

70 FLRA No. 175

UNITED STATES
SMALL BUSINESS ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2959
(Union)

0-AR-5270

DECISION

October 5, 2018

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 apply the recently announced rule for whether a grievance impermissibly involves classification under § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute),¹ and we determine that the dispute at issue, for thirty-one grievants, is barred.

In an interim award, Arbitrator Sherry R. Wetsch determined that a grievance may proceed to a merits hearing because the grievance did not trigger the classification prohibition of § 7121(c)(5). The main question before us is whether that determination is contrary to law. Applying the standard articulated in *U.S. Small Business Administration (SBA)*,² we find that § 7121(c)(5) bars the grievance, and we set aside the interim award.

II. Background and Arbitrator's Award

The Union filed a grievance on behalf of thirty-one employees (the grievants) alleging that, on an “ongoing” basis, the Agency violated Article 27, Section 1 (Article 27-1) and Article 31, Section 4 (Article 31-4) of the parties’ collective-bargaining

agreement.³ Article 27-1 allows employees to file a grievance if they believe that their position descriptions are not accurate. Article 31-4 states that if the Agency details an employee to a higher-graded position for more than thirty days, it will temporarily promote the employee to that position on the thirty-first day. In an attachment to the grievance, the Union listed the grievants’ names, departments, assigned grade levels, and grade levels of the higher-graded duties that each grievant allegedly performed.

After a hearing before the Arbitrator on arbitrability, the Agency filed a motion to dismiss the grievance. The Agency argued that the grievance was untimely, lacked specificity, and was not arbitrable under § 7121(c)(5) of the Statute because it concerned the classification of the grievants’ positions.

In an interim award dated February 17, 2017, the Arbitrator noted that the grievance asserted violations of Articles 31-4 and 27-1, and she concluded that the grievance did not involve classification under § 7121(c)(5). Additionally, she rejected the Agency’s claim that the grievance lacked specificity and noted that the recovery period is “ongoing, ending on the date of [a]rbitration on the merits.”⁴ Accordingly, she denied the Agency’s motion to dismiss and ordered the parties to proceed to a hearing on the merits.

On March 15, 2017, the Agency filed exceptions to the interim award, and on April 7, 2017, the Union filed an opposition to the Agency’s exceptions.

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

Because the Arbitrator has not yet ruled on the grievance’s merits, the Agency acknowledges that its exceptions are interlocutory,⁵ but argues that the Authority should resolve them because the grievance is not arbitrable. The Agency claims that the grievance concerns the classification of the grievants’ positions within the meaning of § 7121(c)(5).⁶ In response, the Union argues that the Authority should deny the Agency’s “[i]nterlocutory [a]ppeal”⁷ because the

³ Exceptions, Joint Ex. 3, Grievance (Grievance) at 1, 3.

⁴ Award at 12.

⁵ Exceptions Br. at 1, 4-5, 7.

⁶ When an exception involves an award’s consistency with law, the Authority reviews the award de novo. 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. In making that assessment, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party establishes that they are nonfacts. *E.g.*, *SSA*, 60 FLRA 62, 65 (2004).

⁷ Opp’n Br. at 1.

¹ 5 U.S.C. § 7121(c)(5).

² 70 FLRA 729, 729 (2018) (Member DuBester dissenting).

Authority has held that grievances asserting temporary-promotion claims do not concern classification within the meaning of § 7121(c)(5).⁸ For the following reasons, we find that the Agency has established a plausible jurisdictional defect that warrants interlocutory review.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 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.”¹¹ 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).¹²

The Authority recently revised the rule to determine whether a dispute concerns classification within the meaning of § 7121(c)(5).¹³ Under the revised rule articulated in *SBA*, to present an arbitrable temporary-promotion claim, 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 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.¹⁴ A party’s allegation that an employee *assumed* higher-graded duties, without management’s express direction to perform those duties, is insufficient to show that a claim is grievable and arbitrable.¹⁵

In *SBA*, the Authority further clarified that, where an arbitrator’s factual findings are insufficient to conduct the above analysis, the Authority will exercise its discretion to review the record evidence and determine whether the dispute concerns classification under § 7121(c)(5).¹⁶

