 7106(a) and 7106(b)(1) of the Statute. Significantly, the prefatory language of section 5-1 of the agreement states that the management rights clause is to be exercised in accordance with the Statute. Further, in explaining the application of the management rights provision of the agreement, the Agency specifically stated its view that management's reserved rights under sections 5-1 and 5-2 of the agreement are coextensive with the management rights contained in the Statute. Although the Arbitrator stated that he was "bound to apply the entire agreement of the parties[,]" the Arbitrator looked to the decision in Fort Bliss, which he found presented an analogous situation. Award at 18. Consequently, we are unable to ascertain from the award whether the Arbitrator applied only the provisions of the agreement, or the provisions of the Statute, as well.

If, in interpreting the parties' agreement, the Arbitrator had issued an award finding that the Agency had a statutory right to alter the method of paying FLSA overtime when Authority case law held otherwise, such an award would have been inconsistent with the Statute and, therefore, deficient as contrary to law. Similarly, if the Arbitrator had concluded that the Agency could not alter the method of paying FLSA overtime, when, in fact, the Agency had acted consistent with the exercise of a statutory management right, the Arbitrator's award would have been deficient as contrary to law. See for example, U.S. Department of Veterans Affairs Medical Center, Providence, Rhode Island and Laborers' International Union of North America, Local 1056, 37 FLRA 566 (1990) (arbitrator's award finding violation of parties' agreement and ordering negotiations over changes in position description and assignment of duties found inconsistent with management's right to assign work under the Statute and modified to reflect statutory bargaining obligations). In the absence of a

clear understanding as to the basis of the Arbitrator's award, we are unable to assess whether the award is contrary to law, rule and regulation.

Therefore, we will remand this case to the parties for resubmission to the Arbitrator to clarify the basis of his award. The parties should also be advised that the Authority no longer adheres to Fort Bliss. See American Federation of Government Employees, Local 1698 and U.S. Department of the Navy, Naval Aviation Supply Office, Philadelphia, Pennsylvania, 38 FLRA 1016 (1990). See also National Federation of Federal Employees, Local 2099 and U.S. Department of the Navy, Naval Air Systems Command, Naval Plant Representative Office, St. Louis, Missouri, 38 FLRA 1191 (1990); Department of the Army, U.S. Army Enlisted Records and Evaluation Center, Fort Benjamin Harrison, Indiana and Finance and Accounting Office for the Secretary of the Army, St. Louis, Missouri, 41 FLRA 885, 896 (1991), petition for review filed sub nom. U.S. Department of the Army, U.S. Army Enlisted Records and Evaluation Center, Fort Benjamin Harrison, Indiana v. FLRA, No. 91-1473 (D.C. Cir. Sept. 26, 1991).

V. Decision

The case is remanded to the parties for resubmission to the Arbitrator in accordance with this decision.

APPENDIX

Article 5 (Rights of the Employer), Section 5-1 states in pertinent part that

> [i]n accordance with Title VII [Federal Service Labor-Management Relations], Public Law 95-454, nothing in this Agreement shall affect the authority of any management official of the Employer:
>
> a. To determine the mission, budget, organization, number of employees and internal security practices of the Employer.
>
> b. In accordance with applicable laws:
>
> (1) To hire, assign, direct, layoff and retain employees, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees.
>
> (2) To assign work, to make determinations with respect to contracting out, and to determine the personnel by which the Employer's operations shall be conducted.
>
> (3) With respect to filling positions, to make selections for appointments from:
>
> (a) Among properly ranked and certified candidates for promotion.
>
> (b) Any other appropriate source.
>
> (4) To take whatever actions may be necessary to carry out the Employer's mission during emergencies.

Section 5-2 states that

> [t]he obligation of the Employer to negotiate with the Union does not include the numbers, types and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods and means of performing work.

FOOTNOTES:

(If blank, the decision does not have footnotes.)

1. At the time of the processing of the grievance in this case, General Schedule employees who were entitled to overtime compensation under 5 U.S.C. § 5542 and who were also covered by the FLSA, were entitled to overtime compensation under the FLSA if that entitlement was greater than under 5 U.S.C. § 5542. 5 C.F.R. § 551.513. The Federal Employees Pay Comparability Act of 1990, Pub. L. No. 101-509, § 210, 104 Stat. 1427, eliminated the requirement to perform overtime computations under both title 5 and the FLSA for covered employees. Instead, overtime pay for employees covered by the FLSA are to be computed and paid only under the FLSA. See 56 Fed. Reg. 20339-20343 (1991).

2. Article 7 (Employee Rights), Section 7-2 (Past Practice), provides:

> Those privileges which by custom, tradition, or known past practice have become an integral part of working conditions, which are not in conflict

with this Agreement, shall not be abridged as a result of not being enumerated in this Agreement.

Article 32 (Overtime), Section 32-5 provides in pertinent part:

Premium pay for overtime work will be computed and paid in accordance with applicable laws and regulations. . . . Actual hours worked will be paid at the applicable overtime rate, when worked in conjunction with the normal tour of duty.

3. Sections 5-1 and 5-2 are set forth in the Appendix to this decision.

05:0050(9)AR - Delaware NG, Wilmington, DE and ACT, Delaware Chapter -- 1981 FLRAdec AR

[v05 p50]
05:0050(9)AR
The decision of the Authority follows:

5 FLRA No. 9

DELAWARE NATIONAL GUARD
WILMINGTON, DELAWARE
Activity

and

ASSOCIATION OF CIVILIAN
TECHNICIANS, DELAWARE
CHAPTER
Union

Case No. 0-AR-86

DECISION

THIS MATTER IS BEFORE THE AUTHORITY ON EXCEPTIONS TO THE AWARD OF ARBITRATOR ALEXANDER M. FREUND FILED BY THE UNION UNDER SECTION 7122(A) OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE (5 U.S.C. 7122(A)).

ACCORDING TO THE ARBITRATOR, THE PARTIES SUBMITTED A GRIEVANCE TO ARBITRATION "INVOLV(ING) A DISPUTE AS TO THE INTERPRETATION OF THE CONTRACT LANGUAGE 'STANDARD CIVILIAN ATTIRE.'" SPECIFICALLY, IN THEIR SUBMISSION AGREEMENT THE PARTIES STIPULATED THE UNRESOLVED ISSUES TO BE PRESENTED TO THE ARBITRATOR AS FOLLOWS:

IS (THE ACTIVITY) CORRECT IN (ITS) INTERPRETATION OF THE CONTRACT WHEREBY BARGAINING UNIT

EMPLOYEES MAY ONLY WEAR STANDARD CIVILIAN ATTIRE OF COMMON DESIGN AND STYLE . . . ?

IS (THE UNION) CORRECT IN (ITS) INTERPRETATION OF THE CONTRACT WHEREBY BARGAINING UNIT

EMPLOYEES MAY WEAR CIVILIAN ATTIRE AS LONG AS IT IS CONSISTENT WITH SECTION 7 OF ARTICLE XXV

(RELATING TO ATTIRE AND GROOMING) . . . ?

AT ARBITRATION THE UNION ARGUED THAT THE MEANING OF THE TERM "STANDARD CIVILIAN ATTIRE," AS USED IN ARTICLE XXV OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT, WAS THAT CIVILIAN ATTIRE WAS STANDARDIZED ONLY WITH RESPECT TO COLOR. THE ACTIVITY ARGUED THAT THIS TERM MEANT THAT "AN UNDIVERSIFIED AND STANDARDIZED CIVILIAN UNIFORM (WAS) TO BE WORN BY ALL."

