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DECISION



M. Volpe
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-191266

DATE: June 12, 1978

MATTER OF: Roy F. Ross and Everett A. Squire--
Arbitration Award of Temporary Promotions
for Higher Level Duties

DIGEST: Arbitrator awarded backpay to two employees based on provision in negotiated agreement requiring a temporary promotion when an employee is assigned to higher grade position for 30 or more consecutive work days. Award may be implemented since arbitrator reasonably concluded that agency violated agreement in assigning higher grade duties to grievants for over 30 days. Award is consistent with prior GAO decisions and does not conflict with rule against retroactive entitlements for classification errors.

This action involves a request by the Federal Labor Relations Council, dated February 7, 1978, for an advance decision as to the legality of implementing the backpay award of an arbitrator in the matter of Internal Revenue Service, Jacksonville District and National Treasury Employees Union, Florida Joint Council (Russell A. Smith, Arbitrator), FLRC No. 77A-97. The arbitrator found that the agency (IRS) had violated its collective bargaining agreement with the union (NTEU) in failing to temporarily promote the two grievants during their assignments to higher grade duties, and he awarded them backpay as a remedy. This case is before the Federal Labor Relations Council as a result of a petition for review filed by the agency alleging that the award violates applicable laws and regulations.

BACKGROUND

The background of this case, as presented in the arbitrator's award and opinion dated July 21, 1977, is as follows. The grievants, Roy F. Ross and Everett A. Squire, were employed as Revenue Officers, grade GS-9, by the Internal Revenue Service Jacksonville District, and were assigned to the Collection Division in the IRS office in St. Petersburg, Florida. The principal duties of a Revenue Officer in the Collection Division are to arrange for the collection of delinquent taxes and to secure delinquent returns. Each case is assigned a

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numeric indicator supplied by the IRS computer on the basis of selected objective criteria. Pursuant to the "Case Assignment Guide for Revenue Officers" of the IRS Manual, the numeric level assigned indicates the predicted grade level of the case and is the primary consideration in the assignment of cases for field contact. Numeric Level 1 cases meet the predicted work requirements of grade GS-12; Level 2 cases meet such requirements of grade GS-11; and Level 3 cases are for lower grades. The general objective is that Level 1 and 2 cases are to be assigned to Revenue Officers in grades GS-12 and GS-11 to the maximum extent feasible, but they may be assigned as developmental work to lower graded officers to enable them to gain experience in higher grade work. Such developmental work normally should be no more than 25 percent of their work. Finally, group managers are authorized to review the cases and make changes in the numeric level indicators.

On or about November 24, 1975, there was a general reallocation of case assignments to Revenue Officers in the St. Petersburg office. As a result of that action, Messrs. Ross and Squire filed grievances in late January, 1976, requesting temporary promotions to grade GS-11 for the period from November 24, 1975, to January 26, 1976, in the case of Mr. Ross and from December 9, 1975, to January 26, 1976, in the case of Mr. Squire. The grievants also requested permanent promotions to grade GS-11, but it appears that they later withdrew that request.

The grievants sought these temporary promotions under the provisions of Article 8 (Details), Section 1, of the Multi-District Agreement between Internal Revenue Service and National Treasury Employees Union, on the ground that more than 50 percent of their case load and completed work had been classified Level 2 (GS-11) work for a period of more than 30 working days. Almost immediately after the two grievances were filed, the agency conducted a review of the grievants' case inventories in order to evaluate the grievances. The review was conducted on January 29, 1976, by two management officials and a union representative. They concluded

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that only a small portion of the cases then assigned to Messrs. Ross and Squire actually belonged in Level 2 and, therefore, that the prior assignment of Level 2 cases to them did not constitute a detail to a higher grade position. They did not, however, change the coded level of the cases to Level 3 or reassign the cases to other officers at that time. Then, on March 1, 1976, there was another reshuffling of assignments and the bulk of the Level 2 cases assigned to the grievants were transferred to Revenue Officers of grade GS-11 classification.

