

REGULAR ARBITRATION PANEL

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**In the Matter of the Arbitration** (  
) **GRIEVANT:** Class Action  
    **between** (  
) **POST OFFICE:** Fort Myers  
**UNITED STATES POSTAL SERVICE** (  
)  
    **and** (  
) **USPS Case No.:** H06T-1H-C 08166932  
**AMERICAN POSTAL WORKERS** (  
    **UNION, AFL-CIO** ) **APWU Case No.:** 2008217  
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BEFORE: Andrew M. Strongin, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Lynne M. Chiochi, Labor Relations Specialist

For the Union: Charlie Robbins, National Business Agent

Place of Hearing: 14080 Jetport Loop, Ft. Myers, FL 33913

Date of Hearing: January 28, 2010

Date Record Closed: January 28, 2010

Date of Award: March 12, 2010

Relevant Contract Provision: Article 15

Contract Year: 2006

Type of Grievance: Contract

Award Summary:

The Service violated Article 15 of the Agreement by failing timely to implement the terms of the parties' January 29, 2008, settlement agreement with regard to posting and filling certain custodial positions at the Ft. Myers P&DC, but the remedial period terminates as of July 8, 2008, when the area came under Article 12 withholding. Pursuant to the parties' request at hearing, the question of remedy is remanded to the parties in the first instance, subject to the Arbitrator's retention of remedial jurisdiction.

  
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Andrew M. Strongin, Arbitrator

This grievance protests the Service's failure to fill three custodial positions at the Ft. Myers, Florida P&DC, pursuant to the terms of a national settlement agreement arising out of a national award requiring the reinstatement of the 1983 MS-47 Handbook. As a preliminary matter, the Service argues that the grievance was filed prematurely and therefore is inarbitrable.

In National Case No. Q98C-4Q-C 02013900 (Das 2006), Arbitrator Shyam Das directed the Service to rescind the 2001 version of the MS-47 Handbook, and to reinstate the 1983 version. On January 29, 2008, the parties settled remedial questions flowing from that National Award ("Das Settlement"), agreeing in relevant part as follows:

- 4. In facilities where the staffing package results in additional custodial positions than presently on the rolls, these additional positions shall be posted by notice of intent within 60 days of the signing of this agreement and filled in accordance with the Collective Bargaining Agreement.**
- 8. No employee will be involuntarily reassigned (ref: Article 12.5.C.5) solely as a result of this settlement or the implementing of the staffing package ....**
- 9. All duty assignments created by this settlement and any resulting vacancies shall be filled in accordance with Article 38.**

Application of ¶ 4 of the Das Settlement at the Ft. Myers P&DC required the posting and filling of three additional custodial positions than presently were on the rolls as of March 2008. On March 22, 2008, the Union filed the instant grievance alleging that the Service failed to comply with the Das Settlement by failing to fill the three custodial positions. As the case was submitted to the Arbitrator at hearing, the parties agree that the Service had not filled the positions as of July 8, 2008, when the area first became subject to

withholding under Article 12. The parties dispute both whether the Service is liable for its failure to fill the positions between March 29 and July 8, 2008, and also whether the Service is liable for its failure to fill the positions thereafter. The parties agree that all withheld positions ultimately were filled.

Turning to the facts relating to the Service's arbitrability claim, it is undisputed that the Union filed the instant grievance at Step 1 on March 22, 2008, seven days prior to the expiration of the 60-day period established by ¶ 4 of the Das Settlement. It further is undisputed that the Service failed to raise that defense at either Step 1 or Step 2 of the grievance procedure. The Service first raised the question of premature filing in its Step 3 denial letter, to which the Union objected on timeliness grounds at hearing.

On the merits, the Union bases its case-in-chief on the undisputed facts that the Das Settlement, as applicable to the Ft. Myers P&DC, at the time of its execution required the posting and filling of three additional custodial positions, and that the Service admits it did not reach the full custodial complement, at least as of July 8, 2008. The Service relies on then-Acting Maintenance Manager Steven Krankoski, who testifies that he continuously attempted to fill the positions through the eReassign transfer process to reach the full complement until the area came under withholding, and that despite accepting three transfers through that process, he could not reach the full complement due to the loss of other custodians through attrition. Specifically regarding the requirements of Article 38.5.B.7 and the pecking order for filling vacant maintenance positions more specifically described in the JCIM 2007, Krankoski acknowledges that to his knowledge, the Service did not solicit or create an in-service register at any time prior to July 2008.

The Union principally contends that the three custodial positions added to the Ft. Myers P&DC by operation of the Das Settlement had to be posted and filled, and that the Service admittedly did not fill the positions, which requires the grievance to be sustained. The Union argues that Article 12 withholding is no defense to the Service's failure to fill the jobs either prior to the advent of withholding or thereafter. In this regard, the Union points out that ¶ 8 of the Das Settlement specifically references Article 12, whereas ¶ 9 makes no mention of Article 12, from which the Union argues that if withholding was intended to provide a defense to restoring the lost positions, the national-level representatives would have made that express. As for the question of prematurity, the Union argues that the Service's failure to raise the issue at either Step 1 or 2 constitutes a waiver of the defense under the oft-cited Aaron Award. By way of remedy, the Union asks that the positions be posted and filled, and that all affected employees be compensated for lost hours at the overtime rate.

