

**United States Department of the Navy, Naval Surface Warfare Center,
Indian Head Division, Indian Head, MD and American Federation of
Government Employees, Local 1923**

58 FLRA 498

Federal Labor Relations Authority

58 FLRA No. 123

0-AR-3517

April 30, 2003

The grievant satisfied the Office of Personnel Management's minimum qualification requirements necessary to receive a temporary promotion. The grievant performed the higher-graded duties. The agency was required to compensate her accordingly.

Case Summary

The agency filed an exception regarding an arbitration award. The award stated the grievant performed higher-graded duties and the agency failed to properly compensate her. The grievant, a GS-303-7 personnel certification assistant, was regularly assigned the higher-graded duties of a GS-343-9 program analyst, the union alleged. The agency violated the master collective bargaining agreement, rule or regulation and law by not paying her more while she was in the higher-graded position. The union requested the grievant receive a retroactive temporary promotion and backpay. It noted that the agency did this in a prior similar grievance.

The grievance was timely filed and arbitrable, the arbitrator stated. The grievant performed the higher-graded duties approximately 25 percent of the time. She was entitled to the temporary promotion, the arbitrator decided. The arbitrator relied on a settlement by the agency regarding a similar case.

The grievance did not satisfy OPM's requirements, the agency alleged. The grievant needed one year of experience in the GS-343 series to receive the promotion. Additionally, an employee must have been entitled to a promotion to receive backpay. This was not the case. She did not meet the "minimum qualification requirements."

The award is not contrary to the Back Pay Act or OPM regulations, the FLRA stated. Arbitrators may award backpay when an employee was denied a temporary promotion he was entitled to under the CBA for performing the higher-graded duties for an extended period of time. However, the employee must meet OPM's minimum qualification requirements. The OPM regulation did not require experience in that particular job series, as the agency alleged. An employee must demonstrate "the particular knowledge, skills, and abilities to perform successfully the duties of the position." the FLRA explained. The grievant demonstrated this ability. The agency's exception was denied.

Judge / Administrative Officer

Dale Cabaniss, Carol Waller Pope and Tony Armendariz

Full Text

- I. Statement of the Case
- II. Background and Arbitrator's Award
- III. Positions of the Parties
 - A. Agency's Exception
 - B. Union's Opposition
- IV. Analysis and Conclusions
 - A. Preliminary Matter
 - B. The Award Is Not Contrary to the Back Pay Act
- V. Decision

Before the Authority: Dale Cabaniss, Chairman, and Carol Waller Pope and Tony Armendariz, Members

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator Irwin Kaplan filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exception.

The Arbitrator sustained a grievance alleging that the Agency failed to pay an employee for performing higher-graded duties. For the following reasons, we deny the Agency's exception.

II. Background and Arbitrator's Award

The grievant is a GS-303-7 Personnel Certification Assistant. The Union filed a grievance claiming that the Agency violated the master collective bargaining agreement, law, rule or regulation by regularly assigning the grievant higher-graded duties of a GS-343-9 Program Analyst position, without proper

compensation. See Award at 1-2. As a remedy, the Union sought a retroactive temporary promotion with backpay.

Prior to filing the grievance in this case, the Union filed a similar grievance on behalf of another employee in the GS-303-7 Personnel Certification Assistant position. See *id.* at 5. The Agency settled that grievance with the Union and gave that grievant a retroactive temporary promotion to the GS-343-9 Program Analyst position. See *id.*

In the instant case, however, the grievance was not resolved. In response to step three of the grievance, the Agency conceded that the duties performed by the grievant and the employee promoted as a result of the settlement of the other grievance are "materially the same." *Id.* at 5-6. However, the Agency "was not satisfied that the documentation 'substantiate[d] that the grievant performs analysis duties to the degree described by the grievant, nor could her supervisor substantiate that she did those duties.'" *Id.* at 6.

The grievance was submitted to arbitration, where the Arbitrator framed the issue as whether:

the grievance is time-barred under the Master Agreement and is not otherwise arbitrable. As to the merits, the grievance turns on whether the record established that the Grievant performed the grade-controlling duties of a GS-343-09 Program Analyst from 1994 to the present to entitle her to a retroactive promotion with back pay.

Id. at 2-3 (footnote omitted).

