

American Federation of Government Employees, Local 1923 and Social Security Administration, Baltimore, MD

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The grievant claimed that she had been performing higher graded duties since at least 1994 and had not been properly compensated for that work. The agency argued that the claim was not grievable under the agreement because it concerned the classification of a position. The arbitrator concluded that the matter was arbitrable, but denied the grievance on the merits. Back in the early 1990s the grievant began to be given certain work assignments not specifically enumerated in her paralegal position description. Over the years, these assignments gradually expanded in volume and complexity. First, on the issue of arbitrability, the arbitrator did not agree with the agency argument that the grievance was a pure position classification masquerading as a temporary promotion and back pay case. The arbitrator noted that the union was seeking nothing more for the grievant than appropriate compensation for her claim that she should have been temporarily promoted. Authority precedent dictates that such grievances are grievable. Regarding the merits, the arbitrator found two flaws in the union's case. First, the union failed to establish that the grievant performed the grade-controlling duties of the higher position when she reviewed and analyzed requests for disclosure of information. Second, the arbitrator found that the evidence suggested that the grievant did not perform functions that were inconsistent with the paralegal specialist position.

Arbitrator: Laurence M. Evans

I. Statement of the Case

On February 12, 1999, the Grievant, a GS-1 1 paralegal, Series 950, in the Office of General Counsel (OGC), filed a grievance under the parties' National Agreement claiming that she had been performing higher graded duties since at least 1994 and had not been properly compensated for that work.

Throughout the grievance procedure, SSA denied the grievance, taking the position that the Grievant's claim was not grievable under Article 24, Section ') D.5. of the National Agreement because it concerned the "classification' of a position.

Nonetheless, the Union invoked arbitration and the matter was assigned to the undersigned pursuant to the parties' arbitration panel procedures. The hearing

commenced on November 3, 1999, at SSA Headquarters in Baltimore, NM. The parties were unable to complete their presentations on November 3rd and the matter was rescheduled for December 2, 1999. At the arbitration hearings, the parties had ample opportunity to examine and cross-examine witnesses under oath present evidence and argue their respective positions. A verbatim transcript of the proceedings was taken. On January 18, 2000, each side filed a post-hearing brief

The history of this dispute dates back to the early 1990s. At that time, the Grievant began to be given certain work assignments not specifically enumerated in her paralegal position description. Over the years, these assignments gradually expanded in volume and complexity until the latter part of 1997 when the Grievant came to believe that she was performing work classified by SSA at grades GS-12 and GS-13 in the Social Insurance Specialist (SIS) position, Series 105. The Grievant brought this situation to her supervisor's attention and it led to a "paper" audit of her duties, a "desk" audit of her duties, and an attempt by OGC management to get the Grievant's paralegal position reclassified at the GS-12 level. In the course of this activity, the Grievant's second-line supervisor, John M. Sacchetti, Associate General Counsel for Litigation, sent a memorandum*1 to Dan Stern, a senior classifier in the personnel office, in which Sacchetti set forth the OGC view of the duties the Grievant (and a co-worker) had come to perform over the years.

Additionally, the paralegals perform critical functions that are within the essential duties defined in the Social Insurance Specialist, GS-105-12, PD in the Office of Disclosure Policy. For example, the paralegals review and analyze requests for disclosure of information from individuals, other Federal agencies and public and private entities. They recommend release and denial of requested information based on the law and Agency policy and participate in agency workgroups dealing with disclosure issues. Similarly, they perform some of the key functions contained in both the Social Insurance Specialist, GS-105-12, PD in the Litigation Staff and the Disability Specialist, GS-12 PD in ODIO One of our primary concerns is to do our utmost to ensure that our employees are being compensated at the appropriate grade for functions similar to those performed by individuals working at higher grade levels.

Mr. Sacchetti's attempt to get the Grievant's position reclassified *2 at a higher grade went for naught as Mr. Stern, on December 29, 1998, wrote back to Mr. Sacchetti, stating, in part:

The comparative analysis done with other positions, such as the Disability Specialist, is not proper since these positions are covered by different Office of Personnel Management guidelines. Positions in which legal or quasi-legal knowledge is incidental or subordinate to program (GS-105) or other predominate subject matter knowledge cannot be used as a match. Series

detrimentations are made based on the work of the occupational group, which in this case is the Legal and Kindred Group which is GS-900.

