

71 FLRA No. 37

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3438
(Union)

0-AR-5402

DECISION

July 3, 2019

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

I. Statement of the Case

In this case, we reiterate that the Authority does not have jurisdiction to review a grievance involving classification.

The Union grieved the Agency’s failure to pay the grievant, a term-appointed personal assistant paid at the General Schedule (GS)-5 level, for her alleged performance of higher-graded, GS-8 customer-service-representative duties.

Arbitrator John R. Tucker issued a bench decision that sustained the grievance and, in a subsequent email to the parties, ordered that the grievant “be immediately given a GS-8 rating and be paid retroactively.”¹

The 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) of the Federal Service Labor-Management Relations Statute (the Statute)² bars the grievance, and we set aside the award in its entirety.

¹ Award at 1.
² 5 U.S.C. § 7121(c)(5).

II. Background and Arbitrator’s Award

The grievant was a term employee, paid at the GS-5 level, who had signed a series of agreements, referred to by the parties as “contract[s],” acknowledging her Schedule A, excepted service status.³ The Agency employed the grievant as a personal assistant, as an accommodation for another disabled employee who herself had been promoted to a GS-8 customer service representative position. The Union grieved the Agency’s failure to pay the grievant for her alleged performance of higher-graded “GS-8 [s]ervice [r]epresentative” duties.⁴

The grievance went to arbitration. The parties agreed to a streamlined arbitration process that allowed for a bench decision without a hearing transcript.

The Agency argued that the grievant occupied a “contract” excepted service position, that any additional duties that she had been given to perform were not higher graded, that the duties alleged by the Union could be performed by customer service representatives at the GS-5, -6, -7, and -8 levels, and that she lacked the requisite training and knowledge for the competitive service position of a GS-8 customer service representative.⁵ The Union submitted the following issue statement to the Arbitrator: “Did the grievant perform higher-graded duties from [January 19, 2013 to] present, and if so, what shall the remedy be?”⁶

On July 19, 2018, the Arbitrator rendered a bench decision and sustained the grievance. In a July 24, 2018, email, the Arbitrator ordered that, as a remedy, the grievant “be immediately given a [higher-graded] GS-8 rating and be paid retroactively [from] January 19, 2013 to [the] present.”⁷

On August 17, 2018, the Agency filed exceptions to the award. On September 21, 2018, the Union filed an opposition to the exceptions.

III. Analysis and Conclusion: This dispute is not grievable or arbitrable.

In its exceptions, the Agency did not challenge the arbitrability of the grievance. Regardless, an award cannot stand if the arbitrator lacked jurisdiction to resolve

³ Exceptions, Attach. 4, Agency’s Opening Statement (Agency’s Opening Statement) at 2.
⁴ Opp’n, Attach. 4, Union’s Opening Statement at 1.
⁵ Agency’s Opening Statement at 2.
⁶ Opp’n, Attach. 3, Union’s Issue Statement (Union’s Issue Statement) at 1.
⁷ Award at 1.

the grievance in the first place.⁸ Accordingly, we must consider whether this dispute was grievable or arbitrable as a matter of law.⁹

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.”¹⁰ As relevant here, a grievance involves classification where it seeks the reclassification of an employee’s position, including where a grievance seeks a promotion due to the alleged performance of higher-graded duties.¹¹ Under certain circumstances, a grievance concerning an employee’s entitlement to a

temporary promotion under a collective-bargaining agreement or agency regulation does not concern classification.¹²

Although the Union cites a provision in the parties’ collective-bargaining agreement pertaining to temporary promotions, the Union does not appear to have asserted a temporary promotion claim under the standard articulated by the Authority in *U.S. Small Business Administration*.¹³ Specifically, the record before us contains no evidence that: the Agency expressly reassigned a majority of the GS-8 customer-service-representative duties to the grievant,¹⁴ including all of the grade-controlling duties of that position;¹⁵ any reassigned duties were different from duties that the grievant already performed in her term position;¹⁶ or 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.¹⁷

