

70 FLRA No. 193

UNITED STATES
DEPARTMENT OF THE NAVY
COMMANDER NAVY REGION SOUTHWEST
NAVAL AIR WEAPONS STATION-CHINA LAKE
(Agency)

and

INTERNATIONAL ASSOCIATION
OF FIREFIGHTERS
LOCAL F-32
(Union)

0-AR-5321

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DECISION

December 11, 2018

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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 address whether an arbitrator may direct an agency to promote an employee retroactively without regard to whether the employee satisfied qualification standards established by the U.S. Office of Personnel Management (OPM). Because OPM regulations *mandate* that an employee meet a position's specialized-experience requirements before he or she is eligible for promotion, we set aside Arbitrator David Alexander's award directing the retroactive promotion of an employee (the grievant) who did not satisfy those requirements.

II. Background and Arbitrator's Award

The Agency employed the grievant as a police officer for over five years. The grievant decided to become a firefighter with the Agency, and accepted a downgrade from his General Schedule (GS)-7 police-officer position to a GS-3 firefighter position. In June 2016, the grievant obtained two certifications required for Department of Defense firefighters (the certifications). Consequently, the grievant's supervisor submitted paperwork to promote the grievant to GS-4, which the Agency approved. Two weeks later, the grievant's supervisor submitted paperwork to promote the grievant to GS-5.

The Agency denied the grievant's promotion to GS-5 on the basis that he did not have the specialized experience that OPM required for that grade level. Over the next few months, the grievant worked as a GS-4 firefighter and obtained additional training. In August 2016, the grievant's supervisor resubmitted the GS-5 promotion paperwork, with the grievant's updated documentation. The Agency determined that the grievant's four months' experience as a GS-4 firefighter, combined with his additional training, satisfied the specialized-experience requirement for the GS-5 position, and the Agency promoted him in September 2016.

The Union then filed a grievance, alleging that the Agency's failure to promote the grievant to GS-5 in June 2016 violated an oral agreement between the parties. The grievance went to arbitration. As relevant here, the Arbitrator found that the parties had an oral agreement to promote firefighters from GS-3 directly to GS-5 when the employees obtained the certifications, without regard to time-in-grade restrictions for promotion. The Arbitrator concluded that the Agency repudiated the oral agreement when it did not promote the grievant to GS-5 immediately after he obtained the certifications in June. Consequently, the Arbitrator granted the grievance and directed the Agency to make the grievant's GS-5 promotion retroactive to June 2016 with backpay.

On October 19, 2017, the Agency filed exceptions to the Arbitrator's award. The Union did not file an opposition to those exceptions.

III. Analysis and Conclusion

A. The award is not based on a nonfact.

The Agency argues that the award is based on a nonfact because the Arbitrator erroneously found that the grievant had satisfied the *specialized-experience* requirements, which OPM established for the GS-5 firefighter position, when he obtained the certifications in June 2016.¹ However, the Arbitrator made no such finding. Rather, the Arbitrator found that the parties had an oral agreement to disregard *time-in-grade* restrictions and promote employees to GS-5 once they obtained the certifications.² The Arbitrator found that, when the grievant obtained the certifications, he had satisfied the oral agreement's requirements, which concern only time-in-grade restrictions.³ But, time-in-grade restrictions are distinct

¹ Exceptions at 8-10.

² Award at 1, 9.

³ *Id.* at 9, 11.

from OPM's specialized-experience requirements.⁴ And because the Arbitrator made *no* findings concerning whether the grievant satisfied OPM's specialized-experience requirements, the Agency's argument provides no basis for finding that the award is based on a nonfact.⁵

B. The award is contrary to OPM regulations.

According to the Agency, because it has no authority to enter an agreement that waives OPM's specialized-experience requirements, the award is contrary to OPM regulations.⁶

This case requires us to examine the interplay of several regulations. OPM requires that all personnel actions "comply with the qualification standards and regulations" that OPM issues.⁷ One such regulation requires that some employees have a certain amount of "time-in-grade" experience before an agency can promote them.⁸ OPM allows agencies to waive the time-in-grade requirement in certain circumstances.⁹ However, OPM regulations also provide that agencies "must ensure that employees . . . meet the requirements included in [an OPM manual]" for specific positions, and the manual's requirements go beyond time-in-grade restrictions.¹⁰

In other words, even when an agency has the power to waive a *time-in-grade* requirement, the agency still must comply with the OPM manual, which includes, as relevant here, a *specialized-experience* requirement for firefighter positions.¹¹ Further, neither party cites any

OPM regulation that would authorize waiving the specialized-experience requirements for firefighter promotions. Thus, to be promoted, an employee must satisfy *both* the general time-in-grade requirement and the specialized-experience requirement for the firefighter position at the appropriate GS level.¹²

The award requires the Agency to waive time-in-grade requirements, and that portion of the award is consistent with OPM regulations that recognize an agency's discretion to waive such requirements.¹³ Nevertheless, we still must determine whether the award is consistent with other OPM qualifications standards.

