66 FLRA No. 99

UNITED STATES
DEPARTMENT OF JUSTICE
U.S. MARSHALS SERVICE
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2272
(Union)

0-AR-4763

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DECISION

February 29, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Lawrence Roberts 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.[1]

The Arbitrator found that the Agency violated the parties' agreement by implementing various changes in promotion and training policies. For the following reasons, we deny the Agency's exceptions in part and remand the award in part.

II. Background and Arbitrator's Award

This case concerns changes the Agency made to the career path of Deputy U.S. Marshals (Deputy Marshals) occupying positions in one job series (General Schedule (GS)-082) who progress to the position of Criminal Investigator Deputy Marshal in another job series (GS-1811). As set forth below, the Arbitrator found that the changes were applied in a manner that unfairly disadvantaged the grievants, who were hired prior to October 2006.

The facts are complicated and encompass several job requirements that have remained constant throughout the time period involved in this case and several requirements that have changed.[2] Beginning with the requirements that have remained constant, at all relevant times, the career path involved in this case has required employees hired as Deputy Marshals to complete at least three years in the 082 series in order to become eligible for Criminal Investigator positions in the 1811 series.[3] Exceptions, Attach. E; Opp'n, Attach. A at 2. Also at all relevant times, the career ladder in the 082 series has encompassed GS-05 through GS-11, with some grievants hired at the GS-05 level and others at the GS-07 level. Exceptions, Attach. F; Exceptions, Attach. C (Tr.) at 287. Varying numbers of years served at various grades (time-in-grade) are required to progress between the GS-05 and GS-11 levels in the 082 series. Exceptions, Attach. F. In addition, throughout the period involved in this case, Deputy Marshals have been required to complete the Criminal Investigator Training Program (the training program) in order to become eligible for Criminal Investigator positions. Opp'n, Attach. A at 2. Completion of the training program is a prerequisite for employees to acquire investigatory experience (specialized experience) necessary for promotion within the 1811 series. *Id.* at 3; Tr. at 225. That is, specialized experience can be obtained only after completing the training program. Tr. at 27.

As for the requirements that have changed, prior to October 2006, Deputy Marshals were required to *compete* for Criminal Investigator positions. Exceptions, Attach. F at 1; Opp'n, Attach. A at 1. In October 2006, the Agency changed this and implemented a conversion program, under which Deputy Marshals with at least three years of service in the 082 series were sent to the training program and, upon completion, were converted *noncompetitively* to Criminal Investigator positions in the 1811 series at the grade level they occupied at the time of conversion.[4] Exceptions, Attach. E; Opp'n, Attach. A at 1. The Agency also changed the requirement that Deputy Marshals complete three years in the 082 series before becoming eligible for the training program. *Id.* In

[1] In addition, as discussed further below, the Authority issued an Order to Show Cause why the exceptions should not be dismissed as interlocutory, to which the Agency filed a response.

[2] We note that the Arbitrator made few findings of fact. What follows is a best attempt to piece together the facts from the award, testimony, documents entered into the record at the arbitration hearing, and undisputed assertions by both parties.

[3] Criminal Investigator pay includes a 25 percent pay differential (as compared to the same grades in the 082 series) based on Law Enforcement Availability Pay. *See* Exceptions at 4; Opp'n at 5.

[4] Prior to the 2009 changes discussed below, and at least after 2003, the career ladder in the 1811 series encompassed GS-05 through GS-11. Exceptions, Attach. F.

particular, after October 2006, the Agency began sending Deputy Marshals to the training program when they were hired (in conjunction with other training). Tr. at 27. As a result, Deputy Marshals hired after October 2006 were able to acquire specialized experience (because they had completed the training program) earlier in their careers than Deputy Marshals hired before then. *Id.* at 218-19.

