74 FLRA No. 36

UNITED STATES
DEPARTMENT OF DEFENSE
ADJUTANT GENERAL NEVADA
NEVADA ARMY NATIONAL GUARD
(Agency)

and

LABORERS' INTERNATIONAL
UNION OF NORTH AMERICA
LOCAL 1776
(Union)

0-AR-5752

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DECISION

March 25, 2025

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

I. Statement of the Case

Arbitrator Michael Anthony Marr issued an award finding that a grievance concerning a temporary promotion was substantively arbitrable and that the Agency violated the parties' collective-bargaining agreement by failing to pay the grievant for performing higher-graded duties. The Agency filed exceptions to the award on contrary-to-law and exceeded-authority grounds. Because the Agency fails to demonstrate that the award is deficient, we deny the exceptions.

II. Background and Arbitrator's Award

The grievant's permanent position is a logistics-management specialist at the grade 9 level in the general schedule (GS). In an April 15, 2015 memorandum (memo), the Agency appointed the grievant to perform the duties of a GS-11 food-program manager (manager) for the Nevada National Guard until relieved from those duties. The memo also stated that the manager duties were to be performed in accordance with a certain Army food-service regulation.[1] In April 2021, the Agency ordered the grievant to stop performing the manager duties.

While appointed to manager, the grievant requested a temporary promotion for performing GS-11 duties. Although the grievant did not request a desk audit, the Agency conducted one and concluded that she was performing GS-9 duties. Subsequently, the Union filed a grievance claiming the grievant was entitled to backpay for the higher-graded manager duties. The Union advised the Agency that the grievant was not seeking to have her permanent position upgraded to the GS-11 grade. The Agency denied the grievance and the matter went to arbitration.

The Arbitrator framed the issue as whether the grievance was substantively arbitrable and, if so, whether the Agency "violate[d] Article 17, Section 17.2.4" of the parties' agreement (Article 17) when it "failed to compensate" the grievant for performing higher-graded duties.[2]

Addressing the first issue, the Arbitrator rejected the Agency's argument that the grievance was not substantively arbitrable under Article 12, Section 12.3.2e. of the parties' agreement (Article 12)[3] and § 7121 of the Federal Service Labor-Management Relations Statute (the Statute)[4] because it concerned a classification matter. The Arbitrator determined that Article 12 and Article 17 did not "create[] either a latent or patent contract ambiguity," as Article 17's "singular purpose" is to address "when 'other duties as assigned' entitle an employee to a 'temporary promotion,'"[5] whereas Article 12 "precludes arbitrators from considering [a]gency classification matters."[6] The Arbitrator then applied the four-part test established by the Authority in *U.S. Small Business Administration* (*SBA*) to conclude that the grievance did not concern a classification and, thus, was arbitrable.[7] In reaching this conclusion, the Arbitrator noted the testimony of the Agency's primary witness – that the grievant was the food-program manager for the Nevada National Guard despite her official title as

[1] Award at 5, 25 n.7.
[2] *Id.* at 5. Article 17 states:

> Neither the Agency nor employees shall abuse the use of 'other duties as assigned.' If an employee is assigned duties of a higher[-]pay grade for a period in excess of fourteen . . . days, either consecutive or aggregate, during any . . . 120[-]day period, the employee should be temporarily promoted to the higher[-]paying position. Promotions exceeding . . . 120 . . . days shall be competitively announced.

Id. at 13.
[3] Article 12 provides that "'[t]he classification of any position which does not result in the reduction in grade or pay of an employee' may not be grieved." *Id.* at 11 n.3 (alteration in original) (emphasis omitted).
[4] 5 U.S.C. § 7121.
[5] Award at 19 (quoting Article 17).
[6] *Id.*
[7] 70 FLRA 729 (2018).

logistics-management specialist – and found that, despite the desk audit and the overlapping of some duties, "*[t]here is nothing in the evidence to* indicate that anyone, other than the [g]rievant, was performing the [manager] duties" for Nevada.[8]

Having found the grievance substantively arbitrable, the Arbitrator then found the grievant met the contractual requirements for a temporary promotion because she worked as the manager for six years, thereby meeting Article 17's "threshold requirement" for a temporary promotion.[9] The Arbitrator determined that the Agency's refusal to temporarily promote the grievant was an unjustified and unwarranted personnel action. Thus, the Arbitrator awarded backpay from the date the Agency appointed her to the GS-11 position until the date it relieved her from those duties.[10]

The Agency filed exceptions to the award on August 12, 2021, and the Union filed an opposition on September 9, 2021.

