66 FLRA No. 29

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2328
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
HAMPTON, VIRGINIA
(Agency)

0-AR-4472

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DECISION

September 21, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Irwin H. Socoloff filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.[1]

The Arbitrator denied the Union's grievance claiming that the Agency failed to establish separate locality pay schedules for employees classified as nurse practitioners (NPs) and clinical nurse specialists (CNSs) in violation of 38 U.S.C. § 7451(a)(1) and (d)(3)(B), and the Veterans Affairs VA Handbook (VA Handbook) 5007, Part X, Chapter 1, paragraph 7. The Arbitrator found that the matter became moot when the Agency established the required locality pay schedules. The Arbitrator also denied the Union's grievance that the Agency's failure to establish such locality pay schedules was an administrative error under Article 51, Section 2B. of the parties' collective bargaining agreement (CBA). For the reasons set forth below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Union represents the NPs and CNSs at the Agency. The Union filed a grievance claiming that the Agency violated law and the CBA by failing to establish separate locality pay schedules for NPs and CNSs. Award at 1. The grievance further claimed that the failure to establish separate locality pay schedules was an "administrative error" that resulted in the affected employees receiving incorrect pay. *Id.* at 1-2. After the Union filed the grievance, the Agency informed the Union that it would establish separate locality pay schedules and that, if salary data was not available for the local labor market, then it would order that locality pay salary surveys (salary surveys) be conducted. *Id.* The Agency subsequently advised the Union that it had ordered salary surveys, which would be completed within two months. *Id.* When the salary surveys were not timely completed, the Union invoked arbitration. *Id.*

Prior to the arbitration hearing, the Agency sought a decision from the VA Under Secretary for Health (USH) as to whether the issue grieved was excluded from collective bargaining under 38 U.S.C. § 7422(b).[2] *Id.* at 2-3. At the arbitration hearing, the issue before the Arbitrator was: "Whether the [Agency] ignored [VA] policy and regulations, and committed an 'administrative error,' by failing to establish separate locality pay schedules for NPs and CNSs which resulted in incorrect compensation paid to those employees over a number of years and which requires retroactive pay relief." *Id.* at 2. The Arbitrator heard arguments concerning jurisdiction and the merits of the case, but agreed to stay the proceeding pending the issuance of a decision from the USH.

Subsequently, the USH found that the issue concerning the Agency's failure to establish pay scales

[1] The Union filed a supplemental submission in response to the Agency's opposition. Section 2429.26 of the Authority's Regulations requires a party filing supplemental submissions to request permission to file such submissions. 5 C.F.R. § 2429.26. As the Union did not request permission to file its supplemental submission, we do not consider it. *See, e.g., AFGE, Local 933*, 65 FLRA 9, 10 (2010) (union's supplemental submission not considered where union did not request permission to file).

[2] Under 38 U.S.C. § 7422, "matter[s] or question[s] concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation" are specifically excluded from coverage by a negotiated grievance procedure. 38 U.S.C. § 7422(b); *see Veterans Admin., Long Beach, Calif.*, 48 FLRA 970, 975 (1993) (*VA, Long Beach*). Further, the issue of whether a "matter or question" falls within the meaning of § 7422(b) "shall be decided by the Secretary." 38 U.S.C. § 7422(d). The Authority has held that the Secretary has "exclusive authority" to make such determinations and that the Secretary's determination is not reviewable by the Authority. *U.S. Dep't of Veterans Affairs Med. Ctr., Kansas City, Mo.*, 65 FLRA 809, 811 (2011); 38 U.S.C. § 7422(d).

