

70 FLRA No. 101

UNITED STATES
DEPARTMENT OF LABOR
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 12
(Union)

0-AR-5280

DECISION

April 23, 2018

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

I. Statement of the Case

On March 28, 2017, in an interim award on arbitrability (the arbitrability award), Arbitrator Gloria Johnson found that a grievance was arbitrable because it sought a temporary promotion for an employee (the grievant), rather than the reclassification of the grievant's position.

The main question before us is whether the grievance concerns a classification matter and is therefore precluded by § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute).¹ Because the Union admitted that the grievance concerns duties that the Agency had not previously classified as part of any established position description, the arbitrability award is contrary to § 7121(c)(5).

II. Background and Arbitrator's Award

The grievant alleged that the Agency failed to pay him properly for certain duties. The Union filed a step-one grievance on his behalf, asserting that the Agency violated the equal-pay-for-equal-work provision of the parties' collective-bargaining agreement, as well as equal-employment-opportunity (EEO) laws and regulations. The Agency denied the step-one grievance based, in part, on a determination that the grievant was

challenging the classification of his permanent position at the General Schedule, Grade 13 (GS-13) level.

In a subsequent, step-two grievance, the Union asserted that: (1) the Agency "fail[ed] to promote and properly pay and grade [the grievant] as a GS-14";² (2) "the work of . . . a [former] GS-14 [employee (the former employee)] was directly assigned to" the grievant after the former employee's departure;³ and (3) "no . . . position description accurately captured the work . . . assigned to" the grievant.⁴ After the Agency denied the step-two grievance, the parties went to arbitration. The Arbitrator agreed to issue an interim award on the grievance's arbitrability, and the parties introduced the step-one and step-two grievances as joint exhibits for the Arbitrator's consideration.

In the arbitrability award, the Arbitrator found that the "[g]rievant does not appear to seek [a] change in the classification of his established position. Rather . . . , it appears he is seeking compensation for sporadic, temporary periods [during which] he performed higher-level work."⁵ Thus, the Arbitrator found the grievance arbitrable, and she directed the parties to schedule a future hearing on the grievance's merits.

On April 27, 2017, the Agency filed an exception to the arbitrability award, and on May 26, 2017, the Union filed an opposition to the Agency's exception.

III. Analysis and Conclusion: Section 7121(c)(5) of the Statute bars the grievance.

The Agency argues that the arbitrability award is contrary to § 7121(c)(5) of the Statute.⁶ Although the Arbitrator found the grievance arbitrable, the Authority does not defer to an arbitrator on the legal question of whether a grievance concerns a classification matter.⁷

As relevant here, § 7121(c)(5) provides that negotiated grievance-and-arbitration procedures "shall not apply with respect to any grievance concerning . . . the classification of any position [that] does not result in the reduction in grade or pay of an employee."⁸ A grievance is not arbitrable under § 7121(c)(5) if it seeks a promotion based on the grade level of the duties assigned

² Exception, Attach., Joint Ex. 3, Step-Two Grievance at 1.

³ *Id.* at 2.

⁴ *Id.*

⁵ Arbitrability Award at 7.

⁶ Exception Br. at 6-10.

⁷ *U.S. Dep't of HUD, Wash., D.C.*, 59 FLRA 630, 631 (2004) ("Although the Authority defers to an arbitrator's factual findings, it reviews questions of law, such as the classification issue asserted in this case, de novo.")

⁸ 5 U.S.C. § 7121(c)(5).

¹ 5 U.S.C. § 7121(c)(5).

to, and performed by, the grievant as part of her or his permanent position.⁹ By contrast, § 7121(c)(5) does not bar a grievance about whether a grievant is entitled to a temporary promotion for performing the duties of an established, higher-graded position.¹⁰ However, where the duties upon which a grievant relied to support a promotion claim “had not previously been classified” as part of a position with a higher grade level than the grievant’s permanent position,¹¹ the Authority held that a grievance seeking a promotion based on the grade level of the grievant’s duties “involved a classification matter” under § 7121(c)(5).¹²

The Arbitrator found that the grievant sought “compensation for . . . temporary periods [during which] he performed higher-level work.”¹³ However, there can be no temporary promotion where there is no higher-graded position to which the grievant could be promoted.¹⁴ Here, the Union admitted that no higher-graded position description “accurately captured” the duties upon which the grievant relied to support his promotion claim.¹⁵ Thus, the matter concerns classification, not a temporary promotion.¹⁶

