
 In the Matter of the Arbitration between)
)
AMERICAN FEDERATION OF GOVERNMENT) CBA Articles 12, 17, 23, 27 & 49
EMPLOYEES, LOCAL 2344) FMCS 17-01047-6
)
 and) Grievant: Bryan E. Collins
)
DEPARTMENT OF VETERANS AFFAIRS)

BEFORE : Mark Lurie, Arbitrator

APPEARANCES

AFGE : Patty Nash, Advocate
 VETERANS AFFAIRS : Staci M. Wren, Advocate, paralegal

This is a grievance arbitration decision issued pursuant to the master collective bargaining agreement effective March 15, 2011 (“CBA”) between the Department of Veterans Affairs (the “Agency” or the “Department”) and the American Federation of Government Employees (the “Union” or the “AFGE”) representing, among other job classifications, the Agency’s Information Technology Specialists (“IT Specialists”).

Upon due notice, the parties appeared at the prescribed arbitration hearing time and place: June 20, 2017 at 9:15 a.m., at the Veterans Administration Medical Center in Huntington, West Virginia, where they presented their respective positions and the evidence in support of those positions. The advocates furnished written closing arguments that the Arbitrator received and exchanged by email attachment on August 11, 2017, as of which date the hearing was declared closed.

All bold font emphases in this decision are by the Arbitrator. Uncorroborated hearsay testimony has been omitted by the Arbitrator where its purpose has been to prove the truth of a statement made but not when its purpose has been to prove the fact that the statement was made.

ISSUES

There are two issues:

- Whether the IT Specialist position held by the grievant, Bryan E. Collins, was a GS-2210-11/12 position (i.e., a “career ladder” position with advancement from GS-11 to GS-12 based upon prescribed factors) or was instead a GS-11 position.
- Whether the following provision of the CBA denies the Arbitrator the authority to decide the merits of the above issue:

ARTICLE 43 - GRIEVANCE PROCEDURE

B. This article shall not govern a grievance concerning:

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

FACTS

A memoranda dated April 8, 2011 between the Agency and the Union (the “Volunteering MOU”) stated, *inter alia*, that IT staff could volunteer for Operation Service Line positions, and that the Agency would inform the Union of any changes in working conditions experienced as a result of the voluntary assignment.¹

On September 8, 2015, Mr. Don Rockwell, the Chief Information Officer of the Huntington Veterans Affairs Medical Center (“Huntington”) hired Mr. Collins to serve as an IT Specialist grade GS-11 tasked with implementing and managing Huntington’s PACS or “Picture Archive Computer System” and a voice dictation system termed “Powerscribe.” The Position Description (or “PD”) of Mr. Collins’ Huntington assignment was that of an IT Specialist grade GS-11. At that grade, an IT Specialist performs some managerial duties.² Mr. Collins testified

1 The April 8, 2011 Memorandum of Understanding states, in part,
The following constitutes an Agreement between the Department of Veterans Affairs, (V A) and the American Federation of Government Employees, AFL-CIO, National Veterans Affairs Council #53 (NVAC) concerning the Office of Information and Technology (OI&T) Operations, Service Line Management Program within OI&T Regions...

2. *The OI&T agrees that bargaining unit employees within any Region may volunteer to apply for OI&T Operation Service Line Positions...*

4. *Any changes in the conditions of employment of bargaining unit employees by OI&T Service Line management Officials will not be made without providing notice to the NVAC.*

2 The Position Description of an Information Technology Specialist GS-11 states, *inter alia*, the following. The emphases are the Arbitrator’s:

*This position is located within the Office of Information and Technology (OI&T) in Huntington, WV. The major duties and responsibilities include: Provide **total systems analysis, support, and maintenance services** affecting assigned computer applications in clinical, management, and research domains Participate in all phases of new projects*

that he was not furnished with a copy of that GS-11 Position Description. The Arbitrator finds that, even if that were true, no evidence was presented to show that if Mr. Collins had requested one it would not have been given to him. Mr. Collins testified that Mr. Rockwell told him that he would be working with cutting-edge computer technologies. Mr. Collins further testified that he (Collins) saw the Huntington position as an opportunity to gain new competencies and thereby advance his career.

Three months after he was hired, Mr. Collins was reassigned, under a *Management Directed Reassignment* or “MDR”³ to work with a team of IT Specialists at Region 3 Business Critical Systems,⁴ where his work consisted primarily of maintaining a twenty-year-old (non-cutting edge) imaging system called VistA that was proprietary to the Agency.⁵ The MDR was made pursuant to a 2015 Memorandum of Understanding between Huntington and Region 3

assigned and in the maintenance and revision of current projects. Advise on computer requirements and limitations to help users define problems, needs, and proposed changes to assist in revision requirements.

