74 FLRA No. 23

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
WEST PALM BEACH VA MEDICAL CENTER
WEST PALM BEACH, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 507
(Union)

0-AR-5913

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DECISION

November 25, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko and Anne Wagner, Members
(Member Kiko concurring)

I. Statement of the Case

Arbitrator Michelle Miller-Kotula issued an award finding the Agency violated the parties' collective-bargaining agreement and an Agency handbook "when it failed to review [the grievants] for promotion"[1] from General Schedule, Grade 9 (GS-9) to GS-11. The Arbitrator found the grievants performed GS-11 duties more than 25% of the time, and, if they met the minimum qualifications for a GS-11 position, then the Agency must "move forward" with compensating them at the GS-11 rate.[2] However, the Arbitrator also directed the parties to devise an appropriate remedy and update her about whether they had done so within 180 days. She retained jurisdiction in the event the parties could not devise a remedy.

Both parties filed exceptions. The Agency argues the award is contrary to law because the grievance involves classification. Without determining whether the exceptions are interlocutory, we find that the grievance and award concern classification under § 7121(c)(5) of the Federal Service Labor-Management Statute (the Statute).[3] In particular, § 7121(c)(5) bars the grievance because it asked to promote the grievants to GS-11 based on the grade level of the grievants' permanently assigned duties. Thus, we grant the Agency's contrary-to-law exception, set aside the award, and do not address the parties' other exceptions.

II. Background and Arbitrator's Award

The grievants are GS-9 medical technologists (GS-9 technologists) whose duties include performing and interpreting diagnostic tests. Unless the grievants act as team leaders, their positions do not allow for promotion beyond GS-9. However, the Department of Veterans Affairs (VA) has adopted qualification standards for distinct GS-11 medical-technologist positions (GS-11 technologists), and those standards appear in VA Handbook 5005. Higher-graded technologists are distinguished from GS-9 technologists based, in part, on more-complex duties, which GS-11 technologists must perform at least 25% of the time.[4]

The grievants believed their duties qualified them to be GS-11 technologists, so they asked the Agency to review their duties and promote them to GS-11. The Agency determined that the grievants were not performing GS-11 duties at least 25% of the time, so the Agency denied their promotion requests. The Union grieved the denied promotions and, as a "remedy, . . . ask[ed that] the employees . . . be made whole by . . . [p]romoting all [GS-9 technologists] . . . to GS-11 immediately."[5] The Agency denied the grievance, which went to arbitration.

The Arbitrator framed the issue as whether the Agency violated the parties' collective-bargaining agreement or VA Handbook 5005 by "fail[ing] to review for promotion and promot[ing]" the grievants,"who contended they were performing GS-11grade[-]controlling work for over 25% of their time."[6] The Arbitrator found that, under the parties' agreement and VA Handbook 5005, once the Agency assigns a technologist higher-graded duties for more than 25% of their time, "the Agency must review the lower grade for promotion against the qualification standards for the higher grade."[7]

Comparing the grievants' duties against the GS-11 technologists' qualification standards, the Arbitrator found that the grievants perform GS-11 grade-controlling work for more than 25% of their

[1] Award at 76.
[2] *Id.* at 75.
[3] 5 U.S.C. § 7121(c)(5).
[4] *See* Agency's Exceptions, Attach. 4, Arb. Joint Ex. 13, VA Handbook 5005, pt. II, app. G24, Medical Technologist Qualification Standard at II-G24-6.
[5] Award at 4 (quoting Grievance).
[6] *Id.* at 60.
[7] *Id.* at 66.

time. Therefore, the Arbitrator concluded the Agency violated the parties' agreement and VA Handbook 5005 by "fail[ing] to review [the grievants] for promotion."[8]

Further, the Arbitrator directed the Agency to "review[]" the grievants "for promotion from . . . GS-9 to . . . GS-11"[9] – although she acknowledged that "the higher-level positions do not exist" at the grievants' work location.[10] The Arbitrator also concluded that the Agency "must . . . properly compensate[] [the grievants] for completing [GS-11] duties if they met the minimum qualifications for the GS-11 position."[11] Notwithstanding these conclusions, the Arbitrator noted that the parties had agreed to bifurcate any remedial determination from a decision on the grievance's merits. Thus, the Arbitrator directed the parties to devise an appropriate remedy and update her within 180 days. She retained jurisdiction in the event the parties could not make a remedial determination on their own.

