

Arbitration between:

Goddard Space Flight Center, NASA

and

Goddard Engineers, Scientists & Technicians
Association, IFPTE Local 29

regarding the denial of an “accretion of duties”
promotion

FMCS Case No. 04-51585

BEFORE: PAUL GREENBERG, Arbitrator

Appearances:

For Goddard Space Flight Center:

James T. Mahoney, Esq., *Office of Legal Counsel, Greenbelt, Maryland*

For Goddard Engineers, Scientists and Technicians Association:

Bryan A. Chapman, Esq., *Washington, D.C.*

DECISION

The Grievant, G., is a GS-13 engineer at the NASA Goddard Space Flight Center (GSFC or Agency) in Greenbelt, Maryland. Late in 2002, G. asked that his pay grade be raised to a GS-14 level on an “accretion of duties” basis. G.’s request was denied by the Agency in March 2003, and he filed a grievance through his union, the Goddard Engineers, Scientists & Technicians Association, IFPTE Local 29 (GESTA or Union). The Agency and GESTA were unable to resolve the grievance, and arbitration was invoked.

BACKGROUND

G.’s employment with NASA – The Goddard Space Flight Center is a large NASA installation that develops and operates unmanned scientific spacecraft. According to the Agency, more than 9,000 workers are employed at GSFC. About 3,000 of these workers are federal employees, and 6,000 work for NASA contractors. The staff is dominated by a large number of scientists, engineers and other professional and administrative staff.

G. works as a mechanical engineer in the Construction, Operations and Maintenance (COM)

Branch of the GSFC Facilities Management Division. He began working at GSFC in 1987, and was hired at the GS-13 level – the same grade he occupies today. The COM Branch includes three supervisory GS-14 engineers and four non-supervisory GS-13 engineers. G. is responsible for managing construction projects, and is paid at the highest pay level allowed for his position. The position is not a “career ladder” job, *i.e.*, the position description does not allow for an increase to a higher pay grade. Therefore, for G. to achieve a higher level of pay, he would need to be promoted to a higher-ranked position.

Although not central to this arbitration decision, it is useful to note that G. is an Asian-American of Indian heritage.

According to his supervisor, Carl Lazerow, G.’s work always has been satisfactory, and he has received positive performance evaluations during his career with the Agency. G. has made repeated efforts to be promoted to a GS-14 grade position, both competitively (through job applications) as well as through the accretion promotion process, but these efforts have not been successful.

The discrimination charge filed by African-American professionals at GSFC, and the resulting accretion promotion process – In 1993, a group of 125 African-American scientists and engineers at GSFC filed a class action discrimination claim against NASA seeking accretion promotions to GS-14 and GS-15 pay grades. After several years of litigation, NASA entered into a Settlement Agreement to resolve the discrimination claims. Under the settlement agreement, NASA agreed to conduct reviews for all members of the class, to determine whether they should be promoted to higher grades. This first component of the settlement agreement, which was limited to the class of 125 African-American scientists and engineers at Goddard, became known as the “Phase I” review.

In addition to the remedy specifically provided to the class action members, NASA agreed to conduct a broader “Phase II” review of the classification of many other scientists and engineers at GSFC based on their current work. Under Phase II, NASA agreed to review the promotion potential of all GS-13 and GS-14 level scientists and engineers who were not members of the class, so long as they had eight years or more of time-in-grade. The pay grade of approximately 474 additional GSFC scientists and engineers was reviewed as part of this Phase II process.

In essence, the Settlement Agreement allowed for a broad merit-based, non-competitive review of existing members of the GSFC science and engineering staff to determine whether they should be promoted to a higher pay grade. There was no limit on the number of promotions available. In the Phase II process, employees graded in the lower-levels of career ladder positions (*e.g.*, a GS-13 employee in a GS-13/14 job) would be considered for immediate elevation to the higher pay grade if they demonstrated the ability to perform the higher-level functions of the established position description. Employees (including G.) who already were working at the “full performance level” for a job would be evaluated to determine whether they merited promotion based on an accretion of duties.

The Settlement Agreement was reviewed and approved by an EEOC administrative judge in July 2002. To insure that the promotion evaluations were conducted uniformly, the parties agreed that a single GSFC official would be designated to review and decide all promotion applications. The Agency and Class Counsel agreed that this role would be performed by GSFC's Director of Applied Engineering and Technology, Dr. Arthur "Rick" Obenschain.

