

69 FLRA No. 61

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

0-AR-5179

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DECISION

June 16, 2016

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

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated Article 12 of the parties' collective-bargaining agreement by failing to temporarily promote an employee (the grievant) while the grievant was detailed to a higher-graded position. Arbitrator James M. Darby found that the grievance was arbitrable because it concerned the grievant's entitlement to a temporary promotion, not the classification of the grievant's position. The Arbitrator sustained the grievance and, as a remedy, directed the Agency to pay the grievant backpay. There are two questions before us.

The first question is whether the Arbitrator's finding that the grievance concerned a temporary promotion – rather than the classification of the grievant's position – is contrary to § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute).¹ Because the Agency has not established that the grievance concerns the classification of the grievant's position, the answer is no.

The second question is whether the award is contrary to the Back Pay Act (the Act)² because the Arbitrator awarded the grievant backpay in a reclassification action. Because the Agency's argument regarding the Act is premised on its claim that the award is contrary to § 7121(c)(5) – a claim that we reject – the answer is no.

II. Background and Arbitrator's Award

The grievant was a general schedule (GS)-10 kinesiologist in the Agency's "spinal[-]cord[-]injury area."³ The Agency detailed the grievant to the driver-rehabilitation-specialist area (rehabilitation area). After approximately ten months, the Agency permanently promoted the grievant to a GS-11 driver-rehabilitation-specialist (specialist) position.

Before the Agency permanently promoted the grievant, the Union filed a grievance alleging that the Agency violated Article 12 of the parties' agreement (Article 12) by failing to "temporar[ily] promot[e]" the grievant while he was performing higher-graded duties.⁴ Article 12 requires the Agency to "temporarily promote[]" an employee whom the Agency "detail[s] to a higher[-]graded position for a period of more than [ten] consecutive work days" and "who performs [the] higher-graded duties" of that position "at least 25%" of the time.⁵

The grievance went to arbitration, and the parties stipulated to the following issues: "Did the Agency violate the parties' . . . [a]greement when it failed to temporarily promote the [g]rievant . . . ? If so, what shall be the remedy?"⁶

As an initial matter, the Agency argued that the grievance was not arbitrable under § 7121(c)(5) of the Statute because it concerned the classification of the grievant's position. However, the Arbitrator observed that the grievance did "not seek to have the [g]rievant's GS-10 position reclassified to a GS-11 position."⁷ Instead, the Arbitrator found, the grievance "expressly request[ed] that the Agency provide the [g]rievant a '[r]etroactive [t]emporary [p]romotion' as a result of his being detailed . . . to the higher-graded [specialist] position."⁸ Accordingly, the Arbitrator determined that the grievance concerned whether the grievant "was

² *Id.* § 5596.

³ Award at 5.

⁴ Exceptions, Attach. 6, Joint Ex. 2 (Grievance Packet) at 8.

⁵ Award at 3 (quoting Article 12).

⁶ *Id.* at 2.

⁷ *Id.* at 17.

⁸ *Id.* (quoting Grievance Packet at 9).

¹ 5 U.S.C. § 7121(c)(5).

entitled to a temporary promotion pursuant to Article 12,⁹ and that the grievance was arbitrable.

Turning to the grievance's merits, the Arbitrator found that: it was "undisputed that the Agency detailed (and physically moved) the [g]rievant to the [rehabilitation] area";¹⁰ during the detail, the grievant spent over 25% of his time performing specialist duties; and "all" specialists worked "at the GS-11 grade level."¹¹ Based on these findings, the Arbitrator concluded that the grievant met the requirements for a temporary promotion under Article 12 and that the Agency violated the parties' agreement by failing to temporarily promote the grievant.