III. Preliminary Matter

The Agency requests an expedited, abbreviated decision on the basis that this case is "not complex."[11] The Union does not address this request in its opposition.

As discussed below, the Arbitrator resolved the grievance based on a legal test that the Authority recently reversed in *U.S. Marine Corps, Marine Corps Air Ground Combat Center, Twentynine Palms, California* (*Twentynine Palms*).[12] Having considered the award and the issues presented in the exceptions, we find that this case's complexity, potential for precedential value, and lack of similarity to other, fully detailed decisions involving the same or similar issues, warrant issuing a full-length decision.[13] Therefore, we deny the Agency's request for an expedited, abbreviated decision.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Agency argues the award is contrary to law.[14] Specifically, the Agency asserts the award is not arbitrable, as a matter of law, because it concerns a classification matter under § 7121(c)(5) of the Statute.[15]

In resolving an exception claiming that an award is contrary to law, the Authority reviews any question of law raised by an exception and the award de novo.[16] In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[17] Under this standard, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.[18]

Section 7121(c)(5) of the Statute excludes from parties' negotiated grievance procedures "any grievance concerning . . . the classification of any position which does not result in the reduction in grade or pay of an employee."[19] In *Twentynine Palms*, the Authority overturned *SBA* and explained that it will determine whether a grievance concerns classification by applying the Authority's pre-*SBA* standards.[20] The Authority explained in *Twentynine Palms* that it construes 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 Office of Personnel Management] under chapter 51 of title 5, United States Code."[21]

Under the pre-*SBA* standards, where the substance of a grievance concerns the grade level of the duties permanently assigned to and performed by an employee, the grievance concerns the classification of a position within the meaning of § 7121(c)(5).[22] However, where the substance of the grievance concerns whether the employee is entitled to a temporary promotion under a collective-bargaining agreement because the employee has performed the established duties of a higher-graded

[8] Award at 29 (emphasis added); *see also id.* at 28-29 (noting that the Agency's witness was the same official who had conducted the desk audit).
[9] *Id.* at 32 (citing Article 17).
[10] *Id.* at 33.
[11] Exceptions at 7-8.
[12] 73 FLRA 379 (2022) (then-Member Kiko dissenting in part).
[13] *See, e.g.*, *U.S. Dep't of the Army, Mil. Dist. of Wash., Fort Myer, Va.*, 72 FLRA 772, 773 n.20 (2022) (denying request for expedited, abbreviated decision); *AFGE, Nat'l INS Council*, 69 FLRA 549, 550 (2016) (same).
[14] Exceptions at 4.
[15] *Id.* at 4-5.
[16] *AFGE, Loc. 3954*, 72 FLRA 403, 404 (2021) (Member Abbott concurring) (citing *U.S. Dep't of the Interior, Bureau of Land Mgmt., Eugene Dist., Portland, Or.*, 68 FLRA 178, 180 (2015) (*Interior*)).
[17] *Id.* (citing *Interior*, 68 FLRA at 180).
[18] *Id.* (citing *Interior*, 68 FLRA at 180-81).
[19] 5 U.S.C. § 7121(c)(5).
[20] 73 FLRA at 381.
[21] *Id.* (quoting *U.S. Dep't of the Treasury, IRS, Small Bus./Self Employed Bus. Div. Fraud/BSA, Detroit, Mich.*, 63 FLRA 567, 571 (2009)) (internal quotation marks omitted).
[22] *Id.*

position, the grievance does not concern classification within the meaning of § 7121(c)(5).[23]

The Authority "resolves arbitration cases based on the state of the law at the time that it decides those cases,"[24] "absent manifest injustice or statutory direction . . . to the contrary."[25] In this case, we can perceive no manifest injustice or statutory direction that would prevent us from applying the pre-*SBA* standards to the Agency's exceptions.[26] Thus, we apply those standards.

