68 FLRA No. 107

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
FORREST CITY, ARKANSAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS #33
LOCAL 922
(Union)

0-AR-4913

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DECISION

June 10, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement (the agreement), Agency regulations, and federal law when the Agency did not select the grievant for a promotion. Arbitrator Sidney S. Moreland, IV granted the grievance. In its exceptions, the Agency asks the Authority to review the award on three grounds.

First, the Agency argues that the award is contrary to law because the Arbitrator wrongly determined that the Agency committed prohibited personnel practices in violation of 5 U.S.C. § 2302(b). Because the Agency conceded at arbitration that consideration of an open disciplinary investigation against the grievant while evaluating him for a promotion constituted a prohibited personnel practice, we find that this exception is barred by §§ 2425.4(c) and 2429.5 of the Authority's Regulations.

Second, the Agency alleges that the award fails to draw its essence from the agreement because the agreement does not permit grievances based on non-selection from a group of properly ranked candidates. Because the award draws its essence from the agreement, we deny this exception.

Third, the Agency claims that the award is contrary to law because the Arbitrator wrongly determined that the Agency committed unfair labor practices under § 7116 of the Federal Service Labor-Management Relations Statute (the Statute).[1] Because the award is based on separate and independent grounds, and the Agency does not demonstrate that those grounds are deficient, we deny this exception.

II. Background and Arbitrator's Award

The grievant is a correctional officer with the Agency. An inmate filed a formal complaint against another correctional officer whose last name is similar to the grievant's. The Agency mistakenly opened an investigation against the grievant based on the inmate's complaint.

Nearly two years after the inmate's complaint, the grievant's supervisor informed him for the first time that he was being investigated. The supervisor also told the grievant that "people [were] trying to help [him] get promoted" and advised him that he should sign an Agency form B, which is ordinarily used by the Agency to notify an employee that they are the subject of an investigation, because "his promotion depended upon the investigation."[2]

The grievant immediately informed his supervisor that these allegations had not been made against him but against another officer, with a similar last name, at a facility where the grievant had never worked. Nonetheless, the grievant signed the form.

Approximately three weeks later, the grievant and the other officer, against whom the inmate complaint was made, were considered for a promotion. The Agency did not select the grievant because of the "open" investigation, but rather selected the officer against whom the inmate complaint actually had been filed.[3] The Union filed a grievance, which was unresolved, and the parties submitted the matter to arbitration.

The Arbitrator framed the issue before him as: "Did the Agency violate statute, regulation, and/or the [agreement] by [its] non-selection of the [g]rievant . . . and if so, what is the appropriate remedy?"[4] The Arbitrator found that the Agency violated 5 U.S.C. § 2302(b)(2), (4), and (6) and committed a prohibited personnel practice by erroneously opening an investigation against the grievant, then failing to close the investigation after being informed of its error, and considering that investigation in the selection process.

[1] 5 U.S.C. § 7116.
[2] Award at 2-3.
[3] *Id.* at 4.
[4] *Id.* at 1.

The Arbitrator also found that the Agency violated Articles 5 and 33 of the agreement, as well as program statement P3000.03, which was negotiated pursuant to the agreement. The Arbitrator further found that the Agency violated §§ 7106 and 7116(a)(5), (7), and (8) of the Statute. As a remedy, the Arbitrator directed the Agency to retroactively promote the grievant effective to the date he was denied the promotion.

The Agency filed exceptions to the award, and the Union filed an opposition.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Agency's contrary-to-law exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[5] Moreover, under those Regulations, the Authority will not consider arguments offered in support of an exception if those arguments differ from, or are inconsistent with, a party's arguments to the arbitrator.[6]

The Agency argues that its consideration of the open investigation against the grievant while assessing him for a promotion was not a violation of 5 U.S.C. § 2302(b)(2) because doing so was merely an "evaluation of the character, loyalty, or suitability" of the grievant, as permitted by 5 U.S.C. § 2302(b)(2)(B).[7] However, the Arbitrator found that the Agency "concur[red] [during arbitration] that the consideration of an employee being investigated as a factor during the merit[-]promotion process would be a prohibited personnel practice."[8] The Agency does not except to this finding.[9] Thus, it is inconsistent for the Agency to now argue that its consideration of the investigation against the grievant did not constitute a prohibited personnel practice. Therefore, we find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations prohibit the Agency from making this argument, and we dismiss it as such.

