

71 FLRA No. 109

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
HEALTH RESOURCES CENTER
TOPEKA, KANSAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 906
(Union)

0-AR-5463

DECISION

February 20, 2020

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members

I. Statement of the Case

In this case, we affirm that the Authority is without jurisdiction over a claim advanced at arbitration that concerns whether a grievant had completed her probationary period at the time of her removal. Such a claim is inextricably intertwined with a removal matter that could be reviewed by the Merit Systems Protection Board (MSPB) and, on appeal, by the United States Court of Appeals for the Federal Circuit.

The Agency filed exceptions to an award by Arbitrator Joseph V. Simeri, who found that the Agency failed to remove a probationary employee (the grievant) before the end of her probationary period. Because the award relates to a matter described in § 7121(f) of the Federal Service Labor-Management Relations Statute (the Statute),¹ we find that the Authority lacks jurisdiction to review the award under § 7122(a) of the Statute.² Therefore, we dismiss the Agency’s exceptions.

II. Background and Arbitrator’s Award

On April 16, 2017, the Agency hired the grievant subject to a one-year probationary period. In

accordance with 5 C.F.R. § 315.804(b),³ the grievant’s probationary period was set to expire Friday, April 13, 2018 – her last scheduled workday before the one-year anniversary date of her appointment. It is undisputed that the Agency mailed a removal notification to the grievant before the completion of the probationary period. However, the grievant – partially due to family circumstances of which her supervisor was aware – did not receive the notification until after her probationary period had expired.

Subsequently, the Union filed a grievance alleging that the Agency violated the parties’ collective-bargaining agreement, 5 C.F.R. § 315.804, and MSPB precedent by removing her after the expiration of her probationary period without affording her due process. The Agency denied the grievance, and the Union invoked arbitration.

The Arbitrator framed the issues as follows: “Whether the [Agency] made reasonable and diligent efforts to serve [the g]rievant with written notice of her termination before the effective date of her termination. If not, what is the remedy?”⁴

Applying MSPB standards,⁵ the Arbitrator found that the Agency failed to act reasonably or diligently when it mailed the letter to the grievant’s home the day before her probationary period ended, knowing that the grievant was likely tending to her hospitalized sister. Accordingly, the Arbitrator concluded that the Agency failed to remove the grievant before the end of her probationary period. And, as the Agency had not provided the grievant the due process to which tenured employees are entitled, the Arbitrator directed the Agency to reinstate the grievant.

³ 5 C.F.R. § 315.804(b) (“Probation ends when the employee completes his or her scheduled tour of duty on the day before the anniversary date of the employee’s appointment. For example, when the last workday is a Friday and the anniversary date is the following Monday, the probationer must be separated before the end of the tour of duty on Friday since Friday would be the last day the employee actually has to demonstrate fitness for further employment.”).

⁴ Award at 6.

⁵ Compare *id.* at 11 (“[W]hile there [was] no absolute requirement that [the g]rievant actually receive the notice before the termination, the [Agency] still must [have] act[ed] diligently and reasonably under the circumstances in communicating the [termination.]”), with *Lavelle v. Dep’t of Transp.*, 17 M.S.P.R. 8, 15 (1983) (*Lavelle*) (“[N]otification [of a probationary termination] does not have to be actually received by the employee prior to the termination where the agency’s attempts to give prior notification are diligent and reasonable under the circumstances.”).

¹ 5 U.S.C. § 7121(f).

² *Id.* § 7122(a).

The Agency filed exceptions to the award on January 17, 2019, and on February 19, 2019, the Union filed an opposition to the Agency's exceptions.⁶

III. Analysis and Conclusion: The Authority lacks jurisdiction to resolve the Agency's exceptions.

After receiving the Agency's exceptions, the Authority's Office of Case Intake and Publication issued an order, directing the Agency to show cause why the Authority should not dismiss the exceptions for lack of jurisdiction under § 7122(a) of the Statute.⁷ The Agency filed a response to the order arguing, as described further below, that the Authority has jurisdiction.⁸

Under § 7122(a) of the Statute, the Authority lacks jurisdiction to resolve exceptions to an award "relating to" a matter described in § 7121(f) of the Statute.⁹ Matters described in § 7121(f) include serious adverse actions, such as removals,¹⁰ that are covered under 5 U.S.C. § 4303 or § 7512.¹¹

The Authority will determine that an award "relates to" a matter described in § 7121(f) when it resolves, or is "inextricably intertwined" with a matter covered under § 4303 or § 7512.¹² In making that determination, the Authority looks not to the outcome of the award, but to whether the claim advanced in arbitration is one that would be reviewed by the MSPB and, on appeal, by the Federal Circuit.¹³

