

73 FLRA No. 46

NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.
(Agency)

and

NATIONAL LABOR RELATIONS BOARD
PROFESSIONAL ASSOCIATION
(Union)

0-AR-5550

DECISION

September 12, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members
(Member Kiko dissenting)

I. Statement of the Case

Arbitrator Laurence M. Evans found that the Agency violated the parties' collective-bargaining agreement, government-wide regulations, and Agency policy by improperly calculating the grievants' tenure. The Agency filed exceptions to the award on nonfact, contrary-to-law, essence, and exceeded-authority grounds. Because the Agency does not establish that the award is deficient on any of these grounds, we deny the exceptions.

II. Background and Arbitrator's Award

This dispute concerns the Agency's tenure calculation for employees hired as law clerk trainees, and then converted to attorneys in a different job series. The attorney positions are subject to the Agency's two-year probationary period for permanent tenure. The Union filed two grievances challenging the Agency's failure to credit the time the grievants worked as law clerk trainees toward the two-year probationary period.¹ The parties

consolidated the grievances and submitted them to arbitration.

The Arbitrator framed the issue as whether the Agency violated the parties' agreement, government-wide regulations, and Agency policy "when it determined . . . that time [worked] by Agency law clerk trainees . . . would not count toward[] satisfying the Agency's two[-]year probationary requirement for excepted service . . . attorneys? If so, what shall be the appropriate remedy?"²

Relying on the definition of permanent "employee" in 5 U.S.C. § 7511(a)(1)(C)(ii), the Arbitrator found that the time employees worked as law clerk trainees could be credited toward the probationary period if the position was "other than a temporary appointment" and the work performed was "in the same or similar position[]" as the attorney position.³

Regarding whether the grievants held "temporary appointments" as law clerk trainees, the Arbitrator noted that 5 C.F.R. § 213.104(a)(1) defines "temporary appointments" as those "made for a specified period not to exceed [one] year" and that "[t]ime-limited appointments made for more than [one] year are not considered to be temporary appointments."⁴ He also noted that 5 C.F.R. § 213.3102(e) defines law clerk trainee positions as "[a]ppointments . . . for periods not to exceed [fourteen] months pending admission to the bar."⁵ Applying these provisions, he concluded that because the law clerk trainee positions are appointments for more than one year, they are not temporary appointments. He also found that law clerk trainees do not fall within the exceptions to 5 C.F.R. § 213.104(a)(1) found in § 213.104(b)(3)(ii). Specifically, he determined that those exceptions apply to positions that are filled to allow appointees "to meet academic or professional qualification requirements,"⁶ but that the applicable positions, which are listed in other regulations referenced by § 213.104(b)(3)(ii),⁷ do not include law clerk trainees.

Next, the Arbitrator analyzed whether the law clerk trainees hold the "same or similar positions"⁸ as attorneys. He found that Section 17.B of the Agency's Administrative Policy and Procedures Manual (APPM 17.B), similar to 5 U.S.C. § 7511(a)(1)(C)(ii), requires that law clerk trainees work "in the same agency [and] in the same line of work" as attorneys for their

¹ The Union named twenty-one individuals in the grievance and also stated that the grievance sought relief for "all similarly situated unit employees whose tenure codes have or will be will be incorrectly calculated." Exceptions, Attach., 1 at 2-3, 7, Joint Ex. 19 (Grievance) at 1-2, 6.

² Award at 12.

³ 5 U.S.C. § 7511(a)(1)(C)(ii) (stating that an employee is a person who has "completed [two] years of current continuous

service in the same or similar positions . . . under other than a temporary appointment").

⁴ 5 C.F.R. § 213.104(a)(1).

⁵ *Id.* § 213.3102(e).

⁶ *Id.* § 213.104(b)(3)(ii).

⁷ *Id.* § 213.3102(r)-(s); *id.* § 213.3402(a)-(c) (includes positions in "Pathways Program").

⁸ 5 U.S.C. § 7511(a)(1)(C)(ii).

service to count toward the probationary period.⁹ Comparing work performed in both positions, he found the work sufficiently similar such that the grievants' work as law clerk trainees should count toward the probationary period.

Consequently, the Arbitrator found that the Agency violated 5 U.S.C. § 7511(a)(1)(C)(ii), 5 C.F.R. § 213.104(a)(1), and APPM 17.B by failing to credit time worked as law clerk trainees toward satisfying the two-year probationary period for permanent tenure. For the same reasons, the Arbitrator also found that the Agency violated Article 3, Section 3.1 of the parties' agreement (Section 3.1), which requires the Agency to follow government-wide regulations and Agency policies in administering the parties' agreement.

