

72 FLRA No. 104

UNITED STATES
DEPARTMENT OF THE NAVY
COMMANDER, NAVY REGION MID-ATLANTIC
NAVAL WEAPONS STATION EARLE
(Agency)

and

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS
LOCAL F-147
(Union)

0-AR-5684

DECISION

December 10, 2021

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

I. Statement of the Case

Arbitrator Daniel F. Brent issued an award finding that the Agency violated the parties' agreement by not properly paying the grievants for temporary assignments to higher-graded positions.¹ As a remedy, he ordered backpay for one year. The Agency filed exceptions on the ground that the remedy is contrary to law. Because a backpay remedy for a temporary, noncompetitive promotion that exceeds 120 days is inconsistent with 5 C.F.R. § 335.103(c), the award is contrary to law. Accordingly, we grant the Agency's exception and modify the remedy.

II. Background and Arbitrator's Award

The grievants are general service (GS)-8 lead firefighters at the Agency. When two supervisory GS-9 positions became vacant, the Agency temporarily assigned the grievants to those positions from July 2019 through July 2020. Subsequently, the Union filed a grievance seeking payment of the differential between the

grievants' GS-8 pay as lead firefighters and the applicable GS-9 pay as supervisory captains during that period. The Agency denied the grievance and the matter went to arbitration.

As relevant here, the Arbitrator found that the grievants were temporarily assigned the duties of a higher-rated position.² He further found that the Agency violated the parties' collective-bargaining agreement, which requires that employees temporarily assigned to a higher-rated position for two pay periods or more will receive the rate of pay to which they have been assigned.³ Therefore, the Arbitrator awarded the grievants backpay for the pay differential between the two grades from July 26, 2019 through July 20, 2020.

The Agency filed exceptions to the award on December 9, 2020, and the Union filed an opposition on January 5, 2021.

III. Preliminary Matter: The grievance does not involve classification.

Under 5 U.S.C. § 7121(c)(5), arbitrators lack jurisdiction to determine "the classification of any position which does not result in the reduction in grade or pay of any employee."⁴ An award cannot stand if the arbitrator lacked jurisdiction to resolve the grievance in the first place, so the Authority has held that we will apply § 7121(c)(5)'s exclusion of grievances concerning classification regardless of whether a party makes such a claim before us.⁵ Thus, before resolving the Agency's exception concerning 5 C.F.R. § 335.103(c)(1)(i), we must first determine whether the grievance concerns classification.

The Authority has found that, under certain circumstances, a grievance regarding an employee's entitlement to a temporary promotion does not concern classification within the meaning of § 7121(c)(5). In *U.S. Small Business Administration (SBA)*, the Authority found that prior temporary-promotion decisions had often "failed to recognize the realities of, and flexibilities required of, a 21st Century federal workforce."⁶ The Authority observed "the modern workplace reality that managers often assign employees various duties on a temporary basis as part of their permanent positions, and not as temporary promotions, for any number of

² Award at 4, 10.

³ *Id.* at 15 (citing Article 11, Section 6(c)); *see also id.* at 10-11.

⁴ 5 U.S.C. § 7121(c)(5).

⁵ *E.g.*, *SSA*, 71 FLRA 205, 205-06 (2019) (*SSA*) (Member Abbott concurring; then-Member DuBester dissenting).

⁶ 70 FLRA 729, 730 (2018) (then-Member DuBester dissenting).

¹ The Arbitrator issued an award finding that the Agency violated the parties' agreement and ordering backpay as the remedy for the violation. He also issued a supplemental award which discussed the background and his findings. The supplemental award is the award referenced in this case.

reasons.”⁷ Accordingly, the Authority held that in order to present a temporary-promotion claim that does not involve classification, a party must offer evidence 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 employee development or succession plan, or for similar reasons; and (4) the employee did not receive a temporary promotion for performing the reassigned duties.⁸

As determining whether a grievance asserts a temporary-promotion claim under *SBA* is a fact-specific inquiry, the Authority requires a well-developed factual record. Here, the Arbitrator undertook the appropriate factfinding to allow us to determine whether the requisite elements for a temporary-promotion claim were met. The Arbitrator found that the Agency expressly directed the grievants to assume the roles of existing higher-graded positions.⁹ While there is overlap between the grievants’ lead-firefighter duties and supervisory captain duties, the Arbitrator found that the grievants were

⁷ *Id.*

⁸ *Id.* at 730-31; *see, e.g., U.S. Small Bus. Admin.*, 71 FLRA 999, 1000 (2020) (then-Member DuBester dissenting) (grievance failed to allege temporary-promotion claim under *SBA* by alleging that the grievant performed *both* GS-13 and GS-14 duties rather than alleging that the agency “expressly assigned the grievant to a *specific* higher-graded position”); *SSA*, 71 FLRA at 206 (grievance concerned classification where there was no record evidence to support the first three parts of the *SBA* temporary-promotion standard and the awarded remedy was a permanent non-competitive promotion); *U.S. Small Bus. Admin.*, 70 FLRA 895, 897 (2018) (then-Member DuBester dissenting) (grievance alleging employees performed higher-graded *duties* but failing to identify higher-graded *positions* failed to establish temporary promotion claim under *SBA*).