IN RESOLVING THIS DISPUTE, THE ARBITRATOR FIRST REVIEWED THE SUBSECTIONS OF SECTION 7 OF ARTICLE XXV OF THE AGREEMENT. HE FOUND THE UNION'S ARGUMENT "UNPERSUASIVE BECAUSE SUBSECTION 7-A SIMPLY DOES NOT SAY THAT CIVILIAN ATTIRE SHALL BE STANDARD IN RESPECT TO COLOR ONLY." HE FURTHER EMPHASIZED THAT "IF THE LANGUAGE 'STANDARD CIVILIAN ATTIRE' WAS INTENDED TO REFER TO STANDARDIZATION OF COLOR ONLY, THERE WOULD HAVE BEEN NO NEED FOR THAT LANGUAGE, SINCE SUBSECTIONS 7-C THROUGH 7-J SPECIFY THE COLOR COMBINATIONS EMPLOYEES ARE REQUIRED TO WEAR." MOREOVER, THE ARBITRATOR RECOGNIZED THAT WHEN THE PARTIES BEGAN THEIR NEGOTIATIONS, THE TERM "STANDARD CIVILIAN ATTIRE" HAD BEEN REFERRED TO IN A NUMBER OF DECISIONS OF THE FEDERAL SERVICE IMPASSES PANEL INVOLVING

OTHER NATIONAL GUARD ACTIVITIES. THE PANEL HAD REFERRED TO "STANDARD CIVILIAN ATTIRE" AS A "CIVILIAN UNIFORM," AND AS ATTIRE, "STANDARD IN DESIGN AND COLOR." THE ARBITRATOR ALSO FOUND, BASED ON TESTIMONY BEFORE HIM, THAT THESE DECISIONS WERE KNOWN TO THE PARTIES AT THE TIME THEY WERE NEGOTIATING THEIR AGREEMENT. THUS, THE ARBITRATOR OBSERVED THAT THE LANGUAGE IN QUESTION HAD A SPECIFIC MEANING THAT WAS KNOWN TO MANAGEMENT AND THE UNION. ACCORDINGLY, THE ARBITRATOR "UPHELD" THE ACTIVITY'S INTERPRETATION AND RULED THAT WHEN THE PARTIES AGREED TO THE CONTRACT LANGUAGE "STANDARD CIVILIAN ATTIRE," IT WAS UNDERSTOOD THAT BARGAINING UNIT EMPLOYEES WOULD BE REQUIRED TO WEAR A CIVILIAN UNIFORM.

WITH RESPECT TO A REMEDY, THE ARBITRATOR NOTED THAT "THE PROBLEM WHICH GAVE RISE TO THE GRIEVANCE APPEARS TO INVOLVE COMFORT ITEMS" (IDENTIFIED IN THE AGREEMENT AS ITEMS SUCH AS SWEATERS AND JACKETS). THE ARBITRATOR NOTED THAT THE ACTIVITY HAD REQUESTED AS A REMEDY THAT THE EMPLOYEES BE DIRECTED TO OBTAIN SUCH ITEMS FROM ONE SOURCE IN ORDER TO ASSURE UNIFORMITY OF DRESS. IN REFUSING SUCH A REMEDY, THE ARBITRATOR RULED THAT IT WAS SUFFICIENT THAT THE ACTIVITY'S INTERPRETATION OF THE AGREEMENT WAS BEING UPHELD BECAUSE EMPLOYEES WOULD
BE OBLIGATED TO COMPLY WITH THAT INTERPRETATION. THEREFORE, THE ARBITRATOR'S AWARD WAS AS FOLLOWS:

THE GRIEVANCE IS DENIED. THE EMPLOYER'S INTERPRETATION OF SECTION 7 IS UPHELD: THE INTENT

OF THE LANGUAGE "STANDARD CIVILIAN ATTIRE" IS A CIVILIAN UNIFORM.

THE UNION FILED EXCEPTIONS TO THE ARBITRATOR'S AWARD UNDER SECTION 7122(A) OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE /1/ AND PART 2425 OF THE AUTHORITY'S RULES AND REGULATIONS, 5 CFR PART 2425. THE AGENCY DID NOT FILE AN OPPOSITION.

THE QUESTION BEFORE THE AUTHORITY IS WHETHER, ON THE BASIS OF THE UNION'S EXCEPTIONS, THE ARBITRATOR'S AWARD IS DEFICIENT BECAUSE IT IS CONTRARY TO ANY LAW, RULE, OR REGULATION, OR IS DEFICIENT ON OTHER GROUNDS SIMILAR TO THOSE APPLIED BY FEDERAL COURTS IN PRIVATE SECTOR LABOR-MANAGEMENT RELATIONS CASES.

IN ITS FIRST EXCEPTION THE UNION CONTENDS THAT THE AWARD IS CONTRARY TO EXISTING LAW. IN SUPPORT OF THIS EXCEPTION, THE UNION ASSERTS THAT THE ARBITRATOR "ABRIDGED THE RIGHTS OF THE (UNION) FOUND IN 5 U.S.C. 7119(A), (B) AND (C)" /2/ BY APPLYING THE FEDERAL SERVICE IMPASSES PANEL'S DEFINITION OF "STANDARD CIVILIAN ATTIRE" TO THE CONTRACT DISPUTE IN THIS CASE. THE UNION ARGUES THAT IT WAS IMPROPER FOR THE ARBITRATOR TO IMPOSE THE PANEL'S DEFINITION ON THE PARTIES WHEN THEY HAD AGREED TO THEIR OWN DEFINITION. THE UNION FURTHER MAINTAINS THAT PANEL DETERMINATIONS ONLY HAVE "PRECEDENTIAL APPLICATION" TO THE ISSUES AND PARTIES DIRECTLY BEFORE THE PANEL.

THE UNION'S EXCEPTION THAT THE AWARD IS CONTRARY TO LAW STATES A GROUND ON WHICH THE AUTHORITY WILL FIND AN AWARD DEFICIENT UNDER SECTION 7122(A)(1) OF THE STATUTE. HOWEVER, IN THIS CASE THE UNION DOES NOT DEMONSTRATE IN WHAT MANNER THE AWARD IS CONTRARY TO LAW. IN PARTICULAR, THE UNION HAS FAILED TO SHOW THAT THE ARBITRATOR'S AWARD IS CONTRARY TO SECTION 7119 OF THE STATUTE. THE UNION HAS PRINCIPALLY ASSERTED THAT THE ARBITRATOR VIOLATED SECTION 7119 BY "IMPOSI(NG) . . . THE PANEL'S CONSTRUCTION OF DEFINITIONS . . . WHEN IN FACT, THE PARTIES HAD AGREED TO THEIR OWN DEFINITION DURING NEGOTIATIONS." HOWEVER, AS WAS NOTED, THE ARBITRATOR, RATHER THAN "IMPOSI(NG)" THE PANEL'S DEFINITION, RESOLVED THE PARTIES' DISPUTE BY DETERMINING PRECISELY THE MEANING OF THE CONTRACT LANGUAGE THEY "HAD AGREED TO . . . DURING NEGOTIATIONS." THUS, THE ARBITRATOR IN HIS AWARD SPECIFICALLY UPHELD THE ACTIVITY'S INTERPRETATION OF THE LANGUAGE IN DISPUTE. FURTHERMORE, THE ARBITRATOR SPECIFICALLY RULED THAT, WHEN THE PARTIES AGREED TO THE LANGUAGE "STANDARD CIVILIAN ATTIRE," BOTH MANAGEMENT AND THE UNION UNDERSTOOD AS THEIR AGREEMENT THAT EMPLOYEES WOULD BE REQUIRED TO WEAR A CIVILIAN UNIFORM. THE ARBITRATOR, AS AN AID IN DETERMINING WHAT THE PARTIES "HAD AGREED TO . . . DURING NEGOTIATIONS," DID OBSERVE THAT THE CONTRACT LANGUAGE AGREED TO HAD A SPECIFIC MEANING FROM THE PANEL DECISIONS THAT WAS WELL KNOWN TO BOTH MANAGEMENT AND THE UNION AT THE TIME OF THEIR NEGOTIATIONS. HOWEVER, THIS PROVIDES NO BASIS FOR FINDING THE AWARD CONTRARY TO SECTION 7119. IT IS WELL ESTABLISHED THAT AN ARBITRATOR MAY PROPERLY DRAW FROM ANY RELEVANT SOURCE AS AN AID IN INTERPRETING A COLLECTIVE BARGAINING AGREEMENT. UNITED STEELWORKERS OF AMERICA V. WARRIOR & GULF NAVIGATION CO., 363 U.S. 574, 578-82(1960); UNITED STEELWORKERS OF AMERICA V. ENTERPRISE WHEEL & CAR CORP., 363 U.S. 593, 597(1960); HUMBLE OIL & REFINING CO. V. LOCAL 886, INTERNATIONAL