More changes were made in 2009. In February, the Agency began to permit Deputy Marshals hired prior to October 2006 to attend the training program even if they had not completed three years of service in the 082 series. Exceptions, Attach. G at 2. Thereafter, in September 2009, the Agency changed the Criminal Investigator career ladder in two ways. First, the Agency expanded the career ladder, which previously encompassed noncompetitive promotion only to the GS-11 level, to include noncompetitive promotion to the GS-12 level.[5] Exceptions, Attach. D at 4. Second, the Agency began to require only one year time-in-grade at each grade of the career ladder. *Id.* Previously, Criminal Investigators in the 1811 series were required to complete three years time-in-grade at the GS-09 level (in that series) to be eligible for career-ladder promotion to the GS-11 level (the highest grade available noncompetitively prior to expansion to include the GS-12 level). *Id.*

It is undisputed that the complex interplay of time-in-grade and specialized experience requirements, coupled with changes both in eligibility of Deputy Marshals to attend the training program and in the Criminal Investigator career ladder, had significant effects on the career path involved here. In this regard, all Deputy Marshals (including the grievants, who were hired prior to October 2006) were able to become GS-12 Criminal Investigators more quickly than if the changes had not been made. This was conceded by several grievants who testified at the hearing. Tr. at 149 (Barrois); 164-65 (Fisher); 182 (Turman-Hogan). In addition, however, Deputy Marshals hired after October 2006 had the ability to become GS-12 Criminal Investigators more quickly than Deputy Marshals hired prior to October 2006. Specifically, testimony at the arbitration hearing indicates that the Deputy Marshals hired after October 2006 were eligible for promotion to the GS-11 level (and the GS-12 level after the 2009 changes) between seven and ten months earlier than Deputy Marshals hired prior to October 2006. *Id.* at 30.

The ability of Deputy Marshals hired after October 2006 to become GS-12 Criminal Investigators more quickly resulted from the fact that they were permitted to attend the training program at the beginning of their careers and, as a result, were able to acquire not only time-in-grade but also specialized experience at the GS-09 level *while still in the 082 series*. *Id.* at 218-19. Accordingly, after completion of three years in the 082 series, they could convert to the 1811 series at the GS-11 level. *Id.* Deputy Marshals who did not complete the training program in time to acquire a year of specialized experience at the GS-09 level prior to conversion were required to remain at the GS-09 level in the 1811 series, even if they had one year time-in-grade at the GS-09 level, until the requirement for a year of specialized experience was satisfied. This is the crux of the dispute in this case.

As relevant here, the Union filed a grievance alleging that the 2009 changes violated the parties' agreement. Award at 3. The grievance sought: (1) *career-ladder promotions* to the GS-11 level for all Criminal Investigators with one year time-in-grade at the GS-09 grade level; and (2) *conversions* to the 1811 series at the GS-11 level for all Deputy Marshals with at least one year time-in-grade at the GS-09 level. *Id.* at 6. When the grievance was not resolved, it was submitted to arbitration, where the Arbitrator framed the relevant issues as: (1) "Whether the grievance is non-arbitral as a classification matter[?]"; and (2) "Whether the Agency violated the [parties' agreement] . . . when it changed and implemented a new career path for [Criminal Investigators][,] thereby creating an unjust promotional system which in essence results in a reduction in pay and/or grade [and, if] so, what is the proper remedy?" *Id.* at 10-11.

At the outset, the Arbitrator found that the Agency could not challenge the arbitrability of the grievance under § 7121(c)(5) of the Statute (§ 7121(c)(5))[6] because, contrary to Article 20.9 of the parties' agreement,[7] it failed to do so during step one of the grievance process. *Id.* at 12-14. The Arbitrator also determined that Article 20.3 of the parties' agreement[8] did not bar the grievance because the grievance challenged policies that "resulted in a delayed promotion

[5] Prior to that time, advancement to the GS-12 level was available through competition or accretion-of-duties promotions. Exceptions, Attachment F. After the change, advancement to the GS-13, GS-14, and GS-15 levels are available through competition. Tr. at 279.

[6] The pertinent wording of § 7121(c)(5) is set forth *infra*.