The Phase II process was implemented in the second half of 2002 and the beginning of 2003. Training sessions were conducted for supervisors and employees to explain the process, and information describing the procedure was posted on the Agency's website. For employees like G., who would be considered for promotion through the accretion of duties process, the procedure called for supervisors to invite employees to provide input about their work experience that would justify an accretion promotion, and also to solicit feedback about the employees' work from their "customers." Ultimately, this information would be assembled by each supervisor, who would evaluate the employee against criteria set by Agency management. The promotion standard was described generally to supervisors as follows:

[E]mployee is at his/her FPL [Full Performance Level]. The promotion is based on the person's impact to the job[,] that is[:] special knowledge, skills, abilities, talents or achievements of the individual which have an effect on the duties, responsibilities and expectations of the job. An accreted position reverts to the previous grade when the employee leaves the position. The person must already be doing all the things described in the criteria for the higher-grade level. Demonstrating the ability to perform at the higher level is not sufficient for an accretion promotion. Being a high performer at the current grade and/or having a heavy workload are not in [and] of themselves reasons for an accretion promotion, but rather should be recognized through awards.

Ultimately, supervisors were to compile a recommendation using a template provided by the Agency. The template included these major evaluation headings: the employee's accomplishments; leadership; responsibility; impact; customer service; time-in-grade/time-in-position; and personal development. In a sheet entitled "Things to Remember" that guided the Phase II process, GSFC managers were exhorted:

- This is a very serious exercise. Don't try to game the system. You may be explaining your position in court someday.
- Be sure to include the employee in the process and give them enough time to give input.
- Promotion candidates must meet all the criteria

- Feedback to employee
- Be honest

Emphasis supplied.

After receiving input from the employee and customers, and comparing the employee's work performance against the standards, the "flow chart" for the Phase II process indicates that the supervisor was to prepare a 2-4 page write-up for each applicant. If the supervisor was recommending the employee for promotion, the supervisor would develop a new position description for the employee, and then send the package onward, ultimately to be reviewed by Obenschain. If the supervisor was not recommending the employee for promotion, the flow chart indicates that the employee was to be given feedback on the adverse recommendation and an opportunity to respond. In this instance, too, the paperwork would be forwarded through channels to Obenschain for a final decision.

Obenschain testified that if there was a shortfall in the data generated by the supervisor, the employee/applicant would be given an opportunity to submit additional materials in support of the accretion promotion package. This material would be generated by the employee in the form of a "reclama," or rebuttal. According to Obenschain, supervisors were not to alter any of the presentation that the employee generated, but instead were responsible for sending the reclama forward *en toto* for Obenschain's review. Once the final package was before him, Obenschain reviewed (1) the promotion criteria, (2) the supervisor's recommendation and (3) the employee's reclama; if Obenschain had any questions about the materials, he would question the responsible supervisor. He used this process to review about 600 promotion applications (Phases I and II), a process that he admitted was very time-consuming. Of approximately 474 applications received in the Phase II process, about 140 GSFC scientists and engineers were promoted. The vast majority of these workers were promoted based on the recommendation of their supervisors. In about five or six instances, Obenschain felt that there was sufficient discrepancy between the supervisor's evaluation and the material in the employee's reclama to ask the supervisor to take a second look. According to Obenschain, he awarded only two promotions over the contrary recommendation of a supervisor.

G.'s accretion promotion application and grievance – G. and other employees who met the Phase II criteria received an email notification from Obenschain at the beginning of October 2002. Obenschain's email advised these employees of the promotion application and evaluation process, with links to GSFC website locations explaining the criteria for promotion and the procedure that would be used. Eligible employees were encouraged to become familiar with the promotion criteria, and to prepare to provide supervisors with material supporting their application. Employees were counseled that the supervisors "will be contacting your customers/organizations that you support for feedback and input." The notice indicated that the review process would begin immediately, and would be completed by April 30, 2003.