BROTHERHOOD OF TEAMSTERS, 447 F.2D 229, 232-33 (2D CIR. 1971); UAW V. WHITE MOTOR CORP., 505 F.2D 1193, 1197-98 (8TH CIR. 1974). THIS IS PRECISELY WHAT THE ARBITRATOR DID IN THIS CASE, LOOKING TO DECISIONS OF THE PANEL KNOWN TO THE PARTIES DURING NEGOTIATIONS, AS WELL AS TO THE CONTRACT LANGUAGE UPON WHICH THEY ULTIMATELY AGREED. CONSEQUENTLY, THE UNION IN ITS EXCEPTION AND SUPPORTING ASSERTIONS IS DISAGREEING WITH THE ARBITRATOR'S INTERPRETATION OF THE COLLECTIVE BARGAINING AGREEMENT, WHICH DOES NOT CONSTITUTE A BASIS FOR FINDING THE AWARD DEFICIENT. UNITED STATES ARMY MISSILE MATERIEL READINESS COMMAND (USAMIRCOM) AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1858, AFL-CIO, 2 FLRA NO. 60(1980). THEREFORE, THE UNION'S FIRST EXCEPTION PROVIDES NO BASIS FOR FINDING THE AWARD DEFICIENT UNDER 5 U.S.C. 7122(A) AND SECTION 2425.3 OF THE AUTHORITY'S RULES AND REGULATIONS.

IN ITS SECOND EXCEPTION THE UNION CONTENDS THAT THE ARBITRATOR'S AWARD IS INCOMPLETE AND AMBIGUOUS. IN SUPPORT OF THIS EXCEPTION THE UNION ASSERTS THAT THE AWARD IS AMBIGUOUS BECAUSE A QUESTION REMAINS AS TO WHICH PARTY THE ARBITRATOR WAS REFERRING TO WHEN HE DENIED THE GRIEVANCE. IN THIS RESPECT, THE ARBITRATOR WAS REFERRING TO WHEN HE DENIED THE GRIEVANCE. IN THIS RESPECT, THE UNION MAINTAINS THAT THE PARTIES AGREED THE ACTIVITY WOULD BE THE GRIEVANT IN THE DISPUTE. THE UNION FURTHER ARGUES THAT THE AWARD IS INCOMPLETE AND AMBIGUOUS BECAUSE THE ARBITRATOR HAS LEFT THE PARTIES WITH "UNACCEPTABLE TERMS WHICH WILL NOT SETTLE THE INITIAL DISPUTE." THE UNION THEN SPECULATES THAT AS A RESULT IT "APPEARS THAT THE PARTIES ARE COMPELLED TO RETURN TO THE BARGAINING TABLE" WHICH IT ASSERTS WOULD BE CONTRARY TO SECTION 7114(B)(5) AND SECTION 7117 OF THE STATUTE CONCERNING THE DUTY TO BARGAIN IN GOOD FAITH. THE UNION ALTERNATIVELY SPECULATES THAT "THE AWARD WOULD LEND ITSELF TO VIOLATIONS" OF SECTION 7116(A) OF THE STATUTE CONCERNING AGENCY UNFAIR LABOR PRACTICES.

THE AUTHORITY WILL FIND AN ARBITRATION AWARD DEFICIENT UNDER SECTION 7122(A)(2) OF THE STATUTE WHEN IT IS INCOMPLETE, AMBIGUOUS, OR CONTRADICTORY SO AS TO MAKE IMPLEMENTATION OF THE AWARD IMPOSSIBLE. VETERANS ADMINISTRATION HOSPITAL, NEWINGTON, CONNECTICUT AND NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R1-109, 5 FLRA NO. 12(1981). HOWEVER, THE UNION HAS PROVIDED NO BASIS FOR FINDING THE AWARD DEFICIENT. THE UNION HAS ONLY ASSERTED THAT A QUESTION REMAINS AS TO WHICH PARTY THE ARBITRATOR WAS REFERRING TO WHEN HE DENIED THE GRIEVANCE AND HAS SURMISED THAT THE AWARD "LEND(S) ITSELF" TO VARIOUS VIOLATIONS OF THE STATUTE AS A RESULT OF ITS ASSERTED INCOMPLETENESS AND AMBIGUITY. HOWEVER, AS HAS BEEN NOTED, THE PARTIES STIPULATED THE ISSUE TO BE RESOLVED BY THE ARBITRATOR AS WHICH PARTY WAS CORRECT IN ITS INTERPRETATION OF THE CONTRACT LANGUAGE IN DISPUTE. THE ARBITRATOR COMPLETELY AND UNAMBIGUOUSLY RESOLVED PRECISELY THAT ISSUE WHEN AS HIS AWARD THE ARBITRATOR "UPHELD" THE ACTIVITY'S INTERPRETATION OF THE DISPUTED LANGUAGE. MOREOVER, IN RECOGNITION THAT "THE PROBLEM WHICH GAVE RISE TO THE GRIEVANCE APPEARS TO INVOLVE COMFORT ITEMS," THE ARBITRATOR SPECIFICALLY REJECTED THE REQUESTED REMEDY OF THE ACTIVITY THAT HE DIRECT EMPLOYEES TO OBTAIN SUCH ITEMS FROM ONE SOURCE IN ORDER TO ASSURE UNIFORMITY OF DRESS. INSTEAD, THE ARBITRATOR ADVISED THAT IT WAS SUFFICIENT THAT THE ACTIVITY'S INTERPRETATION OF THE AGREEMENT WAS BEING UPHELD BECAUSE EMPLOYEES WOULD BE OBLIGATED TO COMPLY WITH THAT INTERPRETATION. IN THESE CIRCUMSTANCES, THE UNION HAS FAILED TO DEMONSTRATE THAT THE AWARD IS INCOMPLETE OR THAT THE AWARD IS AMBIGUOUS OR THAT IMPLEMENTATION OF THE AWARD IS IMPOSSIBLE AS A RESULT OF THE AWARD BEING "UNCLEAR IN ITS MEANING AND EFFECT" OR BEING "TOO UNCERTAIN IN (ITS) EFFECT TO BE (SUSTAINED)." VETERANS ADMINISTRATION HOSPITAL, SUPRA AND THE PRIVATE SECTOR CASES CITED THEREIN. THEREFORE, THIS EXCEPTION CONTENDING THAT THE AWARD IS INCOMPLETE AND AMBIGUOUS PRESENTS NO BASIS FOR FINDING THE AWARD DEFICIENT. CONSEQUENTLY, THE UNION'S ASSERTIONS SPECULATING VARIOUS POTENTIAL VIOLATIONS OF THE STATUTE PREMISED SOLELY ON THE AWARD BEING INCOMPLETE AND AMBIGUOUS LIKEWISE PRESENT NO BASIS FOR FINDING THE AWARD DEFICIENT. THUS, THE UNION'S SECOND EXCEPTION FAILS TO PROVIDE A BASIS FOR FINDING THE AWARD DEFICIENT UNDER 5 U.S.C. 7122(A) AND SECTION 2425.3 OF THE AUTHORITY'S RULES AND REGULATIONS.

FOR THE FOREGOING REASONS AND PURSUANT TO SECTION 2425.4 OF THE AUTHORITY'S RULES AND REGULATIONS, WE HEREBY SUSTAIN THE ARBITRATOR'S AWARD.

ISSUED, WASHINGTON, D.C., FEBRUARY 4, 1981

RONALD W. HAUGHTON, CHAIRMAN

HENRY B. FRAZIER III, MEMBER

LEON B. APPLEWHAITE, MEMBER

FEDERAL LABOR RELATIONS AUTHORITY

---------- FOOTNOTES$ ----------

/1/ 5 U.S.C. 7122(A) PROVIDES:

(A) EITHER PARTY TO ARBITRATION UNDER THIS CHAPTER MAY FILE WITH THE AUTHORITY AN EXCEPTION

TO ANY ARBITRATOR'S AWARD PURSUANT TO THE ARBITRATION (OTHER THAN AN AWARD RELATING TO A

MATTER DESCRIBED IN SECTION 7121(F) OF THIS TITLE). IF UPON REVIEW THE AUTHORITY FINDS THAT

THE AWARD IS DEFICIENT--

(1) BECAUSE IT IS CONTRARY TO ANY LAW, RULE, OR REGULATION; OR

(2) ON OTHER GROUNDS SIMILAR TO THOSE APPLIED BY FEDERAL COURTS IN PRIVATE SECTOR

LABOR-MANAGEMENT RELATIONS;

THE AUTHORITY MAY TAKE SUCH ACTION AND MAKE SUCH RECOMMENDATIONS CONCERNING THE AWARD AS IT

CONSIDERS NECESSARY, CONSISTENT WITH APPLICABLE LAWS, RULES, OR REGULATIONS.

