

67 FLRA No. 30

UNITED STATES
DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 286
(Union)

0-AR-4870

ORDER DISMISSING EXCEPTION

December 18, 2013

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

In an interim award, Arbitrator Howard C. Edelman found arbitrable a consolidated grievance concerning whether several employees (the grievants) were entitled to compensation for temporarily performing higher-graded duties of a different position. The Arbitrator found the grievance arbitrable because it concerned pay for higher-graded duties and not classification of the grievants' positions.

The question before us is whether the award is contrary to § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute) because the Arbitrator erred in finding that the grievance did not involve classification. Because the grievance involved temporary promotions, rather than classification, we find that the answer is no.

II. Background and Arbitrator's Award

The consolidated grievance concerned whether several general schedule (GS)-5 clerks at the New York Immigration Court were entitled to compensation for performing duties assigned to higher-graded legal assistants. In the consolidated grievance, the Union requested that the Agency compensate the grievants for the higher-graded duties – duties that the Union alleged the Agency required the grievants to perform “daily for

over [thirty] days without any compensation.”¹ The Union also stated that it was not seeking reclassification of the grievants' lower-graded positions.

Before the Arbitrator, the Agency claimed that the grievance was not arbitrable because it concerned classification of the grievants' positions, a matter excluded from the negotiated grievance procedure by § 7121(c)(5) of the Statute – the pertinent wording of which is set forth below – as well as the parties' agreement.

In an interim award, the Arbitrator acknowledged the limitations imposed by § 7121(c)(5) and the parties' agreement. However, he concluded that the matter before him did not concern classification of the grievants' positions, but rather compensation for performing higher-graded duties of another position. Specifically, he found that the Union did not seek to have the relevant positions reclassified, but only sought compensation on behalf of the grievants for their “temporar[y]” performance of higher-graded duties.² Thus, the Arbitrator found that classification of the grievants' positions was not before him and that there was “no dispute as to whether the positions [were] properly classified.”³ The Arbitrator therefore found the grievance arbitrable, but did not address the merits of the grievance.

The Agency filed an exception to the interim award. The Union filed an opposition to the Agency's exception.

III. Analysis and Conclusions

The Authority will not generally grant “interlocutory” review of arbitration awards.⁴ That is, the Authority will not consider exceptions to an arbitrator's award until the arbitrator has issued a final decision with respect to all issues submitted to arbitration.⁵ If an arbitrator's award postpones the determination of a submitted issue or retains jurisdiction over at least one issue, then the decision is not a final award.⁶

But the Authority will review interlocutory exceptions when there are extraordinary circumstances

¹ Exception, Attach. 8 at 2.

² Award at 5-6.

³ *Id.* at 7, 8.

⁴ 5 C.F.R. § 2429.11; *U.S. DOL, Bureau of Labor Statistics*, 65 FLRA 651, 653-54 (2011) (*Labor*).

⁵ *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Carswell, Tex.*, 64 FLRA 566, 567 (2010); *U.S. Dep't of HHS, Navajo Area Indian Health Serv.*, 58 FLRA 356, 357 (2003) (*HHS*).

⁶ *AFGE, Local 12*, 38 FLRA 1240, 1246 (1990); *HHS*, 58 FLRA at 357.

warranting review.⁷ The Authority has found extraordinary circumstances only in situations in which a party raised a plausible jurisdictional defect, the resolution of which would advance the ultimate disposition of the case.⁸ Exceptions raise a plausible jurisdictional defect when they present a credible claim that the arbitrator lacked jurisdiction over the subject matter of the grievance as a matter of law.⁹ However, the Authority has repeatedly declined to extend interlocutory review to alleged jurisdictional defects that do not preclude arbitration of the grievance as a matter of law.¹⁰

In this case, the Agency concedes that its exception is interlocutory, but argues that its exception demonstrates extraordinary circumstances warranting interlocutory review.¹¹ Specifically, the Agency argues that its exception raises a plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of the case.¹² In this connection, the Agency argues that the grievance concerns a classification matter within the meaning of § 7121(c)(5) of the Statute and that, as a result, the Arbitrator lacks jurisdiction to resolve it.¹³

