69 FLRA No. 19

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JAMES N. QUILLEN
VA MEDICAL CENTER
MOUNTAIN HOME, TENNESSEE
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1687
(Union)

0-AR-5142

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DECISION

December 21, 2015

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

I. Statement of the Case

Arbitrator Douglas F. Coleman found that the Agency violated the applicable master labor agreement (master agreement) when it selected an employee (the selectee) for a vacancy rather than other qualified employees with more seniority. As a remedy, the Arbitrator directed the Agency to place one of the non-selected employees (the grievant) into the position.

We must decide one substantive question: whether the Arbitrator's award is contrary to law, specifically § 7121(c)(4) of the Federal Service Labor-Management Relations Statute (Statute),[1] which prohibits a grievance over "any examination, certification, or appointment."[2] Because § 7121(c)(4) applies only to an individual's initial entry into federal service, and both the grievant and the selectee already were federal employees when the Agency filled the vacancy, the answer is no.

[1] 5 U.S.C. § 7121(c)(4).
[2] *Id.*

II. Background and Arbitrator's Award

As relevant here, the Agency posted a vacancy. Both the selectee and the grievant, along with at least one other employee (whose application the Agency rejected as incomplete) applied for the vacancy. After the Agency chose the selectee for the position, the Union filed a grievance. The grievance asserted that a prior settlement agreement between the parties had provided, among other things, that "trained employees would be rotated through all clinics on a fair and equitable basis, based on" several factors, including "seniority."[3] According to the grievance, the Agency violated that prior settlement agreement when it "posted a position to fill the vacancy."[4]

The grievance went to arbitration. In its opening statement at arbitration, the Union argued that "[f]illing the posted vacancy with the [selectee] . . . while a senior employee with prior experience was available [was] a violation of" Article 21, Section 3(h) of the master agreement.[5] Article 21, Section 3(h) provides that "[s]eniority among employees with comparable qualifications will be the determining factor for access to a preferred tour," and that "[s]eniority will be defined locally."[6]

The Arbitrator noted that "[t]he original grievance was mostly protesting the training of a junior employee in [a particular department] while senior employees were not offered the training," but that "the grievance was expanded to protest the filling of the posted vacancy with a junior employee."[7] And the Arbitrator found that Article 13 of the master agreement applied to this dispute. Article 13 provides, in relevant part: "If more employees volunteer [for reassignment] than vacancies exist, the [Agency] will select from the qualified volunteers. Seniority will be the selection criterion. If there are an insufficient number of volunteers, then the least senior qualified employee(s) will be selected."[8] The Arbitrator found that the grievant was: (1) qualified for the position, (2) senior to the selectee, and (3) the only employee, other than the selectee, who submitted a valid application for the vacancy. Accordingly, the Arbitrator found that the Agency violated the master agreement by selecting the selectee rather than the grievant for the vacancy. As a

[3] Exceptions, Attach. (Step 1 Grievance) at B-1; Exceptions, Attach. (Step 2 Grievance) at C-1; Exceptions, Attach. (Step 3 Grievance) at D-1.
[4] Exceptions, Attach. (Step 1 Grievance) at B-2; Exceptions, Attach. (Step 2 Grievance) at C-2; Exceptions, Attach. (Step 3 Grievance) at D-2.
[5] Award at 4.
[6] *Id.* at 3.
[7] *Id.* at 11.
[8] Exceptions, Attach. 12 (Master Agreement) at 46.

remedy, the Arbitrator directed the Agency to place the grievant in the position.

The Agency then filed exceptions to the Arbitrator's award.

III. Preliminary Matters: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's management-rights and nonfact exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[9]

The Agency argues that the award is contrary to its right, under § 7106(a)(2)(C) of the Statute, to make selections for appointments.[10] The Agency claims that, at arbitration, it argued that "apply[ing] the provisions of Article 13 in this case" would be contrary to § 7106(a)(2)(C) of the Statute.[11] Thus, the Agency effectively concedes that it was aware, at arbitration, that Article 13 was at issue. As a result, the Agency should have known to raise any arguments regarding Article 13's consistency with § 7106 of the Statute. But the only references to § 7106 of the Statute that appear in the Agency's pre- or post-hearing briefs concern the interpretation of a previous memorandum of understanding between the parties – not Article 13.[12] As such, the Agency did not present its management-rights argument, as it relates to Article 13, to the Arbitrator, even though it could have done so. Accordingly, §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's management-rights exception, and we dismiss that exception.

