70 FLRA No. 145

UNITED STATES
SMALL BUSINESS ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3841
(Union)

0-AR-5239

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DECISION

July 19, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

In this case, we take the opportunity to clarify our standards for determining whether a grievance involves a classification matter under § 7121(c)(5) of the Federal Labor-Management Relations Statute (the Statute),[1] or a temporary promotion that falls outside the scope of § 7121(c)(5).

In January 2015, the Union filed a grievance on behalf of an employee (the grievant) who alleged that she had not received appropriate compensation for certain work. The grievance went to arbitration before Arbitrator John L. Woods. Before a hearing was held, the Agency filed, with the Arbitrator, a motion to dismiss the grievance, claiming that it involved an issue excluded from the negotiated grievance procedure – specifically, the classification of a position under § 7121(c)(5). On October 27, 2016, the Arbitrator issued an arbitrability award denying the Agency's motion to dismiss.

The main issue before us is whether the arbitrability award is contrary to law because the grievance involves classification within the meaning of § 7121(c)(5) – and, thus, is not grievable or arbitrable. Applying our clarified standards here, we find that § 7121(c)(5) bars the grievance, and, consequently, set aside the arbitrability award.

[1] 5 U.S.C. § 7121(c)(5).

II. Background and Arbitrator's Award

The Agency employs loan servicing assistants (assistants), whose positions are classified at General Schedule (GS) grade 6 or 7, and loan specialists (specialists), whose positions are classified at GS grade 9, 11, or 12. During 2013 and 2014, the Agency organized a group of employees to focus on certain flood-insurance requirements for loans that the Agency services. Employees who participated in this group flood-insurance project – including the grievant – devoted virtually all of their work time to meeting the project's goals.

After the project ended, the Union filed a grievance alleging that the grievant, who occupies an assistant position, had performed the duties of a specialist during her participation in the project but had not received appropriate compensation. The Agency denied the grievance, which went to arbitration.

Before a hearing was held, the Agency filed a motion to dismiss the grievance as non-arbitrable under § 7121(c)(5) of the Statute. Both parties filed briefs with the Arbitrator concerning the motion, which the Arbitrator later denied in the arbitrability award. The substantive portion of the arbitrability award states, in full, "The Agency's motion to dismiss is denied. The grievant is entitled to a hearing on the merits in that I have determined that this [is] a higher[-]graded[-]duties case and not a classification case."[2]

The Agency filed exceptions to the arbitrability award on October 31, 2016, and the Union filed an opposition on November 10, 2016.

III. Analysis and Conclusion

At the outset, we note that the Agency's challenges to the arbitrability award are interlocutory because the Arbitrator has not yet resolved the grievance on the merits.[3] However, for the following reasons, we find that the Agency has established a plausible jurisdictional defect that warrants interlocutory review.

Section 7121(c)(5) states that negotiated grievance procedures under the Statute "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."[4] The Authority has construed "classification" under § 7121(c)(5) as "the analysis and identification of a

[2] Arbitrability Award.
[3] *E.g., U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div. Keyport, Keyport, Wash.*, 69 FLRA 292, 293 (2016) (finding exceptions interlocutory where arbitrator's interim award "postponed addressing the grievance's merits").
[4] 5 U.S.C. § 7121(c)(5).

position and placing it in a class under the position-classification plan established by [the Office of Personnel Management] under chapter 51 of title 5, United States Code."[5]

The Authority has found that a grievance involved classification where it sought, for example: (1) a non-competitive promotion based on the accretion of higher-graded duties to an employee's permanent position;[6] (2) the reclassification of an employee's position based upon alleged classification errors;[7] (3) a change to the promotion potential of an employee's permanent position;[8] or (4) compensation for performing allegedly higher-graded duties at a time when those duties were not part of an established, previously classified position description.[9] By contrast, as relevant here, the Authority has long held that the question of an employee's entitlement to a temporary promotion under a collective-bargaining agreement or agency regulation does not concern classification within the meaning of § 7121(c)(5).[10]

Nevertheless, the Authority's existing standards for determining what constitutes a temporary promotion have not always been clear and failed to recognize the realities of, and flexibilities required of, a 21st Century federal workforce. For example, the Authority has found that a grievance concerned a temporary promotion – and, consequently, was grievable and arbitrable – merely because an employee performed some duties that appeared in a higher-graded position description.[11] In our view, such cases fail to recognize the modern workplace reality that managers often assign employees various duties on a temporary basis as part of their permanent positions, and not as temporary promotions, for any number of reasons. For example, these assignments might be for an urgent mission requirement or just to give the employee valuable experience that could be useful when applying for a future promotion or succession planning. The Authority's previous failure to recognize these realities has led to gray areas in § 7121(c)(5) case law and confusion among parties and arbitrators. Therefore, we find it appropriate to clarify our standards regarding § 7121(c)(5).

