68 FLRA No. 119

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 12
(Union)

and

UNITED STATES
DEPARTMENT OF LABOR
(Agency)

0-AR-5093

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DECISION

July 14, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member DuBester dissenting)

I. Statement of the Case

Arbitrator Andrée Y. McKissick dismissed as non-arbitrable the Union's grievance, finding that the substance of the Union's grievance involved a classification determination, which was precluded by § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute) and a provision of the parties' collective-bargaining agreement that mirrors § 7121(c)(5).[1] This case presents us with two questions.

The first question is whether the Arbitrator erred as a matter of law when she dismissed the grievance as non-arbitrable. Because the award lacks sufficient findings for the Authority to answer this question, we remand the matter to the parties for resubmission to the Arbitrator.

The second question is whether the award draws its essence from the parties' agreement. Because the Union fails to support this exception "in full" by providing a copy of the parties' agreement, or even an excerpt of the relevant portions of the parties' agreement, we dismiss this exception.[2]

For the reasons set forth below, we dismiss the Union's exceptions, in part, and remand the award, in part, to the parties for resubmission to the Arbitrator, absent settlement, for further findings and clarification of the basis of the award, consistent with this decision.

II. Background and Arbitrator's Award

The grievant was employed as a customer-service assistant. The Union filed a grievance asserting a violation of Article 20, Sections 4 and 5, of the parties' agreement, which addressed position classification. However, pursuant to the parties' agreement, the Arbitrator was first asked to render a decision regarding arbitrability before hearing the merits of the grievance.

The parties could not agree as to the issue, and so, the Arbitrator listed the parties' proposed issues separately. The issue presented by the Agency was "[w]hether . . . the grievance is arbitrable when the subject matter of the grievance is the classification of a position, a matter excluded from the grievance process by Article 47, Section 5 of the [parties' agreement]."[3] The issue presented by the Union was "[w]hether the Agency must pay [the grievant] for work she performed above her pay grade as required by the Merit Staffing Act, 5 U[.]S[.]C[. §] 2301 and [the] Prohibited Personnel Act under 5 U[.]S[.]C[. §] 2302 for [e]qual [p]ay for [e]qual [w]ork."[4]

In particular, the Union argued that the grievance did not involve a classification issue, because it was not seeking a reclassification of the grievant's position. Instead, the Union requested that the Arbitrator compare the tasks performed by the grievant with the tasks performed by employees in higher-graded positions to ensure that the grievant had an accurate position description.

The Agency maintained that the grievance involved a classification matter. The Agency noted that the proper procedure to contest an employee's position description would be to request a desk audit. Viewing the Union's grievance as involving a classification matter, the Agency asked the Arbitrator to dismiss the grievance as non-arbitrable.

The Arbitrator found that the grievance was not arbitrable. First, the Arbitrator applied the Agency's internal personnel regulations on classification and found that the comparison of job duties to appropriate pay, title, or series constituted a classification determination. Second, the Arbitrator noted that the parties' agreement excluded grievances concerning the classification of any position that does not result in the reduction of grade or

[1] 5 U.S.C. § 7121(c)(5).
[2] *See* 5 C.F.R. § 2425.4(a).
[3] Award at 2.
[4] *Id.*

pay of an employee, and that in this grievance, the "thrust and substance" would require a classification analysis.[5] Next, the Arbitrator found that the Union's reliance on equal-pay principles did not redeem a grievance that concerned classification. Lastly, the Arbitrator noted that the grievant failed to opt for a desk audit to challenge any existing disparities of duties and pay.

The Arbitrator concluded that the substance of the grievance involved classification, which precluded the matter from arbitration under § 7121(c)(5) of the Statute and a provision of the parties' agreement that mirrors § 7121(c)(5). The Arbitrator dismissed the grievance.

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

III. Preliminary Matters

A. Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Union's arguments regarding temporary promotion.