We reject the Union’s argument that the Arbitrator considered whether the grievant performed the duties of a higher-graded position by comparing the grievant’s duties to “those performed by” the former employee.¹⁷ In fact, the Arbitrator did not refer to the duties or position description of the former employee. Further, we note that this claim is inconsistent with the Union’s argument, at arbitration,¹⁸ that no higher-graded

position description “accurately captured” the grievant’s duties.¹⁹ Thus, §§ 2425.4(c) and 2429.5 of the Authority’s Regulations bar the Union’s current claim.²⁰

In addition, the Union contends that the grievance concerns “issues of discrimination” rather than “classification issues.”²¹ But the Authority has held that a matter barred by § 7121(c)(5) is not rendered grievable²² just because a union makes an equal-pay claim based on a collective-bargaining agreement, applicable regulations, or employment-discrimination provisions, such as those found in the Civil Rights Act of 1964.²³ Thus, the grievance’s discrimination allegations do not shield it from § 7121(c)(5)’s bar.

For the reasons explained above, the grievance “involve[s] a classification matter” that is barred by § 7121(c)(5).²⁴ Thus, while the Agency’s exception is interlocutory – because the Arbitrator has not yet resolved the merits of the dispute – the Agency has established a plausible jurisdictional defect, the resolution of which advances the ultimate disposition of this case.²⁵ Therefore, we grant interlocutory review and set aside the arbitrability award as contrary to § 7121(c)(5) of the Statute.²⁶

IV. Decision

We set aside the arbitrability award.

⁹ *U.S. DOL*, 63 FLRA 216, 218 (2009) (citing *Laborers Int’l Union of N. Am., Local 28*, 56 FLRA 324, 326 n.2 (2000) (Member Cabaniss concurring)).

¹⁰ *Id.* (citing *U.S. Dep’t of Transp., FAA, Atlanta, Ga.*, 62 FLRA 519, 521 (2008)).

¹¹ *U.S. Nuclear Regulatory Comm’n*, 54 FLRA 1416, 1421 (1998) (*NRC*) (Member Wasserman dissenting).

¹² *Id.* at 1422; see also *SEIU, Local 200*, 10 FLRA 49, 49-50 (1982) (if the grievant’s employing agency had not previously “established” and “classified” a higher-graded position to include the duties upon which the grievant relied to support his or her promotion claim, then the grievant was not eligible for a temporary promotion for performing those duties).

¹³ Arbitrability Award at 7 (emphasis added).

¹⁴ See *NRC*, 54 FLRA at 1421-22; *SEIU, Local 200*, 10 FLRA at 49-50.

¹⁵ Exception, Attach., Joint Ex. 3, Step-Two Grievance at 2.

¹⁶ See *NRC*, 54 FLRA at 1421-22 (because the grievant’s duties were not classified as part of a previously established, higher-graded position, a grievance seeking a promotion based on those duties involved a classification matter under § 7121(c)(5)).

¹⁷ Opp’n at 9.

¹⁸ See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, 69 FLRA 176, 178 (2016) (citing *AFGE, Local 2145*, 69 FLRA 7, 8 (2015)) (under §§ 2425.4(c) and 2429.5, the Authority will

not consider arguments that differ from, or are inconsistent with, a party’s arguments to the arbitrator).

¹⁹ Exception, Attach., Joint Ex. 3, Step-Two Grievance at 2 (after discussing the former employee’s position and duties, the Union asserted that no position description “accurately captured” the grievant’s duties).

²⁰ 5 C.F.R. §§ 2425.4(c), 2429.5.

²¹ Opp’n at 4.

²² *U.S. DOL*, 63 FLRA at 218 (citing *U.S. EPA, Region 2*, 61 FLRA 671, 675-76 (2006) (*EPA*)).

²³ See *EPA*, 61 FLRA at 671-72, 675-76 (setting aside grievance that sought permanent promotion based on contractual, regulatory, and EEO statutory provisions due to conflict with § 7121(c)(5)).

²⁴ *NRC*, 54 FLRA at 1422.

²⁵ See, e.g., *U.S. DOL*, 63 FLRA at 217 (citing *U.S. Dep’t of Transp., FAA*, 61 FLRA 634, 635-36 (2006)).

²⁶ See *id.* at 217-18.

Member DuBester, dissenting:

I disagree with the majority's decision to grant interlocutory review of the Agency's exceptions and set aside the arbitrability award.¹ In my view, the majority's decision misinterprets the grievance, the award, and the record.

