

71 FLRA No. 63

UNITED STATES MARINE CORPS
MARINE CORPS AIR GROUND COMBAT CENTER
TWENTYNINE PALMS, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2018
(Union)

0-AR-5444

DECISION

September 27, 2019

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

This matter is before the Authority on exception to an award of Arbitrator Linda S. Klibanow filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute)¹ and part 2425 of the Authority's Regulations.² The Union filed an opposition to the Agency's exceptions.³

We have determined that this case is appropriate for issuance as an expedited, abbreviated decision under § 2425.7 of the Authority's Regulations.⁴

The Agency argues that the award is contrary to law because the Union's grievance is barred by § 7121(c)(5) of the Statute and essentially concerns "the classification of any position which does not result in the reduction in grade or pay of an employee."⁵ In *U.S. DOD, Marine Corps Air Ground Combat Center, Twentynine Palms, California (Twentynine Palms)*,⁶ we considered a nearly identically worded grievance between the same parties and concluded that it was not arbitrable because the grievance's wording concerned classification.⁷ Because the grievance in this case is nearly identical to the grievance in *Twentynine Palms*, we find that the Union's grievance is barred by § 7121(c)(5).⁸ Upon full consideration of the circumstances of this case, including the case's similarity to other fully detailed decisions involving the same or similar issues,⁹ we conclude that the award is deficient on the grounds raised in the exception and set forth in §§ 7121(c)(5) and 7122(a).

Accordingly, we grant the Agency's exception and set aside the award in its entirety.

¹ 5 U.S.C. § 7122(a).

² 5 C.F.R. pt. 2425.

³ The Union argues that the Agency's exception is untimely relative to the Arbitrator's jurisdiction determination. Opp'n at 5. However, the Union failed to support an argument that the Agency was required to seek interlocutory review. We find the Agency timely filed its exception. The Union also asserts that it was not properly served with the Agency's exception. Opp'n at 5-6. However, the Union's support for this assertion consists only of a series of e-mail messages indicative of service. Further, the Union timely filed its opposition and has demonstrated no harm from the alleged improper service. *U.S. Dep't of State, Bureau of Consular Affairs, Passport Servs. Directorate*, 70 FLRA 918, 919 n.13 (2018) ("When a party serves timely exceptions on an opposing party, the Authority views such service to be procedurally sufficient, unless the opposing party demonstrates that it has been prejudiced by such service."); *NAGE, Local RI-109*, 61 FLRA 593, 595 (2006) (denying motion to dismiss where the opposing party suffered no harm from the improper service).

⁴ 5 C.F.R. § 2425.7 ("Even absent a [party's] request, the Authority may issue expedited, abbreviated decisions in appropriate cases.")

⁵ Exceptions Br. at 4. Also, "an award cannot stand if the arbitrator lacked jurisdiction to resolve the grievance in the first place." *SSA*, 71 FLRA 205, 205-06 (2019) (Member Abbott concurring; Member DuBester dissenting).

⁶ 71 FLRA 173 (2019) (Member DuBester dissenting).

⁷ *Id.* at 173-74 ("[T]he [u]nion's grievance sought a promotion and backpay because the grievant allegedly had been working outside of her position description and was tasked with additional, higher-graded duties. As demonstrated by the requested remedy and regardless of how the [a]rbitrator characterized the dispute, the essential nature of this grievance concerned classification.")

⁸ *Id.*; Exceptions, Agency Ex. 4, Step 1 Grievance at 1; Exceptions, Agency Ex. 6, Step 2 Grievance at 1.

⁹ 5 C.F.R. § 2425.7; see also *Twentynine Palms*, 71 FLRA at 173-74 ("[A] grievance involves classification where it seeks the reclassification of an employee's position based upon alleged classification errors, including where a grievance seeks a promotion due to the alleged performance of higher-graded duties.")

Member DuBester, dissenting:

The majority's decision to set aside the Arbitrator's award because the grievance is barred by § 7121(c)(5) of the Statute¹ is flawed for the same reasons as its decision in *U.S. DOD, Marine Corps Air Ground Combat Center, Twentynine Palms, California (Twentynine Palms)*.² In both decisions, the majority mischaracterizes the essential nature of the grievance, and ignores the Arbitrator's carefully reasoned determination that the grievance does not involve the grievant's reclassification but instead alleges that the grievant should have been temporarily promoted pursuant to Article 14 of the parties' collective-bargaining agreement.

As in *Twentynine Palms*, the grievance in this case alleges that the grievant had been "tasked with additional duties which are higher than his pay grade" and that this violated Article 14 of the parties' agreement.³ The grievance requests that the grievant "be made whole by compensating him retroactively and if any additional duties remain in effect, [then] the [grievant] should be promoted as prescribed in Article 14."⁴ Article 14 governs when and how an employee should receive a temporary promotion or detail.⁵

Also similar to *Twentynine Palms*, the arbitrator had no difficulty ascertaining that the grievance concerns whether the grievant had been temporarily promoted, and that she was not, therefore, barred from considering the grievance pursuant to § 7121(c)(5) of the Statute. This is reflected in her decision denying the Agency's argument towards this end, in which she "fully recognizes that 'classification' matters are outside her jurisdiction and remedial authority," but determines that she is not precluded from awarding a "temporary promotion and backpay in appropriate cases for violation of express provisions of the [parties' agreement]."⁶ This is also reflected in the Arbitrator's merits award, in which she concludes that, "in failing to temporarily promote the grievant . . . the Agency violated Article 14[,] Section 3 of the [parties' agreement] . . . warranting an award of backpay for a period not to exceed the 120-day period set forth in Article 14[,] Section 3 and 5 C.F.R. [§] 335.103(c)."⁷

Considering the record in its entirety, it is clear that this grievance does not concern a classification matter within the meaning of § 7121(c)(5) of the Statute. Accordingly, and for the reasons expressed in my dissenting opinion in *Twentynine Palms*,⁸ I dissent.

¹ 5 U.S.C. § 7121(c)(5).

² 71 FLRA 173 (2019) (Member DuBester dissenting).

³ Exceptions, Agency Ex. 4, Step 1 Grievance at 1.

⁴ *Id.* (emphasis added).

⁵ Exceptions, Agency Ex. 1, Consolidated Master Labor Agreement at 41.

⁶ Exceptions, Agency Ex. 12, Notice of Hearing on Specified Procedural Nonarbitrability Issue at 10-11.

⁷ Award at 18.

⁸ 71 FLRA at 175-76 (Dissenting Opinion of Member DuBester).