/2/ 5 U.S.C. 7119 CONCERNS THE AVAILABILITY AND APPLICATION OF THE IMPASSE RESOLUTION SERVICES OF THE FEDERAL MEDIATION AND CONCILIATION SERVICE AND THE FEDERAL SERVICE IMPASSES PANEL.

FLRA.GOV
Federal Labor Relations Authority

40:0937(76)AR - - DOL, Mine Safety and Health Administration, Southeastern District and AFGE Local 2519 - - 1991 FLRAdec AR - - v40 p937

[v40 p937]
40:0937(76)AR
The decision of the Authority follows:

40 FLRA No. 76

FEDERAL LABOR RELATIONS AUTHORITY

WASHINGTON, D.C.

U.S. DEPARTMENT OF LABOR

MINE SAFETY AND HEALTH ADMINISTRATION

SOUTHEASTERN DISTRICT

(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

LOCAL 2519

(Union)

0-AR-2023

DECISION

May 24, 1991

Before Chairman McKee and Members Talkin and Armendariz.

I. Statement of the Case

This matter is before the Authority on exceptions to the award of Arbitrator George V. Eyraud, Jr. filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator sustained a grievance alleging that the Agency violated the collective bargaining agreement in filling a vacancy. The Arbitrator ordered the Agency to remove the selectee from the position and rerun the selection action.

For the following reasons, we conclude that the portion of the award requiring the Agency to remove the selectee from the position is deficient. We will, however, deny the remainder of the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency posted a vacancy announcement for the position of Mine Safety and Health Specialist, GS-13. The announcement stated that the position was not in the bargaining unit. The announcement also stated:

> Legal Requirements: The Federal Mine Safety and Health Amendments Act of 1977 states: "That, to the maximum extent feasible, in the selection of persons for appointment as mine inspectors, no person shall be selected unless he has the basic qualification of at least five years practical mining experience . . . ."

Award at 9 (emphasis in original).

A Certificate of Eligibles for the position was issued containing the names of six applicants, including the grievant. The certificate did not contain the name of the employee who ultimately was selected (the selectee) for the position. On the date the certificate was issued, the selectee "filed a request for re-evaluation and her immediate supervisor . . . filed a request for review of classification strongly protesting the selection process." Id. The selectee's immediate supervisor was the selecting official for the vacancy.

Subsequently, the requirement for 5 years' practical mining experience was deleted as a qualification requirement for the position. A new vacancy announcement was not posted, however. An amended certificate was prepared containing the names of eleven applicants, including the selectee. The selecting official selected his assistant, the selectee, for the position.

The grievant filed a grievance alleging that the Agency's actions in filling the position violated various provisions in the parties' collective bargaining agreement. When the grievance was not resolved, it was submitted to arbitration.

Before the Arbitrator, the Agency conceded that "procedural errors were made in the selection process." Id. at 11. Among other things, the Agency conceded that applicants for the position should have been ranked by a qualified rating examiner and that the vacancy announcement erroneously stated that the position was outside the bargaining unit.(1) The Agency asserted, however, that its errors were "harmless." Id. at 12.

The Arbitrator concluded that the Agency violated two sections of Article 20 of the parties' collective bargaining agreement. First, the Arbitrator found that the Agency violated section 10(A)(1) by failing to submit the candidates' applications to a qualification rating examiner or a merit staffing evaluation panel.(2) Second, the Arbitrator found that the Agency violated section 11(B)(1) by failing to conduct interviews of the candidates.(3) The Arbitrator also concluded that although the Agency's failure to reannounce the vacancy after the requirement for 5 years' mining experience was deleted "may not be a direct violation" of the agreement, "it certainly leaves a great deal to be desired." Id. at 14. The Arbitrator stated that if other employees had "known of the lesser requirements for the position, most assuredly there would have been additional applicants for the job." Id.

Finally, the Arbitrator rejected the Agency's argument that "it has a right to determine qualifications . . . and that such matters are not arbitrable." Id. at 15. The Arbitrator stated that the matter before him did not "turn on management rights to set qualifications or determine qualifications of employees." Id. Instead, according to the Arbitrator, the matter involved the requirements of Article 20.

To remedy the violations of the parties' agreement, the Arbitrator directed the Agency to remove the selectee from the position "with a re-announcement of the position based on applicants at the time of the award." Id. at 16.

III. Agency's Exceptions

The Agency excepts to the award on four grounds.

First, the Agency asserts that the Arbitrator's award violates the Agency's rights to assign employees and assign work under section 7106(a)(2)(A) and (B) of the Statute. The Agency claims that the Arbitrator improperly substituted his judgment for management's in determining that the selectee was not qualified for the disputed position.

Second, the Agency contends that the Arbitrator violated section 7105(a)(2)(A) of the Statute by determining that the disputed position is in the bargaining unit. The Agency asserts that only the Authority is authorized to make such determinations.

Third, the Agency contends that the Arbitrator's remedy is contrary to Federal Personnel Manual (FPM) Chapter 335, Appendix A, section A-4b and violates its right to make selections for appointments under section 7106(a)(2)(C) of the Statute. The Agency asserts that a selectee is entitled to be retained in a position pending corrective action unless it is specifically determined that he or she could not have been properly selected.

Finally, the Agency argues that the award is unclear and "does not give the [A]gency adequate direction as to what relief has been granted." Exceptions at 10.

IV. Union's Opposition

The Union claims that the Arbitrator did not determine the qualifications necessary to perform the work of the disputed position. The Union also contends that the Arbitrator did not resolve an issue concerning the bargaining unit status of the disputed position. The Union notes that after its CU petition was filed, the parties agreed that the position was in the unit.

Finally, the Union argues that the Arbitrator's remedy is not deficient. The Union contends that the Arbitrator properly ordered that the selectee be removed from the position because he found that she could not have been selected under the original vacancy announcement.

V. Analysis and Conclusions

A. Management's Rights to Assign Employees and Work

The Agency's argument that the award is deficient because it violates its rights to assign employees and assign work is misplaced. The Arbitrator did not

determine that the selectee was not qualified for the disputed position and the award does not, in any way, restrict the Agency's rights to establish qualifications or determine whether employees possess required qualifications. In fact, the Arbitrator specifically stated that the dispute before him did not "turn on management's rights to set qualifications or determine qualifications of employees" but rather, "turns on Article 20 . . . which requires that the content of vacancy announcements set forth knowledge, skills, and abilities required and their relative importance." Award at 15. Accordingly, the Agency's exception provides no basis for finding the award deficient.

B. Bargaining Unit Status

Section 7105(a)(2)(A) of the Statute provides that the Authority shall "determine the appropriateness of units for labor organization representation under section 7112 . . . ." The Authority's jurisdiction under this provision is exclusive. As such, "factual disputes concerning the bargaining unit status of employees must be resolved by filing a clarification-of-unit petition with the Authority under section 2422.2(c) of our Rules and Regulations." U.S. Department of Defense, Army and Air Force Exchange Service, Dallas, Texas and American Federation of Government Employees, 37 FLRA 71, 75 (1990). See also U.S. Small Business Administration and American Federation of Government Employees, Local 2532, AFL-CIO, 32 FLRA 847 (1988) (SBA), motion for reconsideration granted sub nom. U.S. Small Business Administration and American Federation of Government Employees, Local 2532 and Council 228, 36 FLRA 155 (1990).

