

**American Federation of Government Employees, Local 1923 and
Department of the Navy, Naval Sea Logistics Center, Detachment Atlantic,
Indian Head, MD**

101 FLRR 2-1196

Appealed (O-AR-3441)

July 16, 2001

The Arbitrator found the grievance was a classification matter and beyond the scope of arbitration, but did find the Agency violated the CBA by not providing the grievant with an accurate position description.

The grievant filed a grievance that she was a GS-12 computer specialist performing the duties of a GS-13 computer specialist and should receive a temporary promotion and back pay. At Step 2 of the grievance procedure, the union claimed the agency discriminated against the grievant on the basis of race and sex. The agency denied the grievance. At arbitration, the agency argued that the grievance was a classification issue and not arbitrable. The arbitrator found the grievance was a classification issue and therefore beyond the scope of arbitration. The arbitrator did find that the agency violated the master agreement because it did not provide the grievant with an accurate position description. The arbitrator then found that the grievant had not proven the agency discriminated against her. The arbitrator ordered the agency to provide the grievant with a proper PD.

Arbitrator: Laurence M. Evans

1. Statement of the Case

The Grievant has been a GS-12 computer specialist (334) since June 7, 1998. She began her employment with the Activity in 1992 as GS-5 computer assistant. The Grievant contends that she started performing the higher graded duties of a GS-13 computer specialist in 1997 after colleague Nancy Burnett, a GS-12 computer specialist, left the employ of the Activity. Following Ms. Burnett's departure, work on the Activity's web page increased significantly and substantially, according to the Grievant, and so did her web duties and responsibilities. She became her section's team leader and de facto "webmaster." Over time, the Grievant contends that her duties and responsibilities, which she described at length in her testimony, evolved into the kind of work that should be classified at the GS-13 level, and that for approximately the last two years, she has been under-graded and under-compensated.

On May 1 2000, the Union filed a Step I grievance on behalf of the Grievant, seeking, among other things, a retroactive temporary promotion and back pay for the Grievant on the basis that she had been constructively promoted to a GS- 1 3 computer specialist position some time after Nancy Burnett left the Activity in 1997.¹ The Activity disputed the Grievant's contention that her expanded "webmaster", work warranted GS-13 pay and denied the grievance. Thereafter, the Union filed grievances at Step 2 and at Step 3 of the grievance procedure with no success. At Step 2, orally, the Union raised the claim that the Activity had discriminated against the Grievant due to her race and sex. At Step 3, the Union put that claim into writing. In its Step 3 response, the Activity again denied the grievance in its entirety and stated, additionally, with respect to the Grievant's claim that she had been discriminated on the basis of her race, that:

The fact that black females are underrepresented at the GS- 1 3 Computer Specialist series is not sufficient evidence to support a claim of discrimination against the grievant.

At the arbitration hearing, the Activity argued that the Union did not timely raise the discrimination issue under Article 9 of its Master Agreement.

This matter was heard on various dates between February 7, 2001 and April 19, 2001, at Indian Head, MD. The parties had ample opportunity to examine and cross-examine witnesses under oath, present evidence and argue their respective positions as warranted. A verbatim transcript of the proceeding was prepared by a court reporting service. Post-hearing briefs were received from each side on July 11, 2001.

II. Relevant Statutory and Contract Provisions

Section 712 1 (C)(5) of the Federal Service Labor-Management Relations Statute (Statute) provides as follows:

The preceding subsections of this section shall not apply with respect to any grievance concerning ... the classification of any position which does not result in the reduction in grade or pay of an employee.² [Footnote added.]

Article 19, Section I of the parties' Master Agreement provides, in relevant part, as follows:

The parties agree that position descriptions will accurately reflect the duties and functions performed by bargaining unit employees....

Article 38, Section I of the Master Agreement provides, in relevant part:

The Employer and the Union affirm their commitment to the policy of providing equal employment opportunities to all employees and to prohibit discrimination because of race The Employer will have a positive, continuing, and results-oriented program of affirmative action.

Article 38, Section 2.a. (Affirmative Employment Program Plan) of the Master Agreement provides, in relevant part,

Establishment and implementation of the Affirmative Employment Program Plan is required by EEOC regulations and the Department of the Navy. The Employer will continue to provide overall management support and budgetary planning to achieve affirmative action objectives throughout the Activity....

