

68 FLRA No. 61

UNITED STATES
DEPARTMENT OF THE ARMY
WOMACK ARMY MEDICAL CENTER
FORT BRAGG, NORTH CAROLINA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1770
(Union)

0-AR-5065

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DECISION

March 19, 2015

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Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement by failing to temporarily promote an employee (the grievant) and compensate him accordingly. Arbitrator Samuel J. Nicholas, Jr. found that the Agency's actions violated the parties' agreement (the agreement), and he sustained the grievance. As a remedy, he directed the Agency to pay the grievant backpay at the rate of the position to which the Agency should have temporarily promoted him, beginning on the initial date of the agreement violation in May 2010.

The substantive question before us is whether the Arbitrator's award is contrary to § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute)¹ because the award allegedly concerns the classification of the grievant's permanently assigned duties – a matter that, as a matter of law, is not grievable. Because § 7121(c)(5) does not bar a grievance that concerns a temporary promotion under a collective-bargaining agreement, and the Arbitrator's award involved such a matter, the answer is no.

II. Background and Arbitrator's Award

The Agency hired the grievant as a general schedule, grade 9 (GS-9), video-teleconference specialist. The Union filed a grievance alleging that he was required to perform duties outside the scope of his position – specifically, the duties of a general schedule, grade 11 (GS-11), systems administrator. The grievance went to arbitration, where the stipulated issues before the Arbitrator were, in relevant part: (1) whether the Agency required the grievant to perform GS-11 duties for more than sixty consecutive calendar days “without providing a temporary position in accordance with Article 25, Section 6” of the agreement,² and, if so, then (2) whether the grievant was entitled to backpay.

Article 25, Section 6 of the agreement provides: “When an employee is fully qualified for promotion and is assigned to perform the duties of an established bargaining[-]unit position of a higher grade for more than sixty . . . consecutive calendar days, temporary promotion will be made in accordance with applicable rules and regulations.”³

At arbitration, the Union presented evidence to show that the grievant had in fact been performing duties outside the scope of his position and pay grade, and he should have been awarded a temporary promotion. But the Agency argued that the grievant did not possess the expertise, accreditation, or skill required for the GS-11 position. The Agency further argued that it reviewed and updated the grievant's job description and that the grievant's additional duties were not consistent with the systems-administrator position.

The Arbitrator determined that the Union's evidence established that the Agency violated Article 25, Section 6 of the agreement by failing to temporarily promote the grievant. The Arbitrator did not find that the grievant should be permanently classified as a systems administrator, but concluded that the grievant should have been temporarily compensated as a systems administrator at the GS-11 pay rate.

As a remedy, the Arbitrator directed the Agency to pay the grievant backpay at the GS-11 rate for the period during which he should have been temporarily promoted, beginning on the initial date of the agreement violation in May 2010.

The Agency filed exceptions to the Arbitrator's award.

¹ 5 U.S.C. § 7121(c)(5).

² Award at 4.

³ *Id.* at 3.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar two of the Agency's arguments.

The Agency argues that the Arbitrator's remedy violates a government-wide regulation, 5 C.F.R. § 335.103(c), and fails to draw its essence from the parties' agreement.⁴ Specifically, the Agency contends that, although the Arbitrator granted backpay for a temporary promotion for more than four years, § 335.103(c) limits backpay for non-competitive temporary promotions to 120 days.⁵ Similarly, the Agency argues that Article 25, Section 6 of the agreement provides that "competitive procedures must be used for any temporary promotion in excess of . . . [120] consecutive days."⁶

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.⁷ The Union: argued before the Arbitrator that "the [g]rievant should have been awarded a temporary promotion in accordance with the language found within Article 25, Section 6";⁸ and requested, in the grievance, that the grievant receive retroactive compensation for all work performed at a higher rate.⁹ As such, the Agency was on notice that the Union had requested backpay for the temporary promotion of more than 120 days, and the Agency could have argued that § 335.103(c) and Article 25, Section 6 preclude that remedy. But there is no evidence that the Agency made those arguments to the Arbitrator. Therefore, consistent with §§ 2425.4(c) and 2429.5, we do not consider the Agency's exceptions alleging that the remedy is contrary to § 335.103(c) and fails to draw its essence from the parties' agreement.¹⁰