In this case, the Arbitrator did not resolve a dispute over the unit status of the disputed position. Prior to the arbitration hearing, the parties agreed that the disputed position was in the bargaining unit represented by the Union and, as a result of that agreement, the Union withdrew a CU petition it had filed with the Authority regarding the issue. We note, in this regard, that the Agency does not now assert that the disputed position is outside the unit. Accordingly, there was no issue regarding the unit status of the position to be resolved by the Arbitrator and the Agency's exception does not demonstrate that the award is deficient. Compare SBA, 32 FLRA at 854 ("There is no unit status question when the Authority has already determined that the grievant or the grievant's position is in the unit . . . .").

C. The Arbitrator's Remedy

Except with respect to its assertion that the award is ambiguous, the Agency does not except to the portion of the award requiring it to rerun the selection action. Moreover, it is well established that where an arbitrator finds that a selection action did not conform to applicable requirements of law or a collective bargaining agreement, the arbitrator may order that the action be rerun. For example, U.S. Small Business Administration, Atlanta, Georgia and American Federation of Government Employees, Local 3906, 37 FLRA 137, 143 (1990).

We agree with the Agency's argument that the portion of the award requiring the Agency to remove the selectee from the position is deficient, however. Where an arbitrator determines that an agency violated proper procedures in filling a vacant position, including procedures contained in a collective bargaining agreement, "the incumbent employee is entitled under [FPM] Chapter 335, Appendix A, section A-4b to be retained in the position pending corrective action unless it is specifically determined that the incumbent originally could not have been properly selected." U.S. Department of Defense, Delaware National Guard, Wilmington, Delaware and Association of Civilian Technicians, 39 FLRA 1225, 1236 (1991) (Delaware National Guard).

In this case, the Arbitrator made no finding that the selectee could not have been selected if the Agency had followed proper procedures. The Arbitrator found only that the Agency violated the parties' collective bargaining agreement by its actions in filling the vacancy. In the absence of the required finding that the selectee could not originally have been properly selected for the position, the award is deficient as contrary to FPM Chapter 335, Appendix A, section A-4b.[4] See Delaware National Guard, 39 FLRA at 1236. We will, therefore, modify the award to delete the requirement that the selectee be removed from the position.

D. The Arbitrator's Award Is Not Ambiguous

The Agency objects to the portion of the award requiring the Agency to "reannounce[] . . . the position based on applicants at the time of the award." Award at 16. The Agency claims that this portion of the award "is ambiguous and does not give the [A]gency adequate direction as to what relief has been granted." Exceptions at 10.

The Authority will find an award deficient when it is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible. Delaware National Guard, Wilmington, Delaware and Association of Civilian Technicians, Delaware Chapter, 5 FLRA 50, 53 (1981). The Agency has not established that the award is deficient under this standard.

The award requires the Agency to rerun the disputed selection action. As no contrary indication appears in the award or the record, the Agency is required to reannounce the position and fill it in accordance with applicable procedures. There is no basis on which to conclude that the award is impossible of implementation. As such, the Agency's exception provides no basis for finding the award deficient.[5] See, for example, Social Security Administration and American Federation of Government Employees, SSA General Committee, 30 FLRA 381 (1987).

VI. Decision

The Arbitrator's award is modified to delete the portion requiring the selectee to be removed from the position.

FOOTNOTES:

(If blank, the decision does not have footnotes.)

1. After the grievance was filed, the Union filed a clarification of unit (CU) petition with the Authority seeking to include the disputed position in the bargaining unit. Before the arbitration hearing was conducted, the parties agreed that the position was in the unit and the Union withdrew the CU petition. Joint Exhibit 11.

2. Article 20, Section 10(A)(1) provides, in pertinent part:

> If 10 or fewer eligible candidates apply, all may be certified to the selecting official without evaluation. . . . Otherwise, the [qualification review examiner] or panel is responsible for identifying a reasonable number of best qualified candidates to certify to the selecting official.

Joint Exhibit 1 at 63.

3. Article 20, Section 11(b)(1) provides, in pertinent part:

> The selecting official or his/her designee must interview each DOL bargaining unit candidate on the certificate. The interview . . . must be done face-to-face if the candidates are in the same region.

Joint Exhibit 1 at 65.

4. As that part of the remedy requiring the Agency to remove the selectee from the position is contrary to the FPM, we do not address whether it also violates the Agency's right to select.

5. We express no view on the Union's contention that if the selectee applies for the position after it is reannounced, the selectee may not claim any experience gained during her tenure in the position.

FLRA.GOV
Federal Labor Relations Authority

43:0927(73)AR - - Justice, INS, Honolulu District Office, Honolulu, HI and AFGE, National INS Council - - 1992 FLRAdec AR - - v43 p927

[v43 p927]
43:0927(73)AR
The decision of the Authority follows:

43 FLRA No. 73

FEDERAL LABOR RELATIONS AUTHORITY

WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

HONOLULU DISTRICT OFFICE

HONOLULU, HAWAII

(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

NATIONAL IMMIGRATION AND NATURALIZATION

SERVICE COUNCIL

(Union)

0-AR-2118

DECISION

January 7, 1992

Before Chairman McKee and Members Talkin and Armendariz.

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Paul P. Tinning filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition to the Agency's exceptions.

The Union filed a grievance disputing the Agency's 7-day suspension of an employee for "neglect of duty and . . . failure or delay in carrying out the orders, work assignments, or instructions of superiors." Exceptions, Exhibit 2. The Arbitrator determined that the Agency did not violate any existing laws, rules, regulations or the parties' negotiated agreement by disciplining the employee and, therefore, denied the grievance. After denying the grievance, the Arbitrator then determined that the 7-day suspension was excessive and directed the Agency to: (1) rescind the suspension and, instead, issue an official reprimand for the misconduct found; and (2) reimburse the employee for any pay or benefits lost as a result of the suspension.

For the reasons discussed below, we conclude that the award is ambiguous and must be remanded to the parties for resubmission to the Arbitrator.

II. Background

The grievant has been employed by the Agency for over 16 years as a criminal investigator and special agent. Currently, he works as a special agent in the Agency's Honolulu District Office (HDO). The grievant also serves as chief steward for the Union.

The HDO is responsible for all law enforcement in that jurisdiction that is within the Agency's authority. On April 11, 1990, the assistant district director for investigations of the HDO directed the grievant to "initiate a seizure case against" a fishing vessel called the Magic Dragon. Award at 7.(1) To initiate such proceeding, the grievant had to prepare an affidavit, "which is a requisite in seizure proceedings[.]" Id. at 10.

On May 11, the assistant district director advised the grievant that he wanted to see the affidavit on May 14. On May 14, he met with the grievant and the grievant's supervisor to review the affidavit and during this meeting advised the grievant that the affidavit was insufficient and that it must be completed for presentation on May 30. Later, the assistant district director was told by the acting district director that the affidavit must be completed no later than May 25. On May 25, the grievant's supervisor informed the assistant district director that the grievant was not ready to present the case for seizure. Later, the grievant's supervisor advised the assistant district director that on May 29, the grievant informed him that he was scheduled for training for Union officers and that he had not completed the affidavit. Subsequently, the assistant district director advised the grievant of his failure to complete the seizure assignment. On June 4, the assistant district director advised the district director that he was initiating disciplinary action against the grievant for "'failure to carry out orders and dereliction of duty.'" Id. at 14.

By letter dated July 16, the deputy district director, the proposing official in disciplinary matters, informed the grievant that, based upon the record submitted to him, he proposed that the grievant be suspended without pay for 7 days for "'[n]eglect of duty and failure/delay in carrying out orders, work assignments, or instructions of superiors.'" Id. at 17. The deputy district director asserted that the discipline was based on the Agency's schedule of disciplinary offenses and penalties.

Subsequently, the grievant's Union representative responded to the deputy district director's letter and informed the district director that several of the allegations against the grievant were untrue. By memorandum of August 29, the district director rejected the Union representative's contentions and, on August 30, suspended the grievant, without pay, effective September 16 through September 22. A grievance disputing the suspension was filed and submitted to arbitration. The stipulated issue presented before the Arbitrator was:

> Did the Agency violate any existing laws, rules, regulations, or the negotiated agreement when it suspended the grievant . . . from duty? And, if so, what is the remedy?

Id. at 3 (footnote omitted).

