

**71 FLRA No. 150**

UNITED STATES  
DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
(Agency)

and

NATIONAL TREASURY  
EMPLOYEES UNION  
CHAPTER 97  
(Union)

0-AR-5513

DECISION

June 2, 2020

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 remind the federal labor-management community that a grievance allegedly seeking a temporary promotion is a non-arbitrable classification matter under § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute)<sup>1</sup> when, as relevant here, the assigned duties providing the basis for the claim were not different from duties the employee performed in his or her permanent position.

Arbitrator Samuel A. Vitaro issued an award finding that the Union's grievance was arbitrable because it sought a temporary promotion. The main issue before us is whether the award is contrary to law. Applying the clarified standards set forth in *U.S. Small Business Administration (SBA I)*,<sup>2</sup> we find that § 7121(c)(5) bars the grievance, and we set aside the award in its entirety.

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

Within the Agency's "[e]ntity section," General Schedule (GS)-4 and -6 employees process amended tax returns known as "1040x."<sup>3</sup> The entity

employees are all assigned a random batch of twenty-five 1040x tax returns to complete before moving to the next assignment.

The Union filed a "[m]ass" grievance alleging that GS-4 employees (grievants) were performing GS-6 duties at least 25% of the year without compensation.<sup>4</sup> As a remedy, the Union requested that the grievants receive a retroactive temporary promotion for 120 days "per [affected] year," consistent with the parties' collective-bargaining agreement.<sup>5</sup> The parties were unable to resolve the grievance, and the dispute proceeded to arbitration.

The Arbitrator assessed whether the grievance concerned a non-arbitrable classification matter under § 7121(c)(5). He noted that the position descriptions for GS-4 and -6 employees "contain[ed] the same language [for the] major duties."<sup>6</sup> However, the Arbitrator found that the grievance concerned a temporary-promotion claim under the parties' agreement because the grievants performed duties that were in the GS-6 position description; therefore, the grade level of the duties was already established. On the merits, the Arbitrator noted the Agency's argument that the grievants in both GS-4 and GS-6 grades performed 1040x work, but the GS-4s were under less rigorous standards than GS-6 employees, for example a GS-4 employee would need more "nurturing or assistance" while a GS-6 employee would be more self-sufficient.<sup>7</sup> But the Arbitrator relied on an email by an Agency representative (who had retired in 2008)<sup>8</sup> stating that "1040x work is GS-6 level."<sup>9</sup> Accordingly, the Arbitrator concluded that the grievants qualified for a temporary promotion under the parties' agreement.

On June 3, 2019, the Agency filed an exception to the award, and the Union filed an opposition on July 22, 2019.

<sup>1</sup> 5 U.S.C. § 7121(c)(5).

<sup>2</sup> 70 FLRA 729, 730-31 (2018) (Member DuBester dissenting).

<sup>3</sup> Award at 2.

<sup>4</sup> *Id.* at 1-2.

<sup>5</sup> *Id.* at 8.

<sup>6</sup> *Id.* at 6.

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.* at 11.

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

The Agency argues that the grievance and award are contrary to § 7121(c)(5) of the Statute.<sup>10</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>11</sup> The Authority has construed “classification” as “the analysis and identification of a position and placing it in a class under the position-classification plan established by [the Office of Personnel Management] under chapter 51 of title 5, United States Code.”<sup>12</sup> But the Authority has held that an employee’s entitlement to a temporary promotion under a collective-bargaining agreement or agency regulation does not concern classification within the meaning of § 7121(c)(5).<sup>13</sup> As relevant here, to present an arbitrable temporary-promotion claim under *SBA I*, a party must offer evidence that the allegedly reassigned duties were different from the duties of the lower-graded employee’s permanent position.<sup>14</sup> We exercise our discretion to review the record and determine whether the dispute concerns classification under § 7121(c)(5) or a temporary promotion.<sup>15</sup>

