73 FLRA No. 74

UNITED STATES
MARINE CORPS
MARINE CORPS AIR GROUND COMBAT CENTER
TWENTYNINE PALMS, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2018
(Union)

0-AR-5703

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DECISION

December 9, 2022

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and Susan Tsui Grundmann, Members
(Member Kiko dissenting in part)

I. Statement of the Case

In this case, we revisit our standards for determining whether a grievance concerns a temporary promotion and, therefore, does not involve classification under § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute).[1]

Applying the test established in *U.S. Small Business Administration* (*SBA I*),[2] Arbitrator David M. Gaba found the grievance requested a temporary promotion and did not concern classification. He also found the Agency violated the parties' collective-bargaining agreement by failing to give the grievant a temporary promotion. Therefore, the Arbitrator ordered the Agency to retroactively promote the grievant for the period when higher-graded job duties were performed and to provide the grievant with the requisite 120-day backpay differential commensurate with the temporary promotion.

The Agency excepts to the award on several grounds. For the following reasons, we find: some of the Agency's exceptions are not properly before us; the Agency fails to establish the Arbitrator improperly applied § 7121(c)(5); and the award is contrary to § 7122(b) of the Statute insofar as it requires the Agency to take any action before the award becomes final and binding.[3] Therefore, we dismiss the Agency's exceptions in part, deny them in part, and grant them in part, and we modify the award as discussed below.

II. Background and Arbitrator's Award

The grievant is a General Schedule (GS)-9 protocol specialist with the Agency. The dispute arose after the previous protocol officer was unable to fulfill the position's duties. The Agency assigned another employee (the supervisor) to the protocol-officer position and the supervisor allegedly assigned the grievant all of the protocol officer's job duties. In October 2019, the grievant requested a temporary promotion to protocol officer – which is a GS-12 position – because the grievant had allegedly been performing the higher-graded duties of a protocol officer since March 2019. After a series of informal email exchanges, the grievant's supervisors initially stated that they would give the grievant a retroactive temporary promotion to protocol officer. As the informal requests did not produce the desired results,[4] the grievant filed a step-one grievance on February 5, 2020 requesting a retroactive temporary promotion to protocol officer.

The supervisor granted the step-one grievance and stated the grievant should receive a retroactive temporary promotion. However, the supervisor stated the grievant could only recover a 120-day backpay differential commensurate with the temporary promotion. Because the Agency took no further action on the grievance, the grievant advanced the grievance to step two. The Agency then denied the grievance, alleging it concerned classification. The Union invoked arbitration.

There was no dispute the Arbitrator did not have authority over matters involving classification. On this point, the Arbitrator concluded the grievance sought to "properly compensate[]" the grievant for those periods when the grievant "performed the duties of a [p]rotocol [o]fficer," but did not request the grievant's position "be reclassified to protocol officer."[5]

At arbitration, the parties stipulated to the following as the only issue to be decided by the Arbitrator: "[w]as [the grievant] temporarily promoted to the already classified Protocol Officer, GS-0301-12, PD# CG-H37

[1] 5 U.S.C. § 7121(c)(5).
[2] 70 FLRA 729, 729 (2018) (then-Member DuBester dissenting); *see also U.S. Small Bus. Admin.*, 70 FLRA 895, 896 (2018) (*SBA II*) (then-Member DuBester dissenting).
[3] 5 U.S.C. § 7122(b).
[4] The Agency's human-resources office told the supervisors to ignore the grievant's request because it was not contained in a formal grievance. Award at 23.
[5] Exceptions, Attach. 1, Arbitrator's Ruling on the Grievance's Procedural Arbitrability (Arbitrability Ruling) at 13-14.

position description, under the FLRA's four[-]prong test established in [*SBA I*], without compensation in violation of Article[s] 6, 14, and 22 of the [parties' agreement], and if so, what should be the remedy?"[6]

