

**74 FLRA No. 32**

UNITED STATES  
DEPARTMENT OF COMMERCE  
NATIONAL OCEANIC  
AND ATMOSPHERIC ADMINISTRATION  
SOUTHEAST FISHERIES SCIENCE CENTER  
(Agency)

and

NATIONAL ASSOCIATION  
OF INDEPENDENT LABOR  
LOCAL 20  
(Union)

0-AR-5708

—————  
DECISION

January 27, 2025

Before the Authority: Susan Tsui Grundmann, Chairman,  
and Colleen Duffy Kiko and Anne Wagner, Members

**I. Statement of the Case**

Arbitrator Sue Olinger Shaw awarded two employees (the grievants) backpay for their performance

<sup>1</sup> 5 U.S.C. § 5596.

<sup>2</sup> See Exceptions Br. at 5-6 (describing the “ZP series” of the Commerce Alternative Personnel System).

<sup>3</sup> Exceptions, Attach. 2, Agency Ex. 5 at 1 (first grievant’s step-one grievance), 5 (first grievant’s step-two grievance); Exceptions, Attach. 2, Agency Ex. 6 at 1 (second grievant’s step-one grievance), 5 (second grievant’s step-two grievance). Article 12(1)(a) provides:

The Employer agrees that employees will normally be assigned work which is appropriate for their position description taking into account the mission of the [A]gency. “Other duties as assigned” frequently used in position descriptions will not be construed as meaning that a significant amount of work at a higher or lower grade level will be assigned to an employee unless the supervisor advises the personnel office and requests revision of the position description and appropriate classification action.

Exceptions, Attach. 2, Agency Ex. 1, Collective-Bargaining Agreement at 26.

<sup>4</sup> See Exceptions, Attach. 5, Union’s Pre-Hr’g Submission.

<sup>5</sup> See generally Exceptions, Attach. 7, Nov. 4, 2020 Tr. (First Tr.); Exceptions, Attach. 8, Nov. 13, 2020 Tr. (Second Tr.).

of certain duties. The Agency filed exceptions on contrary-to-law, essence, nonfact, and exceeded-authority grounds. For the reasons discussed below, we set aside the award as contrary to the Back Pay Act (the Act),<sup>1</sup> and we find it unnecessary to resolve the Agency’s remaining exceptions.

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

The grievants worked as Operations Research Analysts at the ZP-2 level under the Commerce Alternative Personnel System.<sup>2</sup> On July 9, 2020, they filed grievances alleging they had been performing duties at the ZP-3 level since 2014 and 2016, respectively. The grievances both alleged violations of Article 12, Section 1(a) of the parties’ agreement (Article 12(1)(a)).<sup>3</sup>

However, when the grievances got to arbitration, the Union no longer relied on Article 12(1)(a). In this regard, the Union’s prehearing submission to the Arbitrator did not cite Article 12(1)(a);<sup>4</sup> Article 12(1)(a) was not mentioned even once during the arbitration hearing;<sup>5</sup> and the parties opted to make closing statements at the hearing rather than filing post-hearing briefs.<sup>6</sup> Instead, at arbitration, the Union argued Article 2 of the parties’ agreement incorporates laws, rules, and regulations,<sup>7</sup> and cited: (1) the principle of “equal pay for equal work” under 5 U.S.C. § 2301,<sup>8</sup> and (2) 5 C.F.R. § 335.102(f).<sup>9</sup>

As relevant here, in her award, the Arbitrator framed the substantive issues as “whether the [g]rievants were entitled to temporary promotions ‘for performing the

<sup>6</sup> Second Tr. at 109-110.

<sup>7</sup> See First Tr. at 16 (at arbitration, Union stated, “So where does the temporary[-]promotion process come from? According to the collective[-]bargaining agreement at Article 2, the collective[-]bargaining agreement adopts all Agency policies and regulations government-wide.”).

