

71 FLRA No. 29

UNITED STATES  
DEPARTMENT OF DEFENSE  
U.S. MARINE CORPS  
AIR GROUND COMBAT CENTER  
TWENTYNINE PALMS, CALIFORNIA  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 2018  
(Union)

0-AR-5376

DECISION

May 28, 2019

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

Decision by Member Abbott for the Authority

**I. Statement of the Case**

In this case, we must determine whether a grievance impermissibly involves classification under § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute).<sup>1</sup> We determine that it does.

In an interim award, Arbitrator Trudi Ferguson determined that the grievance could proceed to a merits hearing because the arbitration could avoid classification issues. The main question before us is whether that determination is contrary to law. Because the essential nature of the grievance concerns classification, regardless of how the Arbitrator characterized it, we find that § 7121(c)(5) bars the grievance, and we set aside the interim award.

**II. Background and Arbitrator’s Award**

On September 22, 2017, the Union filed a grievance alleging that the grievant was performing duties outside her position description and that she had been “tasked with additional duties which are higher than

her pay grade” in violation of the parties’ agreement.<sup>2</sup> As a remedy, the Union requested that the grievant be promoted to a General Schedule-9 position and awarded backpay. The Agency denied the grievance, finding that it was a classification matter that could not be grieved.

The parties were unable to resolve the grievance, and they submitted it to arbitration.

The Arbitrator issued an interim award on April 6, 2018, in which she determined, among other things, that the dispute before her was arbitrable. In particular, the Arbitrator stated that there was “insufficient and conflicting evidence as to the exact nature of the grievance.”<sup>3</sup> The Arbitrator added that she would not consider at arbitration classification issues excluded under the parties’ agreement. Rather, the Arbitrator stated that she would consider how “duties are assigned to the [g]rievant, were they properly detailed, temporarily promoted, or compensated” in accordance with the parties’ agreement.<sup>4</sup>

The Agency filed exceptions to the interim award on May 11, 2018. The Union did not file an opposition to the Agency’s exceptions.

**III. Analysis and Conclusion: Section 7121(c)(5) bars the grievance.**

The Agency acknowledges that its exceptions are interlocutory because the Arbitrator has not yet decided the merits of the grievance.<sup>5</sup> However, as the grievance raises<sup>6</sup> a plausible jurisdictional defect

<sup>1</sup> 5 U.S.C. § 7121(c)(5).

<sup>2</sup> Exceptions, Attach. 2 (Union Grievance) at 1.

<sup>3</sup> Award at 3.

<sup>4</sup> *Id.* at 5.

<sup>5</sup> Exceptions Br. at 4 (citing to Authority case law on interlocutory review).

<sup>6</sup> Although the Agency did not file an exception to the Arbitrator’s determination concerning classification, we will consider, *sua sponte*, jurisdictional issues, including if § 7121(c)(5) of the Statute precludes a matter from the grievance process. *U.S. DOL*, 70 FLRA 903, 904 (2018); *U.S. Dep’t of HUD*, 70 FLRA 605, 607 (2018).

concerning classification,<sup>7</sup> we grant interlocutory review.<sup>8</sup>

Under § 7121(c)(5), arbitrators lack jurisdiction to determine “the classification of any position [that] does not result in the reduction in grade or pay of an employee.”<sup>9</sup> As relevant, a grievance involves classification where it seeks the reclassification of an employee’s position based upon alleged classification errors, including where a grievance seeks a promotion due to the alleged performance of higher-graded duties.<sup>10</sup>

Here, the Union’s grievance sought a promotion and backpay because the grievant allegedly had been working outside of her position description and was tasked with additional, higher-graded duties. As demonstrated by the requested remedy<sup>11</sup> and regardless of

how the Arbitrator characterized the dispute, the essential nature of this grievance concerned classification.<sup>12</sup>

Accordingly, we conclude that § 7121(c)(5) bars the grievance, and we set aside the interim award as contrary to law.<sup>13</sup>

#### IV. Decision

We grant interlocutory review and set aside the interim award.