Here, the issue that the parties disputed at arbitration was whether the grievant had completed her probationary period at the time of her removal.¹⁴ This issue is an essential element of the Union's arbitration claim, as it is a necessary factor in establishing whether

the grievant was entitled to the procedural protections afforded to tenured employees under 5 U.S.C. § 7513 and the parties' agreement.¹⁵ In reviewing challenges to removals, the MSPB routinely resolves disputes as to whether or not an employee was probationary at the time of a removal,¹⁶ and those determinations are appealable to Federal Circuit, regardless of the outcome.¹⁷ Accordingly, the Union's claims advanced at arbitration are inextricably intertwined with a removal matter that could have been reviewed by the MSPB and, on appeal, by the Federal Circuit.

In its response to the order, the Agency – citing *NTEU, Chapter 103 (NTEU)*¹⁸ – contends that the Authority has jurisdiction and should address whether the Arbitrator erred, as a matter of law, by asserting jurisdiction over the grievance.¹⁹ While the Authority in *NTEU* asserted jurisdiction over an award concerning a probationary employee's removal, it did so because it was undisputed that the employee was probationary "at the time of her termination."²⁰ Here, as the Agency itself acknowledges, the "question regarding the [grievant's] probationary status is *not settled* and remains at the center of the parties' dispute."²¹ Thus, *NTEU* is dissimilar, and, as established above, the Federal Circuit would have jurisdiction over that issue.²²

⁶ The Union completed an opposition form, and, in that form, it refers to an "attached brief." Opp'n Form at 4. However, the Union did not actually attach an opposition brief. Thus, we consider only the contentions that it made in the form.

⁷ Order to Show Cause (Order) at 1-2.

⁸ Resp. to Order at 2-4.

⁹ 5 U.S.C. § 7122(a).

¹⁰ *Id.* §§ 4303(a), 7512(1).

¹¹ *Id.* § 7121(f).

¹² *U.S. Dep't of the Treasury, U.S. Customs Serv.*, 57 FLRA 805, 806 (2002) (*Customs Serv.*) (citing *U.S. Dep't of Transp., FAA*, 57 FLRA 580, 581 (2001)).

¹³ *Id.* (citations omitted).

¹⁴ Exceptions, Attach. F, Union's Post-Hr'g Br. at 3 (arguing that the grievant "was outside of her probationary period when she received the Agency's termination letter" and, therefore, "was not a probationary employee" when removed); see also Resp. to Order at 4 (noting that the dispute before the Arbitrator concerned whether "the [g]rievant was separated from employment during her probationary period" (emphasis added)).

¹⁵ *Customs Serv.*, 57 FLRA at 806; see also *Dep't HHS, SSA*, 15 FLRA 714, 715 (1984) (finding that unlike for tenured employees, "procedural protections for probationary employees [cannot] be established through collective bargaining").

¹⁶ *E.g., Santillan v. Air Force*, 54 M.S.P.R. 21, 26-27 (1992) (finding that appellant was terminated during his probationary period where the agency diligently attempted to deliver the termination notice in time, and he deliberately attempted to avoid receipt of notice); *Cephas v. Treasury*, 27 M.S.P.R. 69, 72 (1985) (finding that appellant's failure to actually receive notice of termination before the end of her tour of duty on last day of her probationary period did not preclude her termination from becoming effective on that date, where the agency sent representatives to her home to personally serve the notice, and finding no one at home, taped the notice to her door); *Lavelle*, 17 M.S.P.R. at 15-16 (finding that two appellants were entitled to statutory procedural protections where the agency failed to make reasonable and diligent attempts to serve termination notices before the end of their probationary periods).

¹⁷ *Customs Serv.*, 57 FLRA at 806-07 (citing *Hardy v. MSPB*, 13 F.3d 1571, 1573-75 (Fed. Cir. 1994)).

¹⁸ 66 FLRA 416, 418 (2011).

¹⁹ Resp. to Order at 3-5.

²⁰ *NTEU*, 66 FLRA at 418.

²¹ Resp. to Order at 5 (emphasis added).

²² See 5 U.S.C. §§ 7121(f), 7703.

Based on the above, we conclude that we lack jurisdiction, under § 7122(a), to review the award.²³

IV. Decision

We dismiss the Agency's exceptions.

²³ *Customs Serv.*, 57 FLRA at 807 (finding award concerning whether grievant was a probationer inextricably intertwined with grievant's removal).