We now hold that a grievance concerns classification under § 7121(c)(5) if an employee seeks additional compensation for performing new or additional duties that are part of that employee's work in his or her permanent position. This includes situations where an employee claims to have performed duties that appear in a higher-graded position description. Such grievances essentially seek to have the employee's permanent position reclassified, even if only for a limited time. Thus, we will no longer follow previous Authority decisions – including those that the Union cites[12] – to the extent that they found claims grievable and arbitrable based merely on the existence of higher-graded position descriptions that contained duties that lower-graded employees allegedly performed for a limited period of time.

We clarify that, in order to present a temporary-promotion claim that does not involve classification under § 7121(c)(5), a party must offer evidence that: (1) an agency *expressly reassigned* a majority of the duties of an already classified, higher-graded position to a lower-graded employee, including all of the grade-controlling duties of that position; (2) the reassigned duties were *different* from the duties of the lower-graded employee's permanent position; (3) the duties were not assigned to meet an urgent mission requirement, to give the employee experience as part of an employee development or succession plan, or for similar reasons; and (4) the employee did not receive a temporary promotion for

[5] *AFGE, Local 953*, 68 FLRA 644, 647 (2015) (quoting 5 C.F.R. § 511.101(c)).
[6] *E.g.*, *AFGE, Local 2142*, 61 FLRA 194, 196 (2005); *AFGE, Local 1858*, 59 FLRA 713, 715 (2004).
[7] *E.g.*, *AFGE, Local 987*, 58 FLRA 453, 454-55 (2003) ("The [a]rbitrator found that the grievant, in the original grievance, contended that his position was improperly classified and that he requested a permanent promotion."); *AFGE, Local 987*, 52 FLRA 212, 213, 215 (1996) ("Where the issue before the arbitrator involves the appropriateness of a grievant's assigned grade level, the matter is not arbitrable under [§] 7121(c)(5) of the Statute.").
[8] *E.g.*, *U.S. DOL*, 63 FLRA 216, 218 (2009) ("[T]he [u]nion concedes that the grievance challenges the grade level of the career-ladder or journeyman level warranted for the [grievants].").
[9] *E.g.*, *U.S. Nuclear Regulatory Comm'n*, 54 FLRA 1416, 1421-22 (1998) (Member Wasserman dissenting) ("[T]he [a]rbitrator determined, and the [u]nion does not dispute, that the duties performed by [the grievant] were new and had not previously been classified anywhere.").
[10] *See, e.g.*, *Ga. Air Nat'l Guard, 165th Tactical Airlift Grp., Savannah, Ga.*, 15 FLRA 442, 442-43 (1984) (rejecting argument that award was contrary to § 7121(c)(5) based on finding that "entitle[ment] to a promotion does not directly concern the classification of any position").
[11] *E.g.*, *U.S. Dep't of the Treasury, IRS, Small Bus./Self Employed Bus. Div. Fraud/BSA, Detroit, Mich.*, 63 FLRA 567, 571 (2009).
[12] *See, e.g.*, Opp'n Br. at 6 (citing *U.S. Dep't of the Treasury, IRS, S. Tex. Dist.*, 60 FLRA 598, 599-600 (2005); *U.S. Dep't of VA, Med. Ctr., Asheville, N.C.*, 59 FLRA 605, 608 (2004); *U.S. Dep't of the Navy, Naval Aviation Depot, Marine Corps Air Station, Cherry Point, N.C.*, 42 FLRA 795, 801 (1991) (*Navy*)).

performing the reassigned duties.[13] Therefore, a party's allegation that an employee *assumed* higher-graded duties, without management's express direction to perform those duties, will be insufficient to show that a claim is grievable and arbitrable. Using these clarified standards, a claim regarding the following situation would not involve classification under § 7121(c)(5): After a higher-graded position becomes vacant, an agency manager explicitly directs a lower-graded employee to temporarily perform the duties that the former occupant of the higher-graded position performed, consistent with the higher-graded position description.