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<sup>7</sup> Under § 2429.11 of the Authority’s Regulations, the Authority ordinarily will not resolve exceptions to an arbitrator’s award unless the award completely resolves all of the issues submitted to arbitration. *See, e.g., U.S. Dep’t of the Army, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 70 FLRA 172, 173 (2017) (*Army*); *U.S. DOJ, Exec. Office for Immigration Review*, 67 FLRA 131, 131 (2013) (*DOJ*). However, the Authority will review interlocutory exceptions where there are extraordinary circumstances, including where they would advance the ultimate disposition of the case by ending the litigation. *See, e.g., U.S. Dep’t of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (*IRS*); *Army*, 70 FLRA at 173. This includes exceptions that raise a plausible jurisdictional defect—i.e., those that present a credible claim that the arbitrator lacked jurisdiction over the subject matter of the grievance as a matter of law. *See IRS*, 70 FLRA at 808; *DOJ*, 67 FLRA at 132.

<sup>8</sup> When an exception involves an award’s consistency with law, the Authority reviews the award de novo. In applying the standard of *de novo* review, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the applicable standard of law. In making that assessment, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party establishes that they are nonfacts. *E.g., SSA*, 60 FLRA 62, 65 (2004).

<sup>9</sup> 5 U.S.C. § 7121(c)(5); *AFGE, Local 2142*, 58 FLRA 416, 417 (2003) (*Local 2142*), *overruled on other grounds by Small Bus Admin.*, 70 FLRA 729 (2018) (*SBA*) (Member DuBester dissenting).

<sup>10</sup> *SBA*, 70 FLRA at 730 n.7 (citing *AFGE, Local 987*, 58 FLRA 453, 454-55 (2003) (finding that a grievance concerned classification where “[t]he grievance alleged that the grievant performed higher graded duties without compensation”); *Local 2142*, 58 FLRA at 417 (“When the substance of a grievance concerns the grade level of the duties assigned to, and performed by, the grievant, the grievance concerns the classification of a position within the meaning of § 7121(c)(5).”); *AFGE, Local 987*, 52 FLRA 212, 213, 215 (1996) (*Local 987*) (“Where the issue before the arbitrator involves the appropriateness of a grievant’s assigned grade level, the matter is not arbitrable under [§] 7121(c)(5) of the Statute.”)).

<sup>11</sup> *See U.S. Dep’t of HUD*, 70 FLRA 605, 608 (2018) (Member DuBester dissenting).

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<sup>12</sup> *See Local 987*, 52 FLRA at 213, 215.

<sup>13</sup> Because we set aside the award, we do not address the Agency’s remaining exceptions. *See U.S. DOD, Def. Logistics Agency Aviation Richmond, Va.*, 70 FLRA 206, 207 (2017) (setting aside award on exceeded-authority ground made it unnecessary to review remaining exceptions).

**Member DuBester, dissenting:**

The majority errs in holding that the grievance concerns a classification matter within the meaning of § 7121(c)(5) of the Statute.<sup>1</sup> Accordingly, because the Agency's interlocutory exceptions to the Arbitrator's interim award do not demonstrate that the award has a "plausible jurisdictional defect,"<sup>2</sup> the Agency's exceptions should be dismissed.

As relevant here, the Authority has 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)."<sup>3</sup> In stark contrast, arbitrators lack jurisdiction when the essential nature of a grievance concerns the grade level of the duties assigned to and performed by a grievant in *his or her permanent position*, which would involve the classification of a position within the meaning of § 7121(c)(5).<sup>4</sup> In prior decisions, the Authority has had relatively little difficulty in distinguishing between these two concepts.<sup>5</sup>

The majority concludes that the Arbitrator was barred from considering the Union's grievance because its "essential nature . . . concerned classification."<sup>6</sup> It bases this conclusion upon its finding that, as a remedy, "the Union requested that the grievant be promoted to a General Schedule-9 position and awarded backpay."<sup>7</sup>

<sup>1</sup> I note that the majority considers this issue notwithstanding that the Agency has not filed an exception regarding the classification matter.