Both parties filed exceptions to the award on August 30, 2023. The Union filed an opposition to the Agency's exceptions on September 28, 2023; the Agency filed an opposition to the Union's exceptions on September 29, 2023.

III. Preliminary Matters

A. Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Agency's classification argument.

The Agency asserts the award is contrary to law because it involves classification.[12] In its opposition, the Union argues that the Authority should not consider the Agency's classification argument, because the Agency did not raise it at arbitration.[13] Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider – and an exception may not rely on – arguments that could have been, but were not, presented to the arbitrator below.[14] However, the Authority has recognized that arbitrators lack the power to resolve grievances that are mandatorily excluded, by law, from the scope of negotiated grievance procedures – such as a grievance concerning the classification of any position that does not result in a reduction in grade or pay, under § 7121(c)(5) of the Statute.[15] Consequently, the Authority has held that a § 7121(c)(5) exception is properly before the Authority even if the excepting party did not present a classification argument at arbitration.[16] As such, regardless of whether the Agency raised its classification argument at arbitration, §§ 2425.4(c) and 2429.5 do not bar that argument here.

B. We need not decide whether the exceptions are interlocutory.

The Union also argues the Authority should dismiss the Agency's exceptions as interlocutory.[17] Section 2429.11 of the Authority's Regulations pertinently provides that "the Authority . . . ordinarily will not consider interlocutory appeals."[18] In other words, the Authority ordinarily will not consider exceptions to an award that does not completely resolve all of the issues submitted to arbitration, including remedies.[19] However, the Authority will review interlocutory appeals under extraordinary circumstances,[20] and the Authority has long recognized that an award's inconsistency with § 7121(c)(5) of the Statute is one extraordinary circumstance that merits an interlocutory decision.[21]

For the reasons discussed below, we find the award is contrary to § 7121(c)(5). Thus, if the exceptions *are not* interlocutory, then the Authority must resolve them; and if the exceptions *are* interlocutory, then extraordinary circumstances permit review.[22] In other words, the outcome of this case does not depend on

[8] *Id.* at 75.
[9] *Id.* at 74.
[10] *Id.*
[11] *Id.* at 74-75.
[12] *See* Agency's Exceptions at 7.
[13] Union's Opp'n at 4, 15.
[14] 5 C.F.R. §§ 2425.4(c), 2429.5.
[15] *U.S. Dep't of the Army, U.S. Army Garrison Redstone Arsenal, Huntsville, Ala.*, 73 FLRA 210, 211 (2022) (*Army*); *U.S. Dep't of the Treasury, IRS, Small Bus./Self Employed Bus. Div. Fraud/BSA, Detroit, Mich.*, 63 FLRA 567, 571 (2009) (*Treasury*); *see* 5 U.S.C. § 7121(c)(5) ("[Grievance procedures] shall not apply with respect to any grievance concerning . . . the classification of any position which does not result in the reduction in grade or pay of an employee.").
[16] *Army*, 73 FLRA at 211 (citing *USDA, Food & Consumer Serv., Dall., Tex.*, 60 FLRA 978, 981 (2005) (Member Pope dissenting on other grounds)).
[17] Union's Opp'n at 3-4, 9-10.
[18] 5 C.F.R. § 2429.11.
[19] *U.S. DHS, U.S. CBP*, 66 FLRA 904, 907 (2012).
[20] *E.g., U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Bastrop, Tex.*, 73 FLRA 423, 424 (2023) (noting Authority will grant interlocutory review under certain extraordinary circumstances, but only where doing so will obviate the need for further arbitration).
[21] *See, e.g., U.S. DOL*, 63 FLRA 216, 217-18 (2009); *U.S. Dep't of the Interior, Bureau of Indian Affs., Wapato Irrigation Project, Wapato, Wash.*, 55 FLRA 1230, 1232 (2000) (explaining that a properly supported exception showing the award violated § 7121(c)(5) would merit interlocutory review, but finding no extraordinary circumstances because party did not support its § 7121(c)(5) exception).
[22] *See U.S. Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 59 FLRA 64, 67 (2003) ("We find that, whether or not the exceptions are interlocutory, they are properly before us.").

