65 FLRA No. 90

UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL OF HUD LOCALS 222
(Union)

0-AR-4586

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DECISION

January 26, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Andrée Y. McKissick 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 filed an opposition to the Agency's exceptions.

The Union filed a grievance alleging that the Agency violated the parties' agreement by failing to promote the grievants. *See U.S. Dep't of Hous. & Urban Dev.*, 59 FLRA 630, 630 (2004) (*HUD*). In her merits award (the MA), the Arbitrator sustained the grievance and awarded an "organizational upgrade" to the grievants. MA at 16. For the reasons that follow, we set aside the remedy and remand the MA to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency's advertising and filling of certain positions with promotion potential to General Schedule (GS)-13 deprived employees occupying similar positions with promotion potential to GS-12 of the opportunity to be promoted to GS-13. *HUD*, 59 FLRA at 630. In response, the Agency asserted, as relevant here, that the grievance was not arbitrable under § 7121(c)(5) of the Statute because it concerned the classification of positions.[1] *Id.* The parties proceeded to arbitration on the stipulated issue of arbitrability, and the Arbitrator issued an award (First Arbitrability Award, or First AA) finding that the grievance involved "the fairness of advertisements and vacancy announcements, not the proper classification of a position and one's concurrent duties." *Id.* (citing First AA at 6) (internal quotation marks omitted). Therefore, the Arbitrator found that the grievance was arbitrable.

The Agency filed exceptions to the First AA, and, in *HUD*, the Authority found that the Agency presented a plausible jurisdictional defect that warranted interlocutory consideration of the exceptions – namely, whether the grievance concerned classification, under § 7121(c)(5) of the Statute. 59 FLRA at 631. However, the Authority could not determine whether the Arbitrator had found that the grievance concerned "re*classifying* the grievants' permanent positions" or "re*assigning* the grievants to . . . newly-established, already-classified positions[.]" *Id.* at 632 (emphases added). The Authority stated that the "distinction between the two [findings] is critical because the Arbitrator: (1) would not have jurisdiction over a grievance concerning the promotion potential of employees' permanent positions; but (2) would have jurisdiction over a grievance alleging a right to be placed in previously-classified positions." *Id.* Accordingly, the Authority remanded the First AA for resubmission to the Arbitrator for clarification of the arbitrability issue. *Id.* On resubmission, the Arbitrator clarified that she found the "grievance [to be] alleging a right to be placed in previously-classified positions [with promotional potential to GS-13] and . . . thus arbitrable." Second Arbitrability Award (Second AA) (Opp'n, Attach., Ex. 2) at 1; *see also id.* at 6, 8.[2]

1. Under § 7121(c)(5) of the Statute, a grievance concerning "the classification of any position which does not result in the reduction in grade or pay of an employee" is excluded from the scope of the negotiated grievance procedure. 5 U.S.C. § 7121(c)(5).

2. The Agency filed exceptions to the Second AA, but the Authority's Office of Case Intake and Publication dismissed them as untimely filed. *See* MA at 2.

Thereafter, the Arbitrator issued the MA, which resolved the grievance's merits. In that award, the Arbitrator first recounted her earlier finding that the "grievance was arbitrable, as [it] was based upon the right to be placed in previously classified positions." MA at 2. She then stated that the issues for resolution in the MA were: "Whether the Agency violated the [c]ollective [b]argaining [a]greement [(CBA)], [l]aw[, r]ule, or other regulation [by] fail[ing] to treat bargaining unit employees fairly and equitably [at the time it] post[ed] vacancy announcement[s for newly-created positions] . . . until the present? If so, what are the appropriate remedies?" *Id.* at 3.

Because the Agency did not disclose information, including vacancy announcements, that the Arbitrator had previously directed it to provide to the Union, the Arbitrator drew an adverse inference against the Agency regarding the advertising and selection for newly-created positions with promotion potential to GS-13. *Id.* at 10-11. The Arbitrator also found that the Agency failed to rebut Union witnesses' testimony that "they were told by their supervisors that their applications to various [advertised, newly-created] positions would be destroyed, or not considered, and they should not apply." *Id.* at 12. Therefore, the Arbitrator concluded that the "evidence supports the Union's case that the [g]rievants were . . . not considered for selections [and were] dissuaded from applying" for positions with promotion potential to GS-13. *Id.* at 15.

