65 FLRA No. 139

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3615
(Union)

and

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY
ADJUDICATION AND REVIEW
(Agency)

0-AR-4695

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DECISION

March 30, 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 Sean J. Rogers 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 untimely opposition to the Union's exceptions.

The Arbitrator concluded, as relevant here, that: (1) the Union's claim that the grievants were entitled to temporary promotions pursuant to Articles 26 and 27 of the parties' agreement (Agreement) was not arbitrable because the Union had failed to raise those provisions in its grievance, and (2) the Union's claim that the grievants were entitled to a higher rate of pay was not arbitrable because it involved a classification matter. For the reasons set forth below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The grievants are former General Schedule (GS)-334 Computer Specialists in the Agency's Division of Information and Integration, Office of Disability Adjudication and Review (ODAR). Award at 2. As a result of an Agency reorganization, approximately one-half of the GS-334 Computer Specialists in ODAR were reassigned to the Office of Systems (OOS); the other half remained in ODAR, but were moved to GS-343 Program Analyst positions. *Id.* at 13-14.

After the reorganization, the Office of Personnel Management (OPM) replaced the GS-334 Computer Specialist series with the GS-2210 Information Technology Management series. *Id.* at 14. Subsequently, OPM announced a new, special rate of pay for certain information technology positions, including the GS-334 position. *Id.* at 14-15. The OOS GS-334 Computer Specialists who had been converted to the GS-2210 Information Technology Management series received the new rate of pay, but the ODAR GS-334 Computer Specialists who had been moved to the GS-343 Program Analyst positions did not. *Id.* at 15.

The Union presented a grievance on behalf of the GS-343 Program Analysts, which alleged that the Agency violated Article 3, Section 2 and Article 28, Sections 2 and 4 of the Agreement by failing to find the grievants eligible for the GS-2210 special pay rate.[1] *Id.* The Union contended that the grievants were denied the proper pay because their current position descriptions did not accurately reflect their job responsibilities. *Id.* The Agency responded that the grievance was not arbitrable because it concerned classification of the grievants' positions. *Id.* at 2. The grievance was not resolved and was submitted to arbitration. *Id.* Subsequently, at the arbitration hearing, the Union also claimed that the grievants were entitled to temporary promotions pursuant to Articles 26 and 27 of the Agreement, raising these provisions for the first time. *Id.* at 38-39. The Arbitrator framed the relevant issues to be resolved as: (1) whether the Union's grievance is arbitrable, and (2) whether the Agency violated Article 3, Article 26, Section 16, Article 27, Section 4, or Article 28 of the Agreement, and if so, what shall be the remedy.[2] *Id.* at 5.

1. Article 3, Section 2 provides that "[a]ll employees shall be treated fairly and equitably in all aspects of personnel management . . . ." Award at 6. Article 28, Section 2 provides, in relevant part, that "position descriptions shall accurately state the principal duties and responsibilities of the position." *Id.* at 9.

2. The Agency also contended at the arbitration hearing that the grievance was untimely, a claim that the Arbitrator rejected. *Id.* at 34-35. Because no exceptions were filed to the Arbitrator's resolution of this issue, it is not before us.

The Arbitrator concluded that the Union's claim that the grievants were entitled to temporary promotions pursuant to Articles 26 and 27 of the Agreement was not arbitrable. *Id.* at 41. According to the Arbitrator, Article 24, Section 9 of the Agreement required the Union to plead in its grievance the specific provisions of the Agreement that had been violated.[3] Thus, the Union was not entitled to bring new claims at the arbitration hearing. *Id.* at 40-41. Because the Arbitrator found that the grievance only alleged that the Agency violated Articles 3 and 28 and did not mention Articles 26 and 27, he found that the Union's claim that the grievants were entitled to temporary promotions pursuant to Articles 26 and 27 was not arbitrable. *Id.* at 38-41.