G. and his supervisor, Lazerow, met on or about October 16, 2002, to discuss the accretion promotion application process. In a follow-up email of October 17, Lazerow encouraged G. to review the material on the GSFC website. Lazerow's email noted that he and G. agreed on a target date of November 28 for G. to provide materials supporting his application for a promotion, as well as "the names and phone numbers of customer[s] or organizations that you think I [Lazerow] should contact for feedback." Although the final application process deadline was April 30, 2003, Lazerow noted that his goal was to complete his review of G.'s application and submit it to Obenschain by December 31.

On December 6, G. provided Lazerow with a list of eight construction projects that he felt were relevant to his promotion request, and identified 12 individuals who were connected to the projects. Of the 12, five were "customers," *i.e.*, persons identified with GSFC's operations departments that would be directly affected by the projects. Seven were NASA contracting officers.

On December 9, Lazerow sent an email to 13 persons who had worked with G., asking for comments that would help Lazerow evaluate G.'s promotion request. G. is identified as receiving a copy of this email, and most of the names coincide with the list that G. had provided to Lazerow a few days earlier. Lazerow received comments from only four of these individuals: three contracting officers, and one individual from the "operations" side. In three instances, the respondent included negative comments about G.'s job performance, sometimes sharply critical. The fourth respondent felt that her interaction with G. had been so brief that it would be inappropriate to provide an evaluation.

According to Lazerow, he reviewed this feedback from the contracting officers and customer, along with other materials that were in G.'s application file; in addition, Lazerow testified that he considered his personal observations of G.'s performance over the prior to two years. Based on this data, Lazerow concluded that G. had not been performing work at a GS-14 level and did not meet all the criteria that had been outlined by GSFC's personnel office. He prepared a report recommending *against* promoting G. In Lazerow's view, the work that G. was performing fell within the scope of work of a GS-13 project manager. Although Lazerow felt that G. was proficient in his work performance, he did not feel that G.'s tasks or impact on the position met the criteria for promotion.

Lazerow met with G. around February 10, 2003, to review his report and recommendation. G. disagreed with Lazerow's conclusions, and noted that he was attaching additional materials that supported his promotion request; these materials appear to be two letters of commendation (one from 1986, the other from 1993) expressing appreciation for G.'s work.

According to G., Lazerow asked that he (G.) prepare his reclama within a two week period. G. objected to the time limitation, and said he would let Lazerow know by the end of the month (February 2003) how much time he needed. G. provided some additional material early in March 2003, but told Lazerow that more might follow. G. asked Lazerow whether Lazerow's evaluation package would be revised to incorporate the new information that G. was supplying. Lazerow

advised G. that he would not revise his recommendation package, but instead would transmit both the recommendation package and G.'s reclama forward to Obenschain.

It appears that Lazerow forwarded his recommendation to Obenschain in mid-March, before receiving the final version of G.'s rebuttal materials. G. completed his reclama on or about March 18, 2003, detailing at length (16 pages) the alleged errors in Lazerow's evaluation and attaching various awards and commendations, including two new commendation letters (dated February 11 and 27, 2003) from individuals who had been contacted earlier by Lazerow in October 2002, but who had not responded to Lazerow. G. contacted the Agency's HR office, which accepted his reclama and bundled it with Lazerow's adverse recommendation. Both were provided to Obenschain.

Obenschain reviewed G.'s promotion package, and on March 31, 2003, concurred with Lazerow's assessment that G.'s performance did not warrant an accretion promotion. G. subsequently asked for a written explanation from Obenschain, but was advised that Obenschain was not elaborating on his promote/non-promote decisions.

G. grieved his non-promotion pursuant to Article 16 of the collective bargaining agreement, which includes the following grievance provision:

Section 16.01 The procedure described herein shall be the exclusive procedure available to all employees in the Units for resolving grievances in accordance with the Civil Service Reform Act of 1978. *This Negotiated Grievance Procedure covers any matter of employee concern or dissatisfaction which is subject to the control of Center Management with the exception of a termination during a probationary period . . . and exclusions cited in Section 16.02 below.*

Emphasis added. Section 16.02 includes the following exclusion:

Section 16.02 This Negotiated Grievance Procedure does not apply to:

* * *

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

SCOPE OF THE DISPUTE/ISSUE PRESENTED

The parties agreed that the arbitrator would frame the issue based upon the arguments advanced and the evidence presented. It is also helpful to note what this case is not about.

