63 FLRA No. 72

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
OAKDALE, LOUISIANA
(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 3957
(Union)

0-AR-4164

DECISION

March 31, 2009

Before the Authority: Carol Waller Pope, Chairman, and Thomas Beck, Member

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator Sidney S. Moreland IV, 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 exception.

A grievance was filed alleging that the Agency violated the parties' collective bargaining agreement (CBA) and its process for filling vacant positions with employees who were displaced by budget cuts. The Arbitrator sustained the grievance. For the reasons set forth below, we dismiss the Agency's exception.

II. Background and Arbitrator's Award

In 2004, the Agency enacted a plan called the "Process for Placement of Displaced Employees" (the Placement Process), delineating the procedure by which employees who were displaced by budget cuts would be placed into vacant positions that became available. Award at 1-3. At the same time, the Agency also approved a hiring freeze until a certain date after which the Placement Process would become effective. Shortly thereafter, a memorandum was sent to "All [Human Resources] Offices" providing that vacant positions intended to be filled after the lifting of the hiring freeze were to be posted immediately on the Sallyport website. *Id.* at 3. After the hiring freeze was lifted and the Placement Process was implemented, a vocational training instructor position (training position) became available. The Agency failed to post the position on the website. Instead, the Agency filled the bargaining unit position with an employee whose position was targeted for abolishment. *Id.* at 4.

The Union filed a grievance alleging that, by failing to post the training position on the website, the Agency violated the Placement Process, the CBA, and the memorandum that set forth the procedures by which vacant positions would be filled after the lifting of the hiring freeze. *Id.* The Union claimed that the vacant position was never announced, thereby preventing displaced employees from applying for the position. *Id.* Therefore, the Union requested that the Agency "re-open" the position and allow qualified displaced employees to compete for it according to the Placement Process, CBA, and memorandum. *Id.* The Agency denied the grievance, claiming that it was authorized to reassign the employee to the training position without announcing it on the website. The Agency argued that such action was within management's right.

The Arbitrator set forth the issue to be decided at arbitration as:

> Did the [Agency] violate the [CBA], the Human Resource Manual, the [Placement Process], the Memorandum/Directives of the Regional Director, federal law, or any other applicable rule or regulation by failing to post the vacancy of a Vocation Training [Instructor] position before filling said position, and if so, what is the appropriate remedy?

Id. at 1.

The Arbitrator found that the Agency's Placement Process "would certainly satisfy the 'appropriate source' requirement from which the Agency may fill a position pursuant to the [CBA] and [§ 7106 of the Statute]." *Id.* at 7. The Arbitrator then concluded that "to fill a position without regard for the established process for doing so, may constitute a hiring practice that is not an 'appropriate source' pursuant to the [CBA] and [§ 7106 of the Statute]." *Id.*

The Arbitrator rejected the Agency's arguments supporting its decision to fill the training position without posting it on the website. Specifically, the Arbitrator rejected the Agency's claim that the Assistant Director's verbal approval was sufficient to

circumvent the procedures set forth in the Placement Process requiring that exceptions be placed in writing. *Id.* at 8. The Arbitrator also rejected as irrelevant the Agency's argument that the training position was filled as a "re-assignment at management's prerogative" under 5 CFR § 335.103(c)(3)(v). *Id.* at 8-9. In addition, the Arbitrator denied the Agency's claim that the training position was filled according to the merit promotion plan, because the position did not involve such a promotion plan. *Id.* at 9.

In sum, the Arbitrator concluded that the Agency did not post the training instructor position in accordance with the Placement Process and "failed to properly demonstrate and/or obtain an approved exception to [the Placement Process] in order to place [the employee] into the [training position]." *Id.* at 10-11. Consequently, the Arbitrator determined that the Agency violated the Placement Process by filling the training instructor position without first advertising the vacant position on the appropriate Agency website. *Id.* at 10-11.