Doing so, we find the Arbitrator correctly concluded the grievance did not involve a classification. On this point, the Arbitrator found that the Agency expressly directed the grievant to assume the role of an existing higher-graded position,[27] and that there were three major duties in the higher-graded manager position that were not in the grievant's permanent position.[28] The Arbitrator also determined that the grievance concerned a violation of the parties' agreement regarding temporary promotions under Article 17 and framed the issue as such.[29] Consequently, the Arbitrator's findings demonstrate that the substance of the grievance concerned whether the grievant was entitled to a temporary promotion under the parties' agreement.[30]

The Agency argues that the grievance concerned a classification matter because it was preceded by a desk audit that found the grievant was performing GS-9 duties. However, the Authority has never held that a grievance concerns classification merely because the duties at issue were also subject to a desk audit. Indeed, the Authority has found a grievance concerned a temporary promotion even where a desk audit had been conducted with regard to the job duties at issue.[31] Moreover, contrary to the Agency's assertion, the Arbitrator did not "disregard[]" the desk audit's findings.[32] Rather, the Arbitrator found the desk audit provided "additional information . . . to determine if [the grievant] [was] performing higher[-]graded work and entitled to a temporary promotion,"[33] and specifically relied upon the testimony of the Agency employee who conducted the audit to find that the grievant was performing the managerial duties of the GS-11 position.[34]

Additionally, the Agency asserts the Arbitrator erred by ignoring that the initial grievance requested that the grievant "be immediately promoted" to the GS-11 position.[35] According to the Agency, the Arbitrator "admit[ted]"[36] in the award that "[s]uch a position would have meant a denial of the . . . [g]rievance."[37] However, in the portion of the award upon which the Agency relies, the Arbitrator found that the grievance was "not seeking a *permanent* promotion for the [g]rievant."[38] The Agency has failed to demonstrate how this finding is inconsistent with the initial grievance's wording or is otherwise inconsistent with his finding that the grievance did not concern classification.

Because the Agency's assertions do not demonstrate that the award is contrary to law, we deny this exception.

B. The Agency's exceeded-authority exception fails to demonstrate that the award is deficient.

The Agency asserts that the Arbitrator exceeded his authority by disregarding federal law and Authority precedent regarding promotions that involve classifications.[39] The Agency also argues that the Arbitrator "misconstrue[d]" its position with respect to whether the grievant is performing GS-11 duties, which, according to the Agency, was that the desk audit demonstrated she was performing GS-9 duties.[40]

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to persons

[23] *Id.* at 381-82.
[24] *NLRB*, 72 FLRA 334, 337 n.41 (2021) (quoting *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 71 FLRA 183, 184 (2019) (Member DuBester dissenting)).
[25] *U.S. Dep't of the Army, U.S. Army Rsrv. Pers. Ctr., St. Louis, Mo.*, 49 FLRA 902, 903 (1994).
[26] *See, e.g., U.S. Dep't of HHS, SSA, Kan. City, Mo.*, 38 FLRA 1480, 1484 (1991) (rejecting argument that Authority should not have applied revised standard to exceptions because "an agency's ability to revise approaches on particular issues is an essential component of the administrative decision[-]making process").
[27] Award at 29.
[28] *Id.* at 30-31.
[29] *Id.* at 5, 19-21.
[30] *Twentynine Palms*, 73 FLRA at 382.
[31] *See, e.g., U.S. Nuclear Regul. Comm'n*, 54 FLRA 1416, 1422-23 (1998) (finding that arbitrator correctly determined the grievance concerned a temporary promotion despite conduction of a desk audit on the position at issue after grievance was filed); *U.S. Dep't of the Navy, Naval Aviation Depot, Marine Corps Air Station, Cherry Point, N.C.*, 42 FLRA 795, 800-02 (1991) (finding grievance did not involve classification despite prior desk audit).
[32] Exceptions at 5.
[33] Award at 31 n.11.
[34] *Id.* at 29-30.
[35] Exceptions at 5 (citing Award at 33).
[36] *Id.*
[37] Award at 33.
[38] *Id.* (emphasis added).
[39] Exceptions at 6-7.
[40] *Id.* at 7.

who are not encompassed by the grievance.[41] The Agency neither explains how the award is deficient under this standard, nor sets forth any legal authority for this contention.[42] To the extent this exception is premised on the same contrary-to-law argument we rejected above, it provides no basis for finding the award deficient.[43] Accordingly, we deny the Agency's exceeded-authority exception.

V. Decision

We deny the Agency's exceptions.

[41] *U.S. DHS, U.S. CBP, L.A., Cal.*, 72 FLRA 411, 412 (2021) (citing *AFGE, Nat'l VA Council No. 53*, 67 FLRA 415, 415-16 (2014)).