More importantly, the Arbitrator directed that the grievant “be immediately given a GS-8 rating,”¹⁸ and nothing in his award limited that remedy to a temporary promotion.¹⁹ Additionally, the Union’s issue statement did not specify that it was seeking only a temporary promotion,²⁰ and it now relies, in its opposition, on a provision of the parties’ agreement that concerns employees’ entitlement to permanent non-competitive promotions.²¹

⁸ *U.S. DOL*, 70 FLRA 903, 904 (2018) (*DOL*) (Member DuBester dissenting) (citing *U.S. DOL, Bureau of Labor Statistics*, 66 FLRA 282, 284 (2011) (*Statistics*)).

⁹ *DOL*, 70 FLRA at 904 (citing *Statistics*, 66 FLRA at 284); *U.S. Dep’t of the Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 512, 514 (2018) (Member DuBester dissenting); *U.S. DOD, Def. Commissary Agency*, 69 FLRA 379, 380 (2016); see also *U.S. DOJ, Fed. BOP, Fed. Med. Ctr. Carswell, Fort Worth, Tex.*, 70 FLRA 890, 891 (2018) (Member DuBester dissenting) (jurisdictional issues are to be considered sua sponte); *U.S. Dep’t of HUD*, 70 FLRA 605, 607 (2018) (*HUD*) (Member DuBester dissenting) (noting that § 7121(c)(5)’s exclusion “appl[ies] irrespective of whether a party makes such a claim before the Authority” because “[t]o hold otherwise would be inconsistent with clearly expressed congressional intent to bar grievances over [classification] matters” (citation omitted)).

¹⁰ 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). We do not share the dissent’s fond remembrance for the Authority’s frequently confusing precedent on when, and under what circumstances, the 7121(c)(5) classification bar applies. See Dissent at 7. Without question it is this Authority’s privilege and responsibility to bring clarity and correction when existing precedent has been so woefully inadequate and only lent itself to even more confusion and uncertainty. We will not join our colleague’s invitation to return to that state of affairs.

¹¹ *SBA*, 70 FLRA at 730; *AFGE, Local 987*, 58 FLRA 453, 453 (2003) (*AFGE*) (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.”); cf. *Veterans Admin. Med. Ctr., Togus, Me.*, 17 FLRA 963, 963-64 (1985) (*Veterans*) (where the issue before the arbitrator was “whether the duties performed by [a temporary employee] should have been compensated at the pay rate for [a] higher grade level,” and the effect of the award was to reclassify the grievant’s position, the award concerned classification within the meaning of § 7121(c)(5)).

¹² *U.S. Small Bus. Admin.*, 70 FLRA 895, 896 (2018) (Member DuBester dissenting) (*SBA II*).

¹³ 70 FLRA at 730-31.

¹⁴ See Exceptions at 6 (noting testimony establishing that the duties that the grievant performed “can be found in every [service representative] position description”).

¹⁵ See Agency’s Opening Statement at 1 (arguing that the grievant was “not performing the full range of the [s]ervice [r]epresentative position”).

¹⁶ See *id.* (arguing that the grievant was performing duties “within her position description”).

¹⁷ See *SBA*, 70 FLRA at 730-31 (stating the requirements for presenting a temporary-promotion claim).

¹⁸ Award at 1.

¹⁹ *Id.* (directing immediate promotion of grievant without specifying when such a promotion might end); see *SBA II*, 70 FLRA at 897 (where grievance sought promotions that were “ongoing” this undermined claim that requested promotions were temporary).

²⁰ See Union’s Issue Statement at 1 (asking the Arbitrator to determine a remedy for the alleged assignment of higher-graded duties from January 19, 2013 to “present”).

²¹ Opp’n at 6, 10.

