

72 FLRA No. 42

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
POPLAR BLUFF, MISSOURI
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

0-AR-5622

DECISION

April 27, 2021

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

I. Statement of the Case

Arbitrator Timothy B. Tobin sustained a grievance challenging a probationary employee's termination. The Agency filed exceptions contesting the Arbitrator's jurisdiction to resolve the grievance on contrary-to-law grounds. Because a grievance concerning the termination of a probationary employee is excluded from the scope of the negotiated grievance procedure, the Arbitrator did not have jurisdiction to resolve the grievance. Accordingly, we set aside the award.

II. Background and Arbitrator's Award

Following a series of incidents, the grievant, a probationary nursing assistant, reported to her supervisor that a coworker was harassing her on the basis of race. Several months later, the Agency investigated but the matter was unresolved. The grievant was intermittently absent during this period and ultimately stopped reporting to work. The Union then filed a grievance asserting that the Agency had violated provisions in the parties' agreement pertaining to equal employment opportunity and general working conditions by failing to protect the grievant from a pattern of bullying and harassment on the basis of race.

While the grievance was pending, the Agency terminated the grievant during her probationary period for failing to follow leave request procedures, which had resulted in a charge of about 776 hours of absence without leave. The parties then submitted the grievance to arbitration.

The Arbitrator framed the issues, in pertinent part, as whether the Agency: discharged the grievant for just cause, provided a workplace that was not hostile, or discriminated against the grievant on the basis of race.¹

As relevant here, the Arbitrator determined that the Agency violated the parties' agreement and law by creating a hostile work environment that caused the grievant to be absent from work. Because the grievant's termination was based on her absences, the Arbitrator concluded that the Agency did not have just cause to terminate her. As a remedy, he ordered the Agency to reinstate the grievant.

On April 27, 2020, the Agency filed exceptions to the award,² and on May 26, 2020, the Union filed an opposition to the Agency's exceptions.³

III. Analysis and Conclusion: The award is contrary to law.

The Agency argues that the award is contrary to law because the Arbitrator had no jurisdiction to resolve the grievant's probationary removal and reinstate her.⁴ As an initial matter, although the Agency did not raise this jurisdictional bar at arbitration, the award "cannot stand if [the arbitrator] lacked jurisdiction to resolve the

¹ Award at 1-2.

² In its exceptions, the Agency indicates that there is a related equal employment opportunity (EEO) proceeding. Agency's Exceptions at 4. However, the EEO complaint is not in the record and the Agency states that the complaint was filed on September 26, 2018, after the grievance filed on September 20, 2018. *Id.* Therefore, based on the Agency's assertion, the formal EEO complaint was filed after the grievance and did not bar the grievance. *NTEU, Chapter 145*, 65 FLRA 898, 899 (2011) (holding that the "timely initiation of an action" under statutory EEO procedures occurs with the "filing of a formal written complaint." (quoting *AFGE, AFL-CIO, Nat'l INS Council*, 27 FLRA 467, 469-70 (1987))).

³ On April 28, 2020, the Union filed a cross-exception to the award. The Agency did not file an opposition to the Union's exception. Because the Union's exception challenges the award's remedy, and we set aside the award because the Arbitrator lacked jurisdiction, it is unnecessary to address the Union's exception. *See, e.g., U.S. DOL, Bureau of Lab. Stat.*, 66 FLRA 282, 284 (2011) (*DOL*) (finding that it was unnecessary to address the agency's remaining exceptions after setting aside the award as contrary to law).

⁴ Agency's Exceptions at 5-7.

[grievance] in the first place.”⁵ Thus, we consider whether the Arbitrator had jurisdiction to resolve the grievance.