The Acting District Director of IRS denied the grievances on the ground that Messrs. Ross and Squire were not assigned or detailed to a position of a higher grade since no vacant position of a higher grade existed, and therefore, there was no violation of Article 8, Section 1, and no basis for the relief requested.

ARBITRATOR'S OPINION AND AWARD

The arbitrator first addressed the issue of whether the grievants did in fact perform grade GS-11 work during the periods claimed. The standard he applied is whether the higher level duties assigned are greater than normally expected of "developmental" work and have been performed at least at the minimum range of skill and responsibility expected.

He found that, on November 24, 1975, each grievant was assigned to preponderance of cases that were coded Level 2 and thus presumably involved grade GS-11 work. Mr. Squire received 75 cases, of which 62 (84 percent) were coded at Level 2. Mr. Ross received 26 cases, of which 22 (85 percent) were Level 2. After November 24, 1975, Mr. Squire testified that a preponderance of his work was on Level 2 cases and that in the next weeks he closed 36 cases, of which 30 were Level 2. Mr. Ross testified that, between November 24, 1975 and January 28, 1976, he received 92 more cases, of which 58 (62 percent) were Level 2, and an additional 42 cases by transfer, of which 33 were coded Level 2. He closed 33, of which 21 were Level 2.

This data was not challenged by the IRS nor was there any evidence submitted that, prior to the file review of

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January 29, 1976, the agency revised the level of any assigned case or questioned the job performance of grievants. As to the January 29 review, the arbitrator noted that it did not focus on the cases closed after November 24 and prior to the filing of the grievances and should not be given retroactive effect as an evaluation of the work performed prior to January 29.

On the basis of the foregoing analysis, the arbitrator found that the grievants had performed a substantial amount of grade GS-11 level work during the period November 24, 1975 to January 29, 1976, such as to warrant a finding that they had been assigned to grade GS-11 work for that period within the meaning of Article 8, Section 1, assuming its applicability. He further found that the proportion of such higher level work far exceeded the normal maximum of 25 percent properly assignable for "developmental" purposes. After January 29, he found that the grievants did not perform a significant amount of grade GS-11 work.

The arbitrator then turned to the issue of whether Article 8, Section 1, of the agreement applies to the facts of this case. It reads as follows:

"The Employer agrees that an employee who is assigned to a position of higher grade for thirty (30) consecutive work days or more will be temporarily promoted and receive the rate of pay for the position to which he is temporarily promoted. The Employer further agrees to refrain from rotating assignments of employees to avoid compensation at the higher level."

The arbitrator concluded that this provision applied to the grievance on the basis of an analysis of the nature of work performed, without regard to whether there had been a formal assignment or detail of the employee to the higher graded position or whether a vacancy existed in the higher graded position, provided that the job duties assigned at the higher level were of a quantity or magnitude beyond that normally expected of "developmental" work assignments and were performed at the minimum level of skill and responsibility properly expected. In so holding,

he rejected the agency's contention that Article 8, Section 1, applies only when an employee has been detailed to a position for which there is a funded vacancy.

The arbitrator also rejected the agency's contention that the grievances involving Messrs. Ross and Squire must be considered under Article 9, Section 2, of the agreement dealing with Evaluations of Performance. That section provides, in pertinent part, as follows:

** * *Where it has been administratively determined that an employee has performed:

1. higher graded duties for 50% or more of the previous 12 month period,
2. in a manner which fully meets the performance requirements or the higher graded duties,

such performance will be recognized by a Special Achievement Award. * * *

The arbitrator stated that Article 9, Section 2, can be read as dealing with a situation where, over a long-term period, the employee intermittently performs higher graded duties aggregating 50 percent or more of his time, while Article 8, Section 1, can be read as dealing with a situation where the employee for a shorter period of time (but at least 30 consecutive days) performs such duties as a significant portion of his total work load.