Although *SBA* clarified the standard for evaluating temporary-promotion claims, certain bedrock requirements from previous caselaw remained the same.¹⁷ In particular, long before *SBA*, temporary-promotion claimants knew that they could not avoid § 7121(c)(5)’s classification bar unless they identified a *specific*, higher-graded *position* to which the Agency could temporarily promote them.¹⁸ Indeed, it is inherent in the nature of a grievable, arbitrable temporary-promotion claim that it must seek a promotion

⁸ *Id.* at 4. As our dissenting colleague emphasizes, Dissent at 5, the grievance also asserts violations of contract provisions concerning accurate position descriptions. Importantly, however, the grievance does not request any relief that would remedy any alleged inaccuracies in the grievants’ position descriptions. See Grievance at 2-3. Thus, we focus our analysis on whether the grievance asserts a temporary-promotion claim.

⁹ Under § 2429.11 of the Authority’s Regulations, the Authority ordinarily will not resolve exceptions to an arbitrator’s award unless the award completely resolves all of the issues submitted to arbitration. See, e.g., *U.S. Dep’t of the Army, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 70 FLRA 172, 173 (2017) (*Army*); *U.S. DOJ, Exec. Office for Immigration Review*, 67 FLRA 131, 131 (2013) (*DOJ*). However, the Authority will review interlocutory exceptions that would advance the ultimate disposition of the case by ending the litigation. See, e.g., *U.S. Dep’t of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (*IRS*); *Army*, 70 FLRA at 173. This includes exceptions that raise a plausible jurisdictional defect – i.e., those that present a credible claim that the arbitrator lacked jurisdiction over the subject matter of the grievance as a matter of law. See *IRS*, 70 FLRA at 808; *DOJ*, 67 FLRA at 132.

¹⁰ 5 U.S.C. § 7121(c)(5); see also *SBA*, 70 FLRA at 730-31.

¹¹ E.g., *SBA*, 70 FLRA at 729-730 (citing *AFGE, Local 953*, 68 FLRA 644, 647 (2015)).

¹² *Id.* at 730 (citing *Ga. Air Nat’l Guard, 165th Tactical Airlift Grp., Savannah, Ga.*, 15 FLRA 442, 442-43 (1984)).

¹³ *Id.* at 729-30.

¹⁴ *Id.* at 730-31.

¹⁵ *Id.* at 731.

¹⁶ In *SBA*, the union alleged that the grievant was entitled to a temporary promotion because she performed duties associated with three higher-graded positions. However, the Authority found that the “[u]nion’s claim that the grievant performed an amalgamation of duties from three different position descriptions fail[ed] to allege that the [a]gency expressly assigned the grievant the duties of any specific higher-graded position.” *Id.* Accordingly, the Authority concluded that the grievance involved classification. *Id.*

¹⁷ See *id.* at 730 (identifying certain features of a dispute that clearly identify it as a non-grievable classification matter, such as an accretion of higher-graded duties to a permanent position).

¹⁸ *U.S. DOL*, 63 FLRA 216, 218 (2009) (“[G]rievances concerning whether grievants are entitled to temporary promotions on the basis of having temporarily performed the established duties of a *position* other than their own are not barred by § 7121(c)(5).” (emphasis added)); *U.S. Dep’t of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 59 FLRA 64, 67 (2003) (finding a grievance barred under § 7121(c)(5) where it was “undisputed that there was not a properly classified civilian *position* for the work being performed by the grievant” (emphasis added)); *U.S. Dep’t of the Air Force, Air Educ. & Training Command, Randolph Air Force Base, San Antonio, Tex.*, 49 FLRA 1387, 1390 (1994) (finding grievance barred under § 7121(c)(5) where “there were no available . . . *positions* into which the grievant could be promoted” (emphasis added)).

to a *position*; the concept of a “promotion” to higher-graded *duties* is nonsensical.