IV. Analysis and Conclusions

A. The award does not fail to draw its essence from the agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator wrongly determined that the grievance was arbitrable.[10] This is a substantive-arbitrability issue.[11] An arbitrator's determination regarding substantive arbitrability under the terms of a collective-bargaining agreement is subject to the deferential essence standard that federal courts use in reviewing arbitration awards in the private sector.[12] To show that an award fails to draw its essence from the collective-bargaining agreement, the appealing party must establish that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective-bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[13] The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained."[14]

The Agency claims that the award is contrary to Article 5(c) of the agreement,[15] which states: "while the procedures used by an agency to identify and rank qualified candidates may be proper subjects for formal complaints or grievances, *non-selection* from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance."[16] The Agency also cites program statement P3000.03, which states that "[f]ormal grievances may not be based on: [f]ailure to be selected for promotion when proper promotion procedures are used, that is, non-selection from properly rated, ranked, and certified applicants."[17]

The Agency notes that the only issue before the Arbitrator was whether the Agency "violate[d] statute, regulation, and/or the [agreement] by [its] *non-selection*

[5] 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Local 3448*, 67 FLRA 73, 73-74 (2012).
[6] *U.S. Dep't of VA, Bos. Healthcare Sys., Bos., Mass.*, 68 FLRA 116, 118 (2014) (citing *AFGE, Council of Prison Locals, Local 405*, 67 FLRA 395, 396 (2014)).
[7] Exceptions at 15.
[8] Award at 9.
[9] *See generally* Exceptions.
[10] *Id.* at 5-10.
[11] *E.g., AFGE, Local 3911*, 59 FLRA 516, 518 (2003).
[12] *See* 5 U.S.C. § 7122(a)(2); *SPORT Air Traffic Controllers Org.*, 64 FLRA 606, 609 (2010); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[13] *U.S. DOD, Def. Contract Audit Agency, Cent. Region, Irving, Tex.*, 60 FLRA 28, 30 (2004) (*DOD Irving*) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*)).
[14] *Id.* (internal quotation marks omitted).
[15] Exceptions at 5-6.
[16] Award at 12 (emphasis added).
[17] Exceptions at 7 (quoting Exceptions, Ex. D, Program Statement P3000.03 at 36).

of the [g]rievant."[18] Because the agreement does not allow for grievances regarding non-selection from a group of properly ranked candidates, the Agency argues that this grievance is not arbitrable.[19] The Agency further explains that, regardless of whether the Agency's consideration of improper factors caused the grievant's non-selection, "[t]here is no evidence . . . that anything improper was done *prior* to the grievant being ranked and placed on the [best-qualified] list for possible selection."[20] According to the Agency, the Arbitrator disregarded the parties' agreement when he "review[ed] the reasons for non-selection, a matter that is specifically excluded from the negotiated grievance procedure."[21]

Contrary to the Agency's arguments, however, the Arbitrator found that the grievance was arbitrable because "proper promotion procedures"[22] were not used, as is required by the parties' agreement.[23] Specifically, the Arbitrator found that the Agency not only erroneously opened an investigation against the grievant, but allowed the investigation to remain open for eighteen months and did not resolve the investigation even after the grievant informed the Agency of its error.[24] Therefore, the Arbitrator concluded that the Agency violated Article 3, Section d. of the agreement, which "endorse[s] the concept of timely disposition of investigations and disciplinary/adverse actions."[25] Additionally, the Arbitrator found that Articles 5 and 33 of the agreement require that "procedures for promoting employees [should be] based on merit and [must be] available in writing to candidates," and that "actions under a promotion plan . . . shall be . . . based solely on job[-]related criteria."[26]