*Serves as project manager over multidisciplinary teams comprised of technical staff, end-user representatives, and system experts on large-scale projects involving clinical, management, and research functions. Analyze work process and operations to determine the feasibility of developing new or upgrade existing systems to improve the efficiency and productivity of the business process. Implements project plans to meet objectives. Coordinates and integrates project activities. **Manages, leads or administers project resources.** Identifies project documentation requirements or procedures. Developing cost estimates for new or modified systems. Planning systems implementation. Provide technical assistance, instruction, and guidance in procedural matters affecting assigned software programs. Incumbent is to plan, develop, debug and test applications modified functions and provide supporting documentation of success and provide end user training if necessary.*

- 3 Federal personnel law permits agencies to direct the lateral reassignment of employees from one position to another.
- 4 The team was created pursuant to a December 15, 2015 Memorandum of Understanding (the “*Intra-Agency MOU*”) to which the Union was not a party. According to the *Intra-Agency MOU*, Mr. Collins was to remain organizationally under the Huntington Medical Center, although Huntington and Region 3 would have “cooperative” supervisory authority over him. The *Intra-Agency MOU* “Statement of Purpose” stated, *inter alia*, the following:

The purpose of this MOU is to recognize the need for cooperative management and supervision of OIT employee Mr. Collins between the local facility, the VISN and the R3 Business Systems service line, specifically the Business Critical division.

Mr. Collins will remain organizationally under the FCIO at HUN. During the period of the Team Agreement, payroll, leave and attendance, travel documentation, training compliance and other administrative process must take place through the HUN facility. Oversight of these activities will be provided by FCIO, AFCIO and BCS Leadership Team.

Under “Future Plans,” the MOU stated,

For the period of this Team Agreement Mr. Collins will be supported by the HUN facility but his job duties, work assignments, performance monitoring and all other aspects of his day to day work will be managed and coordinated by the R3 Business Systems/Business Critical division supervisor, who will conduct performance reviews within the allotted timeframes defined by the FCIO. Every effort will be made to keep HUN informed regularly on this process.

- 5 Mr. Rockwell was not subpoenaed to testify in person or by phone, and did not testify. The sole evidence presented of the circumstances of Mr. Collins’ hiring was his own uncorroborated testimony.

In general, federal personnel law permits the Agency to laterally assign an employee from one position to another and, if the employee declines the reassignment, the Agency can discharge the employee for failure to accept the management directed reassignment if the removal will promote the efficiency of the service.

(the “*Intra-Agency MOU*”).⁶ The *Intra-Agency MOU* stated, in relevant part, that more responsibility would be placed upon Mr. Collins to function without direct supervision.⁷

Mr. Collins did not sign a copy of the *Intra-Agency MOU*, but the Arbitrator finds that his working and accepting compensation as a Region 3 “VistA Imaging Manager” constituted his constructive acceptance of its terms. Mr. Collins’ Region 3 Business Critical Systems chain of command was head by Line Manager Sherry Boone. Under Line Manager Boone was Systems Division Chief Tracy Bumgarner and then Systems Supervisor Maurice Arline. Supervisor Arline directly supervised Region 3’s “Business Critical Systems Division IT Analysts” of whom Mr. Collins was one.⁸

The Agency acknowledges that Mr. Collins’ performance as a Region 3 “VistA Imaging Manager” has been excellent.⁹ Mr. Collins testified that the MDR has denied him the kind of work that would have allowed him to advance in his profession; that he was “set back 12 years” doing work on the VistA system in Region 3.¹⁰

The Arbitrator finds that any pre-employment representations made by Mr. Rockwell to Mr. Collins are irrelevant to the merits of this case, which pertains to the enforcement of the terms of the CBA after Mr. Collins’ date of hire. Representations made by Mr. Rockwell to Mr. Collins before his date of hire are not a part of the CBA, are beyond the Arbitrator’s jurisdiction, and are thus a matter for another forum.

6 A summary of the *Intra-Agency MOU* stated the following:

This Memorandum of Understanding (MOU) represents an interim agreement between the R3 Business Systems Service Line Manager (SLM), the Facility (FCIO) and the VISN OIT Network CIO (NCIO) regarding the supervision and full time Team Agreement of Site OI&T employee Mr. Bryan Collins to the R3 Business Systems service line/Business Critical division. Currently, Mr. Collins is assigned to the Huntington WV (HUN) VAMC IT staff and with the approval of this MOU, will be full time Team Agreement for a period of 365 days to the R3 Business Systems Service Line/Business Critical division. Upon the completion of the established timeframe the MOU will be reevaluated and extended in 365 days increments as appropriate.

This MOU is intended to describe roles and responsibilities and provide a framework for establishing a cooperative and productive working relationship between the R3 Business System service line/Business Critical division, the NCIO and the FCIO in order to provide the best support for both the facility and required projects for the Business Systems/Business Critical division.

7 The *Intra-Agency MOU* stated, inter alia, the following:

*Part of this process consists of the development of virtual teams. As such, **more responsibility will be placed upon you as a facility based IT Analyst.** This means **you will function in your position without the presence of direct supervision.** We are confident that you possess the skills, knowledge, and abilities required to work independently, which will allow you to provide our customers with an exceptional level of service. As a R03 BSD employee you will further provide ownership and support for the VistA Imaging System.*

8 Source: AFGE Exhibit B.

9 “VistA Imaging Manager” was Division Chief Bumgarner’s term for Mr. Collins’ position. Mr. Bumgarner is the Region 3 Chief of Business Critical Systems.