Discrimination – The Union suggested at several points during the hearing that the Agency’s 2003 denial of G.’s promotion application, coupled with the Agency’s repeated failure to promote G. to a GS-14 level over many years, might be discriminatory. I conclude that this claim is not properly before me.

The Civil Service Reform Act requires employees with discrimination claims to elect whether to bring their claim through negotiated grievance procedures, or instead pursue their claim through statutory procedures (*e.g.*, internal EEO complaints, appeals to the EEOC, court suits, etc.). Federal employees are prohibited from doing both. 5 U.S.C. §7121(d); *see also* EEOC Management Directive (MD)110, Chapt. 4 §III(A)(1) (“When an aggrieved employee is covered by a collective bargaining agreement that permits claims of discrimination to be raised in a negotiated grievance procedure, the employee must elect to file an EEO complaint or a grievance. The underlying principle is that an aggrieved employee who has a choice of forums in which to proceed cannot go forward in more than one forum . . .”). At the time of the hearing, G. already had filed a discrimination claim against the Agency in federal court, which indicates clearly that he has elected to pursue his discrimination charge through the established statutory procedures, rather than through the collectively-bargained grievance procedure.

In addition, G.’s grievance focuses on allegations that GSFC did not process and evaluate his application fairly. Although the basis for the grievance is formulated very clearly three times (at Step 1, Step 2 and Step 3 of the grievance procedure), there was no indication during the grievance process that G. was raising a discrimination claim. Arbitration is a less-formal procedure than court litigation, and this Arbitrator normally will give grievants some leeway to refine their grievance at the arbitration level. However, when an issue is raised at a hearing that has not been considered by the parties during the grievance process, or expands the dispute in new ways, the best response is to conclude that the issue has not been properly presented to the arbitrator for decision. *Wood Co.*, 105 L.A. 568 (Bernhardt 1995); *National Educ. Ass’n*, 86 L.A. 592 (Wahl 1985). For these reasons, I conclude that the matter of possible discrimination is not properly before me.

The merits of the Agency’s non-promotion decision – At the hearing, the parties agreed that if I found for the grievant, the sole remedy available would be to direct the Agency to reevaluate G.’s accretion promotion package. Although not discussed directly by the parties, it is clear that this grievance focuses on the *process* used by GSFC to review G.’s request, and that the *merits* of the Agency’s non-promotion decision are not before me. This is consistent with the language of §16.02 of the collective bargaining agreement, *supra*, which expressly states that classification decisions (such as the instant matter) that do not result in a reduction in pay or grade are outside the scope of the negotiated grievance procedure. In turn, this provision of the labor agreement tracks the requirements of the Civil Service Reform Act itself, 5 U.S.C. §7121(d), which excludes classification decisions that do not result in a reduction in pay or grade from federal-sector grievance procedures. *See AFGE L. 2142*, 58 F.L.R.A. 416, 2003 WL 1831913 (2003); *Social Security Administration*, 60 F.L.R.A. No. 16, 2004 WL 1533146 (2004); *cf. U.S. Dep’t of the Air Force, Warner Robbins Air Force Logistics Center*, 37 F.L.R.A. 155 (1990) (federal-sector collective bargaining agreements are not precluded from including provisions allowing employees to receive

temporary promotions when they are assigned to perform work of a higher-grade position). The Union does not assert that G. is performing the work of an existing higher-classified job, and it appears that accretion of duties promotions are deemed to be reclassification decisions. *See* 5 C.F.R. §330.606(d)(17). Therefore, the merits of the Agency's denial of G.'s promotion are not before me.

Although there is agreement that the dispute before me is limited to the review *process*, the parties diverge on how to frame the issue. The Union argues that the question is whether G. was treated fairly. In contrast, the Agency notes that G.'s grievance alleged five discreet procedural errors, and urges that these five questions constitute the issues to be resolved.

Both positions have merit. By agreeing to the accretion promotion review as part of its settlement of the class action discrimination suit, it is implicit that the Agency agreed to conduct this task reasonably and in good faith with regard to all eligible employees. On the other hand, G.'s grievance concisely argues five specific ways in which he believes his application *was not* treated fairly by the Agency. While G.'s specific points provide the framework for analyzing his grievance, *infra*, I characterize the issues before me in this manner:

ISSUE PRESENTED: Did the Agency fail to give the Grievant's accretion promotion request a fair and reasonable review? If so, what shall be the remedy?