The Arbitrator similarly noted that program statement P3000.03 prohibits consideration of anything other than the employee's "job performance and knowledge, skills, and abilities."[27] In this respect, he noted that at a 2011 labor-management relations meeting, the Agency explained that the policy "does not allow selecting officials to exclude employees from consideration for promotion . . . based on pending allegations of misconduct."[28] Accordingly, the Arbitrator found that the Agency's own interpretation of the agreement prohibits consideration of open investigations against employees on the best-qualified list for a promotion.[29]

The Arbitrator also noted that the agreement prohibits grievances over non-selection only when the list of candidates is "properly ranked."[30] The Arbitrator found that, by considering the investigation against the grievant, the best-qualified list was not properly ranked.[31] The Arbitrator thus concluded that the grievance was arbitrable.[32]

In reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority grants deference to an arbitrator's interpretation of that agreement.[33] This standard, and the private sector cases from which it is derived, make it clear that an arbitrator's award will not be found to fail to draw its essence from the agreement merely because a party believes that the arbitrator misinterpreted the agreement.[34] The Arbitrator based his interpretation of the agreement on numerous provisions of the agreement – specifically, those that require that "proper promotion procedures" be followed,[35] that the best-qualified list be "properly ranked,"[36] and that promotion actions be based solely on "merit" and "job-related criteria."[37] The Agency provides no basis for finding that the Arbitrator's determinations are irrational, unfounded, implausible, or in manifest disregard of the agreement.[38]

Accordingly, we deny this exception.

B. The award is not contrary to law.

The Agency argues that the award is contrary to law because the Arbitrator improperly found that the Agency committed prohibited personnel practices, in violation of 5 U.S.C. § 2302(b)(2), (4), and (6) and unfair labor practices, in violation of § 7116(a)(5), (7), and (8) of the Statute.

When an arbitrator's remedy is based on separate and independent grounds, the Authority has held

[18] Award at 1 (emphasis added).
[19] Exceptions at 6.
[20] *Id*. at 9.
[21] *Id*. at 10.
[22] Exceptions, Ex. D at 36.
[23] Award at 15-16.
[24] *Id*. at 10-11.
[25] *Id*. at 10 n.3.
[26] *Id*. at 14.
[27] *Id*. at 12-13 (internal quotation marks omitted).
[28] *Id*. at 10.
[29] *Id*.
[30] *Id*. at 15.
[31] *Id*. at 15-16.
[32] *Id*.
[33] *DOD Irving*, 60 FLRA at 30.
[34] *See SSA*, 63 FLRA 691, 692 (2009) (citing *OSHA*, 34 FLRA at 575-76); *see also United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987) ("Because the parties have contracted to have disputes settled by an arbitrator chosen by them . . . , it is the arbitrator's view of the facts and the meaning of the contract that they have agreed to accept.").
[35] Exceptions, Ex. D at 36.
[36] Award at 15-16.
[37] *Id*. at 14.
[38] *DOD Irving*, 60 FLRA at 30.

that the excepting party must establish that all of the grounds are deficient in order for the Authority to find the award deficient.[39] When an excepting party has not demonstrated that the award is deficient on one of the grounds relied on by the arbitrator, and the award would stand on that ground alone, then it is unnecessary to address exceptions to the other grounds.[40]

As explained above, we find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations prohibit the Agency from arguing that it did not violate 5 U.S.C. § 2302(b)(2) when it considered the investigation against the grievant during its selection process.[41] Accordingly, the Agency has not demonstrated that the Arbitrator's award is contrary to law insomuch as the award found that the Agency committed a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(2). This finding provides a separate and independent ground for the Arbitrator's award. Consequently, it is unnecessary to address the Agency's remaining contrary-to-law exceptions.

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

[39] *U.S. DHS, U.S. CBP*, 68 FLRA 184, 188 (2015) (citing *SSA, Region VI*, 67 FLRA 493, 496 (2014); *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, San Juan, P.R.*, 66 FLRA 81, 86 (2011); *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000)).
[40] *Id*. (citing *SSA, Region VI*, 67 FLRA at 496; *U.S. Dep't of the Air Force, 442nd Fighter Wing, Whiteman Air Force Base, Mo.*, 66 FLRA 357, 364-65 (2011)).
[41] 5 C.F.R. § 2429.5.