



United States, Department of Housing and Urban Development, Washington, D.C. (Agency) and American Federation of Government Employees National Council of HUD, Locals 222, AFL-CIO (Union)

[v59 p630]

59 FLRA No. 116

UNITED STATES
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
WASHINGTON, D.C.
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL OF HUD
LOCALS 222, AFL-CIO
(Union)

0-AR-3718

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DECISION

February 11, 2004

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Before the Authority: Dale Cabaniss, Chairman, and
Carol Waller Pope and Tony Armendariz, Members

This matter is before the Authority on exceptions to an award of Arbitrator Andree Y. McKissick filed by the Agency under § 7122(a) 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 determined that a grievance challenging the Agency's advertising and filling of certain positions with promotion potential to GS-13 was arbitrable and directed the parties to proceed to a hearing on the merits of the grievance.

For the reasons that follow, we remand the award to the parties.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency's advertising and filling certain positions with promotion potential to GS-13 deprived employees occupying similar positions with promotion potential to GS-12 of the opportunity to be non-competitively promoted to GS-13. The grievance sought as a remedy "full promotion potential for all similarly situated employees to the GS-13 level and other just relief." Award at 4. The Agency denied the grievance on the ground that it was not arbitrable under § 7121(c)(5) of the Statute and Article 22 § 22.05 of the parties' agreement because it concerned the classification of positions. [n1] The grievance was unresolved and was submitted to arbitration on the following stipulated issue: "Whether or not this grievance is arbitrable?" [n2] *Id.*

The Arbitrator concluded that the grievance was arbitrable because, as relevant here, it did not involve a classification matter. In this regard, the Arbitrator stated that the grievance involves "the fairness of advertisements and vacancy announcements, not the proper classification of a position and one's concurrent duties." *Id.* at 6. The Arbitrator also determined that the remedy requested by the Union -- "reassignment of employees to reclassified positions" -- was consistent with a memorandum of understanding (MOU). [n3] *Id.* at 5, 6. As her award, the Arbitrator found the grievance arbitrable and directed the

parties to proceed to a hearing on the merits of the grievance. [n4] See *id.* at 7.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the exceptions are not interlocutory because the issue before, and decided by, the Arbitrator was limited to arbitrability. The Agency also contends that if the exceptions are interlocutory, then there are extraordinary circumstances warranting review because the exceptions present a plausible jurisdictional defect. In particular, the Agency claims that the award is contrary to § 7121(c)(5) because the grievance involves a classification matter. The Agency claims, in this regard, that the grievance sought reclassification of the grievants' positions.

The Agency also claims that the Arbitrator's finding that the Union's requested remedy was reassignment constitutes a nonfact because the remedy requested in the grievance was full promotion potential for all similarly situated employees to the GS-13 level. In addition, the Agency asserts that a remedy requiring reassignments [v59 p631] would interfere with management's right to assign employees and assign work under § 7106(a)(2)(A) and (B) of the Statute.

B. Union's Opposition

The Union contends that the exceptions are interlocutory because the Arbitrator provided only an interim ruling on the jurisdictional issue. In this regard, the Union points out that the Arbitrator ordered a hearing on the merits of the grievance. The Union also claims that the exceptions do not present any extraordinary circumstances warranting review.

The Union also contends that the award is not contrary to § 7121(c)(5) of the Statute. According to the Union, the Agency's classification exception "merely repeats the argument it unsuccessfully made before the [A]rbitrator." Opposition at 5. Also according to the Union, the award is not based on a nonfact. In this regard, the Union claims that the requested remedy sought not only "full promotion potential for all similarly situated employees," but also "such other relief as may be just" and the Agency has not demonstrated why reassignment may not be considered to be part of the "other relief." *Id.*

IV. Analysis and Conclusions

Section 2429.11 of the Authority's Regulations provides: "[T]he Authority . . . ordinarily will not consider interlocutory appeals." In arbitration cases, the Authority will not resolve exceptions filed to an arbitration award unless the award constitutes a complete resolution of all of the issues submitted to arbitration. See, e.g., *United States Dep't of Health and Human Servs., Ctrs. for Medicare and Medicaid Servs.*, 57 FLRA 924, 926 (2002) (*HHS*). The parties' agreement to conduct a separate hearing on a threshold issue does not convert the threshold ruling into a final award subject to exceptions under § 7122(a) of the Statute. See *HHS*, 57 FLRA at 926; *United States Dep't of the Treasury, Internal Revenue Serv., L. A. Dist.*, 34 FLRA 1161, 1163 (1990).