When applying the clarified standards, rather than automatically remanding a dispute in which an arbitrator's factual findings are insufficient to conduct a § 7121(c)(5) analysis, we will exercise our discretion to review all of the record evidence and determine whether the dispute concerns classification under § 7121(c)(5).[14] In this case, the record shows that the Union sent the Agency an email with supplemental information to support the grievance.[15] This email listed duties from the position descriptions of GS-9, GS-11, *and* GS-12 specialists that the Union alleged the grievant had performed during her work on the group flood-insurance project.[16] However, neither the grievance nor the email indicated that, as part of the grievant's participation in the project, management directed her to perform the duties of any one of those specialist grades in particular. And, obviously, the Agency could not have temporarily promoted the grievant to three different GS grades. Thus, the Union's claim that the grievant performed an amalgamation of duties from three different position descriptions fails to allege that the Agency expressly assigned the grievant the duties of any specific higher-graded position, and we find that the grievance involved classification. Accordingly, § 7121(c)(5) bars the grievance, and we set aside the arbitrability award as contrary to law. We also overrule any previous decisions inconsistent with the reasoning set forth above.[17]

IV. Decision

We grant interlocutory review and set aside the arbitrability award.

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[13] Of course, if a collective-bargaining agreement or applicable agency regulation contains additional requirements for receiving a temporary promotion, then a claiming party must offer evidence to satisfy those requirements as well.

[14] *See* 5 C.F.R. § 2425.9(e) ("[W]hen it would otherwise aid in disposition of [an arbitration] matter, the Authority . . . may . . . [t]ake any . . . appropriate action.").

[15] *See generally* Exceptions, Attach., Agency Ex. 9.

[16] *Id.* at 3-6 (identifying GS-9-specialist duties that grievant allegedly performed), 7-13 (identifying GS-11-specialist duties that grievant allegedly performed), 14-20 (identifying GS-12-specialist duties that grievant allegedly performed).

[17] *E.g.*, *Navy*, 42 FLRA at 796 (noting that grievance alleged employee "perform[ed] the work of the [Wage Grade (WG)]-9, WG-10, and WG-11 mechanic positions"), 801-03 (finding that grievance concerned temporary promotion and was consistent with § 7121(c)(5)).

Member DuBester, dissenting:

The majority errs in finding that the grievance concerns a classification matter within the meaning of § 7121(c)(5) of the Statute. Consequently, because the Agency's interlocutory exceptions to the Arbitrator's "Prehearing Decision on Arbitrability"[1] do not demonstrate that the award has a "plausible jurisdictional defect,"[2] the Agency's exceptions should be dismissed.

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."[3] Where the essential nature of a grievance concerns the grade level of the duties assigned to and performed by a grievant in *his or her permanent position*, the grievance concerns the classification of a position within the meaning of § 7121(c)(5).[4] However, as relevant here, the Authority has long held that "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 grievance does not concern the classification of a position within the meaning of § 7121(c)(5)."[5]

The Agency does not cite any evidence to show that the grievance concerns "the grade level of the duties assigned to and performed by the grievant *in his or her permanent position*"[6] as a GS-7 loan service assistant. Rather, as the Arbitrator found,[7] the grievance concerns the grievant's compensation for, allegedly, temporarily performing the higher-grated duties of GS-9, GS-11, and GS-12 loan specialists[8] while "expressly assigned"[9] by the Agency to work on the "temporary flood insurance project"[10] for approximately twenty-one months. To make this determination, the Arbitrator would not be required to consider any classification issues concerning the proper grade level of the grievant's own duties in her GS-7 position. The Arbitrator would only be required to consider whether the grievant did, indeed, temporarily perform previously classified, higher-graded duties.

Moreover, the Authority's longstanding framework for resolving whether grievances concern classification issues is well-adapted to "the realities of, and flexibilities required of, a 21st Century federal workforce."[11] Nothing in the Authority's case law interferes with an Agency's interest, or discretion, in assigning employees higher-graded duties on a temporary basis for reasons like meeting "urgent mission requirement[s]," or to give employees valuable experience for "succession[-]planning"[12] purposes. The Authority's caselaw acknowledges the validity of those employer interests. The Authority's caselaw simply acknowledges the reality of employees' interest in being fairly compensated when they are assigned increased responsibilities above the grade level at which they are ordinarily being paid.

Accordingly, because the majority's decision is inconsistent with longstanding, well-reasoned Authority precedent, and includes consideration of issues that have nothing to do with classification, I dissent.

[1] Arbitrability Award at 1.
[2] Majority at 2.
[3] *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 70 FLRA 49, 50 (2016).
[4] *Id.*
[5] *Id.* (emphasis added).
[6] *Id.* (emphasis added).
[7] Arbitrability Award at 1.
[8] Union's Opp'n, Attach. 2, Union's Pre-Hr'g Br. at 3-5; Exceptions, Agency Ex. 9, Union's Email at 3-8.
[9] Majority at 5.
[10] Exceptions, Ex. 1, Agency's Pre-Hr'g Br. at 3.
[11] Majority at 3.
[12] *Id.*