POSITIONS OF THE PARTIES

A. *Union position*

The Union argues that the Agency's processing of G.'s accretion promotion application was flawed in several respects:

1. *Supervisor prejudgment* – The Union argues that Lazerow erred by completing his review of G.'s promotion eligibility in February 2003, and then presenting his evaluation to G. as a finished document without first discussing it. The Union contends that if Lazerow had discussed the various shortcomings with G. first, G. would have been able to demonstrate to Lazerow that his assessment was incorrect, leading to a recommendation that G. receive an accretion promotion.

2. *Supervisor failed to integrate G.'s rebuttal materials into the supervisor's evaluation* – The Union notes that Lazerow refused to modify his recommendation when G. produced his reclama, but instead decided to forward his recommendation “as is,” accompanied by G.'s reclama as a separate document. In the Union's view, the failure to merge the two sets of materials resulted in G. not receiving “fair and impartial consideration.”

3. *Lack of communication of results* – G. expected to receive a written response to his application, but received nothing in writing from either Lazerow or Obenschain. G. represents that Lazerow claimed the promotion decision was Obenschain's to make, while Obenschain advised G.

to speak with his supervisor (*i.e.*, Lazerow) about the problem. The situation is characterized as unfair.

4. *Inconsistent action by supervisors* – The Union asserts that the processing of promotion applications was inconsistent among supervisors at GSFC. Some supervisors prepared their evaluations in coordination with the employees, some modified their recommendations after speaking with employees, and others (*e.g.* Lazerow) prepared their evaluations independently and then just forwarded their recommendations to Human Resources accompanied by the employees' rebuttal. In addition, some supervisors tied their recommendations closely to the promotion criteria as a "check list," while others did not tie their recommendations so closely to the list.

5. *Unclear period of performance* – The Union criticizes the decision to restrict the evaluations to the employee's current year's work plus two prior years.

B. Agency position

The Agency asserts that Lazerow's and Obenschain's actions complied with the requirements of the class action settlement, and that G.'s application received fair consideration. To the extent that there may have been variation in the processing of applications among the different supervisors at GSFC, this variation was not prohibited by the processing guidelines or inconsistent with them, and ultimately all recommendations were supervised by and evaluated fairly by Obenschain.

DISCUSSION

The Grievant has held the same position (engineer/construction manager) and grade (GS-13) throughout a multi-year career at GSFC. His long-time supervisor, Carl Lazerow, freely acknowledges that G. is a good employee. It is understandable, then, that G. would feel frustration that his repeated efforts to win promotion to a higher grade have been unsuccessful.

A federal employee earns an "accretion [of duties] promotion" when the employee demonstrates that he or she is performing work that merits a higher grade level for an extended period of time. This may occur through a variety of means. For example, an employee's superiors may, over time, assign higher-level projects to the employee. Alternatively, an employee may, through innovation or initiative, have an impact on an agency's mission that significantly exceeds what is expected of the employee's assigned position.

The federal personnel system is designed to compensate employees based on merit principles. In theory, deciding whether an employee is entitled to greater pay based on an accretion of duties is based on objective criteria. As a practical matter, however, the criteria for evaluating professional employees often include subjective judgments about the difficulty of the tasks performed, level of ability demonstrated, the impact of the work, etc. In this particular accretion promotion program,

the process of evaluating the work of the engineers and scientists at GSFC was assigned to their immediate supervisors in the first instance, with ultimate decision-making performed by Obenschain.

As noted, the merits of Lazerow's recommendation and Obenschain's decision declining to promote G. are outside the scope of the grievance procedure and this arbitration. The sole question before me is whether the process used denied G.'s application a fair review. Based on the record presented, I conclude that Agency's process was reasonable, and that G. received a fair review. Moreover, it is clear from the testimony of Lazerow and Obenschain that a second look would not change the result.

Lazerow met with G. in October 2002 and asked for data to support G.'s request for a promotion. He also asked for a list of persons familiar with G.'s work on his recent projects. Based on the materials he received from G. and the feedback from the contacts G. provided, Lazerow concluded that G. did not meet several of the criteria for promotion and prepared his recommendation. He discussed his conclusions with G. only *after* the recommendation was fully drafted. G. argues that this reflected prejudgment on Lazerow's part.