The Arbitrator found the Agency violated the parties' agreement by not temporarily promoting the grievant and determined the grievance satisfied all four parts of the *SBA I* test. In particular, the Arbitrator determined the grievant performed the higher-graded duties of the vacant protocol-officer position at the direction of the supervisor and the job duties performed as protocol officer are different from those performed by the grievant as a protocol specialist.[7] The Arbitrator also found the Agency did not assign the higher-graded duties to meet an urgent mission requirement. Accordingly, the Arbitrator awarded a retroactive temporary promotion for the period the grievant performed the higher-graded job duties of protocol officer and backpay at the higher pay for 120 days. The Arbitrator stated the "retroactive [backpay] must be paid within fourteen . . . days of the date of this [a]ward."[8]

On February 2, 2021, the Agency filed exceptions to the Arbitrator's award. On March 2, 2021, the Union filed its opposition to the Agency's exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Agency's exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[9] The Agency argues the award is contrary to law and based on nonfacts because the grievant – a GS-9 protocol specialist – did not meet the necessary time-in-grade requirements to be temporarily promoted to a GS-12 protocol officer.[10] However, the Union argues the Agency never presented this argument to the Arbitrator.[11]

At arbitration, the Agency stipulated to the limited issue of whether the grievant was eligible for a temporary promotion.[12] Therefore, the Agency could have raised these arguments to the Arbitrator. It did not do so. Accordingly, we dismiss these exceptions as barred by §§ 2425.4(c) and 2429.5 of the Authority's Regulations.[13]

IV. Analysis and Conclusions

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

The Agency argues the award is contrary to § 7121(c)(5) of the Statute because the grievance involves classification.[14] Specifically, the Agency asserts there is no evidence the grievant performed any duties from a higher grade and the grievance merely seeks additional compensation for the performance of new or additional duties that are a part of the grievant's current position description.[15] Further, the Agency notes the Arbitrator found that it is "unclear whether [the grievant] seeks 'reclassification' as part of [the] remedy."[16] According to the Agency, by finding the grievance only sought a temporary promotion, "the Arbitrator . . . allowed [the grievant] to modify, supplement, and expand" the grievance.[17]

The Authority reviews questions of law raised by exceptions to an arbitrator's award de novo.[18] In making that determination, we defer to the arbitrator's underlying findings of fact unless the excepting party establishes they are based on nonfacts.[19]

In *SBA I*, the Authority changed the Authority's long-established standard for determining whether a

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[6] Award at 2-3; *see also id.* at 31.

[7] The Arbitrator found the grievant performed the protocol officer's duties from approximately March 2019 until August 2020.

[8] *Id.* at 47 (citing Article 22, Section 3 of the parties' agreement, which states that in the event of an employee failing to receive proper and timely compensation due to Agency error, "[c]ompensation will be paid within fourteen . . . days of notification of the problem").

[9] 5 C.F.R. §§ 2425.4(c), 2429.5.

[10] Exceptions Br. at 11-14.

[11] Opp'n Br. at 6.

[12] Award at 2-3, 31.

[13] *NATCA*, 72 FLRA 299, 300 (2021).

[14] Exceptions Br. at 9. While the Agency also argues the award fails to draw its essence from the parties' agreement, we note the parties' agreement mirrors § 7121(c)(5) of the Statute. Exceptions Br. at 9 (citing Art. 11, § 2e of the parties' agreement). *Compare* Award at 4 (quoting Art. 11, § 2e of the parties' agreement, which excludes from the negotiated grievance procedure "[t]he classification of any position, which does not result in the reduction in grade or pay of an employee"), *with* 5 U.S.C. § 7121(c)(5) (excluding from negotiated grievance procedures any grievance concerning "[t]he classification of any position which does not result in the reduction in grade or pay of an employee"). Therefore, we will not separately address the Agency's essence exception. *See AFGE*, 59 FLRA 767, 769-70 (2004) (finding the Authority applies statutory standards in assessing the application of contract provisions that mirror – or are intended to be interpreted in the same manner as – the Statute).

