

IN THE MATTER OF ARBITRATION BETWEEN

U.S. DEPARTMENT OF ENERGY
OAK RIDGE, TN
AND

FMCS NO-98-4546

THE OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION,
AFL-CIO, LOCAL 268
KNOXVILLE, TN

GRIEVING: [name deleted]
ISSUE: WITHDRAWAL OF BUYOUT

JANUARY 11, 1999

APPEARANCES:

AGENCY: IVAN A. BOATNER, OFFICE OF CHIEF COUNSEL, OAK RIDGE, TN UNION: PHILLIP POPE, BUSINESS REPRESENTATIVE, KNOXVILLE, TN

The stipulated issue in this case is whether the agency had a valid reason to deny the grievant's request to withdraw his buyout; and if not, what should be the remedy. The grievance is dated October 9, 1997. The Arbitrator was notified of his selection on February 19, 1998. The hearing was conducted on July 30, 1998. There was no court reporter. There is no arbitrability question. Witnesses were sworn, but not sequestered. All parties had a full, and complete opportunity to call and questions witnesses, introduce documents and exhibits, and argue their respective positions.

The grievant was an [deleted] specialist in [deleted] in the [deleted] at Oak Ridge, TN with 28 years service. In the summer of 1997, the Department of Energy ("DOE") was going through a "budget crisis" at the Washington, DC level. Funding for fiscal year 1998 was very much in doubt. There was lots of uncertainty. The situation changed daily, even hourly.

On July 30, 1997, the possibility of a reduction in force at Oak ridge came up for the first time. At first, the grievant's job was not on the RIF hit list (UX8). But on August 13, 1997 at around 10:50 a.m., grievant's [supervisor] told grievant that grievant's job was on the RIF hit list.

The grievant knew that if he got a RIF notice he would not be eligible for the \$25,000 buyout being offered or severance pay. Thus, at 1:41 p.m. that same day, August 13, 1997, the grievant signed and submitted his voluntary buyout SF52 form (UX9) which in part says, in grievant's handwriting: "employee is being forced by management to take retirement". The grievant also checked the paragraph on that form which says:

"I have met the age and service requirement for voluntary early or regular optional retirement and, therefore, request to retire with a buyout effective 11/3/97 (later changed to 12/30/97. My decision to retire is entirely voluntarily and has not be coerced (UX9). Around this time, and even into November and December of 1997, according to the testimony of Jennifer Hackett, Director of Planning and Budget Division at ORO, congress expected cuts in both the number of employees and also funding. She testified the [deleted] account was still short \$463,000 (CX20), even though she was told, the agency could probably ultimately cover that, but they did not know for sure about this at that time. She also testified the [deleted] account has

to stand alone, and the agency is prohibited by law -- the Anti-Deficiency Act -- even if the agency wanted to, from adding grievant back in because that put the [deleted] account even deeper in debt. Hackett further testified that the agency did not receive funds to cover the shortfall until March of 1998, well after the grievant and all of the other buyouts became effective.

The buyout window was opened again from October 21 to November 11 (UX36) pursuant to an agreement with the Union, wherein the agency, according to Union testimony, indicated that it "might consider" saving grievant's job if the agency received two more buyouts. That apparently did not occur. A fourth buyout window was also opened from December 11 to December 29, 1997 (UX38).

Significant to the Union's position, after October 8, 1997 four additional employees left saving \$233,098.00. Finally, on December 30, 1997 the grievant signed his retirement paper's "under duress and protest" (UX39). The agency had informed the Union and grievant that if he did not do this by December 31, the agency would consider the grievant to have resigned and the grievant would not have received the \$25,000 or severance pay, and would not receive any retirement at all until grievant reached 62 years of age.

UNION POSITION.

The Union position is that grievant should have been allowed to withdraw his buyout application because the agency received sufficient funding from congress and there were in fact no RIF's; and the agency has not proven any valid reason to deny grievant's withdrawal request.

The Union also relies on Union Exhibit 43, the Federal Employees Almanac (1997, 44th, Edition) . The Almanac at pages 144 and 244 says:

"Withdrawal of Application to Retire: Since optional retirement is a form of voluntary separation.... this means you can withdraw it if you change your mind before the separation is effective."

"And at page 44. (UX43):

"Those accepting buyout offers..., in general, may withdraw their acceptance up to (their separation date] , except when the agency can show a valid reason why allowing the employees to change their minds would cause a hardship to the agency." (UX43)

Thus, the Union contends the agency can not force the grievant to voluntarily separate on December 30, 1997.

The Union also relies on Union Exhibit 45 which says the burden of proof is on the agency to prove by a preponderance of the evidence that the agency had a valid reason not to allow the grievant to withdraw his buyout. Reginald L. Cook v. DOD, 53 MSPB 270 (June 22, 1994) (UX45). Thus, the Union contends the agency has not met its burden of proof in this case.