The arbitrator also rejected the agency's contention that the grievant's complaint involves a classification error for which a statutory appeal procedure exists. He found that, since the complaint dealt with the temporary assignment of higher graded work which was normally assigned to someone in an established grade GS-11 Revenue Officer position, the Civil Service Commission (CSC) classification appeals procedure would not be available. Finally, he ruled that backpay was not precluded by rulings of the Supreme Court or the Comptroller General:

Therefore, the arbitrator sustained the grievances and awarded the grievants backpay based upon the pay differential between grades GS-9 and GS-11 for the applicable periods.

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On appeal to the Federal Labor Relations Council, the agency contends that the arbitrator's award is inconsistent with and in violation of the classification requirements of the CSC since the arbitrator ignored the position classification standards promulgated by the CSC for the Internal Revenue Officer Series, GS-1169-0, and substituted the agency's "case assignment guide" in determining whether the grievants had actually performed higher level duties. The agency also argues that the issue is essentially a classification question, that is, whether the duties which the grievants were assigned should have been classified at the grade GS-11 level. Thus, the agency concludes: (1) that the award may not be implemented since the issue involves classification appeals which are subject to a statutory appeals procedure and are, therefore, outside the scope of arbitration; (2) that backpay may not be awarded for classification errors; and (3) that the decisions of our Office concerning extended details are not applicable.

The union contends that the arbitrator's finding that the grievants performed grade GS-11 work is a finding of fact which is not reviewable by the Council and is not otherwise in contravention of CSC classification standards. The union also argues that the classification appeals procedure is inappropriate in this case since the grievants do not seek to have their positions reclassified but rather seek only higher pay for temporarily assuming the duties of a higher graded position. Finally, the union states that the award of backpay is appropriate under decisions of our Office since there has been a violation of a collective bargaining agreement.

DISCUSSION

Because of the Comptroller General's authority over the expenditures of appropriated funds (31 U.S.C. §§ 74, 82d), the Federal Labor Relations Council has requested our decision as to whether the arbitrator's award violates applicable law. In deciding the issue, we fully agree with the Council's view that courts and agencies authorized to review an arbitration award must be reluctant to interfere with it. At the same time, we must carry out our statutory duty to make sure that Federal funds are spent only in accordance with the laws

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passed by the Congress. Accordingly, our duty is to determine whether the award made by the arbitrator is consistent with applicable laws, regulations, and Comptroller General decisions so that it may be validly implemented through the expenditure of appropriated funds for backpay.

We have held that the violation of a mandatory provision in a negotiated agreement, whether by an act of omission or commission, which causes an employee to lose pay, allowances, or differentials is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay, provided the provision was properly included in the agreement. See Annette Smith, et al., 56 Comp. Gen. 732 (1977) and decisions cited therein. The Back Pay Act, 5 U.S.C. § 5596 (1976), and the implementing Civil Service Commission regulations contained in 5 C.F.R. Part 550, Subpart H, are the appropriate authorities for compensating employees for such violations of a negotiated agreement assuming there is a finding that the denial or loss of pay or allowances is a result of and would not have occurred but for the unjustified or unwarranted personnel action. Smith, supra. See also 5 C.F.R. § 550.803(a), as amended March 25, 1977, 42 Fed. Reg. 16125.

In ruling upon the legality of appropriated fund expenditures incident to arbitration awards, we generally will not rule upon any exceptions to the arbitrator's award relating to the facts, and thus, in the present case, we shall limit our consideration to the legality of implementing the award based on the facts as found by the arbitrator that the grievants had performed a substantial amount of grade GS-11 work during the period in question.

In the case before us, the IRS, in effect, maintains that the arbitrator misinterpreted Article 8, Section 1, of the agreement. The agency's view is that the section applies only to details to higher grade positions and not to the assignment of higher level duties. Thus, according to the agency, the section does not apply to the instant case because the grievants were not "detailed" to vacant, budgeted positions within the meaning of the Federal Personnel Manual, but were merely assigned higher graded duties.