The Arbitrator thus ordered the Agency to re-open the training instructor position to employees who were qualified for the job at the time the position was filled. *Id.* at 11. The Arbitrator also ordered the employee who was initially placed in the training position to remain in that position if there were no displaced employees in the bargaining unit who met the requirements to apply for the position. *Id.*

III. Positions of the Parties

A. Agency's Exception

The Agency argues that the award is contrary to management's right to select under § 7106 of the Statute, which, the Agency claims, "affords agencies the discretion to select candidates from any appropriate source without limitation." Exception at 4-5 (citations omitted). The Agency contends that the Arbitrator limited the Agency's right to select by requiring that it select candidates by using the Placement Process, thereby preventing it from hiring from other appropriate sources. *Id.* at 5 (citing *Ass'n of Civilian Technicians, Treasure State Chapter # 57*, 56 FLRA 1046 (2001)), for the proposition that precluding an Agency from selecting from appropriate sources affects management's right to select).

The Agency asserts that, as the award affects the exercise of a management right, the Authority should apply *United States Department of the Treasury, Bureau of Engraving & Printing, Wash., D.C.*, 53 FLRA 146 (1997) *(BEP)*. *Id.* at 3-4. In this regard, the Agency argues that prong I of the two-prong test set forth in *BEP* is not satisfied because the Arbitrator is enforcing the Placement Process, not a contract provision negotiated under § 7106(b) of the Statute. *Id.* at 6-7. The Agency further claims that, even if the Placement Process is considered a negotiated provision, it does not constitute an appropriate arrangement because it does not seek to mitigate adverse effects flowing from management's right to select. *Id.* at 7. The Agency also argues that the award fails to satisfy prong II of *BEP* because it would not have re-opened the training position if there was a displaced employee who was qualified for the position at

the time it selected the employee to fill the position. *Id.* at 8. The Agency claims that, instead, it would have complied with the Placement Process by placing the exception in writing.
Id. at 9.

B. Union's Opposition

The Union claims that the Agency admitted at arbitration that it did not follow the process set forth in the Placement Process. Opposition at 1. The Union argues that the training instructor vacancy should have been posted according to the Placement Process and that there is not an exception allowing the position to be filled without posting the vacancy. *Id.* at 3. The Union asserts that by failing to post the training position, the Agency violated the rights of all of the displaced employees who may have been qualified for that position. *Id.* at 4.

IV. Analysis and Conclusions

The Agency argues that the award limits the Agency's right to select under § 7106(a)(2)(C) of the Statute by requiring that it select candidates by using the Placement Process, which, it claims, is unenforceable because it is not a contract provision negotiated under § 7106(b) of the Statute. In support of its claim, the Agency cites *United States Department of the Treasury, Bureau of Engraving & Printing, Wash., D.C.*, 53 FLRA 146.

Under 5 C.F.R. § 2429.5, an issue that could have been but was not presented to an arbitrator will not be considered by the Authority. *See United States Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 59 FLRA 542, 544 (2003). We note, in this regard, that the Agency does not except to the Arbitrator's statement of the issue at arbitration. Further, the Agency's own framing of the issue in its post-hearing brief demonstrates that its application of the Placement Process was in dispute. Exception, Attach. B at 1. These factors, coupled with the allegations in the grievance and the evidence presented at the hearing, establish that the Agency was aware that the dispute entailed the enforcement of the Placement Process and, as a result, that the Agency could, and should, have made its argument before the Arbitrator. As the Agency did not raise to the Arbitrator its claim that the Placement Process was not a negotiated contract provision under § 7106(a)(2)(C) of the Statute, it may not do so now. Exception at 5-7. Based on the foregoing, we dismiss the Agency's exception.*
See 5 C.F.R. § 2429.5.

V. Decision

The Agency's exception is dismissed.

* In view of the above conclusion, there is no need to apply the *BEP* framework.

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STATEMENT OF SERVICE

I hereby certify that copies of the Decision of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the following:

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DATED: March 31, 2009
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