70 FLRA No. 11

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

0-AR-5196

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DECISION

November 7, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement by failing to temporarily promote an employee (the grievant). Finding the grievance substantively arbitrable, Arbitrator Jane Minnich determined that the parties' agreement entitled the grievant to a temporary promotion for performing higher-graded duties, and awarded the grievant backpay. This case presents the Authority with two substantive questions.

The first question is whether the Arbitrator's finding that the grievance was substantively arbitrable because it concerned a temporary promotion – rather than a reclassification of the grievant's position – is contrary to § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute).[1] Because the Agency does not establish that the grievance concerns the reclassification of the grievant's position, the answer is no.

The second question is whether the award is contrary to the Back Pay Act (the Act)[2] because the Arbitrator awarded the grievant backpay in a reclassification action. Because the Agency's argument is premised on its claim that the award concerns a classification matter – which we reject – the answer is no.

II. Background and Arbitrator's Award

The grievant is a general schedule (GS)-6 inpatient pharmacy technician at the Agency's medical center in Richmond, Virginia. The grievant applied for a GS-7 pharmacy technician position in the inpatient IV room, and the Agency found him qualified for the position. However, the Agency selected another employee (the selectee) to fill the vacancy. But the selectee had difficulty keeping up with the work volume and was absent for extended periods of time. To compensate, the Agency frequently assigned the grievant, and other GS-6 technicians, to perform the duties of the selectee's GS-7 position. When the selectee retired, the Agency posted a vacancy of a temporary detail to the position and later a vacancy notice to permanently fill it. The grievant did not apply for either job, and another employee was permanently appointed to the GS-7 position.

The Union filed a grievance alleging that the Agency violated Article 12 of the parties' agreement (Article 12) when it failed to temporarily promote the grievant to a GS-7 pharmacy technician for his work in the inpatient IV room. Article 12 provides, in pertinent part, that "a GS employee, who performs the grade-controlling duties of a higher-graded position for at least 25% of his/her time . . . shall be temporarily promoted."[3] As a remedy, the grievance asked for a retroactive-temporary promotion and retroactive GS-7 backpay. The parties did not resolve the grievance and submitted it to arbitration.

As relevant here, the issues before the Arbitrator were "(1) whether the grievance . . . [is] substanti[ve]ly arbitrable, and if so, (2) whether the Agency violated the [parties' agreement] by failing to temporarily promote the [g]rievant to the position of GS-7 [p]harmacy [t]echnician[.]"[4]

The Arbitrator rejected the Agency's contention that the grievance was not substantively arbitrable under § 7121(c)(5) of the Statute because it concerned the reclassification of the grievant's position. The Arbitrator found that the evidence supported a determination that "the Union [was] not seeking the [g]rievant's reclassification, but rather, his temporary promotion to a GS-7 [p]harmacy [t]echnician based upon the . . . duties he regularly performed during [the selectee's] absences."[5]

[1] 5 U.S.C. § 7121(c)(5).
[2] *Id.* § 5596.
[3] Award at 3.
[4] *Id.* at 2.
[5] *Id.* at 13.

Therefore, the Arbitrator concluded that the grievance was substantively arbitrable.

Turning to the merits, the Arbitrator first found that "there [was] no dispute that the [g]rievant was qualified for the GS-7 . . . position."[6] Next, the Arbitrator determined that the grievant performed GS-7 duties more than twenty-five percent of the time. Based on this finding, the Arbitrator concluded that the grievant met the requirements for a temporary promotion under Article 12 of the parties' agreement, and that the Agency violated the agreement by failing to temporarily promote him.

As a remedy, the Arbitrator directed the Agency to make the grievant whole with backpay and retroactive promotions.

The Agency filed exceptions to the award, and the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusions

A. The award is not contrary to § 7121(c)(5) of the Statute.

The Agency argues that the award is contrary to § 7121(c)(5) of the Statute because the grievance concerns the classification of the grievant's position.[7] 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.[8] 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.[9] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[10]

Under § 7121(c)(5), arbitrators lack jurisdiction to determine "the classification of any position which does not result in the reduction in grade or pay of an employee."[11] 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).[12] However, where the substance of the grievance concerns whether the grievant is entitled to a temporary promotion under a collective-bargaining agreement because the grievant performed the established duties of a higher-graded position, the Authority has long held that the grievance does not concern the classification of a position within the meaning of § 7121(c)(5).[13]

The Agency does not establish that the grievance concerns a classification matter within the meaning of § 7121(c)(5). The Arbitrator found that "the Union [was] not seeking the [g]rievant's reclassification, but rather, his temporary promotion to a GS-7 [p]harmacy [t]echnician based upon the . . . duties he regularly performed during [the selectee's] absences."[14] Moreover, the plain wording of the grievance demonstrates that the substance of the grievance concerned a temporary promotion: the Union sought "proper pay compensation for [the] temporary promotion" of the grievant when he performed the work of the selectee's position as the selectee's "back up."[15]

