

FEDERAL LABOR RELATIONS AUTHORITY

1400 K Street, NW, Suite 200
Washington, DC 2042-0001

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)
National Council of HUD Locals 222,)
AFGE, AFL-CIO,)
Union)

v.)

)
)
U.S. Department of Housing)
and Urban Development,)
Agency.)

Issue: Fair & Equitable Compliance

AGENCY EXCEPTIONS TO ARBITRATOR MODIFICATION

Pursuant to 5 U.S.C. §7122(a), the Department of Housing and Urban Development (Agency or HUD) hereby files exceptions to the Modification of the January 10, 2012, Award on Remand of Arbitrator Andree McKissick. Pursuant to 5 C.F.R. Section 2425.7 of the Authority's Regulations, the Agency is not requesting an expedited, abbreviated decision.

As set forth fully below, the Agency contends that Arbitrator McKissick exceeded her authority by issuing a Modification, dated August 2, 2014, to a final and binding Opinion and Award, dated August 8, 2012. Specifically, that Arbitrator McKissick's Modification constitutes *functus officio*, and is deficient. The August 2, 2014, Modification should, therefore, be set aside.

PROCEDURAL HISTORY

The Department of Housing and Urban Development and the American Federation of Government Employees, Council 222, (Council 222) are parties to a collective bargaining agreement (CBA). See Exhibit (Exh.) 1. Pursuant to Article 22 of the parties' CBA, Council 222 filed a grievance on November 13, 2002. See Exh. 2. The grievance alleged that the Agency posted new positions to the grade 13 with identical job responsibilities of current bargaining unit employees who encumbered similar positions with a career ladder of grade 12. See id. The grievance asserted that the new positions created by the Agency offered applicants a higher grade promotion potential to grade 13, compared to the positions encumbered by bargaining unit employees at the grade 12 at the time of the job postings. See Exh. 2.

The parties participated in an arbitration hearing, and on September 29, 2009, Arbitrator McKissick issued her Initial Decision on the merits, sustaining Council 222's grievance. See Exh. 3. The Arbitrator found that the Agency violated Articles 4.01 and 4.06 [grievants were unfairly treated and unjustly discriminated against]; Article 9.01 [classification standards were not fairly and equitably applied]; and Article 13.01 [Agency sought to hire external applicants, instead of promoting and facilitating the career development of internal employees]. See id. at p. 15.

As a remedy, Arbitrator McKissick ordered an organizational upgrade of affected positions to the GS-13 level, retroactive to 2002. See Exh. 3 at p. 15. Arbitrator McKissick's Award also advised the parties that she would maintain jurisdiction for the purpose of implementation of the award. See id. On October 30, 2009, the Agency filed exceptions to the award before the FLRA.

On January 26, 2011, the FLRA issued a decision, finding the grievance was arbitrable because it dealt with issues of fairness and equity. See Exh. 4. Notwithstanding this determination, the FLRA remanded the Arbitrator's award for action consistent with its decision that the Arbitrator's reference to "reclassified positions" was unclear, and required clarification to determine whether Arbitrator McKissick had jurisdiction over the grievance.

See id.

On January 10, 2012, Arbitrator McKissick issued a follow up Opinion and Award (Opinion and Award). See Exh. 5. In the Award, the Arbitrator concluded that the following remedy was appropriate:

That the Agency process retroactive permanent selections of all affected BUEs 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.

See id. at pp. 2-3.

The Arbitrator identified the class of grievants subject to the Remedy as:

All bargaining unit employees in a position in a career ladder (including at the journeyman level), where that career ladder lead to 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.

See Exh. 5 at p. 4.

The Arbitrator ordered that the Agency stop advertising positions in a way that requires current employees to take downgrades in order to secure greater promotion potential. See id. The Arbitrator advised the parties that she would retain jurisdiction to

provide alternative relief, in the event relief provided was found to be inconsistent with law or otherwise not available, or set aside. See Exh. 5 at p. 5.