As a remedy, the Arbitrator directed the Agency to make the grievant whole "by providing him back[pay] and any other benefits associated with performing the [specialist] GS-11 position from the first day of his detail . . . until the date of his permanent promotion."¹²

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

III. Analysis and Conclusions

A. The award is not contrary to § 7121(c)(5) of the Statute.

The Agency asserts that the grievance and the award concern the classification of the grievant's position within the meaning of § 7121(c)(5) of the Statute.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, but defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are based on nonfacts.¹⁵

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 The Authority has construed the term "classification" in § 7121(c)(5) as involving "the 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 chapter 51 of title 5, United States Code."¹⁷

The Authority has held that where the substance of a grievance concerns the grade level of the duties permanently assigned to and performed by an employee, the grievance concerns the classification of a position within the meaning of § 7121(c)(5).¹⁸ However, where the substance of the grievance concerns whether the employee is entitled to a temporary promotion under a collective-bargaining agreement because he or she has performed the established duties of a higher-graded position, the grievance does not concern the classification of a position within the meaning of § 7121(c)(5).¹⁹

Here, the Arbitrator concluded that the grievance concerned whether the grievant was "entitled to a temporary promotion" for performing the duties of a higher-graded position during his detail.²⁰ Moreover, the Arbitrator concluded that the grievance did *not* claim that the grievant's permanent GS-10 position was improperly classified.²¹ The Agency challenges these conclusions in several respects.

First, the Agency argues that the grievance concerns a classification matter because it alleges that the grievant's "permanent promotion should have occurred earlier."²² However, the plain wording of the grievance does not support such a conclusion. In this regard, the grievance alleges that the grievant "performed higher-graded duties . . . warranting [a] temporary promotion[.]"²³ And, even the Agency concedes that the grievance requests, as a remedy, a "retroactive temporary promotion."²⁴

Second, the Agency cites *SSA*²⁵ to support its interpretation of the grievance.²⁶ In *SSA*, the Authority found that the grievance at issue involved a classification matter because — although requesting a temporary promotion — it concerned the grade level of duties that were *permanently* assigned to the grievant's

⁹ *Id.* at 18 (citing *U.S. Dep't of the Army, Fort Polk, La.*, 44 FLRA 1548 (1992)).

¹⁰ *Id.* at 16.

¹¹ *Id.* at 17.

¹² *Id.* at 19-20.

¹³ Exceptions at 4-6 (citing 5 U.S.C. § 7121(c)(5)).

¹⁴ *U.S. Dep't of the Treasury, IRS, Small Bus./Self Employed Bus. Div., Fraud/BSA, Detroit, Mich.*, 63 FLRA 567, 570 (2009) (*IRS*) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).

¹⁵ See *id.* (citing *U.S. DOD, Dep'ts of the Army & the A.F., Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).

¹⁶ *Id.* at 571 (quoting 5 U.S.C. § 7121(c)(5)).

¹⁷ *Id.* (alteration in original) (quoting *U.S. Dep't of Transp., FAA, Atlanta, Ga.*, 62 FLRA 519, 521 (2008) (*FAA Atlanta*)).

¹⁸ *E.g., id.* (citing *FAA Atlanta*, 62 FLRA at 521).

¹⁹ *E.g., id.* (citing *FAA Atlanta*, 62 FLRA at 521).

²⁰ Award at 18.

²¹ *Id.* at 17.

²² Exceptions at 5.

²³ Grievance Packet at 8.

²⁴ Exceptions at 5 (quoting Award at 7).

²⁵ 60 FLRA 62 (2004).

²⁶ Exceptions at 5.

position.²⁷ Here, the grievance does not allege that the Agency permanently assigned specialist duties to the grievant's kinesiologist position; nor does it seek to change the grade level of that position. Rather, the grievance concerns whether the grievant is entitled to a temporary promotion for the period during which the Agency undisputedly "detailed (and physically moved) the [g]rievant to the [rehabilitation] area."²⁸ Thus, SSA does not support a conclusion that the grievance involves a classification matter.²⁹

Next, the Agency contends that the Arbitrator impermissibly "analy[zed] and identifi[ed]" the grade level of the duties assigned to the grievant and to the GS-11 specialists.³⁰ But, as discussed above, the Arbitrator determined that the grievance concerned whether the grievant was entitled to a temporary promotion under Article 12 for performing GS-11 specialist duties.³¹ In order to resolve that issue, the Arbitrator appropriately examined the specialist duties and assessed whether the grievant performed such duties during his detail.³² In this regard, the Arbitrator found that the grievant, while detailed, consistently performed specialist duties over 25% of the time,³³ and that "all" specialists worked "at the GS-11 grade level."³⁴ The Arbitrator did not evaluate the grade level of the duties assigned to, and performed by, the grievant in order to determine the appropriate classification of the grievant's permanent position. Thus, the Arbitrator did not make a classification determination.³⁵

