

**63 FLRA No. 160**

UNITED STATES DEPARTMENT OF  
THE TREASURY  
INTERNAL REVENUE SERVICE  
SMALL BUSINESS/SELF EMPLOYED  
BUSINESS DIVISION  
FRAUD/BSA  
DETROIT, MICHIGAN  
(Agency)

and

NATIONAL TREASURY EMPLOYEES UNION  
CHAPTER 78  
(Union)  
0-AR-4034

—————  
DECISION

July 30, 2009

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Before the Authority: Carol Waller Pope, Chairman  
and Thomas M. Beck, Member

**I. Statement of the Case**

This case is before the Authority on exceptions to an award of Arbitrator Terry A. Bethel 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 exceptions.

The Arbitrator sustained a grievance finding that grievants, General Schedule (GS), GS-592-5, (GS-5) tax examining technicians in the Penalty Group of the Agency's Detroit facility, performed higher-graded duties at the GS-6 level.

For the reasons that follow, we deny the Agency's exceptions.

**II. Background****A. Initial Award**

The grievants are assigned to the 8300 Penalty Group (8300 Group), which is part of the BSA Compliance Branch.

Trades or businesses that receive cash payments of \$10,000 or more are required to file Form 8300. If the form is incomplete, the Agency's Edit and Error Branch

sends a letter to the party requesting additional information and instructing them to contact a named employee in the 8300 Group, who is assigned such cases. The cases are assigned randomly to the grievants who receive between 92 and 150 cases. The grievants have six to eight weeks to process the cases and following this period they have another two weeks or so to work on final matters involving the cases. Upon completion of this work, the cases are returned to the Edit and Error Branch. At issue here are the duties performed by the grievants during the six to eight week period. More specifically, the dispute concerns whether the GS-5 tax examining technicians in the 8300 Group are entitled to be paid for higher-graded duties based on a GS-6 position description (PD). In this regard, the parties agreed that the issues were as follows: "whether the [g]rievants are performing higher[-]graded duties and, if so, whether they perform them for more than 25% of their direct time." Award at 2-3. The Arbitrator also determined that the only procedural issue before him was the Union's additional claim that employees employed in GS-6 lead positions were encompassed by the grievance.

According to the Arbitrator, the grievant, a representative of the class of employees in dispute, testified as follows: By the time the 8300 Group receives the case, taxpayers have a proposed penalty notice that includes the name and telephone number of a Group employee. The grievant testified that as tax filers call, the grievants spend a substantial amount of time on the telephone for the next three weeks. During these calls, the grievants obtain missing information, but "do[] not do the clerical work of completing the form." *Id.* at 4.

The Arbitrator noted the Union's claim that the grievants' "principal work is to determine whether the taxpayer establishes reasonable cause and either to assess the penalty or waive it[]" and found that the "reasonable cause/penalty assessment determination is [g]rievants' principal function." *Id.* The Arbitrator found that the grievants work under a standard PD, (the assigned PD), that is applied to them and other employees in different departments and that, as agreed to by the Union, a G-6, tax examining technician PD (target PD) would be used to determine if the grievants work at a higher level. *Id.* at 5. Before the Arbitrator, the Union asserted that the grievants are unfairly classified at GS-5 and that the target PD captures some of their duties.

The Arbitrator noted that some of the Union's argument, including the previous assertions, suggests that the Union believes that the grievants are improperly classified at the GS-5 level. However, the Arbitrator found that "as the parties' stipulations reflect, this is a

higher graded duties case, not a classification case.” *Id.* at 11. In this regard, the Arbitrator stated that he would “assume [that the] [g]rievants are properly classified.” *Id.* The Arbitrator considered the assigned and target PDs and found that paragraphs 2 and 7 of the target PD describe the grievants’ work of determining whether to waive a penalty for late filing or other defects concerning the 8300 form and that “neither the words ‘processes . . . cases’ or any other language on the assigned PD . . . includes these duties.” *Id.* at 18.

