

64 FLRA No. 155

UNITED STATES
DEPARTMENT OF LABOR
WASHINGTON, D.C.
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 12
(Union)

0-AR-4368

—
DECISION

May 28, 2010

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 Sean J. Rogers 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 Arbitrator concluded that two GS-13 grievants had an inaccurate position description and had been performing the duties of GS-14 employees. Consequently, he ordered the Agency: (1) to perform a desk audit of the grievants' position to determine the position's proper grade; and (2) to pay the grievants backpay. For the reasons set forth below, we set aside the award as inconsistent with § 7121(c)(5) of the Statute.

II. Background and Arbitrator's Award

Employees P and K (the grievants) held the position of International Economists (Economist), GS-13.¹ *See* Award at 8. Following personnel changes and new legislation, both grievants received

additional duties. *See id.* at 12-14. An Agency classifier subsequently prepared a new position description for the grievants. *See id.* at 9. After preparing the position description, the classifier concluded that the grievants were appropriately rated at the GS-13 level. *See id.* at 11.

The Union filed a grievance on behalf of the grievants arguing that the Agency violated Article 20, §§ 1-5 of the parties' agreement by failing to pay them for their performance of GS-14 Economist duties.² *See id.* at 2. The Union argued that the classifier created an inaccurate position description and that an accurate position description, in conjunction with the duties the grievants performed, would establish that the grievants were entitled to promotions to the GS-14 level. *See id.* at 17; *see also* Opp'n, J. Ex. 2 at 3. The Agency conceded that the position description was inaccurate, but maintained that the grievants were properly graded. *See* Award at 17-18. The matter was unresolved and was submitted to arbitration. The Arbitrator framed the issue for resolution as: "Whether the [Agency] violated Article 20, Sections 1-5 of the [parties' agreement]? If so, then what shall the remedy be?" *Id.* at 5.

The Arbitrator concluded that the grievants' position description was inaccurate. *See id.* at 19. The Arbitrator found that, under Article 20, § 4 of the parties' agreement, the grievants were entitled to an accurate position description or desk audits if the position description was inaccurate. *See id.* at 18-19. The Arbitrator stated, however, that he lacked the authority to reclassify the grievants to a higher grade or correct their position description because both actions would require him to resolve a classification dispute. *See id.* at 18-19. The Arbitrator, accordingly, ordered the Agency to perform a desk audit of the grievants' position to determine the correct grade. *See id.* at 20, 21.

The Arbitrator also concluded that the Agency violated Article 20, §§ 4 and 5 of the parties' agreement by failing to pay the grievants equal pay for substantially equal work. *See id.* at 20. The Arbitrator found that the grievants performed duties that were substantially equal to the duties of GS-14 Economists. *See id.* The Arbitrator, accordingly, ordered the Agency to pay the grievants the difference between the GS-13 pay that they received and the GS-14 pay that they should have received. *See id.* at 20, 21. The Arbitrator held that employee

1. Employee K retired shortly before the arbitration hearing. *See* Award at 17.

2. The relevant portions of the parties' agreement are set forth in the attached Appendix.

P's award of backpay would begin January 2003 and end when the Agency performed a desk audit to "determin[e] her correct grade[.]" *id.* at 20; *see also id.* at 21, and that employee K's backpay would begin January 2003 and end with his retirement date. *See id.* at 21.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the award is contrary to law because, by concluding that the grievants' position description was inaccurate, the Arbitrator made an impermissible classification determination. *See* Exceptions at 5. The Agency specifically asserts that the Arbitrator was prohibited from considering any aspect of the position description, including its creation. *See id.* at 6. The Agency additionally alleges that the award is contrary to law because: (1) the Arbitrator failed to identify any provision in the parties' agreement that mandates compensation for the temporary performance of higher-graded duties, *see id.* at 3; and (2) even if the award itself is not contrary to law, the amount of backpay that the Arbitrator awarded is contrary to law. *See id.* at 6-7.

B. Union's Opposition

The Union rejects the Agency's assertion that the award involves a classification matter. According to the Union, the Arbitrator only concluded that there was a problem with the grievants' position description, and did nothing more than base his award on the work the grievants actually performed. *See* Opp'n at 4. The Union additionally contends that the Arbitrator based his award on the equal pay for equal work provision of the parties' agreement. *See id.* at 7-8. The Union rejects the Agency's other contrary to law claims. *See id.* at 5-10.

IV. Analysis and Conclusions

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 *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.*

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 removed from the scope of the negotiated grievance procedure. 5 U.S.C. § 7121(c)(5). 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 5 U.S.C. Chapter 51. *U.S. Dep't of Transp., FAA, Atlanta, Ga.*, 62 FLRA 519, 521 (2008) (*FAA*). Consequently, when the essential nature of a grievance is integrally related to the accuracy of the classification of a grievant's position, the grievance concerns a classification matter within the meaning of the Statute. *See U.S. EPA, Region 2*, 61 FLRA 671, 675 (2006) (*EPA*). However, where the substance of a grievance is limited to the question of the accuracy of the grievant's position description, the grievance does not concern the classification of a position within the meaning of § 7121(c)(5). *See, e.g., U.S. Dep't of Def., Marine Corps Logistics Base, Albany, Ga.*, 57 FLRA 275, 277 (2001). By contrast, when a grievance requires an arbitrator to examine a position description for purposes of ascertaining whether a position is properly classified, the grievance concerns classification within the meaning of § 7121(c)(5). *See, e.g., U.S. EPA, Region 2*, 59 FLRA 520, 525 (2003) (then-Member Pope dissenting in part as to other matters). Moreover, grievances concerning whether grievants are entitled to temporary promotions on the basis of having temporarily performed the established duties of a position other than their own are not barred by § 7121(c)(5). *See FAA*, 62 FLRA at 521.