Accordingly, because the essential nature of the dispute concerned classification,²² we conclude that § 7121(c)(5) bars the grievance, and we set aside the award.²³

IV. Decision

We vacate the award.²⁴

Member Abbott, concurring:

I agree that the Arbitrator did not have jurisdiction to consider this grievance. After a generous reading of the sparse record before us¹, I concur that § 7121(c)(5) does bar the review of the merits of the grievant's claim. I am writing separately to stress another aspect of this case that I would have found *also* rendered this grievance not grievable or arbitrable.

Here, the grievant is a Schedule A, excepted service, time-limited employee, who signed agreements, called "contracts" by both parties, that informed her of her position as a reader for another, disabled employee, her pay at the GS-5 level, and that she could be released from her employment *at any time*. In her grievance, she demanded that the arbitrator make her, with the tap of a keyboard, a competitive service employee with all of the privileges and rights attached.

In its opening statement, the Union plainly argued to the Arbitrator that the grievant should be placed into a GS-8 position after her years of disappointment being non-selected for other, vacant, competitive service positions, all the while being a "team player" who

²² See *HUD*, 70 FLRA at 608; *Local 987*, 52 FLRA at 213, 215.

²³ See *Office & Prof'l Emp. Int'l Union, Local 2001*, 62 FLRA 67, 69 (2011) (finding that a grievance concerned classification where the arbitrator considered only whether grievants were entitled to permanent retroactive promotions); see also *AFGE*, 58 FLRA at 454-55 (grievance seeking permanent promotion involved classification); *Veterans*, 17 FLRA at 963-64 (finding that a grievance and award concerned classification where arbitrator ordered the agency to pay a temporary employee at a higher grade level).

²⁴ Because we set aside the award on this basis it is unnecessary to address the Agency's remaining arguments. See *DOL*, 70 FLRA at 905 n.38; *Statistics*, 66 FLRA at 284 n.5 (citing *U.S. Dep't of Transp., FAA, Nashua, N.H.*, 65 FLRA 447, 450 n.3 (2011)).

¹ The Arbitrator's written award consisted of one sentence, rendered in an email message. The only record of the evidence and arguments presented below are the written, opening statements of each party. There is no transcript, no written fact findings or considered legal conclusions by the Arbitrator, and so, the record contains not much more than a summary of the issues and evidence actually raised and considered by the Arbitrator. While agencies and exclusive representatives are free to negotiate, and live under, what appears to be an expedited, abbreviated arbitration proceeding, this decision in turn leaves the Authority with little to rely on when faced with exceptions, and oppositions, that cite to various statutes, regulations, policies, caselaw, and legal arguments. How this grievance, wherein *both* parties argued the significance of the grievant's employment status, the significance of duties assigned to the grievant, when they were assigned, and how they came to be assigned, seemed to be a good fit for an expedited procedure utterly escapes me.

performed the various tasks given to her.² Therefore, the grievance sought to *force* the conversion of her excepted service status to that of the competitive service.

However, sympathy does not bestow on arbitrators OPM-esque powers.³

In *U.S. DOL*, the Authority recently found that a grievance involving the decision not to convert an excepted-service intern, serving under a temporary appointment, to a permanent position, was not grievable or arbitrable as a matter of law.⁴ The Authority reasoned that “[t]o hold otherwise would give arbitrators the power to grant an entirely new class of rights to term appointees that neither [the Office of Personnel Management] nor Congress intended them to have”⁵ and “Congress did not give arbitrators the power to grant permanent-employee status to term appointees.”⁶

Mindful of our precedent, such as *U.S. DOL*, I would have concluded that this dispute is not grievable or arbitrable as a matter of law, and set aside the award.⁷

² Opp’n, Attach. 3, Union’s Opening Statement at 1. In its opposition, the Union argues that the Agency’s arguments should not be considered because they were not raised to the Arbitrator. Opp’n at 4, 9, 11, 17. Generally, 5 C.F.R. §§ 2425.4(c) and 2429.5 provide that the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator. However, as the Union concedes, the Agency raised the grievant’s “contract” status at arbitration. Opp’n at 4, 9, 11, 17; *see also* Exceptions, Attach. 4, Agency’s Opening Statement at 2; *U.S. Dep’t of the Air Force, Joint Base Elmendorf-Richardson*, 69 FLRA 541, 543 (2016) (citing *U.S. Dep’t of the Treasury, IRS*, 66 FLRA 342, 344 (2011) (where an arbitration proceeding lacks a formal transcript, the Authority permits parties to submit statements that reflect what transpired and considers such statements to the extent that they constitute arguments in support of the submitting party’s exceptions)); *AFGE, Local 836*, 69 FLRA 502, 503 (2016) (finding that argument was properly raised that was discussed in party’s opening statement).