<sup>8</sup> Award at 15 (summarizing Union’s position as “contend[ing] that a series of temporary promotions . . . [based] on the principle of ‘equal pay for equal work’ that is set out in . . . 5 [U.S.C. §] 2301[] is not barred”); see also First Tr. at 11 (Union stated, “In the end, [the grievants] are simply seeking equal pay for equal work, as guaranteed by 5 U.S.C. [§] 2301.”), 17-18 (Union stated, “[T]he U.S. Code also requires the [g]rievants to be paid equal pay for equal work. This is found at 5 U.S.C. [§] 2301 under Merit Principles. . . . Therefore, there is a federal statute mandating the individuals be treated fairly with regards to their pay.”); Second Tr. at 117 (Union stated, “[M]y clients are not getting equal pay for equal work, a prohibited personnel practice under Merit Systems principles, and . . . they are entitled to that. And the way to do that is through a temporary promotion for the higher-graded duties they performed . . .”).

<sup>9</sup> First Tr. at 16-17 (Union stated that, by adopting government-wide regulations in Article 2, the parties’ agreement “adopts 5 C.F.R. [§] 335.102(f), which provides for temporary promotions. A temporary promotion is available to [g]rievants assigned to a higher-graded position.”).

... [ZP-3] position' and, if so, what relief should they be given?"<sup>10</sup> The Arbitrator sustained the grievances on the merits, finding both grievants performed substantial work of the higher-graded ZP-3 position. However, the Arbitrator did not specify what violation(s) she found.<sup>11</sup> She directed the Agency to compensate the grievants for their work performed at the ZP-3 level, beginning in fiscal year 2020, and to "continue such compensation for as long as the discrepancies between their [position descriptions] and their actual duties remain."<sup>12</sup>

On February 10, 2021, the Agency filed exceptions to the award, and the Union filed an opposition to the Agency's exceptions on March 3, 2021.<sup>13</sup>

### III. Analysis and Conclusion: The award is contrary to the Act.

The Agency cites Authority precedent applying the Act and argues that, "consistent with . . . the . . . Act, an employee may be compensated for the temporary performance of the duties of a higher-graded position on the basis of . . . a contract provision making temporary promotions mandatory for the performance of such duties."<sup>14</sup> According to the Agency, the Arbitrator did not rely on such a contract provision.<sup>15</sup> In this connection, the Agency asserts that, "[d]espite claiming that the Agency had violated Article 12(1)(a) in its grievances, the Union's argument at arbitration merely cited general principles about 'equal pay for equal work' and in no way identified how the Agency had violated the terms of the contract with the Union."<sup>16</sup>

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.<sup>17</sup> 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.<sup>18</sup> In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.<sup>19</sup>

The Authority has held that, under the Act, a backpay award is authorized only where an arbitrator finds that (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action has resulted in the withdrawal or reduction of the employee's pay, allowances, or differentials.<sup>20</sup> As a general rule, an employee is entitled only to the salary of the position to which the employee is appointed.<sup>21</sup> An exception to this general rule exists, permitting compensation for the temporary performance of the duties of a higher-graded position, based on an agency regulation, or when the parties to a collective-bargaining agreement agree to make temporary promotions mandatory for details to higher-graded positions, thereby establishing a nondiscretionary agency policy which would provide a basis for backpay.<sup>22</sup>

Absent such a regulation or collective-bargaining provision, the fact that a grievant performed higher-graded duties is insufficient to entitle the grievant to an award of backpay.<sup>23</sup> Thus, where an arbitrator fails to identify a non-discretionary agency regulation or a collective-bargaining-agreement provision that would entitle a grievant to backpay for performing the duties of a higher-graded position, there is no unjustified or unwarranted personnel action that would entitle the grievant to an award of backpay under the Act.<sup>24</sup>

As noted above, in awarding backpay, the Arbitrator did not specify a basis for finding an Agency violation. Although the grievances cited Article 12(1)(a), the Union no longer relied on that contract provision at arbitration, and instead relied on 5 U.S.C. § 2301 and 5 C.F.R. § 335.102(f). Even assuming the award could be read as finding violations of 5 U.S.C. § 2301 and 5 C.F.R. § 335.102(f), the Authority has held that those provisions do not, by themselves, support awards of backpay under the Act.<sup>25</sup>

Because the Arbitrator did not base her award of backpay on a non-discretionary Agency policy set forth in an Agency regulation or a collective-bargaining

<sup>10</sup> Award at 5.

<sup>11</sup> *Id.* at 22, 24.

<sup>12</sup> *Id.* at 22.