⁹ Award at 3 (finding that “each of the two platoons . . . at Fire Station 22 was *commanded* by either a Supervisory Captain (GS-9) or a Battalion Commander (GS-10)”) (emphasis added); *id.* at 4 (finding “the [g]rievants were temporarily reassigned . . . to Fire Station 22 to *command* the other three fire fighters . . . in each platoon”) (emphasis added).

Member Kiko notes that the Agency email directing the reassignment does not expressly instruct the grievants to perform supervisory captain duties. *See* Opp’n, Ex. B, Email from Agency to Grievants at 1. However, the Arbitrator concluded that the Agency directed the grievants “to fulfill the essential duties of a higher rated position.” Award at 10. In support of that conclusion, the Arbitrator found that the grievants “refuted” the Agency’s assertion that it had instructed the grievants to perform only lead firefighter duties during their temporary reassignment. *Id.* at 14. Thus, the Arbitrator’s unchallenged factual findings compel her to conclude that the first *SBA* requirement for asserting a temporary-promotion claim is met here.

assigned “the essential duties” from the higher-graded position.¹⁰ As to part three of the test, the duties were not assigned to meet an urgent mission requirement or to give the employee experience.¹¹ Finally, it is undisputed that the grievants did not receive temporary promotions for performing the reassigned duties.¹² Therefore, the grievance does not involve classification because it meets the requirements set forth in *SBA*.

IV. Analysis and Conclusion: The backpay remedy is contrary to law.

The Agency challenges only the amount of the backpay remedy. Specifically, the Agency argues that the remedy is contrary to 5 C.F.R. § 335.103(c)(1)(i) and Authority precedent¹³ because it exceeds 120 days for a temporary, noncompetitive promotion.¹⁴ When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by the

¹⁰ *Id.* at 10; *see also id.* at 8-9 (“Grievants routinely attended meetings with other department heads servicing the waterfront facility [T]he primary responsibility for coordinating with peers in charge of different phases of the waterfront operation was a significant component of the job duties of the Supervisory Captain or Battalion Commander assigned to Fire Station 22. The day to day operations at the Waterfront Fire Station 22 included inspection of ‘hot work,’ which involved issuing permits and inspecting devices that could potentially emanate a spark Thus, the [g]rievants did not simply transfer their prior level of responsibility”); *id.* at 12 (describing duties “regularly and routinely performed” by the grievants that appear only in the supervisory captain position description). In contrast, in *U.S. Department of the Treasury, Internal Revenue Service*, the grievants failed to establish a temporary-promotion claim under *SBA* where the arbitrator “did not find that the assigned duties were different from the duties of the lower-graded employees’ permanent position.” 71 FLRA 771, 772 (2020) (then-Member DuBester dissenting).

¹¹ The record indicates that the temporary assignments were not to meet an urgent mission requirement or intended to give the grievants experience. *See* Opp’n, Ex. B, Email from Agency to Grievants at 1 (reassigning the grievants to Fire Station 22 and stating that “[t]he duration of this assignment is undetermined at this time and pending future promotional assignments of [p]ermanent [s]upervisors”).

¹² *See* Award at 2 (providing that the issue at arbitration was whether “the Agency fail[ed] to properly pay the [g]rievants . . . for temporary assignments”); Exceptions Form at 4 (arguing only that the remedy is contrary to law); Exceptions Br. at 3 (same).

¹³ Exceptions Br. at 3-4. Section 335.103(c) states, in pertinent part, that “competitive procedures in agency promotion plans apply to all promotions under § 335.102 of this part and to the following actions: (i) Time-limited promotions under § 335.102(f) of this part for more than 120 days to higher graded positions” 5 C.F.R. § 335.103(c)(1)(i).