In formulating a remedy, the Arbitrator found that the Agency's tenure miscalculation put the grievants and "similarly situated"¹⁰ bargaining-unit law clerk trainees hired after the grievance was filed at risk during a reduction-in-force (RIF) and, for the new trainees, "at risk for earlier summary termination during their probationary period[s]."¹¹ Therefore, he directed the Agency to credit time worked as law clerk trainees by the named grievants and similarly situated employees toward their probationary period for official personnel records.

The Agency filed exceptions to the award on October 9, 2019, and the Union filed an opposition to the Agency's exceptions on November 7, 2019.¹²

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar three of the Agency's arguments.

The Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.¹³ As part of its essence exceptions, the Agency cites 5 U.S.C. § 5584, arguing that "the contractual language does not add a layer of justification other than the statutory factors already in that statute, which themselves accord a substantial degree of deference to the agency."¹⁴ The Agency also argues in its essence exceptions that the Arbitrator failed to address Article 3, Section 3.5 of the parties' agreement (Section 3.5).¹⁵ Additionally, the Agency argues that the Arbitrator exceeded his authority by awarding relief to employees not encompassed by the grievance.¹⁶ Because there is no evidence in the record that the Agency raised any arguments concerning 5 U.S.C. § 5584, Section 3.5, or awarding relief to non-named grievants before the Arbitrator, even though it could have done so, we dismiss these arguments.¹⁷

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency contends that the award is based on a nonfact because, despite crediting testimony that the law clerk trainees are "temporary, nonpermanent positions" and the probationary period "begins when the law clerk trainee passes a state bar," the Arbitrator reached "a different conclusion."¹⁸ To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.¹⁹ However, disagreement with an arbitrator's evaluation of evidence, including the determination of the

⁹ Award at 15 (quoting APPM 17.B).

¹⁰ *Id.* at 17.

¹¹ *Id.*

¹² On November 26, 2019, the Union requested leave to file – and did file – a motion to approve official time of a Union representative. Mot. to Approve Official Time at 1. The Authority's Regulations provide that the Authority may, in its discretion, grant leave to file "other documents" as it deems appropriate. 5 C.F.R. § 2429.26; *see also AFGE, Loc. 3652, 68 FLRA 394, 396* (2015). We do not find the submission appropriate and deny the Union's request. 5 C.F.R. § 2429.26(a); *see also Haw. Fed. Emp. Metal Trades Council, 70 FLRA 324, 326 n.27* (2017).

¹³ 5 C.F.R. §§ 2425.4(c), 2429.5; *AFGE, Loc. 3627, 70 FLRA 627, 627* (2018); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bennettsville, S.C., 70 FLRA 342, 343* (2017).

¹⁴ Exceptions Br. at 6.

¹⁵ *Id.* at 7.

¹⁶ *Id.* at 8. The Agency concedes that it did not raise before the Arbitrator an argument that he could not award relief to "employees who were not parties to the arbitration." Exceptions Form at 8. *But see* Grievance at 1-2 (grievance stated that the grievance sought relief for "all similarly situated unit employees whose tenure codes have or will be will be incorrectly calculated"); Exceptions, Attach. 7, Union's Post-Hr'g Br. at 19 (seeking remedy for similarly situated employees).

¹⁷ *AFGE, Loc. 2338, 71 FLRA 1039, 1040* (2020) (barring claim that award contrary to Fair Labor Standards Act where no indication in record that agency raised it at arbitration); *NAGE, 71 FLRA 775, 776 n.15* (2020) (barring essence claim where no indication in record that agency raised it at arbitration).

¹⁸ Exceptions Br. 3-4, 4 n.4; *see* Exceptions Form at 6-7.

¹⁹ *AFGE, Loc. 3254, 70 FLRA 577, 580* (2018) (citing *AFGE, Council of Prison Locs. #33, Loc. 0922, 69 FLRA 351, 353* (2016) (*Local 0922*)).

weight to be given such evidence, provides no basis for finding an award deficient.²⁰

Here, even if the Arbitrator credited the testimony cited by the Agency, he also considered other evidence to determine whether the grievants were temporary employees.²¹ The Agency's disagreement with the Arbitrator's evaluation of the evidence and the determination of the weight given the evidence provide no basis for finding the award deficient based on a nonfact.²² Accordingly, we deny this exception.

