

72 FLRA No. 139

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2324
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
DIRECTORATE OF PUBLIC WORKS
FORT RILEY, KANSAS
(Agency)

0-AR-5741

DECISION

March 18, 2022

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

Decision by Member Abbott for the Authority

I. Statement of the Case

The Union filed exceptions to an award by Arbitrator Stephen Douglas Bonney which upheld the Agency’s removal of the grievant from federal service for conduct unbecoming of a federal employee. For the reasons below, we find that the Authority lacks jurisdiction under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute).¹ Accordingly, we dismiss the Union’s exceptions.

¹ 5 U.S.C. § 7122(a).

II. Background and Arbitrator’s Award

The Agency removed the grievant from a Maintenance Worker position and from federal service for conduct unbecoming of a federal employee including, submitting misleading and/or inaccurate leave requests and providing misleading and/or inaccurate information during a management inquiry. The Union filed a grievance contesting the removal and invoking arbitration. Before the hearing, the Agency raised a preliminary issue regarding arbitrability of the grievance. Following submission of briefs from both parties on the issue, the Arbitrator found the Union’s grievance arbitrable under the parties’ collective-bargaining agreement. A hearing proceeded on the merits.

The parties stipulated the following issues at arbitration: whether there is a preponderance of evidence to find that the grievant committed the charge of conduct unbecoming a federal employee for (1) “submit[ting] misleading and/or inaccurate leave requests,” and/or (2) “provid[ing] misleading and/or inaccurate information or responses during management inquiry.”² And, if so, “[w]hether the penalty of removal was reasonable and of such nature as to promote the efficiency of the service?”³ The Arbitrator ultimately denied the grievance and sustained the grievant’s removal.

The Union filed exceptions to the award on June 14, 2021. The Agency filed an opposition to the exceptions on July 13, 2021.

III. Order to Show Cause

After receiving the Union’s exceptions, the Authority’s Office of Case Intake and Publication (CIP) issued a show-cause order. CIP requested the Union to show cause why its exceptions to an award relating to the removal of the grievant should not be dismissed for lack of jurisdiction under § 7122(a) of the Statute.⁴

In response, the Union argues that “[b]ut for the Arbitrator’s misinterpretation of law, rule and regulation, basing his decision on [n]on-fact and failing to draw his conclusion from the parties’ agreement[,] the Arbitrator would have reached different conclusions.”⁵ Specifically, the Union argues that this case is properly before the

² Award at 3.

³ *Id.*

⁴ Order to Show Cause at 2 (“Because it appears that the claim advanced at arbitration is inextricably intertwined with a removal that is reviewable by the [Merit Systems Protection Board], the Union must show cause why the Authority should not dismiss its exceptions for lack of jurisdiction.”).

⁵ Response to Order (Response) at 6.

Authority because “review of the legal conclusions made by the Arbitrator are within the jurisdiction of the [Authority].”⁶

IV. Analysis and Conclusion: The Authority lacks jurisdiction to resolve the Union’s exceptions.

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.⁷ Matters described in § 7121(f) include adverse actions, such as removals, that are covered under 5 U.S.C. §§ 4303 or 7512.⁸ Such matters are appropriately reviewed by the Merit Systems Protections Board (MSPB) and ultimately the United States Court of Appeals for the Federal Circuit (Federal Circuit).⁹

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 § 7512.¹⁰ In making that determination, the Authority looks not to the outcome of the award, but to whether the claim advanced in arbitration is reviewable by the MSPB, and, on appeal, by the Federal Circuit.¹¹

Here, the grievant’s removal was before the Arbitrator. Specifically, the Arbitrator was tasked with determining, among other things, whether “the penalty of removal was reasonable and of such nature as to promote the efficiency of the service.”¹² The Union’s response does not demonstrate how the grievance relates to a matter other than the grievant’s removal and only restates

the arguments presented in its exceptions.¹³ Without more and applying the above precedent, the award relates to a matter described in § 7121(f) of the Statute.¹⁴ Accordingly, we conclude that the Authority lacks jurisdiction to review the Union’s exceptions.¹⁵

V. Decision

We dismiss the Union’s exceptions.

⁶ *Id.*

⁷ 5 U.S.C. § 7122(a) (“Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator’s award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title.”); *id.* § 7121(f) (“In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the [Merit Systems Protection] Board.”).

⁸ *U.S. Dep’t of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 88, 89 (2021) (*Poplar Bluff*) (Chairman DuBester concurring) (citing *AFGE, Loc. 933*, 71 FLRA 521, 521 (2020)).

⁹ *Id.* (citing *U.S. Dep’t of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 533, 534 (2020) (VA)).

¹⁰ VA, 71 FLRA at 534 (citing *AFGE, Loc. 1013*, 60 FLRA 712, 713 (2005) (finding Authority lacked jurisdiction to resolve exceptions to award where claim before arbitrator related to grievant’s removal)).

¹¹ See *Poplar Bluff*, 72 FLRA at 89; see also VA, 71 FLRA at 534 (citing *Schafer v. Dep’t of Interior*, 88 F.3d 981, 986 (Fed. Cir. 1996)).

¹² Award at 3.

¹³ See Response at 1-6.

¹⁴ 5 U.S.C. § 7121(f).

¹⁵ See VA, 71 FLRA at 534 (finding the Authority lacked jurisdiction to resolve exceptions to an award “because the claim advanced before the Arbitrator relates to the grievant’s removal”); see also *Poplar Bluff*, 72 FLRA at 89 (concluding that the Authority lacked jurisdiction to review an agency’s exceptions where the award related to a matter described in § 7121(f) of the Statute).

Chairman DuBester, concurring:

I agree with the Decision to dismiss the Union's exceptions.