As a preliminary matter, the Agency contends that the Authority should dismiss the Union's arguments that the grievant was entitled to backpay for performing higher-graded duties as a result of a temporary promotion or detail, because these arguments were not raised before the Arbitrator.[6]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[7]

The following factors, taken together, provide a sufficient basis for concluding that, at arbitration, the Union raised a temporary-promotion issue: (1) the Union argued that it was not seeking a reclassification of the grievant's position, but was asking the Arbitrator to "order[] [that] a comparison be performed between the tasks performed by [the grievant] and tasks performed by employees in higher[-]graded positions to ascertain [whether] the [g]rievant was performing at a level higher than anticipated by her position description";[8] (2) the requested remedy was purely retrospective, specifically, to "make[] the [g]rievant whole, including [backpay]";[9] (3) the Arbitrator noted the grievant's "omission to request a desk audit";[10] and (4) the Union cited[11] *U.S. Department of VA Medical Center, Buffalo, New York*[12] – a case involving a request for a temporary promotion. Because the Union raised a temporary-promotion issue at arbitration, we find that §§ 2425.4(c) and 2429.5 do not bar the Union's arguments.

B. Section 2425.4(a)(2)-(3) of the Authority's Regulations bars the Union's essence exception.

Under the Authority's Regulations, an exception must "set[] forth[] in full" all arguments "in support of" its exceptions, including "specific references to the record . . . and any other relevant documentation," as well as "[l]egible copies of any documents" that "the Authority cannot easily access (such as . . . provisions of collective[-]bargaining agreements)."[13]

The Union claims that the Arbitrator erred because the award does not draw its essence from the parties' agreement.[14] Specifically, the Union challenges the Arbitrator's finding that Article 20, Section 5, of the parties' agreement does not apply.[15] The Arbitrator did not set forth the wording of Article 20, Section 5, in the award. And the Union does not provide a copy of the parties' agreement, nor does it provide an excerpt of Article 20, Section 5. As the Union failed to "set[] forth[] in full" its argument in support of its essence exception, we find that § 2425.4(a)(2)-(3) bars consideration of the essence exception.[16]

IV. Analysis and Conclusions

The Union argues that the Arbitrator committed "legal error" when she concluded the grievance concerned a matter of classification without a sufficient explanation or analysis of the cases she relied upon to reach her decision.[17] The Union also contends that the Arbitrator erred in failing to distinguish its request for

[5] *Id.* at 6.
[6] Opp'n at 1-2 & 5.
[7] *See, e.g., AFGE, Council 215*, 66 FLRA 771, 773 (2012) (declining to consider an argument that the award failed to draw its essence from the parties' agreement because the argument could have been but was not made during the arbitration hearing); *U.S. Dep't of HUD*, 64 FLRA 247, 249 (2009) (refusing to consider documents existing at the time of the arbitration hearing, but not presented to the arbitrator).
[8] Award at 4.
[9] *Id.* at 5.
[10] *Id.* at 7.
[11] *Id.* at 4.
[12] 37 FLRA 379, 384 (1990).
[13] 5 C.F.R. § 2425.4(a)(2)-(3).
[14] Exceptions at 2.
[15] *Id.*
[16] *See U.S. DHS, U.S. CBP*, 66 FLRA 634, 637 (2012); *U.S. DOJ, Fed. BOP, Corr. Inst. McKean, Pa.*, 49 FLRA 45, 47-48 (1994) (denying exception under § 2425.2(d) for failure to provide copy of relevant document on which exception relied).
[17] Exceptions at 2.

equal pay for equal work from a grievance that involves classification.[18]

A grievance concerns classification within the meaning of § 7121(c)(5)[19] where the substance of the grievance concerns the grade level to which the grievant could receive a noncompetitive-career promotion.[20] This principle applies to requests for noncompetitive promotions beyond the full performance level of the employee's established career ladder.[21] In contrast, where an arbitrator determines a grievant's entitlement to a temporary or other noncompetitive promotion based on performance of previously classified duties, the award does not concern classification.[22]

