

64 FLRA No. 93

SOCIAL SECURITY ADMINISTRATION
 PORT ST. LUCIE DISTRICT
 PORT ST. LUCIE, FLORIDA
 (Agency)

and

AMERICAN FEDERATION
 OF GOVERNMENT EMPLOYEES
 LOCAL 2014
 (Union)

0-AR-4356

—
 DECISION

February 26, 2010

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 Before the Authority: Carol Waller Pope, Chairman,
 and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Barney O. Spurlock, Jr., 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 filed an opposition to the Agency's exceptions.

The Arbitrator found that the Agency violated the parties' agreement by failing to temporarily promote the grievants, and he awarded the grievants backpay for a period of approximately three years. For the reasons discussed below, we deny the exceptions in part, grant them in part, and modify the award of backpay.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency violated the parties' agreement by failing to temporarily promote the grievants, two GS-8 Service Representatives, to GS-9 Claims Representative positions. The dispute was unresolved and was submitted to arbitration.

At the hearing, the Agency argued that the grievance was not arbitrable because it concerned classification within the meaning of § 7121(c)(5) of the Statute. *See* Award at 3. The Arbitrator asked the parties to address this issue in their post-hearing briefs. *Id.*

As the parties could not agree on the issues to be resolved, the Arbitrator framed them as follows:

1. While assigned to the Appeals function and the Medical Continuing Disability Review (CDR) function in the Port St. Lucie District Office, did [the grievants] perform work of a higher graded position (Claims Representative GS-9) on a regular and recurring basis in excess of [twenty-five] percent of their time for a period in excess of thirty days?

2. If they did so, are they entitled to a Temporary Promotion and payment at the higher rate of the Claims Representative GS-9 under the provisions of Article 26, [§] 16 of the [parties' agreement]?[¹]

Id. at 9.

In his award, the Arbitrator rejected the Agency's claim that the grievance raised issues of classification, within the meaning of § 7121(c)(5) of the Statute, and determined that the grievance was arbitrable. *Id.* at 8. In particular, the Arbitrator noted that, prior to the hearing, both parties treated the dispute as one involving temporary promotion. *Id.*

With regard to the merits of the grievance, the Arbitrator found that, from June 2001 until approximately April 2004, the Agency assigned the two grievants to the CDR Unit, where they supported the Claims Representatives with appeals and CDR functions. *Id.* at 3. The Arbitrator determined that, during this time, the grievants were the only Service Representatives performing duties in the CDR Unit, which was otherwise composed of Claims Representatives who are at level GS-9 or above. *Id.* Based on the testimony of Agency witnesses, the Arbitrator found that the grievants fully performed six, and partially performed three, of the fifteen enumerated Claims Representative duties. *Id.* at 15. The Arbitrator also found that the grievants had received the same training as Claims Representatives and that the grievants were replaced by Claims Representatives when they were absent from work. *Id.* at 3-4. Further, the Arbitrator found that, when one of the grievants was transferred to another location in April 2004, she was replaced by a Claims Representative. *Id.* at 14. The Arbitrator also found that, after the grievants left the CDR Unit, all of the Service Representatives were temporarily promoted to GS-9 to receive training in the handling of appeals. *Id.*

1. The text of this provision was not included in the documents submitted to the Authority.

In addition, the Arbitrator determined that the Agency did not effectively refute the evidence presented by the grievants that they performed duties of the higher-graded position more than twenty-five percent of the time for longer than thirty days. *Id.* at 15. Therefore, the Arbitrator found that the Agency violated Article 26, § 16 of the parties' agreement by failing to temporarily promote the grievants. *Id.* The Arbitrator awarded the grievants the difference between the rates of pay for GS-8 and GS-9 from the time of their assignment to the CDR Unit in June 2001 until they left around April 2004. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the Arbitrator erroneously disregarded the Agency's claim that the grievance was barred by § 7121(c) of the Statute. Exceptions at 4. The Agency argues that, because jurisdictional claims under § 7121(c) of the Statute may be raised at any time, the Arbitrator wrongly "barred" the Agency from making this argument for the first time at the arbitration hearing. *Id.* at 5.