10 Quoting Mr. Collins.

The parties disagree about whether Mr. Collins volunteered for the Region 3 MDR team position. Agency witness Tracy Bumgarner testified that Mr. Collins did volunteer¹¹; Mr. Collins countered that he was coerced to agree because his Huntington job had been substantively eliminated (albeit that no claim was made that the position had been abolished). In Mr. Collins' view, his "choice" was between having a job in Region 3 and having no job at Huntington.¹² Both parties' advocates acknowledged, during the arbitration hearing, that Mr. Collins had the right to leave the Region 3 team and return to his Huntington position at any time. The Union did not claim a violation of Article 13, Reassignment, Shift Changes, and Relocations; Section 5, Involuntary Reassignments. Based upon the foregoing, the Arbitrator finds that Mr. Collins volunteered for the MDR position.

In late January 2016 – after Mr. Collins began working at Region 3 – Mr. Rockwell was replaced at Huntington by Mr. Dewaine Beard. Mr. Beard was Mr. Collins' supervisor for the purposes of processing this grievance.

Mr. Collins testified that he was not given a Position Description for his Region 3 GS-11 assignment; that the only written description of the position was that of the MOU that described his title as an "IT Analyst" and that explained

This means you will function in your position without the presence of direct supervision... As a R03 BSD [Region 3 Business Systems Division] employee you will

11 Mr. Bumgarner is the Division Chief of Business Critical Systems for Region 3. He testified that Mr. Collins had called him to express interest in the Region 3 position:

Q Did Brian volunteer for this team agreement?

A Yes he did. He called me himself and asked. And I don't know if you remember Brian, but you called me and told me that Dan wasn't giving you anything new to do, and all you were doing was sitting around the telephone and it was driving you crazy and you needed something to do. And because of that, you had started walking over to radiology and going to the radiologist and seeing if there was anything you could do to help.

Mr. Collins testified that he made that call, but that he volunteered only because Mr. Rockwell had told him that his job at Huntington would no longer exist; that he volunteered only in the sense that his choice was to volunteer or have no job.

When I called Tracy, I said "I don't have any work to do. I need something to do. Dan's telling me that I can't do that job any longer," that's when we discussed this team agreement, this contract that was going to come through, and that I was going to be teamed with [Region 3].

Mr. Rockwell was not subpoenaed to testify either in person or by telephone, and was not deposed. Mr. Collins' testimony of what Mr. Rockwell told him is uncorroborated.

12 Mr. Collins testified of having feared that if he withdrew from the Region 3 team and worked solely at Huntington, his employment with the Agency would cease imminently, when his work at Huntington was completed. And yet, on January 25, 2017, he sent an email to Huntington personnel advising them that he had been detailed there, as the Patron Archiving Systems (PACS) Administrator, for six months. Division Chief Bumgarner, whom Mr. Collins had copied in the email, responded immediately to say that he had agreed that Mr. Collins would assist Huntington (that it would, in fact, be his first priority) but that he would "still preform your normal duties when you're not working on...[Huntington]." Those "normal duties" – his detail – would remain his Region 3 Vista imaging duties. The Union noted that Mr. Collins did not sign the team agreement, to which Mr. Bumgarner responded that others hadn't as well, and that it was not thought necessary because the terms had been explained and continuing participation was at the employee's option.

further provide ownership and support for the VistA Imaging System, assistance to Biomed, and collaborate with the FCIO.

Mr. Collins testified that he began his Region 3 assignment by first receiving about a month's training with a GS-13 and that, thereafter, he worked independently in Region 3 while also servicing the Huntington Center's imaging systems and servers. He testified that the people at Region 3 who were performing the same job as his were all classified GS12:

...doing the job that everyone else in the Region that I was working alongside of was doing. We were all on conference calls together; all doing the same thing... We each had an individual site that we took care of and that was our responsibility.

...all of the people I was working with [in Region 3] were GS grade 12s.¹³

Mr. Collins stated his case succinctly:

I know what I was hired to do. I know they changed what I was hired to do... My only issue is that I'm doing the job of a 12, being paid as an 11.

Mr. Collins stated that the right thing for the Agency to have done would have been to post his Region 3 opening as a GS-11/12 or GS-12 position, rather than as an MDR under which he continued to work as a GS-11.¹⁴ The Arbitrator observes that no such posting occurred.

On April 7, 2016, the Union filed a third step grievance seeking that "Mr. Collins ...stay in the Region 3 Group and be paid as a GS-12." The grievance asserted, through the Union's use of bold font in the grievance form to identify specific CBA text, that the Agency had breached the Union's contractual right to bargain over changes in conditions of employment.¹⁵ That right is set forth in CBA Article 49. The Arbitrator observes that the

13 No documentary evidence was presented to support Mr. Collins' assertion that his fellow Region 3 VistA Imaging Managers were all classified as GS-11/12 or higher. The Union neither subpoenaed nor submitted such documentation; nor did the Agency present documentation to prove that the Region 3 VistA Imaging Managers were classified at or below GS-11. (The Union bore the burden of proof on this point.) In the arbitration hearing, Mr. Collins testified that Mr. Beard told him that "there were other people just like [him] in the Region that were working at the 11 level, waiting for that 12 promotion." Mr. Collins thus acknowledged that not "all" of the Region 3 VistA Imaging Managers were GS-12s.