[15] Exceptions Br. at 9-10.

[16] Arbitrability Ruling at 14.

[17] Exceptions Br. at 10-11.

[18] *U.S. Dep't of the Treasury, IRS*, 71 FLRA 771, 772 n.11 (2020) (then-Member DuBester dissenting).

[19] *U.S. Dep't of the Navy, Naval Med. Ctr. Camp Lejeune, Jacksonville, N.C.*, 73 FLRA 137, 140 (2022).

grievance impermissibly involves classification under § 7121(c)(5) of the Statute.[20] The Authority found that its "[then-]existing standards for determining what constitutes a temporary promotion have not always been clear and fail[] to recognize the realities of, and flexibilities required of, a 21st Century federal workforce."[21] More specifically, it reasoned that the existing standard "fail[ed] to recognize the modern workplace reality that managers often assign employees duties on a temporary basis as part of their permanent positions, and not as temporary promotions, for any number of reasons," including to meet "urgent mission requirement[s]" or to garner experience for "succession[-]planning" purposes.[22] Additionally, it concluded that the Authority's failure to "recognize these realities" led to "gray areas in § 7121(c)(5) case law and confusion among parties and arbitrators."[23]

We recognize that employers have a valid interest in temporarily assigning duties for a variety of reasons. However, this "workplace reality," standing alone, does not mean that employees should not be "fairly compensated when they are assigned increased responsibilities above the grade level at which they are ordinarily being paid."[24] Consequently, we find that *SBA I* does not properly balance the countervailing interests of employees and employers.

Additionally, on a more fundamental level, we conclude that the four-part *SBA I* test bears little, if any, relevance to the question it was purportedly designed to address: whether a grievance is barred by § 7121(c)(5) of the Statute because it concerns classification. The *SBA I* test arguably considers factors that could be relevant to determining the merits of a temporary-promotion grievance. However, neither *SBA I* nor the decisions subsequently applying the *SBA I* standard explain how its four-part test accurately assesses whether a grievance concerns the *classification* of any position.[25] Moreover, these decisions have never explained why the Authority should adopt a *presumption* that a grievance alleging entitlement to a temporary promotion actually concerns classification, and is therefore jurisdictionally barred under § 7121(c)(5), simply because the *SBA I* standard is not satisfied.[26] We find that such a presumption, which has no basis in § 7121(c)(5), "lacks both a legal and a logical justification."[27]

Furthermore, the decision in *SBA I* fails to explain how the new standard provides more clarity than the Authority's previous standard.[28] Therefore, we will no longer follow *SBA I* or the Authority decisions that apply it because those decisions do not provide an adequate justification for revising the standard employed by the Authority for determining whether a grievance concerns classification. Rather, we will return to the standard applied by the Authority prior to *SBA I*, which we find more closely hews to the language and purpose of § 7121(c)(5) of the Statute. We set forth those standards below.

Under § 7121(c)(5), arbitrators lack jurisdiction to determine "the classification of any position which does not result in the reduction in grade or pay of an employee."[29] 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."[30]

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).[31] However, where the substance of the grievance concerns whether the employee is entitled to a

[20] *SBA I*, 70 FLRA at 730-31 ("[T]o present a temporary-promotion claim that does not involve classification under § 7121(c)(5), 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 the 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 731 ("When applying the clarified standards, rather than automatically remanding a dispute in which an arbitrator's factual findings are insufficient to conduct a § 7121(c)(5) analysis, [the Authority] will exercise [its] discretion to review all of the record evidence and determine whether the dispute concerns classification under § 7121(c)(5).").

[21] *Id.* at 730.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 732 (Dissenting Opinion of then-Member DuBester).

