

71 FLRA No. 195

UNITED STATES
SMALL BUSINESS ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2959
(Union)

0-AR-5430

DECISION

October 5, 2020

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

In this case, we inform Arbitrator Ed W. Bankston, and remind others in the federal-labor management community, that a grievance concerns a non-arbitrable classification matter under § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute)¹ when its essential nature is integrally related to the accuracy of the classification of the grievant's position.

The Arbitrator issued an award finding, as relevant here, that a grievance was arbitrable because it sought a seven-year temporary promotion and an updated position description. The main question before us is whether the award is contrary to law. Because the essential nature of the grievance concerns classification, we find that § 7121(c)(5) bars the grievance, and we set aside the award in its entirety.

II. Background and Arbitrator's Award

On April 17, 2017, the Union filed a grievance alleging that the grievant, a General Schedule (GS)-12 employee, was "performing [h]igher[-g]rade[d] [d]uties of GS[-]13 and GS[-]14" without being properly compensated.² The grievance also alleged that the

Agency violated the parties' collective-bargaining agreement by failing to provide the grievant with an accurate position description. As a remedy, the grievance requested that the Agency "[p]romot[e]" the grievant "to [a] GS[-]14" position and provide "[b]ack pay to GS[-]13 and [up] to [a] GS[-]14" position.³ The parties were unable to resolve the grievance, and the dispute proceeded to arbitration.

As relevant here, the Arbitrator addressed whether the grievance concerned a non-arbitrable classification matter under § 7121(c)(5) of the Statute. The Arbitrator found the grievance arbitrable because it did not seek reclassification of the grievant's position. He found, instead, that the "the crux of the matter concern[ed] higher[-]graded work . . . controlled by" Article 31 of the parties' agreement (Article 31).⁴ That article states that if the Agency details an employee to a higher-graded position for more than thirty calendar days, the Agency will temporarily promote the employee to that position on the thirty-first day. Accordingly, the Arbitrator concluded that Article 31 "foreclosed" the "threshold issue of classification."⁵

On the merits, the Arbitrator examined whether the Agency violated Article 31 by failing to temporarily promote the grievant. He determined that the grievant had been performing GS-13 duties since 2010. As a result, the Arbitrator directed the Agency to provide the grievant with a seven-year "temporary promotion" with backpay, and to update his position description to reflect GS-13 work.⁶

On November 2, 2018, the Agency filed exceptions to the award, and on December 4, 2018, the Union filed an opposition to the exceptions.

III. Analysis and Conclusion: The award is contrary to § 7121(c)(5) of the Statute.

The Agency argues that the grievance and award are contrary to § 7121(c)(5) of the Statute.⁷ Under § 7121(c)(5), an arbitrator lacks jurisdiction to determine "the classification of any position which does not result in the reduction in grade or pay of an employee."⁸ Where the substance of a grievance concerns the grade level of the duties permanently assigned to and performed by the grievant, the grievance concerns classification within the

³ *Id.* at 17.

⁴ *Id.* at 22.

⁵ *Id.*

⁶ *Id.* at 28.

⁷ Exceptions Br. at 12-18.

⁸ 5 U.S.C. § 7121(c)(5). The Authority reviews questions of law raised by exceptions to an arbitrator's award *de novo*. *U.S. SEC, Wash., D.C.*, 61 FLRA 251, 253 (2005).

¹ 5 U.S.C. § 7121(c)(5).

² Award at 16.

meaning of § 7121(c)(5).⁹ The Authority has recognized that, in certain circumstances, a grievance concerning the accuracy of a grievant's position description does not concern classification.¹⁰ But "when the essential nature of a grievance goes beyond the accuracy of the contents of the grievant's position description[,] and is integrally related to the accuracy of the classification of the grievant's position," the grievance concerns classification under § 7121(c)(5).¹¹

Here, the "essential nature" of the grievance went beyond the accuracy of the grievant's position description.¹² In the grievance, the Union specifically requested that the Agency "[p]romot[e]" the grievant "to [the] GS[-]14" level.¹³ The Authority has long held that requesting such a remedy – the permanent reclassification of an employee's position to a higher grade – demonstrates that a grievance concerns a non-arbitrable classification matter.¹⁴

Moreover, the Arbitrator erroneously focused on the parties' collective-bargaining agreement while ignoring Authority decisions interpreting § 7121(c)(5). The Arbitrator concluded that "the crux of the matter [was] ... controlled by" Article 31.¹⁵ But parties' agreements cannot, as the Arbitrator erroneously asserted, "foreclose[]" disputes from jurisdictional defects under § 7121(c)(5).¹⁶ Notwithstanding the Arbitrator's awarded remedy of a seven-year "temporary promotion,"¹⁷ in