³ The U.S. Court of Appeals for the Third Circuit issued a decision recently that provides timely wisdom. The court wrote: “A chance at a job is not a right to it. When the government has broad discretion to take a benefit away from its employees, that benefit is not a constitutionally protected property interest.” *Tundo v. Cnty. of Passaic*, 923 F.3d 283, 285 (3d Cir. 2019).

⁴ *U.S. DOL*, 70 FLRA 903, 905 (2018) (*DOL*) (Member DuBester dissenting); *see also U.S. DOL*, 68 FLRA 927, 929-31 (Concurring Opinion of Member Pizzella) (would find expiration of term appointment not arbitrable as a matter of law).

⁵ *DOL*, 70 FLRA at 905 (citing *U.S. DOJ, INS v. FLRA*, 709 F.2d 724, 729-30 (D.C. Cir. 1983)).

⁶ *Id.*

⁷ *Id.*; *see also U.S. DOJ, Fed. BOP, Fed. Med. Ctr. Carswell, Fort Worth, Tex.*, 70 FLRA 890, 891-92 (2018) (Member DuBester dissenting); *Colburn v. Dep’t of the Army*,

2015 WL 3507649, *2 (nonprecedential final order) (MSPB lacks jurisdiction over nonrenewal of term appointment not to exceed one year, even when employee had been serving under such appointments for over twelve years).

Member DuBester, dissenting:

For the reasons expressed in my earlier dissents,¹ I disagree with the majority's application of its revised § 7121(c)(5)² analysis³ to find that a grievance concerns a classification matter.⁴ Instead, consistent with long-standing precedent predating the majority's "deeply flawed revised rule,"⁵ I would find that the grievance in this case concerns whether the grievant was entitled to a temporary promotion under the parties' collective-bargaining agreement.

I have previously noted that the majority's revised rule adopts an unwarranted presumption that temporary-promotion grievances involve "classification" unless a union offers evidence satisfying the four-part test set forth in *SBA*.⁶ Applying this presumption to the case before us, the majority vacates the Arbitrator's award because the Union "does not appear to have asserted a temporary promotion claim."⁷

This conclusion is flawed on several levels. At the outset, the majority applies the evidentiary rule created in *SBA* to the Union despite the fact that the arbitration hearing in this case took place – and the Arbitrator issued his bench decision – on July 19, 2018, the *same day* the Authority issued its decision in *SBA*.⁸ Under these circumstances, the Union could hardly have been expected to have developed an evidentiary record tailored to the new four-part test, and it should certainly not be penalized for having failed to anticipate this new evidentiary burden.⁹

Moreover, the record that was before the Arbitrator demonstrates that the essential nature of the

Union's grievance does not concern a classification matter. 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)."¹⁰ In 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).¹¹

Applying this precedent, I would conclude that the essential nature of the Union's grievance does not concern a classification matter. In its opening statement to the Arbitrator, the Union explicitly requests that the grievant "be paid via *temporary promotions* for the higher-graded work [as a General Schedule (GS)-8 service representative] assigned to her for the last three years."¹² Consistent with this request, the Agency's issue statement also limits the question before the Arbitrator to whether the grievant performed the GS-8 service representative duties for a three-year period.¹³ Thus, the parties' own positions before the Arbitrator reflect that this was not a dispute over the grievant's reclassification, but rather concerned her entitlement to a series of temporary promotions because she performed the established duties of the GS-8 service representative position.