In response to SSA's contention that the grievance is not grievable or arbitrable, the Union argues that this case is only about the Grievant's claim for a retroactive temporary promotion and resulting back pay for performing the duties of a higher graded position(s), the SIS, GS- 1 2 and GS- 1 3, Series 105. The Union expressly states that this matter is not about the classification or reclassification of the Grievant's paralegal position and it seeks no relief or remedy in that regard.

111. Relevant Contract Provisions

Article 24. "Grievance Procedure," Section 2 D. 5.

"Grievances on the following matters are excluded from the scope of this procedure:

5. the classification of any position which does not result in the reduction in grade or pay of an employee.*3

Article 26. "Merit Promotion." Section 16, "Temporary Promotions"

"When employees are temporarily assigned to a position of a higher grade for a period in excess of 30 days, the assignment must be made via temporary promotion effective the first day of the assignment."

Article 27, "Details." Section 1. "Definition"

"A detail is the temporary assignment of an employee to a different position or the same position for a specific period, with the employee returning to his/her regular duties at the end of the detail."

III. The Issues

The parties were unable to agree upon a stipulated issue(s) and thus left it to the Arbitrator to frame the issue(s). Having reviewed the issues as proposed by the parties, I find them to be as follows.

1. Is Ms. Harrison's February 12, 1999, grievance precluded from grievance/arbitration under Article 24 of the parties' National Agreement or by virtue of the provisions of the Statute?

2. If the grievance is grievable/arbitrable, is the Grievant entitled to a retroactive temporary promotion and back pay for performing, over a period of time, certain

duties also performed by higher graded GS12 and GS-13 Social Insurance Specialists, Series 105, working in the Office of Disclosure Policy?

IV. The Positions of the Parties

A. The Union:

With regard to SSA's contention that the grievance is neither grievable or arbitrable under the parties' agreement, the Union cites a substantial number of FLRA decisions supporting its position to the contrary. According to the Union, the FLRA has consistently held that where, as here, the dispute concerns whether the employee is entitled to a temporary promotion and back pay, the matter is grievable and arbitrable. See, inter alia, DOD, Norfolk Naval Shipyard, 55 FLRA 1014 (1999); SSA, OHA, Mobile, Alabama, 55 FLRA 778 (1999); Department of the Army, Fort Polk, LA, 44 FLRA 1548 (1992); and SSA, DHHS, Baltimore, MD, 38 FLRA 89 (1990). Where the dispute concerns the grade level of the duties performed by the employee, the FLRA finds such a dispute to concern the classification of a position and is, therefore, not grievable under Section 7121 (c)(5) of the Statute. The Union contends that the instant matter is only about the Grievant's entitlement to a temporary promotion and back pay and does not concern the classification of her GS- 11 paralegal position.

On the merits, the Union maintains that since the early 1990s the Grievant was assigned and has performed the duties of the SIS, GS-12, and since 1997 has also been assigned and performed the duties of the SIS, GS 13. The Grievant testified that she performs all of the duties listed on SIS, GS- 1 2 position description and that she performs many of the duties listed on the SIS, GS 131 position description. While the Grievant has never been officially detailed to a higher level position or received a temporary promotion for performing the duties of an SIS, the Agency's failure to do so is a violation of the National Agreement and constitutes an unwarranted and unjustified personnel action within the meaning of the Back Pay Act, 5 USC 5596 but for which she would have received additional pay.

Moreover, the Union contends that, under OPM Classification Decision No. 16-031 (March 1992), the Grievant has performed SIS GS-12 and GS- 1 3 grade controlling work because she performed the stated essential functions of these positions for more than 25 percent of the time. In this respect, the Union cites the decision of Arbitrator H. Ellsworth Steele in an SSA/AFGE case involving Article 26 of the instant National Agreement. There, Arbitrator Steele pointed out: "To be eligible for a temporary promotion under Article 26, Grievants must have spent at least 25% of their time performing the higher graded work. The parties agree on this point and arbitral and FLRA decisions support it...." In his Award, Arbitrator Steele concluded that the grievants were "constructively detailed" to a higher level position and directed that they be given "retroactive-temporary promotions" with back pay and interest.