14 Quoting relevant portions a March 24, 2016 email from Mr. Collins to Union President Nash:
If the jobs are 11/12 or 12 then why wasn't I offered that job to start with last year? If they'd done right and posted a position like they are supposed to I could've started that 11/12 in September of last year and I'd be looking at the GS-12 in 5 months but, that didn't happen the way it was supposed to and they've been dragging all this on much further than it should have been...

...They have done me wrong by removing me from the job I came here to do and forced me into a job/team agreement as an 11 without compensating me at the same rate or even offering me the job as the other analysts in Region 3 have been hired for...

15 These are the CBA provisions cited by the Union:

Article 17 – Employee Rights, Section 1 – General:

F Recognizing that productivity is enhanced when employee morale is high, managers, supervisors, and employees shall endeavor to treat one another with utmost respect and dignity.

Article 27 – Performance Appraisal, Section 1 – Overview:

Volunteering MOU as well contained a requirement for notification to the Union of any changes in working conditions but did not contain an explicit duty to bargain over them. The Arbitrator finds that the duty to bargain was implicit in the *Volunteering MOU* because, without that right, the requirement for notification would have been meaningless.

Mr. Beard (who, again, was Mr. Collins' new Huntington supervisor) responded to the grievance by means of an April 28, 2016 email. However, in that email, Mr. Beard stated his response was for informational purposes and was not a "formal response," to the grievance. He said that that would come later, through the Agency's HR Department. In his email, Mr. Beard stated the position into which Mr. Collins had "**been teamed**" was a GS-11/12 position, but that he **was functioning** at the GS-11 level and was being supervised to a greater extent than those working at the GS-12 level.^{16,17} The Arbitrator observes that Mr. Collins and the Union construed Mr. Beard's statements to mean that Mr. Collins was functioning in a GS-11/12 position.¹⁸ The Arbitrator finds that there was insufficient grounds for that conclusion

D ...The local union may provide input into any changes to performance standards and/or establishment of new performance standards.

E. The local union shall be given reasonable written advance notice (no less than 15 calendar days) when the Department changes, adds to, or establishes new elements and performance standards. Prior to implementation of the above changes to performance standards, the Department shall meet all bargaining obligations.

Article 49 – Rights and Responsibilities, Section 4 - Notification of Changes in Conditions of Employment

A The Department shall provide reasonable advance notice to the appropriate Union official(s) prior to changing conditions of employment of bargaining unit employees. The Department agrees to forward, along with the notice, a copy of any and all information and/or material relied upon to propose the change(s) in conditions of employment. All notifications shall be in writing by U.S. mail, personal service, or electronically to the appropriate Union official with sufficient information to the Union for the purpose of exercising its full rights to bargain.

16 See footnote 13 for why the statements contained in this April 28, 2016 email were hearsay.

17 Quoting relevant portions of the email (AFGE exhibit C.1.):

1. *Mr. Collins is on a voluntary team agreement, not a detail. This team agreement can be terminated at any time by either the service line or the employee.*
2. ***The position into which Mr. Collins has been teamed is a GS-2210-11/12 position.***
3. *He is functioning at the Ob 2210-11 level with significantly more supervision than those working at the GS-12 level.*
4. *Other staff are similarly situated in Region 3 Health Systems Service Line (facility based staff teamed to the service line at less than the GS-12 level).*

If, once you have reviewed the final, formal response from me on this matter you and the employee feel that the issue is still unresolved, I would request that we have an additional conversation with the Health Systems Division Chief, Tracy Bumgarner. I spoke with him at length about the situation and he can provide additional details about the position, level of supervision being provided, and other similarly situated staff in Region 3.

18 Mr. Collins cited a June 1, 2016 email exchange with his immediate Region 3 supervisor, Mr. Arline, as evidence that he was working in a grade 11/12 position. The Arbitrator finds that the email lacks such evidentiary value, both because Mr. Arline did not speak with certainty but of his "belief" that Mr. Collins would be officially reassigned, and Mr. Arline did not state that Mr. Collins would be promoted to grade 12 but that his GS grade would be "looked at." Here is the relevant text of the email exchange:

Mr. Collins to his supervisor, Mr. Arline:

and further finds that Br. Beard's April 28th response did not constitute a settlement of the grievance because, as noted, he stated that it was for informational purposes and was not a formal response. Mr. Beard testified, in this arbitration, that while Mr. Collins had been teamed with a GS-11/12 position, he had neither been promoted to nor assigned work beyond his GS-11 position.