The Arbitrator next considered the arbitrability of the grievants' entitlement to the GS-2210 special pay rate. *Id.* at 43-44. The Union asserted that the Agency's failure to pay the grievants at the GS-2210 special pay rate violated Article 3, Section 2 of the Agreement, which provides that employees are to be treated fairly and equitably. *Id.* at 44. The Arbitrator concluded that granting a special pay rate established by OPM to a different job series would involve a classification matter and, thus, he was without jurisdiction to decide the issue. *Id.* Therefore, he dismissed that portion of the grievance.[4] *Id.*

III. Preliminary Matter

The Agency submitted an opposition to the Union's exceptions by facsimile. The Authority issued an Order to Show Cause (Order) to the Agency because the Authority's Regulations do not permit an opposition to be filed by facsimile. Order at 1-2 (citing 5 C.F.R. §§ 2429.24(e) & 2429.27(b)). The Agency failed to respond to the Order in a timely manner.[5] Accordingly, we do not consider the Agency's opposition. *See AFGE, Local 933*, 64 FLRA 718, 718 n.* (2010) (refusing to consider the agency's opposition where it did not respond to the Authority's deficiency order in a timely manner).

IV. Union's Exceptions

The Union argues that the Arbitrator's determination that the Union was required to specifically plead a violation of Articles 26 and 27 of the Agreement in its grievance evidences a manifest disregard of Article 24, Section 9 of the Agreement. Exceptions at 6. According to the Union, Article 24, Section 9 does not require parties to specifically plead all alleged violations, just that they "normally" should do so. *Id.* at 7.

The Union also argues that the award is contrary to law because the Arbitrator improperly found that the Union's claim that the grievants were entitled to the GS-2210 special rate of pay was not grievable. *Id.* at 10. The Union claims that it is asking simply for a temporary promotion for the grievants by reason of their having performed higher-graded duties that have been previously classified. *Id.* at 11. According to the Union, the Arbitrator did not need to determine the proper grade level of the duties, but, rather, could have compared the grievants' duties to the GS-2210 position descriptions. *Id.* at 12.

Finally, the Union argues that the Authority should grant the grievants backpay for the entire period at issue rather than the 120-day period of backpay authorized by *United States Department of Veterans Affairs, Ralph H. Johnson Medical Center, Charleston, South Carolina*, 60 FLRA 46 (2004) (*Ralph H. Johnson*). Exceptions at 13-15. The Union asserts that "the years since the *Ralph H. Johnson* case have revealed that OPM's interpretation is plainly erroneous," and, as a result, the Authority should not limit the remedy to the time period set forth in the OPM opinion letter in that case. *Id.* at 15.

3. Article 24, Section 9 provides that "[t]he written grievance should normally contain a description of the matter(s) being grieved, include the article(s) of the agreement that is involved, and the requested relief, if known." *Id.* at 8.

4. In response to the Union's claim that the grievants' position descriptions were inaccurate, the Arbitrator awarded a desk audit intended to lead to the creation of accurate position descriptions. *Id.* at 41-48. Because no exceptions were filed to the Arbitrator's resolution of this issue, it is not before us.

5. Under 5 C.F.R. § 2429.23(b), an expired time limit can be waived upon a showing of "extraordinary circumstances" justifying the waiver. The Agency's arguments that it "misplaced" the Authority's Order and was not able to file a timely response "due to the holiday, emergency personal leave, and competing obligations," Agency's Motion for Leave to File Out of Time at 1, do not constitute extraordinary circumstances. *See AFGE, Local 2113*, 55 FLRA 414, 414 (1999) (finding no extraordinary circumstances where failure to comply with an Authority order was due to a party's own "inadvertence, accident, or mistake").

V. Analysis and Conclusions

A. The Arbitrator's finding with regard to the temporary promotion claim constitutes a procedural arbitrability determination.

The Union argues that the Arbitrator's determination that the Union did not plead Articles 26 and 27 with sufficient specificity does not draw its essence from Article 24, Section 9 of the Agreement. Exceptions at 6. This exception involves the Arbitrator's procedural arbitrability determination. *See AFGE, Local 1741*, 57 FLRA 696, 696 n.1 (2002). Procedural arbitrability involves questions of whether the procedural conditions to arbitrability have been met, while substantive arbitrability involves questions of whether the subject matter of a dispute is arbitrable. *See U.S. Dep't of Transp., Fed. Aviation Admin.*, 64 FLRA 680, 684 (2010). Here, the Arbitrator found the Union's temporary promotion claim was not arbitrable because it did not conform to the specificity requirements in Article 24, Section 9 of the Agreement and, thus, his conclusion is a procedural arbitrability determination. *See AFGE, Local 703*, 55 FLRA 507, 508 (1999) (finding an arbitrator's conclusion that a grievance did not meet the specificity requirements in the parties' agreement to be a procedural arbitrability determination).