whether the exceptions are interlocutory. Accordingly, we need not decide whether they are.[23]

IV. Analysis and Conclusion: The award is contrary to § 7121(c)(5).

As noted above, the Agency argues the award is contrary to law because it involves classification.[24] In its opposition, the Union contends that the Agency fails to identify a law that the award allegedly violates.[25] Although the Agency does not cite § 7121(c)(5) specifically, the Agency argues the award's requirement to pay the grievants at the GS-11 level is "a claim . . . [that] the [GS-9 technologists'] position was wrongly classified[,] which is barred."[26] In support of this position, the Agency also asserts the award is inconsistent with: (1) an Authority decision that analyzed a § 7121(c)(5) exception;[27] and (2) a U.S. Supreme Court decision that held "the Classification Act . . . [does not] create[] a substantive right . . . to backpay for [a] period of . . . claimed wrongful classifications."[28] Taken together, these points raise a claim that the award is contrary to § 7121(c)(5).

As for the legal standard that governs the Agency's exception, under Authority precedent, if the substance of a grievance concerns the grade level of the duties permanently assigned to, and performed by, a grievant, then the grievance concerns the classification of a position within the meaning of § 7121(c)(5).[29] In this case, at the Union's urging, the Arbitrator examined whether the grievants performed their permanently assigned duties at the GS-11 level, rather than GS-9.[30] Despite this direct challenge to the grade level of the grievants' permanent duties, the Union insists that the award merely directed the Agency to compensate the grievants for performing duties already classified as GS-11.[31] According to the Union, the "Arbitrator did not order the Agency to reclassify the position, nor did the Arbitrator find that the [GS-9 technologist] position was incorrectly classified."[32] However, these Union claims do not withstand scrutiny. The Union repeatedly requested the grievants' promotion to GS-11,[33] and those promotions could occur only if the Agency: (1) created new GS-11 positions for the grievants at their work location; or (2) reclassified the grievants' current positions.[34]

Relatedly, the Union asserts that this dispute is "[n]early identical" to *Lexington-Blue Grass Army Depot* (*Blue Grass*).[35] In that case, the Authority denied a classification exception to an award that required an agency to compensate a Wage Grade, Grade 8 (WG-8) employee at the WG-10 rate whenever he performed the duties of a WG-10 position. Contrary to the Union's assertion, this dispute is unlike *Blue Grass*. There, the grievant sought compensation only for limited periods when he performed discrete WG-10 duties, whereas here, the grievants sought permanent promotions to GS-11.[36] In *Blue Grass*, there was also an existing WG-10 position at the grievant's work location,[37] so the agency could have temporarily promoted him to that position. By contrast, the Arbitrator found there are no GS-11 technologist positions at the grievants' work location,[38] so the Agency could not even temporarily promote the grievants to such positions. Thus, *Blue Grass* is inapposite.