The Arbitrator concluded that "but for these inequitable and unfair situations . . . , these affected positions [sic] should have been promoted to the journeyman level to GS-13 retroactively . . . ." *Id.* at 15. The Arbitrator found that the Agency's actions violated the following provisions of the CBA: (1) Article 4, Sections 4.01 and 4.06, "as these [g]rievants were unfairly treated and were unjustly discriminated against[;]" (2) Article 9, Section 9.01, "as classification standards were not fairly and equitably applied[;]" and (3) Article 13, Section 13.01, as the Agency "sought to hire external applicants, instead of promoting and facilitating the career development of internal employees." MA at 15. As for the appropriate remedy, the Arbitrator directed "an organizational upgrade of affected positions by upgrading the journeyman level for all the subject positions to [the] GS-13 level retroactively[.]" *Id.* at 16.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that, by requiring an "organizational upgrade" of the grievants' positions, the award improperly: (1) classifies positions, in violation of law; (2) awards promotions, in violation of applicable regulations; (3) interferes with management's rights under the Statute; (4) exceeds the authority of the Arbitrator; and (5) violates the CBA. Exceptions at 2. According to the Agency, because the award directs "[t]he elevation of the grade of a position[,]" it "by definition[] requires [the position's] reclassification[,]" contrary to law. *Id.* at 2, 3 n.1. In addition, the Agency argues that the award provides the grievants with noncompetitive promotions, contrary to 5 C.F.R. § 335.103(c)(1)(v).[3] *Id.* at 3. Further, the Agency contends that the award "prohibits the Agency from removing duties from the positions encumbered by the grievants" and, consequently, violates its statutory rights to "determine its organization, assign work, and determine the grades of employees assigned to its organization." *Id.* at 4 (citing 5 U.S.C. § 7106(a), (b)(1)).[4] Moreover, the Agency contends that the award is deficient because the Arbitrator assumed classification authority that she did not possess under

3. 5 C.F.R. § 335.103 provides, in pertinent part:

> (c) Covered personnel actions--
>
> (1) Competitive actions. Except as provided in paragraphs (c)(2) and (3) of this section, competitive procedures in agency promotion plans apply . . . to the following actions:
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> . . . .
>
> (v) Transfer to a position at a higher grade or with more promotion potential than a position previously held on a permanent basis in the competitive service . . . .

5 C.F.R. § 335.103(c)(1)(v).

4. The Agency notes that management's rights are incorporated into the CBA, and, therefore, the Agency argues that the award's alleged violations of management's rights contravene both the Statute and the CBA. *See* Exceptions at 4 (citing CBA Art. 3, § 3.06 (Exceptions, Attach. 3 at 7) (CBA provisions restating 5 U.S.C. § 7106(a)-(b)).

law or the CBA. *See id.* at 2-3 (citing CBA Art. 23, § 23.10(2) (Exceptions, Attach. 3 at 121)).[5] Finally, the Agency asserts that the award grants noncompetitive promotions in violation of the CBA. *Id.* at 3-4 (citing CBA Art. 13, § 13.09 (Exceptions, Attach. 3 at 58-59) (describing the application process "[t]o be considered for a vacancy")).

B. Union's Opposition

The Union asserts that the exceptions ignore the Arbitrator's clear statement that the MA determined "whether the bargaining unit employees were treated unfairly and inequitably with regard to *already* classified vacant positions[.]" Opp'n at 7 (citing MA). In this regard, the Union contends that the "remedy does not require [the] reclassification of employees presently at the GS-12 level, but rather [requires] that the Agency promote or reassign bargaining unit employees to the already classified positions."[6] *Id.* at 8. The Union argues that the remedy can be viewed as "direct[ing] the Agency to permanently[,] retroactively promote all affected [employees] into currently existing career ladder positions[.]" *Id.* at 16. In addition, the Union argues that an "organizational upgrade" will "remedy the Agency's failure to give the bargaining unit employees . . . proper consideration at the time of the competitive hiring/promotion actions." *Id.* at 11; *see also id.* at 9. In the alternative, the Union argues that the awarded "organizational upgrade can also be viewed as an accretion of duties, a valid and lawful remedy." *Id.* at 11. Finally, the Union contends that the award "is silent as to the prospective treatment of bargaining unit employees[,]" and, thus, does not violate management's rights by prohibiting the Agency from "removing duties from positions encumbered by bargaining unit employees[.]" *Id.* at 15.