The Agency, citing *U.S. Department of the Army, Fort Polk, Louisiana* (*Fort Polk*),[16] argues that the grievant's assumption of GS-7 duties for over three years is too long for the Arbitrator to have found that this assignment was "temporary."[17] *Fort Polk*, however, does not support the Agency's argument. In *Fort Polk*, the Authority found that an employee was not assigned temporary duties when the employee had not only performed the duties of a higher-graded position for over five years, but the employee had also been formally appointed to that position.[18] Here, unlike *Fort Polk*, the grievant was not appointed to the GS-7 position. As the Arbitrator found, the grievant performed higher-graded

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[6] *Id.*
[7] Exceptions Br. at 4.
[8] *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 69 FLRA 427, 428 (2016) (*VA Richmond*); *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)).
[9] *VA Richmond*, 69 FLRA at 428; *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[10] *VA Richmond*, 69 FLRA at 428.
[11] 5 U.S.C. § 7121(c)(5).
[12] *VA Richmond*, 69 FLRA at 428; *U.S. Dep't of VA, Med. Ctr., Perry Point, Md.*, 68 FLRA 83, 84 (2014) (*VA Perry Point*).
[13] *VA Richmond*, 69 FLRA at 428; *VA Perry Point*, 68 FLRA at 84; *see also U.S. Dep't of the Air Force, 81st Training Wing, Keesler Air Force Base, Miss.*, 60 FLRA 425, 427-28 (2004) (holding that an arbitrator's comparison of a grievant's duties with the duties of another position in order to determine whether the grievant is entitled to a temporary promotion does not constitute a classification determination).
[14] Award at 13.
[15] *Id.* at 1-2.
[16] 61 FLRA 8 (2005) (then-Member Pope dissenting).
[17] Exceptions Br. at 3.
[18] *Fort Polk*, 61 FLRA at 12; *see also U.S. Dep't of HUD, La. State Office New Orleans La.*, 53 FLRA 1611, 1612, 1615 (1998) (finding temporary promotion where grievant performed back-up duties for three years for a higher-graded position); *U.S. Dep't of the Air Force, Warner Robbins Air Logistics Ctr.,Robins Air Force Base, Ga.*, 52 FLRA 938, 938, 941 (1997) (finding temporary promotion where grievant performed higher-graded work for over two years).

duties only when the selectee was unavailable, and ultimately another employee filled the position permanently after the selectee retired.[19]

In addition, the Agency misconstrues the award when it asserts that the Arbitrator "essentially" found that the "grievant was entitled to a promotion due to [his] accretion of higher-graded GS-7 duties."[20] The Arbitrator did not find, as the Agency asserts, that the grievant was entitled to a promotion in his permanent position due to higher-graded duties that were accreted to his existing duties. Therefore, the Agency's reliance on *AFGE, Local 2142* (*Local 2142*)[21] is misplaced. In *Local 2142*, the arbitrator "specifically found that the substance of the grievance concerned the accretion of higher-graded duties" to the grievants' existing positions and therefore the Authority determined that the grievance was not arbitrable because it involved a classification matter.[22] Here, the Arbitrator found that the substance of the grievance concerned the grievant's entitlement to a temporary promotion under the parties' agreement for performing GS-7 duties for more than twenty-five percent of the time while assigned to perform the duties of the selectee's GS-7 position.[23]

Thus, the Agency does not establish that the award is contrary to § 7121(c)(5) of the Statute, because it fails to show that the grievance concerns the classification of a position.[24] Accordingly, we deny the Agency's exception.

B. The award is not contrary to the Act.

The Agency claims that the awarded remedy violates § 5596(b)(3) of the Act because that section does not authorize backpay in a reclassification action.[25] However, the Agency's argument is premised solely on its claim that the award concerns a classification matter under § 7121(c)(5) of the Statute.[26] Because we reject that premise, we deny this contrary-to-law exception.[27]

IV. Decision

We deny the Agency's exceptions.

[19] Award at 5, 13.

Chairman Pope notes that she continues to believe that the award in *Fort Polk* did not involve classification, as she noted in her dissent in that case. *See Fort Polk*, 61 FLRA at 15 n.5 (Dissenting Opinion of then-Member Pope). However, she agrees that *Fort Polk* is distinguishable from this case, for the reasons discussed above.

[20] Exceptions Br. at 4.

[21] 61 FLRA 194 (2005).

[22] *Id.* at 196.

[23] Award at 12-13, 16.

[24] *VA Richmond*, 69 FLRA at 429 (finding that grievance and award concerned a temporary promotion under parties' agreement and not a classification matter); *VA Perry Point*, 68 FLRA at 85 (same).

[25] *See* Exceptions Br. at 4-5 (citing 5 U.S.C. § 5[5]96(b)(3)).

[26] *Id.* at 4.

[27] *See VA Richmond*, 69 FLRA at 430 (where Authority rejected agency's claim that the award concerned a classification matter under § 7121(c)(5), claim that remedy violated § 5596(b)(3) premised on that claim was also rejected).