Article 38, Section 2.b of the Master Agreement provides, in relevant part:

The Employer's plan shall comply with EEOC regulations and directives which currently states as follows:

(1) A comprehensive program analysis of the current status of all affirmative action efforts including.

(b) Workforce analysis.

1. Analysis of the Activity's workforce by Professional, Administrative, Technical ... and major occupations.
2. Comparison of the Employer's workforce with the previous year's workforce.
3. Comparison of the Employer's workforce with the appropriate Civilian Labor Force (CLF).

Article 38, Section 2.h.(Program evaluation) of the Master Agreement provides, in part:

(4) Establishment of numerical objectives (goals) for each job category or major occupation where there is a manifest imbalance or conspicuous absence of EEO group(s) in the workforce[.]

II. The Issues

The parties were unable to agree on a stipulated issue(s), thus leaving it to the arbitrator to frame the issues. Having reviewed the issues as proposed by the parties, I find them to be as follows:

1. Is the grievance, in whole or in part, precluded from grievance/arbitration by virtue of 5 U.S.C 7121(C)(5), as a classification dispute?
2. If the grievance is arbitrable in whole or in part, did the Activity violate any provision of the parties' Master Agreement by failing to temporarily promote the Grievant to a GS- 13 computer specialist position?
3. If the Activity violated the Master Agreement, what shall the appropriate remedy be?

IV. Analysis and Opinion

The fundamental question presented by this matter is whether it concerns; a "garden variety" temporary promotion case, as the Union insists it does, or whether it involves the classification of a position and, therefore, is not grievable or arbitrable under the Statute, as argued by the Activity. The thrust of the Union's argument is predicated entirely on the hypothesis that the duties and responsibilities the Grievant has been performing are, in fact, higher level duties that warrant higher level pay. But nowhere in this record has it been established that the duties and responsibilities at issue warrant, or are worth, the higher level pay of GS-13.

I have carefully considered this matter and find that it involves the pure classification of a position and that I therefore lack jurisdiction to resolve this dispute under the Statute and under the parties' Master Agreement. This case is about the evolving duties and responsibilities performed by the Grievant over the last several years—duties and responsibilities that have been and are being performed in an ever-advancing technological field, the internet. The Activity employs a number of GS-13 computer specialists in the 334 series but none of them performs the kinds of duties performed by the Grievant for the Activity. The Grievant's claim to higher level pay is that her expanded and evolving duties have risen to the level of GS-13 because she performs the key grade controlling duties set forth in the Activity's GS-13 PD. Thus, to the Grievant, when she looks at the GS-13, series 334 PD, and sees phrases such as "lead systems analyst," "leader of a project team," "maintain major data processing systems," "using advanced computer technologies," "developing ... feasibility studies," "establishing milestone timeframes," "assigning technical tasks to team members," etc, she sees a reflection of the duties and responsibilities she believes she has been performing but at the GS-12 level.

The problem the Union has here is that the duties and responsibilities currently being performed by the Grievant have not been subject to a definitive and official

position classification analysis. There is no evidence in the record that these duties have been properly classified by the Activity or appropriate outside authority as warranting the GS-13 level. The Grievant's GS-12 position may well have evolved into a GS-13 position over time but I am not authorized to make that determination under the Statute. If there were a GS-13 position at the Activity involving duties like those performed by the Grievant, then I would have a basis to determine whether or not the Activity had constructively detailed the Grievant to an existing higher graded position in violation of Article 21 of the parties' Master Agreement. However, on this record, I am being asked to determine the worth of the Grievant's actual duties and responsibilities in a vacuum and that, in my view, is precisely why this particular kind of dispute is beyond the scope of an Arbitrator's authority and is a matter appropriately left to the position classification experts. I therefore decline to render any opinion as to whether the Grievant's current duties and responsibilities warrant a higher grade or not.

On the other hand, what is arbitrable in this matter is the Union's claim that the Grievant does not have an accurate PD, in violation of Article 19, Section 1. The evidence shows that the parties are attempting to update the Grievant's PD and have traded proposals in this regard. It is highly likely that the Grievant's PD does not accurately reflect her current duties and responsibilities and I will direct below that the Activity continue to study this matter and provide the Grievant with an accurate PD, as is required by the Master Agreement.