The Authority has held that an employee "must meet the minimum qualification requirements prescribed by [OPM]" for a higher-graded position in order to receive a promotion to that position.¹⁴ Further, the Authority has set aside awards that directed promotions for grievants who did not possess the specialized experience required for promotion.¹⁵ The OPM qualifications standards for employees in the fire protection and prevention job series state that, in order to be promoted to GS-5, employees must have one year of specialized experience equivalent to "at least GS-4."¹⁶ Specialized experience is defined as "[e]xperience that demonstrate[s] that the employee has] the particular knowledge, skills, and abilities . . . to perform successfully the duties of the position."¹⁷ The standards also provide that appropriate training can substitute for the required experience on a month-for-month basis.¹⁸

As discussed previously, the Arbitrator made no findings regarding whether the grievant possessed the OPM-mandated specialized experience. But the record

⁴ 5 C.F.R. § 300.601 (time-in-grade restrictions are "in addition to the eligibility requirements for promotion" in 5 C.F.R. part 335); *id.* § 335.103(b)(3) (in order to be eligible for promotion, candidates must meet OPM's minimum qualifications standards).

⁵ *U.S. Nuclear Regulatory Comm'n, Arlington, Tex.*, 48 FLRA 466, 470 (1993) (citing *U.S. DOD, Dependents Sch., Mediterranean Region*, 47 FLRA 3, 9 (1993)) (denying nonfact exception that challenged arbitrator's finding that union had not demonstrated that selectee was unqualified).

⁶ Exceptions at 7-8 (citing 5 C.F.R. § 250.101); *see also id.* at 8-9; Exceptions, Ex. 8, OPM Classification & Qualifications, General Schedule Qualification Standards, Fire Protection and Prevention Series, 0081 (Standards) at 1; 5 C.F.R. § 335.103(b)(3); *id.* § 338.301 ("Agencies must ensure that employees who are given competitive service appointments meet the requirements included in . . . [OPM's] Operating Manual: Qualification Standards for General Schedule Positions.").

⁷ 5 C.F.R. § 250.101.

⁸ *Id.* § 300.604.

⁹ *Id.* § 300.603(b).

¹⁰ *Id.* § 338.301.

¹¹ *See id.* § 300.601 (time-in-grade restrictions are "in addition to the eligibility requirements for promotion" in 5 C.F.R. part

335); *id.* § 335.102 (promotions are subject to 5 C.F.R. § 335.103); *id.* § 335.103(b) ("To be eligible for promotion . . . , candidates *must* meet the minimum qualification standards prescribed by [OPM].") (emphasis added)).

¹² *See U.S. DOD, Def. Commissary Agency, Fort Lee, Va.*, 56 FLRA 855, 859 (2000) (Chairman Wasserman concurring) (holding that an employee must meet both "time-in-grade requirements and specialized[-]experience requirements" to be eligible for promotion).

¹³ 5 C.F.R. § 300.604(c) (stating that employees "may be advanced without time restriction to positions up to GS-5 if the position to be filled is no more than two grades above the lowest grade the employee held within the preceding 52 weeks").

¹⁴ *U.S. DOJ, U.S. Marshals Serv.*, 66 FLRA 531, 536 (2012) (*Marshals*) (quoting *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 58 FLRA 498, 500 (2003)); *see* 5 C.F.R. § 335.103(b)(3).

¹⁵ *Marshals*, 66 FLRA at 536 (citing *U.S. Dep't of the Army, Headquarters Fort Dix, Fort Dix, N.J.*, 49 FLRA 730, 736-37 (1994)).

¹⁶ Exceptions, Ex. 8, Standards at 1.

¹⁷ *Id.*

¹⁸ *Id.* at 2.

supports the Agency's argument that the grievant did not possess the specialized experience required for the GS-5 position until September 2016.¹⁹ According to the GS-5 firefighter position description,²⁰ GS-5 employees must have experience in structural and airfield firefighting, emergency medical care, health and safety compliance, and maintenance of facilities.²¹ The record demonstrates that, after June 2016, in September 2016, the grievant received additional training that allowed him to satisfy the specialized-experience requirement for a GS-5 firefighter.²² Therefore, September 2016 is the earliest that the Agency could have promoted him to GS-5. Consequently, the Arbitrator's award directing the Agency to promote the grievant retroactively is contrary to OPM regulations that require one year of specialized experience equivalent to the GS-4 level,²³ before promotion to GS-5.

Accordingly, we grant the Agency's exception and set aside the award.²⁴

IV. Decision

We set aside the award.

¹⁹ The Union did not file an opposition to the Agency's exceptions and, therefore, did not challenge the Agency's argument that the grievant did not satisfy OPM's specialized-experience requirement in June.