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The arbitrator carefully considered the IRS arguments on this issue. He posed the question and answered it as follows (Opinion, p. 24):

"In view of the conclusions reached above, it is necessary to determine whether Article 8, Section 1, applies to a fact situation such as that posed in the instant cases. The material interpretative question is whether it has application on the basis alone of an analysis of the nature of the work performed during a consecutive 30-day period, without regard to whether there has been a formal assignment or 'detailing' of the employee to the higher GS grade and whether or not there exists a 'vacancy' in the GS 11 position. In my judgment, although the question is not free from doubt, a proper interpretation is that it has application in the former circumstance provided the employee's performance of job duties of the higher grade level is such as to meet the standards outlined in the analysis in Part I of this Opinion, i.e., where the job duties assigned are of a quantity or magnitude beyond that normally expected of 'developmental' work assignments and have been performed at least at the minimum level of skill and responsibility properly to be expected."

He, therefore, determined that Article 8, Section 1, of the agreement applied to the grievances before him based on the nature of the work performed, without regard to whether there had been a formal assignment or detail to the higher grade or whether there was a vacancy in the higher grade position. He stated (Opinion, p. 27) that "[i]f the proper performance of higher graded work of significant amounts constitutes, in effect, an 'assignment' of the employee to the classification to which such work is normally assigned, then it follows that there was a temporary assignment to a 'position', namely that of the classification. The GS-11 Revenue Officer classification obviously is a 'position'."

In our consideration of an arbitration award, we will give great weight to the arbitrator's interpretation of the collective bargaining agreement. If it represents a

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reasonable interpretation of the negotiated agreement under the circumstances of the case, we will accept the arbitrator's interpretation, even if more than one interpretation could be made or we might have interpreted the agreement differently in the first instance.

In the present case, the negotiated agreement clearly could be interpreted to apply only to formal details to vacant higher level positions, as the IRS has interpreted it. But the agreement must be looked at in the context of the facts of the case. Here, the difference between the grades of Revenue Officers is based in large part on the level of difficulty of the cases assigned. As stated above, the IRS has established a system of coded numeric levels for case assignments equated to grade levels, as well as a procedure for revising the coded level if necessary. Under such a system it seems clear that assigning all or substantially all higher grade work to a Revenue Officer would be tantamount to a detail to the higher grade position. The arbitrator found that 84 percent and 85 percent, respectively, of the cases assigned to the grievants on November 24, 1975, were higher grade work.

We note that in the last sentence of Article 8, Section 1, the agency has agreed "to refrain from rotating assignments of employees to avoid compensation at the higher level." We think it is reasonable to interpret Article 8, Section 1, as also applying to prohibit the agency from assigning a significant amount of higher level cases to a Revenue Officer for 30 days or more to avoid compensation at the higher level. In our opinion, therefore, the arbitrator's interpretation of the collective bargaining agreement between IRS and NTEU is reasonable and proper and we will accept it for purposes of determining whether his award is valid.

We have considered the objections to the award raised by IRS and have concluded that the award does not violate law or regulation for the reasons set forth below.

The award is consistent with prior decisions of this Office. We have upheld prior awards of retroactive temporary promotions with backpay based on the assignment of higher level duties to employees. Thus, in Annette Smith, 56 Comp. Gen. 732 (B-183903, June 22, 1977), the arbitrator had found that, in addition

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to periods of formal details, the agency had on numerous occasions assigned custodial employees to perform higher grade duties for extended periods without officially recording such details. We upheld the award of backpay for both periods based on our Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), which permitted backpay for details of more than 120 days to higher grade positions.

Although our Turner-Caldwell decisions are based on the 120 day period for details to higher grades specified in the Federal Personnel Manual, they do not preclude retroactive promotions for shorter periods when specified in agency regulations or in negotiated agreements. In Kenneth Fenner, B-183937, June 23, 1977, where nondiscretionary agency regulations provided for temporary promotions for details of more than 60 days to higher grade positions, we held that the agency had a mandatory duty to promote an employee beginning on the 61st day of such a detail. See also Burrell Morris, 56 Comp. Gen. 786 (B-187509, July 11, 1977), where we held that an 8-day detail of a prevailing rate employee to perform the duties of a higher level General Schedule position was a violation of a collective bargaining agreement provision. We concluded that the violation constituted an unwarranted personnel action which entitled the employee to corrective action under the Back Pay Act.