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.¹⁴ 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.¹⁵ In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *Id.*

Under § 7121(c)(5) of the Statute, arbitrators lack jurisdiction to determine "the classification of any position which does not result in the reduction in grade or pay of an employee."¹⁶ 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).¹⁷ However, § 7121(c)(5) does not bar grievances concerning whether

employees are entitled to temporary promotions for having temporarily performed the established duties of a position other than their own.¹⁸

Here, although the Arbitrator did not expressly label the grievance as one seeking a temporary promotion, he characterized the Union's arguments as "alleging that the [g]rievants are temporarily performing work clearly within the Legal Assistant title," and "not seek[ing] to reclassify the jobs at issue[,] but only to properly compensate employees who are performing work in the higher rated position."¹⁹ As noted above, we defer to the Arbitrator's factual findings.²⁰ Moreover, in reaching his conclusion that the grievance did not concern classification and was thus arbitrable, the Arbitrator relied upon Authority decisions holding that "[g]rievances claiming that higher[-]rated pay is due for temporary performance of higher[-]rated assignments have been determined . . . arbitrable."²¹ Finally, it is undisputed that the grievance stated that the Union "never alleged that [the positions had] been improperly classified" or that "[the Union] wanted th[e] position[s] to be reclassified."²² These findings support a conclusion that the award involved temporary promotions, rather than classification.²³

Although the Agency cites *U.S. Dep't of the Army, Anniston Army Depot, Anniston, Ala. (Anniston)*,²⁴ and *U.S. EPA, Region 2 (EPA)*,²⁵ those decisions are inapposite. In those cases, the arbitrators found that the substance of the grievances at issue concerned requests for permanent promotions to higher-graded positions.²⁶ The Arbitrator here made no such finding. Thus, the Agency's reliance on these decisions does not support a conclusion that the Arbitrator's award here involved classification.

For the foregoing reasons, we find that the Agency has not demonstrated that the grievance concerned the classification of the employees' positions under § 7121(c)(5). Accordingly, we find that the Agency has not established a plausible jurisdictional

⁷ See *Labor*, 65 FLRA at 653-54.

⁸ See *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 851 (2012) (*Pope AFB*).

⁹ See *id.* (citing *U.S. DHS, U.S. Citizenship & Immigration Servs.*, 65 FLRA 723, 725 (2011)).

¹⁰ See *Pope AFB*, 66 FLRA at 851.

¹¹ Exception at 3-4.

¹² *Id.*

¹³ *Id.* at 4, 5-8.

¹⁴ 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)).

¹⁵ *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (*DOD*).

¹⁶ 5 U.S.C. § 7121(c)(5).

¹⁷ See *U.S. Dep't of HUD*, 65 FLRA 433, 435 (2011).

¹⁸ *AFGE, Local 3615*, 65 FLRA 647, 649 (2011).

¹⁹ Award at 5-6 (emphasis added).

²⁰ *DOD*, 55 FLRA at 40.

²¹ Award at 7-8 (emphasis added) (citing *U.S. Dep't of the Treasury, IRS, S. Tex. Dist.*, 60 FLRA 598 (2005)).

²² Exception, Attach. 8 at 1.

²³ See *Labor*, 65 FLRA at 654 (where the substance of a grievance concerns whether the grievant is entitled to a temporary promotion by reason of having performed established duties of a higher-graded position, the grievance does not concern classification within the meaning of § 7121(c)(5)).

²⁴ 64 FLRA 10 (2009).

²⁵ 61 FLRA 671, 675 (2006).

²⁶ *Anniston*, 64 FLRA at 10-11; *EPA*, 61 FLRA at 675.

defect warranting interlocutory review.²⁷ Therefore, we dismiss the Agency's interlocutory exception without prejudice.

IV. Order

We dismiss the Agency's exception without prejudice.

²⁷ *U.S. Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project, Wapato, Wash.*, 55 FLRA 1230, 1232 (2000) (finding no jurisdictional defect where the union's classification claim was not sufficiently supported).