III. Arbitrator's Award

The Arbitrator found that the record showed that no special agent in the Western Region, except the grievant, had been disciplined for failing to meet a work deadline. According to the Arbitrator, this evidence suggested that work performance deficiency problems are addressed through means other than disciplinary measures, such as performance improvement plans (PIP). In the Arbitrator's view, a PIP, rather than the suspension, would have been the appropriate forum in which to correct the grievant's alleged deficiencies. The Arbitrator noted that the Agency did place the grievant on a PIP in late October to correct the "same work performance deficiencies for which he initially received a seven-day disciplinary suspension" in September. Id. at 32-33. The Arbitrator, noting that discipline is generally viewed as corrective rather than punitive in nature and noting the Agency's reliance on the schedule of disciplinary offenses and penalties, stated that, in this case, if discipline is viewed as corrective, an "'official reprimand,' rather than a punitive seven-day suspension, would clearly have been within the discretion of [the] Agency . . . ." Id. at 34. The Arbitrator rejected the Agency's claim that the Magic Dragon seizure was a high profile case because there was "no evidence" to support this claim. Id.

The Arbitrator stated that the "weight of [the] record evidence . . . strongly suggests that the subject disciplinary action was taken largely, if not entirely, because of an alleged attitudinal problem on the part of the grievant rather than substantive deficiencies" in the affidavit. Id. at 35. The Arbitrator found that the assistant district director's instructions and guidance to the grievant in preparing the affidavit, including the two, not three, deadlines that he set for completion of the work, "were not unreasonable in terms of time." Id. at 39. In this regard, the Arbitrator found that although the Agency claimed that the grievant failed to meet three deadlines for completion of the affidavit, the evidence revealed that the grievant was not informed of the May 25 deadline. The Arbitrator further stated that the assistant district director's instructions and guidance to the grievant "lend themselves to scrutiny in view of the information conveyed to" the grievant and his supervisor as to what was needed in the affidavit, coupled with doubt raised in the matter as a result of the deputy district director's remark to the assistant district director that he was "'out to get'" the grievant for his alleged involvement in a matter causing an internal investigation of a trip made by the deputy district director. Id. at 38 and 39.

Nevertheless, the Arbitrator further found that the grievant was "dilatory in completing the assignment as requested." Id. at 39. The Arbitrator noted that this was "especially" true in light of the grievant's statement that, in his view, the assistant district director was "'running the case'" and his claim that other Agency employees were the ones that would determine what needed to be done. Id. Therefore, the Arbitrator stated that he was "compelled to conclude that the Agency did not violate any existing laws, rules, regulations or the negotiated agreement by taking the subject disciplinary action against the grievant." Id. at 40. The Arbitrator also stated that, "in light of the overall findings and reasons" in his decision, the 7-day suspension was excessive for the misconduct found. Id. As his award, the Arbitrator concluded that the "issue presented for determination must be answered in the NEGATIVE, that is the Agency did not violate any existing laws, rules, regulations, or the negotiated agreement by taking the subject disciplinary action against the grievant." Id. at 41 (emphasis in original). Accordingly, he denied the grievance.

After denying the grievance, the Arbitrator repeated his conclusion that the 7-day suspension, "in light of the overall findings and reasons," was "excessive for the grievant's dilatory conduct found." Id. The Arbitrator directed the Agency to: (1) rescind the suspension in its entirety; (2) issue an official

reprimand to the grievant for the dilatory conduct; and (3) reimburse the grievant for any pay or benefits lost as a result of the suspension.

IV. Agency's Exceptions

The Agency contends that the award is deficient because the Arbitrator exceeded his authority under the parties' agreement. The Agency states that the parties stipulated that the issue for determination was "'did the Agency violate any existing laws, rules, regulations, or the negotiated agreement when it suspended the grievant . . .,'" and that "only" if the Arbitrator found that the Agency committed such violation was he then authorized to remedy that violation. Exceptions at 8. The Agency asserts that notwithstanding the Arbitrator's determination that the Agency did "'not violate[] any existing laws, rules, regulations, or the negotiated agreement,'" by suspending the grievant, he, nonetheless, fashioned a remedy rescinding the suspension. Id. Relying on the Authority's decision in Veterans Administration and American Federation of Government Employees, Local 2798, 24 FLRA 447 (1986) (Veterans Administration), the Agency contends that the Arbitrator's award constitutes a clear case of the Arbitrator "exceeding the authority granted to him by the parties' submission." Id. Therefore, the Agency contends that the award, to the extent that it requires the Agency to rescind the suspension and instead issue a reprimand and to provide the grievant with backpay, "must be set aside as in excess of the Arbitrator's authority." Id. at 9.

The Agency next argues that, even assuming that the Arbitrator did not exceed his authority, the remedy "is predicated on a non-fact." Id. The Agency states that the Arbitrator "was concerned that the suspension action was 'punitive' rather than 'corrective' in nature because of the fact that management subsequently placed the grievant on a PIP on October 30, 1990." Id. at 10. According to the Agency, the Arbitrator was concerned that management "was not privileged to take what he incorrectly viewed as two separate personnel actions against the grievant" based on the same incident involving the seizure affidavit. Id. The Agency contends that the Arbitrator was "laboring under the unwarranted misapprehension that the grievant had been placed in some form of double jeopardy, and that it was this misapprehension" that motivated the Arbitrator to order that the suspension be rescinded notwithstanding his finding that the suspension did not violate any law, rule, regulation, or the parties' agreement. Id. The Agency asserts that the Arbitrator's "error of fact in this regard was compounded by his initial error in considering the October 30, 1990 action . . . to be a central fact" which was relevant to the appropriateness of the suspension and his "assumption that a PIP was a separate personnel action." Id. at 11 and 12. In conclusion, the Agency asserts that the Arbitrator's "finding" that the suspension was "'punitive'" was based on the "non-fact that management was precluded by law from putting the grievant on a PIP." Id. at 13.

The Agency further contends that the award directly interferes with management's right to discipline employees under section 7106(a)(2)(A) of the Statute. Citing the Supreme Court's decision in Department of the Treasury, Internal Revenue Service v. FLRA, 110 S. Ct. 1623 (1990), the Agency asserts that the Court made it clear that arbitrators may not reverse an agency's decision under section 7106(a)(2) of the Statute, such as the right to "'suspend,'" unless they find that the decision was not "in accordance with applicable laws." Exceptions at 13. The Agency argues that as the Arbitrator found that management did not violate any applicable laws or any rules, regulations, or the negotiated agreement, the Arbitrator "had no legal basis" for directing the Agency to rescind the suspension. Id. at 14.

Finally, the Agency asserts that the award of backpay is deficient under the Back Pay Act, 5 U.S.C. § 5596. The Agency states that, as a prerequisite for an award of backpay, a grievant must demonstrate that the challenged personnel action violated applicable law, rule, regulation or the parties' collective bargaining agreement. The Agency asserts that in this case, the Arbitrator "affirmatively found[]" to the contrary. Id. at 15. The Agency argues, therefore, that the award of backpay is deficient.

V. Union's Opposition

The Union asserts that the Agency "seeks to overturn the [Arbitrator's] decision on the grounds of a minor error in the crafting" of his award. Opposition at 2. The Union states that while the Union might have written the award differently, "the [a]ward is well thought out . . . and should be allowed to stand." Id. The Union asserts that if there is a question as to the Arbitrator's meaning or a need for clarification, the award should be remanded to the Arbitrator for clarification. However, the Union also states that, in its view, "such action is not necessary as the . . . [a]ward [is] clear and unambiguous despite the seeming contradiction." Id. at 4.

The Union acknowledges that the Arbitrator "plainly found there was no contract violation in the Agency's decision to discipline [the] grievant." Id. at 3. However, the Union also contends that the Arbitrator found, "on the separate but included issue, that the discipline imposed was excessive." Id. (emphasis in original). The Union asserts that what the Arbitrator failed to do was include in his award a statement to the effect that "although discipline was appropriate, and did not violate the contract, law or regulation, the discipline imposed was excessive to such a degree that it did not comport with the contract." Id. (emphasis in original). According to the Union, it is only in this respect that the award may be lacking. In this regard, the Union contends that it believes that the purposes of the agreement, the grievance procedure and its just cause provisions, and the Statute, are to promote good labor relations and substantial justice in the relationship between the Agency and the employees. According to the Union, "[s]uch provisions demand more than a mere dot your i and cross your t approach to personnel matters." Id. at 4.