Here, in an attachment to the grievance, the Union lists the grievants’ names, departments, assigned grade levels, and grade levels of the higher-graded *duties* that each grievant allegedly performed. However, nothing in the record states what factual circumstances gave rise to the grievance, what the grievants’ permanent positions were, or what *positions* were associated with the higher-graded duties that the grievants allegedly performed. In fact, for all but five of the thirty-one grievants listed in the grievance attachment, the Union asserts that they performed duties at multiple grade levels.¹⁹ Those assertions are inconsistent with seeking a temporary promotion to a specific *position* classified at a single grade level. Further, the Union claims the recovery period for the grievance is “ongoing,”²⁰ which supports a finding that the claim does not involve *temporary* promotions.²¹

For the foregoing reasons, we disagree with the dissent that “it is clear . . . that the grievance in this case is about . . . ‘detail[s] to a higher-graded *position*.’”²² As previously mentioned, the grievance does not identify *any* higher-graded positions to which the Agency could promote the grievants.²³ The grievants assert that they performed an amalgamation of unspecified, higher-graded duties, sometimes at multiple grade levels. Thus, the grievance suggests on its face that it seeks either permanent promotions based on the accretion of higher-graded duties, or the reclassification of the grievant’s permanent positions. Long-established

precedent recognizes that § 7121(c)(5) bars both of those types of claims.²⁴

Therefore, we find that the Union’s claim fails to allege that the Agency expressly assigned the grievants the duties of any specific higher-graded positions, and we find that the grievance involved classification.²⁵ Accordingly, we conclude that § 7121(c)(5) bars the grievance, and we set aside the interim award as contrary to law.²⁶

IV. Decision

We grant interlocutory review and set aside the interim award.

¹⁹ Exceptions, Joint Ex. 3, Union Grievance at 2-3.

²⁰ *Id.* at 2.

²¹ See *SSA*, 60 FLRA at 65 (finding that the arbitrator improperly decided a classification matter where, in the arbitrator’s view, the grievance was ongoing and “permanent [in] nature, thereby defeating any claim that the performance of [the disputed] duties was for a temporary period of time”).

²² Dissent at 6 (emphasis added).

²³ The dissent’s claim that the Union could not have known about this “evidentiary rule” rings hollow, *id.* at 7, because, as we have repeatedly emphasized, unions have been aware for *decades* that they must identify a higher-graded position to which an employee could be temporarily promoted in order to escape the § 7121(c)(5) bar. See note 18 above (identifying a 1994 decision that articulated this requirement). And beyond the notice that the Authority’s caselaw provided the Union, the Agency repeatedly faulted the Union’s claim for failing to identify the positions to which the grievants alleged promotional entitlements. See Exceptions, Joint Ex. 5, Step-2 Grievance Resp. at 3; Exceptions, Attach., Arbitration Hr’g Tr. at 44, 85, 89. Yet the Union never provided such information.

²⁴ See *SBA*, 70 FLRA at 730 & n.6 (accretion-of-duties promotions involve classification); *id.* at 730 & n.7 (a challenge to the appropriateness of the grievant’s assigned grade level involved classification).

²⁵ See *id.* at 731 (finding that a “[u]nion’s claim that the grievant performed an amalgamation of duties from three different position descriptions fail[ed] to allege that the [a]gency expressly assigned the grievant the duties of any specific higher-graded position”).

²⁶ Because we set aside the interim award on this basis, we find it unnecessary to resolve the Agency’s remaining arguments. See generally *U.S. DOD, Def. Logistics Agency Aviation Richmond, Va.*, 70 FLRA 206, 207 (2017) (setting aside award on exceeded-authority ground made it unnecessary to review remaining exceptions).

Member DuBester, dissenting:

For reasons expressed in my dissent in *U.S. Small Business Administration*,¹ the majority once again errs by applying its revised § 7121(c)(5) analysis² to find³ that a grievance concerns a classification matter.⁴ As I made clear in *SBA*, the majority's revision is inconsistent with longstanding, well-reasoned Authority precedent. Instead, it is clear from the award and the record that the grievance in this case is about position-description accuracy and "detail[s] to a higher-graded position."⁵

Citing the grievance, the Arbitrator makes clear, as the majority acknowledges,⁶ that the only issues before him are whether the Agency violated Articles 27-1 and 31-4 of the parties' agreement.⁷ Neither article involves classification issues. Rather, Article 27-1 involves position-description-accuracy disputes,⁸ and Article 31-4 involves disputes concerning "[a] detail to a higher[-]graded position."⁹ Article 31-4 provides, among other things, that "[a]n employee who is detailed to a higher-graded position for more than thirty (30) calendar days will be given a temporary promotion to that higher grade."¹⁰

At the merits stage, the Arbitrator can resolve whether the Agency violated either of those provisions without resolving any classification issues. Therefore, the Arbitrator did not err when he found the grievance arbitrable.