B. The award is not contrary to law.

The Agency contends that the award is contrary to law for several reasons.²³ When resolving a contrary to law exception, the Authority reviews any question of law raised by the exception and the award *de novo*.²⁴ Applying a *de novo* standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.²⁵ In making that assessment, the Authority defers to the arbitrator's

underlying factual findings unless the excepting party establishes that they are nonfacts.²⁶

The Agency argues that the Arbitrator erred in determining that the law clerk trainee position identified in 5 C.F.R. 213.3102(e) is not a temporary appointment.²⁷ The Agency asserts that the position falls under 5 C.F.R. § 213.104(b)(3)(ii)'s exceptions to the one-year limit on temporary appointments in § 213.104(a)(1).²⁸ However, the grievants' appointments as law clerk trainees were made for a non-renewable period not to exceed fourteen months.²⁹ Under the plain wording of 5 C.F.R. § 213.104(a)(1), because the grievants' appointments were made to exceed one year, they are not temporary appointments.³⁰ Rather, the grievants' appointments were "[t]ime-limited appointments" and "*not subject to the . . . time limits*" in § 213.104(b).³¹ Therefore, because the exceptions in § 213.104(b)(3)(ii) only apply to "[t]emporary appointments, as defined in [§ 213.104(a)(1)]," and law clerk trainees do not fall within that definition, the exceptions are inapplicable.³²

²⁰ *AFGE, Loc. 17*, 72 FLRA 162, 163 (2021) (*Local 17*) (Member Abbott concurring) (citing *AFGE, Loc. 12*, 70 FLRA 582, 583 (2018)).

²¹ See Award at 12-15; *id.* at 2-3 n.4 (relying on "uncontradicted record evidence"); *id.* at 12 (considering "testimony of the parties' witnesses, the documentary evidence submitted and the arguments advanced by the parties . . . in their post-hearing briefs").

²² *Local 17*, 72 FLRA at 163.

²³ Exceptions Br. at 2-5; see Exceptions Form at 4.

²⁴ *U.S. Dep't of State, Bureau of Consular Affs., Passport Servs. Directorate*, 70 FLRA 918, 919 (2018).

²⁵ *Id.*

²⁶ *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014).

²⁷ Exceptions Br. at 2-3.

²⁸ *Id.*

²⁹ Consistent with 5 C.F.R. § 213.3102(e), the law clerk trainee vacancy announcement indicates that the position is not to exceed fourteen months. Exceptions, Attach. 3, Agency Ex. A at 2, Law Clerk Vacancy Announcement at 1; see *supra* note 1. Although the Agency argues that the vacancy announcement characterizes the appointment as "[t]emporary," Exceptions Br. at 3, we note that between the label "temporary" on a document that is not part of an employees' official personnel record and the stated term of fourteen months – which reflects the regulatory limit to the position – the latter controls. *Grigsby v. U.S. Dep't of Com.*, 729 F.2d 772, 776 (Fed. Cir. 1984) (holding that a "[Standard Form]-50 is not a legally operative document controlling on its face an employee's status and rights"); see *Mitchell v. MSPB*, 741 F.3d 81, 87 (Fed. Cir. 2014) (*Mitchell*).

³⁰ As discussed previously, § 213.104(a)(1) provides: "Temporary appointments are made for a specified period not to exceed [one] year and are subject to the time limits in paragraph (b) of this section. *Time-limited appointments made for more than [one] year are not considered to be temporary appointments, and are not subject to these time limits.*" 5 C.F.R.

§ 213.104(a)(1) (emphasis added); see *Mitchell*, 741 F.3d 81 (finding that an appointment not to exceed eighteen months – pending a background check – was not temporary under § 213.104(a)(1), because, among other things, it was not limited to a period of one year or less and nothing indicated that the agency contemplated it to be a short-term position).

³¹ 5 C.F.R. § 213.104(b) (emphasis added); see 62 Fed. Reg. 18,505 (Apr. 16, 1997) (explaining that when adding the last sentence of 5 C.F.R. § 213.104(a), which refers to "[t]ime-limited appointments," "[t]he existing regulations provide that if the appointments are for [one] year or less, by definition, they are temporary appointments" and "that agencies continue to have the ability to make appointments with time limits of more than [one] year [and that t]hese time-limited appointments are not subject to the restrictions for temporary appointments"); see also 59 Fed. Reg. 4,601 (Feb. 1, 1994); 59 Fed. Reg. 46,895 (Sept. 13, 1994) (notices only refer to temporary appointments as an appointment limited to one year or less and there is no indication in the notices that the Office of Personnel Management (OPM) intended to redefine temporary appointments as an appointment made to exceed one year).