The Union also points out 30 employees took buyouts, and an additional 8 employees left ORO between July 30 and December 30, 1997. Thus, 38 left the ORO payroll. The Union also produced evidence

regarding several ORO employees and their salaries brought on since October 8, 1997.

The Union asks that the grievant be reinstated and made whole with all back pay, interest, and the Union costs of this case.

AGENCY POSITION.

The Agency argues that it relied on the buyouts in the budget numbers it sent to Washington, DC; that it had a number of valid reasons at the time in question; hindsight is irrelevant as is funding of the shortfall in March, 1998. The agency contends it had a number of valid reasons to deny grievant's request to withdraw his buyout application at the time in question. First, Hackett testified to a \$633,000 shortfall, \$463,000 of which was in grievant's [deleted] account. Second, and very important to the agency, keeping grievant violates the Anti-Deficiency Act. Third, of the 30 who took buyouts, the grievant is the only one from [deleted], and the agency can not take money from other budgets to cover the [deleted] shortfall.

Four, the Agency relied on the grievant and all of the others to be irrevocable buyouts. Fifth, the budget submitted to Washington had all of the buyouts factored in, which is why they asked all of them to sign the "irrevocable" application. And the agency expects grievant and the others to live up to their promises that their buyout decisions are irrevocable.

The agency also points out that the grievant could have, but did not take advantage of any bumping/retreat rights, especially with 28 years of service, nor did he use the chance to meet with a Retention Specialist.

The agency reiterated several times its argument that all it has to show is one valid reason, and that the Anti-Deficiency Act clearly "and unequivocally prohibits the agency from adding the grievant back in; that is, that the agency is prohibited by law from adding to the debt in [deleted]. Thus, the agency argues that its denial of the grievant's request to withdraw his buyout was the only decision the agency could make within the law.

OPINION

The grievance is denied. The ' agency has shown by a preponderance of the evidence that it had a valid reason for denying the grievant's request to withdraw his buyout application. The evidence sufficiently established that the agency would violate the Anti-Deficiency Act had it allowed the grievant's request to withdraw.

The grievant's application for buyout was "irrevocable". But according to Union Exhibit 45, the MSPB decision in Cook v. DOD, an irrevocable request alone does not meet the agency's burden of proving a valid reason. There must be more. And there was more in the evidence in this case.

The focus of the analysis must be based on the information the agency had at the relevant times in 1997, from the time the grievant signed his buyout application (UX9) on August 13, 1,997 until the agency approved it on September 26 (UX33), and also until grievant's last day, December 31, 1997.

Based on all of the evidence, the agency really had no lawful choice but to deny the grievant's withdrawal

request during this entire relevant period of time for the reasons put forth by the agency at the arbitration hearing. Most importantly, the agency would have clearly and directly violated the Anti-Deficiency Act. The agency is prohibited from overspending, and a violation of the Act could lead to civil and criminal liability. The FY98 budget for [deleted] was \$433,000 in the red according to Hackett's calculations in the last few months of 1997. The agency can not use money from another department to cover that shortfall.

All of the buyouts were significant cost and personnel reductions that congress was insisting upon and demanding from DOE. And all of the buyout employees had signed that their decisions were all irrevocable.

The agency relied on the irrevocable nature of the buyout applications in submitting its budget request to Washington. And the agency was justified in relying-on them, especially in light of the [deleted] shortfall and other budget factors at the time. If the grievant was allowed to withdraw his buyout, any and all of the 30 could have done the same. And the potential overall adverse effect on the DOE budget could have been very dramatic. The agency knew it could not take that uncertainty. In all likelihood, that is probably why the agency asked the employees to sign irrevocable buyouts by September 2, 1997 (UX22). The agency needed to know, had to know for sure, so it could submit firm cost cuts to congress and hopefully, avoid a reduction in force. The evidence clearly established that this was all an integral part of the budget that was ultimately approved. And the RIF's were avoided

The Union's contention regarding additional employees, additional salaries and the March 1998 funding to cover the shortfall, are all after the fact. The agency pointed out that hindsight can always find funds somewhere to cover grievant's job. The Arbitrator is inclined to agree with the agency on this point based on the evidence in this particular case. Employees are always coming and going, being promoted, etc. The agency here made its decision based on information available in the last half of 1997. Looking back on it, and using information and events from 1998 does not prove that the agency did not have a valid reason at the time in 1997 when the decision was made.

Also, the Union's argument regarding Union Exhibit 43, the 1997 Federal Employees Almanac, must be subordinate to the Anti-Deficiency Act. The Almanac cannot be superior to or supersede federal statute. And the burden of proof ruling in Union Exhibit 45 (the MSPB decision), has been met by the agency in this case.

All other arguments and contentions of the Union have been carefully considered by the Arbitrator and found to be insufficiently persuasive to overcome the company's level of proof in this case.

AWARD

The grievance is denied.