DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-180010 DATE: NOV 4 1975

MATTER OF: Community Services Administration and American Federation of Government Employees, Local Union No. 2649 - Arbitration award of retroactive promotions to two employees

DIGEST:

1. Federal Labor Relations Council questions the propriety of implementing arbitration award that sustains grievance of two Community Services Administration employees for retroactive promotions and backpay. Because the record contains substantial evidence that grievants would probably have been demoted shortly after they should have been promoted--evidence which the arbitrator apparently did not consider--the award is indefinite. The matter should be remanded to the arbitrator for additional proceedings with instructions that he hear evidence on whether demotions would have occurred and, if so, on what date.

2. When agency regulations are incorporated by reference in negotiated agreement, arbitrator should accord great deference to agency interpretation of regulations it has promulgated. However, where regulations are plain on their face, no interpretation is required and the arbitrator was correct in rejecting agency interpretation at variance with the plain language of regulations.

This action involves a request for an advance decision from the Federal Labor Relations Council (FLRC) as to the legality of two retroactive promotions with backpay awarded by an arbitrator in the matter of Community Services Administration and American Federation of Government Employees, Local Union No. 2649 (Rohman, Arbitrator), FLRC No. 74A-29. The case is before the Council as a result of a petition for review filed by the agency alleging that the award violates applicable laws and regulations. The name of the agency was officially changed from the Office of Economic Opportunity (OEO) to the Community Services Administration during the pendency of the proceedings in this case.

On September 12, 1973, recommendations for promotion to grade GS-13 of Mr. Frank Gallardo and Mr. Roy Brooks, the grievants in this case, were submitted by proper authority to the regional personnel office of the agency. That office reviewed the recommendations to discover whether the grievants satisfied the criteria

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for promotion to the higher grade and determined that both men fulfilled the eligibility requirements. The recommendations were then forwarded to the regional director for approval. No action was taken by the regional director and the two grievants were not promoted. On September 27, 1973, the union filed a grievance on behalf of numerous employees alleging that the agency had violated various sections of the collective-bargaining agreement. Many of the differences were settled by the parties, but the grievances of Messrs. Gallardo and Brooks proceeded to arbitration.

The arbitrator, on April 3, 1974, found that the agency's failure to comply with its own regulation (incorporated by reference into the negotiated agreement) requiring an 8-day time frame for processing promotion recommendations, was a violation of the negotiated agreement. He, therefore, sustained the grievance and ordered retroactive promotions and retroactive pay for both grievants from September 23, 1973.

In 54 Comp. Gen. 403 (1974) this Office considered a request from the Office of Economic Opportunity involving the same agreement, and the same regulation. We there stated our view that the arbitrator's authority to interpret the provisions of a collective-bargaining agreement under section 13 of Executive Order No. 11491, 3 C.F.R. p. 254, extends to the interpretation of the agency's regulations when they have been incorporated by reference into the agreement. We added, however, that the arbitrator's views did not necessarily take precedence over the agency's own interpretation which generally should be accorded great deference. Nevertheless, since OEO had not taken an exception to the arbitrator's interpretation to the Federal Labor Relations Council under Executive Order No. 11491, we presumed its acquiescence with the arbitrator's findings and interpretations. And for the three employees involved therein, we held that OEO could legally implement the arbitrator's award of backpay.

In the present case, the OEO, now the Community Services Administration, filed a timely petition with the Federal Labor Relations Council for review of the arbitrator's award. The Council has accepted the petition and is considering the issue raised prior to rendering a decision on the award.

Article 2, section 2, of the collective-bargaining agreement provides that the parties will abide by: "all Federal laws,

applicable state laws, regulations of the Employer, and this agreement, in matters relating to the employment of employees covered by this agreement." Hence, the negotiated agreement incorporated by reference the existing agency regulations, including OEO Staff Manual 250-2, which set forth the time frames for personnel actions as follows:

> "To expedite the processing of Standard Form 52 through the various steps, the following time frames have been established. They are applicable only if the request follows a routine schedule. This means that all necessary forms, documents and additional memoranda are properly signed and received in Personnel with the request and that no changes be made by the requesting office."

The various kinds of routine personnel actions are allotted specific time frames in which they are to be processed. Recommendations for promotions are to be processed in 8 days. The union's grievance is predicated upon the failure of the agency to abide by the aforementioned time frame.

The agency contended at the arbitration proceeding and in its review petition that the above-quoted regulation by its terms applied only to routine personnel actions. It argued that the October 1973 reorganization and the study that preceded it served to remove the promotion actions here in question from the routine category.

The issue involved in this case, then, is whether these promotion actions were routine within the meaning of the regulation.

It is a general principle of administrative law that an agency's construction and interpretation of its own regulations will generally be accorded great deference by a court or reviewing authority. Udall v. Tallman, 380 U.S. 1 (1964); Bowles v. Seminole Rock Co., 325 U.S. 410 (1944). Accordingly, we think that arbitrators must accord great weight to an agency's interpretation of its own regulations, notwithstanding the fact that such regulations have been incorporated by reference in a negotiated agreement. However, it is also a general principle of law that where the

language of a statute or a regulation is plain on its face and its meaning is clear, there is no room for interpretation or construction by the reviewing authority. Shea v. Vialpando, 416 U.S. 251 (1974); Lewis, Trustee v. United States, 92 U.S. 618 (1875); United States v. Turner, 246 F.2d 228 (1957).