[7] Article 20.9 of the parties' agreement provides, in pertinent part: "New issues may not be raised after [s]tep [o]ne unless the party had no knowledge of the issue at the time the grievance was initially filed." Exceptions, Attach. B, Master Agreement at 48.

[8] Article 20.3, which is identical in wording to § 7121(c)(5), provides, in pertinent part, that the grievance procedure does not cover "[t]he classification of any position which does not result in a reduction in grade or pay of any employee[.]" Exceptions, Attach. B, Master Agreement at 40-41.

that[,] in essence, was a clear reduction or loss in pay." *Id.* at 15.

On the merits, the Arbitrator found that the parties' agreement "requires a level playing field," and that the "[s]tandards must be equal." *Id.* at 16. In this connection, he found that the 2009 changes established a "multi[-]tiered system of promotion" in which "standards and requirements varied, depending on when employment commenced." *Id.* The Arbitrator concluded that the Agency violated Article 40 of the parties' agreement[9] by not providing "a fair and equitable system in which to equitably manage career promotions." *Id.* at 17. He directed that the grievants be "ma[d]e whole," and referred the matter to the parties "for a resolution of remedy only." *Id.* at 18.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award fails to draw its essence from Article 40 of the parties' agreement. Exceptions at 12-14. In this regard, the Agency alleges that the Arbitrator erred by finding that the Agency's actions violated Article 40 because that provision: (1) neither precludes the Agency from making "changes based on classification procedures and requirements," nor requires that the impact of the changes be identical as to all employees; and (2) pertains only to competitive promotions -- not the noncompetitive promotions at issue here. *Id.* at 13.

The Agency also argues that the Arbitrator's arbitrability finding is contrary to § 7121(c)(5) and Article 20.3 of the parties' agreement. *Id.* at 8-12. In this connection, the Agency argues that the "grade and series determinations challenged in this case result from the Agency's 'specialized experience' requirement for GS-1811-11 promotion." *Id.* at 9. Specifically, the Agency claims that it made a classification determination when it decided that one year of specialized experience at the GS-09 level is necessary for either promotion or conversion to the GS-11 Criminal Investigator position. *Id.* at 10. Further, the Agency states that, "to the extent the grievants are challenging the Agency's compression of the career progression in 2009, that too is barred from grievance arbitration as a classification matter." *Id.*

Finally, the Agency contends that the remedy award is contrary to the Back Pay Act, 5 U.S.C. § 5596. *Id.* at 14-15. Specifically, the Agency contends that, because the Arbitrator did not find that the Agency committed an unjustified or unwarranted personnel action by failing to promote the grievants prior to implementing the 2009 policies, or that the grievants suffered a loss in pay during that period, he could not award retroactive compensation for lost pay during that period. *Id.* at 15.

B. Union's Opposition

The Union maintains that the award draws its essence from Article 40 of the parties' agreement. Opp'n at 7-9. The Union also maintains that the parties' agreement bars the Authority from considering the arbitrability issue because the Agency did not timely raise that issue at arbitration. *Id.* at 3. The Union further claims that, "by pursuing the issues of the grievance throughout the grievance procedure and at arbitration, the [A]gency demonstrated its intent to argue the case on the merits." *Id.* In addition, according to the Union, the Arbitrator's determination concerns a merit-promotion issue, not a classification issue. *Id.* And the Union contends that the award does not conflict with the Back Pay Act because the Arbitrator found that "the [A]gency's action caused a delay in promotion" that resulted in a "clear loss or reduction" in pay. *Id.* at 6.