for NPs and CNSs was not a matter concerning the establishment, determination, or adjustment of employee compensation under Title 38. He also found that the issue of whether the Agency's failure to establish separate specialty schedules for NPs and CNSs constituted an administrative error is not covered by the 38 U.S.C. § 7422(b) exclusions. Award at 3. However, he stated that adjustments to the compensation of NPs and CNSs based on a finding that the Agency failed to follow its own policy and/or regulations would fall under "the establishment, determination, or adjustment of employee compensation" under 38 U.S.C. § 7422 and could not be granted as an arbitration remedy. *Id.* The USH further stated that while an arbitrator may order the Agency to comply with applicable laws and regulations in cases of administrative errors, a remedy that "specifically requires the adjustment in the compensation of NP[s] and CNS[s] . . . will concern or arise out of the establishment, determination or adjustment of employee compensation under 38 U.S.C. § 7422." *Id.*

After issuance of the USH decision, the salary surveys were completed and the Agency's director signed new and separate locality pay schedules for, among others, NPs and CNSs. *Id.* The new locality pay schedules went into effect prior to the date the parties filed post-hearing briefs with the Arbitrator.

The Arbitrator found that, although the Agency had breached its contractual and regulatory duty to establish separate locality pay schedules for NPs and CNSs, the matter became moot when the Agency established the pay schedules. *Id.* at 5. In this regard, the Arbitrator found that the duty to establish separate locality pay schedules did not require that salary surveys be conducted or that pay be adjusted "at any particular time." *Id.* In particular, the Arbitrator found that determining when to conduct salary surveys is within the discretion of the Agency's director. *Id.* According to the Arbitrator, "surveys are to be conducted in the discretion of the director when said director determines that they are necessary for competitive purposes . . . ." *Id.* Therefore, he concluded that the remedy sought by the Union – retroactive pay relief – was not available, "even apart from statutory and regulatory restrictions." *Id.*

In addition, the Arbitrator found that retroactive pay was not available under the CBA because the Agency's failure to conduct salary surveys and adjust pay prior to the Union's grievance was not an "administrative error" but, instead, was an exercise of statutory discretion. *Id.*

Based on the foregoing, the Arbitrator denied the grievance, concluding that the matter was moot and that retroactive pay relief was not a proper remedy in the circumstances of this case. *Id.* at 6.

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the Arbitrator erred when he found that the matter was moot and that the Agency's violation of law, VA regulations, and the CBA had no remedy. Exceptions at 2, 6-7. Specifically, the Union argues that the Arbitrator misinterpreted 38 U.S.C. § 7451(a)(1) & (d)(3)(B) and paragraph 7 of the VA Handbook when he found that the Agency's director had discretion "in not establishing separate pay schedules, and in not paying the adversely affected nurses."[3] *Id.* at 6.

The Union also asserts that the Agency's failure to conduct salary surveys and to create separate locality pay schedules in a timely manner was an "administrative error" and that, under Article 51, Section 2B. of the CBA, the Agency is required to retroactively compensate employees for any lost salary.[4] *Id.* at 8-9.

B. Agency's Opposition

The Agency claims that the Arbitrator appropriately interpreted the Agency's obligation to establish separate locality pay schedules for NPs and CNSs. Opp'n at 10. The Agency also argues that the Arbitrator appropriately interpreted the relevant statutory provisions and the CBA in finding that the Agency's director had the discretion to adjust pay. *Id.* at 7. Finally, the Agency argues that the Union seeks Authority review of the determination made by the USH, and that such review is impermissible under 38 U.S.C. § 7422. *Id.* at 11.

IV. Analysis and Conclusions

The Arbitrator found that the grievance was moot and that retroactive pay relief was not a proper remedy in the circumstances of this case. Award at 6.

In *NFFE, Council of Consolidated Locals*, 52 FLRA 137 (1996), the Authority set forth the standard of review to be applied in cases where an arbitrator had found a grievance moot. In addressing this issue, the Authority held that it would accord such a determination the same deference it would "accord an arbitrator's decision regarding the procedural arbitrability of a grievance under the parties' [CBA]." *Id.* at 139.

[3] 38 U.S.C. § 7451(a)(1) & (d)(3)(B) and paragraph 7 of the VA Handbook are set forth in the appendix to this decision.