The Union asserts that 1040x work is *solely* GS-6 work<sup>16</sup> because of an Agency email stating that “1040x work is GS-6 level.”<sup>17</sup> And the Union contends that because the grievants’ “job title and description” were different from those of GS-6 employees, the grievants were “engaging in higher[-]graded duties.”<sup>18</sup> Although the GS-4 employees’ performance of those duties was evaluated under a less rigorous standard,<sup>19</sup> all entity employees were assigned the same work, 1040x tax returns,<sup>20</sup> and the position descriptions for GS-4 and GS-6 “contain[ed] the same language [for the] major duties.”<sup>21</sup> In this regard, the Arbitrator did not find that the assigned duties were different from the duties of the lower-graded employees’ permanent position – only that both GS-4 and -6 employees performed 1040x work.<sup>22</sup> As the clarified *SBA I* standard for establishing a temporary-promotion claim was neither discussed in the award, nor met under the facts of this case,<sup>23</sup> § 7121(c)(5)

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<sup>16</sup> Opp’n at 10.

<sup>17</sup> Award at 11.

<sup>18</sup> Opp’n at 11.

<sup>19</sup> Award at 7 (noting that GS-4 employees “need more nurturing or assistance from the Lead, Manager, Coach, etc. . . . while the [GS-]5 or [-]6 [employees] may be doing more self[-]sufficient research”).

<sup>20</sup> *Id.* at 2.

<sup>21</sup> *Id.* at 6.

<sup>22</sup> *Id.* at 6-18; *see also* SSA, 71 FLRA 205, 206 (2019) (Member Abbott concurring; Member DuBester dissenting) (finding the record contained no evidence that the reassigned duties were different from duties that the grievant already performed in her position).

<sup>23</sup> To establish a temporary-promotion claim under *SBA I*, the union must show that: (1) an agency expressly reassigned a majority of the duties of an already classified, higher-graded position to a lower-graded employee, including all of the grade-controlling duties of that position; (2) the reassigned duties were different from the duties of the lower-graded employee’s permanent position; (3) the duties were not assigned to meet an urgent mission requirement, to give the employee experience as part of an employee development or succession plan, or for similar reasons; *and* (4) the employee did not receive a temporary promotion for performing the reassigned duties. *SBA I*, 70 FLRA at 729-730 (emphasis added). Our analysis specifically discusses the second requirement, and that alone establishes that the Union did not present an arbitrable temporary-promotion claim. Nevertheless, we also note that the record does not demonstrate the Union made the requisite demonstration for the other listed requirements. For example, even if we credited the Union’s claim that the Agency expressly reassigned 1040x work to GS-4 employees, there is no evidence in the record that the Agency expressly reassigned *all* of the grade-controlling duties of the GS-6 position to the grievants, as required by *SBA I*. *See* Award at 7 (stating that the “scope” of “[GS-]6 [work] is broader; while the [GS-]4 [work] is more procedural” (citation omitted)).

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<sup>10</sup> Exception Br. at 8-15.

<sup>11</sup> 5 U.S.C. § 7121(c)(5); *see U.S. Small Bus. Admin.*, 70 FLRA 895, 896 (2018) (*SBA II*) (Member DuBester dissenting). The Authority reviews questions of law raised by exceptions to an arbitrator’s award de novo. *U.S. SEC, Wash., D.C.*, 61 FLRA 251, 253 (2005).

<sup>12</sup> *SBA I*, 70 FLRA at 729-30 (quoting *AFGE, Local 953*, 68 FLRA 644, 647 (2015)).

<sup>13</sup> *Id.* at 730; *see also Ga. Air Nat’l Guard, 165th Tactical Airlift Grp., Savannah, Ga.*, 15 FLRA 442, 443-44 (1984) (finding the grievance was a valid temporary-promotion claim and did not concern classification).

<sup>14</sup> 70 FLRA at 730; *see also SBA II*, 70 FLRA at 896.

<sup>15</sup> *SBA II*, 70 FLRA at 897 (reviewing evidence to determine whether the dispute concerned classification under § 7121(c)(5)); *SBA I*, 70 FLRA at 731 (same).

bars the grievance, and we set aside the arbitration award as contrary to § 7121(c)(5).<sup>24</sup>

#### IV. Decision

We set aside the award.