In December 2016, Shannon Rhodes replaced Maurice Arline as Mr. Collins' immediate supervisor at Region 3. On December 12, 2016, Local President Nash sent an email to Supervisor Rhodes stating, in part,

I am requesting that Brian Collins be moved into the GS12 position PD I00074-A. I filed a grievance on 4-7-2016, and part of the resolution to that grievance was that this employee would be a GS 12...

President Nash thus represented that the April 7th grievance had been resolved: that the Agency had agreed to make Mr. Collins a GS-11/12. The Arbitrator finds that no such grievance settlement existed.

There are two means by which Mr. Collins' promotion to a GS-11/12 position could have been effectuated. One was through a competitive posting. Supervisor Rhodes told President Nash and Mr. Collins this in December 19, 2016 and January 18, 2017 emails.¹⁹ The

So will the MDR officially make me a part of region 3 as in changing my PD to the 11/12 position?? Or is it still a temporary/team agreement move??

Mr. Arline replied, in relevant part, that Mr. Collins' grade issue would be "looked at."

*I'm still trying to sort through how all of this works. I believe the MDR makes you officially as a move to the service line. I believe there will be a change in your [Position Description] but [it] will not happen overnight. Our service lines allows for GS 9-12. It will take a little while after the Oct. date to get everything changed or moved such as where you get paid from, where your leave request goes, etc. Once that is complete, then the grade issue can will [sic] **be looked at**. I'm sure it will happen, but don't have a projected date.*

In his testimony, Mr. Collins attributed a greater meaning to Mr. Arline's email than that his grade issue would be "looked at." Here is Mr. Collins' testimony on this point:

- A. *That MDR letter would move me to that position and/or that facility [Region 3], that pay center, cost center, whatever else would pay me as a 12.*
- Q. *How do you know the MDR would have made you a 12?*
- A. *I asked my supervisor whether the MDR letter would do that, and he said "Not right away, but that it would happen once they did all the paperwork." And he sent me that in an email, explaining that the letter... the move would come. That they had accidentally identified me as a budget analyst working in a kind of accounting role I guess, and not as an IT Analyst, and that it would officially move me there and that, along with the paperwork, I would eventually be moved into that role.*

19 Supervisor Rhodes stated the following in his December 19, 2016 email:

We cannot move staff into a career ladder position that would give them a promotion. If/when recruitments begin and we can make announcements, he can then apply.

And he stated this in his January 18, 2017 email:

...it is illegal to move someone from a single grade position to a ladder position that has a promotion potential. What I need is permission to announce positions with the 11/12 ladder and then [for] qualified personnel [to] apply and compete.

second was by Mr. Collins submitting a job grading appeal with his local Human Resources Management (HRM") office.²⁰ Mr. Collins pursued neither path.

The Union filed a second, formal Third Step grievance on January 25, 2017. It charged, *inter alia*,²¹

- that Mr. Collins' working conditions changed when he was reassigned to Region 3 and that the Agency had failed to notify the local Union of those changed conditions, as required by CBA Article 49.²² The Agency agreed that Mr. Collins' working conditions changed and that the Agency had not notified or bargained with the Union. The Arbitrator will address this grievance claim later in this decision.
- That, at Region 3, Mr. Collins had been "working side by side with GS-12 [personnel, and yet had been] paid as a GS-11 doing the same work";

20 Appeal to the HRM office, to the Department or to the Office of Personnel Management is provided for in CBA Article 9 – Classification, Section 3 – Classification Appeals:

- A. *The Department will provide employees and the local union with copies of procedures for filing classification appeals through the Department or OPM channels, upon request.*
- B. *Employees or their representatives are encouraged to submit their classification/job grading appeals through the local Human Resources Management (HRM) office. The HRM office will forward the appeal to the Department or OPM, as appropriate, no later than 15 days from receipt and will provide the Local with 2 copies of the employee's appeal request. However, this does not preclude an employee from filing a classification/job grading appeal directly to the Department or OPM, as appropriate.*
- C. *An employee who files a classification appeal is entitled to a copy of the classification appeal file. The local union is entitled to the same material, upon request.*
- D. *General Schedule (GS) and Federal Wage System (FWS) employees who file appeals with the Department concerning the title, series and grade, and/or coverage of their position will have their appeal decided within a reasonable period of time with a goal of 60 days from the date the Appeals Office receives a completed application. Classification appeal decisions will be forwarded to the local union.*

21 Quoting the relevant provisions of the grievance,

[The Union's] understanding is that since [Mr. Collins] is teamed with the GS11/12 after one year, performing without supervision, being rated as excellent, Mr. Collins would be moved to the GS-12.

OPM regulations state: When an employee in GS-11/12 position, the employee will be promoted after one year, of success performance at the GS11 to GS12.

Duties were changed, supervisor was changed and an MOU between management was made with his new conditions of employment outlined in this MOU... This is a change in conditions of employment without notification to the Union [in contravention of] Article 49...

Mr. Collins has not been detailed nor temporarily promoted so therefore has not been properly compensated for the higher grade work he is performing on a daily basis, violating the Master Agreement.

22 *Ibid* Footnote 15.