On February 10, 2012, the Agency filed exceptions to the Opinion and Award. On August 8, 2012, the FLRA issued an Order dismissing the Agency's exceptions, citing the Agency's failure to challenge the proposed remedy prior to filing its exceptions. See Exh. 6. The Opinion and Award became final and binding on August 8, 2012. See id.

On October 24, 2012, Council 222 filed an unfair labor practice ("ULP") charge, alleging that the Agency failed to comply with the Opinion and Award. See Exh. 7. On March 21, 2013, the FLRA advised the Agency that Council 222 withdrew the ULP charge. See Exh. 8. On April 23, 2013, Council 222 advised the Agency that if the parties were not able to reach agreement on implementation, that it would contact Arbitrator McKissick. See Exh. 9.

IMPLEMENTATION EFFORTS BEFORE ARBITRATOR MCKISSICK

On May 30, 2013, the parties participated in a teleconference with Arbitrator McKissick to discuss implementation with the Opinion and Award. See Exh. 10. During the teleconference, the Agency outlined its implementation efforts toward compliance with the Opinion and Award, identified as an Implementation Plan developed during the processing of the ULP charge. See id. During a follow-up teleconference, held on July 8, 2013, Arbitrator McKissick verbally advised the parties that any reference to vacancy announcements in her Opinion and Award was "inadvertent," and that bargaining unit members deemed eligible should receive the remedy outlined in the Opinion and Award.

On August 7, 2013, the Agency responded via letter, and raised the issue of a modification with the Opinion and Award directly before the Arbitrator. See Exh. 11.

The Agency's response outlined its position that the Arbitrator's statements that the posting of announcements was "inadvertent" may constitute a modification of her Award, and requested a written clarification. See id. On August 13, 2013, the Union submitted a response to the parties, via email. See Exh. 12. A copy of a Memorandum For The Record memorializing the July 8, 2013, teleconference, was included as an attachment to the email. See id. The Memorandum For The Record prepared by Union counsel reiterates the Arbitrator's statements to the parties that the remedy was not vacancy announcement driven. See id. On August 29, 2013, Arbitrator McKissick denied the Agency's request, responding that because the Opinion and Award was final and binding, no written clarification was needed. See Exh. 13. On November 13, 2013, the Agency requested that the Arbitrator reconsider the Agency's request for written clarification. See Exh. 14.

On December 9, 2013, Arbitrator McKissick advised the parties of her intent to convene Implementation Meetings between the parties. See Exh. 15. Following the Implementation Meetings, Arbitrator McKissick issued a Summary of Implementation Meeting to the parties. See Exh. 16. The stated purpose of the Summary of Implementation Meeting is to "discuss implementation of the January 10, 2012, Opinion and Award." See id. To date, Implementation Meetings have been held on: February 4, 2014; March 26, 2014; and June 12, 2014. See Exh. 16-17. On August 2, 2014, Arbitrator McKissick forwarded a Summary of Implementation Meeting (Implementation Summary) of the parties' June 12, 2014, Implementation Meeting. See Exh. 17.

The Implementation Summary memorializes the Arbitrator's instructions to the parties. Namely, that: "The Parties were instructed that based upon this Arbitrator's

Award, as an example, all GS-1101 employees at the GS-12 level from 2002 were to be promoted, per the Back Pay Act and CBA, with back pay and interest, as of their earliest date of eligibility.” See id. at p. 1. The Implementation Summary states: “This Arbitrator further reminded the Agency that any use of location, vacancies or any other limiting factors would not comport with the Award.” See Exh. 17 at p. 2.