#### Member DuBester, dissenting:

In my dissenting opinion in *U.S. Small Business Administration (SBA I)*,<sup>1</sup> I warned that the majority's newly-devised test for assessing whether a grievance involves a classification matter under § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute)<sup>2</sup> "includes consideration of issues that have nothing to do with classification."<sup>3</sup> And in my subsequent dissenting opinion in *U.S. Small Business Administration (SBA II)*,<sup>4</sup> I noted that the majority's "deeply flawed" test "adopts a presumption, without explanation, that temporary-promotion grievances involve 'classification' if a union fails to support its temporary-promotion claim."<sup>5</sup> On this basis, I cautioned that the majority's test improperly "conflat[es] arbitrability and merit issues" without either "a legal [or] a logical explanation."<sup>6</sup>

It is hard to imagine a better illustration of these obvious flaws than the majority's decision in the case before us today.

Although barely mentioned in the majority's analysis, the Arbitrator based his conclusion that the grievants were entitled to temporary promotions upon Article 16, Section 2(A)(2) of the parties' bargaining agreement, which sets forth the conditions under which the Agency is required to "temporarily promote" an employee.<sup>7</sup> Framing the issues before him according to this provision's requirements, the Arbitrator considered whether the Union had proved, by a preponderance of the evidence, that:

- (1) each [G]rade 4 [employee] performed higher graded duties for 25 percent or more of his/her direct time;
- (2) each employee performed such higher graded duties at a level of skill and responsibility properly expected of a [G]rade 6 [employee];
- (3) each employee meets the minimum [Office of Personnel Management] qualifications for the promotion to the next higher grade; and
- (4) each employee meets time

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<sup>24</sup> See, e.g., *SSA*, 71 FLRA at 206-07. Contrary to the dissent's assertion, the temporary-promotion article in the parties' agreement does not govern the outcome of this case. The exclusion contained in § 7121(c)(5) of the Statute is a mandatory exclusion from the grievance and arbitration procedure. *AFGE, Local 2142*, 51 FLRA 1140, 1142 (1996) (grievances concerning classification under 7121(c)(5) "are precluded by law from coverage by a negotiated grievance procedure"). Thus, parties cannot contract to permit grievances that involve classification within the meaning of that law. Compare Exceptions, Attach. 8, Joint Ex. 1, 2009 Collective Bargaining Agreement at 55 (stating that an employee is entitled to a temporary promotion if he or she "performs higher[-]graded duties for twenty-five percent (25%) or more of his or her direct time"), with *SBA I*, 70 FLRA at 730 (a grievance involves a temporary-promotion claim and not classification when, as relevant here, the agency expressly reassigns a majority of the duties of an already classified, higher-graded position, including all of the grade-controlling duties of that position). Recognizing that "gray areas in § 7121(c)(5) case law" were leading to confusion over the distinction between a classification claim and a temporary-promotion claim, the Authority clarified the minimum requirements for establishing a temporary-promotion claim that would not involve classification within the meaning of the Statute. See *SBA I*, 70 FLRA at 730-31 (listing four elements to establish such a claim). Although a collective-bargaining agreement could contain additional requirements for establishing an entitlement to a temporary promotion, such a provision could not render arbitrable a grievance that is prohibited by the Statute.

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<sup>1</sup> 70 FLRA 729, 732 (2018) (Dissenting Opinion of Member DuBester).

<sup>2</sup> 5 U.S.C. § 7121(c)(5).

<sup>3</sup> *SBA I*, 70 FLRA at 732.

<sup>4</sup> 70 FLRA 895, 898-899 (2018) (Dissenting Opinion of Member DuBester).

<sup>5</sup> *Id.* at 898.

<sup>6</sup> *Id.* (further noting that "[a]t most, a party that fails to carry its burden of proof in an arbitration proceeding will have its grievance denied. Failure to meet the requirements of the majority's new 'revised rule' implies no more.>").

<sup>7</sup> Award at 10.

and grade requirements for promotion to the next higher grade.<sup>8</sup>

After weighing the evidence, the Arbitrator concluded that the Union had proven each element with respect to a number of the grievants.