- That Supervisors Beard and Bumgarner had identified Mr. Collins' position as being a career ladder GS grade 11/12 but that they had not treated it as such.²³ For example, they had not

23 Article 12 – Details and Temporary Promotions

Section 1 - General

- A. *The Department will **provide notification of all details** to the local union President. Where the detail did not result in changes to conditions of employment, the notification will be at least weekly. **Where changes to conditions of employment would result, the Department will provide reasonable advance notice.** When a detail is known far enough in advance and affects conditions of employment, the notification should occur as soon as practicable but no later than 10 days prior to the employee being detailed...*

Section 2 - Temporary Promotions

- A. ***Employees detailed to a higher graded position for a period of more than 10 consecutive work days must be temporarily promoted.** The employee will be paid for the temporary promotion beginning the first day of the detail. The temporary promotion should be initiated at the earliest date it is known by the Department that the detail is expected to exceed 10 consecutive work days. The 10 consecutive work day provision will not be circumvented by rotating employees into a higher-grade position for less than 10 days solely to avoid the higher rate of pay. For the purposes of this section, a GS employee, who performs the grade-controlling duties of a higher-graded position for at least 25% of his/her time for 10 consecutive work days or a FWS employee who performs higher-graded duties on a regular and recurring basis, shall be temporarily promoted.*
- B. *Title 5 temporary promotions in excess of 60 calendar days shall be filled through competitive procedures under Article 23 - Merit Promotion as though the promotion were permanent. Temporary promotions of 60 days or less shall be made in accordance with Section 1.*

Article 23 – Merit Promotion

Section 3

- B. *A career ladder plan will be established for each career ladder position. The career ladder plan will outline the objective criteria for each grade level which an employee must meet in order to be promoted. A copy of the plan will be given to each employee upon entry into the career ladder and when the employee is promoted to a new level of the career ladder.*

The employee will also be advised of his/her earliest date of promotion eligibility. When career ladder plans are established and/or revised, the Department will provide notice to the local union in accordance with Article 49 - Rights and Responsibilities. The employee will be provided with a copy of any revised career ladder plan within 30 days of such revision.

Section 4 - Career Ladder Advancement

- A. ***At the time the employee reaches their earliest date of promotion eligibility, the Department will decide whether or not to promote the employee.***
1. *If an employee is rated as successful and is meeting the promotion criteria in the career ladder plan, the Department will certify the promotion which will be effective at the beginning of the first pay-period after the requirements are met.*

Section 7 - Applicability of Noncompetitive Actions

A. Promotions

The following promotions may be taken on a noncompetitive basis unless otherwise provided:

1. *Promotion of the incumbent in a position that is reclassified at a higher grade due to the accretion of additional duties and responsibilities and not as the result of a planned management action;*
2. *Promotion of an employee previously selected competitively for a lower step of a career ladder;...*

Article 27 – Performance Appraisal

Section 1 - Overview

- G. ***An annual rating of "fully successful" assures employees of eligibility for award consideration, promotion consideration, and within grade increases and serves as a positive, tangible assertion that the employee is meeting his/her job requirements.***

furnished Mr. Collins with the promotional criteria standards for the GS-11/12 position which, if met, could have resulted in his promotion;²⁴ and

- That the Agency had treated Mr. Collins unfairly, in contravention of CBA Article 17 – Employee Rights. The Arbitrator finds Article 17 claim to be without merit, prima facie. The Article deals with such things as invidious discrimination, the avoidance of public embarrassment and ridicule, intimidation and harassment, and treating others disrespectfully and without dignity. None pertained in this case.

Supervisor Rhodes answered the grievance on February 1, 2017 asserting, among other things,

- That the grievance was untimely. The Arbitrator finds the claim of untimeliness to be without merit, both because Mr. Beard had promised a formal response that never came and because the grievance, if valid on its merits, would have been of a continuing nature.
- That Supervisor Beard had erred in his April 28, 2016 response (the response that Mr. Beard had described as being for informational purposes only) when he said that “Mr. Collins had been reassigned to a GS-11/12 position.” [Quoting Supervisor Rhodes] The Arbitrator finds that it was Supervisor Rhodes who had erred. Mr. Beard did not say that Mr. Collins had been reassigned to a GS-11/12 position; he said that ‘the position into which Mr. Collins had been teamed was a GS-2210-

Section. 5 - Performance Standards

- A. *Objective criteria will be used to the maximum extent feasible in establishing and applying performance standards and elements. **The rating official will establish and communicate in writing to employee(s) critical and non-critical elements and performance standards, at the beginning of the appraisal period (normally within 30 days)...** All aspects of the performance plan, including numerical standards, measurement indicators, priorities, and weightings, if applicable, will be communicated in writing to the affected employees at the time the employees receive his/her performance elements and standards. **The local union may provide input into any changes to performance standards and/or establishment of new performance standards.***
- E. ***The local union shall be given reasonable written advance notice (no less than 15 calendar days) when the Department changes, adds to, or establishes new elements and performance-standards. Prior to implementation of the above changes to performance standards, the Department shall meet all bargaining obligations.***

24 Article 12 – Details and Temporary Promotions

Section 1 - General

- A. A detail is the temporary assignment of an employee to a different position for a specified period of time, with the employee returning to his or her regular duties at the end of the detail. Details are intended only for the needs of the Department’s work requirements when necessary services cannot be obtained by other desirable or practicable means.