In sum, because the grievance concerned the grade level of the duties *permanently* assigned to, and performed by, the grievants, the grievance concerned

[23] *See id.* (where exception demonstrated award was contrary to § 7121(c)(5), finding it "unnecessary to determine" whether exceptions were interlocutory).
[24] *See* Agency's Exceptions at 7 (arguing the grievants "are being compensated at the correct grade level and to do otherwise would be a claim . . . the [GS-9 technologists'] position was wrongly classified[,] which is barred").
[25] Union's Opp'n at 17.
[26] Agency's Exceptions at 7.
[27] *Id.* at 6 (citing *Lexington-Blue Grass Army Depot*, 32 FLRA 256 (1988) (*Blue Grass*)).
[28] *Id.* at 9 (quoting *United States v. Testan*, 424 U.S. 392, 407 (1976)).
[29] *U.S. Marine Corps, Marine Corps Air Ground Combat Ctr., Twentynine Palms, Cal.*, 73 FLRA 379, 382 (2022) (*Twentynine Palms*) (Member Kiko dissenting in part); *Treasury*, 63 FLRA at 571.
[30] *See* Award at 70-74 (analyzing whether the grievants' permanently assigned duties encompassed the grade-controlling duties of the GS-11 technologist position).
[31] Union's Opp'n at 17-18.
[32] *Id.* at 18.
[33] *E.g.*, Award at 4 ("As a remedy, [the Union] is asking [that] the employees . . . be made whole by . . . [p]romoting all [GS-9 technologists] . . . to GS-11 immediately." (quoting Grievance)).
[34] *See id.* at 74 (acknowledging that "the higher-level positions do not exist" at the grievants' work location).
[35] Union's Opp'n at 17 (citing *Blue Grass*, 32 FLRA at 258).
[36] *See Blue Grass*, 32 FLRA at 258 ("The question before the [a]rbitrator was whether the grievant was entitled to compensation at a higher rate of pay *whenever he operated the modified scoop loader*, a duty classified under the position description of a WG-10." (emphasis added)).
[37] *See id.* at 257 ("[The arbitrator] concluded that the [a]gency violated the collective[-]bargaining agreement when [the agency] refused to compensate the grievant at the WG-10 rate of compensation, the rate *normally paid* to the operators of the oversized equipment." (emphasis added)); *id.* at 258 ("The grievant merely requested compensation at the higher rate of pay for the times he performed the duties of *the WG-10 position*." (emphasis added)).
[38] *See* Award at 74.

classification under § 7121(c)(5).[39] Consequently, the award resolving that grievance is contrary to § 7121(c)(5).[40] Therefore, we grant the Agency's contrary-to-law exception, set aside the award, and do not address either party's remaining exceptions.[41]

V. Decision

We grant the Agency's contrary-to-law exception and set aside the award.

[39] *Cf. Twentynine Palms*, 73 FLRA at 382 (finding grievance did not involve classification where it concerned whether the grievant was entitled to a *temporary* promotion under the parties' collective-bargaining agreement).

[40] *See Army*, 73 FLRA at 211 (because grievance concerned classification under § 7121(c)(5), Authority set aside award resolving that grievance as contrary to law).

[41] *See id.* at 211 n.23 (after setting aside award based on one exception, Authority found it unnecessary to address remaining exceptions) (citing *NLRB Prof'l Ass'n*, 73 FLRA 50, 53 n.44 (2022)).

Member Kiko, concurring:

I continue to disagree with the standard set forth in *U.S. Marine Corps, Marine Corps Air Ground Combat Center, Twentynine Palms, California* (*Marine Corps*).[1] Furthermore, it has no application to this case. *Marine Corps* does not deal with a permanent promotion, and this is a permanent-promotion case. The majority's need to inject that inapposite decision into the analysis for this case is one that I cannot understand.[2] Although I do not agree with the inclusion of *Marine Corps*, I agree completely with the remainder of the decision.

[1] 73 FLRA 379 (2002) (Member Kiko dissenting in part). As I explained in my dissent in *Marine Corps*, *id.* at 383 (Dissenting Opinion of Member Kiko), I would continue to apply the standard set forth in *U.S. Small Business Administration*, 70 FLRA 729 (2018) (Member DuBester dissenting).

[2] *See* Majority at 5 n.29, 6 n.39.