

71 FLRA No. 15

UNITED STATES
DEPARTMENT OF AGRICULTURE
ANIMAL AND PLANT HEALTH
INSPECTION SERVICE
PLANT PROTECTION AND QUARANTINE
(Agency)

and

NATIONAL ASSOCIATION
OF AGRICULTURE EMPLOYEES
(Union)

0-AR-5380

DECISION

March 29, 2019

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

I. Statement of the Case

Arbitrator Leonard M. Shapiro found that the Agency violated a U.S. Office of Personnel Management (OPM) rule when the Agency determined that the seven grievants did not satisfy the minimum educational requirements for their positions and when it denied one of those grievants a promotion. The Agency filed exceptions to the award.

We find that the Arbitrator did not err when he concluded that the OPM rule applied to the employees' positions.

II. Background and Arbitrator's Award

The grievants' positions as plant protection and quarantine officers were originally part of the General Schedule (GS)-436 series. OPM abolished that series and reclassified the grievants' positions as part of

the GS-401 series.¹ The GS-401 series has the same minimum educational requirement as the former GS-436 series. The Agency reassigned the employees in the GS-436 series to the GS-401 series.²

The Agency appointed one of the grievants (the primary grievant) to his current position after he completed coursework that the Agency determined would satisfy the position's minimum educational requirement. At the time of the primary grievant's initial appointment, his position was still in the GS-436 series. Ten years after OPM reclassified the GS-436 positions into GS-401 positions, the primary grievant applied for a competitive promotion in the GS-401 series to a GS-12 position, after having served in temporary promotions off and on between 2013 and 2016. The Agency found him qualified and selected him.

Shortly thereafter, the Agency revoked the primary grievant's promotion and informed him he did not meet the minimum educational requirement for *either* his current position at the GS-11 level or the promotion at the GS-12. The Agency determined that, when reviewing his eligibility for the GS-436 series position, it had erroneously credited some of his coursework and that he was actually five semester hours short of meeting the minimum educational requirement for the GS-401 series.

The Agency then reviewed the records of other employees who had been in the GS-436 series and were reclassified to the GS-401 series. The Agency determined that six additional employees did not meet the minimum educational requirement for their positions. The Agency advised the employees that it would reassign them unless they obtained the required college credits,

¹ See *OPM Handbook of Occupational Groups and Families*, 191 (May 2009), (stating that the GS-436 series was "cancel[led] . . . as a result of a recent occupational study"); *OPM Functional Guide to Professional Work in the Natural Resources Management and Biological Sciences Group, 0400*, 3 (Sept. 2005), <https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/standards/0400/g0400p.pdf> (*OPM Functional Guide*) (stating that GS-436-series positions were reclassified to be part of the GS-401 series).

² Although the Arbitrator stated the employees were transferred, "a change of an employee, while serving continuously within the same agency, from one position to another without promotion or demotion" is a reassignment. 5 C.F.R. § 210.102(b)(12); see also *The Guide to Processing Personnel Actions*, Ch. 14(2)(e), <https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/occupationalhandbook.pdf>, ("Reassignment is the change of an employee from one position to another without promotion or change to lower grade [including] . . . assignment to a position that has been redescribed due to the introduction of a new or revised classification or job grading standard[.]").

but the Agency stated that they could obtain the credits during working hours at the Agency's expense.

The Union filed a grievance on behalf of the seven affected employees, and the grievance went to arbitration. As relevant here, the Union argued that an OPM rule called the "add-on rule" applied to the grievants.³ According to the Union, the add-on rule allowed the Agency to accept the grievants' existing coursework as sufficient to satisfy the GS-401 educational requirements. The Agency countered that the add-on rule did not apply in the circumstances of this case.

The Arbitrator found that the add-on rule applied to the grievants because the Agency reassigned them from the GS-436 series to the GS-401 series. The Arbitrator further found that, because the Agency accepted the grievants' education as meeting the minimum educational requirements for their GS-401 positions when OPM reclassified those positions, the Agency could not reexamine, under the add-on rule, those same qualifications later – in this case, *ten years later*. Consequently, the Arbitrator found that the Agency committed an unjustified and unwarranted personnel action when it reexamined the grievants' education, failed to promote the primary grievant, and found the other six grievants unqualified for their positions. As a remedy, the Arbitrator directed the Agency to (1) promote the primary grievant and pay him back pay and (2) correct the personnel records of all seven grievants to reflect that they are fully qualified for their GS-401 positions.

On May 30, 2018, the Agency filed exceptions to the Arbitrator's award, and on June 25, 2018, the Union filed an opposition to those exceptions.

