

63 FLRA No. 159

UNITED STATES DEPARTMENT
OF THE ARMY
UNITED STATES ARMY CORPS
OF ENGINEERS
MEMPHIS DISTRICT
MEMPHIS, TENNESSEE
(Agency)

and

INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS
LOCAL 259
(Union)
0-AR-4258

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DECISION

July 16, 2009

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Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Jerome J. La Penna filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union did not file an opposition to the exceptions.

The Arbitrator sustained a grievance alleging that the grievant was entitled to compensation for having performed the duties of a higher-graded position. For the reasons that follow, we conclude that the award is deficient because it resolves a classification matter, within the meaning of § 7121(c)(5) of the Statute.

II. Background and Arbitrator's Award

The grievant, a deckhand, alleged that, for about ten years beginning in 1996, he was assigned to and performed higher-graded duties consisting of the operation of crew boats without receiving compensation commensurate with the higher-graded duties. Award at 2, 9. The grievant sought back pay for his ten years of performing the higher-graded duties as well as consideration for permanent promotion to a boat operator position. *Id.* at 2, 15, 20.

The Arbitrator determined that the dispute did involve classification within the meaning of § 7121(c)(5) of the Statute. *Id.* at 6. The Arbitrator also determined that the grievant spent more than fifty percent of his work time operating crew boats -- not performing deckhand duties. *Id.* at 10-14; 49-53. According to the Arbitrator, during the processing of the grievance, the grievant's third-line supervisor sent a memorandum to the grievant proposing, in settlement of the grievance, the outline of a new deckhand position description (PD) that would include boat operator functions. *Id.* at 16-19; 36-37. Under the proposal, the PD would be classified by the Agency. *Id.* at 37. The memorandum suggested that the classifiers could consider a factor evaluation plan for a benchmark position of Launch Operator. Award, attachment following p. 69. The grievant did not accept this proposal. *Id.* at 19, 38.

Finding that the record lacked a PD for boat operator, Award at 57, the Arbitrator treated the benchmark PD for Launch Operator as the PD for the higher-graded work that the grievant performed. Award at 60. The Arbitrator found that the Agency's failure to compensate the grievant for his temporary performance of the higher-graded duties was an unjustified and unwarranted personnel action and that back pay was warranted for an eight-year period. *Id.* at 66. He identified as an unresolved issue the grade level of the Launch Operator position from 1996 through 2005. *Id.* at 67. Accordingly, the Arbitrator ordered the parties to:

initiate and conduct a joint inquiry to establish . . . the true grade level of the Launch Operator 5903 position . . . and/or in the alternative, if necessary, to negotiate for the purpose of arriving at an agreement as to the said grade level of pay to be used in connection with the computation of back pay awarded to the grievant, herein which pay grade level shall be, in no event, lower than pay grade level 7.

Id. at 72-73.¹

III. Agency's Exceptions

The Agency contends that the award: (1) concerns a classification matter; (2) is based on a nonfact; and (3) violates the Back Pay Act.

Specifically, as relevant here, the Agency claims that the award is deficient because "there is no evidence that the grievant performed all duties of a then existing

1. The Arbitrator denied the portion of grievance seeking "special preferential treatment for permanent promotion[.]" Award at 71. As no exceptions were filed to this portion, we do not address it further.

higher graded position.” Exceptions at 7. The Agency points out, in this regard, that the Arbitrator ordered the parties “to negotiate the pay grade, or classification, of the purported existing position.” *Id.* at 11.

IV. Analysis and Conclusions

The award is deficient under § 7121(c)(5) of the Statute.

Where, as here, 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 *United States 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 *United States Dep’t of Def., Dep’ts of the Army and 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. *Id.*

Under § 7121(c)(5) of the Statute, grievances covering “the classification of any position which does not result in the reduction in grade or pay of an employee” are precluded by law from coverage by a negotiated grievance procedure. The Authority has construed the term “classification” as “the analysis and identification of a position and placing it in a class under the position-classification plan established by OPM [Office of Personnel Management] under chapter 51 of title 5, United States Code.” *AFGE, Local 987*, 37 FLRA 386, 389 (1990) (quoting 5 C.F.R. § 511.101(c)). As applied in this case, Authority precedent holds that if resolution of a grievance requires classification of previously-unclassified duties, then the grievance concerns classification within the meaning of § 7121(c)(5). *Cf. AFGE, Local 1617*, 55 FLRA 345, 347 (1999).

In this case, it is clear that the position comprising the duties that, according to the Arbitrator, entitle the grievant to compensation *is not currently classified*. Indeed, although the Arbitrator ordered a grade 7 or 9 for the position, he also ordered negotiations over the “true grade level” of the position. Award at 70 and 72. As the disputed duties have not been classified, the grievance involves classification within the meaning of § 7121(c)(5) and the award is deficient. See *United States Dep’t of Veterans Affairs Med. Ctr, Muskogee, Okla.*, 47 FLRA 1112, 1117 (1993) (award deficient when to determine grade level of duties performed by grievant).

Based on the foregoing, we find the award, including the award of back pay, to be deficient because it involves classification under § 7121(c)(5) of the Statute.²

V. Decision

The award is set aside as contrary to § 7121(c)(5) of the Statute.

2. In light of this determination, we do not address the Agency’s remaining exceptions.