The Arbitrator found that the grievance was timely and that it was substantively arbitrable.¹ On the merits, the Arbitrator found that the grievant had performed the higher-graded duties of the GS-343-09 Program Analyst position for at least twenty-five percent of the time. The Arbitrator relied, in part, on the fact that the Agency and the Union had reached a settlement agreement in the similar grievance on behalf of the other employee in the same GS-303-7 Personnel Certification Assistant position. *Id.* at 28.

The Arbitrator noted that the grievant who received the temporary promotion under the settlement agreement was found to be working in a position the range of duties and responsibilities of which were not adequately reflected by her GS-303-7 position description, and that the employee had performed higher-graded duties. The Arbitrator further noted that the Agency acknowledged that the grievant in the instant case and the promoted employee had performed materially the same duties. See *id.* The Arbitrator rejected the Agency's contention that the grievant did not meet specialized experience requirements of the Office of Personnel Management (OPM) for a temporary promotion to a GS-343-09

position since her GS-303-7 position is in a different job series. See id. at 22, 26 and 31.

As a remedy, the Arbitrator directed the Agency to provide the grievant a retroactive temporary promotion to the GS-343-09 Program Analyst position, along with backpay and interest. The Arbitrator rejected the Union's request that the grievant receive backpay retroactive to 1994 because he was not persuaded that the grievant performed sufficient grade controlling duties of the GS-9 position since that year. See id. at 32 n.13.

The Arbitrator retained jurisdiction for the purpose of resolving differences between the parties over implementing the remedy awarded by the Arbitrator. See id. at 32.

III. Positions of the Parties

A. Agency's Exception

The Agency contends that the award is contrary to law because the grievant did not satisfy OPM's "specialized experience requirements" for a temporary promotion to the Program Analyst GS-343-09 position. Exception at 8-9. Citing OPM's "Operating Manual: Qualification Standards for General Schedule Positions, Group Coverage Qualification Standards for Administrative and Management Positions" (OPM Manual), the Agency asserts that the specialized experience requirement for a GS-9 within the GS-343 series is one year experience equivalent to at least GS-7 within the GS-343 series. See id. at 8. The Agency further states that the OPM manual provides that the "specialized experience" must have been "equivalent to at least the next lower grade level in the normal line of progression for the occupation in the organization." Id. (emphasis omitted). The Agency argues that the grievant has not held a position in the GS-343 series, and, as such, she does not meet the "minimum qualification requirements" for a temporary promotion to the GS-343 series position. Id.

Furthermore, the Agency states that in order to receive backpay under the Back Pay Act, an employee must have been entitled to a promotion based on the performance of higher-graded duties. According to the Agency, an employee must meet the minimum qualifications prescribed for promotion by OPM in order to be promoted, and in this case the grievant did not meet such qualifications.

B. Union's Opposition

The Union argues that the Agency's exception is "premature" because the parties have not reached impasse in bargaining over the remedy. Opposition at 10. The Union notes that the Arbitrator retained jurisdiction to assist the parties in

resolving their differences over the remedy. The Union asserts that the Agency chose to file an exception, rather than bargain over the relief awarded.

Further, the Union interprets the Agency's exception that the grievant did not satisfy the minimum qualification requirements for a temporary promotion to the Program Analyst GS-343-09 position as a claim that the award is based on a nonfact. The Union asserts that this matter was litigated before the Arbitrator and that the Authority will not find an award deficient on the basis of an arbitrator's determination on a factual matter that the parties disputed at arbitration. In any event, the Union contends that the grievant is qualified for a temporary promotion to the Program Analyst GS-343-09 position because the Arbitrator found that she performed the duties of that position for several years.²

IV. Analysis and Conclusions

A. Preliminary Matter

The Union's argument that the Agency's exception is premature is without merit. The Arbitrator did not postpone a determination of the remedy and leave that matter up to the parties to resolve through bargaining. Rather, the Arbitrator provided a remedy -- namely, a retroactive promotion with backpay -- and retained jurisdiction to assist the parties in resolving any differences over that remedy. Such retention of jurisdiction does not render the exception interlocutory. See *United States Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project*, 55 FLRA 152, 158 (1999) (citing *United States Dep't of the Navy, Mare Island Naval Shipyard, Vallejo, Cal.*, 53 FLRA 267, 269 (1997)). Cf. *United States Dep't of Health and Human Services, Ctrs. for Medicare and Medicaid Services*, 57 FLRA 924, 926 (2002) (an arbitration award that postpones the determination of an issue submitted does not constitute a final award subject to review).

