

67 FLRA No. 2

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R4-17
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
HAMPTON, VIRGINIA
(Agency)

0-AR-4825

DECISION

October 5, 2012

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Robert E. Nagle filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

As relevant here, the Arbitrator resolved an arbitrability issue. The Arbitrator concluded that the issue of whether the grievants' positions should be aligned under a different position description was non-arbitrable as a classification matter within the meaning of § 7121(c)(5) of the Statute and Article 44 of the parties' agreement.

For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Agency's medical center has six distinct medical-service areas. Award at 2-3. Each of the three grievants works as an administrative officer in a separate medical-service area – one in primary care, one in surgical, and one in spinal cord injury and disorders. *Id.* at 2. The Agency's other administrative officers work in the remaining three medical-service areas – mental

health, medicine, and GREC.¹ *Id.* at 2-3. Until January 2008, all of the Agency's administrative officers worked under the same position description, PD 2128. *Id.* at 2. PD 2128 classified the administrative officers' position at the general schedule (GS)-9 level. *Id.*

In 2008, the Agency's administrative officers working in the mental health, medicine, and GREC medical-service areas requested a classification review from the Agency. *Id.* at 3. Along with their request, they submitted their administrative officer position descriptions and evidence of additional duties related to their work in those service areas. *Id.* Based upon the additional duties, the Agency issued those administrative officers a new position description, identified as PD 2228, which upgraded the positions to GS-11 (2008 reclassification). *Id.*

In August 2011, the Union filed a grievance alleging that the Agency violated Article 16, Section 1.D of the parties' agreement² by failing to properly align the grievants' positions under PD 2228. The Union requested that the grievants be "aligned under the current PD [2228] . . . and that they be compensated for the difference between the GS-9 and GS-11 salary for the period covering January 30, 2008 to the present." *Id.*

When the parties could not resolve the grievance, they submitted it to arbitration. *Id.* at 1-2. The Arbitrator framed the issue as "[w]hether the [g]rievance [i]nvolves 'the [c]lassification of [a]ny [p]osition.'" *Id.* at 7.

The Arbitrator found the grievance non-arbitrable as a classification matter barred by § 7121(c)(5)³ and by Article 44 of the parties' agreement.⁴ *Id.* at 8, 11. Specifically, the Arbitrator found that the grievance concerns a classification matter because it challenges the grade level of the duties performed by the grievants and whether the grievants' positions should be reclassified consistent with PD 2228. *Id.* at 8, 10-11. In reaching this conclusion, the Arbitrator rejected the Union's argument that the only issue before him was the Agency's failure to properly realign the

¹ The record does not define the term "GREC." Therefore, we refer to this service area only by its acronym.

² The relevant text of Article 16, Section 1.D states that "position descriptions will be kept current and accurate, and positions will be classified properly Changes to a position will be incorporated in the position description to assure that the position is correctly classified/graded to proper title, series and grade" Award at 5.

³ Section 7121(c)(5) excludes from the scope of grievance procedures under the Statute, "any grievance concerning . . . classification of any position which does not result in the reduction in grade or pay of an employee." 5 U.S.C. § 7121(c)(5).

⁴ The pertinent section of Article 44 restates the statutory language of § 7121(c)(5). Award at 5.

grievants' positions under PD 2228 and to compensate them accordingly. *Id.* at 9-10. In this connection, the Arbitrator found that the Agency's 2008 reclassification action was unique to the administrative officers performing additional duties in the particular Agency medical-service areas addressed in the 2008 reclassification (mental health, medicine, and GREC). *Id.* at 9. The Arbitrator also found that the 2008 reclassification action did not include consideration of the grievants' positions and duties, or their medical-service areas (primary care, surgical, and spinal cord injury and disorders). *Id.* at 9-10.

The Arbitrator likewise rejected the Union's claim that a 2011 letter from the Office of Personnel Management (OPM) supported the Union's argument that the matter at issue is not a classification matter, but instead a matter of reassignment under PD 2228. *Id.* at 10-11. OPM's letter responded to the Union's 2011 request that OPM determine that the grievants' positions should be "properly aligned" under PD 2228 and that the Agency compensate the grievants with backpay from the date on which the administrative officer position was reclassified. *Id.* at 9-10.