Here, the Union did not file its grievance to obtain an accurate position description; rather, it filed the grievance to challenge the accuracy of the grievants' classification. The Union, in its step-one grievance, contended that the grievants were "entitled to a promotion to the GS-14 level" because they were performing higher-graded work. Opp'n, Jt. Ex. 2 at 3. Similarly, in its step-two grievance, the Union asserted that a desk audit would prove that the grievants were performing higher-graded work. *See* Opp'n, Jt. Ex. 5 at 1. Further, at the hearing, the Union argued that the inaccurate position description, together with the grievants' new duties, established that the grievants were entitled to promotions to the GS-14 level, and that the classifier had failed to properly classify the grievants as GS-14 Economists.

See Award at 17. Indeed, based on the Union's arguments, the Arbitrator ordered the Agency to perform a desk audit of the grievants' position so that it could determine the position's proper grade. *See id.* at 20, 21. Thus, based on these facts, it is clear that the substance of the Union's grievance concerned, and is integrally related to, the accuracy of the grievants' classification. *See EPA*, 61 FLRA at 675. The grievance, accordingly, is not grievable.

Moreover, although the grievants testified that they were performing the duties of an existing, previously classified position (GS-14 Economists), the record contains no basis for concluding that they sought only temporary promotions. As discussed above, their grievance alleged a violation of the classification provision of the parties' agreement and requested a desk audit and higher-graded pay as remedies. *See Opp'n, Jt. Ex. 2* at 3; *Opp'n, Jt. Ex. 5* at 1. Therefore, although the Arbitrator awarded the grievants time-limited promotions, the Union's grievance is clearly analogous to grievances alleging the accretion of higher-graded duties to an existing position. The Authority has repeatedly held that such grievances "concern[] a classification matter." *EPA*, 61 FLRA at 675 (citations omitted). Consequently, the Union's grievance remains non-grievable.

The Union's assertion that the Arbitrator merely ordered equal pay for equal work under Article 20, § 5 of the parties' agreement is similarly unavailing. The Authority has held that reliance on equal pay principles does not make grievable a grievance that concerns classification. *See, e.g., U.S. Dep't of Labor*, 63 FLRA 216, 218 (2009) (*DOL*) (Authority concluded that Union's reliance on equal pay principles did not make its grievance arbitrable because substance of grievance concerned classification). As discussed above, the record clearly establishes that the essential nature of the Union's grievance concerns, and is, therefore, integrally related to, the classification of the grievants' position. Article 20, § 5, accordingly, does not make the Union's grievance grievable. *See id.*

Based on the foregoing, we find that the award resolved a classification dispute and set aside the award as inconsistent with § 7121(c)(5) of the Statute.³ *See, e.g., FAA*, 62 FLRA at 521 (setting aside award after concluding that it impermissibly resolved a classification dispute).

³ In view of this decision, we do not address the Agency's other exceptions. *See DOL*, 63 FLRA at 218 n.4.

V. Decision

The Agency's exception is granted and the award is set aside.

APPENDIX

Article 20 of the parties' agreement, "Position Classification[.]" provides:

Section 1. Desk Audits

Absent extenuating circumstances, the Union will be provided at least five work days notice prior to the desk audit of an employee in the bargaining unit and may briefly consult with such an employee upon receipt of such notice. Notices will identify the employee, position, and the reason the audit is being conducted. In addition, where the Office of Personnel Management (OPM) has notified the Department that it intends to conduct an audit of bargaining unit employee pursuant to a classification appeal, the Department will notify the Union.

Section 2. Classification Audits

The Union will be provided a timely notice of personnel management evaluations conducted by either the Department or OPM which will involve classification audits of bargaining unit employees.

Section 3. Classification Appeals

- a. Employees have a right to appeal the classification of their positions in accordance with Department and OPM regulations.
- c.[sic] An employee may request a classification audit when the employee believes that a material change has occurred in the position the employee encumbers. The audit shall be conducted within a reasonable period of time. After completion of the audit, the employee shall be provided in writing the management determination.

Section 4. Position Classification

Management will maintain an accurate position description for each position which

reflects the significant duties of the employee filing the position.

Section 5. Equal Pay for Equal Work

The parties agree to the principle of equal pay for substantially equal work.

The parties wish to foster an atmosphere of cooperation and mutual respect between supervisors and employees. To that end, supervisors and employees are encouraged to communicate regularly with each other and discuss any problems or concerns and try to resolve them informally. If such informal efforts are unsuccessful, employees may utilize the grievance procedure as prescribed in this Article.

Award at 5-6.