[4] Article 51, Section 2B. provides, in pertinent part: "Whenever an adjustment in Title 38 nurse pay is delayed due to an administrative error, a nurse shall be retroactively compensated for any lost salary." Award at 3-4.

Therefore, an arbitrator's mootness ruling is not subject to challenge except on grounds that do not challenge the mootness ruling itself. *See id*. at 139-40. In this regard, the Authority noted that although a mootness determination may not depend on an interpretation of the CBA, it disposes of the grievance procedurally and not on the merits. *See id*. at 140. The Authority further stated that mootness is an issue for arbitration because procedural matters bearing on the final disposition of a grievance should be left to the arbitrator. *Id*. at 139-40.

Here, the Arbitrator found that, although the Agency breached its contractual and regulatory duty to establish separate locality pay schedules for NPs and CNSs, the matter became moot when the Agency established the separate locality pay schedules. Award at 5. The Arbitrator further found that the remedy sought by the Union – retroactive pay relief – was not available, "even apart from statutory and regulatory restrictions." *Id*.

The Union's claim that the matter was not moot challenges the Arbitrator's findings and reasoning for concluding that the grievance was moot. Accordingly, based on the foregoing, it does not provide a basis for finding the award deficient.[5] *AFGE, Local 2921*, 50 FLRA 184, 186 (1995).

In addition, the Union's claim regarding retroactive pay relief under Article 51, Section 2B. of the CBA is precluded by the USH's determination. In this regard, the USH stated that any adjustments to the compensation of NPs and CNSs based on a finding that the Agency failed to follow its own policy and/or regulations would fall under "the establishment, determination, or adjustment of employee compensation" under 38 U.S.C. § 7422 and could not be granted as an arbitration remedy. Award at 3. As noted earlier, the Secretary's determination is not reviewable by the Authority. *See supra* note 2. Accordingly, the Arbitrator correctly concluded that retroactive pay relief was not available to the grievants.

Based on the foregoing, we deny the Union's exceptions.

V. Decision

The Union's exceptions are denied.

[5] Even if the Authority were to review (as it does in connection with procedural arbitrability claims) the Union's claim that the finding of mootness is contrary to law, there is no basis to find the award deficient. In this regard, the Union cites nothing to support a conclusion that the Arbitrator erred in finding that the Agency was not required to conduct a survey or increase pay "at any particular time." Award at 5.

APPENDIX

38 U.S.C. § 7451 provides, in pertinent part:

> (a)(1) It is the purpose of this section to ensure, by a means providing increased responsibility and authority to directors of Department health-care facilities, that the rates of basic pay for health-care personnel positions described in paragraph (2) in each Department health-care facility (including the rates of basic pay of personnel employed in such positions on a part-time basis) are sufficient for that facility to be competitive, on the basis of pay and other employee benefits, with non-Department health-care facilities in the same labor-market area in the recruitment and retention of qualified personnel for those positions.
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> (d)(3)(B) In the case of a Department health-care facility located in an area for which the Bureau of Labor Statistics does not have current information on compensation . . . the director of that facility shall conduct a survey in accordance with this subparagraph and shall adjust the amount of the minimum rate of basic pay for grades in that covered position at that facility based upon that survey. . . . Any such survey shall be conducted in accordance with regulations prescribed by the Secretary. . . . Upon conducting a survey under this subparagraph, the director concerned shall determine, not later than 30 days after the date on which the collection of information through the survey is completed or published, whether an adjustment in rates of pay for employees at that facility for any covered position is necessary in order to meet the purposes of this section. . . .

VA Handbook 5007, Part X, Chapter 1, Paragraph 7 provides, in pertinent part:

> A separate salary schedule may be established for any nurse category . . . by conducting a survey of pay rates for the corresponding specialty in the [local labor market area (LLMA)].

Exceptions, Ex. 10 at X-7.