

71 FLRA No. 68

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY MEDICAL DEPARTMENT ACTIVITY
FORT GEORGE G. MEADE, MARYLAND
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1923
(Union)

0-AR-5457

—
DECISION

October 10, 2019

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

I. Statement of the Case

In this case, we reaffirm that a grievance seeking a permanent promotion through the accretion of allegedly higher-graded duties is a grievance concerning classification excluded from the negotiated grievance procedure by § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute).¹

The Union filed a grievance alleging that the Agency was required to promote an employee (the grievant) based on the accretion of certain duties to his position. Arbitrator Richard Trotter issued an award sustaining the grievance and directing the Agency to permanently promote the grievant.

Because the grievance and the award concern classification within the meaning of § 7121(c)(5), we set aside the award.

II. Background and Arbitrator's Award

The Agency assigned the grievant, a General Schedule (GS)-7 hospital housekeeping assistant,

additional duties previously assigned to, and performed by, his GS-11 supervisor. Because of these added duties, the Union filed a grievance alleging that the grievant was entitled to a non-competitive promotion to the GS-9 level “based on an accretion of duties.”² The parties were unable to resolve the matter, and the grievance went to arbitration.

Before the Arbitrator, the Union maintained that the Agency’s assignment of “additional duties and responsibilities” from the supervisor to the grievant entitled the grievant to a permanent promotion.³ However, the Agency argued that the grievance concerned a non-arbitrable classification matter under § 7121(c)(5).

In the award, the Arbitrator stated that the parties stipulated to the following issues: “Do the [additional] duties recurrently assigned to [the grievant], and performed by him, require raising his grade, under the appropriate personnel and standards[,]” and “[i]s there a lawful path to increasing [the grievant’s] grade?”⁴ The Arbitrator found that the addition of the supervisor’s duties to the grievant’s position did not concern classification. Instead, the Arbitrator determined that “the accretion of [those] duties” constituted a basis for increasing the grievant’s grade.⁵ As a remedy, the Arbitrator directed the Agency to promote the grievant to a GS-9 “per accretion of grade determinative duties.”⁶

¹ 5 U.S.C. § 7121(c)(5).

² Award at 1.

³ *Id.* at 9.

⁴ *Id.* at 13.

⁵ *Id.* at 21.

⁶ *Id.*

On January 29, 2019, the Agency filed exceptions to the award, and, on March 5, 2019, the Union filed an opposition to the Agency's exceptions.⁷

III. Analysis and Conclusion: The award is contrary to § 7121(c)(5) of the Statute.

The Agency argues that the award is contrary to § 7121(c)(5) because the grievance concerned the grade level of the grievant's permanently assigned duties, which is a matter of classification.⁸ Under § 7121(c)(5), an arbitrator lacks jurisdiction to determine "the classification of any position which does not result in the reduction in grade or pay of an employee."⁹ Where the substance of a grievance concerns the grade level of the duties permanently assigned to and performed by the grievant, the grievance concerns the classification of a position within the meaning of § 7121(c)(5) of the Statute.¹⁰ And, as relevant here, the Authority has long held that where the substance of a grievance concerns the accretion of higher-graded duties to an existing position, the grievance concerns a classification matter.¹¹

Here, it is undisputed that the grievance and the award concern the grievant's entitlement to a permanent promotion based on the accretion of duties.¹²

⁷ After the deadline for filing an opposition, the Union refiled its opposition, including attachments that it had not filed with its original opposition. The Union acknowledged the untimeliness of the attachments, explaining that the Union representative handling the case failed to timely file the attachments due to a serious illness. Union's Response to Order to Show Cause at 2. While the Authority may waive or extend an expired time limit "in extraordinary circumstances" under § 2429.23(a)-(b) of the Authority's Regulations, the Authority has declined to find such circumstances based on a party representative's illness. See, e.g., *U.S. DHS, ICE*, 66 FLRA 880, 883 (2012) (finding that the reason for untimely filing – away from the office due to work and illness – did not demonstrate extraordinary circumstances for waiving the expired time limit). Accordingly, we will not consider the Union's untimely attachments. See *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 444 (2014) (finding no extraordinary circumstance for waiving expired time limit where union failed to explain why union representative could not have requested another person to monitor mail while he was out of the office).

⁸ Exceptions at 3-4.

⁹ 5 U.S.C. § 7121(c)(5).

¹⁰ *AFGE, Local 987*, 52 FLRA 212, 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.").

¹¹ *U.S. Small Bus. Admin.*, 70 FLRA 729, 730 (2018) (Member DuBester dissenting) (citing *AFGE, Local 2142*, 61 FLRA 194, 196 (2005) (*Local 2142*); *AFGE, Local 1858*, 59 FLRA 713, 715 (2004)).

¹² Award at 1.

Specifically, the Union alleged in the grievance,¹³ and continues to claim, that the grievant is entitled to a permanent promotion because his position accreted some of the duties of his supervisor's position.¹⁴ And the Arbitrator found that through "the accretion of [those] duties," the grievant was entitled to a permanent promotion.¹⁵ Accordingly, the grievance and the award concern classification,¹⁶ and we set aside the award as contrary to § 7121(c)(5) of the Statute.

IV. Decision

We set aside the award.

¹³ *Id.* (noting that the Union's grievance alleged that the grievant was entitled to a promotion "based on an accretion of duties").

¹⁴ Opp'n at 1 (arguing that the grievant "accreted" higher-graded duties that were properly classified to a GS-11 position).

¹⁵ Award at 20 (emphasis added).

¹⁶ See *Local 2142*, 61 FLRA at 196 (setting aside award where the arbitrator "specifically found that the substance of the grievance concerned the accretion of higher-graded duties").

Member DuBester, concurring:

I agree with the Decision to set aside the award as contrary to § 7121(c)(5) of the Statute. While I continue to dispute the validity of the majority's revised analysis for determining whether a grievance concerns a classification matter,¹ I agree that the grievance and award in this case concern a classification matter because they concern "the accretion of higher-graded duties to an existing position."²

¹ See, e.g., *U.S. Small Bus. Admin.*, 70 FLRA 729, 732 (2018) (Dissenting Opinion of Member DuBester).

² *AFGE, Local 2142*, 61 FLRA 194, 196 (2005).