IV. Preliminary Issue

In an Order to Show Cause (Order), the Authority directed the Agency to explain why its exceptions should not be dismissed as interlocutory.[10] Order at 1. In its response, the Agency argues that its exceptions are not interlocutory because "where an arbitrator awards particular monetary remedies and leaves to be determined only the specific amounts to be awarded, the arbitrator's retention of jurisdiction to assist the parties in their computations of those remedies does not render exceptions interlocutory." Agency Response to Order at 4 (quoting *U.S. Dept of Homeland Sec., Customs & Border Prot.*, 64 FLRA 989, 991 (2010)) (internal citations omitted). Alternatively, the Agency argues that, even if the exceptions are interlocutory, the Authority should review them because they raise a plausible jurisdictional defect: whether the Arbitrator's arbitrability finding conflicts with § 7121(c)(5). *Id.* at 3-4.

[9] Article 40 provides, in pertinent part, that merit principles must be applied "in a consistent manner with equity . . . and . . . based solely on job-related criteria." Exceptions, Attach. B, Master Agreement at 78.

[10] The Authority informed the Union that it had the option to file a response to the Agency's Response to Order. *See* Order at 3. The Union did not file a response.

Under § 2429.11 of the Authority's Regulations, the Authority "ordinarily will not consider interlocutory appeals." 5 C.F.R. § 2429.11. Thus, the Authority ordinarily will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 65 FLRA 603, 605 (2011). However, the fact that an award does not identify which employees were affected by an agency's actions does not, by itself, render exceptions to the award interlocutory. *AFGE, Nat'l Council of EEOC Locals No. 216*, 65 FLRA 252, 253-54 (2010) (*EEOC*).

The relevant issues before the Arbitrator included: (1) whether the grievance was arbitrable; (2) whether the Agency violated the parties' agreement; and (3) if so, what was the appropriate remedy. Award at 10-11. After determining that the grievance was arbitrable, the Arbitrator found that the Agency violated the parties' agreement, and directed a make-whole remedy. *Id.* at 17-18. Although the Arbitrator "referred [the matter] back to the [p]arties for a resolution of remedy only," *id.* at 18, a reasonable interpretation of this statement, in context, supports a conclusion that the Arbitrator left the parties to resolve only the determinations of the affected persons' identities and the amounts of backpay. Accordingly, we find that the exceptions are not interlocutory, and we resolve them below.

V. Analysis and Conclusions

A. The award draws its essence from the parties' agreement.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review 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 an arbitration award 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 U.S. 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 challenges the Arbitrator's finding that the Agency violated Article 40 of the parties' agreement. Exceptions at 12-14. Specifically, the Agency argues that Article 40: (1) neither precludes the Agency from making "changes based on classification procedures and requirements," nor requires that the impact of the changes be identical as to all employees; and (2) pertains only to competitive merit promotions -- not the non-competitive promotions at issue here. *Id.* at 13.

Article 40 provides, in pertinent part, "that merit promotion principles [be] applied in a consistent manner with equity to all bargaining unit employees . . . and shall be based solely on job-related criteria." Exceptions, Attach. B, Master Agreement at 78. The Arbitrator determined that Article 40 "requires a level playing field," and that the "[s]tandards must be equal." Award at 16. In this connection, he found that the 2009 changes established a "multi[-]tiered system of promotion" because "standards and requirements varied, depending on when employment commenced." *Id.* Accordingly, he found that the Agency violated Article 40 by not providing "a fair and equitable system in which to equitably manage career promotions." *Id.* at 17. Nothing in Article 40 precluded the Arbitrator from finding that the Agency was required to implement policies that had an equal impact on all employees. Moreover, the wording of Article 40 does not indicate that it applies only to competitive merit promotions. Thus, the Agency does not establish that the Arbitrator's interpretation of Article 40 is irrational, implausible, unfounded, or in manifest disregard of the parties' agreement, and we deny the essence exception.

B. The award is not contrary to § 7121(c)(5), but the record is insufficient for us to determine whether the award is contrary to the Back Pay Act.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998) (*Local 1437*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. Section 7121(c)(5)

Contrary to the Arbitrator's determination, set forth above, the Authority has held that "parties are not estopped from contending that a grievance is substantively nonarbitrable under § 7121(c)(5) merely because they have failed to comply with contract provisions regarding when arbitrability issues may be raised." *AFGE, Local 1923*, 66 FLRA 424, 425 (2012) (internal quotations omitted) (citing *U.S. Dep't of Agric., Food & Consumer Serv., Dallas, Tex.*, 60 FLRA 978, 980-81 (2005) (then-Member Pope dissenting in part on other grounds)). Thus, we consider the Agency's argument regarding § 7121(c)(5).