The Arbitrator finds the grievance arbitrable because the "[g]rievant does not appear to seek change in the classification of his established position. Rather[,] from the limited information presented, it appears he is seeking compensation for sporadic, temporary periods that he performed higher-level work."²

In the majority's view, these findings are not sufficient to establish that the grievance does not involve a classification matter. The majority states, accurately, that to be arbitrable, a grievance seeking a temporary promotion must rely on "the duties of an established, higher-graded position."³

Relying on this test, the majority finds, for two reasons, that neither the grievance in this case, nor the award, indicates a reliance on previously classified duties. First, as discussed, the majority finds the Arbitrator's characterization of the grievance insufficient. Second, the majority relies on "the Union's assert[ion] [in its step-two grievance] that no higher-graded position description 'accurately captured' the grievant's duties."⁴ The majority then summarily concludes that the grievance involves a classification matter, apparently because, in the majority's opinion, the Arbitrator would have to conduct a classification analysis of the duties the grievant is performing to determine whether those duties justify paying the grievant at a level higher than the grievant's current grade.⁵

The majority's decision misconstrues the grievance, the award, and the record. When the

Arbitrator analyzes whether the grievance concerns a classification matter, she is clearly aware of the limitations imposed by § 7121(c)(5) that would apply to her merits award in the second stage of the proceeding. She explicitly and accurately states the Authority's test numerous times. For example, the award notes that a "grievance does not concern . . . 'classification'" "where the . . . grievance involves a determination of whether the [g]rievant has a right to a temporary promotion . . . *based upon performance of the established duties of a higher-graded position.*"⁶ The Arbitrator is similarly explicit, and accurate, elsewhere in her award.⁷

Accordingly, the Arbitrator's analysis of the grievance, and her determination that it does not concern a classification matter, is informed by her clear understanding that to resolve the grievance, she would have to "compare[] the duties of the . . . positions [at issue] that had already been established and classified by the Agency."⁸ And the Authority is ordinarily deferential to an arbitrator's interpretation of a grievance.

Consequently, because the Arbitrator accurately understands that to be arbitrable, the grievance has to rely on the established duties of a higher-graded position, the award's reference to "higher-level work" should be interpreted, reasonably and in context, to refer to such established, higher-graded duties. Because the Arbitrator is clearly aware of what she had to do to avoid an impermissible classification determination, and reasonably concludes that the grievance requires her to apply the proper test, no further analysis is necessary to find that the Agency fails to raise a "plausible jurisdictional defect."⁹

Moreover, if one looks behind the Arbitrator's award to the language of the grievance itself, it is clear that the majority's decision is erroneous for another reason. Regarding the grievance, the majority's reliance on the assertion in the Union's two-step grievance, "that no higher-graded position description 'accurately captured' the grievant's duties,"¹⁰ is misplaced. As an initial matter, the majority's characterization of the Union's statement is not accurate. What the Union asserts, in the passage the majority cites, is that the Agency violated its *contractual obligation* to "*maintain an accurate position description which reflects the duties of the [grievant], . . . because no such position description accurately captured the work which was*

¹ In its exceptions, the Agency requested that this case be referred for Collaboration and Alternative Dispute Resolution (CADR). Exceptions Form at 3. This was not done. As I have said previously, referral for CADR is consistent with longstanding Authority practices, the history of successfully resolving disputes through the use of CADR, and a key purpose of the Statute—to "facilitate[] and encourage[] the amicable settlements of disputes between employees and their employers." See 5 U.S.C. § 7101(a)(1)(C); see also *AFGE, Local 1148*, 70 FLRA 440, 440 n.5 (2018). Therefore, at the Agency's request, this case should have been referred for CADR.

² Award at 7.

³ Majority at 3.

⁴ *Id.* (citing Exception, Attach., Joint Ex. 3, Step-Two Grievance at 2).

⁵ See *id.*

⁶ Award at 7 (emphasis added).

⁷ *Id.* at 5-6.

⁸ *Id.* at 6.

⁹ Majority at 4.

¹⁰ *Id.* at 3.

being assigned to [the grievant].”¹¹ Thus, the Union’s statement that the majority relies on concerns whether the grievant’s position description, encompassing all of the grievant’s currently assigned duties, is accurate. That is not relevant to the basis upon which the grievant is seeking a temporary promotion.

Significantly, the basis for the grievant’s request for a temporary promotion is addressed two paragraphs earlier in the two-step grievance, in language the majority summarily dismisses. On the same page of the two-step grievance where the language the majority cites appears, the grievance asserts: “[T]he work of [another employee], a GS-14, was directly assigned to [the grievant] with no alteration in its complexity, volume[,] or significance, . . . and such work continues to be performed by [the grievant].”¹² Thus, the language of the grievance itself refers to “the duties of an established, higher-graded position.”¹³ This too should be dispositive.

For these reasons, I would not grant interlocutory review of the Agency’s exceptions. Nor would I set aside the arbitrability award.

¹¹ Exception, Attach., Joint Ex. 3, Step-Two Grievance at 2 (emphasis added).

¹² *Id.*

¹³ Majority at 3.