Significant also to the Union's position is the "concession" made by Mr. Sacchetti in his October 16, 1998, memorandum to Mr. Stem wherein he stated that "[the Grievant] perform[s] critical functions that are within the essential duties defined in the Social Insurance Specialist, GS-1 105-12, PD in the Office of Disclosure Policy." Thus, according to the Union, there was nothing de minimus about the work performed by the Grievant while on a "constructive" detail.

Finally, the Union maintains, under the authority of the FLRA's decision in Department of Agriculture, U.S. Forest Service, 35 FLRA 542 (1990), that it is not significant that the Grievant performed the work at issue in another GS Series (105) in another SSA component the Office of Disclosure Policy. In the Forest Service case, the FLRA found that "the absence of a classified Forestry Technician GS- 11 position in the Wallowa Valley Ranger District (where the grievant worked) does not preclude the Grievant from being promoted temporarily In this case, the Arbitrator found that duties identical to those performed by the grievant were classified by the [Forest Service] at the GS- 11 level, albeit in other ranger districts within the Forrest...."

B. The Agency:

SSA challenges the Grievant's claim to a temporary promotion and back pay on a number of grounds. Initially, it argues that this dispute is not grievable under the National Agreement and Statute because it concerns the duties performed by the Grievant as a paralegal, GS- 11, and whether those duties want a higher grade. To the Agency, such a claim is precluded from the grievance procedure and arbitration; the Union's theory that the Grievant is entitled to a temporary promotion "is nothing more than a claim of retroactive reclassification by another name and ... is precluded by section 712 1 (c)(5) of the statute. ,*4

On the merits, SSA contends that the Union has failed to prove 'that the Grievant has any legal entitlement to higher level back pay for the work she performed since the early 1990s at either grade GS- 12 or GS- 13 in the SIS series. First, SSA contends that the duties performed by the Grievant that are at issue in this matter are duties that are well within the scope of, and compatible with, the Grievant's paralegal series (950) and not at all in line with SIS positions, Series 105. Because the Grievant's "disclosure" duties arise within the context of litigation, unlike the "disclosure" duties of SIS incumbents, the fact that this work "looks" comparable does not necessarily mean that the Grievant is entitled to higher level pay. Rather, to SSA, the Grievant is performing work that is within her paralegal job series even if SIS incumbents perform similar functions.

Second, SSA points out that the Grievant is not entitled to back pay for performing higher graded duties in her own paralegal series because the OGC's Division of Litigation, where the Grievant works, has no officially classified GS- 12 paralegal position. Although there are GS-12 paralegal positions in SSA

regional legal offices, according to SSA, the Grievant is not entitled to higher level pay because she has not shown that she performed the full range of GS-12 paralegal duties as set forth in the GS-12 paralegal position description.*5

Third, SSA argues that the Grievant has not established that she possesses the minimum OPM qualifications for the GS- 12 and GS- 13 SIS positions at issue here. Additionally, SSA notes that there is no evidence showing that the Grievant has met the time-in-grade requirements--one year at a GS 12--to be even eligible for back pay at the GS- 13 level.

Fourth, SSA maintains that the Grievant has failed to establish that she was ever "detailed" to perform the higher graded duties of the SIS positions because she continued to perform paralegal duties all the while. Thus, the Grievant has not established that the Grievant performed the full range of SIS duties sufficient to receive back pay. Moreover, SSA points out that management never certified that the Grievant had been detailed to another position. Finally, in this regard, SSA claims that under its own policy, "[a]n employee in one component cannot assume duties delegated to another component absent a formal agreement between the two components."*6