What is also arbitrable in this matter is the Union's claim that the Activity has discriminated against African-Americans for GS-13 computer specialist positions, in violation of Article 38. I do not agree with the Activity that this particular issue was not timely raised. It was raised unofficially at Step 2 by the Union and then officially at Step 3 and was responded to by management on the merits in its Step 3 answer. Moreover, the claim is by its nature a continuing violation that could be raised at any time in connection with any related matter of discrimination, or as a separate matter under Article 38. In this regard, Article 9, Section 5.a., provides, in relevant part, "An employee and/or the Union shall present the grievance ... in Writing within thirty (30) calendar days of the date that the employee or Union became aware ... or an time if the act or occurrence is of a continuing nature." (Emphasis supplied.)

The Union has submitted raw statistical data which should be of concern to all parties. That information purports to show that there are no African-Americans holding GS-13 computer specialist positions at the Activity. Significantly, the Activity conceded in its Step 3 response to the Union's grievance that African-American females were underrepresented in the GS- 1 3 computer specialist series. There may well be a variety of reasons for this circumstance which, upon further scrutiny, would establish that no unlawful or inappropriate conduct has occurred over time.

Notwithstanding the Union's statistical data, however, looking at the Grievant's claim of discrimination on an individual basis, I find that there is no direct evidence in the record that the Grievant herself has been the victim of racial discrimination or that management's decision not to promote her was based on any unlawful motivation. The evidence in this matter does not establish that the Union has met its burdens under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Among other factors, the Grievant was promoted to a GS-12 computer specialist position as a result of a gradual accumulation of duties (GAD) by some of the same people who currently believe in good faith that her current duties and responsibilities do not warrant the grade of GS-13. Moreover, the two GS-12 Caucasian employees who received GS-13 positions as a result of a GAD, performed computer related duties substantially dissimilar from those performed by the Grievant, and, contrary to the Union, I cannot draw any negative inferences against the Activity from this particular circumstance.

Nonetheless, the absence of African-Americans at the GS-13 computer specialist level potentially suggests the kind of systemic problems which Article 38 of the parties Master Agreement was obviously designed to address and resolve.

Accordingly, I am directing below in the Award that the Activity look into and determine whether "there is a manifest imbalance or conspicuous absence of EEO group(s) in the [GS-13 computer specialist] workforce" and, if so, take the necessary and appropriate steps to comply with Statute, regulation and contract.⁴

V. The Award

The grievance of Ms. Shelly J. Posey is sustained in part and denied in part, as follows:

A. The Activity shall, within 45 days of its receipt of this Award, review the Grievant's PD and provide her with an up-to-date and accurate position description reflecting her current duties and responsibilities, as prescribed by Article 19, Section I of the parties' Master Agreement.

B. Consistent with the discussion above, I am remanding the portion of the grievance that concerns the Activity's affirmative action obligations under Article 38 of the Master Agreement to the Activity. The Activity shall forthwith undertake a review of its affirmative action obligations to determine whether or not there is a "manifest imbalance or conspicuous absence" of African-Americans in its complement of GS-13 computer specialists and, upon completion of its review, promptly advise the Union, in writing, of its findings.

C. For the reasons set forth above in Section IV, under the dictates of 7121 (C)(5) of the Statute, I find that the grievance is neither grievable nor arbitrable to

the extent it calls for the Arbitrator to classify the Grievant's disputed duties and responsibilities at a particular grade level, which I find that it does.

D. I am retaining jurisdiction of this matter for 90 days from the time this Decision & Award becomes final and binding in order to resolve any disputes that may arise over the implementation of this Award.

Laurence M. Evans, Arbitrator
July 16, 2001, Rockville, MD

fn1 The Union also claimed that the Activity had failed to provide the Grievant with an accurate position description (PD).

fn. Article 9, Section 2.d.(5) of the parties' Master Agreement additionally provides that their negotiated grievance procedure does not cover "[t]he classification of any position which does not result in the reduction in grade or pay of any employee."

fn2 Article 9, Section 2.d.(5) of the parties' Master Agreement additionally provides that their negotiated grievance procedure does not cover "[t]he classification of any position which does not result in the reduction in grade or pay of any employee."

fn3 This issue also encompasses the question whether the Grievant was denied a temporary promotion to a GS4 3 computer specialist position on the basis of her race (African-American) under Article 38 of the Master Agreement. It further includes the question whether the Grievant currently has an up-to-date and accurate PD as required under Article 19, Section I of the Master Agreement.

fn4 See Article 38, Sections 1, 2 and 3 of the Master Agreement.