

64 FLRA No. 184

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

and

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

0-AR-4272

DECISION

June 30, 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 Charles J. Murphy, filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency did not file an opposition to the Union's exceptions.

As pertinent here, the Arbitrator resolved an arbitrability issue. The grievance concerned the timeliness of a reclassification action. The Arbitrator concluded that the issue of whether the Agency reclassified the grievant's position in a timely manner under the parties' collective bargaining agreement (CBA) was non-arbitrable as a classification matter within the meaning of § 7121(c)(5) of the Statute. Award at 11-12.

For the reasons set forth below, we find that the award is contrary to law, set it aside in part, and remand to the parties for resubmission to the Arbitrator, absent settlement, for a decision on the merits.

II. Background and Arbitrator's Award

The grievant requested a desk audit to determine whether her position should be reclassified at a higher grade. *Id.* at 8-9. About a year later, the Agency reclassified the grievant's position at a higher grade level after performing the desk audit. *Id.* at 9; Exceptions at 2.

The grievance alleged that the Agency violated Article 9 of the CBA¹ by failing to complete the reclassification process in a timely manner. Award at 3-4. When the grievance was not resolved, it was submitted to arbitration.

At arbitration, the Union argued that the grievance only concerned whether the Agency's review of the grievant's classification was timely under the CBA, not whether the grievant was properly classified. Award at 4, 8. Conversely, the Agency argued that the grievance concerned the classification of the grievant's position, which is neither grievable nor arbitrable. *Id.* at 4, 9.

In his award, the Arbitrator framed the issues, in relevant part, as follows:

1. Are the issues grievable or arbitrable?

....

3. Did the Agency violate the [CBA] by failing to timely reclassify the grievant's position at [a higher-grade] level?

Id. at 4.

1. The relevant portions of Article 9, Section 1 of the CBA provide:

D. Position descriptions will be kept current and accurate, and positions will be classified properly

....

E. . . . An employee . . . upon request, will have access to the position description, evaluations report, if available, organizational and functional charts, and other pertinent information directly related to the classification of the position. This informal classification review process should be completed in a reasonable period of time. When a desk audit is conducted it will be completed within 90 days of the . . . employee request.

Award at 6-7.

The Arbitrator found that the timeliness issue concerning the Agency's reclassification action was non-arbitrable as a classification matter barred by Article 42 of the CBA² and § 7121(c)(5) of the Statute. *Id.* at 11. The Arbitrator rejected the Union's argument that a review of the CBA's time limits for reclassifying the grievant does not also require a review of whether the grievant was properly classified. *Id.* He reasoned that "[l]abeling the case as a timeliness dispute when it is so clearly involved in what was also a classification matter does not somehow take it outside the realm of classification issues."³ *Id.*

III. Union's Exceptions

The Union contends that the award is: (1) contrary to law; and (2) based on a nonfact.

In support of its contrary to law claim, the Union argues that the Arbitrator's arbitrability determination is erroneous. Exceptions at 3. Contrary to the Arbitrator's finding, the Union asserts that the grievance concerns only whether, under the CBA, the Agency timely conducted and completed a review of the grievant's classification. *Id.* In this regard, the Union points out that the grievance does not dispute whether the Agency properly classified the grievant's position at a higher-grade level. *Id.* The Union also notes that it only requested that the Arbitrator review the timeliness of the Agency's classification of the grievant's position, not the actual classification itself. *Id.* For these reasons, the Union argues that the grievance is arbitrable under § 7121(c)(5) of the Statute.⁴ *Id.* at 4.

2. The wording of the relevant portion of Article 42 of the CBA is identical to that found in § 7121(c)(5) of the Statute. The relevant portion of the CBA provides:

This Article shall not govern a grievance concerning . . . [t]he classification of any position which does not result in the reduction in grade or pay of an employee.

Award at 8.

3. In a separate part of the award, the Arbitrator determined that whether the Agency conducted a desk audit in a timely manner was arbitrable, and found that it had been timely conducted. *See* Award at 10-11.