Fifth, SSA notes that "the grievant failed to prove that she performed even the grade-controlling duty of a Social Insurance Specialist at the grade 12 and grade 13 level."*7 Contrary to the claim of the Grievant, SSA contends that the Grievant did not perform all of the SIS GS-12 duties; moreover, SSA her contends that, of the "comparable" SIS duties the Grievant did perform, none of them was grade-controlling. In support of its position, SSA relies on the testimony of several of its witnesses, Etzion Brand, the Grievant's first-line supervisor; Willie J. Polk, Senior Policy Advisor in the Office of Disclosure Policy; Vivian Schimberg, an experienced senior position classifier in SSA's Central Classification Management office. SSA also relies on the testimony of Union witness Maureen Mulford, a GS-13 SIS in the Office of Disclosure Policy.*8 Essential to SSA's position herein is that Ms. Schimberg testified that "the grade-controlling duty [of the GS-12 Social Insurance Specialist PD] is the development of policies and procedures to support and implement the Agency disclosure policy, not the review and analysis of a request for disclosure."*9 Mr. Brand testified that the "disclosure" work performed by the Grievant arises out of litigation and that she is not involved in developing policy and procedures as is the SISGS-12.*10 Mr. Polk testified that the so-called "comparable" disclosure duties performed by SIS employees amounted to a very small percentage of SIS work time, around one percent. Ms. Mulford's testimony shows that she has worked with the Grievant for a number of years and thinks highly of her skills and abilities. However, there is nothing in Ms. Mulford's testimony which establishes that the Grievant performed disclosure policy work as set forth in the SIS position description at either the GS-12 or GS-13 level.

Finally, SSA argues that the Union's contention that the Grievant is entitled to a temporary promotion and back pay because she performs certain "higher graded" duties at least 25 percent of her time in a "mixed grade" context is not applicable in the instant matter because the "higher graded" work must involve a classified position in the same series. According to SSA, this circumstance is not presented by the instant case.

VI. Analysis and Opinion

A. Ms. Harrison's grievance is grievable under the National Agreement and the Statute.

I do not agree with SSA's contention that Ms. Harrison's grievance is a pure position classification dispute "masquerading" as a temporary promotion and back pay case. Here, the Union is seeking nothing more for the Grievant than appropriate compensation for her claim that she should have been temporarily promoted to a GS- 1 2 and GS- 1 3 SIS position for performing certain duties the Union asserts warrant higher level pay. The Union is not asking that I classify the Grievant's position or even issue an award directing that her position be reclassified. The FLRA has consistently held that grievances like the instant one are grievable and are not precluded from the grievance procedure by virtue of Section 712 1 (c)(5) and obviously by implication from the grievance procedure under Article 24, Section 2 D.5. of the National Agreement. (See cases cited above in Section 4 A.)

B. The evidence does not show that the Grievant is entitled to a retroactive temporary promotion and back pay as claimed.

I have carefully reviewed the entire record in this matter, including the testimony of the witnesses for both sides. I find that the Union has failed to meet its burden of proof in at least two significant respects and, as a result, I am unable to conclude that the Grievant is entitled to a temporary promotion and back pay. The first flaw in the Union's theory of the case is that it did not establish that the Grievant, in fact, performed the grade-controlling duties of the GS- 1 2 and GS- 1 3 SIS, Series 105 when she reviewed and analyzed requests for disclosure of information under the Privacy Act and FOIA and responded to various inquires in this regard as well. SSA witness Vivian Schimberg testified without contradiction that:

A grade-controlling duty is one that represents the major function of the position.

It is a regular, recurring function. It is essential to the work of that component... and must be performed. must involve at least 25 percent of the work of the position.... [T]he grade-controlling function [of the GS-12 SIS] is the development of policies and procedures which support and implement the agency's disclosure policy. Tied into that are the review and analysis of proposals for that..... [T]he

grade-controlling duty (of the GS-13 SIS) is the development of the policy and planning, directing and performing of the of the complex studies related to that development. They are the people in the agency who are considered the agency expert and a lead on any type of major policy development projects or studies. [Tr. 317-319]

On cross-examination, Ms. Schimberg conceded that the Grievant's FOIA and Privacy Act disclosure work was an essential function of the GS- 1 2 SIS position but that it was "not necessarily a grade-controlling function" and that there [was] no reference anywhere in any evaluation that would say [that FOIA and Privacy Act disclosure work] was a grade-controlling function." (Tr. 328-330)

Significant also is the undisputed testimony of SSA witness Willie Polk who testified that the percentage of time spent by SIS employees on disclosure matters was "very small," "about one percent." (Tr. 215-216)

The testimony of Union witness Maureen Mulford in the Nona Brooks case-stipulated by the parties as applicable to the Harrison case-is not helpful to the Union's cause. Ms. Mulford testified that her work overlaps with the Grievant in the area of disclosure of Privacy Act and FOIA inquiries but that "we [SISs] write the policy for privacy and FOIA She [the Grievant] performs the area of the disclosure ... after we make the decision on the disclosure a lot of our job ... is the policy area...." *11

