

71 FLRA No. 159

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1738
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
REGIONAL OFFICE
WINSTON-SALEM, NORTH CAROLINA
(Agency)

0-AR-5489

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DECISION

June 18, 2020

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

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement and 5 C.F.R. § 531.223 when it set the grievant's pay in her new position. Arbitrator Robert G. Williams found that the Agency had set the grievant's pay at the maximum payable rate under the parties' agreement and applicable regulations. The Union filed exceptions to the award on essence and contrary-to-law grounds. Because the Union does not demonstrate that the award is contrary to law and makes no argument to support an essence exception, we deny the exceptions.

II. Background and Arbitrator's Award

Before May 2018,¹ the grievant was a program specialist in a different Veterans Affairs facility at the General Schedule (GS) grade-9 level, with an annual salary of \$55,913. The grievant applied, and was selected, for a veterans service representative (VSR) position at the GS-7 grade level with the Agency.

Before she started the VSR position, the grievant e-mailed the Agency stating, "I currently am employed and am a [GS]-9 step 3 (at a \$55, 913 salary) . . . Will I maintain my current pay?"² The same day, an Agency

representative responded to the grievant, "Yes, you will retain your current pay."³

Three days later, the grievant received an e-mail confirming her "selection for the position of [VSR] at the GS-7 level Grade/Step: GS-0996-07, Step 1, \$41,365 per annum (including locality pay)."⁴ The grievant began working in the VSR position on May 14.

Two weeks later, the grievant contacted an Agency representative because her personnel forms did not reflect the level of compensation that she expected. The same day, the Agency representative responded that "I am reviewing your [electronic official personnel folder] and will submit a Highest Previous Rate memo to my supervisor for approval. Once approved, we'll provide it to the Winston-Salem [Human Resource (HR)] Liaisons for your review and signature."⁵ The grievant contacted the Agency representative again the next day to inquire about the status of her pay.

After receiving no response for the next two weeks, the grievant e-mailed the Agency representative about the status of her pay. The HR supervisor responded that the Agency was working on the issue, and requested to meet with the grievant.

At the meeting, the HR supervisor requested that the grievant sign a "Request for Voluntary Change to a Lower Grade" memorandum.⁶ The memorandum stated in relevant part: "I hereby request that I be reassigned from my present position of Program Specialist, GS-301-09, Step 3 at the annual salary of \$55,913 . . . to the position of Veterans Service Representative, GS-0996-07, Step 10 at the annual salary of \$53,773 . . . effective on June 13, 2018."⁷ The grievant did not sign the memorandum at the meeting. However, on June 21, she electronically signed the memorandum, indicating that she did not agree to the terms but was signing "under duress" in order to receive retroactive pay.⁸

On June 29, the Union filed a grievance alleging that the Agency violated the parties' agreement and 5 C.F.R. § 531.223 when it set the grievant's pay rate at the GS-7, Step 10 level. The Agency denied the grievance, asserting that the matter was a classification dispute and that the grievant had already received the maximum pay permissible under 5 C.F.R. § 531.222. The Union invoked arbitration.

³ *Id.*

⁴ *Id.* (quoting Agency Ex. 3).

⁵ *Id.* at 5-6 (quoting Union Ex. 2).

⁶ *Id.* at 7 (quoting Union Ex. 1).

⁷ *Id.* at 7-8 (quoting Union Ex. 1).

⁸ *Id.* at 8 (quoting Union Ex. 1).

¹ Unless otherwise noted, all dates hereafter occurred in 2018.

² Award at 5 (quoting Union Ex. 2).

The Arbitrator identified two issues: (1) “[is] the grievance a classification dispute that is not arbitrable under the [parties’ agreement] and statute?”⁹ and (2) “[did] the Agency violate any statutes, regulations, articles, policies or procedures in establishing the [g]rievant’s pay? If so, what shall be the remedy?”¹⁰

The Arbitrator found that the grievance did not involve a classification dispute. On this point, he found that the classification of both of the positions held by the grievant remained the same and that she was merely assigned from one classification to another.

Addressing the merits, the Arbitrator found that the grievant and the Agency had a “binding agreement” that the grievant would be paid her prior job salary when she reported for work in her new position.¹¹ But he also found that because the Agency “had not set an authorized pay rate before [the grievant’s] resignation from her [prior position] became effective,” it made a “unilateral mistake” by entering into an agreement “that exceeded its authority.”¹² On this basis, he concluded that the agreement was “not enforceable.”¹³

The Arbitrator further concluded, however, that the regulations governing the “Maximum Payable Rate Rule” under 5 C.F.R. § 531.221 “provide the appropriate remedy” for the Agency’s mistake.¹⁴ And he determined that, under this regulation, agencies are permitted to “carry forward an employee’s rate from their prior position,” but the employee’s rate is limited to the Step 10 rate for the employee’s new position.¹⁵

Applying these principles, the Arbitrator ultimately concluded that the Agency “violated the regulations when it failed to set a regulation[-]conforming pay rate and communicate that rate to the [g]rievant before her notice to leave her job and her acceptance of her new job.”¹⁶ But he found that the Agency properly applied § 531.221 to correct this error by retroactively setting the grievant’s pay at the GS-7 Step 10 rate.¹⁷

The Union filed exceptions to the Arbitrator’s award on April 1, 2019. The Agency did not file an opposition to the Union’s exceptions.