[25] *See, e.g.*, *SBA II*, 70 FLRA at 898 (Dissenting Opinion of then-Member DuBester) ("Conflating arbitrability and merits issues, the majority finds the grievance not *arbitrable* because the Union fails to meet 'the standard for evaluating temporary-promotion claims,' a *merits* issue.").

[26] *Id.* (noting that *SBA I* "adopts a presumption, without explanation, that temporary-promotion grievances involve 'classification' if a union fails to support its temporary-promotion claim").

[27] *Id.*

[28] *SBA I*, 70 FLRA at 730-31.

[29] *U.S. Dep't of the Treasury, IRS, Small Bus./Self Employed Bus. Div. Fraud/BSA, Detroit, Mich.*, 63 FLRA 567, 571 (2009) (*IRS*).

[30] *Id.*

[31] *See id.*

temporary promotion under a collective-bargaining agreement because the employee has performed the established duties of a higher-graded position, the grievance does not concern the classification of a position within the meaning of § 7121(c)(5).[32]

Applying this standard, we find that the Agency fails to establish the grievance involved classification. As noted above, in concluding the grievance concerns whether the grievant was entitled to a temporary promotion, the Arbitrator found the grievant performed higher-graded protocol-officer duties that are different from the duties of a protocol specialist.[33] The Arbitrator also found the Union's grievance alleged the grievant was entitled to a temporary promotion pursuant to an article in the parties' agreement specifically governing such matters.[34] Consequently, the Arbitrator's findings demonstrate that the substance of the grievance concerned whether the grievant is entitled to a temporary promotion under the parties' agreement.[35] As to the Agency's claim the Arbitrator expanded the grievance by finding that it did not involve classification, the Arbitrator noted the grievance never mentioned classification and only requested for the grievant to be properly compensated for performing the duties of a protocol officer.[36] Therefore, we deny the Agency's § 7121(c)(5) exception.[37]

B. The award is contrary to § 7122(b) of the Statute.

The Agency argues the remedial portion of the award is contrary to § 7122(b) of the Statute[38] because it states that "retroactive back pay must be paid within fourteen (14) days of the date of this [a]ward."[39] Rather, the Agency argues it must comply with the award only after it becomes "final and binding" within the meaning of § 7122(b).[40] The Authority has held § 7122(b) dictates that a party must take actions required by an award only after the Authority has ruled on the exceptions and the award has become final and binding.[41] We agree the Agency cannot be required to comply with the award until the Authority has ruled on the Agency's exceptions and the award becomes final and binding.[42] Consequently, we modify the award to state the Agency must pay any requisite backpay within fourteen days from the date the award becomes final and binding.

V. Decision

We dismiss the Agency's exceptions in part, deny them in part, grant them in part, and modify the award in accordance with the determinations above.

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[32] *See id.*

[33] Award at 34-41.

[34] *Id.* at 41 (citing Art. 14, § 6, which states: "Employees may be non-competitively detailed by the supervisor to a position without an increase in pay. For details longer than thirty (30) days, if
qualified, the employee shall be temporarily promoted to the higher[-]graded position for the period of the assignment not to exceed one hundred-twenty (120) days.").

[35] *U.S. Dep't of VA, Med. Ctr., Perry Point, Md.*, 68 FLRA 83, 84-85 (2014) (Member Pizzella dissenting) ("Further, it is undisputed that the duties allegedly performed by the grievant were the duties of a position other than her own. Specifically, the [a]rbitrator found that the grievant performed duties previously assigned to GS-12 specialists in her office."); *U.S. DOJ, Exec. Off. for Immigr. Rev.*, 67 FLRA 131, 132 (2013); *IRS*, 63 FLRA at 571 ("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.").

[36] Arbitrability Ruling at 13-14.

[37] *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 69 FLRA 427, 428-29 (2016) ("Here, the grievance does not allege that the [a]gency permanently assigned specialist duties to the grievant's kinesiotherapist position; nor does it seek to change the grade level of that position. Rather, the grievance concerns whether the grievant is entitled to a temporary promotion. . . .").