²⁰ We examine the position description because, according to OPM, "[t]he description of duties and responsibilities" found in the position-classification standard, along with the *position description*, identifies the kinds of work experience that satisfy the specialized-experience requirement for the GS-5 level of the fire protection and prevention job series. See OPM, *General Schedule Qualification Policies*, <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-policies/#url=General-Policies> (Policies); see also 5 C.F.R. § 335.103(b) ("[C]andidates must meet the minimum qualification standards prescribed by [OPM]."). But "[e]ducation and experience can be combined to meet the minimum qualification requirements" for the position. Policies, § 5.

²¹ Exceptions, Ex. 17, GS-5 Firefighter Position Description. OPM explains that position descriptions include "a statement of any valid knowledge, *skill*, education, certification, etc., required by the position." OPM, *Classifier's Handbook*, <https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/classifierhandbook.pdf> at 19 (emphasis added).

²² Exceptions, Ex. 10, Grievant's Training Record at 1; Exceptions, Ex. 11, Grievant's Individual Training Report at 15-17.

²³ 5 C.F.R. § 335.103(b); Exceptions, Ex. 8, Standards at 1.

²⁴ Because we set aside the award on the basis that the award is contrary to law, we need not resolve the Agency's exceeded-authority exception. Exceptions at 10-11; e.g., *AFGE, Local 2145*, 69 FLRA 7, 9 (2015).

Member DuBester, dissenting:

I disagree with the majority's decision that the award is contrary to law. "[C]ontinuing its non-deferential treatment of arbitrators and their awards,"¹ the majority's contrary-to-law analysis fails to give appropriate deference to the Arbitrator's factual findings. And the majority also ignores the Office of Personnel Management's (OPM's) determinations concerning the "specialized experience" qualifying an individual for a GS-5 Firefighter position.

When reviewing contrary-to-law exceptions, the Authority defers to an arbitrator's factual findings unless the excepting party establishes that they are nonfacts.² Contrary to the majority's decision,³ the Arbitrator finds that the grievant met all of the requirements to be a GS-5 Firefighter, including required specialized experience under OPM's regulations.⁴ The Arbitrator finds "highly credible" the Union president's testimony that when the parties negotiated their oral agreement to promote the grievant, they were conscious of the need to ensure that the agreement accorded with those regulations.⁵ And the Arbitrator also credited the testimony of one of the grievant's supervisors, the grievant's Fire Chief, that the grievant "[was] actually qualified for a GS-5 Firefighter" position when the parties agreed to promote him.⁶ The Agency does not demonstrate that the Arbitrator's factual findings are nonfacts and, therefore, the Authority should defer to them.

Further, relying on the grievant's position description, the majority erroneously faults the grievant for lacking "OPM-mandated specialized experience" because of a lack of experience "in structural and airfield firefighting, emergency medical care, health and safety compliance, and maintenance of facilities."⁷ Not true. OPM's qualification standards for the GS-5 Firefighter

¹ *U.S. Small Bus. Admin.*, 70 FLRA 885, 888 (2018) (Dissenting Opinion of Member DuBester); see also *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence, Colo.*, 70 FLRA 748, 750 (2018) (Dissenting Opinion of Member DuBester); *U.S. Dep't of Transp., FAA*, 70 FLRA 687, 690 (2018) (Dissenting Opinion of Member DuBester); *U.S. Dep't of the Treasury, IRS, Austin, Tex.*, 70 FLRA 680, 683-84 (2018) (Dissenting Opinion of Member DuBester); *U.S. Dep't of VA, Med. Ctr., Asheville, N.C.*, 70 FLRA 547, 549 (2018) (Dissenting Opinion of Member DuBester).

² *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012)).

³ Majority at 2, 4.

⁴ Award at 9; see also *id.* at 4.

⁵ *Id.* at 9; see also *id.* at 4.

⁶ *Id.* at 9-10.

⁷ Majority at 4-5.

position,⁸ which the majority ignores, expressly address the “specialized experiences” qualifying an individual to be a GS-5 Firefighter. “Structural and airfield firefighting, emergency medical care, health and safety compliance, and maintenance of facilities” are not among them.⁹

But OPM’s qualification standards *do* identify a wide variety of other “specialized experiences” that would qualify an individual for the GS-5 Firefighter position. Those specialized experiences “include (1) controlling or extinguishing fires as a member of an organized military, industrial, volunteer, or governmental fire department or brigade; (2) rescue operations; (3) detection, reduction, or elimination of potential fire hazards; (4) operation of fire communications equipment; (5) controlling hazardous materials incidents and/or (6) developing, implementing, or providing training in fire protection and prevention.”¹⁰ Nothing in the record, or that the majority cites, demonstrates that the grievant does not possess the requisite “specialized experience” in the categories listed in OPM’s qualification standards. And the Fire Chief’s testimony that the grievant “[was] actually qualified” for the position,¹¹ which the Arbitrator credits, is proof that the grievant had the requisite experience.

Because the majority fails to defer to the Arbitrator’s factual findings, and ignores OPM’s qualification standards for the GS-5 Firefighter position, I dissent from the majority’s determination to set aside the award.

⁸ Exceptions, Ex. 8.

⁹ *See id.*

¹⁰ *Id.* at 1-2.

¹¹ Award at 9.