Additionally, the Agency argues that the Arbitrator "backdate[d] the grievant's permanent promotion"³⁶ by awarding a retroactive promotion "from the first day of [the grievant's] detail . . . until the date of his permanent promotion."³⁷ However, there is no evidence that the Arbitrator considered whether the grievant was entitled to a retroactive permanent promotion. In this regard, the issue that the Arbitrator addressed was whether the grievant was entitled to a "temporary promotion,"³⁸ and, in resolving that issue, the Arbitrator found that the Agency violated Article 12 for failing to "temporarily promote" the grievant.³⁹

Further, we find no basis for construing the awarded remedy as a retroactive permanent promotion simply because it extends until the date of the grievant's permanent promotion.⁴⁰ It is undisputed that the grievant's detail – in which he performed the higher-graded specialist duties – lasted until the date of his permanent promotion.⁴¹ Thus, the Arbitrator did not make a classification determination by awarding the grievant a retroactive temporary promotion for the period during which he was detailed.⁴²

Because the grievance and the award concern whether the grievant was entitled to a temporary promotion under the parties' agreement, we find that neither the award nor the grievance concerns the classification of a position within the meaning of § 7121(c)(5) of the Statute. Accordingly, we deny the Agency's exception.

²⁷ 60 FLRA at 65.

²⁸ Award at 16 (emphasis added).

²⁹ See *U.S. DOL, Bureau of Labor Statistics*, 65 FLRA 651, 654 (2011) (finding that a grievance did not concern the classification of the grievant's position, in part, because the duties allegedly performed by the grievant were "of a position other than his own" (citing *U.S. Dep't of the A.F., 81st Training Wing, Keesler A.F. Base, Miss.*, 60 FLRA 425, 428 (2004) (*Keesler*))).

³⁰ Exceptions at 5 (citing Award at 17).

³¹ Award at 18.

³² E.g., *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 298 (2000) ("In resolving a grievance alleging that a grievant is entitled to a temporary promotion because he or she has performed higher-graded duties, an arbitrator examines the higher[-]graded duties and determines whether the grievant in fact performed them." (citing *NAGE, Local R3-35*, 52 FLRA 866, 871 (1997) (*NAGE*))); see also *Keesler*, 60 FLRA at 428 (an arbitrator does not make a classification determination by comparing a grievant's duties to the properly classified duties of a higher-graded position to determine if the grievant is entitled to a temporary promotion).

³³ Award at 18.

³⁴ *Id.* at 17.

³⁵ See *IRS*, 63 FLRA at 571; *Keesler*, 60 FLRA at 428.

³⁶ Exceptions at 5-6.

³⁷ *Id.* at 6 (quoting Award at 20).

³⁸ Award at 18 (emphasis added).

³⁹ *Id.* at 19 (emphasis added).

⁴⁰ See *AFGE, Local 1923*, 38 FLRA 89, 98 (1990) (*Local 1923*) (modifying an award to direct an agency to award a grievant a "retroactive temporary promotion, with backpay" from the date that the agency assigned the grievant higher-graded duties "to the date of the grievant's permanent promotion").

⁴¹ See Award at 19-20.

⁴² See *Local 1923*, 38 FLRA at 94-95, 98.

B. The award is not contrary to the Act.

The Agency claims that the awarded remedy violates § 5596(b)(3) of the Act because that section does not authorize backpay in a reclassification action.⁴³ However, the Agency's argument is premised on its claim that the award concerns a classification matter under § 7121(c)(5) of the Statute.⁴⁴ Because we have rejected that premise, we deny this contrary-to-law exception.⁴⁵

IV. Decision

We deny the Agency's exceptions.

⁴³ See *Exceptions* at 6 (citing "5 U.S.C. § 5[5]96(b)(3)").

⁴⁴ *Id.*

⁴⁵ See *NAGE*, 52 FLRA at 871 (holding that § 5596(b)(3) applies only to reclassifications).