[42] *AFGE, Loc. 1367*, 67 FLRA 378, 379 (2014) (denying exceeded-authority exception where union argument failed to explain how the arbitrator exceeded authority under the standard).

[43] *E.g.*, *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 220, 221 n.22 (2022).

Chairman Kiko, dissenting:

Consistent with my dissent in *U.S. Marine Corps, Marine Corps Air Ground Combat Center, Twentynine Palms, California* (*Twentynine Palms*),[1] I continue to disagree with the Authority's renunciation of *U.S. Small Business Administration* (*SBA*),[2] which provided concrete principles for enforcing § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute)[3] as opposed to the nebulous and ineffective standard the majority employs here. I also disagree with the majority's conclusion that the Union's grievance does not concern classification under § 7121(c)(5). Therefore, I would grant the Agency's contrary-to-law exception and set aside the award.

The Agency employs the grievant as a logistics-management specialist (specialist) in the food-services department at the grade 9 level in the general schedule (GS). In a memorandum (memo), the Agency directed the grievant to perform "the duties of the Food Program Manager."[4] Although the majority and the Arbitrator both seem to conflate the assignment of food-program-manager duties with directing the grievant to "perform the duties of a *GS-11* food-program manager,"[5] the memo does not mention a grade. In fact, as the Arbitrator acknowledged,[6] the grievant's GS-9 position description (PD) states that the incumbent "[m]ay serve as the . . . [f]ood[-p]rogram [m]anager."[7] While serving as food-program manager, the grievant elected to pursue a desk audit.[8] The expert position classifier who conducted this audit concluded that the grievant was performing GS-9 – not GS-11 – duties, noting that the grievant did not "conduct[] detailed analyses of complex function[s]," or perform duties that were "evaluative or analytical in nature."[9] Although the Arbitrator disregarded the desk audit to make his own findings about the grade-level of the grievant's food-program-manager duties, this dispute concerning "the accuracy of the classification of the grievant's position," or "the grade level of the duties assigned to[,] and performed by[,] the grievant," suggests that the grievance concerns the classification of a position within the meaning of § 7121(c)(5).[10] That the grievance amounts to an appeal of that desk audit[11] is further evidence that what the grievant actually sought was the reclassification of her permanent position.[12]

But we need not rely on inferences from the record in this case to determine whether the grievance's essential nature concerns an inarbitrable classification matter. Both before *SBA*, and in decisions the Authority has issued since *Twentynine Palms*, the Authority has

[1] 73 FLRA 379, 383-85 (2022) (Dissenting Opinion of then-Member Kiko).

[2] 70 FLRA 729 (2018) (Member DuBester dissenting). In order to present a temporary-promotion claim under *SBA* – the test in effect when these parties arbitrated their grievance – 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 that 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. *Id.* at 730-31.

[3] 5 U.S.C. § 7121(c)(5).

[4] Award at 5 (citing Opp'n, Ex. U1, Assignment Memo at 1).

[5] Majority at 1-2 (emphasis added); *see also* Award at 31 (stating "the [g]rievant was temporarily promoted to perform the duties and responsibilities of the GS-11, Food Program Manager").

[6] Award at 27.

[7] Opp'n, Joint Ex. 6, PD for GS-9 Logistics-Management Specialist at 2. This suggests the food-program-manager duties are not the grade-controlling duties of the GS-11 specialist position, which would render the grievance inarbitrable under *SBA*. *See U.S. Dep't of the Treasury, IRS*, 71 FLRA 771, 772-73 (2020) (Member DuBester dissenting) (grievance concerned a non-arbitrable classification matter where the assigned duties were not different from the duties of the lower-graded employees' permanent position). As I have stated before, the Authority's temporary-promotion standard must be consistent with Office of Personnel Management (OPM) classification guidance, in particular, the principle "that an employee occupies a higher-graded position *only* when the employee performs the grade-controlling duties of that position." *Twentynine Palms*, 73 FLRA at 384 (Dissenting Opinion of then-Member Kiko) (citing OPM, The Classifier's Handbook 33, 36, 40 (Aug. 1991 ed.), https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/classifierhandbook.pdf.). *But see id.* at 384 n.18 (noting OPM classification guidance providing that an employee's performance of higher-graded duties for *training* purposes does not control employee's grade level).