The Authority has held that a grievance concerning the termination of a probationary employee is excluded from the scope of negotiated grievance procedures as a matter of law.⁶ Accordingly, the merits of a probationary employee’s termination are not subject to review in arbitration.⁷ Where, as here, the issue concerns whether the award is contrary to law, the Authority reviews the arbitrator’s legal determinations de novo.⁸ In applying a standard of de novo review, the Authority determines whether the arbitrator’s legal conclusions are consistent with the applicable standard of law.⁹

Here, the Arbitrator found that “[t]he grievance challenges the propriety of the [Agency’s] decision to remove the [g]rievant from her employment.”¹⁰ Although filed before the grievant’s removal, the grievance challenges the Agency’s actions that led to the grievant’s absence from work – which was the charge underlying the removal.¹¹ Moreover, in its post-hearing brief, the Union argued that the grievance is of a “continuing nature” and “the actions of the Agency have not stopped, they terminated [the grievant] in retaliation of her discrimination claims.”¹² Based on Authority precedent, the Arbitrator may not resolve a grievance concerning the Agency’s decision to terminate the grievant, even where the grievance alleges that the Agency based its decision on discrimination.¹³ Accordingly, the Arbitrator did not have jurisdiction to

resolve whether the Agency had just cause to remove the grievant and direct the Agency to reinstate her.¹⁴

IV. Order

We grant the Agency’s exception and set aside the award.

⁵ *DOL*, 66 FLRA at 284 (citing *USDA, Food & Consumer Serv., Dall., Tex.*, 60 FLRA 978, 981 (2005) (Member Pope dissenting as to other matters) (“[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 . . . excluded.”)).

⁶ *DOL*, 66 FLRA at 284; *GSA, Reg. 2, N.Y.C., N.Y.*, 58 FLRA 588, 589 (2003) (*GSA*).

⁷ See *DOL, 66 FLRA at 284; GSA, 58 FLRA at 589* (“The Authority has uniformly held that a grievance concerning the separation of a probationary employee is excluded from the scope of negotiated grievance procedures based on the statutory and regulatory scheme for a probationary period of employment set forth in 5 U.S.C. [§] 3321 and 5 C.F.R. part 315, subpart H.”).

⁸ See *Fraternal Ord. of Police, N.J. Lodge 173*, 58 FLRA 384, 385-86 (2003).

⁹ See *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998).

¹⁰ Award at 1.

¹¹ Agency’s Exceptions, Attach. 11, Notice of Termination.

¹² Union’s Opp’n, Attach. 1, Union’s Post-Hr’g Br. at 41.

¹³ *DOL*, 66 FLRA at 284 (concluding that “the [u]nion may not grieve the [a]gency’s decision to terminate the grievant, even by alleging that the [a]gency based its decision on discrimination” (internal citation omitted) (citing *GSA, 58 FLRA at 589; NTEU v. FLRA*, 848 F.2d 1273, 1277 (D.C. Cir. 1988))).

¹⁴ In these circumstances, it is unnecessary to resolve the Agency’s remaining contrary-to-law exceptions. Agency’s Exceptions at 5-8; see, e.g., *DOL, 66 FLRA at 284* (finding that it was unnecessary to address the agency’s remaining exceptions after setting aside the award as contrary to law).

Member Abbott, concurring:

The Federal Service Labor-Management Relations Statute (the Statute) and Authority precedent clearly establish that arbitrators do not have jurisdiction to review a grievance that concerns the removal of a probationary employee.¹ Therefore, I agree that the award must be vacated.

The only relevant facts in the instant case are that the grievant—who was a *probationary* employee—was *terminated*. Therefore, it is unnecessary for the decision to discuss any of the circumstances surrounding the grievant’s termination.² Those facts are entirely superfluous to the question before us.

Considering the clarity of the precedent on this matter, the grievance should never have been filed and, in doing so, significant resources were expended unnecessarily. However, our Statute provides no mechanism to assess fees, reimbursement for the cost of official time utilized, or any other penalty when a party pursues a claim that is without any arguable merit. That is a void that should be reexamined if Congress were to consider any revisions to our Statute.

¹ *U.S. DOL*, 70 FLRA 903, 904-05 (2018) (then-Member DuBester dissenting) (“[T]he Authority has repeatedly held that a grievance concerning the termination of a probationary employee is not substantively grievable or arbitrable as a matter law.”).

² Majority at 1-3.