Here, it is unclear whether the Arbitrator rejected the Union's interpretation of the grievance as involving a temporary promotion, or whether the Arbitrator committed a legal error and incorrectly concluded that a request for temporary promotion involves classification. As such, the record is insufficient for us to determine whether the award is contrary to the legal principles set forth above. Where the Authority is unable to determine whether an arbitration award is contrary to law, the Authority will remand for further findings.[23]

Consequently, we remand the matter to the parties for resubmission to the Arbitrator, absent settlement, for the Arbitrator to articulate her findings that supported her determination that the grievance concerns a classification matter within the meaning of § 7121(c)(5) of the Statute.[24]

V. Decision

We dismiss, in part, the Union's exceptions, and we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further findings and clarification of the basis of the award, consistent with this decision.

[18] *Id.* at 5.
[19] 5 U.S.C. § 7121(c)(5).
[20] *See USDA, Agric. Research Serv., E. Reg'l Research Ctr.*, 20 FLRA 508, 509 (1985).
[21] *Id.*
[22] *See U.S. Dep't of HHS, Region X, Seattle, Wash.*, 52 FLRA 710, 715 (1996).
[23] *See, e.g., U.S. DOJ, U.S. Marshals Serv.*, 66 FLRA 531, 536 (2012); *U.S. Dep't of Transp., Maritime Admin.*, 61 FLRA 816, 822 (2006) (citing *AFGE, Local 701*, 55 FLRA 631, 635 (1999)); *U.S. Dep't of the Army, Headquarters, III Corps & Fort Hood, Fort Hood, Tex.*, 56 FLRA 544, 547 (2000).
[24] *See, e.g., U.S. DOJ, U.S. Marshals Serv.*, 66 FLRA 531, 536 (2012); *U.S. Dep't of Transp. Maritime Admin.*, 61 FLRA 816, 822 (2006) (citing *AFGE, Local 701*, 55 FLRA 631, 635 (1999)); *U.S. Dep't of the Army, Headquarters, III Corps & Fort Hood, Fort Hood, Tex.*, 56 FLRA 544, 547 (2000).

Member DuBester, dissenting:

I disagree with the majority's decision to remand the award. Contrary to my colleagues' determination, the Arbitrator's reason for finding that the grievance is not arbitrable is not "unclear."[1]

The Arbitrator based her substantive-arbitrability determination on her identification of the issue before her. Where the parties have stipulated to an issue, an arbitrator seeking to identify the issue before her will focus on the stipulated issue. But in this case, the parties did not stipulate to an issue. So the Arbitrator framed the issue. Examining "the thrust and substance of this grievance," the Arbitrator found that her "determination [of the grievance's merits] requires an analysis of classification."[2] Clarifying what she meant by "classification," the Arbitrator adopted the Authority's "determination that classification in 5 U[.]S[.]C[.] § 7121(c)(5) involves '[t]he analysis and identification of a position and placing it in a class under the position-classification plan [established by the Office of Personnel Management] under [c]hapter [7]1, of title 5, U.S. Code.'"[3] Accordingly, because classification matters under § 7121(c)(5) may not be grieved, the Arbitrator found "that this grievance is not arbitrable."[4]

Authority precedent is quite clear that absent "a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference."[5] Considering "the deference accorded [an] [a]rbitrator regarding h[er] interpretation of the issues before h[er],"[6] I would defer to the Arbitrator, and uphold her determination that the grievance in this case "requires an analysis of classification,"[7] and is therefore not arbitrable.

[1] Majority at 5.
[2] Award at 6.
[3] *Id.* (quoting *SSA, Office of Hearings and Appeals, Mobile, Ala.*, 55 FLRA 778, 779 (1999)).
[4] *Id.* at 7.
[5] *AFGE, Local 3627*, 64 FLRA 547, 549 (2010); *U.S. Dep't of the Air Force*, 61 FLRA 797, 801 (2006).
[6] *AFGE, Local 953*, 68 FLRA 644, 647 (2015).
[7] Award at 6.