<sup>13</sup> The Union also filed a motion requesting permission to provide "new and material evidence" regarding one of the grievant's temporary-promotion claims. See Mot. to Supplement the Record with New & Material Evidence at 1. The document the Union submits indicates that a desk audit concluded one of the grievants should be reclassified. Because the existing record is sufficient to decide this case, we deny the Union's motion. See, e.g., *AFGE, Loc. 3601*, 73 FLRA 515, 518 n.36 (2023) (citing 5 C.F.R. § 2429.26(a)) (denying leave to file supplemental submission where record already sufficed to resolve dispute).

<sup>14</sup> Exceptions Br. at 21 (citing *U.S. Dep't of the Air Force, 81st Training Wing, Keesler Air Force Base, Miss.*, 60 FLRA 425, 429-30 (2004) (*Keesler*)).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 22.

<sup>17</sup> *U.S. Dep't of the Army, U.S. Army Garrison Redstone Arsenal, Huntsville, Ala.*, 73 FLRA 210, 211 (2022).

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

<sup>19</sup> *AFGE, Loc. 953*, 68 FLRA 644, 646-47 (2015).

<sup>20</sup> *U.S. DOJ, Fed. BOP, U.S. Penitentiary McCreary, Pine Knot, Ky.*, 73 FLRA 865, 867 (2024); *Keesler*, 60 FLRA at 428.

<sup>21</sup> *Keesler*, 60 FLRA at 429.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* ("Because [the merit system principles set forth in § 2301] are not self-executing and, alone, cannot form the basis of a legal action, they cannot independently authorize or serve as the basis" for awarding a temporary promotion.).

agreement, the award is contrary to the Act. Therefore, we set the award aside on this basis,<sup>26</sup> and we find it unnecessary to resolve the Agency's remaining exceptions.<sup>27, 28</sup>

#### IV. Decision

We set aside the award.

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<sup>26</sup> *Id.* at 430 (setting aside award of backpay as contrary to the Act because arbitrator failed to identify any non-discretionary agency policy set forth in an agency regulation or a collective-bargaining-agreement provision that would entitle the grievant to backpay for performing the duties of a higher-graded position); *U.S. Dep't of the Army, U.S. Army Rsrv. Pers. Command, St. Louis, Mo.*, 59 FLRA 455, 456 (2003) (Chairman Cabaniss concurring) (same); *USDA, Grain Inspection, Packers & Stockyard Admin., Fed. Grain Inspection Serv., New Orleans, La.*, 59 FLRA 411, 414 (2003) (Member Pope dissenting in part on other grounds) (same); *U.S. Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project, Wapato, Wash.*, 57 FLRA 548, 550-51 (2001) (same); *U.S. Dep't of the Air Force, 88th Air Base Wing, Aeronautical Sys. Div., Wright-Patterson Air Force Base, Ohio*, 52 FLRA 285, 288-89 (1996) (same); *U.S. DOJ, Fed. BOP, Atlanta, Ga.*, 51 FLRA 1422, 1426 (1996) (same).

<sup>27</sup> *See, e.g., U.S. Dep't of the Army, Ariz. Dep't of Emergency & Mil. Affs., Ariz. Army Nat'l Guard*, 73 FLRA 617, 619 n.22 (2023) (vacating award and finding it unnecessary to resolve remaining exceptions).

<sup>28</sup> Member Kiko notes that she also finds merit in the Agency's essence and classification arguments. *See* Exceptions Br. at 23-26 (arguing Arbitrator's timeliness determination failed to draw its essence from the agreement's fifteen-day filing deadline), 15-21 (arguing award is contrary to 5 U.S.C. § 7121(c)(5) because the grievances concerned classification). In particular, she agrees with the Agency that the grievances fail to present arbitrable temporary-promotion claims under *U.S. Small Business Administration*, 70 FLRA 729, 730-31 (2018) (*SBA*) (Member DuBester dissenting). *See* Exceptions Br. at 19-21 (arguing grievants failed to establish that (1) "the [A]gency expressly reassigned [them] a majority of [the] duties of an already classified, higher-graded position," and (2) "the reassigned duties were different from [those the grievants performed in] their permanent positions" (citing *SBA*, 70 FLRA at 730-31)). However, because the Authority sets aside the award as contrary to the Act, Member Kiko agrees that it is unnecessary to resolve the Agency's remaining exceptions.