

73 FLRA No. 42

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY GARRISON REDSTONE ARSENAL
HUNTSVILLE ALABAMA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1858
(Union)

0-AR-5778

DECISION

August 31, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members

I Statement of the Case

Arbitrator Theresa M. Dowdy found the Agency violated a bargaining obligation by refusing to compensate the grievant for performance of extra duties. As a remedy, the Arbitrator ordered the Agency to pay the grievant a stipend for each week the grievant served as a point of contact (POC). The Agency argues that the award is contrary to law because the grievance concerns classification. Because the grievance requested a permanent promotion to a higher classification, we find that the grievance concerned classification and the award is contrary to § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute).¹

II Background

The grievant worked as a General Schedule (GS) grade 4 Security Guard at the Agency’s Redstone Arsenal facility monitoring access control points and gates.² While in this position, the grievant’s supervisor began assigning the grievant POC duties. POC duties include being the

person in charge at a particular gate, controlling access to vehicles entering the facility, inventorying equipment, unlocking the gates, setting up barricades, and other administrative functions.³ There is no job description for serving as POC; there is simply a list of employees who perform those duties. After the grievant began regularly performing POC duties, the grievant asked his supervisor “if he could be taken off the POC list[] because he was still getting Security Guard’s pay.”⁴ The supervisor told the grievant that serving as a POC would look good on a resume if he were to apply for future promotions. The grievant voluntarily continued to perform POC duties.

In December 2017, the grievant filed a third-step grievance alleging the Agency had violated Articles 9 (“Rights and Obligations”) and 32 (“Merit Promotion”) of the parties’ collective-bargaining agreement and that the grievant “was treated unfair[ly] when he [was] continuously working as a Lead Guard [POC] GS[-]6 position from January 2015 to present, but not[] . . . compensated.”⁵ The grievance requested “[r]eimbursement as a GS[-]6 from January 2015 to present” and “[p]ermanent [p]romotion to a GS-6.”⁶ The Agency denied the grievance because the grievant volunteered for additional responsibilities that the Agency alleged were within the scope of his existing position’s duties. The matter proceeded to arbitration.

In the award, the Arbitrator did not frame an issue for resolution. After briefly recounting the facts of the case and the positions of the parties, the Arbitrator stated “[t]here is long standing arbitral precedent that employees who volunteer for additional duties should be paid for those extra duties” and “the act of volunteering is separate from the pay,” and that “the Agency took advantage of [g]rievant[']s work ethic.”⁷ The Arbitrator concluded “[w]hile there is no job description for a POC, this is a bargaining obligation that never took place because the Agency kept calling [the g]rievant’s role as a POC voluntary, which had nothing to do with pay for the POC duties.”⁸ The Arbitrator further concluded that “[a]s a result, until the next contract is open for bargaining, I will set a temporary stipend for working as a POC every workday of \$50 per week for members of the unit that serve as a POC for five workdays.”⁹

The Agency filed exceptions to the award on December 2, 2021, and the Union filed an opposition to the Agency’s exceptions on December 31, 2021.

¹ 5 U.S.C. § 7121(c)(5).

² The grievant was temporarily promoted to GS-5 Lead Security Guard from November 29, 2015 to April 30, 2016 before being permanently promoted to a GS-5 Security Guard on May 1, 2016 as a result of position reclassification. Exceptions Br. at 1-2.

³ *Id.* at 2.

⁴ Award at 2.

⁵ Exceptions, Encl. 3, Grievance File at 4 (3rd Step Grievance).

⁶ *Id.*

⁷ Award at 5.

⁸ *Id.*

⁹ *Id.*

III. Analysis and Conclusion: The award is contrary to § 7121(c)(5) of the Statute.

The Agency argues the award is contrary to 5 U.S.C. § 7121(c)(5) because it involves a classification matter and is thus excluded from the negotiated grievance procedure.¹⁰ Under § 7121(c)(5) of the Statute, 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 When the substance of a grievance concerns the grade level of the duties permanently assigned to and performed by an employee, the grievance concerns the classification of a position within the meaning of § 7121(c)(5).¹² Furthermore, because arbitrators have no authority to rule on grievances that are mandatorily excluded from the scope of negotiated grievance procedures, the Authority has held that exceptions asserting that an award is contrary to § 7121(c) are properly before the Authority even when the arguments were not raised in arbitration proceedings.¹³