Based on his findings, the Arbitrator concluded that the grievants are performing higher-graded duties. The Arbitrator further concluded that the grievants perform the principal function of their work--determining whether to waive a penalty for late filing or other defects concerning the 8300 form--for at least 25% of the time period covered by the grievance. Accordingly, the Arbitrator found that the grievants are entitled to a remedy in accordance with Article 16 of the National Agreement (CBA), which concerns “Details.”<sup>1</sup> The Arbitrator also stated that any remedy must include the GS-6 lead employees because the grievance describes the grievants as “all affected employees” and is not limited to GS-5 employees.<sup>2</sup> *Id.* at 19. The Arbitrator further stated that the Union sought a “remedy that would not extend back further th[a]n six years from the date of the grievance . . . .” *Id.* at 18. The Arbitrator also noted that after the hearing in this case, the Authority issued a decision in *United States Dep’t of Veterans Affairs, Ralph H. Johnson Medical Center, Charleston, South Carolina*, 60 FLRA 46 (2004) (*VA*) (Chairman Cabaniss and Member Pope concurring) and that the parties disputed the effect of *VA* on the appropriate remedy. Therefore, in accordance with the parties’ request, the Arbitrator remanded the remedy portion of the case to them for discussion and retained jurisdiction to address any concerns involving such matter.

#### B. Supplemental Award

According to the Arbitrator, during the initial award hearing, the parties stipulated that, if a remedy was warranted, then a back pay award could not extend back for more than six years from the filing of the grievance on July 12, 2002. However, after *VA*, the Agency asserted, that if a violation of Article 16 was found, then *VA* “limited any back pay . . . to a period of not more

than 120 days,” even though some of the grievants had performed higher-graded work for the entire period covered by the grievance. Supplemental Award at 1. The Arbitrator noted that, pursuant to the remand, the parties had attempted unsuccessfully to agree on a remedy and had, therefore, presented the issue to him on briefs.

The Arbitrator further noted that following *VA*, another arbitrator considered a case where employees had performed higher-graded duties for a period in excess of 120 days (*Abrams* award). The Arbitrator stated that, unlike the instant case and *VA*, the employees in that award had not performed higher-graded duties without interruption. The Arbitrator noted that the arbitrator in that case recognized that he was “bound” by *VA*, but noted that the case “should not be read to unduly undermine the promises made by the parties in their agreement[,]” and he thus awarded the grievants in that case 120 days of back pay for each 12 month period during which they had performed higher-graded duties. *Id.* at 2 (quoting *Abrams* award at 15).

The Arbitrator stated that the Union urged the same remedy here -- that the grievants should be granted a series of non-consecutive 120 days’ promotions, each one separated by a 12 month period. According to the Arbitrator, the Union argued that the promotions should begin on July 7, 1996, that such promotions should not be consecutive and should comply with the 120 days’ limitation in the regulations; while the Agency argued that such a remedy would violate law, in particular, *VA* and the CBA. The Arbitrator found that *VA* controlled the remedy awarded here. However, the Arbitrator determined that even though *VA* limited an employee to a one-time award of 120 days of back pay, it did not follow that the 120 days’ limitation applies in the same way in this case. The Arbitrator found that 5 C.F.R. § 335.103 does not rule out the “string theory” advanced in *VA* because the grievants would receive 120 days of back pay for periods separated by 12 months. *Id.* at 4. Accordingly, the Arbitrator ordered the Agency to provide back pay to grievants for multiple non-consecutive 120 days’ temporary promotions, each separated by a 12-month period. The Arbitrator rejected the Union’s request that the grievants be provided special act awards.

### III. Positions of the Parties

#### A. Agency

The Agency argues that the award is deficient because it concerns a classification matter under § 7121(c)(5) of the Statute. Citing *United States Dep’t*

1. The pertinent text of Article 16 is set forth in the Appendix to this decision.

2. The Agency does not dispute the Arbitrator’s procedural determination. Therefore, it will not be discussed further in this decision.

of Agriculture, Food and Consumer Service, Dallas, Tex., 60 FLRA 978 (2005) (*FCS*) (Member Pope dissenting in part), the Agency contends that this argument can be raised before the Authority regardless of whether it was raised before an arbitrator.

The Agency contends that the grievants' claim here is "based on duties that they consider to be permanently assigned . . . under their [PD]." Exceptions at 11. The Agency asserts that the grievants claimed that they have been performing the same duties for the entire time that they have been assigned to their PD. The Agency thus argues that the duties the Arbitrator found were higher-graded were duties that were permanently assigned to the PD to which the grievants' were assigned, not temporary duties. Therefore, the Agency asserts that because the award concerns the grade level of duties permanently assigned to the grievants under their PD, it concerns a classification matter within the meaning of § 7121(c)(5) and may not be grieved. The Agency further claims that, even though the parties stipulated that the case involved Article 16 higher-graded duties and not Article 26 classification issues, the Union's argument and the Arbitrator's decision "were based on the grade level of duties permanently assigned to the [g]rievants, not on temporary duties for which the [g]rievants were seeking temporary promotions." *Id.* at 12.