U.S. Small Business Administration (SBA I),¹⁸ the Authority recently clarified that, in order to present a temporary-promotion claim that does not involve classification, a party must offer certain evidence.¹⁹ By asserting in the grievance that the grievant performed *both* GS-13 and GS-14 duties,²⁰ the Union failed to allege that the Agency expressly assigned the grievant to a *specific* higher-graded position.²¹ In addition, there is no evidence, or arbitral discussion, concerning whether the duties were assigned to meet an urgent mission requirement, or to give the grievant experience as part of a development or succession plan.²² Thus, the grievance did not assert a temporary promotion claim under the standard articulated by the Authority in *SBA I*.²³

For these reasons, as demonstrated by the grievance, requested remedy, and award, we conclude that the essential nature of this dispute concerns classification.²⁴ Accordingly, we set aside the award as contrary to § 7121(c)(5).²⁵

IV. Decision

We vacate the award.

⁹ *U.S. Dep't of the Army, U.S. Army Med. Dep't Activity, Fort George G. Meade, Md.*, 71 FLRA 368, 369 (2019) (*Fort Meade*) (Member DuBester concurring).

¹⁰ *Veterans Admin., Med. Ctr., Tampa, Fla.*, 19 FLRA 1177, 1178 (1985).

¹¹ *Id.*

¹² *Id.*

¹³ Award at 17.

¹⁴ *E.g., U.S. DOD, U.S. Marine Corps, Air Ground Combat Ctr., Twentynine Palms, Cal.*, 71 FLRA 173, 174 (2019) (*DOD*) (Member DuBester dissenting) (finding the essential nature of the grievance concerned classification where it requested a permanent promotion to a GS-9 position); *U.S. Dep't of the Army, Anniston Army Depot, Anniston, Ala.*, 64 FLRA 10, 11 (2009) ("[W]hen the substance of the grievance concerns whether the grievants are entitled to permanent promotions based on the grade level of the duties they performed, the grievance concerns classification within the meaning of § 7121(c)(5) of the Statute."). *But see AFGE, Local 1760*, 37 FLRA 1193, 1198 (1990) ("A grievance and an award which pertain to whether a grievant is entitled to a career ladder ... promotion do[es] not concern the classification of a position within the meaning of [§] 7121(c)(5) of the Statute.").

¹⁵ Award at 22.

¹⁶ *Id.*; *see DOD*, 71 FLRA at 174 (finding that "regardless of how the [a]rbitrator characterized the dispute, the essential nature of th[e] grievance concerned classification").

¹⁷ Award at 28.

¹⁸ 70 FLRA 729, 730-31 (2018) (*SBA I*) (Member DuBester dissenting).

¹⁹ "[T]o present a temporary-promotion claim that does not involve classification under § 7121(c)(5), a party must offer evidence that: (1) an agency expressly reassigned a majority of the duties of an already classified, higher-graded position to a lower-graded employee, including all of the grade-controlling duties of that position; (2) the reassigned duties were different from the duties of the lower-graded employee's permanent position; (3) the duties were not assigned to meet an urgent mission requirement, to give the employee experience as part of an employee development or succession plan, or for similar reasons; and (4) the employee did not receive a temporary promotion for performing the reassigned duties." *Id.* (emphasis omitted); *see SSA*, 71 FLRA 205, 206 (2019) (Member Abbott concurring; Member DuBester dissenting) (finding § 7121(c)(5) barred the grievance because the union failed to offer evidence for a temporary-promotion claim under *SBA I*).

²⁰ Award at 16.

²¹ *See SBA I*, 70 FLRA at 731 (finding that union's claim that a grievant performed duties from three different position descriptions failed to allege that the agency expressly assigned the grievant the duties of any specific higher-graded position).

²² *See id.* at 730-31 (finding that grievance was barred by § 7121(c)(5) where there was no evidence that "the duties were not assigned to meet an urgent mission requirement, to give the [grievant] experience as part of an employee development or succession plan, or for similar reasons").

²³ *See, e.g., SSA*, 71 FLRA at 206.

²⁴ *See Fort Meade*, 71 FLRA at 369 (finding that the grievance and award concerned classification).

²⁵ Because we set aside the award on this basis, it is unnecessary to address the Agency's remaining arguments. *SSA*, 71 FLRA at 207 n.24.

Member DuBester, dissenting:

The majority's decision once again illustrates the flaws of the test set forth in *U.S. Small Business Administration (SBA I)*.¹ Before this aberrant decision, the Authority had long held that "where the substance of the grievance concerns whether the grievant is entitled to a temporary promotion under a collective-bargaining agreement because the grievant performed the established duties of a higher-graded position, . . . the grievance does not concern the classification of a position within the meaning of § 7121(c)(5) [of the Statute]."² Consistent with this common-sense standard, I would find that the Union's grievance does not concern the classification of the grievant's position within the meaning of § 7121(c)(5).