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.¹⁴ 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.¹⁵ In making that assessment, the Authority defers to the arbitrator’s underlying factual findings.¹⁶

While the Agency did not present any arguments regarding § 7121(c)(5) to the Arbitrator, we find the Agency’s contrary-to-law exception is properly before the Authority because it asserts that the grievance is excluded

from the scope of the parties’ negotiated grievance procedure pursuant to § 7121(c)(5).¹⁷ While the Authority has held that grievances concerning a temporary promotion are not contrary to § 7121(c)(5),¹⁸ it has also found that grievances seeking a permanent promotion are excluded from the grievance procedure.¹⁹ Here, the Union argues the grievance does not concern classification because the substance of the grievance involves the grievant’s compensation for performing POC duties.²⁰ However, the grievance explicitly requests a permanent promotion to a GS-6.²¹ Moreover, the grievance contains no allegation that the grievant was entitled to a temporary promotion, but rather relies for its requested relief upon a contract provision governing merit promotions. Consequently, we find the Arbitrator lacks jurisdiction over the grievance because it concerns, by its own construction and requested remedy, whether the grievant was entitled to a permanent promotion.²²

Because the grievance concerns classification, we set aside the award as contrary to § 7121(c)(5) of the Statute.²³

IV. Decision

Because we find the award is contrary to law, we vacate the award.

¹⁰ Exceptions Br. at 4.

¹¹ 5 U.S.C. § 7121(c)(5).

¹² *U.S. Dep’t of the Treasury, IRS, Small Bus./Self Employed Bus Div. Fraud/BSA, Detroit, Mich.*, 63 FLRA 567, 571 (2009); *U.S. DOL*, 63 FLRA 216, 218 (2009) (“when the substance of a grievance concerns whether the grievants are entitled to permanent promotions based on the grade level of the duties performed by the grievants, the grievance concerns classification within the meaning of § 7121(c)(5)” (citing *U.S. Dep’t of Transp., FAA, Atlanta, Ga.*, 62 FLRA 519, 521 (2008))).

¹³ *USDA, Food & Consumer Serv., Dall., Tex.*, 60 FLRA 978, 981 (2005) (*USDA*) (Member Pope dissenting on other grounds) (“a party’s failure to present an issue to an arbitrator cannot have the effect of creating jurisdiction in an arbitrator over a matter that Congress expressly excluded in § 7121(c) of the Statute”).

¹⁴ *U.S. Dep’t of VA, Med. Ctr., Richmond, Va.*, 70 FLRA 49, 50 (2016) (citing *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)).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *USDA*, 60 FLRA at 981 (“where an issue is presented to the Authority concerning a statutory exclusion under § 7121(c) of the Statute, the Authority is required to address that statutory issue,

regardless of whether the issue was also presented to the arbitrator”).

¹⁸ *VA Richmond*, 69 FLRA at 428-29.

¹⁹ *U.S. Dep’t of Transp., FAA*, 62 FLRA 516, 518 (2008) (“Under Authority precedent, the substance of the grievance concerned whether the grievants were entitled to permanent promotions based on the grade level of the duties permanently assigned to, and performed by, the grievants and not whether they were entitled to temporary promotions under the parties’ collective bargaining agreement for performing previously classified duties of higher-graded positions. As such, the grievances involve classification matters within the meaning of § 7121(c)(5) of the Statute and [are] excluded from the grievance procedure.”).

²⁰ Opp’n at 2.

²¹ 3rd Step Grievance at 4.

²² *AFGE, Loc. 953*, 68 FLRA 644, 647 (2015); *NAGE, Loc. R4-17*, 67 FLRA 4, 6 (2012).

²³ *E.g., U.S. Dep’t of the Army, U.S. Army Med. Dep’t Activity, Fort George G. Meade, Md.*, 71 FLRA 368, 369 (2019) (then-Member DuBester concurring) (setting aside award as contrary to § 7121(c)(5) where the grievance concerned the grievant’s entitlement to a permanent promotion based on the accretion of duties). Because we have set aside the award, we need not address the Agency’s remaining exceptions. *E.g., NLRB Prof’l Ass’n*, 73 FLRA 50, 53 n.44 (2022).