Additionally, the Agency argues that the Arbitrator based the award on a nonfact.[13] Specifically, it claims that the selectee actually had more seniority than the grievant.[14] There is no dispute that Article 13 provides for selection on the basis of seniority (among qualified volunteers),[15] or that the Union's opening statement at arbitration claimed that the Agency violated another provision of the master agreement when it filled the vacancy with the selectee "while a senior employee with prior experience was available."[16] So the Agency should have known to present, to the Arbitrator, any arguments and evidence concerning the selectee's seniority, relative to the grievant. But there is no evidence that it did so. Accordingly, we dismiss the Agency's nonfact exception as well.

IV. Analysis and Conclusion: The Arbitrator's determination that the grievance is substantively arbitrable is not contrary to law.

The Agency argues that the Arbitrator's determination that the grievance was arbitrable is contrary to law.[17] When an exception involves an award's consistency with law, the Authority reviews any questions of law raised by the exception and the award de novo.[18] In applying the standard of de novo review, the Authority determines whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[19]

Section 7121(c)(4) of the Statute provides that a negotiated grievance procedure may not cover grievances concerning "any examination, certification, or appointment."[20] The Authority has long held that the terms "examination," "certification," and "appointment," as used in § 7121(c)(4), apply to an individual's initial entry into federal service.[21] Thus, § 7121(c)(4) "does not affect the arbitrability of claims regarding the hiring of grievants who were already federal employees when they applied for the position."[22]

Here, the Agency argues that the Arbitrator erred in finding the grievance arbitrable because it concerns "the 'examination, certification, or appointment' of [the selectee]."[23] But because all of the individuals involved in this case already were federal employees when the Agency filled the vacancy, § 7121(c)(4) does not apply.

Accordingly, the Arbitrator's determination that the grievance was arbitrable is not contrary to law, and we deny this contrary-to-law exception.

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[9] 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DHS, CBP*, 68 FLRA 157, 159 (2015).
[10] Exceptions at 1-2.
[11] *Id.* at 2.
[12] *See* Exceptions, Attach. 4 (Pre-Hr'g Br.) at 3-5; Exceptions, Attach. 5 (Post-Hr'g Br.) at 2, 3, 7.
[13] Exceptions at 1-2.
[14] *Id.* at 2.
[15] *See* Award at 2 (setting forth pertinent wording of Article 13).
[16] *Id.* at 4.
[17] Exceptions at 1-2.
[18] *E.g., U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 61 FLRA 765, 770 (2006) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).
[19] *E.g., id.* (citing *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Terre Haute, Ind.*, 58 FLRA 327, 329 (2003)).
[20] 5 U.S.C. § 7121(c)(4).
[21] *E.g., USDA, Rural Dev. Centralized Servicing Ctr., St. Louis, Mo.*, 57 FLRA 166, 168 (2001) (*USDA*); *accord Suzal v. Dir., U.S. Info. Agency*, 32 F.3d 574, 580 (D.C. Cir. 1994) ("[W]e read the word 'appointment' . . . to refer only to *initial* appointments, not to reappointments.").
[22] *Broad. Bd. of Governors*, 68 FLRA 342, 345 (2015).
[23] Exceptions at 1.

V. Decision

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

Member Pizzella, dissenting in part:

In *U.S. Department of VA, Board of Veterans Appeals*,[1] I observed that my colleagues' application of the nonfact exception has been "so narrow[]" that the exception has been, "for all practical purposes, denigrated to extinction."[2] As I noted in that case, the Authority should not blindly defer to "inconsistent[or] outrageous" findings, simply because they "involve[] a matter that was 'disputed' before the arbitrator."[3]

Once again, with today's decision, the Majority continues its full-frontal assault against the nonfact exception and wounds it so severely that it will no longer have any practical purpose.

Here, Arbitrator Douglas F. Coleman based his award on a non-existent "*fact*" – that the grievant was *senior* to the selectee. Wait a minute, there is one problem – the record clearly demonstrates that assumption to be not true. In reality, the record clearly demonstrates the opposite – the grievant was *junior* to the selectee.