B. The Award Is Not Contrary to the Back Pay Act

The Agency contends that the award is contrary to law because the grievant did not satisfy the "specialized experience requirements" prescribed by OPM for a temporary promotion to the Program Analyst GS-343-09 position. See Exception at 8-9. The Agency argues that the grievant has not held a position in the GS-343 series, and, as such, she does not meet the "minimum qualification requirements" for a temporary promotion to the GS-343 series position. *Id.*

As the Agency's contention involves the award's consistency with law, we review the questions of law raised by the contention *de novo*. See *NTEU*, Chapter 24, 50 FLRA 330, 332 (1995) (citing *United States Customs Service v. FLRA*, 43 F.3d 682, 686-87 (B.C. Cir. 1994)). In applying the standard of *de novo* review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law, based on the underlying factual findings.

NFFE, Local 1437, 53 FLRA 1703, 1710 (1998) . In making that assessment, the Authority defers to the arbitrator's underlying factual findings. See *id.*

An arbitrator may properly award backpay under the Back Pay Act when the arbitrator determines that an agency has denied an employee a temporary promotion to which the employee was entitled under a collective bargaining agreement or applicable regulations for having performed the duties of a higher-graded position for an extended period of time. See *United States Dep't of Health and Human Services, Public Health Service, Navajo Area Indian Health Service*, 50 FLRA 383, 385 (1995). However, the Authority has consistently held that an "employee must meet the minimum qualification requirements prescribed by the Office of Personnel Management" for the higher-graded position in order to receive a temporary or permanent promotion to that position. See *id.* at 386. See also *United States Dep't of Housing and Urban Development, Louisiana State Office, New Orleans, Louisiana*, 53 FLRA 1611, 1619 (1998).

As relevant here, the minimum qualification requirements prescribed by OPM for a temporary promotion to the Program Analyst GS-343-09 position include specialized experience requirements. In this regard, OPM imposes a specialized experience requirement of "1 year equivalent to at least [the] GS-7 [grade level]" for employees seeking promotion to the Program Analyst GS-343-09 position. OPM Manual at IV-A-14. In addition, an employee must possess "[e]xperience that equip[s] that applicant with the particular knowledge, skills, and abilities to perform successfully the duties of the position, and that is typically in or related to the work of the position to be filled." *Id.* at IV-A-16. Further, the "specialized experience must have been equivalent to at least the next lower grade level in the normal line of progression for the occupation in the organization." *Id.*

Contrary to the Agency's assertions, the foregoing OPM regulation demonstrates that the relevant specialized experience for promotion to the Program Analyst GS-343-09 position does not require experience in that particular job series, but, instead, requires only experience that provides an employee "with the particular knowledge, skills, and abilities to perform successfully the duties of the position and that is typically in or related to the work of the position to be filled." *Id.*

Furthermore, contrary to the Agency's assertions, the Arbitrator found that the grievant was performing sufficient specialized experience for a temporary promotion to the Program Analyst GS-343-09 position. As noted, the Arbitrator relied, in part, on the fact that the Agency and the Union had reached a settlement agreement in the similar grievance on behalf of another employee in the GS-303-7 Personnel Certification Assistant position. Award at 28. The Arbitrator noted that the grievant who received the temporary promotion under the settlement agreement was found to be working in a position the range of duties and responsibilities of which were not adequately reflected by her GS-303-7 position description, and that the employee had performed higher-graded duties. As that employee received a temporary promotion, the Agency effectively

agreed that the employee had the requisite specialized experience under OPM's requirements to be promoted. We note that the Agency conceded that both employees performed the same duties. See *Id.* at 5-6. In these circumstances, there is no basis on which to distinguish the employee here from the employee whom the Agency found to have satisfied OPM's requirements. Consequently, based upon the Arbitrator's factual findings, we conclude that the grievant also had the requisite specialized experience to be promoted. Therefore, we deny the exception.

V. Decision

The Agency's exception is denied.

1The Agency did not except to these findings and we do not address them further.

2To the extent the Union claims in its opposition that the remedy should be modified to grant the grievant a temporary promotion retroactive to an earlier date than that granted by the Arbitrator, the claim constitutes an untimely exception and is dismissed. See, e.g., *NAGE, Local R4-6*, 54 FLRA 1594, 1597 (1998).