IV. Analysis and Conclusions

The Agency argues that the award is contrary to law because it requires the reclassification of positions. 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. *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)). 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 U.S. Dep't of Def., Dep'ts of the Army & 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. *See id.*

The Authority has repeatedly held that 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) of the Statute. *E.g., U.S. Dep't of Labor, Wash., D.C.*, 64 FLRA 829, 830 (2010) (citing *U.S. EPA, Region 2*, 61 FLRA 671, 675 (2006) (*EPA*)); *SSA, Balt., Md.*, 20 FLRA 694, 694-95 (1985). In addition, a grievance concerns classification within the meaning of § 7121(c)(5) if it contends that the grievant's permanent position warrants a change in its journeyman level or promotion potential. *U.S. Dep't of Labor*, 63 FLRA 216, 218 (2009) (*DOL*) (citing *HUD*, 59 FLRA at 632). In contrast, "a disputed failure to promote a grievant under a competitive procedure . . . does not concern classification matters." *U.S. Dep't of the Air Force, Air Educ. & Training Command, Randolph Air Force Base, San Antonio, Tex.*, 49 FLRA 1387, 1389 (1994); *see also U.S. Dep't of the Army, Fort Campbell, Ky.*, 37 FLRA 1102, 1107, 1109 (1990).

Where an exception alleges that a grievance or award concerns classification in violation of § 7121(c)(5), the Authority may analyze *both* the nature of the grievance *and* the nature of the award – including the awarded remedy – in order to determine whether the award is contrary to law. *E.g., U.S. Dep't of Veterans Affairs, Med. Ctr., Muskogee, Okla.*, 47 FLRA 1112, 1117 (1993); *U.S. Dep't of Agric., Agric. Research Serv., E. Reg'l Research Ctr.*, 20 FLRA 508, 509 (1985). In this regard, an award may be contrary to law because it concerns classification within the meaning of § 7121(c)(5) based on the remedy. *See U.S. Envtl. Prot. Agency, Region 2*, 59 FLRA 520, 524-25 (2003) (*EPA, Region 2*).

5. Article 23, Section 23.10(2) of the CBA provides, in relevant part, "The Arbitrator shall not have authority to add to, subtract from, or modify any of the terms of th[e CBA], or any supplement thereto." Exceptions, Attach. 3 at 121 (CBA Art. 23, § 23.10(2)).

6. According to the Union, "[t]his exact same remedy was addressed in the [parties' m]emorandum of [u]nderstanding, where the Agency agreed to the reassignment of employees to reclassified positions." Opp'n at 8.

In response to the Authority's decision in *HUD*, the Arbitrator found that the grievants "alleg[ed] a right to be placed in previously-classified positions[.]" Second AA at 1. The Arbitrator identified the previously-classified positions at issue as those newly-created positions – similar to the grievants' positions – with promotion potential to GS-13, and the Arbitrator credited the grievants' unrebutted testimony that they were "told by their supervisors that their applications to [these] various positions would be destroyed, or not considered, and they should not apply." MA at 12. The Arbitrator concluded that, "but for these inequitable and unfair situations[,]" the grievants would have been promoted to positions with GS-13 potential. *Id.* at 15. These findings support the Arbitrator's determination that the grievance was arbitrable because it did not concern classification within the meaning of § 7121(c)(5).

However, the remedy chosen by the Arbitrator – directing the Agency to perform an organizational *upgrade* of affected *positions* by *upgrading the journeyman level* for all the subject positions to GS-13 retroactively – involves classification. MA at 16 (emphases added); *see DOL*, 63 FLRA at 218; *cf. EPA, Region 2*, 59 FLRA at 525 (finding "substance of the grievance . . . [was not] barred by § 7121(c)(5)[,]" but setting aside award, in part, because remedial directions concerned classification, in part). In this regard, although the Arbitrator found that the grievance involved "previously-classified positions[,]" Second AA at 1, her remedy directs the Agency to *re*classify the grievants' *existing positions* by raising their journeyman level. As the Authority stated in *HUD*, the Statute does not authorize the Arbitrator to change the "promotion potential of employees' permanent positions[.]" *HUD*, 59 FLRA at 632. Moreover, although the Union asserts that a permanent-promotion remedy based on an accretion of duties to the grievants' positions would not involve classification within the meaning of § 7121(c)(5), the Authority has held to the contrary. *See, e.g.*, *EPA*, 61 FLRA at 675 (citing *AFGE, Local 2142*, 61 FLRA 194, 196 (2005)). For these reasons, the Arbitrator's remedy is contrary to law because it concerns classification matters, and we set it aside.

In cases where the Authority sets aside an entire remedy, but an arbitrator's finding of an underlying violation is left undisturbed, the Authority remands the award for determination of an alternative remedy. *See, e.g.*, *U.S. Dep't of Transp., FAA, Salt Lake City, Utah*, 63 FLRA 673, 676 (2009). As we have set aside the MA's entire remedy, we remand the MA to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.[7]

V. Decision

For the foregoing reasons, we set aside the remedy and remand the MA to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.

7. Because the Agency's remaining exceptions challenge the remedy that we set aside, they are moot, and we do not address them.