The Authority generally will not find an arbitrator's ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the procedural arbitrability ruling itself. *See, e.g., AFGE, Local 3882*, 59 FLRA 469, 470 (2003). However, the Authority has stated that a procedural arbitrability determination may be found deficient on the ground that it is contrary to law. *See id.* (citing *AFGE, Local 933*, 58 FLRA 480, 481 (2003)). In addition, the Authority has stated that a procedural arbitrability determination may be found deficient on grounds that do not directly challenge the determination itself, which include claims that an arbitrator was biased or that the arbitrator exceeded his or her authority. *See U.S. EEOC*, 60 FLRA 83, 86 (2004) (citing *AFGE, Local 2921*, 50 FLRA 184, 185-86 (1995)).

The Union's argument that the Arbitrator's award fails to draw its essence from the Agreement directly challenges the Arbitrator's procedural arbitrability finding and does not provide a basis for finding the award deficient. *See U.S. Dep't of Energy, Sw. Power Admin., Tulsa, Okla.*, 56 FLRA 624, 626 (2000) (finding that an agency's claim that the arbitrator erred in finding that the grievance met the specificity requirements in the parties' agreement directly challenged the procedural arbitrability determination). Therefore, we deny this exception.

B. The award is not contrary to § 7121(c)(5).

The Union argues that the Arbitrator's award is contrary to § 7121(c)(5) because the Arbitrator improperly found that the Union's claim for backpay at the GS-2210 special pay rate concerned a classification matter. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

Under § 7121(c)(5) of the Statute, a grievance concerning "the classification of any position which does not result in the reduction in grade or pay of an employee" is removed from the scope of the negotiated grievance procedure. 5 U.S.C. § 7121(c)(5). The Authority has repeatedly held that, where the essential nature of a grievance concerns the grade level of the duties assigned to and performed by the grievant in his or her permanent position, the grievance concerns the classification of a position within the meaning of § 7121(c)(5) of the Statute. *See U.S. Dep't of Hous. & Urban Dev.*, 65 FLRA 433, 435 (2011). However, where the substance of a grievance is limited to the question of the accuracy of the grievant's position description, the grievance does not concern the classification of a position within the meaning of § 7121(c)(5). *See, e.g., U.S. Dep't of Def., Marine Corps Logistics Base, Albany, Ga.*, 57 FLRA 275, 277 (2001) (*Marine Corps*). Moreover, grievances concerning whether grievants are entitled to temporary promotions on the basis of having temporarily performed the established duties of a position other than their own are not barred by § 7121(c)(5). *U.S. Dep't of Labor, Wash., D.C.*, 64 FLRA 829, 830 (2010) (*DOL*).

Before the Arbitrator, the Union argued both that the grievants' position descriptions were inaccurate and that the Agency failed to compensate the

grievants at the GS-2210 special pay rate. Award at 2. The Arbitrator found that the position description claim was arbitrable because it did not concern a classification matter, but that the claim requesting backpay at the GS-2210 special pay rate was not arbitrable because it did concern a classification matter. *Id.* at 41-43. The Union, in its exceptions, argues that the grievants were requesting only temporary promotions and that the Arbitrator erred in finding that claim concerned a classification matter. Exceptions at 12.

The Union has failed to establish that it requested only temporary promotions. The Union's grievance alleged "improper classification" of the grievants' permanent positions. Award at 15. Additionally, because the Arbitrator found the grievants' temporary promotion claim to have been improperly raised, the grievance, as advanced at arbitration, did not involve a temporary promotion claim. Therefore, we find that the Arbitrator did not err in concluding that the Union's request for backpay at the GS-2210 special pay rate concerned a classification matter, find that the award is not contrary to § 7121(c)(5), and deny this exception.[6] *See AFGE, Local 987*, 58 FLRA 453, 454-55 (2003) (finding a grievance to concern a classification matter where the grievance alleged that the grievant was improperly classified).

VI. Decision

The Union's exceptions are denied.

6. In light of this decision, it is unnecessary to address the Union's remaining exception.