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

The Agency asserts that the award is contrary to law because § 7121(c)(5) of the Statute¹¹ precludes grievances that involve the classification of positions.¹² When an exception involves an award's consistency with

law, the Authority reviews any question of law de novo.¹³ In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.¹⁴

The Agency relies on *SSA, Port St. Lucie District, Port St. Lucie, Florida (St. Lucie)*¹⁵ to support its argument that the award is contrary to § 7121(c)(5).¹⁶ In *St. Lucie*, the Authority stated that:

[W]hen 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). 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.¹⁷

According to the Agency, the Arbitrator reviewed the matter as "a claim to a permanent promotion," although the issue before him concerned a "temporary promotion."¹⁸ The Agency claims that the Arbitrator's statement, "your Arbitrator refuses to classify the [g]rievant as a [s]ystem[s] [a]dministrator, due to the fact that he is not technically qualified to man the position,"¹⁹ demonstrated a desire to award a permanent promotion to the grievant.²⁰ Further, the Agency argues that the Arbitrator's use of quotation marks in the statement, "the [g]rievant should have been 'temporarily' compensated as [a] [s]ystems [a]dministrator,"²¹ reveals the Arbitrator's understanding that the assigned duties in dispute were permanent.²² Finally, the Agency argues that it viewed the duties in dispute as part of the grievant's permanent position and not temporary.²³

⁴ Exceptions at 4-5.

⁵ *Id.* at 4.

⁶ *Id.* at 5.

⁷ 5 C.F.R. §§ 2425.4(c), 2429.5.

⁸ Award at 5.

⁹ *Id.* at 7.

¹⁰ See *U.S. DOD, Def. Commissary Agency, Fort Lee, Va.*, 56 FLRA 855, 858 (2000) (where Authority found nothing in the record indicated that consistency with 5 C.F.R. § 335.103(c) was presented to the arbitrator, in accordance with § 2429.5 of the Authority's Regulations, the Authority did not consider that argument).

¹¹ 5 U.S.C. § 7121(c)(5).

¹² Exceptions at 2.

¹³ *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).

¹⁴ *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 68 FLRA 269, 270 (2015).

¹⁵ 64 FLRA 552 (2010).

¹⁶ Exceptions at 2-3.

¹⁷ 64 FLRA at 554 (citations omitted).

¹⁸ Exceptions at 3.

¹⁹ Award at 13.

²⁰ Exceptions at 3.

²¹ Award at 13 (emphasis added).

²² Exceptions at 3.

²³ *Id.*

Here, the parties stipulated the issue as whether the Agency required the grievant “to perform [GS-11] . . . duties for more than sixty . . . consecutive calendar days without providing a temporary position in accordance with Article 25, Section 6.”²⁴ The Arbitrator found a violation of only Article 25, Section 6,²⁵ which concerns temporary promotions,²⁶ and the Arbitrator awarded a temporary promotion, not a permanent reclassification.²⁷ As such, the award involves a temporary promotion, not a classification matter within the meaning of § 7121(c)(5). The Agency’s contrary arguments provide no basis for finding that the grievance concerned, or that the Arbitrator directed, a permanent promotion based on the classification of the grievant’s duties. For these reasons, we find that the award is not contrary to law. In rejecting the Agency’s contrary-to-law argument, we note that the Agency also argues that the parties’ agreement bars grievances on classification matters, but does not argue that the agreement differs from § 7121(c)(5) in any way. Thus, the Agency’s reliance on Article 39, Section 4.6 of the agreement provides no basis for finding the award deficient.

V. Decision

We dismiss, in part, and deny, in part, the Agency’s exceptions.

²⁴ Award at 4.

²⁵ *Id.* at 13.

²⁶ *Id.* at 3.

²⁷ *Id.* at 13.