[38] 5 U.S.C. § 7122(b).

[39] Exceptions Br. at 14 (quoting Award at 47).

[40] *Id*. at 15.

[41] *U.S. Dep't of the Air Force, NAS Joint Rsrv. Base (NASJRB), Fort Worth, Tex.*, 66 FLRA 3, 3 n.1 (2011) (citing *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 59 FLRA 282, 287-88 (2003)).

[42] *See id.*

Member Kiko, dissenting in part:

I agree with the majority in Section III that §§ 2425.4(c) and 2429.5 of the Authority's Regulations[1] bar the Agency's time-in-grade argument;[2] I agree with the ultimate holding in Section IV.A that the Arbitrator correctly found that the grievance is not barred under § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute);[3] and I agree with Section IV.B that the remedial portion of the award is contrary to § 7122(b) of the Statute.[4] However, I dissent from the majority's unnecessary and awkwardly placed critique of *U.S. Small Business Administration* (*SBA*),[5] particularly because *SBA* produces the same result as the majority's analysis.[6] And I dissent from the majority's decision to replace *SBA* with a previous standard that proved ineffective at distinguishing temporary-promotion claims from inarbitrable classification matters.

Rather than providing concrete principles for arbitrators to apply, the nebulous pre-SBA standard left questions of classification almost entirely to arbitral discretion. Before the Authority refined its temporary-promotion standard in *SBA*, a grievance did not concern classification if it alleged that an employee was "entitled to a temporary promotion under a collective-bargaining agreement because [the employee] has performed the established duties of a higher-graded position."[7] One might wonder how an arbitrator could determine whether a grievance that *claimed* to be seeking only a temporary promotion might actually be a reclassification grievance in a temporary-promotion guise. Not to worry: The Authority instructed arbitrators to refuse to resolve grievances whose "essential nature" concerned the grade level of the duties assigned to, and performed by, grievants in their permanent positions.[8]

Unsurprisingly, arbitrators who attempted to uncover grievances' "essential nature" often reached determinations that were inconsistent with § 7121(c)(5). For example, applying the pre-*SBA* standard, the Authority deferred to an arbitrator's finding that a grievance asserting that employees were "unfairly classified"[9] sought only *temporary* promotions for the *six-year* grievance period.[10] More egregiously, under the pre-*SBA* standard, the Authority upheld an arbitrator's determination that a grievant was entitled to a temporary promotion for performing a mix of higher-graded duties from *three* position descriptions at *different* General Schedule grades.[11] Such decisions plainly demonstrated that, unless the Authority revised its temporary-promotion standard, grievants would continue circumventing the classification bar by merely invoking the magical phrases "higher-graded duties" or "temporary promotion."[12]

Given the need to clarify § 7121(c)(5), the Authority devised the four-part *SBA* test.[13] Instead of relying solely on what a grievance "allege[d],"[14] arbitrators would conduct a "fact-specific inquiry" into whether an agency assigned the duties of a higher-graded position to an employee.[15] As the Authority explained in *SBA*, this exercise is necessary because § 7121(c)(5) bars grievances that "seek[] additional compensation for performing new or additional duties that are part of that