Accordingly, in the present case, the 30-day period specified in Article 8, Section 1, of the agreement is not precluded by Turner-Caldwell. Since the Federal Personnel Manual (Chapter 300, § 8-4e) permits an agency to provide for temporary promotions for brief periods of service, an agency may enter into a collective bargaining agreement making such promotions mandatory for periods of less than 120 days.

Another decision of this Office involved facts very similar to those involved in the present grievance of Ross and Squire. In B-181173, November 13, 1974, two grade GS-5 voucher examiners, who normally worked on travel vouchers, were requested to process more difficult employee relocation vouchers because the office has accumulated a backlog of this work. The relocation vouchers were normally assigned to grade GS-6 voucher examiners. After a period of training they

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spent five and a half months processing the relocation vouchers before they were returned to their regular duties. The employees filed a grievance, through their union, under a negotiated agreement provision requiring temporary promotions for details to higher grade positions of 60 days or more. Even though there had been no formal detail, the arbitrator found that the two employees had been "detailed" to a temporary assignment of performing higher level duties and that the agency had violated the agreement by failing to compensate them as "temporarily promoted" to grade GS-6 during the five-and-a-half-month period. We upheld the award on the ground that the agency's failure to temporarily promote in violation of the agreement was an unjustified personnel action under the Back Pay Act which entitles the employees to backpay. See also 54 Comp. Gen. 263 (1974).

This case does not involve the situation of a detail to a position which has not been established or classified. See Willie W. Cunningham, 55 Comp. Gen. 1062 (1976). It is clear in the record before us that the position of Revenue Officer, grade GS-11, is an established and classified position with position classification standards which describe the nature and complexity of assignments as presenting a wider range of problems than those encountered at the grade GS-9 level.

The agency has not denied the existence of an established grade GS-11 position, but it argues there were no vacant, funded positions at grade GS-11 to which the grievants could be assigned. We are unaware of any requirement that a position be vacant in order for an employee to be detailed to that position, and we would point out that the definition of a detail as set forth in the FPM Manual, Chapter 300, Subchapter 8, states that a position is not filled by a detail since the employee continues to be the incumbent of the position from which he is detailed.

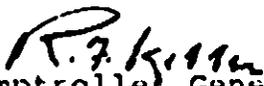
Finally, the agency contends that the grievance actually involves a classification appeal which is outside the scope of arbitration and that the award violates classification requirements of the CSC. Classification appeals to the Civil Service Commission are subject to the procedures

set forth in 5 U.S.C. § 5112 (1976) and 5 C.F.R. Part 511, Subpart F (1977). These provisions establish the right of an employee to have his current position reviewed and classified based upon those duties officially assigned to the employee at the time the appeal is filed. However, we believe that grievances or claims concerning temporary assignments of higher level duties or details do not involve improper classification and are not cognizable under the classification appeal procedure. The rule against retroactive entitlements to backpay for classification errors was reaffirmed by the United States Supreme Court in United States v. Testan, 424 U.S. 392 (1976), but it is our view that the Testan case is limited to improper classification and does not affect entitlement to temporary promotions for improper details. See Reconsideration of Turner-Caldwell, supra. Moreover, we do not agree with IRS that the arbitrator disregarded the CSC's classification standards. It appears to us that he followed the agency's own practices implementing the classification standards by assigning numerical levels to the cases assigned to Revenue Officers, representing the predicted degree of difficulty of each case.

This decision is not intended to change the general rule that the mere accretion of duties in a position does not entitle the occupant to a promotion. We simply hold that where there is a mandatory provision requiring temporary promotion for assignments to higher level positions and where the fact-finder has determined that the assignment of higher level work is of such magnitude as to be equivalent to a "detail" to the established higher level position, an award of a retroactive temporary promotion with backpay may be proper depending upon the circumstances of the case.

CONCLUSION

We believe the arbitrator's interpretation of the contract and his award are reasonable and consistent with law, regulations, and prior decisions of our Office. Accordingly, we conclude that the arbitrator's award is valid and may be implemented.


Acting Comptroller General
of the United States