III. Preliminary Matter: The Authority has jurisdiction over the Union’s exceptions.

On July 18, 2019, the Authority’s Office of Case Intake and Publication issued an order directing the Union to show cause why the Authority should not dismiss its exceptions for lack of jurisdiction under §§ 7122(a) and 7121(f) of the Federal Service Labor-Management Relations Statute (the Statute) because the award “relates to a reduction in pay or grade.”¹⁸ In its response to this order, the Union contends that its grievance concerns the “grade and pay that the [grievant] should have been serving in when hired,”¹⁹ and that the award is therefore not appealable to any other entity.

Under § 7122(a) of the Statute, the Authority lacks jurisdiction to resolve exceptions to awards “relating to” a matter described in § 7121(f).²⁰ Matters described in § 7121(f) include adverse actions, such as a reduction in pay or grade, that are covered under 5 U.S.C. § 7512.²¹ The Authority will determine that an award relates to a matter described in § 7121(f) “when it resolves . . . or is inextricably intertwined with,” a § 7512 matter.²²

In making that determination, the Authority looks not to the outcome of the award, but to whether the claim advanced in arbitration is one reviewable by the Merit Systems Protection Board (MSPB), and, on appeal, by the United States Court of Appeals for the Federal Circuit. Therefore, the Authority looks to MSPB precedent for whether a matter is covered under § 7512.²³

The MSPB has found that, among other things, where an agency reduces an employee’s grade or pay from a rate that would be “contrary to law or regulation[.]” the action is not an adverse personnel action under § 7512.²⁴ Here, the Arbitrator found that the claim advanced at arbitration concerned whether the Agency properly set the grievant’s initial rate of pay for the VSR position in accordance with OPM regulations. The award does not concern any Agency action that

⁹ *Id.* at 2-3.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 22.

¹² *Id.*

¹³ *Id.* at 27.

¹⁴ *Id.* at 18, 22.

¹⁵ *Id.* at 19.

¹⁶ *Id.* at 27.

¹⁷ *Id.*

¹⁸ Order to Show Cause at 2.

¹⁹ Union’s Response to Show Cause Order at 1.

²⁰ 5 U.S.C. § 7122(a) (“Either party to arbitration . . . may file with the Authority an exception to any arbitrator’s award pursuant to the arbitration (other than an award relating to a matter described in § 7121(f) of this title).”).

²¹ 5 U.S.C. § 7121(f).

²² *AFGE, Local 2004*, 59 FLRA 572, 573 (2004).

²³ *U.S. Dep’t of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 65 FLRA 969, 972 (2011) (citing *U.S. Dep’t of Transp., Nat’l Highway Traffic Safety Admin.*, 58 FLRA 333, 336 (2003)).

²⁴ *Id.* (citing *Gessert v. Dep’t of the Treasury*, 113 M.S.P.R. 329, 332 (2010); *Deida v. Dep’t of the Navy*, 110 M.S.P.R. 408, 412 (2009)).

reduced the grievant's grade or pay in the VSR position. Therefore, the claim is not one reviewable by the MSPB.²⁵ Moreover, the Authority has previously held that it has jurisdiction to review claims alleging that an Agency incorrectly set a grievant's rate of pay.²⁶

Accordingly, we find that the award does not relate to a matter described in § 7121(f) of the Statute and the Authority has jurisdiction to resolve the exceptions.

IV. Analysis and Conclusions: The award is not contrary to law.

The Union argues that the award is contrary to law because the Agency lacks the authority to "reduce [the grievant's] grade unilaterally."²⁷ It bases this argument upon its contention that the Agency could have lawfully set the grievant's pay in her new position at her prior salary level, but it simply chose not to do so.

The only legal authority set forth by the Union in support of this argument is 5 C.F.R. § 531.221. It claims that this regulation authorizes the Agency to "set pay based on the employee's prior rate when they are transfers as the [g]rievant was here."²⁸ As the Arbitrator concluded, however, this regulation limits the pay rate that can be carried forward by an employee in a new position to the Step 10 rate for the new position's grade. The Union has not demonstrated that the Arbitrator erred in this conclusion. Nor has it cited any other law, rule, or regulation to support its contention that the award is contrary to law. Accordingly, we deny the exception.²⁹

V. Decision

We deny the Union's exceptions.

²⁵ See *Dekmar v. Dep't of Army*, 103 M.S.P.R. 512, 514-15 (2006) (explaining that the issue of whether an agency properly set an employee's pay as required by the retained pay regulations in 5 C.F.R. part 536, subject to the maximum payable rate rule at 5 C.F.R. § 531.221, does not concern a reduction in pay that is within the Board's jurisdiction).

²⁶ See, e.g., *U.S. Dep't of the Treasury, IRS, Small Bus./ Self Employed Operating Div.*, 65 FLRA 23 (2010).

²⁷ Exceptions at 3.

²⁸ *Id.* at 4.

²⁹ The Union asserts that the Agency lacked the authority to unilaterally reduce the grade of the grievance "both as a matter of law and under the [parties' agreement]." Exceptions at 3. However, other than its general reference to the parties' agreement, the Union does not explain how the award conflicts with any provision in the agreement. Consequently, to the extent that the Union attempts to raise an essence exception, we deny it as unsupported. 5 C.F.R. § 2425.6(e)(1) (an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to . . . support a ground" listed in § 2425.6(a)-(c)).