Section 7, Applicability of Noncompetitive Actions

A. Promotions

The following promotions may be taken on a noncompetitive basis unless otherwise provided:

1. Promotion of the incumbent in a position that is reclassified at a higher grade due to the accretion of additional duties and responsibilities and not as the result of a planned management action...

11/12 position” and that “At no time was Mr. Collins expected to perform GS-12 duties.” And, as Supervisor Rhodes correctly noted, Supervisor Beard’s response was identified as not being the Agency’s Step 3 decision.

Supervisor Rhodes acknowledged, as part of his formal Step 3 decision, that the Agency had changed Mr. Collins’ working conditions without having notified the Union.²⁵ The Arbitrator will address the consequences of this later but, for now, the Arbitrator agrees with Supervisor Rhodes’ observation that, under federal statute, job classification is not a condition of employment:

5 U.S. Code § 7103 - Definitions; application

(a) For the purpose of this chapter—

*(14) “conditions of employment” means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, **except** that such term does not include policies, practices, and matters—*

(B) relating to the classification of any position...

²⁵ Quoting Supervisor Rhodes’ decision,

Management acknowledges that in an effort to provide a team building opportunity, the work conditions of Mr. Collins were changed without giving the Union advanced notice and an opportunity to bargain. However; this was an attempt to provide an opportunity, not the opposite...

Mr. Bumgarner testified that AFGE was not notified about a change in Mr. Collins’ conditions of employment because his conditions were not changed: Mr. Collins was still working within the scope of his original Position Description (or “PD”). He was hired as a PACS manager in Huntington and, as a team member, he worked as a VistA manager for Region 3, with VistA being the VA’s proprietary version of a PACS system. The Arbitrator takes the Agency’s official position to be that of Supervisor Rhodes Step 3 decision. Nonetheless, Mr. Bumgarner’s testimony is set forth below for the parties’ future reference:

- Q You agree that [Mr. Collins working conditions] changed from the time he was hired in September 2015 and when he came to the team agreement?*
- A Well. His duties under the PD that he was hired under was to manage VistA imaging here at Huntington; the imaging storage and servers. He was still responsible for managing the VistA imaging storage and servers under hour team agreement.*
- Q ...Was his PD changed from the time he was hired?*
- A Yes it was changed in July during the MDR. And... during that whole process of him being MDR’d and the PDs changing... he may have been accidentally given the 10073 and 10074 PDs [i.e., the GS-11/12 PD] and then, when they told us that he couldn’t move to that position, that he had to stay in a GS-11, then the 10072 PD [i.e., the GS-11 PD] was issued.*
- Q So you admit that there have been multiple changes, with his PDs; and his job duties have been admittedly changed in a grievance response dated February 1st by Mr. Rhoades, who admitted changing Mr. Collins’ duties several times without notifying the Union.*
- A I have no knowledge of that, but... when Monte explained that he could not move to a career ladder position and could not receive a promotion as part of the MDR, then we were told to issue the 10072 PD [i.e., the GS-11 PD].*

And the Arbitrator agrees with Supervisor Rhodes' contention that, under both USC 7121(c)(5)²⁶ and CBA Article 43(2)(B)(5)²⁷ the Arbitrator lacks the authority to rule upon a claim that an employee is misclassified (except where there has been a reduction in grade). In view of this finding, Mr. Bumgarner's testimony during the arbitration hearing – that Mr. Collins should be classified GS-12²⁸ – is irrelevant to the merits of this case, even though it may be relevant in any subsequent CBA Article 9 classification proceeding undertaken by Mr. Collins.²⁹ The Arbitrator notes that the Agency advocate in this case stated that she shared Mr. Bumgarner's opinion.

Regarding the Agency's acknowledged breach of CBA Article 49, *Rights and Responsibilities*, Supervisor Rhodes proposed as a remedy the rescission of Mr. Collins' MDR

26 5 U.S. Code § 7121 - Grievance procedures

(c) *The preceding subsections of this section shall not apply with respect to any grievance concerning—*
 (5) *the classification of any position which does not result in the reduction in grade or pay of an employee.*

27 CBA Article 43, Section 2 – Definition

- A. A grievance means any complaint by an employee(s) or the Union concerning any matter relating to employment, any complaint by an employee, the Union, or the Department concerning the interpretation or application of this Agreement and any supplements or any claimed violation, misinterpretation or misapplication of law, rule, or regulation affecting conditions of employment. The Union may file a grievance on its own behalf, or on behalf of some or all of its covered employees.
- B. This article shall not govern a grievance concerning:
5. The classification of any position which does not result in the reduction in grade or pay of an employee.

28 Mr. Bumgarner testified that

- historically... business-critical positions ..had all been GS11/12s*
 and that
the majority of VistA Imaging Systems Managers... are GS-12s,
 and that
if [he had been able] to have made them all GS-12s at that point, [he] would have....