[1] 5 C.F.R. §§ 2425.4(c), 2429.5.
[2] Majority at 3.
[3] 5 U.S.C. § 7121(c)(5); Majority at 7 ("[W]e deny the Agency's § 7121(c)(5) exception.").
[4] 5 U.S.C. § 7122(b); Majority at 7.
[5] 70 FLRA 729 (2018) (then-Member DuBester dissenting).
[6] *See* Exceptions, Attach. 1, Arbitrator's Ruling on the Grievance's Procedural Arbitrability at 15-16 (applying *SBA* and concluding that the grievance was arbitrable).
[7] *E.g.*, *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 69 FLRA 427, 428 (2016) (*VA*).
[8] *E.g.*, *U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 65 FLRA 1017, 1020 (2011) (*Fort Bragg*).
[9] *U.S. Dep't of the Treasury, IRS, Small Bus./Self Employed Bus. Div. Fraud/BSA, Detroit, Mich.*, 63 FLRA 567, 567 (2009) (*Treasury*).
[10] *Id.* at 568 (arbitrator noted that the grievants "performed higher-graded duties without interruption" during the six-year period covered by the grievance), 571 (Authority found that the grievance did not concern classification under § 7121(c)(5) because the grievants alleged they were performing the "higher[-]graded duties" of another position (alteration in original)).
[11] *U.S. Dep't of the Navy, Naval Aviation Depot, Marine Corps Air Station, Cherry Point, N.C.*, 42 FLRA 795 (1991); *see id.* at 796 (noting that grievance alleged employee "perform[ed] the work of the [Wage Grade (WG)]-9, WG-10, and WG-11 mechanic positions"), 801-03 (finding that grievance concerned temporary promotion and was consistent with § 7121(c)(5)).
[12] Even a grievance alleging improper classification could survive the pre-*SBA* standard, as long as the grievance also mentioned "higher-graded duties." *Treasury*, 63 FLRA at 567 (grievance alleged improper classification), 571 (Authority deferred to arbitrator's finding that the "issue before him concerned 'higher[-]graded duties' and not 'a classification' matter" (alteration in original) (quoting Arbitration Award at 11)).
[13] To present a temporary-promotion claim under *SBA*, the union 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 the 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. *SBA*, 70 FLRA at 729-30.
[14] *VA*, 69 FLRA at 428, 429.
[15] *U.S. Dep't of the Navy Commander, Navy Region Mid-Atl., Naval Weapons Station Earle*, 72 FLRA 533, 534 (2021) (*Navy*) (Chairman DuBester concurring).

employee's . . . permanent position."[16] Despite acknowledging that grievances of this nature are inarbitrable, the majority faults *SBA* for creating an alleged "presumption" against arbitrability.[17] To the contrary, *SBA* merely systematized the disparate principles that were guiding arbitrators in the absence of concrete direction from the pre-*SBA* standard.[18] The bright-line rules established in *SBA* "provide[d] more clarity,"[19] and could be applied with greater consistency, than the majority's preferred standard that asks arbitrators to contemplate a grievance's "essential nature."[20]

The following example illustrates the superior concreteness of the *SBA* standard. *SBA* recognized that one characteristic of a temporary-promotion grievance is a concern for the performance of *grade-controlling* duties.[21] The majority acknowledges that the Office of Personnel Management (OPM) is the agency that establishes position-classification plans.[22] And OPM guidance states that an employee occupies a higher-graded position *only* when the employee performs the grade-controlling duties of that position.[23] Thus, in order for an employee to state a claim for temporary promotion, the employee must offer evidence of performing "all of the grade-controlling duties" of a higher-graded position.[24] Although this requirement is a necessary element of any temporary-promotion claim, the majority omits the requirement from its temporary-promotion standard altogether. This difference illustrates how *SBA* "provide[d] more clarity" than the majority's directionless standard.[25]

Since *SBA* issued, arbitrators have shown considerable aptitude in applying its four-part test.[26] Indeed, this very case demonstrates the usefulness of the *SBA* standard: After applying that standard, the Arbitrator correctly resolved a temporary-promotion matter, as the majority itself recognizes.[27] Thus, it is peculiar for the majority to criticize the *SBA* standard as "bear[ing] little, if any, relevance" to a proper classification inquiry,[28] while also admitting that the *SBA* standard led to the correct result here.

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[16] 70 FLRA at 730.

[17] Majority at 5.