The Agency also contends that the award is contrary to § 7121(c) of the Statute because the dispute involves the determination of the proper grade level of the duties performed by the grievants, which is a classification issue. *Id.* at 6. The Agency asserts that the disputed assignments were permanent and that the Arbitrator ordered the Agency to "reclassify the positions" of the grievants. *Id.* at 7.

Finally, the Agency argues that the award of backpay for approximately three years is contrary to law. The Agency argues that, under 5 C.F.R. § 335.103(c), backpay for temporary promotions of more than 120 days cannot be awarded in the absence of competitive procedures.² *Id.* at 8-9 (citing *U.S. Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 60 FLRA 46, 50 (2004) (*VA Charleston*)). According to the Agency, the positions occupied by the grievants were not open for competitive hiring and, therefore, the backpay awarded by the Arbitrator should have been limited to 120 days. Exceptions at 9.

2. 5 C.F.R. § 335.103(c) states, in pertinent part:

(1) *Competitive actions.* Except as provided in paragraphs (c)(2) and (3) of this section, competitive procedures in agency promotion plans apply to all promotions under § 335.102 of this part and to the following actions: (i) Time-limited promotions under § 335.102(f) of this part for more than 120 days to higher graded positions

B. Union's Opposition

The Union asserts that the Arbitrator did not preclude the Agency from making a classification argument. Opp'n at 2. In support of this assertion, the Union contends that the Arbitrator allowed the Agency to make an oral argument at the hearing, allowed both parties to address the issue in post-hearing briefs, and addressed the issue in his award. *Id.* at 2-3.

The Union also asserts that the award is not contrary to § 7121(c) of the Statute. According to the Union, the award involves temporary promotion rather than classification. *Id.* at 4. In this regard, the Union contends that the Arbitrator did not consider the permanently assigned duties of the grievants, but addressed only whether they temporarily performed higher-level duties. *Id.* at 5.

In response to the Agency's backpay argument, the Union requests that the Authority reconsider its holding in *VA Charleston* that backpay for a noncompetitive temporary promotion is limited to 120 days. *Id.* at 8. Alternatively, the Union requests that the Authority remand this matter to the Arbitrator so that the Union can establish a "basis for concluding that the Arbitrator intended the award to encompass" a second 120-day temporary promotion for one of the grievants. *Id.* at 11 (quoting *VA Charleston*, 60 FLRA at 50). In support of its request, the Union claims that, in June 2003, one grievant was absent from work for over a week due to illness, that she was replaced by a GS-9 Claims Representative during that time, and that the Arbitrator could find that a new 120-day period began when the grievant returned to work. Opp'n at 11.

IV. Analysis and Conclusions

A. Whether the Arbitrator failed to consider the Agency's classification argument.

The Agency asserts that the Arbitrator erroneously failed to consider the classification argument that the Agency raised at the arbitration hearing. Exceptions at 4-5. We construe this assertion as an argument that the Arbitrator exceeded his authority. Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. See *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). Despite the Agency's assertion to the contrary, the Arbitrator considered — but rejected — the Agency's classification argument. In this regard,

the Arbitrator asked the parties to address the issue of arbitrability in their post-hearing briefs, and he referenced the parties' arguments on that issue when he reached his decision that the grievance concerned temporary promotion. *Id.* at 3, 7-9. As the premise of the Agency's assertion is incorrect, we deny this exception.

B. Whether the award is contrary to § 7121(c)(5) of the Statute.

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 conclusion is consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).