[8] *See* Opp'n, Attach. 1, Hr'g Tr. (Hr'g Tr.) at 113 (grievant testifying that she "was given the option to do a desk audit" and that she elected to pursue that option).

[9] Award at 28 (quoting Opp'n, Joint Ex. 2, Desk Audit at 6).

[10] *U.S. DOD, Marine Corps Logistics Base, Albany, Ga.*, 57 FLRA 275, 277 (2001).

[11] Hr'g Tr. at 122-23 (grievant affirming she would not have filed the grievance "if the[Agency] had upgraded [her] to a GS-11 as a result of the desk audit and then compensated [her] for back pay"); *see also* Exceptions at 5 (arguing that "[t]here is an administrative process to further appeal a [c]lassification [a]ppeal," but "the [U]nion chose to circumvent that process and file a grievance").

[12] *See USDA, Food & Consumer Serv., Dall., Tex.*, 60 FLRA 978, 982 (2005) (Member Pope dissenting in part) (finding grievance concerned classification where grievant attempted "to 'upgrade' the[ir] . . . permanent position after . . . performing higher-graded duties" and "[a]gency subsequently conducted a desk audit," actions the Authority found "consistent with attempts to determine the proper grade level to assign to the [grievant's] duties").

consistently held that a grievance seeking a permanent promotion is excluded from the negotiated grievance procedure under § 7121(c)(5) of the Statute.[13] Here, the Union's grievance unambiguously requested that the Agency "immediately promote" the grievant to the higher-graded GS-11 specialist position for performing the food-program-manager duties. Moreover, the grievance did not reference a "temporary promotion," or identify any contract language pertaining to temporary promotions. Under these circumstances, Authority precedent compels a finding that the grievance concerns classification and is, thus, not substantively arbitrable.

Indeed, the Arbitrator recognized that if the Union was "seeking a permanent promotion for the [g]rievant[,] . . . [s]uch a position would have [required] a denial of the . . . [g]rievance."[14] But he then found – without further explanation or citation to any authority – that the grievance was arbitrable because the Union "conceded" it was not seeking a permanent promotion.[15] The award does not describe the nature of the Union's concession, whether the Union formally modified its grievance, or on what basis the Union was entitled to assert a temporary-promotion claim not contained in the initial grievance. Notwithstanding this lack of clarity, the Authority has applied the § 7121(c)(5) bar even when a party seeks to abandon its grievance's request for a permanent promotion after filing the grievance.[16] Thus, regardless of the mysterious source of the Arbitrator's "conce[ssion]" finding, the grievance's request for a permanent promotion renders the grievance substantively inarbitrable.[17]

Nonetheless, the majority denies the Agency's contrary-to-law exception on the grounds that the Agency "failed to demonstrate how" the Arbitrator's arbitrability determination was "inconsistent with the initial grievance's wording" or "inconsistent with [the] finding that the grievance did not concern classification."[18] The majority's conclusory analysis gives short shrift to the grievance's unequivocal request for an "immediate[] promot[ion]."[19] On its face, this request directly contradicts the Arbitrator's finding that the Union did not "seek[] a permanent promotion."[20] Further, the majority fails to distinguish several decisions, including those cited in the Agency's exception,[21] where the Authority set aside arbitration awards because the underlying grievances requested permanent promotions.[22] As I have previously noted, *SBA*'s superior fact-specific inquiry ensured that

[13] *E.g.*, *U.S. Dep't of VA, W. Palm Beach VA Med. Ctr., W. Palm Beach, Fla.*, 74 FLRA 121, 123-24 (2024) (then-Member Kiko concurring); *U.S. Dep't of the Army, U.S. Army Garrison, Redstone Arsenal, Huntsville, Ala.*, 73 FLRA 210, 211 (2022) (citing *U.S. Dep't of Transp., FAA*, 62 FLRA 516, 518 (2008)); *U.S. DOD, U.S. Marine Corps, Air Ground Combat Ctr., Twentynine Palms, Cal.*, 71 FLRA 173, 174 (2019) (*DOD*) (Member DuBester dissenting); *U.S. Dep't of the Army, Anniston Army Depot, Anniston, Ala.*, 64 FLRA 10, 10-11 (2009) (*Anniston Depot*).

[14] Award at 33.