¹⁴ Exceptions Form at 4; Exceptions Br. at 3.

exception and the award de novo.¹⁵ 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.¹⁶ In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.¹⁷

The Union asserts that the award is not deficient for two reasons. First, the issue before the Arbitrator involved "temporary assignments,"¹⁸ not temporary promotions. Second, the Arbitrator had the authority to make the grievants whole under the parties' agreement and the Back Pay Act.¹⁹ However, the Authority has found that "a retroactive temporary promotion, whether express, constructive, or implied, is essential to an award of backpay for the performance of the duties of a higher-graded position to which the grievant was never appointed."²⁰ And, the Authority has applied 5 C.F.R. § 335.103(c)(1)(i) to grievances alleging violations of contract provisions governing "temporary assignments."²¹ Here, the Arbitrator found that the grievants performed the duties of a higher-graded position.²² Because the Union did not except to that finding, it has failed to establish that the issue before the Arbitrator involved a temporary assignment.²³

Moreover, an award granting a temporary promotion is enforceable only to the extent that it is consistent with civil service regulations pertaining to such promotions.²⁴ On this point, the U.S. Office of Personnel Management has interpreted 5 C.F.R. § 335.103(c)(1)(i) as requiring that time-limited promotions that exceed 120 days must be competed under

an agency merit-promotion plan.²⁵ Deferring to this interpretation, the Authority has concluded that a retroactive temporary promotion and associated backpay of more than 120 days cannot be awarded unless the promotion was filled competitively.²⁶ Here, no evidence has established that the temporary promotion was competed. Therefore, to the extent that the backpay remedy exceeds 120 days, it is contrary to law.²⁷

Accordingly, we grant the Agency's exception and modify the backpay remedy to 120 days for each grievant.²⁸

V. Decision

We grant the Agency's exception and modify the backpay remedy, consistent with the conclusions herein.

¹⁵ *U.S. Dep't of the Interior, Bureau of Land Mgmt., Eugene Dist., Portland, Ore.*, 68 FLRA 178, 180 (2015) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).

¹⁶ *Id.* (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).

¹⁷ *NTEU*, 72 FLRA 182, 186 (2021).

¹⁸ *Opp'n Br.* at 3.

¹⁹ *Id.* at 4-6, 8-10.

²⁰ *U.S. Dep't of the Treasury, IRS*, 61 FLRA 667, 670 (2006) (*IRS*) (citing *Spagnola v. Stockman*, 732 F.2d 908, 910, 912 (Fed. Cir. 1984)).

²¹ *See U.S. Dep't of VA, Med. Ctr. Wash., D.C.*, 67 FLRA 194, 194, 197-98 (2014) (applying 5 C.F.R. § 335.103(c) to a detail to higher-graded duties that was not based on competitive procedures and finding that retroactive temporary promotion and backpay award beyond 120 days was contrary to § 335.103(c)).

²² Award at 13-14.

²³ *See, e.g., IRS*, 61 FLRA at 670.

²⁴ *Id.* (citing *Dep't of the Army, New Cumberland Army Depot*, 21 FLRA 968, 972 (1986)).

²⁵ *U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 60 FLRA 46, 49 (2004) (*VA Johnson*) (*Chairman Cabaniss concurring; Member Pope concurring*) (citing *OPM advisory opinion as to whether remedy for violation of parties' agreement violates 5 C.F.R. § 335.103(c)(1)(i)* where arbitrator granted a retroactive temporary promotion of more than 120 days); *see also SSA, Port St. Lucie Dist., Port St. Lucie, Fla.*, 64 FLRA 552, 554 (2010) (*SSA Port St. Lucie*); *IRS*, 61 FLRA at 669-70.

²⁶ *VA Johnson*, 60 FLRA at 50; *see also SSA Port St. Lucie*, 64 FLRA at 554; *IRS*, 61 FLRA at 669-70.

²⁷ *SSA Port St. Lucie*, 64 FLRA at 554.

²⁸ *E.g., id.* at 554-55; *IRS*, 61 FLRA at 670.

Chairman DuBester, concurring:

I agree that the backpay remedy is contrary to law for the reasons stated in Part IV of the majority's decision. However, I continue to disagree with the majority's application of the standard articulated in *Small Business Administration (SBA)*¹ to determine whether a grievance regarding an employee's entitlement to a temporary promotion concerns classification within the meaning of 5 U.S.C. § 7121(c)(5).² Indeed, I believe that applying *SBA* to set aside the award would precisely illustrate the flaws of this ill-conceived standard. However, because I agree that the grievance does not involve classification, I concur with the conclusion reached in Part III of the decision.

¹ 70 FLRA 729 (2018) (then-Member DuBester dissenting).

² See *id.* at 732 (Dissenting Opinion of then-Member DuBester); see also *U.S. Dep't of Treasury, IRS*, 71 FLRA 771, 773-74 (2020) (Dissenting Opinion of then-Member DuBester) (noting that the majority's application of *SBA* to render the grievance non-arbitrable "simply defies common sense"); *Small Bus. Admin.*, 70 FLRA 895, 898 (2018) (Dissenting Opinion of then-Member DuBester) (noting 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").