[18] Each part of the *SBA* test guarded against an element of a classification challenge, as previously identified by the Authority or Office of Personnel Management. First, an agency must have expressly reassigned a majority of the duties of an already classified, higher-graded position. *SBA*, 70 FLRA at 730; *see id.* at 730 & n.9 (grievance involves classification if it seeks compensation for performing allegedly higher-graded duties when those duties were not part of an established, previously classified position description (citing *U.S. Nuclear Regulatory Comm'n*, 54 FLRA 1416, 1421-22 (1998) (Member Wasserman dissenting))). Second, the reassigned duties must be different from the duties of the grievant's permanent position. *Id.* at 730; *see id.* at 730 & n.7 (grievance involves classification if it argues that an employee's permanent position was erroneously classified (citing *AFGE, Loc. 987*, 58 FLRA 453, 454-55 (2003) (*Loc. 987*))); *see also Laborers' Int'l Union of N. Am., Loc. 28*, 56 FLRA 324, 326 (2000) (Member Cabaniss concurring) (temporary-promotion claim requires assertion that "grievant performed duties of a higher grade than the grievant's permanent position"). Third, the duties must not have been reassigned to meet an urgent mission requirement or to provide experience as part of an employee-development or succession plan. *SBA*, 70 FLRA at 730; *see, e.g.*, Off. of Pers. Mgmt., Off. of Merit Sys. Oversight & Effectiveness, Digest of Significant Classification Decisions & Opinions, No. 16-03 at 2 (Mar. 1992) ("Work which is . . . assigned solely for the purpose of training an employee for higher[-]level work cannot be considered paramount for grade[-]level purposes."), https://www.opm.gov/policy-data-oversight/classification-qualifications/appeal-decisions/digest/digests-9195/16-03.pdf. Fourth, the employee must not be compensated twice for the reassigned duties. *See, e.g.*, *Loc. 987*, 58 FLRA at 454 (temporary-promotion claim requires an asserted failure "to be compensated at a higher rate of pay").

[19] Majority at 5.

[20] *E.g.*, *Fort Bragg*, 65 FLRA at 1020.

[21] *SBA*, 70 FLRA at 730.

[22] Majority at 6.

[23] *See* 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.

[24] *SBA*, 70 FLRA at 730 (explaining that a temporary-promotion claim that does not involve classification requires evidence that "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*" (original emphasis omitted) (new emphasis added)).

[25] Majority at 5.

[26] *E.g.*, Award at 34-41 (finding that the grievant raised a temporary-promotion claim under *SBA* because: (1) the Agency "explicitly reassigned [the grievant] to perform the higher-graded duties of a GS-12 graded [p]rotocol [o]fficer"; (2) the grievant performed "the majority of the duties of a [p]rotocol [o]fficer"; (3) the higher-graded Protocol Officer duties were not "the *same* duties [the grievant] performed as a Protocol Specialist"; (4) the assignment was not for purposes of meeting an urgent mission requirement; and (5) the grievant never received a temporary promotion); *Navy*, 72 FLRA at 534 (upholding arbitrator's determination that grievance did not concern classification where arbitrator "undertook the appropriate factfinding" and "the requisite elements for a temporary-promotion claim [under *SBA*] were met").

[27] Majority at 7 ("[W]e deny the Agency's § 7121(c)(5) exception.").

[28] *Id.* at 5.

According to the majority, the pre-*SBA* standard "more closely hews to the language and purpose of § 7121(c)(5) of the Statute."[29] However, the majority fails to identify any language from § 7121(c)(5) that is reflected in its resurrected standard – and I can find none except the word "classification."[30] As for § 7121(c)(5)'s purpose, the majority's return to the pre-*SBA* standard will not resolve the "gray areas in § 7121(c)(5) case law" that resulted from the Authority's previous application of that standard.[31]

For the reasons above, I dissent in part.

[29] *Id.*
[30] 5 U.S.C. § 7121(c)(5).
[31] *SBA*, 70 FLRA at 730. In its rush to overturn every clarification or revision in the Authority's caselaw over the past five years, the majority has offered little more by way of a replacement standard than "it's whatever *SBA* was not."