In the present case, the arbitrator found that the above-quoted regulation regarding time frames for personnel actions was plain on its face. He points out that the sentence, "[t]hey are applicable only if the request follows a routine schedule" is followed by a clear and explicit definition of what "routine schedule" means, to wit: "that all necessary forms, documents and additional memoranda are properly signed and received in Personnel with the request." We agree with the arbitrator that the regulation in question is plain on its face and does not require interpretation or construction as to the meaning of "routine schedule"; such meaning having been already supplied by the self-contained definition. Thus, the agency's attempt to give the term "routine schedule" a meaning at variance with the definition in the regulation must necessarily fail.

In our recent cases we have held that a violation of a mandatory provision in a negotiated agreement which causes an employee to lose pay, allowances, or differentials is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay, provided the provision was properly included in the agreement. 54 Comp. Gen. 312 (1974), 54 id. 403 (1974), 54 id. 435 (1974), and 54 id. 538 (1974). Thus the Back Pay Act of 1966, 5 U.S.C. §5596 (1970), is the appropriate statutory authority for compensating the employee for pay, allowances, or differentials he would have received, but for the violation of the negotiated agreement.

Before any monetary payment may be made under the provisions of 5 U.S.C. § 5596 (1970), there must be a determination not only that an employee has undergone an unjustified or unwarranted personnel action, but also that such action directly resulted in a withdrawal of pay, allowances, or differentials, as defined in applicable civil service regulations. Although every personnel action which directly affects an employee and is determined to be a violation of the negotiated agreement may also be considered to be an unjustified or unwarranted personnel action, the remedies

under the Back Pay Act are not available unless it is also established that, but for the wrongful action, the withdrawal of pay, allowances, or differentials would not have occurred. 54 Comp. Gen. 760 (1975).

In light of the foregoing, it is the obligation of the arbitrator not only to find that the negotiated agreement has been violated by agency action or inaction and that thereby the grievants underwent an unjustified personnel action, but also to find that such improper action directly caused the grievants to suffer a loss or reduction in pay, allowances, or differentials.

In the present case, the arbitrator has found that the grievant's promotion recommendations were not processed within the required time frame. The arbitrator stated on the record that "[t]he Employer concedes that the promotions would have taken effect * * *." Also, the arbitrator found that this improper personnel action violated the negotiated collective-bargaining agreement.

Although the award states only that the grievance is sustained, we assume that the arbitrator intended to incorporate by reference in his award the second paragraph of page 2 of his decision, which reads as follows:

> "In the event the grievance is sustained, the remedy as requested by the Union should provide for retroactive promotion for both grievants, as well as retroactive pay from September 23, 1973."

From the foregoing it appears that the arbitrator intended to award the grievants retroactive promotions to grade GS-13 with an effective date of September 23, 1973. In the usual case such an award would be sufficiently definite to permit its implementation, inasmuch as the entitlement to a promotion is deemed to continue in the absence of evidence to the contrary. However, in the present case we find substantial evidence to show that the two employees' entitlement to their grade GS-13 promotions would have been terminated shortly after they were received as a result of a reorganization in the regional office. The arbitrator expressed recognition of this fact on page 10 of his decision when he stated:

> "The fact that the reorganization determined that vacancies no longer existed at the higher grade level is a condition subsequent which did not affect the processing of the recommendations within the eight day time frame."

The agency's petition to the Federal Labor Relations Council for review of the arbitration award states, at page 4, that the reorganization became effective October 28, 1973, and the positions held by the two grievants were abolished. Accordingly, the agency concludes that if the arbitrator's award is allowed to stand and the agency is required to effect promotions as of September 23, 1973, it would also be required by the Position Classification Act to take simultaneous action demoting them as of October 27, 1973.

The record before us does not contain evidence as to what rights, if any, these two employees may have had to retain their higher grades beyond the date on which the positions to which they should have been promoted were abolished as a result of the reorganization. Reduction-in-force procedures contained in 5 C.F.R., Part 351 (1972), are applicable to demotions that are required because of reorganizations. The application of these procedures to the employees here involved might have permitted them to have retained their higher grades beyond the October 27, 1973 date and might have allowed them to avoid demotion altogether. Therefore, the evidence in the present record is insufficient to show if and when such demotions would have occurred.

Hence, we are of the opinion that the arbitrator's award is too indefinite to permit implementation, inasmuch as the record contains substantial evidence that the grievants may have been demoted. Where an award is too indefinite to implement, such as here, the reviewing authority should, if feasible, resubmit the defective award to the arbitrator for appropriate corrective action. Enterprize Wheel and Car Corp. v. United Steelworkers, 269 F.2d 327 (4th Cir. 1959), approved in part 363 U.S. 593 (1960), National Brotherhood Packinghouse and Dairy Workers Local No. 52 v. Western Iowa Pork Company Inc., 247 F. Supp. 663 (1965), affirmed 366 F.2d 275 (8th Cir. 1966).

In view of these facts, the arbitrator has an obligation to establish a termination date, as well as an effective date, of the grievants' entitlement to grade GS-13 pay. We are of the opinion that the arbitrator's award must conform to the evidence in the record as to what the grievants' entitlements should have been, but for the unjustified and unwarranted personnel actions. Therefore, the award should be remanded to the arbitrator for further proceedings with instructions that he hear evidence on

whether the grievants would have been demoted and if so, to fashion an award setting a definite date of demotion.

R.F. KELLER

Deputy Comptroller General
of the United States