Under § 7121(c)(5), a grievance concerning "the classification of any position which does not result in the reduction in grade or pay of an employee" is removed from the scope of the negotiated grievance procedure. *U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Nw. Div., Portland, Or.*, 59 FLRA 443, 445 (2003) (*Army*). The Authority interprets "classification" under § 7121(c)(5) in the context of 5 C.F.R. chapter 511, which defines classification of a position 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 (OPM)] under chapter 51 of title 5, United States Code." 5 C.F.R. § 511.101(c). Thus, classification entails the identification of the appropriate title, series, grade, and pay system of a position. *See Army*, 59 FLRA at 445 (citing 5 C.F.R. § 511.701(a)). Accordingly, where the essential nature of a grievance concerns the grade level of the duties performed by the grievant in his or her permanent position, the grievance concerns classification within the meaning of § 7121(c)(5). *E.g., U.S. Dep't of HUD*, 65 FLRA 433, 435 (2011). In contrast, a grievance concerning whether a grievant is entitled to a career-ladder promotion does not concern classification. *See U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 65 FLRA 1017, 1020 (2011) (*Womack*); *U.S. DOL*, 24 FLRA 435, 436-37 (1986) (*DOL*).

There is no dispute that the Agency has established career ladders under which employees are converted noncompetitively from Deputy Marshal positions in one job series to Criminal Investigator positions in another job series upon meeting certain requirements. The Agency does not contend that the award improperly addressed the conversion of employees from one position/series to another. Rather, the Agency's classification argument is that the Arbitrator improperly addressed the grade level at which employees were converted and, in so doing, ignored the Agency's "'specialized experience' requirement for GS-1811-11 promotion." Exceptions at 9.

Applying the standard set forth above, the grievance did not challenge the appropriate title, series, grade, or pay system of either the Deputy Marshal or the Criminal Investigator position. Instead, the grievance alleged that, *within the Agency's already-established career ladders*, GS-09 Deputy Marshals should have been converted to Criminal Investigator positions at the GS-11 level if they had satisfied the time-in-grade requirement (without regard to whether they met specialized-experience requirements). As such, the grievance did not involve "the analysis and identification of a position and placing it in a class under the position-classification plan established by OPM under chapter 51 of title 5, United States Code." 5 C.F.R. § 511.101(c). *See, e.g., U.S. Dep't of Veterans Affairs, Reg'l Office, Winston-Salem, N.C.*, 66 FLRA 34, 39 (2011) (grievance that did not involve the grievant's title, series, grade, or pay system did not involve classification). Instead, it challenged only how employees advance within the established career ladder. Thus, it is analogous to a grievance arguing that a grievant is entitled to a career-ladder promotion, which does not involve classification. *See, e.g., Womack*, 65 FLRA at 1020; *DOL*, 24 FLRA at 436-37.

We note the Agency's claim that, to the extent the grievants are challenging the Agency's change in the number of years spent between grades in the career ladder in 2009, "that too is barred from grievance arbitration as a classification matter." Exceptions at 10. But there is no basis for finding that the grievance challenged this change. As such, we reject the Agency's claim.

For the foregoing reasons, we find that the grievance did not involve classification as alleged, and deny the Agency's § 7121(c)(5) exception.

