BEFORE ARBITRATOR
DR. ANDREE Y. MCKISSICK

In the Matter of
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC
(Agency)

And

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

GRIEVANCE OF THE PARTIES
ON
QUESTION OF ARBITRABILTY FMCS CASE NUMBER 03-07743

DEPARTMENT'S BRIEF

STATEMENT OF THE CASE

This case arose after Management denied the Union's Grievance of the Parties as excluded from the grievance procedure. The denial was based on Section 7121 (c) (5) of the Federal Service Labor Management Relations Statute, which excludes from the negotiated grievance procedures the classification of any position, which does not result in the reduction in grade, or pay of an employee and Article 22, Section 22.05 (5) of the HUD/AFGE Agreement. The Union invoked arbitration. Since an issue involving the classification of a position, which does not result in the reduction of grade or pay of any employee, may not be brought before an arbitrator, Management declined to participate in the selection of an arbitrator for this case. The Union then requested the Federal Mediation and Conciliation Service (FMCS) to make a direct designation of an arbitrator. On March 31, 2003, FMCS complied with the request. The Arbitrator concluded the grievance was arbitrable because it did not involve a classification matter and directed the parties to a hearing on the merits of the grievance. The Agency filed exceptions and the Union opposition to exceptions with the FLRA. The FLRA remanded the award to the parties where the award must be resubmitted to the Arbitrator for clarification of the jurisdictional issue. In accordance with Article 22, Section 22.14 of the Agreement, this Management Argument is submitted to demonstrate that the matter in question is not grievable, nor within the jurisdiction of the arbitrator.

ISSUES

WAS THE ISSUE FAIRNESS OF ADVERTISEMENTS OR CLASSIFICATION

IS THE GRIEVANCE NON-GRIEVABLE/ARBITRABLE PURSUANT TO SECTION 7121 (c) (5) OF THE STATUTE AND ARTICLE 22, SECTION 22.05 (5) OF THE AGREEMENT

IS THERE AN APPROPRIATE REMEDY IS THIS CASE

FACTS

The Grievance alleged that Management either advertised or advertised and filled certain positions with promotion potential to the GS-13 level. It also states that the positions were open to current federal employees and the general public while similarly situated HUD staff has promotion potential only to the GS-12 level. The alleged harm committed by such advertisements is that employees do not have the opportunity to be noncompetitively promoted to the GS-13 level. The Grievance alleges that the foregoing violates Sections 4.01, 4.06, 9.01 and 13.01 of the Agreement as well as unspecified sections of the Statute and unidentified law rule and regulation. The remedy sought is " …that the full promotion potential for all similarly situated employees be GS-13, and such other relief as may be just." The Grievance does not identify what "such other relief as may be just" may be. The record failed to show where any employee suffered a loss of grade or pay due to Management's alleged action in this case. Yet the remedy requires the reclassification of positions with GS-12 promotion potential to that of GS-13 promotion potential. Also important to note, Article 9 Position Classification Section 9.05 of the Agreement provides ways in which relief can be granted related to the grading of jobs. However, this grievance does not include any of those methods.

The Federal Labor Relations Authority (FLRA) has consistently held that where as here, the essence of a grievance concerns the classification of a position within the meaning of section 7121 (c) (5) of the Statute, and that section 7121(c) (5) precludes such a grievance from coverage by a negotiated grievance procedure when there has been no reduction in the grade or pay of an employee. National Treasury Employees Union, Chapter 73 v. Department of Treasury, Internal Revenue Service 57 FLRA No. 73 (2001), Social Security Administration v. American Federation of Government Employees, Local 1923, 31 FLRA No. 73 (1988), Social Security Administration, Baltimore, Maryland v. American Federation of Government Employees, Local 1923, 20 FLRA No. 82 (1985), Veterans Administration Medical Center v. American Federation of Government Employees, Local 547 19 FLRA No. 129 (1985). The FLRA distinguishes between non-grievable classification matters, and issues regarding the performance of higher graded duties, which are grievable. A objective reading of the Grievance compels the conclusion that it concerns the classification of positions since, as noted above, the remedy seeks that"…the full promotion potential for all similarly situated positions be GS-13…" It must also be pointed out that nowhere in the record is there a claim that any member of the class of grievants should be compensated for the performance of higher graded duties.