The guidelines for the accretion promotion process exhorted supervisors to be sure that they engaged the employees in the process. There does not seem to have been any single formula used for "engaging" employees in the process, and perhaps some supervisors at GSFC had more extensive contact with the employees and a more iterative process for developing their recommendation. In this instance, however, it is clear that Lazerow met with G. to discuss the process, requested information, followed-up with an email, contacted references provided by G., and then met with G. to discuss his (Lazerow's) conclusions. Lazerow testified credibly that his conclusion that G. was not performing work beyond his GS-13 grade level reflected his personal observation of G.'s work, as well as the feedback that he received from the customers and contracting officers. Nothing about this process suggests to me that Lazerow prejudged the outcome of the promotion application.

G. developed an extended rebuttal to Lazerow's adverse recommendation, which was then provided to Obenschain as a companion document to Lazerow's report. G. criticizes Lazerow for being unwilling to integrate the rebuttal material into the main body of Lazerow's recommendation. However, Obenschain testified that the format Lazerow used (supervisor recommendation in one document, reclama in a second document) was the format used by most GSFC supervisors, and that he (Obenschain) systematically reviewed all promotion applications and reclama when making his decision. Obenschain had been selected to perform this function in consultation with Class Counsel in the EEO action, which reflects Class Counsel's confidence that Obenschain would be diligent and fair in his review. Obenschain testified credibly that the "two document" review was common and was not an obstacle to him in evaluating G.'s application carefully. I therefore conclude that this aspect of the process was neither unfair nor unreasonable.

During the grievance process, G. expressed dissatisfaction that he had not received a written decision from Obenschain, but that Obenschain's decision was communicated to him orally by Lazerow. While I agree with G. that a written response from the responsible management official

(Obenschain) might have been a better practice, the means that the Agency used to communicate its decision relates to events that come only *after* the non-promotion decision was made, and therefore bear little relationship to the decision-making process itself.

G. also noted that supervisors in various GSFC divisions prepared their accretion promotion evaluations differently, asserting that this inconsistency supports his claim that his application was not judged fairly. As discussed above, Obenschain acknowledged that the promotion packages came to him in different formats; however, Obenschain also was clear that the format that Lazerow used was common, and posed no problem to Obenschain when he performed his review. Although I agree with G. that consistency is a good objective, there is no evidence that the variations in approach among the different supervisors actually disadvantaged him. Lazerow was very clear in his testimony that the additional material G. supplied did not change his conclusion to recommend against a promotion.

Lazerow and Obenschain testified that the accretion promotion review focused, for the most part, on work that applicants had performed during the current year and the prior two years. G. criticized this time period in his grievance, noting that no time frame was indicated in the Agency's published promotion criteria. I do not believe G.'s criticism is justified. The theory underlying an accretion promotion is that an employee *currently* is performing work that is outside his grade level; in fact, accretion promotions often are viewed as temporary promotions for performing higher-grade tasks, with an employee returning to his or her grade level after the employee ceases to perform higher-graded work. It therefore was appropriate for Agency managers to focus on the work that G. had performed in recent years.

Finally, I note that this grievance focuses on process. The underlying theory of the grievance is that if the process were changed or revisited, there might be a different result. In this case, we had extensive testimony from the two management employees responsible for making the decision on G.'s promotion application: (1) G.'s supervisor, Carl Lazerow, who was responsible for making the initial recommendation, and (2) Rick Obenschain, the final decisionmaker for all the Phase I and Phase II promotion applications. Both Lazerow and Obenschain had before them at the hearing all the materials from the case, including Lazerow's initial recommendation and G.'s reclama (both with supporting documents). Lazerow and Obenschain each expressed his view that G. did not meet the criteria for an accretion promotion – not just in one of the areas to be considered, but in several areas. It therefore is clear that returning this matter to GSFC management would not change the result, and would be a futile exercise.

CONCLUSION

For the reasons stated, I find that G.'s accretion promotion application received a fair and reasonable review. The grievance is DENIED.

Paul Greenberg, Arbitrator
Washington, D.C.

August 13, 2004