III. Analysis and Conclusions

A. The award is not contrary to the OPM Qualifications Handbook or 5 C.F.R. § 335.103(b).⁴

The Agency argues that the award is contrary to the OPM Qualifications Handbook⁵ and 5 C.F.R. § 335.103(b)⁶ because the Arbitrator found that the add-on rule applies to the grievants.⁷

³ Award at 8.

⁴ The Agency also argued that the Award was contrary to 5 C.F.R. § 351.702. Exceptions at 4-6. That section, pertaining to bump and retreat rights of employees subject to a reduction in force, appears inapplicable to the arbitrator's award in this case. Furthermore, the Agency has not indicated how this section is applicable, so we deny this exception. *U.S. Dep't of the Air Force, Air Force Logistics Command, Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 49 FLRA 828, 831 (1994) (rejecting argument where a party fails to explain, and it is not apparent from the record, how a provision of law is applicable).

⁵ Exceptions at 6-8. The "OPM Qualifications Handbook" to which the Agency refers was attached to the Union's Opposition as Attachment A – "Classification and Qualifications General Schedule Qualification Policies." Opp'n, Attach. A, General Schedule Qualifications Policy (Policy) at 1-35, <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-policies/#url=General-Policies>. The Policy was issued in accordance with 5 C.F.R. § 338.301 for Federal agencies to determine whether applicants meet the minimum requirements for a position being filled.

⁶ Exceptions at 10.

⁷ Exceptions at 6-8.

OPM's General Schedule Qualifications Policy (the policy)⁸ defines the "add-on" rule under the section titled "Special Inservice Placement Provisions."⁹ The add-on rule permits an agency to find that an employee subject to an inservice placement action¹⁰ meets the minimum qualifications for a position. The policy defines inservice placement as a "noncompetitive action in which a position is filled with a current or former competitive service employee through promotion, reassignment, change to lower grade, transfer, reinstatement, reemployment, or restoration[.]" or through conversion of a position from the excepted service into the competitive service.¹¹

In 2005, OPM reclassified the grievants' positions from GS-436 to GS-401,¹² and the Agency reassigned the employees to the GS-401 series. Since a reassignment is one of the inservice placement actions to which the add-on rule applies, the Arbitrator correctly found that the rule applied to the grievants.

The Agency contends that the add-on rule cannot "waive" minimum education requirements.¹³ Contrary to the Agency's exception, the award does not require the Agency to waive the minimum educational requirements for the grievants' positions.¹⁴ In particular, the Arbitrator specifically stated that he "could not rule that the waiver policy applies here."¹⁵ The purpose of the standards contained in the policy is to help agencies "determine which applicants would be able to perform satisfactorily in the positions to be filled."¹⁶ Minimum education requirements are established when "OPM has determined that the work cannot be performed by persons who do not possess the prescribed minimum education. This includes instances where it would not be cost-effective for an individual to acquire, through on-the-job training, the [knowledge, skills, and abilities] necessary for successful performance of the critical duties within a reasonable period of time."¹⁷ The policy recognizes that,

on rare occasions there may be applicants who may not meet exactly the educational requirements for a particular series, but who, in fact, may be demonstrably well qualified to

perform the work in that series because of exceptional experience or a combination of education and experience. In such instances, a more comprehensive evaluation must be made of the applicant's entire background, with full consideration given to both education and experience. To be considered qualified, the applicant's work experience must reflect significant full performance-level accomplishment directly applicable to the position to be filled.¹⁸

The policy specifically states that, "[a]pplicants may be considered to have satisfied the minimum [education] qualification requirements for a position if they can present evidence that clearly justifies a high evaluation of their competence, such as . . . [a] substantial record of experience."¹⁹ Here, the Arbitrator found that the grievants were reassigned to the GS-401 series in 2006²⁰ and the Agency presented no evidence to demonstrate the employees could not complete their duties due to the lack of a few hours of approved course credits. To the contrary, the employees performed GS-401 duties successfully for ten years. Therefore, under the add-on rule, the Agency could not reexamine those same qualifications ten years later.

The Agency further contends that the add-on rule does not apply to the primary grievant's promotion and that the award is contrary to 5 C.F.R. § 335.103(b).²¹ However, the add-on rule applies to the Agency's 2006 determination when the employees were initially placed in the GS-401 series. Since the primary grievant's promotion was to a GS-12 in the same GS-401 series, the application of the add-on rule is the same.