The Arbitrator also concluded that the grievance was not barred by § 7121(c)(5).<sup>9</sup> In addition to the fact that the Union's grievance sought enforcement of a provision in the parties' agreement specifically governing entitlement to temporary promotions, the Arbitrator noted that the Union had not "claimed, either in its grievance or testimony, that the GS-4 positions were misclassified or that the [g]rievants should be permanently promoted."<sup>10</sup>

Notwithstanding the Arbitrator's detailed findings, the majority concludes that the Union's grievance is jurisdictionally barred by § 7121(c)(5) of the Statute because "the clarified *SBA I* standard for establishing a temporary-promotion claim was neither discussed in the award, nor met under the facts of this case."<sup>11</sup> And it finds that the *SBA I* standard was not satisfied because the Arbitrator "did not find that the assigned duties were different from the duties of the lower-graded employees' permanent position,"<sup>12</sup> and because "there is no evidence in the record that the Agency expressly reassigned *all* of the grade-controlling duties of the GS-6 position to the grievants."<sup>13</sup>

Even if the majority was correct regarding these purported deficiencies, its conclusion that they render the Union's grievance *non-arbitrable under § 7121(c)(5)* simply defies common sense. To be sure, a finding that the grievants' assigned duties were no different from the duties they were expected to perform in their permanent positions would certainly relate to whether the grievants had been *temporarily promoted* to higher-graded duties, as would evidence concerning the degree to which higher-graded duties had been assigned to the grievants. But the majority has yet to explain how a lack of sufficient evidence with respect to either issue compels the conclusion that a grievance concerns the "classification" of a position.<sup>14</sup>

This is not merely a question of semantics. Concluding that a grievance is jurisdictionally barred by § 7121(c)(5) has enormous consequences. Indeed, in a prior case, the majority relied upon this provision to vacate – on a *sua sponte* basis – no less than "seven decisions made by a variety of panels of Authority members reaching back well over a decade" because it found that the union's grievance concerned classification matters.<sup>15</sup> And by concluding that the Arbitrator's award in the case before us is contrary to § 7121(c)(5) because the Union failed to meet *SBA I*'s four-part test, the majority effectively discards the Arbitrator's application of the provision in the parties' agreement governing temporary promotions in favor of a test that bears little relevance to the grievance's arbitrability.<sup>16</sup>

Before our flawed decision in *SBA I*, the Authority consistently held that a grievance concerns a classification matter within the meaning of § 7121(c)(5) "[w]here the essential nature of [the] grievance concerns the grade level of the duties assigned to and performed by the grievant in his or her permanent position."<sup>17</sup> In contrast, "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 Authority would find that the grievance "does not concern the classification of a position within the meaning of § 7121(c)(5)."<sup>18</sup> Applying these straight-forward principles, I would conclude that the Union's grievance does not concern the classification of the grievants' positions for the reasons set forth by the Arbitrator.

Accordingly, I would find that the Union's grievance was not barred by § 7121(c)(5) of the Statute, and would deny the Agency's exception.

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Id.* at 9.

<sup>10</sup> *Id.* at 8.

<sup>11</sup> Majority at 3-4.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> *Id.* at 4 n.22.

<sup>14</sup> See, e.g., *Office & Prof'l Emps. Int'l Union, Local 2001*, 62 FLRA 67, 69 (2007) (noting that "the Authority has construed the term 'classification' in § 7121(c)(5) as involving 'the analysis and identification of a position and placing it in a class under the position-classification plan established by [the U.S. Office of Personnel Management] under chapter 51 of

title 5, United States Code") (quoting *SSA, Office of Hearings & Appeals, Mobile, Ala.*, 55 FLRA 778, 779-80 (1999)).

<sup>15</sup> *U.S. Dep't of HUD*, 70 FLRA 605, 609 (2018) (Dissenting Opinion of Member DuBester).

<sup>16</sup> The majority's application of *SBA I*'s test to set aside the award is compounded by the fact that *SBA I* was decided "after the arbitration hearing was finished and the record was closed." Opp'n at 2.

<sup>17</sup> *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 70 FLRA 49, 50 (2016).

<sup>18</sup> *Id.*