Conflating arbitrability and merits issues, the majority finds the grievance not *arbitrable* because the Union fails to meet "the standard for evaluating temporary-promotion claims,"¹¹ a *merits* issue. Depending on what the Union presents during the merits phase of the proceeding, the Union may either demonstrate that the Arbitrator should sustain the grievance, or the Union may fail. But these possibilities do not alter the Arbitrator's arbitrability determination which frames the issues presented by the grievance as

involving only position-description-accuracy issues and "detail[s] to a higher-graded position."¹²

Moreover, even under the majority's deeply flawed "revised rule,"¹³ the majority's decision is incorrect. The majority's conclusion, that the grievance involves classification, does not follow from its finding that the Union failed before the Arbitrator to "offer evidence" required by the "revised rule" to support its temporary-promotion claim.¹⁴ The majority apparently adopts a presumption, without explanation, that temporary-promotion grievances involve "classification" if a union fails to support its temporary-promotion claim. Such a presumption lacks both a legal and a logical justification. At 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.

Finally, the majority also abuses its discretion by retroactively applying its "revised rule" to this case, and not remanding the case to the parties for an opportunity to comply with its new standard.¹⁵ The parties closed the arbitration record in February 2017, and the majority's new rule issued over a year later in July 2018.¹⁶ Still, the majority penalizes the Union for failing to comply with a new evidentiary rule the Union—and even the Authority—did not know existed at the time.¹⁷

¹² *E.g.*, Award at 12.

¹³ Majority at 3.

¹⁴ *Id.* at 3-4.

¹⁵ *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-08 (1971) (in determining whether decision should apply retroactively to the present case, the Court considers three factors: (1) does the decision establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) does retroactive application diminish the purpose and effect of the decision; and (3) what is the weight of inequity imposed by retroactive application); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988) ("Retroactivity is not favored [R]ulemaking authority [does not] encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant."); *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60 n.12 (1984) ("an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests").

¹⁶ *Compare* Award at 1 (arbitration deadline on February 3, 2017), *with SBA*, 70 FLRA at 729 (decision issued on July 19, 2018).

¹⁷ Majority at 3-4 (finding that the Union fails the majority's "revised rule" by not alleging "that the Agency expressly assigned the grievants the duties of any specific higher-graded positions"—despite the rule coming out more than a year after the arbitration closed).

¹ 70 FLRA 729, 732 (2018) (*SBA*) (Dissenting Opinion of Member DuBester).

² 5 U.S.C. § 7121(c)(5).

³ Majority at 3 (citing *SBA*, 70 FLRA at 729-30).

⁴ *See SBA*, 70 FLRA at 732.

⁵ *See, e.g.*, Award at 12; Exceptions, Joint Ex. 3, Grievance at 1, 3.

⁶ Majority at 2.

⁷ *See, e.g.*, Award at 12; *compare* Majority at 2, *with* Exceptions, Joint Ex. 3, Grievance at 1, 3.

⁸ Award at 2-3 (quoting Article 27-1 of the parties' agreement).

⁹ *Id.* at 5 (quoting Article 31-4 of the parties' agreement).

¹⁰ *Id.*

¹¹ Majority at 4.

Because the Agency's interlocutory exceptions to the Arbitrator's interim award do not demonstrate that the award has a "plausible jurisdictional defect,"¹⁸ the Agency's exceptions should be dismissed.

¹⁸ Majority at 3; *Library of Cong.*, 58 FLRA 486, 487 (2003) (finding that where exceptions raise a plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of the case, extraordinary circumstance may exist warranting review of interlocutory exceptions).