ARGUMENT

WAS THE ISSUE FAIRNESS OF ADVERTISEMENTS OR CLASSIFICATION

The Union is alleging that the Agency denied similarly situated employees the opportunity to be promoted non-competitively to GS-13 positions advertised in Fiscal year 2002. The arbitrator stated in her decision that the grievance "involves the fairness of advertisements and vacancy announcements, not the proper classification of a position". The Agency uses both MSH (internal and all federal candidates) and DEU (open to all external candidates) to hire in all positions except where specific skill sets are needed that cannot be found within the Department. In 2002, the Agency advertised at least 33 vacancies that were restricted to HUD only bargaining unit candidates with the promotion potential to GS-13 (Ex 1). The Agency has always considered bargaining unit employees for merit promotions that would be fair and meet the hiring goals of the Department.

In addition, bargaining unit employees at the GS-12, who believe they are performing duties commensurate with GS-13, can request a position review to determine if they are performing at the GS-13 level (Ex 2). If the determination is made that the employee is performing duties at the GS-13 level, and there is work or additional duties to support the GS-13 level, the employee can be non-competitively promoted. However, reassigning employees to positions with more promotion potential than the employee's current position are covered by competitive procedures in Article 13.06 of the HUD/AFGE Collective Bargaining Agreement. In other words, the arbitrator's remedy is illegal according to merit promotion and internal placement procedures but does apply to position review (classification procedures). Thus, it is the Agency's position that the remedy granted the union cannot stand because the grievance is beyond the arbitrator's jurisdiction and not arbitrable/grievable.

THE GRIEVANCE IS NOT ARBITRABLE PURSUANT TO SECTION 712 (C) (5) OF THE STATUTE

The remedy sought by the Union is that the full promotion potential for similarly situated positions be GS-13, and any other just relief. The Union's remedy does not state either or, it asked for a classification change and any other relief that may be just. 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 Department of Agriculture, Agriculture Research Service, Eastern Regional Research Center, 20 FLRA 508, 509 (1985).

Management cannot legally promote employees to a higher grade than their career latter for which they have not competed except when Article 13.03 (9) (a) The employee was previously appointed or competitively selected for an assignment intended to prepare him/her for the position currently being filled. (b) The employee's position is reclassified to a higher grade because of additional duties and responsibilities. (c) The employee's position is upgraded without significant change in its duties and responsibilities due to issuance of a new classification standard or the correction of a prior classification error (Ex. 3). This remedy is also against OPM regulation 5 CFR 335.102 (f) and the Collective Bargaining Agreement (CBA) Article 13.06 (5).

The Arbitrator also determined that the remedy requested by the Union was consistent with a memorandum of understanding (MOU) (Ex. 4) between the Agency and the Union. It is important to note that this memorandum of understanding relied upon by the Union and the arbitrator is dated February 1995. The Collective Bargaining Agreement between HUD and AFGE was signed in 1998. Thus, the MOU relied upon is moot and the CBA prevails on this issue.

IS THERE AN APPROPRIATE REMEDY IS THIS CASE

Due to the circumstances involved in this case, it is the Agency's position that there is no appropriate remedy. The remedy sought by the union is illegal according to OPM regulation 5 CFR 335.102 (f) and Article 13.06 (5). This essence of this case clearly deals with a classification issue and is therefore beyond the jurisdiction of the arbitrator and non-grievable.

CONCLUSION

Based on the foregoing facts and argument, it is respectfully requested that the grievance be denied in its entirety, and that the Union, in accordance with Article 23, Section 23.04 of the HUD/AFGE Agreement, be assessed the full amount of the arbitrator's fees and expenses.

Respectfully submitted,

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