Furthermore, this case had nothing to do with the grievant's seniority. There was no evidence presented at arbitration that even suggested that the grievant was more senior than the selectee. Ironically, the grievant's and the selectee's SF-50s clearly show that the grievant was *junior* to the selectee. It is inexplicable, therefore, how Arbitrator Coleman ever concluded that "[t]he selection of [the selectee] over a *senior* qualified employee[, the grievant,] violate[d] the provisions of . . . Article [13 of the master agreement]"[4] when neither party discussed in any form or fashion, the grievant's seniority. It was simply a non-issue in this case.

Even if I would just go along with the Majority's extraordinarily confining application of the nonfact exception, I would still conclude that the award must be set aside.

The Majority circularly posits that the Agency *should have known* to introduce evidence regarding the selectee's seniority relative to the grievant, even though the Union: *never claimed* that the Agency violated Article 13 by selecting a more junior employee to fill the vacancy;[5] *never argued* that the grievant was more senior than the selectee;[6] and *never requested*, as a remedy, that the Arbitrator assign the grievant to the dermatology position.[7]

In other words, the Majority expects the Agency to act as a soothsayer and predict that it would have to rebut an issue never raised by the Union and drawn out of thin air by the Arbitrator. By not raising any question concerning seniority (which was a matter not at issue or in dispute), one would reasonably conclude that the Union implicitly acknowledged that the grievant's seniority was not relevant.[8]

It is particularly noteworthy that the Majority does not actually find that the Agency *should have known* to raise the grievant's seniority. Rather, the Majority relies on the Agency's "effective[] concession" to that effect.[9] Namely, that because the Agency claims to have raised the argument that "apply[ing] the provisions of Article 13 in this case would excessively interfere with management's right to select under 5[U.S.C. §] 7106(a)(2)"[10] of the Federal Service Labor-Management Relations Statute,[11] "it was aware, at arbitration, that Article 13 was at issue."[12] But the Majority acknowledges that none of the Agency's arguments actually reference Article 13.[13] Indeed, the only mention of Article 13 in either of the Agency's briefs concerns a different grievance than the one at issue here.[14]

It is far more reasonable to conclude, under these circumstances that the Agency's non-attorney representative[15] was simply inartful when he explained its management-rights argument: "the Agency denied the grievance on [October 10, 2014], asserting that the Agency had not violated the [June 2, 2014] agreement, nor had the Agency given up their reserved rights to determine the mission, organization, or the number of employees required . . . covered by 5 [U.S.C. §] 7106(a)."[16]

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[1] 68 FLRA 170 (2015) (Member Pizzella dissenting).
[2] *Id.* at 175 (Dissenting Opinion of Member Pizzella).
[3] *Id.*
[4] Award at 13 (emphasis added).
[5] *See* Exceptions, Attach. 8, Ex. 7B at 1-2.
[6] *See* Award at 6 (summarizing grievant's testimony). *Cf. id.* (expressly noting that another witness "[wa]s senior to [the selectee]"); *id.* at 8 (same).
[7] *See id.* at 4 ("The Union requests the vacancy be vacated.").
[8] *See* Exceptions, Attach. 8, Ex. A.1 (listing relative seniority of medical-outpatient-clinic (i.e., the selectee's office) employees).
[9] Majority at 3.
[10] Exceptions at 2.
[11] 5 U.S.C. § 7106(a)(2).
[12] Majority at 3.
[13] *See* Exceptions, Attach. 4 (Pre-Hr'g Br.) at 3-5; Exceptions, Attach. 5 (Post-Hr'g Br.) at 2, 3, 7.
[14] *See* Pre-Hr'g Br. at 1.
[15] *See id.* at 3.
[16] Post-Hr'g Br. at 2.

As I have stated before, "I do not believe that the Authority should go out of its way to catch parties in technical trapfalls and summarily dismiss otherwise meritorious arguments."[17] But my colleagues do so yet again, effectively forcing the Agency to choose between enforcing the award and enforcing the master agreement (and potentially drawing an unfair-labor-practice charge from whichever employee it ends up disappointing).

Thank you.

[17] *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 607 (2014) (Dissenting Opinion of Member Pizzella).