The Agency next contends that the remedy is "contrary to 5 C.F.R. § 335.103(5)(c)(1)(i) because it requires the Agency to grant a retroactive temporary promotion for more than 120 days without the use of competitive procedures."<sup>3</sup> *Id.* In support, the Agency cites *VA*. The Agency also asserts that to the extent that the remedy does not require the grievants to meet time-in-grade or minimum Office of Personnel Management (OPM) qualifications for promotion to the next higher-grade, it is contrary to 5 C.F.R. § 335.103 and further fails to draw its essence from Article 16 of the CBA. In this regard, the Agency contends that Article 16, Section 1B.2(b) and (c) provides that employees must meet minimum OPM qualifications and time-in-grade requirements for promotion to the next higher grade in order to be granted temporary promotions for performing higher-graded duties, which "mir-

ror similar" OPM requirements set forth in 5 C.F.R. § 335.103(b)(3), and time-in-grade requirements provided in 5 C.F.R. § 300.604(b).<sup>4</sup> *Id.* at 14. The Agency contends that the parties stipulated that the grievants do not meet the time-in-grade requirements and qualification standards for promotion to tax examining technician GS-6, until after one year of being in a GS-5 pay status.

The Agency further asserts that, even if the Authority finds the grievance is not a classification appeal, the Authority should find that the Union did not substantially prevail on the matter, as required by Article 43, Section 4A.1 of the CBA, and thus assess fees and cost of the arbitration equally by the parties.

### B. Union's Opposition

The Union asserts that the Agency waived the classification issue and may not present it to the Authority for the first time in the Agency's exceptions. According to the Union, the issue was limited at the hearing to higher-graded duties under the CBA, and the parties further specifically stipulated that classification was not the issue. The Union asserts that nothing in the cases relied on by the Authority in *FCS* indicates that the parties involved had expressly stipulated that an issue was not before the arbitrator, as in this case.

The Union further contends that the Authority has held that parties may waive statutory rights so long as they are clear and unmistakable. The Union asserts that the "issue was framed based on [the following] stipulation: 'This case involves Article 16 higher graded duties issues and not Article 26 classification issues.'" Opposition at 5 (quoting Attachment A, Award at 2). According to the Union, "stipulating to the exclusion of an issue at hearing could not be a more clear and unmistakable waiver, and is akin to the facts" in *AFGE, Local 2501*, 56 FLRA 1052 (2001) (*Cumberland*). *Id.* The Union states that in *Cumberland*, the Authority enforced a waiver in a settlement agreement against a union, which is similar to this case, because the Agency here,

3. We note that the Agency inadvertently refers to 5 C.F.R. § 335.103(5)(c)(1)(i), instead of the correct citation, 5 C.F.R. § 335.103(c)(1)(i). 5 C.F.R. § 335.103 provides, generally, for the use of competitive procedures for certain promotion actions, including, "[t]ime-limited promotions [temporary 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).

4. 5 C.F.R. § 335.103(b)(3) provides, in pertinent part, that "[t]o be eligible for promotion . . . candidates must meet the minimum qualification standards prescribed by [OPM]. Methods of evaluation for promotion and placement . . . must be consistent with instructions in part 300, subpart A, of this chapter." We note that on November 7, 2008, OPM published in the *Federal Register*, (73 FR 66157), a final rule eliminating the time-in-grade requirement provided in 5 C.F.R. Part 300, to be effective, March 9, 2009, which was later delayed until May 18, 2009, (74 FR 9951 (March 9, 2009)). The final effective date of this rule has been further extended by OPM until August 16, 2009. See 74 FR 23109 (May 18, 2009).

by the stipulation, “affirmatively waiv[ed] its statutory right to argue classification.” *Id.* at 6.