³² 5 C.F.R. § 213.104(b). Contrary to the Agency's argument, "[e]xceptions to the general limits" in § 213.104(b)(3)(ii) are exceptions to the "[s]ervice limits" referenced in § 213.104(b)(1), which refer to agencies' authority to extend temporary appointments for an additional year (twenty-four months of total service). See 59 Fed. Reg. 46,895 (setting the service limit of a temporary appointment at one year with no more than one year extension of that original temporary appointment). Section 213.104(b)(3)(ii) operates to allow appointees in positions described in this section an exception to the *service limits* (i.e. the maximum twenty-four months of total service) of a temporary appointment – whether through reappointment or extension of the appointee's original temporary appointment. But the provision does not disturb the definition of temporary appointment as one made not to exceed one year. See 59 Fed. Reg. 4601; 59 Fed. Reg. 46,895.

The Agency also contends that the Arbitrator's conclusion is inconsistent with the Office of Personnel Management's Guide to Processing Personnel Actions, Chapter 26, Change in Tenure Group (Chapter 26).³³ According to the Agency, Chapter 26 indicates that "[t]ime-limited employees move to tenure group 1 upon successful completion of the time they are required to serve."³⁴ But the excerpt of Chapter 26 provided by the Agency states only that the definition of Tenure Group 1 for the excepted service is "[e]mployees whose appointments carry no restrictions or conditions such as conditional, indefinite, specific time limitation, or trial period."³⁵ It does not state that time worked as law clerk trainees cannot be credited toward a probationary period. Therefore, we find that Chapter 26 does not provide a basis on which to find that the award is contrary to law.³⁶

Accordingly, we deny the Agency's contrary-to-law exceptions.³⁷

C. The award does not fail to draw its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement.³⁸ The Authority will find that an arbitration award is deficient as failing to draw its essence from the collective-bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible

interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.³⁹

The Agency argues that the Arbitrator erroneously found a violation of Section 3.1 because there is no language in the parties' agreement that addresses the probationary period or when tenure accrues.⁴⁰ Section 3.1 provides that "[i]n the administration of all matters covered by this [a]greement, officials and employees are governed by existing or future laws and regulations of appropriate authorities [and] by published Agency policies and regulations."⁴¹ The Arbitrator found that the Agency's tenure miscalculation did not comply with 5 U.S.C. § 7511(a)(1)(C)(ii), 5 C.F.R. § 213.104(a)(1), and APPM 17.B and, therefore, the Agency violated Section 3.1.⁴² The Agency's disagreement with this conclusion does not demonstrate that it is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement.⁴³

Accordingly, we deny the Agency's essence exception.

D. The Arbitrator did not exceed his authority.

The Agency asserts that the Arbitrator exceeded his authority.⁴⁴ As relevant here, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, or disregard specific limitations on their authority.⁴⁵ Where the parties fail to stipulate to an issue, the arbitrator may formulate the issue on the basis of the subject matter before him or her.⁴⁶ In those circumstances, the Authority

³³ Exceptions Br. at 4.

³⁴ *Id.*

³⁵ Exceptions, Attach. 6 at 1.

³⁶ The Agency also argues that the award is contrary to APPM 17.G, Exceptions Br. at 4, which states that "[t]he service required for career tenure must begin and end with non-temporary employment." Award at 6 (quoting APPM 17.G). But the Agency does not explain how the Arbitrator's findings conflict with APPM 17.G other than referring to testimony that is the basis for the Agency's unsuccessful nonfact exception. And the Arbitrator's findings that tenure-creditable service begins with the law clerk trainee position because it is non-temporary employment is consistent with Section 17.G. Therefore, we deny this argument as unsupported. *AFGE, Loc. 2328*, 70 FLRA 797, 798 (2018) (citing *U.S. Dep't of VA, Gulf Coast Veterans Health Care Sys.*, 69 FLRA 608, 610 (2016)) (denying an exception when the party failed to provide support); 5 C.F.R. § 2425.6(e)(1) (An exception "may be subject to dismissal or denial if . . . [t]he party fails to . . . support a ground.").