In the response letter, OPM stated that the Union had no standing to file a classification appeal because the grievants had not provided the Union with written authorization to proceed on their behalf. *Id.* at 10. OPM also stated that "OPM's classification appeal [process] do[es] not cover [the grievants'] underlying dispute; i.e., that these three individuals be placed in the GS-11 position description because their [position description] was redescribed. Assignment[] to a position is a staffing action, not a classification action." *Id.* The Arbitrator found OPM's statement not "dispositive" of the arbitrability issue, concluding that "OPM was under the [mis]impression from the Union's [request] that [the grievants'] positions . . . had already been classified at the GS-11 level." *Id.*

Finally, the Arbitrator indicated that had the grievants wished to dispute the classification of their positions, they should have availed themselves of the provisions in the parties' agreement pertaining to the "classification review and appeal process" –provisions that provide a process separate and apart from the parties' negotiated grievance procedure. *Id.* 8, 11. "Unfortunately," the Arbitrator observed, "the grievants did not avail themselves earlier of . . . the [agreement's] classification review and appeal process." *Id.* at 11.

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that the Arbitrator's arbitrability determination is contrary to law for two

reasons. Exceptions at 4-6. First, the Union argues that the grievance does not concern classification, but rather "the Agency's ongoing failure to compensate the [g]rievants in accordance with their re-described position description." *Id.* at 5. Second, the Union argues that OPM made a determination in its response letter that the issue asserted in the grievance is not a classification matter. *Id.* at 6.

The Union also contends that the award is deficient as based on a nonfact because the Arbitrator erroneously found that the grievants did not avail themselves of the classification and review process described in the parties' agreement. *Id.* at 7-8. The Union argues that it "clearly established that the [g]rievants attempted to utilize the classification appeal process" provided for in the parties' agreement, and when they failed to resolve their claim through this process, they submitted a request to OPM. *Id.* at 8. As OPM advised that the matter was not "one of classification[,] but rather an assignment of work," the Union argues it pursued the only remaining avenue of relief – the parties' negotiated grievance procedure. *Id.* According to the Union, the Arbitrator's "gross error of fact" in this regard "led to an inappropriate result, eliminating the [g]rievant's only forum to seek relief." *Id.*

B. Agency's Opposition

The Agency asserts that the Union's contrary-to-law claim lacks merit because the Arbitrator properly found that the grievance was substantively non-arbitrable as a classification matter under § 7121(c)(5). *Opp'n* at 3. Specifically, the Agency argues that the Arbitrator properly found that the grievance concerns the grade-level of duties assigned to, and performed by, the grievants. *Id.* The Agency also argues that OPM made no "determination that this matter was not one of classification." *Id.* at 4. The Agency notes in this regard that OPM declined to issue a decision on the matter partly because the grievants did not sign the OPM letter or provide the Union with written authorization to proceed on their behalf. *Id.* at 4. Further, the Agency notes, the Arbitrator found the Union "inaccurately described [the] matter in the . . . letter to OPM." *Id.* Accordingly, the Agency argues, the Union's claim that OPM determined that the substance of the grievance is not a classification matter is "simply untrue." *Id.* at 4-5.

As to the Union's nonfact exception, the Agency contends the Union misstates the facts underlying the award. *Id.* at 5. The Agency claims the evidence presented to the Arbitrator demonstrated that the grievants did not follow the appropriate classification appeal channels as required by the parties' agreement. *Id.* at 5-6.

IV. Discussion

- A. The award is not contrary to § 7121(c)(5).