The Union further asserts that, even if the Authority reaches the classification issue, the Authority should find that the grievance does not concern a classification matter. According to the Union, there are differences between this case and *FCS*. The Union asserts that in *FCS* the Authority found it significant that attempts were made to upgrade the grievant’s permanent position after the grievant began performing higher-graded duties, and further a desk audit was conducted. In the instant case, the Union argues that no desk audit was performed and the record does not show that attempts were made to upgrade the grievants’ position. The Union asserts that, instead, the grievants argued that the previously classified duties of a higher-graded position better captured the work they had performed for purposes of determining whether they were entitled to retroactive temporary promotions.

The Union next contends that the grievants are entitled to a retroactive temporary promotion for performing higher-graded duties. According to the Union, in *VA*, OPM “misinformed the Authority.” *Id.* at 9. In this regard, the Union asserts that OPM’s advisory opinion relied on by the Authority in *VA* is “inconsistent with OPM’s statements in the *Federal Register* promulgating [5 C.F.R. § 335].” *Id.* In support, the Union refers to 58 *Federal Register* 59345 (1993), and argues that OPM’s advisory opinion is “inconsistent with the language found in the *Federal Register*” as it concerns the authority of agencies to make time-limited promotions. *Id.* at 12. The Union thus argues that the “deference provided to OPM by the Authority in [*VA*] was misplaced[,]” and requests that the Authority overturn *VA* and remand this case to the Arbitrator to fashion a remedy consistent with OPM’s guidance when it promulgated 5 C.F.R. § 335. *Id.*

The Union further argues that even if the Authority does not overturn *VA*, the Abrams Award was not challenged by the Agency and therefore, it is “collaterally estoppe[d] from raising the issue[.]” concerning the series of non consecutive 120 days promotions ordered here. *Id.* at 13.

#### IV. Analysis and Conclusions

A. The Agency may raise the classification issue in its exceptions

The Agency argues that the award is deficient because it concerns a classification matter under § 7121(c)(5) of the Statute, which can be raised before the Authority regardless of whether it was raised before

the Arbitrator.<sup>5</sup> In response, the Union contends that the Agency waived the classification issue by limiting the matter at arbitration and agreeing through a stipulation that the issue did not involve classification under the CBA.

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*. See *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. See *United States Dep’t of Def., Dep’ts of the Army and the Air Force, Ala, Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator’s underlying factual findings. See *id.*

In *FCS*, the Authority stated that:

§ 7121(c) sets forth “mandatory exclusions” from the scope of negotiated grievance and arbitration procedures. *NTEU, Chapter 260*, 52 FLRA 1533, 1537 (1997). Parties may not include such matters in their negotiated procedures. *Id.* On its face, then, § 7121(c) limits the availability of negotiated grievance and arbitration procedures and, by doing so, renders unlawful an award concerning any of the matters enumerated therein.

....

Put simply, a party’s failure to present an issue to an arbitrator cannot have the effect of creating jurisdiction in an arbitrator over a matter that Congress expressly excluded in § 7121(c) of the Statute. Rather, . . . where an issue is presented to the Authority concerning a statutory exclusion under § 7121(c) of the Statute, the Authority is required to address that statutory issue, regardless of whether the issue was also presented to the arbitrator.

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5. Under § 7121(c), negotiated grievance procedures “shall not apply with respect to any grievance concerning--

- (1) any claimed violation of subchapter III of chapter 73 of title (relating to prohibited political activities);
- (2) retirement, life insurance, or health insurance;
- (3) a suspension or removal under § 7532 of this title;
- (4) any examination, certification, or appointment; or
- (5) the classification of any position which does not result in the reduction in grade or pay of an employee.

60FLRAat980,981(footnoteomitted).

In the instant case, the parties stipulated that the case “involves Article 16 higher[-]graded duties issues and not Article 26 classification issues.” Award at 2. Based on this stipulation, the Union argues that the Agency waived its right to raise the classification issue in its exceptions. However, regardless of the Agency’s stipulation, just as a party’s failure to present an issue to an arbitrator cannot have the effect of creating jurisdiction in an arbitrator over a matter that Congress expressly excluded in § 7121(c) of the Statute, a party’s stipulation that a grievance before an arbitrator does not involve a classification issue, where the case is before the Authority on exceptions, cannot have the effect of creating jurisdiction in an arbitrator over a matter that Congress expressly excluded in § 7121(c) of the Statute. Consistent with Authority precedent, these statutory exclusions apply irrespective of whether a party makes such a claim before the Authority. Similarly, a party’s stipulation that a grievance before an arbitrator does not involve a classification issue, where the case is before the Authority on exceptions, cannot have the effect of creating jurisdiction in an arbitrator over a matter that Congress expressly excluded in § 7121(c) of the Statute.