[15] *Id.*

[16] *See AFGE, Loc. 987*, 58 FLRA 453, 455 (2003) (*Loc. 987*) (finding that although grievant requested a temporary promotion during arbitration hearing, "a claim for a temporary promotion will not preclude the Authority from concluding that the substance of the *underlying grievance* concerns a classification matter" (emphasis added)); *see also SSA*, 60 FLRA 62, 64 (2004) ("[T]he Authority has recognized that a mere claim that a grievant is entitled to a temporary promotion will not cure a grievance that pertains to temporary duties assigned to the grievant's permanent position." (citing *Laborers' Int'l Union of N. Am., Loc. 28*, 56 FLRA 324, 326 n.2 (2000) (Member Cabaniss concurring))).

[17] *See Loc. 987*, 58 FLRA at 455; *U.S. Small Bus. Admin.*, 71 FLRA 999, 1000 (2020) (Member DuBester dissenting) (holding that under longstanding Authority precedent, grievance's "specific[] request[] that the [a]gency '[p]romot[e]' the grievant . . . demonstrate[d] that [the] grievance concern[ed] a non-arbitrable classification matter" (citing *DOD*, 71 FLRA at 174; *Anniston Depot*, 64 FLRA at 11)).

[18] Majority at 6.

[19] Exceptions, Attach. 2, Grievance at 2.

[20] Award at 33.

[21] Exceptions at 5 (citing *SSA*, 71 FLRA 205, 206 (2019) (Member Abbott concurring; Member DuBester dissenting); *Loc. 987*, 58 FLRA 453; *Veterans Admin. Med. Ctr., Togus, Me.*, 17 FLRA 963, 963-64 (1985)).

[22] *See DOD*, 71 FLRA at 174 (where "grievance sought a promotion and backpay because the grievant allegedly . . . work[ed] outside of her position description and was tasked with additional, higher-graded duties," Authority set aside award as contrary to § 7121(c)(5)); *Off. & Prof'l Emps. Int'l Union, Loc. 2001*, 62 FLRA 67, 69 (2007) (granting exception arguing award contrary to § 7121(c)(5) where "substance of the grievance concerned whether the grievants were entitled to permanent promotions"); *AFGE, Loc. 987*, 58 FLRA 619, 619-20 (2003) (Member Pope dissenting) (finding grievance "request[ing] that the [a]gency grant the grievant backpay . . . and promote the grievant" concerned classification because the grievance was based on the performance of permanently-assigned duties); *see also Loc. 987*, 58 FLRA at 454-55 (upholding arbitral finding that grievance was non-arbitrable under § 7121(c)(5) where *original* grievance "requested that the [a]gency promote [the grievant] immediately"); *U.S. Dep't of HUD*, 70 FLRA 605, 608 (2018) (Member DuBester dissenting) (finding grievance non-arbitrable because "the essential nature of th[e] grievance – as demonstrated by the requested remedy – concerned classification").

arbitrators did not misclassify "reclassification grievance[s] in a temporary-promotion guise."[23]

Essentially, the majority's § 7121(c)(5) analysis rests solely on strict deference to the Arbitrator's *construction* of the grievance as concerning a temporary promotion. However, where the grievance's arbitrability is defined by statute, the Authority reviews the Arbitrator's substantive-arbitrability determination de novo.[24] Under the de novo standard, there is no basis for affording deference to the Arbitrator's arbitrability determination in connection with a jurisdictional question under the Statute.[25] Ultimately, the Arbitrator could not – whether through interpretation or construction – bestow arbitrability on a grievance whose remedial request reveals that the "essential nature" of the grievance concerns classification.

For these reasons, I dissent.

[23] *Twentynine Palms*, 73 FLRA at 383 (Dissenting Opinion of then-Member Kiko); *see also id.* (noting that under the pre-*SBA* standard, arbitrators tasked with uncovering a grievance's "essential nature" reached determinations inconsistent with § 7121(c)(5), including "finding that a grievance asserting that employees were 'unfairly classified'" and seeking *six years* of backpay sought only "*temporary*" promotions (quoting *U.S. Dep't of the Treasury, IRS, Small Bus./Self Employed Bus. Div. Fraud/BSA, Detroit, Mich.*, 63 FLRA 567, 567 (2009))).

[24] *See Fraternal Ord. of Police, N.J. Lodge 173*, 58 FLRA 384, 385-86 (2003) (Chairman Cabaniss dissenting).

[25] *Id.* at 386 (applying de novo standard, rather than "deferential" essence standard, where arbitrator's substantive-arbitrability determination was "based on a statute").