The majority's contrary conclusion is based upon a flawed premise and mischaracterizations of both the grievance and the award. For instance, the majority finds that the "essential nature" of the grievance concerns classification because the Union's grievance included a request that the Agency "'promote' the grievant to the GS-14 level."³ But the majority ignores that the Union's grievance specifically challenged the Agency's conduct in assigning the grievant to "higher graded duties, in addition to his regular GS-12 duties . . . [without] the appropriate *temporary promotion* [and] compensation" in violation of Article 31 of the parties' agreement.⁴ This provision specifically addresses the circumstances under which an employee is entitled to a temporary promotion.⁵ When examined in this context, it is apparent that the Arbitrator correctly interpreted the grievance as requesting a temporary promotion under the parties' agreement rather than a permanent promotion to the GS-14 level.⁶

Moreover, the Arbitrator did not conclude, as the majority suggests, that the parties could foreclose consideration of whether a grievance concerns a classification matter by means of a provision in their bargaining agreement. Instead, the Arbitrator simply found that the substance of the Union's grievance was illustrated by its reliance upon Article 31 of the

agreement which, as noted, governs temporary promotions.⁷

Relying upon *SBA I*, the majority also concludes that the grievance could not have concerned a temporary promotion because it asserted that the grievant performed duties at both a GS-13 and GS-14 level, rather than those of a *specific* position.⁸ But under this reasoning, an agency could defeat an otherwise valid temporary promotion claim, on jurisdictional grounds, by simply assigning the grievant the duties of two different, higher-graded positions rather than a single higher-graded position.

And, in addition to having nothing to do with whether a grievance concerns a classification matter, the majority's finding on this point is not supported by the record.⁹ The Arbitrator found that the grievant "was performing higher-graded work at the GS-13 level" and that his performance of GS-13 duties was "well documented on this record."¹⁰ He further found that the grievant "devoted more than one-half (1/2) time to duties at the GS-13 level during the period 2010 through 2017; those work assignments encompassed fully the itemization of GS-13 duties noted herein; [and] those work assignments were not the same as his basic, permanent GS-12 duties."¹¹ These findings clearly relate to the issue of whether the grievant was entitled to a temporary promotion to a specific position at the GS-13 level.

The majority also concludes that the grievance concerns a classification matter because the award contains "no evidence, or arbitral discussion, concerning whether the duties were assigned to meet an urgent mission requirement, or to give the grievant experience as part of a development or succession plan."¹² However, as I have previously stated, the majority's application of this standard to the question of whether a grievance is

¹ 70 FLRA 729 (2018) (Member DuBester dissenting).

² *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 70 FLRA 49, 50 (2016).

³ Majority at 3.

⁴ Award at 20 (emphasis added). The Union also argued that the Agency violated Art. 27 of the parties' agreement by its failure to provide the grievant with an accurate position description. *Id.*

⁵ *Id.* at 5-6.

⁶ See *U.S. DOD, U.S. Marine Corps, Air Ground Combat Ctr., Twenty-nine Palms, Cal.*, 71 FLRA 173, 175-176 (2019) (Dissenting Opinion of Member DuBester).

⁷ Award at 22 (noting that the grievance did not seek reclassification of the grievant's permanent position, but rather "the crux of the matter concerns higher graded work as controlled by [the parties' agreement at Article 31, Section 4(b)].")

⁸ Majority at 4.

⁹ The Union's grievance – which was filed in April 2017, well before the Authority's decision in *SBA I* – does reference GS-14 level duties performed by the grievant. But the majority fails to explain why this reference would render an otherwise arbitrable matter statutorily excluded. See *U.S. Dep't of the Treasury, IRS*, 71 FLRA 711, 773-74 (2020) (Dissenting Opinion of Member DuBester).

¹⁰ Award at 24.

¹¹ *Id.* at 27.

¹² Majority at 4 (applying the standard articulated by *SBA I*).

jurisdictionally barred by § 7121(c)(5) of the Statute improperly “conflat[es] arbitrability and merit issues.”¹³

In sum, the majority’s decision misconstrues the award and rests on a flawed test that includes considerations that have nothing to do with classification. Accordingly, I dissent from the majority’s conclusion, and would find that the Union’s grievance was not barred by § 7121(c)(5) of the Statute.

¹³ *SBA*, 70 FLRA 895, 898 (2018) (Dissenting Opinion of Member DuBester).