Accordingly, the Authority has jurisdiction to address the effect of § 7121(c)(5) upon this case.

B. The award is not contrary to § 7121(c)(5) of the Statute

Under § 7121(c)(5), a grievance concerning “the classification of any position which does not result in the reduction of grade or pay of an employee” is excluded from the scope of the negotiated grievance procedure. The Authority has construed 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.” *United States Dep’t of Transp., Fed. Aviation Admin., Atlanta, Ga.*, 62 FLRA 519, 521 ( *FAA, Atlanta*) (quoting *Soc. Sec. Admin., Office of Hearings & Appeals, Mobile, Ala.*, 55 FLRA 778, 779-80 (1999)).

The Authority has distinguished between two situations in assessing whether a grievance concerns the classification of a position. Where the substance of a grievance concerns the grade level of the duties permanently assigned to, and performed by, the grievant, the Authority finds that the grievance concerns the classification of a position within the meaning of § 7121(c)(5). *See id.* at 521. However, where the substance of the

grievance concerns whether the grievant is entitled to a temporary promotion under a collective bargaining agreement by reason of having performed the established duties of a higher-graded position, the Authority has long held that the grievance does not concern the classification of a position within the meaning of § 7121(c)(5). *See id.*

In this case, the Arbitrator determined that the agreed-upon issue concerned “whether the [g]rievants are performing higher[-]graded duties” in accordance with Article 16 of the parties CBA, which concerns details. Award at 2-3. In this regard, the Arbitrator’s factual findings show that after evaluating the parties’ positions and evidence, the Arbitrator further emphasized that the issue before him concerned “higher[-]graded duties” and not “a classification” matter. *Id.* at 11. In this respect, the Arbitrator found that the matter involved duties performed by the grievants during a six to eight week period when they processed assigned cases received from the Agency’s Edit and Error Branch. More specifically, the Arbitrator found that the matter required him to determine whether the grievants were entitled to be paid for higher-graded duties based on the GS-6 “target PD.” *Id.* at 5. The Arbitrator’s factual findings further show that the Arbitrator “look[ed] to the target PD” and determined that the grievants performed “higher[-]graded duties” and were entitled to a remedy in accordance with Article 16 and thus directed the Agency to grant the grievants “multiple non-consecutive 120 day [temporary] promotions, each one separated by a 12 month period[,]” as appropriate. *Id.* at 17 and 18 and Supplemental Award at 6.

The above findings show that the Arbitrator did not evaluate the grade level of the duties permanently assigned to and performed by the grievants to determine the appropriate classification of their position. Rather, the Arbitrator addressed whether the grievants performed established duties of a higher-graded position. *See, e.g., United States Dep’t of the Air Force, 81st Training Wing, Keesler Air Force Base, Miss.*, 60 FLRA 425, 428 (2004). Accordingly, under Authority precedent, the substance of the grievance concerned whether the grievants were entitled to a temporary promotion (not permanent promotions) under a collective bargaining agreement by reason of having performed the established duties of a higher-graded position. As such, the grievance does not involve a classification matter within the meaning of § 7121(c)(5) of the Statute.

C. The award is not contrary to 5 C.F.R. § 335.103

The Agency contends that the remedy awarded by the Arbitrator is contrary to 5 C.F.R. § 335.103(c)(1)(i) and *VA* because it requires the Agency to grant a retroactive temporary promotion for more than 120 days without the use of competitive procedures.

Section 335.103(c)(1)(i) requires competitive actions for certain “[t]ime-limited promotions . . . for more than 120 days to higher graded positions . . .” In the instant case, the Arbitrator ordered “multiple non-consecutive 120 day[s]’ promotions, each one separated by a 12 month period[]” to address the Agency’s action in assigning the grievants a “series of temporary promotions” over a period of time. Supplemental Award at 4 and 6. Thus, as directed, the remedy does not require the Agency to grant a retroactive temporary promotion for more than 120 days. Rather, the award requires the Agency to grant multiple temporary promotions for 120 days, each separated by one year, as appropriate, for each grievant. As such, the award does not require the Agency to grant an employee a temporary promotion for more than 120 days. Accordingly, the Agency has not demonstrated that the award is inconsistent with 5 C.F.R. § 335.103(c)(1)(i).