As to the Agency's specific contentions, the Union asserts that the Arbitrator did not exceed his authority. The Union asserts that although the Arbitrator found that management's decision to discipline the grievant did not violate any authorities, he had "implicit jurisdiction to find the penalty excessive." Id. at 6. According to the Union, this jurisdiction is contained "within the language of [Article 31, Section H(1) of] the contract which states that discipline must be taken only for reasons that are 'just and sufficient,'" and will promote the efficiency of the Agency. Id. (emphasis in original).[2] The Union contends that the issue before the Arbitrator "incorporated the questions of sufficiency of cause within it by reference to the agreement." Id.

The Union states that it is not inappropriate for an arbitrator to find that just cause exists for discipline while also finding sufficient cause lacking to sustain discipline in the degree imposed. In the Union's view, the Arbitrator found that the discipline imposed was affected "by unacceptable considerations,

among them a desire for vengeance and the punitive rather than corrective nature of the action." Id. at 7. According to the Union, the Arbitrator found that these considerations "merited mitigation of the penalty." Id. In the Union's view, nothing in the issue presented to the Arbitrator "limited his authority to mitigate the discipline imposed if he first found discipline per se justified." Id. Therefore, the Union asserts that the Arbitrator did not exceed his authority by requiring the Agency to mitigate the penalty.

The Union further contends that there is no basis for the Agency's contention that the award is based on a nonfact because the Arbitrator did not find that the suspension and the imposition of a PIP on the grievant were both improper. The Union also asserts that the award does not interfere with management's right to discipline employees because the award "clearly draws its essence from the language of the agreement." Id. at 9. Finally, the Union contends that the award does not violate the Back Pay Act. According to the Union, the Arbitrator's finding that the discipline imposed was excessive "makes it (the discipline) a wrongful personnel action." Id. at 10.

VI. Analysis and Conclusions

For the reasons discussed below, we conclude that the award is ambiguous and, therefore, we cannot determine whether the award is deficient under section 7122(a) of the Statute. Thus, the award must be remanded to the parties for resubmission to the Arbitrator for clarification.

In its exceptions, the Agency contends, among other things, that the Arbitrator failed to confine his award to the stipulated issue and that he exceeded his authority by directing the Agency to rescind the suspension, issue a reprimand, and to pay backpay. It is well established that an arbitrator exceeds his or her authority by, among other things, resolving an issue not submitted to arbitration. See, for example, U.S. Department of Veterans Affairs Medical Center, Asheville, North Carolina and American Federation of Government Employees, Local 446, 37 FLRA 1054 (1990) (arbitrator exceeded his authority by directing an agency to reassign a grievant to his former position); Veterans Administration Medical Center, Houston, Texas and American Federation of Government Employees, Local 1633, 36 FLRA 122, 127-28 (1990) (arbitrator's award resolving an issue not properly before him found deficient as in excess of his authority); Veterans Administration, 24 FLRA at 450-51 (arbitrator exceeded his authority when he failed to confine his decision and remedy to the issues as he framed them).

On the other hand, an arbitrator does not exceed his or her authority when the arbitrator resolves an issue or issues an affirmative order that is within the scope of the matter submitted to arbitration. See U.S. Department of Health and Human Services, Austin, Texas and National Treasury Employees Union, Chapter 219, 40 FLRA 1035, 1041 (1991) (HHS) (arbitrator acted within his authority when he determined that a part of the disciplinary action was not based on just caused and reduced a 3-day suspension to a written reprimand). In HHS, we noted that it is well established that an arbitrator may determine whether or not all or part of a disciplinary action is for just and sufficient cause and may accordingly set aside or reduce the penalty. Id.

In this case, the parties stipulated the issue as: "[d]id the Agency violate any existing laws, rules, regulations, or the negotiated agreement when it suspended the grievant . . . from duty? And, if so, what is the remedy?" Award at 3 (footnote omitted). Thus, the issue before the Arbitrator, as agreed to by the parties, encompassed determinations as to the appropriate remedy for any violation of laws, rules, regulations or the parties' negotiated agreement. In other words, if the Arbitrator answered the issues presented to him by concluding that the Agency's decision to discipline the grievant, including the disciplinary penalty, did not violate any laws, rules, regulations, or the parties' negotiated agreement, then the Arbitrator would have decided the issues presented to him. If the Arbitrator answered the issues presented to him by concluding that the Agency's decision to discipline the grievant did not violate any of the applicable authorities, but that the disciplinary penalty did violate applicable authorities, then it would be within the scope of the Arbitrator's authority to mitigate the penalty.

Having reviewed the record, we are not certain of the Arbitrator's determinations. That is, the award is ambiguous as to: (1) whether the Arbitrator determined that the Agency's decision to discipline the grievant, including the disciplinary penalty, did not violate any laws, rules, regulations, or the parties' negotiated agreement; or (2) whether he determined that the Agency's decision to discipline the grievant did not violate any of the applicable authorities, but that the severity of the disciplinary penalty did violate applicable authorities. In this regard, the Arbitrator stated:

> Based upon the record of this case in its entirety and for the reasons and specific findings contained herein, the Arbitrator concludes that the issue presented for determination must be answered in the NEGATIVE, that is, the Agency did not violate any existing laws, rules, regulations, or the negotiated agreement by taking the subject disciplinary action against the grievant.
>
> Accordingly, the subject grievance is hereby denied.

Id. at 41 (emphasis in original).

Having denied the grievance, the Arbitrator then stated:

> The Arbitrator, however, finds and concludes that the seven-day disciplinary suspension, in light of the overall findings and reasons contained herein, is excessive for the grievant's dilatory conduct found herein. Accordingly, the Arbitrator directs the Agency to rescind the subject disciplinary suspension in its entirety while, at the same time, further directs the Agency to issue the grievant an official reprimand for the grievant's dilatory conduct found herein. The Arbitrator further directs the Agency to reimburse the grievant for any pay or benefits lost as a result of the subject disciplinary suspension.

Id. at 41-42.

We note, as conceded by the Union, that the Arbitrator did not cite specific violations of the parties' agreement or law, rule, or regulation with respect to this determination. However, we note that in his decision, the Arbitrator discussed the Agency's schedule of disciplinary offenses and penalties, the Agency's reliance on this schedule in determining the grievant's penalty, and the range of penalties applicable to the offense for which the grievant was charged. In considering the schedule of disciplinary offenses and penalties, the Arbitrator rejected the Agency's official reason for imposing a suspension rather than a reprimand. The Arbitrator's mitigation of the penalty, therefore, can be viewed as a determination that the Agency, under its schedule of penalties, did not have just cause to suspend the grievant for seven days and, therefore, the penalty violated applicable authority.

On the other hand, the Arbitrator determined, "based upon the record of the case in its entirety[,]" that the issue presented for determination must be answered in the "NEGATIVE, that is, the Agency did not violate any existing laws, rules, regulations, or the negotiated agreement by taking the subject disciplinary action." Id. at 41. That language makes the award unclear as to whether the Arbitrator's mitigation of the penalty is based on a finding of a specific violation of applicable authority. Therefore, we are unable to determine whether the Arbitrator's award exceeds the authority granted to him by the parties.

As the Arbitrator's award is unclear, we find it necessary to remand the award to the parties for the purpose of obtaining a clarification of the award from the Arbitrator. The remand is for the limited purpose of having the Arbitrator clarify and interpret his award by stating the basis for his affirmative order directing the Agency to rescind the suspension, issue a reprimand, and to pay backpay in light of his conclusion that the Agency did not violate any existing laws, rules, regulations, or the negotiated agreement by "taking the subject disciplinary action against the grievant." Id. On receipt of the award, as clarified, either party may file timely exceptions to that award.[3]

VII. Decision

The award is remanded to the parties in accordance with this decision.

FOOTNOTES:

(If blank, the decision does not have footnotes.)