The portions of the record cited by the majority in support of its decision do not alter this conclusion. While the majority finds that the award was inconsistent with a temporary-promotion claim because it does not "specify[] when such a promotion might end,"¹⁴ the Arbitrator in fact limited his award of retroactive pay related to the GS-8 promotion to the date of the award.¹⁵ Contrary to the majority's conclusion, this does not demonstrate that the "grievance sought promotions that were 'ongoing,'"¹⁶ and is instead consistent with a

¹ *U.S. Small Bus. Admin.*, 70 FLRA 729, 732 (2018) (*SBA*) (Dissenting Opinion of Member DuBester); *U.S. Small Bus. Admin.*, 70 FLRA 895, 898-99 (2018) (*SBA II*) (Dissenting Opinion of Member DuBester).

² 5 U.S.C. § 7121(c)(5).

³ Majority at 3-4 (citing *SBA*, 70 FLRA at 729-731 and *SBA II*, 70 FLRA 896-97).

⁴ I note that the majority considers this issue notwithstanding that the Agency has not filed an exception regarding the classification matter.

⁵ *SBA II*, 70 FLRA at 898 (internal citations omitted) (Dissenting Opinion of Member DuBester).

⁶ *Id.*

⁷ Majority at 3.

⁸ *Compare* Exceptions at 2-3 (Arbitrator's award served on the parties July 19, 2018), *with SBA*, 70 FLRA at 729 (decision issued on July 19, 2018).

⁹ *See SBA II*, 70 FLRA at 898 (concluding that majority abused its discretion by "penaliz[ing] the Union for failing to comply with a new evidentiary ruling the Union – and even the Authority – did not know existed at the time") (Dissenting Opinion of Member DuBester).

¹⁰ *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 70 FLRA 49, 50 (2016) (*VA Richmond*) (emphasis added).

¹¹ *Id.*

¹² Opp'n, Attach. 4, Union's Opening Statement (Union's Opening Statement) at 2 (emphasis added).

¹³ Exceptions at 5-6; Exceptions, Attach. 4, Agency's Issue Statement at 2.

¹⁴ Majority at 4 n.19.

¹⁵ Award at 1 (ordering that grievant "be immediately given a GS-8 rating and be paid retroactively since January 19, 2013 to *present*") (emphasis added).

¹⁶ Majority at 4 n.19 (internal citations omitted).

finding that the award concerned a temporary promotion.¹⁷

Moreover, the significance the majority affords to the absence of a claim for a “temporary promotion” from the Union’s issue statement¹⁸ is dispelled by the fact – as noted earlier – that the Union *explicitly asks* the Arbitrator to award the grievant temporary promotions in its opening statement.¹⁹ And although the majority notes the Union’s reliance “on a provision of the parties’ agreement that concerns employees’ entitlement to permanent non-competitive promotions,”²⁰ the majority fails to mention that the Union – on the same two pages of the opposition referenced by the majority – also cites to Article 17 of the parties’ agreement, which governs “Temporary Promotions.”²¹

Accordingly, because the majority’s decision is inconsistent with long-standing, well-reasoned Authority precedent, and fails to consider material facts demonstrating that this grievance did not concern a classification matter, I dissent from the decision to vacate the award on these grounds.²²

¹⁷ *VA Richmond*, 70 FLRA 49, 50-51 (2016) (finding temporary promotion where grievant performed back-up duties for three years for higher-graded position); *U.S. Dep’t of HUD, La. State Office, New Orleans, La.*, 53 FLRA 1611, 1614, 1616 (1998) (same); *U.S. Dep’t of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 52 FLRA 938, 938, 941 (1997) (finding temporary promotion where grievant performed higher-graded work for over two years).

¹⁸ Majority at 4.

¹⁹ Union’s Opening Statement at 2.

²⁰ Majority at 4 (citing to Opp’n at 6, 10).

²¹ Opp’n at 6, 10.

²² Accordingly, I would review the Agency’s exceptions on the merits.