³⁷ Contrary to the dissent's assertion, the grievance in this case did not challenge the grievant's appointment as law clerk trainees. Rather, the grievance challenges the manner in which the Agency later relied on that appointment to calculate the grievant's probationary period in their subsequent appointment. Therefore, we disagree that the grievance concerns an

appointment as contemplated by 5 U.S.C. § 7121(c)(4). *See, e.g., AFGE, Loc. 201*, 57 FLRA 874 (2002) (analyzing parties' arguments regarding nature of grievant's initial appointment under OPM regulations to determine whether award was contrary to law).

³⁸ Exceptions Br. at 5-7; *see* Exceptions Form at 7-8.

³⁹ *Local 17*, 72 FLRA at 164 (citing *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014)).

⁴⁰ Exceptions Br. at 7.

⁴¹ Exceptions, Attach. 1 at 23, Joint Ex. 2, Collective-Bargaining Agreement at 3; *see* Award at 4.

⁴² Award at 17-18.

⁴³ The Agency also contends that award fails to draw its essence from Article 4, Section 3 of the parties' agreement. Exceptions Br. at 6-7. Although the Arbitrator quoted this section as a relevant provision of the parties' agreement, he did not discuss or interpret it. Award at 4. Therefore, the Agency does not demonstrate that the award fails to draw its essence from the parties' agreement based on the Arbitrator's interpretation of this provision. *See, e.g., Nat'l Nurses United*, 70 FLRA 166, 168 (2017) (denying essence exception where arbitrator did not interpret cited contractual provisions).

⁴⁴ Exceptions Br. at 7-10; *see* Exceptions Form at 8.

⁴⁵ *NTEU*, 70 FLRA 57, 60 (2016) (citing *Local 0922*, 69 FLRA at 352).

⁴⁶ *Id.*

examines whether the award is directly responsive to the issue that the arbitrator framed.⁴⁷

First, the Agency argues that the Arbitrator “abandoned” his role of interpreting the parties’ agreement and substituted his personal knowledge to conclude that law clerk trainees perform the same kind of work as attorneys.⁴⁸ However, the Arbitrator relied on “record evidence”⁴⁹ and “judicial/administrative notice,”⁵⁰ separately, to determine that the work performed by the grievants as law clerk trainees was the “same or similar” work as required by 5 U.S.C. § 7511(a)(1)(C)(ii), and work “in the same agency [and] in the same line of work” as required by APPM 17.B.⁵¹ This determination is directly responsive to the issue that the Arbitrator framed,⁵² and the Agency’s argument challenging the Arbitrator’s evaluation of the evidence does not establish that the award is deficient.⁵³

The Agency also contends that the Arbitrator “opined on the Pathways hiring program,” although “hiring under that program” was not a matter submitted to arbitration.⁵⁴ But because the Arbitrator needed to consider whether law clerk trainees fit the exceptions in 5 C.F.R. § 213.104(b)(3)(ii), and that provision specifically references positions in the Pathways Programs,⁵⁵ his discussion was directly responsive to the framed issue.⁵⁶

Finally, the Agency argues that the Arbitrator erred by ordering relief when there was no showing that the grievants suffered any harm.⁵⁷ However, the Arbitrator found that the grievants and similarly situated law clerk trainees face a greater RIF risk and other risks because of the Agency’s improper calculation of tenure, and the Agency has not challenged these findings as nonfacts.⁵⁸ Therefore, we defer to these findings. Accordingly, the Agency’s argument does not demonstrate that the Arbitrator exceeded his authority.⁵⁹

Consequently, we deny the Agency’s exceeded-authority exceptions.

V. Decision

We deny the Agency’s exceptions.

⁴⁷ *Id.*

⁴⁸ Exceptions Br. at 9-10.

⁴⁹ Award at 16-17.

⁵⁰ *Id.* at 15 (internal quotations omitted).

⁵¹ *Id.* at 15-17.

⁵² See *AFGE, Nat’l Border Patrol Council, Loc. 2724*, 65 FLRA 933, 935 (2011) (*Local 2724*) (denying exceeded-authority exception where arbitrator’s determination was responsive to issue as framed).

⁵³ *AFGE, Loc. 1547*, 65 FLRA 624, 628 (2011) (citing *U.S. Dep’t of VA, VA Med. Ctr., Louisville, Ky.*, 64 FLRA 70, 72 (2009)); *FDIC*, 65 FLRA 179, 182 (2010).

