64 FLRA No. 2

UNITED STATES DEPARTMENT OF THE ARMY

ANNISTON ARMY DEPOT

ANNISTON, ALABAMA

(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

LOCAL 1945

(Union)

0-AR-4245

DECISION

August 26, 2009

Before the Authority: Carol Waller Pope, Chairman, and

Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Gerard P. Fleischut filed by the Agency under § 7122 of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union did not file an opposition to the Agency's exceptions.

After concluding that the grievance concerned classification and was not subject to arbitration, the Arbitrator awarded the grievant a series of temporary promotions with backpay. For the reasons that follow, we conclude that the award of temporary promotions with backpay is contrary to § 7121(c)(5) of the Statute.

II. Background and Arbitrator's Award

According to the Arbitrator, the Union filed a grievance on behalf of the grievant, who is assigned to a WG-8 position, seeking his permanent promotion to a WG-10 position. The Arbitrator concluded that the grievance concerned classification and was not subject to arbitration. He determined that, instead, the dispute must be resolved as a "position classification appeal[.]" Award at 3. Consequently, he denied the requested relief of a permanent promotion. *Id.* However, because he found that the grievant had performed work at the WG-10 level after the expiration of his temporary promotion to a WG-10 position, the Arbitrator awarded him a series of temporary promotions with backpay for periods in which he had continued to perform WG-10 work. *Id.* at 2, 4. In this connection, the Arbitrator found that the Agency "had a practice of making 120[-]day temporary promotions" and that there was "no contract provision prohibiting this practice." *Id.* at 4.

III. Agency's Exceptions

The Agency contends that the award is contrary to § 7121(c)(5) of the Statute. The Agency maintains that the grievance sought a permanent promotion to WG-10 and that the Arbitrator correctly concluded that the grievance was not subject to arbitration because it concerned position classification. Accordingly, the Agency claims that "[a]s the arbitrator issued a remedy over a complaint that he himself found was statutorily excluded from the definition of a negotiated grievance, the award violates . . . § 7121 and must be set aside." Exceptions at 3. Alternatively, the Agency contends that, as the grievance sought a permanent promotion, the Arbitrator exceeded his authority by awarding temporary promotions. *Id.* at 5. Finally, the Agency contends that, in any event, the award of temporary promotions with backpay is contrary to the Back Pay Act because they are not based on a regulation or contract provision making temporary promotions mandatory for details to higher-graded positions. *Id.* at 4.

IV. Analysis and Conclusions

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*. *E.g., NTEU Chapter 24*, 50 FLRA 330, 332 (1995). In applying the standard of *de novo* review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *United States Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

Under § 7121(c)(5) of the Statute, a grievance concerning "the classification of any position which does not result in the reduction of grade or pay of an employee" is excluded from the scope of the negotiated grievance procedure. The Authority has construed the

1. Member DuBester did not participate in this decision.

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. chap. 51. *E.g., United States Dep't of Labor*, 63 FLRA 216, 217-18 (2009). Consequently, when the substance of the grievance concerns whether the grievants are entitled to permanent promotions based on the grade level of the duties they performed, the grievance concerns classification within the meaning of § 7121(c)(5) of the Statute. *Id.* at 218.

Applying this established precedent, once the Arbitrator construed the grievance as seeking a permanent promotion, the Arbitrator correctly concluded that the grievance concerned classification and was neither grievable nor arbitrable under the Statute. As he was without jurisdiction to resolve the grievance, the Arbitrator's award of temporary promotions with backpay is contrary to § 7121(c)(5), and we set it aside. [2] *See id.*

V. Decision

The award of temporary promotions with backpay is set aside as contrary to § 7121(c)(5) of the Statute. [3]

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2. We note that, consistent with § 7121(c)(5) and the Back Pay Act, an employee may be compensated for the temporary performance of the duties of a higher-graded position on the basis of an agency regulation or a contract provision making temporary promotions mandatory for the performance of such duties. *E.g., United States Dep't of the Air Force, 81st Training Wing, Keesler Air Force Base, Miss.*, 60 FLRA 425, 429-30 (2004). In this case, even if the grievance had sought a temporary promotion, there is no evidence of such a regulation or contract provision. *See id.*

3. In view of this decision, it is not necessary to address the Agency's remaining exceptions.