4. The Union also argues that the Arbitrator should have made other determinations had he found the grievance arbitrable. *See* Exceptions at 3-5. However, since the Arbitrator never addressed those other issues, it is unnecessary to discuss them here.

The Union also contends that the Arbitrator relied on a nonfact when he found that resolution of the grievance required a review of the grievant's classification. *Id.* at 6.

IV. Analysis and Conclusion

For the reasons set forth below, the Authority grants the Union's exception that the award is contrary to § 7121(c)(5) of the Statute.

The Union contends that the Arbitrator's substantive arbitrability determination -- that the award concerns a classification matter -- is contrary to § 7121(c)(5). When an exception challenges an award's consistency with law, the Authority reviews the 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 this standard, 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.* Where an arbitrator's substantive arbitrability determination is based on law, the Authority reviews that determination *de novo*. *See NTEU*, 61 FLRA 729, 732 (2006) and cases cited therein.

The Authority has discussed the matters that are encompassed by § 7121(c)(5) of the Statute. Under § 7121(c)(5), grievances concerning "the classification of any position which does not result in the reduction in grade or pay of an employee" are excluded from the coverage of negotiated grievance procedures. 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 (OPM)] under chapter 51 of title 5, United States Code." *U.S. Dep't of Transp., FAA, Atlanta, Ga.*, 62 FLRA 519, 521 (2008) (*FAA*) (citation omitted). Classification matters are also implicated "when the essential nature of a grievance is integrally related to the accuracy of the classification of the grievant's position, e.g., where the substance of the dispute concerns the grade level of the duties assigned to and performed by the grievant[.]" *U.S. Dep't of Def., Marine Corps Logistics Base, Albany, Ga.*, 57 FLRA 275, 277 (2001) (*Marine Corps*).

The Arbitrator's arbitrability determination is inconsistent with this precedent. It is clear that the Union's grievance, which deals only with timeliness issues, does not involve the analysis and identification of a position under OPM's position-classification system. *See FAA*, 62 FLRA at 521. It is equally clear that the grievance's "essential nature" is unrelated to the accuracy of the grievant's classification or proper grade level. *See Marine Corps*, 57 FLRA at 277; *cf. U.S. EPA, Region 2*, 61 FLRA 671, 675 (2006) (*EPA*) (Authority held a grievance to be non-arbitrable because the arbitrator's analysis involved the determination of the grade level of the grievant's duties). To the contrary, the "essential nature" of the Union's grievance concerns only the time it took the Agency to complete the reclassification process. *EPA*, 61 FLRA at 675.

Furthermore, the issues that the Union raised during the arbitration proceeding did not seek to bring any classification matters before the Arbitrator. The record shows that the Union never requested that the Arbitrator analyze or identify the grade level of the duties permanently assigned to and performed by the grievant. *See id.* Nor did the Union dispute the Agency's determination of the grievant's proper grade. Instead, the dispute between the parties, as it was developed at arbitration, concerned only whether the Agency violated Article 9 of the CBA by failing to timely review the classification of the grievant's position. Therefore, the grievance contravenes § 7121(c)(5) of the Statute and is arbitrable. Accordingly, the Authority finds that the award is contrary to § 7121(c)(5).⁵

Because the Arbitrator incorrectly determined that the grievance was non-arbitrable, he did not resolve the parties' dispute over whether the Agency violated the CBA by failing to timely reclassify the grievant's position. Accordingly, we set aside the award in part⁶ and remand this matter to the parties for resubmission to the Arbitrator, absent settlement, for a decision on the merits of the grievance.

V. Decision

The award is set aside in part, and this matter is remanded to the parties for resubmission to the Arbitrator, absent settlement, for a decision on the merits.

5. Because the Authority has concluded that the award is contrary to law, it is unnecessary for the Authority to address the Union's additional exception that the award is based on a nonfact.

6. We do not set aside that part of the award finding that the Agency did not fail to timely complete the grievant's desk audit.