Moreover, the Grievant's supervisors since the early 1990s, Mr. Brand and Mr. Sacchetti each testified that she was not involved in or responsible for policy matters under the Privacy Act and FOIA. The Grievant herself stated, on cross-examination, with respect to the GS- 1 3 SIS position:

I don't direct complex studies or projects. I don't have anything to do with the data exchange agreements. I don't conduct oversight reviews. I don't give orientation and training to new analysts. (Tr. 1 00)

Although the Grievant testified that she "develops policies and procedures which support implementation of the Agency's disclosure policy under the Privacy Act and FOIA," there is little probative evidence supporting this claim. And if she has performed these duties, there is no supporting evidence as to how much time she devotes to them. I do not see her role on the Touhy work group as compelling a contrary conclusion.

The fact that the Grievant spends more than 25 percent of her time on privacy and FOIA disclosure duties is not significant unless those duties are grade-controlling for the higher level position at issue. An employee can spend 100 percent of his/her time on an essential but not grade-controlling duty of a classified higher level position and still not be entitled to higher level pay when performing those overlapping work functions. In such a situation, the employee

may be working under an inaccurate position description and/or may have a claim for reclassification to a higher grade under applicable procedures, but a temporary promotion and back pay would not be warranted. The Union has thus failed to establish that the Grievant has performed any grade-controlling functions of the SIS GS- 1 2 or GS- 1 3 in the course of performing her GS- 1 1 paralegal duties or that, if she has, she performed those duties at least 25 percent of the time.

Another obstacle to the Grievant's claim for a temporary promotion and back pay lies in the nature of the disputed duties themselves. The Grievant readily concedes that the disputed work arises in the OGC out of litigation. She is not assigned work that originates in the Office of Disclosure Policy. As a result, the functions she performs that are at issue herein are intrinsically consistent with the Paralegal Specialist Series, GS-950 which provides, among other things:

[Paralegal] specialists ... perform substantive legal analysis of requests for information under the provisions of various acts; ... other similar legal support functions which require discretion and independent judgment in the application of a specialized knowledge of laws, precedent decisions, regulations, agency policies and practices analyzing legal issues involved in requests for agency records; analyzing subpoenaed documents for possible patterns and trends relevant to litigation [*12]

Even assuming arguendo that the disputed duties were grade controlling for the GS-12 SIS position, that circumstance might not entitle the Grievant to higher level pay because those duties, arising as they do out of OGC litigation, are inherently the proper function of a paralegal specialist. Such a circumstance might mean that the paralegal was not working in the correct grade level (not an issue in this case) but the performance of those functions would not create back pay liability under the theory advanced here by the Union.

In view of the foregoing, I decline to make any findings on any of the other defenses raised by SSA in this matter. I therefore find that the Union has failed to meet its burden of proof in establishing that the Grievant is entitled to a temporary promotion and back pay as claimed in her February 12, 1999, grievance.

VII. The Award

For the reasons given above, I find that the grievance of Sandra M. Harrison is grievable and therefore arbitrable. On the merits, for the reasons given above, her grievance is hereby denied.

FOOTNOTES:

*1 Union Exh. No. 7.

*2 At all relevant times, OGC headquarters had no classified GS- 12 paralegal positions. Such a position does exist, however, in SSA Regional Offices.

*3 Article 24, Section 2 D.5. is a restatement of 5 USC 712 1 (c)(5) (the Statute).

*4 Tr., at 18.

*5 The Union has made no claim herein that the Grievant is entitled to higher level pay based on the theory that she has been performing the duties of the paralegal, OS- 12.

*6 SSA Brief, at 35.

*7 SSA Brief, at 38.

*8 Ms. Mulford's testimony was given in another arbitration case involving the Grievant's colleague, NU. Nona Brooks, who has an identical grievance currently awaiting a decision from Arbitrator Irwin Kaplan. Counsel for the parties agreed to incorporate Ms. Mulford's testimony into the record in the instant matter, along with other testimony from the Brooks case.

*9 Tr., at 318.

*10 W. Saccherti, the Grievant's first-line supervisor from 1990 through 1996, testified that she was not involved in developing disclosures policies and procedures during his time as the Grievant's supervisor.

*11 Agency Exh. No. 13.

*2 Agency Exh. 2, at 3.