29 CBA Article 9 – Classification

Section 1. General

- E. *Employees dissatisfied with the classification of their positions should first discuss the problem with their supervisors. If a supervisor is unable to resolve the issue to the employee's satisfaction, the employee can discuss the matter with the Human Resources Manager or appropriate staff member who will explain the basis for the classification/job grading. An employee and/or the local union, upon request, will have access to the PD, evaluation report, if available, organizational and functional charts, and other pertinent information directly related to the classification of the position. This informal classification review process should be completed in a reasonable period of time. When a desk audit is conducted it will be completed within 90 days of the local union or employee request. This time frame may be extended by mutual consent. As appropriate, desk audits will be performed at the employee's work station. If the employee still believes there is an inequity, an appeal may be filed with the Department or Office of Personnel Management (OPM), as appropriate. An employee may file a classification/job grading appeal at any time through appropriate channels whether or not this informal classification review process was followed.*

Section 3. – Classification Appeals

- B. *Employees or their representatives are encouraged to submit their classification/job grading appeals through the local Human Resources Management (HRM) office. The HRM office will forward the appeal to the Department or OPM, as appropriate, no later than 15 days from receipt and will provide the Local with 2 copies of the employee's appeal request. However, this does not preclude an employee from filing a classification/job grading appeal directly to the Department or OPM, as appropriate.*

assignment and his return to being detailed as an IT Specialist position at Huntington. The Arbitrator finds this remedy to be unrelated to the contractual infraction committed: that the Union had been denied the opportunity to bargain over the changes made to Mr. Collins' conditions of employment.

The Arbitrator now comes to the remaining question; one over which he finds he has jurisdiction: the Union's claim that the Agency had, in fact, promoted Mr. Collins to a GS-11/12 position but had then denied him the GS-11/12 PD and performance reviews that were prerequisites to his movement up the promotional ladder. The Arbitrator has already found that there was no settlement of the April 2016 grievance that recognized GS-11/12 status for Mr. Collins. The Union's other evidence that Mr. Collins had been made a GS-11/12 were his Performance Appraisals for FYE 9/30/2016 and 9/30/2017. While both appraisals indicated that Mr. Collins' grade was GS-11, according to Mr. Collins, he was also furnished, in each year, with Self-Appraisal forms for the GS 11/12 and GS-12 position. Blank copies of the forms were submitted into evidence. The Arbitrator finds that no evidence was proffered – aside from Mr. Collins' testimony – that he was directed to complete such Self-Appraisal forms. Nor was evidence proffered to show that he had completed the forms or that the Agency accepted and retained them in its files. But, even if such evidence existed, it would be insufficient to prove that Mr. Collins had been promoted to GS-11/12. The evidence required to have proven that would have been Mr. Collins winning a competitive bid for a posted GS-11/12 position. The essential facts of the case were well expressed by Supervisor Beard:

Q Was it your understanding at any time that Mr. Collins was moved into a GS-11/12 position?

A No. Because it was not a competitive announcement. There was no HR action that would have moved him onto that other [GS-11/12] PD from the [GS-11] PD he was on; therefore there was no way for him to be at the 12 level according to regulations.³⁰

³⁰ Mr. Beard also testified that the work Mr. Collins was assigned at Region 3 remained GS-11 work and not that of a GS-11/12 or GS12. The Arbitrator observes that Mr. Beard's knowledge of this was solely what Mr. Bumgarner told him which, for purposes of this arbitration, was hearsay. Therefore the Arbitrator gives the following testimony by Mr. Beard no evidentiary weight.

Mr. Bumgarner made it very clear to me that there was a major difference in the position descriptions in the business-critical service line – that 11/12 PD – and that was in the level of supervision required. Mr. Bumgarner indicated that Mr. Collins was new to that organization and, as a result, required direct supervision and instructions to accomplish his task[s]... and therefore was assigned the GS-11 level, and Mr. Bumgarner was very committed to assuring that Mr. Collins did not receive any tasks with a complexity level above the GS11. That all the work he was being assigned was at the GS-11 level and not at the GS-12 level...

The person who was signing his performance evaluation and giving him work was Mr. Bumgarner, [who] said that was what [Mr. Collins] was doing. I only have his word for that...

AWARD

CBA Article 43.B.5 denies the Arbitrator the authority to render a decision on Mr. Collins' classification claim. As for the Union's claim that it was denied the opportunity to bargain over Mr. Collins' changed conditions of employment, the Arbitrator sustains the grievance and directs as follows:

The Union shall have two weeks from the date of this decision to file with the Agency a written demand that the Agency bargain over the changes made to Mr. Collins' working conditions. If it makes such a demand, then the Agency shall timely furnish the appropriate Union official with sufficient information to enable the Union to bargain, and shall bargain with the Union over changes made to Mr. Collins' working conditions. Should the Union not make the filing described above, then its right to such information and its right to bargain shall be deemed to have expired. The Arbitrator will retain jurisdiction over the remedy.



Mark I. Lurie, Arbitrator

August 25, 2017