Under § 7121(c)(5) of the Statute, grievances concerning "the classification of any position which does not result in the reduction in grade or pay of an employee" are excluded from the coverage of negotiated grievance procedures. Thus, arbitrators are barred from resolving grievances concerning position classification. *Soc. Sec. Admin.*, 60 FLRA 62, 64 (2004). The Authority has construed the term "classification" to mean analyzing and identifying a position and placing it in a class according to the position-classification plan established by the Office of Personnel Management (OPM), pursuant to 5 U.S.C. chapter 51. *Id.* (citations omitted). Consequently, when the substance of a grievance concerns whether a grievant is entitled to a permanent promotion based on the grade level of his or her duties, the grievance concerns classification and is, therefore, barred by § 7121(c)(5). *See LIUNA, Local 28*, 56 FLRA 324, 326 n.2 (2000) (Member Cabaniss concurring). However, a grievance is not barred by § 7121(c)(5) where the substance of the grievance concerns whether the grievant is entitled to a temporary promotion (1) under a collective bargaining agreement (2) by reason of having performed the established duties of a higher-graded position. *See U.S. Dep't of Veterans Affairs, Med Ctr., Asheville, N.C.*, 59 FLRA 605, 608 (2004) (*VA Asheville*).

In this case, the grievance, as well as the issues framed by the Arbitrator, address whether the Agency violated the parties' agreement by denying the grievants temporary promotions. Award at 2, 9. The Arbitrator interpreted the parties' agreement to require temporary promotions for employees who perform higher-graded duties for more than twenty-five percent of the time for

longer than thirty days. *Id.* at 15. In rendering his award, the Arbitrator confined his analysis and conclusions to resolving this contractual issue. Specifically, he assessed whether the grievants were performing the previously established duties of GS-9 Claims Representatives, and he found that the grievants fully performed six, and partially performed three, of those duties. *Id.* He also found that GS-9 employees, rather than GS-8 employees, replaced the grievants when they were absent. *Id.* at 3-4, 14. The Arbitrator did not consider whether the grievants should have been permanently promoted and "did not evaluate the grade level of the duties permanently assigned to and performed by" the grievants, both of which would constitute classification. *VA Asheville*, 59 FLRA at 608. Therefore, as the Arbitrator did not resolve a classification matter within the meaning of § 7121(c)(5), we deny the exception.

C. Whether the backpay award is contrary to 5 C.F.R. § 335.103(c).

OPM has interpreted 5 C.F.R. § 335.103(c) as requiring that time-limited promotions of more than 120 days be made pursuant to competition under an agency merit-promotion plan. *VA Charleston*, 60 FLRA at 49. Deferring to this interpretation, the Authority has concluded that a retroactive temporary promotion of more than 120 days cannot be awarded in the absence of competitive procedures. *Id.* In accordance with this interpretation, backpay for a retroactive, noncompetitive temporary promotion that exceeds 120 days is inconsistent with 5 C.F.R. § 335.103(c). *Id.*

The Arbitrator awarded the grievants backpay for a period of almost three years. There is no indication from his findings, and the Union does not allege, that the temporary promotions were made based on competitive procedures. Therefore, *VA Charleston* supports a conclusion that the Arbitrator's backpay remedy requires modification because, to the extent that it exceeds 120 days, it is deficient as contrary to 5 C.F.R. § 335.103(c). Because we decline the Union's request to reconsider *VA Charleston*, we grant the Agency's exception and modify the backpay award to 120 days for each grievant.

The Union argues that the award should be remanded to the Arbitrator to determine whether one of the grievants is entitled to an additional 120-day period of back pay. *Opp'n* at 11. However, the Arbitrator found that the grievants were assigned to work in the CDR Unit in 2001, and although he noted that the grievants were sometimes absent from work, he did not find

that their assignments were ever renewed. Award at 4. Thus, as in *VA Charleston*, there is no “basis for concluding that the Arbitrator intended the award to encompass” more than one temporary promotion for each grievant. *VA Charleston*, 60 FLRA at 50. Accordingly, we deny the Union’s request for remand.

V. Decision

We deny the Agency’s exceptions in part, grant them in part, and modify the award of backpay, consistent with the conclusions herein.