2. The Back Pay Act

An award of backpay is authorized under the Back Pay Act when 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 grievant's pay, allowances, or differentials. *See, e.g., U.S. Dep't of Health & Human Servs.*, 54 FLRA 1210, 1218-19 (1998) (*HHS*). In connection with the first requirement, the Authority has held that a violation of a collective bargaining agreement constitutes an unjustified or unwarranted personnel action under the Act. *Id.* In connection with the second requirement, the Authority examines whether the arbitrator has found that, but for the unjustified or unwarranted action, the loss of pay, allowances, or differentials would not have occurred. *Id.*

The Authority has held that an employee "must meet the minimum qualification requirements prescribed by the Office of Personnel Management" for a higher-graded position in order to receive a temporary or permanent promotion to that position. *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 58 FLRA 498, 500 (2003). Specifically, the Authority has held that an employee must meet both "time-in-grade requirements and specialized experience requirements." *U.S. Dep't of Def., Def. Commissary Agency, Fort Lee, Va.*, 56 FLRA 855, 859 (2000) (*Def. Commissary Agency*). (Member Wasserman concurring). Thus, the Authority has set aside awards of backpay to grievants who did not possess specialized experience required for promotion. *See, e.g., U.S. Dep't of the Army, Headquarters Fort Dix, Fort Dix, N.J.*, 49 FLRA 730, 736-37 (1994).

The Arbitrator determined that the Agency's 2009 policies violated Article 40 of the parties' agreement. *See* Award at 15-16. Thus, the Arbitrator found that the Agency committed an unjustified or unwarranted personnel action under the Back Pay Act. *See HHS*, 54 FLRA at 1218-19. We have denied the Agency's essence exception challenging that determination. Accordingly, we find that the award meets the first requirement of the Back Pay Act.

With respect to the second requirement, the Arbitrator found that the Agency's 2009 policies "resulted in a delayed promotion that in essence, was a clear reduction or loss in pay." Award at 15. The Agency contends, without dispute, that employees are required to have one year of post-training-program specialized experience performing Criminal Investigator duties before they can be promoted to the GS-11 level.[11] *See* Exceptions at 10. However, the Arbitrator did not address this issue and made no relevant findings as to any of the grievants. Without this finding, we are unable to determine whether, but for the Agency's violation of the agreement, any of the grievants would have met the qualifications for promotion to the GS-11 level. As such, we cannot determine whether the award satisfies the second requirement of the Back Pay Act as to any of the grievants.

Where the Authority finds that an arbitration award is contrary to law in whole or in part, and is able to determine how it may be modified to bring it into compliance with law, the Authority modifies it. *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Tucson, Ariz.*, 66 FLRA 355, 356 (2011) (modifying award to exclude, among other things, unlawful award of interest); *AFGE, Local 987*, 66 FLRA 143, 148 (2011) (modifying award to require payment to grievant to which he was legally entitled). By contrast, where the Authority is unable to determine whether an arbitration award is contrary to law, the Authority remands for further findings. *See, e.g., U.S. Dep't of the Army, Headquarters, III Corps & Fort Hood, Fort Hood, Tex.*, 56 FLRA 544, 547 (2000) (Authority could not determine whether award was consistent with Back Pay Act). Thus, the Authority repeatedly has remanded arbitration awards granting promotions or backpay where the record was insufficient for the Authority to determine whether the grievants met the qualification standards for those promotions. *See, e.g., Def. Commissary Agency*, 56 FLRA at 859-60; *U.S. Dep't of Justice, Bureau of Prisons, Fed. Corr. Inst., Loretta, Pa.*, 55 FLRA 339, 343 (1999) (Member Wasserman concurring in part and dissenting in part); *U.S. Dep't of HUD, La. State Office, New Orleans, La.*, 53 FLRA 1611, 1620-21 (1998).

Here, we are unable to determine whether the award of backpay to *any* grievant is consistent with the Back Pay Act. As such, we cannot determine whether the award can be modified in a way that will render it consistent with law. Consistent with the foregoing, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further findings.

VI. Decision

The Agency's exceptions are denied in part, and the award is remanded in part.

[11] The Union consistently has claimed that the grievants were entitled to promotions when they satisfied, as relevant here, time-in-grade requirements. However, the Union has not challenged the applicability of the specialized experience requirement.