1. Unless otherwise noted, all dates refer to 1990.

2. Article 31, Section H(1) provides:

> The parties agree that letters [of] reprimand, suspensions of less than fifteen (15) days, and other adverse actions will be taken only for appropriate cause as provided in applicable law. Such cause, in the case of actions which are not based on unacceptable performance, shall be just and sufficient and only for reasons as will promote the efficiency of the service.

Award at 5.

3. In view of this decision, it is unnecessary to address the Agency's exceptions that the award is based on a nonfact and violates the Back Pay Act. For the reasons stated in U.S. Department of Justice, Immigration and Naturalization Service, New York District Office and American Federation of Government Employees, Immigration and Naturalization Service Council, Local 1917, 42 FLRA 650, 658 (1991), we reject the Agency's exception that the award conflicts with management's right to discipline employees under section 7106(a)(2)(A) of the Statute.

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MAXIMUM PAYABLE RATE RULE

Description

The maximum payable rate rule is a special rule that allows an agency to set pay for a General Schedule (GS) employee at a rate above the rate that would be established using normal rules, based on a higher rate of pay the employee previously received in another Federal job. The pay set under the maximum payable rate rule may not exceed the rate for step 10 of the GS grade or be less than the rate to which the employee would be entitled under normal pay-setting rules. The maximum payable rate rule may be used in various pay actions, including reemployment, transfer, reassignment, promotion, demotion, change in type of appointment, termination of a critical position pay authority under 5 CFR part 535, movement from a non-GS pay system, or termination of grade or pay retention under 5 CFR part 536.

Rates of pay that may be used as the highest previous rate (HPR)

The highest previous rate is--

- The highest rate of basic pay previously received by an individual while employed in a civilian position in any part of the Federal Government (including service with the government of the District of Columbia for employees first employed by that government before October 1, 1987), without regard to whether that position was under the GS pay system; or
- The highest rate of basic pay in effect when a GS employee held his or her highest GS grade and highest step within that grade.

The highest previous rate must be a rate of basic pay received by an employee while serving-

- On a regular tour of duty under an appointment not limited to 90 days or less; or
- For a continuous period of not less than 90 days under one or more appointments without a break in service.

If the highest previous rate is a GS locality rate, the underlying GS rate or an LEO special base rate associated with that locality rate must be used as the highest previous rate in applying the maximum payable rate rule.

An agency may use a GS employee's special rate established under 5 U.S.C. 5305 and 5 CFR part 530, subpart C, or 38 U.S.C. 7455 as the highest previous rate when all of the following conditions apply:

- The employee is reassigned to another position in the same agency at the same grade level;
- The special rate is the employee's rate of basic pay immediately before the reassignment; and
- An authorized agency official finds that the need for the services of the employee, and the employee's contribution to the program of the agency, will be greater in the position to which

reassigned. An agency must make such determinations on a case-by-case basis. In each case, the agency must document the determination to use the special rate as an employee's highest previous rate in writing.

Any rate that does not meet the definition of General Schedule or GS in 5 CFR 531.203 is a rate from a non-GS pay system. If an employee's highest previous rate is a non-GS hourly rate of pay, the agency must convert the hourly rate of pay to an annual rate of pay by multiplying the hourly rate of pay by 2,087.

Pay rates that must be treated as if they were rates under a non-GS pay system:

- A critical position pay rate under 5 CFR part 535, and
- An adjusted GS rate that includes market pay under 38 U.S.C. 7431(c).

Rates of basic pay that may not be used as the HPR

The highest previous rate may not be based on certain types of rates, including the following:

- Erroneous rates;
- A rate received during a temporary promotion lasting less than 1 year, except (1) upon permanent placement at the same or higher grade or (2) when a temporary promotion is extended so that the total time equals or exceeds 1 year;
- A special rate established under 5 U.S.C. 5305, except in a reassignment within the same agency when the special rate is the employee's current rate and the agency has a need for the employee's services. (See 5 CFR 531.222(c) for use of a special rate as the HPR.) When a special rate is not used, the employee's underlying GS rate is the HPR.;
- A rate received as a member of the uniformed services; or
- A retained rate under 5 U.S.C. 5363 or a similar rate under another legal authority.

If a temporary promotion of less than 1 year is extended so that the total time of the temporary promotion equals or exceeds 1 year, the HPR may be based on the rate received during the temporary promotion once the total time of the temporary promotion equals or exceeds 1 year.

Determining the maximum payable rate (MPR)

When HPR is based on a GS rate:

When an employee's HPR is based on a GS rate, determine the MPR as follows:

Step A: Compare the employee's highest previous rate with the GS rates for the grade in which pay is currently being set using the schedule of GS rates (excluding any locality payment or additional pay of any kind) in effect at the time the highest previous rate was earned.

Step B: Identify the lowest step in the grade at which the GS rate was equal to or greater than the employee's highest previous rate. If the employee's highest previous rate was greater than the maximum GS rate for the grade, identify the step 10 rate.

Step C: Identify the rate on the currently applicable GS rate range for the employee's current position of record and grade that corresponds to the step identified in step B. This rate is the maximum payable GS rate the agency may pay the employee.

Step D: After setting the employee's GS rate within the rate range for the grade (not to exceed the MPR identified in step C), determine the employee's payable rate of basic pay (i.e., locality rate or special rate).

When HPR is based on an LEO special base rate, see 5 CFR 531.221(b) for special MPR rules.

When HPR is based on the special rate of an employee who is reassigned to a position in the same agency as provided by 5 CFR 531.222(c), see 5 CFR 531.221(c) for special MPR rules.

When HPR is based on a rate under a non-GS pay system:

When a GS employee's HPR is based on a non-GS rate, determine the MPR as follows:

Step A: Compare the highest previous rate to the highest applicable rate range (including a locality rate or special rate range) in effect at the time and place where the highest previous rate was earned. The highest applicable rate range is determined as if the employee held the current GS position of record (including the grade in which pay is being set) at that time and place.

Step B: Identify the lowest step rate in that range that was equal to or higher than the highest previous rate (or the step 10 rate if the highest previous rate exceeded the range maximum).

Step C: Convert the step rate identified in step B to a corresponding rate (same step) on the current highest applicable rate range for the employee's current GS position of record and official worksite. That step rate is the employee's maximum payable rate of basic pay.

Step D: After setting the employee's rate of basic pay in the current highest applicable rate range (not to exceed the MPR identified in step C), determine any underlying rate of basic pay to which the employee is entitled at the determined step rate.

See examples 6-8 and 10 on Pay Action Examples Other than Promotions and Grade and Pay Retention.

Key Terms

Highest applicable rate range means the rate range applicable to a GS employee, based on a given position of record and official worksite that provides the highest rates of basic pay, excluding any retained rates. For example, a rate range of special rates may exceed an applicable locality rate range. In certain circumstances, the highest applicable rate range may consist of two types of pay rates from different pay schedules-e.g., a range where special rates (based on a fixed dollar supplement) are higher in the lower portion of the range and locality rates are higher in the higher portion of the range.

General Schedule or GS means the classification and pay system established under 5 U.S.C. chapter 51 and subchapter III of chapter 53. It also refers to the pay schedule of GS rates established under 5

U.S.C. 5332, as adjusted under 5 U.S.C. 5303 or other law (including GS rates payable to GM employees). Law enforcement officers (LEOs) receiving LEO special base rates are covered by the GS classification and pay system, but receive higher base rates of pay in lieu of GS rates at grades GS-3 through GS-10.

Locality rate means a GS rate or an LEO special base rate, if applicable, plus any applicable locality payment.

Position of record means an employee's official position (defined by grade, occupational series, employing agency, LEO status, and any other condition that determines coverage under a pay schedule (other than official worksite)), as documented on the employee's most recent Notification of Personnel Action (Standard Form 50 or equivalent) and current position description. A position to which an employee is temporarily detailed is not documented as a position of record.

References

- 5 CFR 531.221-223
- 5 CFR 531.247 for GM employees
- 5 CFR 531.216 for an employee moving to a GS position from a Department of Defense and Coast Guard nonappropriated fund instrumentality (NAFI) position

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U.S. Office of Personnel Management
1900 E Street, NW, Washington, DC 20415 | (202) 606-1800 | TTY (202) 606-2532