⁵⁴ Exceptions Br. at 8.

⁵⁵ Award at 14; see 5 C.F.R. § 213.3402 (“Pathways Programs”).

⁵⁶ *Local 2724*, 65 FLRA at 935.

⁵⁷ Exceptions Br. at 8.

⁵⁸ Award at 17.

⁵⁹ *U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Honolulu, Haw.*, 66 FLRA 858, 862 (2012) (holding that an arbitrator does not exceed authority by awarding a particular remedy so long as it is responsive to harm caused by agency’s violation); *U.S. DOL, Bureau of Lab. Stats., Wash., D.C.*, 59 FLRA 533, 535 (2003) (denying exceeded-authority exception because remedy was responsive to violations and appropriate).

Member Kiko, dissenting:

Although disguised as a dispute about tenure calculations, this case involves a rarely seen attempt to use the grievance process to transform employees' initial federal appointments. The problem with this somewhat novel tactic arises from § 7121(c)(4) of the Federal Service Labor-Management Relations Statute (the Statute), according to which negotiated grievance procedures "shall not apply with respect to any grievance concerning . . . appointment."¹ The Authority has recognized that "appointment" under § 7121(c)(4) "relates to the initial entry of an applicant into the [f]ederal service."² Further, Authority precedent makes clear that § 7121(c)(4)'s bar applies to retroactive challenges to the nature of employees' initial appointments even if the challenges were not raised until after the employees accepted their appointments.³

The grievants in this case challenged the nature of their initial entry into the federal service as law-clerk trainees. Specifically, the Agency maintained that the grievants were appointed as temporary employees, and the Union countered that the grievants were appointed as time-limited, but not temporary, employees.⁴ According to the Arbitrator, this appointments dispute was one of two "core" issues in the case.⁵ As such, the core of the parties' dispute implicates § 7121(c)(4). Admittedly, the Union did not raise its challenges until after many of the affected employees had completed their service as law-clerk trainees, but Authority precedent makes this matter of timing irrelevant to the § 7121(c)(4) analysis.⁶

Moreover, the remedies that the Arbitrator awarded – at the Union's request – reinforce the impermissible nature of the grievances' challenges to initial appointments. After finding that the Agency must treat law-clerk-trainee appointments as nontemporary, the Arbitrator directed the Agency to apply the award to all "trainees hired subsequent" to the grievances' filings⁷ – thereby dictating the nature of not only previous appointments, but also future ones.

Because § 7121(c)(4) precludes challenges to initial appointments, the award is inconsistent with the Statute, and I would set it aside on that basis.

¹ 5 U.S.C. § 7121(c)(4).

² *U.S. DOD, Dependents Schs., Kaiserslautern, Ger.*, 51 FLRA 210, 212-13 (1995) (citing *NFFE, Loc. 1636*, 48 FLRA 511, 513-14 (1993); *U.S. DOD, Off. of Dependents Schs.*, 45 FLRA 1411, 1416 (1992); *U.S. Info. Agency*, 32 FLRA 739, 748 (1988); *Nat'l Council of Field Lab. Locs. of the AFGC, AFL-CIO*, 4 FLRA 376, 381 (1980), *abrogated on other grounds by U.S. DOL, Lab.-Mgmt. Servs. Admin., Cleveland, Ohio*, 13 FLRA 677, 678 (1984)); *see also U.S. Dep't of VA, James N. Quillen VA Med. Ctr., Mountain Home, Tenn.*, 69 FLRA 144, 145 (2015) (Member Pizzella dissenting in part on other grounds); *NFFE, Loc. 2010*, 55 FLRA 533, 534 (1999).

³ *See USDA, Rural Dev. Centralized Servicing Ctr., St Louis, Mo.*, 57 FLRA 166, 168-69 (2001) (*USDA*) (§ 7121(c)(4) barred grievance filed on behalf of bilingual loan processors who claimed discrimination "based on the manner in which [they] were initially hired").

⁴ Award at 2 ("The [Union] maintains that law[-]clerk trainees are not true 'temporary' employees . . ." (quoting 5 U.S.C. § 7511(a)(1)(C))).

⁵ *Id.*

⁶ *USDA*, 57 FLRA at 168-69 (§ 7121(c)(4) barred grievance challenging initial appointments even though grievants had accepted those appointments and served under them).

⁷ Award at 18.