Further, the Agency’s reliance on *VA* provides no basis for finding the award deficient. In *VA*, the Authority found that an award, to the extent that it ordered a retroactive temporary promotion that exceeded 120 days, was deficient because it was inconsistent with 5 C.F.R. § 335.103(c)(1)(i). In so finding, the Authority rejected the union’s request that the award be remanded for a determination on whether it should be properly considered as a “string of noncompetitive shorter appointment[s]” finding that the union had not established any basis for concluding that the arbitrator intended the award to encompass such a series of promotions. *VA.*, 60 FLRA at 50 (quoting union’s response). The type of remedy involved in this case -- 120 days’ promotions separated by 12 months periods -- was not awarded or otherwise addressed in *VA*. As such, *VA* provides no basis for finding the instant award deficient.

The Agency also claims that the award is contrary to 5 C.F.R. § 335.103(b)(3) because it does not require the grievants to meet OPM’s minimum qualifications for promotion and time-in-grade requirements, provided in 5 C.F.R. § 300.604(b). This claim provides no basis for finding the award deficient. In this regard, 5 C.F.R. § 335.103(b)(3) provides that in order to be eligible for promotion candidates must “meet the minimum qualifi-

cation standards prescribed by [OPM]” and the time-in-grade requirements provided in “part 300.” 5 C.F.R. § 335.103(b)(3). In this case, because the “effect” of the directed remedy could not be determined from the record, the Arbitrator did not apply the remedy to each grievant, but “remanded” the matter to the parties to determine when a grievant began performing higher-graded duties and the amount of back pay due the grievant. Supplemental Award at 6. As the award leaves it to the parties to determine the amount of back pay due, as appropriate for each grievant, there is no basis to conclude that the award requires the Agency to grant temporary promotions contrary to the requirements of 5 C.F.R. § 335.103(b)(3). Accordingly, we find that the Agency has not demonstrated that the award is contrary to 5 C.F.R. § 335.103(b)(3).

D. The Agency has not established that the award fails to draw its essence from the parties’ CBA

In reviewing an arbitrator’s interpretation of a collective bargaining agreement, the Authority applies the deferential standard that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See United States Dep’t of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context “because it is the arbitrator’s construction of the agreement for which the parties have bargained.” *Id.* at 576.

The Agency argues that the award does not draw its essence from the CBA because the CBA “mirrors” the requirements of 5 C.F.R. § 103(b)(3), which requires for promotions that employees meet OPM’s minimum qualifications and time-in-grade requirements provided under 5 C.F.R. § 300.604(b) and the award violates these requirements. Exceptions at 14. As we have previously rejected the Agency’s claim that the award is contrary to these same requirements, we deny the Agency’s essence exception for the same reasons.<sup>6</sup>

## V. Decision

The Agency's exceptions are denied.

### APPENDIX

#### Article 16

#### Details

#### Section 1

#### A.

For the purpose of this article, a detail is defined as the temporary assignment of an employee to a different position for a specified period with the employee returning to regular duties at the end of the detail. This includes positions at higher or lower grades.

#### B.

2. If an employee is not detailed to a position of higher grade, but who performs higher graded duties for 25% or more of his or her direct time during the preceding four (4) months, the Employer will temporarily promote the employee retroactive to the first full pay period if the employee meets the criteria below:

....

(b) the employee meets minimum OPM qualifications for the promotion to the next higher grade; and

(c) the employee meets time-in-grade requirements for promotion to the next higher grade.

Exceptions, Attachment E.

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6. The Agency also claims that under Article 43, Section 4A.1 of the parties' CBA, the Union did not substantially prevail on the matter involved and, therefore, the Authority should assess fees and cost of the arbitration equally by the parties. Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that were not presented in the proceedings before the arbitrator. *See, e.g., Int'l Ass'n of Fire Fighters, Local F-89*, 50 FLRA 327, 328 (1995). There is no indication in the record that the Agency's argument concerning the apportionment of the Arbitrator's fees, pursuant to Article 43 of the parties' CBA, was raised before the Arbitrator. This issue could, and should, have been presented to the Arbitrator. Accordingly, we dismiss this exception because its consideration is barred by § 2429.5. *See SSA, Office of Hearings and Appeals, Falls Church, Va.*, 59 FLRA 507, 509 (2003).