On August 28, 2014, representatives from the Agency, Council 222 and Arbitrator McKissick participated in another Implementation Meeting. Towanda Brooks was in attendance at the August 28, 2014, meeting. See Exh 18. Ms. Brooks serves as the Deputy Chief Human Capital Officer for the Agency. See id. During the Implementation Meeting, Ms. Brooks advised Council 222 representatives and Arbitrator McKissick that, based upon a career ladder analysis conducted by her staff, at least one position within the GS-1101 series, Project Manager, did not have a career ladder to the grade 13, and could not receive the remedy outlined in the Opinion and Award and Implementation Summary. See Exh. 18. Ms. Brooks advised that, based on data reviewed by the Agency, those employees encumbering positions at the GS-1101 series that did not have a career ladder to the GS-13 could not receive the remedy outlined in the Opinion and Award, even though the Implementation Summary states otherwise. See id. The Agency also advised the Arbitrator that placement into a previously classified position was, in fact, a limiting factor to identify grievants consistent with the Opinion and Award, even though the Implementation Summary also states otherwise. See Exh. 18.

ARGUMENT

I. Exceptions to a Modification are Appropriate

Exceptions filed in response to a modification of an arbitration award which gives rise to the deficiencies alleged in the exceptions filed, are deemed timely, and subject to review before the Authority. See generally U.S. Dep't of Health and Human Serv., Social Security Admin., 23 FLRA 157 (1986) (filing period for exceptions begins with arbitrator's modification of award). Where, as in this case, an arbitrator modifies a final and binding award, a party in the matter where the award was modified may file exceptions. See 5 C.F.R. §2421.11. As such, the Agency's exceptions to the modification issued by Arbitrator McKissick, dated August 2, 2014, are timely and appropriate for consideration.

II. The Arbitrator Exceeded Her Authority by Issuing a Modification to the Opinion and Award

Pursuant to 5 C.F.R. §2425.6, the Agency contends that Arbitrator McKissick exceeded her authority by modifying the Opinion and Award. An arbitrator exceeds their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregards specific limitation to their authority, or award relief to those not subject to the grievance. See American Fed'n of Gov't Employees, Local 1617, 51 FLRA 1645 (1996). Specifically, under the doctrine of *functus officio*, once an arbitrator resolves the matter submitted to arbitration, the arbitrator is generally without further authority. See U.S. Dep't of Transp., FAA, NW, Mountain Region, Renton, Wash., 64 FLRA 823 (2010). The doctrine effectively precludes an arbitrator from

reconsidering a final and binding award. See American Fed'n of Gov't Employees, Local 2172, 57 FLRA 625 (2001).

The Opinion and Award found that “grievants would have been selected for currently existing career ladder positions with promotion potential to the GS-13 level.” See Exh. 5 at p. 2. The Opinion and Award defines the class of grievants as: “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 journey (target) grade of a career ladder of a position with the same job series, which was posted between 2002 and present.” See id. at p. 4.

A dispute arose between the parties over the scope of employees eligible for the remedy. See Exh. 6. The parties jointly requested clarification on the scope of employees eligible for the remedy. See Exh. 11. In response, Arbitrator McKissick provided verbal clarification that her reference to the posting of announcements was “inadvertent.” See id. The Agency requested written clarification based upon on its assertion that verbal statements made by the Arbitrator appeared to modify the Opinion and Award on the class of grievants. See Exh. 11. Requests for written clarification were denied by the Arbitrator. See Exh. 12.

Arbitrator McKissick maintained that because the Opinion and Award was final and binding, no written clarification was needed. See Exh. 13. Instead, the Arbitrator decided to hold Implementation Meetings with the parties. See Exh. 15. Arbitrator McKissick subsequently issued Implementation Meeting Summaries, providing an overview of the meetings, along with instructions and orders to the parties. See Exhs. 16-17.

Notwithstanding this, Arbitrator McKissick's August 2, 2014, Implementation Summary exceeds her authority because she re-examined and modified the Opinion and Award's determination on the class of grievants. Specifically, by directing the Agency to promote all employees in the GS-1101 series from the grade 12 to the grade 13, the Arbitrator modified the class of grievants to include all employees at the grade 12 in the GS-1101 series, regardless of whether a higher target grade exists. See Exh. 17.