<sup>2</sup> Majority at 2.

<sup>3</sup> *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 70 FLRA 49, 50 (2016) (emphasis added).

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., *AFGE, Local 1757*, 58 FLRA 575, 576 (2003) ("nothing in §7121(c) precluded the [a]rbitrator from considering the proper classification of the temporary duties allegedly performed by the grievant in resolving whether she was entitled to a temporary promotion"); *SSA, Office of Hearings and Appeals, Mobile, Ala.*, 55 FLRA 778, 780 (1999) (SSA) ("As the substance of the grievance . . . concerned whether the grievants were entitled to a temporary promotion under the parties' agreement, we find that the award does not concern the classification of a position."); *U.S. Dep't of HUD, La. State Office, New Orleans, La.*, 53 FLRA 1611, 1616-18 (1998) ("the [a]rbitrator was not asked to classify a position within the meaning of section 7121(c) of the Statute" but rather "was required to decide whether the grievant was assigned the duties of a higher-graded position and entitled to compensation for the performance of those duties under the terms of the parties' agreement").

<sup>6</sup> Majority at 3.

<sup>7</sup> *Id.* at 2.

But this perfunctory description wholly mischaracterizes the essential nature of the Union's grievance. What the grievance actually requests is that the grievant "be made whole by compensating her retroactively and *if any additional duties remain in effect*, then the [grievant] should be promoted *as prescribed in Article 14* [of the parties' agreement]."<sup>8</sup> Article 14, in turn, governs when and how an employee should receive a temporary promotion or detail.<sup>9</sup> Thus, while the grievance requests that the grievant be promoted to a GS-9 position, it is clear from this context that the request is for a *temporary* promotion contingent on the grievant continuing to be tasked with additional, higher-graded duties outside of her position description. It follows that the essential nature of the grievance does not concern the grade level of the duties assigned to, and performed by, the grievant in her permanent position.<sup>10</sup>

The Arbitrator had no difficulty ascertaining the nature of the Union's grievance. She precisely states in her interim award that the merits phase of the arbitration will be confined to "issues of contractual obligations in how duties are assigned to the [grievant, were they properly detailed, temporarily promoted, or compensated in accordance with the requirement of the [parties' agreement]."<sup>11</sup> Presumably wanting to extinguish any lingering doubt on this point, she explains that she is aware of the § 7121(c)(5) classification issue and will not consider any of the "excluded issues of classification."<sup>12</sup> Moreover, she advises the Union to "limit the arbitration to issues not excluded from coverage under the [parties' agreement]."<sup>13</sup>

Considering the record in its entirety, it is clear that the Arbitrator correctly concluded that the grievance before her did not concern a classification matter within the meaning of § 7121(c)(5). The single sentence selectively parsed from the grievance by the majority, when read in context of the entire grievance, simply does not bear the weight of the majority's conclusion to the

<sup>8</sup> Exceptions, Attach. 2, Step 1 Grievance at 1 (emphasis added).

<sup>9</sup> *Id.*, Attach. 1, Collective-Bargaining Agreement at 41.

<sup>10</sup> See, e.g., *SSA*, 55 FLRA at 780 ("As the substance of the grievance . . . concerned whether the grievants were entitled to a temporary promotion under the parties' agreement, we find that the award does not concern the classification of a position.").

<sup>11</sup> Award at 5.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

contrary.<sup>14</sup> Further, the majority fails to challenge the Arbitrator's conclusion that during the merit's phase of the arbitration she would not consider the classification issues and only address the parties' contractual obligations. Accordingly, I dissent.

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<sup>14</sup> See, e.g., *AFGE, Local 1923*, 38 FLRA 89, 95 (1990) (finding that grievance was not barred under § 7121(c)(5), even where it included a request that "the GS-9 positions be upgraded to GS-11 positions," where arbitrator ruled the request was "superfluous to the grievances" and decided only whether the grievant was entitled to a temporary promotion under the parties' agreement).