Initially, the Service contends that the grievance is not arbitrable because it was filed prematurely, seven days prior to the date on which the Service was required to post the positions. On the merits, the Service contends that it attempted without success to reach its full complement through the eReassign transfer process between March and July 8, 2008, which efforts insulate it from any liability for its failure to identify sufficient transfers to fill the additional custodial positions. As of July 8 and thereafter, the Service contends, the advent of Article 12 withholding limited its ability to fill the positions, and precludes any finding of a violation relating to the delay in filling the positions.

Turning first to the question of arbitrability, the Service admits that it did not raise the issue for the first time until its Step 3 response. Under Article 15.2 and the oft-cited Aaron Award, the Service's failure to raise this defense at Step 2

constitutes a waiver. It bears noting, too, that the early filing is a technicality that caused no interference with or prejudice to the Service's ability to offer a meaningful response during the various steps of the grievance procedure.

On the merits, the Arbitrator is persuaded that this case must be regarded in two substantive time periods, the first from March 29 to July 8, 2008, and the second from July 8, 2008 and thereafter. As for the first time period, it is undisputed that the Das Settlement, as applied at the Ft. Myers P&DC, required the posting and filling of three additional custodial positions. The record is clear that those positions were not filled by July 8, 2008, which suffices to establish a prima facie case of a violation. The Service's defense is limited to its non-specific and undocumented efforts to fill the positions through the eReassign transfer process. Assuming that the positions timely were posted – a questionable proposition, given that there is no evidence in the record to establish that the positions in fact were posted – the Service apparently limited its efforts to fill the positions prior to July 8 by resorting exclusively to the eReassign service. As the Union points out, Article 38 and the corresponding provisions of the JCIM 2007 establish a pecking order for filling vacant maintenance positions broader than the eReassign transfer process. Although the Service contends that it “made valiant efforts to fill the vacancies,” the Union insists with equal emphasis that the positions easily could have been filled had the Service been diligent in its efforts. Given the clarity of the Das Settlement in requiring that the positions be both posted and filled, and the undisputed evidence that the positions were not filled, the Service's inability to demonstrate – as opposed merely to assert without evidentiary support – the extent of its efforts to fill the positions or to offer a persuasive explanation for its inability to fill the positions supports the Union's contention that the Service failed to satisfy the terms of the Das Settlement.

The period following July 8, 2008, however, requires different analysis and results in a different conclusion. As of July 8, 2008, the area became subject to withholding. The Union argues that the Das Settlement, in referencing Article 12 in ¶ 8 but not ¶ 9, expresses an intention that the additional positions will be filled without regard to Article 12 withholding. The Arbitrator disagrees. Although it is true that ¶ 8 specifically references Article 12 whereas ¶ 9 does not, the Union's argument ignores the fact that ¶ 9 expressly references Article 38: "All duty assignments created by this settlement and any resulting vacancies shall be filled in accordance with Article 38." Article 38.4.A.2 expressly provides for the posting of vacant duty assignments, and provides that, "If a duty assignment has not been posted within 30 days, the installation head or designee shall advise the Union in writing as to the reasons the duty assignment is being withheld." As the Arbitrator reads the provision, the term "withheld" is a clear reference to Article 12.5, effectively establishing withholding as a primary consideration in filling vacancies. The pecking order to which the Union refers applies only after a position is posted; if withholding is in place, as Article 38.4.A.2 makes clear, the job is not posted pursuant to the ordinary rules. Given that the area came under Article 12 withholding on July 8, 2008, the Service properly withheld the additional custodial positions for filling in accordance with Article 12. Absent any evidence that the Service failed timely to fill the three positions under the terms of Article 12 – there is no such evidence on this record – the Arbitrator is constrained to conclude that the Service's liability for violating the Das Settlement concludes on July 8, 2008.

In so concluding, the Arbitrator is mindful of the Union's argument that the Das Settlement was intended to remedy the Service's improper establishment of the 2001 MS-47 Handbook, the implementation of which caused

a diminution in bargaining unit jobs. The Arbitrator is not persuaded, however, that reading the Das Settlement as subject to Article 12 is inconsistent with or otherwise frustrates that intention. The Arbitrator agrees that an evident purpose of the Das Settlement was to restore the jobs lost as a result of the implementation of the 2001 MS-47, but the Arbitrator is not persuaded that the Das Settlement bespeaks any broad promise that there would be no other job reductions unrelated to the MS-47 Handbook that might affect the procedure through which the restored custodial positions would be filled. The fact is that the Service did restore and fill the custodial positions at the Ft. Myers P&DC pursuant to the settlement, albeit ultimately through the reassignment process rather than the posting process. By filling the positions, the Service ultimately, if not belatedly, met the requirements of the Das Settlement.

Although the Arbitrator finds no violation of the Das Settlement during the time period following July 8, 2008, when the area was subject to Article 12 withholding, the Union is entitled to a make-whole remedy for the Service's apparent failure diligently to post and fill the positions between March 29, 2008 and July 8, 2008, during which period the Das Settlement was effective and unaffected by any Article 12 withholding. Pursuant to the parties' request at hearing, the question of remedy is remanded to the parties subject to the Arbitrator's retention of remedial jurisdiction in the event the parties are unable to agree.

**DECISION**

The grievance is sustained in part and denied in part. The Service violated Article 15 of the Agreement by failing timely to implement the terms of the parties' January 29, 2008, Settlement Agreement. Subject to termination of the remedial period on July 8, 2008, when the area became subject to Article 12 withholding, and pursuant to the parties' request at hearing, the question of remedy is remanded to the parties subject to the Arbitrator's retention of remedial jurisdiction in the event the parties are unable to agree.

  
Andrew M. Strongin, Arbitrator

Takoma Park, Maryland