In contrast, the Opinion and Award states that grievants be placed in a position with a career ladder at a lower journeyman grade than the target grade of a position with the same job series, posted between 2002 and present. See Exh. 5. The Opinion and Award defines the class of grievants as those employees in lower career ladder positions than the career ladders of positions subsequently posted by the Agency. The Implementation Summary modifies the Opinion and Award by:

1. Redefining the class of grievants to include all employees in the GS-1101 series, regardless of whether the employees encompass a career ladder at a lower journeyman grade than the target grade of a position with the same job series, posted between 2002 and present; and
2. Redefining the application of factors used to identify grievants eligible for the remedy of a retroactive promotion to the GS-13 level.

Based on above, the Implementation Summary exceeds the Arbitrator's retained authority in effectuating implementation with the Opinion and Award. See Overseas Fed'n of Teachers, AFT, AFL-CIO, 32 FLRA 410 (1988) (after resolving an award on the merits, an arbitrator's authority is limited to the scope of their retained jurisdiction).

The Agency's exceptions, which are based on the issues stemming from the August 2, 2014, Implementation Summary, have been raised before the Arbitrator. See 5 C.F.R § 2429.5. During the parties' August 28, 2014, Implementation Meeting, the Agency raised the issue identified in the Implementation Summary restricting the use of any limiting factor for determining eligible grievants. See Exh. 18.

The Agency also raised the issue that the Implementation Summary directs the Agency to promote all employees in the GS-1101 series from the grade 12 to grade 13, before Arbitrator McKissick. See Exh. 18. At least one position in the GS-1101 series, Project Manager, did not have a career ladder to the grade 13 for the remedy of a retroactive promotion from grade 12 to grade 13. See Exh. 18. Further, those employees encumbering positions at the GS-1101 series that did not have a career ladder to the GS-13, such as the position of Project Manager, could not meet the criteria outlined in the Opinion and Award to qualify as a grievant, even though the Implementation Summary states otherwise. See id.

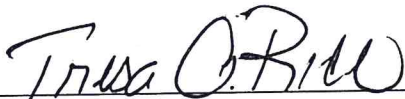
The Arbitrator sustained the grievance, which alleged the Agency posted new positions to grade 13 compared to positions encumbered by employees at the grade 12 with identical job responsibilities. See Exh. 2. The Opinion and Award determined that eligible employees be placed into existing career ladder positions with promotion to grade 13. See Exh. 5. Because the GS-1101 Project Manager position does not have a career ladder to the grade 13, the Implementation Summary instruction that the Agency promote all GS-1101 employees exceeds the Arbitrator's authority because she has awarded relief to persons whom the union did not file a grievance over. See U.S. Dep't of the Air Force, Air Logistics Ctr., Tinker Air Force Base, Oklahoma, 41 FLRA 303

(1991) (arbitrator exceeds authority by issuing order that awards relief to persons who did not file a grievance on own behalf, or did not have the union file a grievance for them).

CONCLUSION

Based on the record, the Arbitrator exceeded her authority in issuing the August 2, 2014, Implementation Summary. The Implementation Summary constitutes *functus officio* by instructing the Agency to: (1) promote all employees in GS-1101 series at the grade 12 to the grade 13, (2) that any use of location, vacancies or any other limiting factors to identify grievants would not comport with the Award, and (3) granting relief to individuals not covered by the grievance, are not consistent with the Opinion and Award. Accordingly, the Implementation Summary constitutes a modification, and must be set aside.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tresa A. Rice", is written over a horizontal line.

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CERTIFICATE OF SERVICE

Pursuant to 5 C.F.R. §2429.27, the Agency's Exceptions to Modification has been served on all parties on the date below, and via the method indicated:

Commercial Delivery Service:

Federal Labor Relations Authority
Office of Case Intake and Publication
Docket Room, Suite 200
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September 4, 2014
(Date)


TRESA A. RICE
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