The Agency contends that the exceptions are not interlocutory because the Arbitrator resolved the only issue -- arbitrability -- stipulated by the parties. However, as the Union argues, the award ordered the parties to proceed to a hearing on the merits issues raised in the grievance and submitted to arbitration. See Award at 7. Further, although the stipulated issue before the Arbitrator involved only arbitrability, the Arbitrator found, and there is no dispute, that the parties' agreement requires arbitrability determinations to be made prior to a hearing on the merits of a grievance. See Award at 4. In these circumstances, we conclude that the exceptions are interlocutory. See *United States Dep't of Defense, Nat'l Imagery and Mapping Agency, St. Louis, Mo.*, 57 FLRA 837, 837 n.2 (2002).

The Authority has held that review of interlocutory exceptions is warranted where the exceptions present a plausible jurisdictional defect, the resolution of which would advance the ultimate disposition of the case. See *United States Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project, Wapato, Wash.*, 55 FLRA 1230, 1232 (2000). Here, the Agency contends that, if the exceptions are interlocutory, then its exceptions raise a plausible jurisdictional defect because the Arbitrator's finding of arbitrability is contrary to § 7121(c)(5) of the Statute.

A grievance concerns the classification of a position within the meaning of § 7121(c)(5) of the Statute where the substance of the grievance concerns the grade level to which the grievant could receive a noncompetitive career promotion. See *United States Dep't of Agric., Agric. Research Serv., Eastern Reg'l Research Ctr.*, 20 FLRA 508, 509 (1985). In contrast, where an arbitrator determines a grievant's entitlement to a temporary, career-ladder, or other noncompetitive promotion based on performance of previously-classified duties, the award does not concern classification matters. See *United States Dep't of Health and Human Servs. Region X, Seattle, Wash.*, 52 FLRA 710, 715 (1996). 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*. See *United States Dep't of the Army, United States Army Corps of Eng'rs, Northwestern Div., Portland, Or.*, 59 FLRA 443, 445 (2003).

The Agency contends that the grievants are seeking reclassification of their permanent positions. As set forth below, there is support in the record for this contention and, if it is correct, then the grievance involves a classification matter within the meaning of § 7121(c)(5). Thus, the Agency's exceptions present a plausible jurisdictional defect.

Recently, the Authority granted review of -- and denied on the merits -- an interlocutory exception, holding that the exception raised a plausible jurisdictional defect and that, whether or not the exception was meritorious, review would advance the ultimate disposition of the case. *Library of Congress*, 58 FLRA 486, 487 (2003) (Member Pope dissenting). As the exceptions present a plausible jurisdictional defect, we conclude that, applying *Library of Congress*, the jurisdictional issue should be resolved on the merits. [v59 p632] Nevertheless, for the reasons that follow, the record in this case does not

permit us to resolve the jurisdictional issue at this time. [n5]

The Arbitrator expressly found that the grievance "involves the fairness of advertisements and vacancy announcements, not the proper classification of a position and one's concurrent duties." Award at 6. The Arbitrator also expressly found that the requested remedy was the "reassignment of employees to reclassified positions." Award at 5, 6. In connection with the latter point, the Arbitrator's reference to "reclassified positions" is unclear: although it may reasonably be read to refer to reclassifying the grievants' permanent positions to have noncompetitive promotion potential to GS-13, it may also be reasonably read to refer to reassigning the grievants to the newly-established, already-classified positions with promotion potential to GS-13. The distinction between the two is critical because the Arbitrator: (1) would not have jurisdiction over a grievance concerning the promotion potential of employees' permanent positions; but (2) would have jurisdiction over a grievance alleging a right to be placed in previously-classified positions.

For the foregoing reasons, we remand the award to the parties. Absent settlement, the award must be resubmitted to the Arbitrator for clarification of the jurisdictional issue.

The Authority remands the award to the parties for action consistent with this decision.

Footnote # 1 for 59 FLRA No. 116 - Authority's Decision

Article 22 § 22.05(5) excludes from the scope of the negotiated grievance procedure "[t]he classification of any position which does not result in the reduction in grade or pay of an employee" Exceptions, Exhibit 2.

Footnote # 2 for 59 FLRA No. 116 - Authority's Decision

The Arbitrator noted that pursuant to Article 22 § 22.14, an arbitrability determination must be made prior to a hearing on the merits of this grievance.

Footnote # 3 for 59 FLRA No. 116 - Authority's Decision

According to the Arbitrator, the MOU "allows an employee who is reassigned to a reclassified position with greater promotion potential to attain the new career ladder potential without competition." Award at 6.

Footnote # 4 for 59 FLRA No. 116 - Authority's Decision

The Arbitrator also ordered the Agency to provide the Union certain information. As no exceptions were filed to this aspect of the award, we do not address it further.

Footnote # 5 for 59 FLRA No. 116 - Authority's Decision

Member Pope dissented in *Library of Congress* on the ground, among others, that granting interlocutory review should be restricted primarily to cases where the excepting party demonstrates that the arbitrator lacks jurisdiction. 58 FLRA at 489. Here, as the record does not permit resolution of the jurisdictional issue at this time, Member Pope agrees that the award must be remanded.