The Authority has held that where an arbitrator's substantive-arbitrability determination is based on law, the Authority reviews that determination de novo. *U.S. Dep't of Veterans Affairs Med. Ctr., Hampton, Va.*, 65 FLRA 125, 127 (2010). In applying a standard of de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Union's contrary-to-law exception challenges the Arbitrator's conclusion that the grievance is substantively non-arbitrable because it concerns a classification matter under § 7121(c)(5). Under § 7121(c)(5), a grievance concerning "the classification of any position which does not result in the reduction in grade or pay of an employee" is excluded from the coverage of negotiated grievance procedures. *U.S. Dep't of Transp., FAA, Atlanta, Ga.*, 62 FLRA 519, 521 (2008). The Authority has construed the term "classification" in § 7121(c)(5) as involving "the analysis and identification of a position and placing it in a class under the position-classification plan established by [OPM] under chapter 51 of title 5, United States Code." *Id.* Classification matters are also implicated "when the essential nature of a grievance is integrally related to the accuracy of the classification of the grievant's position, e.g., where the substance of the dispute concerns the grade level of the duties assigned to and performed by the grievant." *U.S. Dep't of Def., Marine Corps Logistics Base, Albany, Ga.*, 57 FLRA 275, 277 (2001).

The Union claims that the grievance is arbitrable because it merely concerns "the Agency's ongoing failure to compensate the [g]rievants in accordance with their re-described position description." Exceptions at 5. However, it is clear that the grievance concerns the classification of the grievants' positions. The grievance seeks to "align" the grievants' positions under PD 2228. Award at 7-8. But as the Arbitrator found, the Agency's 2008 reclassification action that established PD 2228 concerned *only* administrative officer positions other than the grievants', and the grade level of certain "additional duties" of those positions. *Id.* at 3, 9. And, as the Arbitrator also found, the 2008 reclassification did not include a review of the grade level of duties performed by the grievants. *See id.* at 9. The Union does not challenge these findings as nonfacts. Therefore, to fully resolve the substance of the grievance, the Arbitrator would be required to conduct the classification review that the Agency's classifier did not. But the Authority has

consistently held a grievance to be non-arbitrable under § 7121(c)(5) where an arbitrator's analysis involves the determination of the grade level of a grievant's duties. *See U.S. EPA, Region 2*, 61 FLRA 671, 675 (2006). Accordingly, based on this case law and because the Authority defers to an arbitrator's factual findings in the absence of a demonstration that the findings are nonfacts, e.g., *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008) (*Tinker AFB*), we find that the Union's claim fails to establish that the award is contrary to law.

The Union's contrary-to-law claim based on OPM's response letter is also without merit. The Union argues that the Arbitrator erred in his arbitrability determination because he did not find dispositive OPM's statement in its response letter that the matter is "not a classification action." Award at 10; *see* Exceptions at 6-7. The Union appears to take issue with the Arbitrator's factual finding that OPM was under the misimpression that the Agency had previously reclassified the grievants' positions in 2008. However, the Union does not challenge this finding as a nonfact. Because of the Authority's deference to an arbitrator's factual findings noted above, *see, e.g., Tinker AFB*, 63 FLRA at 61, we find that the Union's claim based on OPM's letter fails to establish that the award is contrary to law. Accordingly, for the reasons discussed above, we deny the Union's contrary-to-law exception.

- B. The award is not based on a nonfact.

The Union also argues that the award is deficient as based on a nonfact. Exceptions at 7-8. The Union contends that the Arbitrator's statement that "the grievants did not avail themselves earlier of . . . the classification review and appeal process" in the parties' agreement, Award at 11, is a "gross error of fact," Exceptions at 7. The Union argues that this error "led to an inappropriate result, eliminating the [g]rievant's only forum to seek relief." *Id.* at 8.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). The factual finding the Union challenges is not a central fact. The result the Arbitrator reached was that the grievance concerns a classification matter and that therefore, under § 7121(c)(5), the grievance is not subject to the parties' negotiated grievance procedure. Award at 8, 11. The factual issue the Union raises – whether the grievants availed themselves of an alternative procedure under the parties' agreement for resolving their classification concerns – is not central, and indeed is irrelevant, to the Arbitrator's arbitrability determination. Accordingly, we

find that the Union fails to show that the award is deficient as based on a nonfact.

V. Decision

We deny the Union's exceptions.