The Agency points to the Authority's decision in *U.S. Department of HHS, Food & Drug Administration, New England District Office (HHS)*,²² to support its argument that it could not waive the education requirements for the position even though it had erroneously found the grievant qualified for the position when it appointed him. But the Agency cannot rely on *HHS*, because the facts are quite different. In *HHS*, the employee *never served in the position for which she was*

⁸ Policy at 1-35.

⁹ *Id.* at 26-27.

¹⁰ *Id.* at 27.

¹¹ *Id.* at 3.

¹² *OPM Functional Guide* at 97.

¹³ Award at 8.

¹⁴ *Id.* at 11.

¹⁵ *Id.* We note, without finding, that the Arbitrator determined he could not waive the requirements.

¹⁶ Policy at 5.

¹⁷ *Id.* at 22.

¹⁸ *Id.* at 23.

¹⁹ *Id.* at 24.

²⁰ While six of the employees have been in their positions since at least 2006, one employee was hired into the GS-401 series in 2015. Opp'n at 3 n.1.

²¹ Exceptions at 10 ("To be eligible for promotion[,] candidates must meet the minimum qualification standards prescribed by [OPM]." (quoting 5 C.F.R. § 335.103(b)(3))).

²² 58 FLRA 567 (2003).

seeking a promotion. Here, the primary grievant served in the GS-401 series since 2006 – including in temporary promotions to the office-in-charge and GS-12 Trade Specialist positions off and on from 2013-2016 – and applied for the promotion announced in 2016 because it would have made his temporary promotion permanent.²³

For these reasons, the Agency has not demonstrated that the award is contrary to the OPM Qualifications Handbook or 5 C.F.R. § 335.103(b), and we deny this exception.

IV. Decision

We deny the Agency's exceptions.

Chairman Kiko, dissenting:

In his award, the Arbitrator mistakenly found that the add-on rule applied in this case, and the majority repeats that mistake by denying the Agency's exceptions. For the following reasons, I would set aside the award as contrary to the add-on rule.

As relevant here, OPM has stated that the add-on rule applies *only* to “a noncompetitive action in which a position is filled . . . through promotion, reassignment, change to lower grade, transfer, reinstatement, reemployment, or restoration.”¹ In other words, the add-on rule applies only when filling a “position” in clearly defined ways.² Notably, OPM has not said that the add-on rule applies to a reclassification or competitive action.

Here, OPM reclassified the grievants' positions so that they were part of the GS-401 series, rather than the discontinued GS-436 series. Before the reclassification, the grievants were Plant Protection and Quarantine Officers.³ And after the reclassification, the grievants were *still* Plant Protection and Quarantine Officers.

The Arbitrator found that, as the result of reclassification, the Agency “transferred” the grievants to different positions and, consequently, that the add-on rule applied.⁴ The majority reformulates the Arbitrator's findings and asserts that the Agency “reassigned” the grievants to different positions and that, therefore, the Arbitrator correctly applied the add-on rule.⁵ But the fundamental flaw in these conclusions is obvious: The

¹ Opp'n, Attach. A, General Schedule Qualifications Policy (Policy) at 3.

² *Id.*

³ See Award at 3 (when the primary grievant obtained his position in the now-discontinued GS-436 series in 2000, the position title was Plant Protection and Quarantine Officer).

⁴ *Id.* at 12. But see 5 C.F.R. § 210.102(b)(18) (defining a “transfer” as “a change of an employee, without a break in service of 1 full workday, from a *position* in one agency to a *position* in another agency” (emphases added)).

⁵ Majority at 4. But see 5 C.F.R. § 210.102(b)(12) (defining a “reassignment” as “a change of an employee, while serving continuously within the same agency, *from one position to another* without promotion or demotion” (emphasis added)). When describing this case's background, the majority recognizes that a “reassignment” requires that an employee “change . . . *from one position to another*,” Majority at 2 n.2 (emphasis added), but then the majority ignores that requirement in its analysis.

²³ Award at 3-4.

grievants' *positions* never changed at all.⁶ Therefore, by its very terms, the add-on rule did not apply to the grievants.

As for the primary grievant – who was seeking a promotion – the add-on rule was doubly inapplicable to him. For the reasons just explained, the rule did not apply to his previous reclassification. In addition, the rule did not apply to the *competitive* promotion that he was seeking because the add-on rule concerns “*noncompetitive* action[s]” only.⁷

Because the award is contrary to the add-on rule, I dissent.

⁶ 5 C.F.R. § 511.101 (defining a “position” as “the work, consisting of the duties and responsibilities, assigned by competent authority for performance by an employee”). There is no contention here that the grievants’ work changed after their reclassification.

⁷ Policy at 3.