

64 FLRA No. 122

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 933
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
GREAT LAKES NATIONAL CEMETERY
HOLLY, MICHIGAN
(Agency)

0-AR-4463

—————
DECISION

April 21, 2010

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 exception to an award of Arbitrator Elliot I. Beitner filed by the Union under § 7122 (a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exception.

The Arbitrator ordered that the grievant's removal be converted to a written reprimand and that the grievant be reinstated with "back seniority" and back pay. He also denied the request for attorney fees. For the reasons that follow, we dismiss the Union's exception for lack of jurisdiction under § 7122(a) of the Statute.

II. Background and Arbitrator's Award

The Agency notified the grievant of his proposed removal from service for "negligent workmanship resulting in the burial of a veteran in the wrong gravesite." Award at 2. The Union filed a grievance contesting the grievant's removal. *Id.* The matter was unresolved and submitted to arbitration. Among other things, the parties submitted to arbitration the following issue: "Was the grievant terminated for just cause?" *Id.* at 4.

The Arbitrator determined that the Agency did not have just cause to terminate the grievant, but did have just cause to impose a lesser discipline. *Id.* at 12.

Accordingly, he ordered that the grievant's removal be set aside and replaced by a written reprimand. He also ordered that the grievant be reinstated to his prior position at the same step level, with "back seniority" and back pay, and denied the Union's request for attorney fees. *Id.*

III. Positions of the Parties**A. Union's Exception**

The Union contests the Arbitrator's ruling regarding attorney fees. Exceptions at 8. The Union asserts that the grievant has met the prerequisites to be awarded such fees. *Id.* at 9. The Union also contends that a fully articulated and reasoned decision is required regarding this issue, not a one-sentence denial as provided by the Arbitrator. *Id.* at 10. Accordingly, the Union requests that the Authority decide the appropriateness of the grievant's requested attorney fees and award such fees, or remand the matter to the Arbitrator for a reasoned and articulated decision. *Id.* at 11.

B. Agency's Opposition

The Agency argues that a requirement for the award of attorney fees is that the grievant be affected by an unjustified personnel action. Opposition at 7. The Agency contends that it did not engage in such an action. *Id.* at 9. The Agency further asserts that attorney fees should not be awarded because the "[g]rievant is not substantially innocent, the Agency's actions were not clearly without merit or wholly unfounded, and the Agency did not know, and should not have known, that it would not prevail." *Id.* at 9. Accordingly, the Agency requests that the exceptions be denied or, in the alternative, remanded to the Arbitrator for clarification. *Id.* at 9-10.

IV. Order to Show Cause

The Authority directed the Union to show cause why its exceptions should not be dismissed for lack of jurisdiction. Order to Show Cause at 2. In response, the Union asserts that the issue of attorney fees is "inextricably intertwined with [the] [g]rievant's removal[.]" Union Response at 2. The Union argues that the Authority has accepted jurisdiction over matters involving the granting or denial of attorney fees by arbitrators. *Id.* According to the Union, in *United States General Services Administration Northeast & Caribbean Region, New York, New York*, 61 FLRA 68 (2005) (*U.S. Gen. Serv. Admin.*), the Authority ruled on the attorney fee issue even though the primary issue in the case involved the suspension of a grievant for fourteen days. *Id.* The Union argues that to dismiss its exception at this

stage would have “a chilling effect on a grievant’s decision to retain counsel” to protect his or her employment rights. *Id.* at 3. In addition, the Union alleges that the Agency has not raised this issue before the Authority. ¹ *Id.* at 2.

V. The Authority lacks jurisdiction to resolve the Union’s exception.

Under § 7122(a) of the Statute, the Authority lacks jurisdiction to resolve exceptions to awards “relating to” a matter described in § 7121(f) of the Statute.² Matters described in § 7121(f) include adverse actions, such as removals, that are covered under 5 U.S.C. § 7512 and are appealable to the Merit Systems Protection Board (MSPB) and reviewable by the United States Court of Appeals for the Federal Circuit.³ *See, e.g., U.S. Dep’t of Commerce, Patent & Trademark Office, Arlington, Va.*, 61 FLRA 476, 477 (2006).

The Authority will determine that an award relates to a matter described in § 7121(f) “when it resolves, or is inextricably intertwined with,” a § 7512 matter. *See AFGE, Local 1013*, 60 FLRA 712, 713 (2005). In making that determination, the Authority looks not to the outcome of the award, but to whether the claim advanced in arbitration is one reviewable by the MSPB, and, on appeal, by the United States Court of Appeals for the Federal Circuit. *See id.*

Applying this precedent, we conclude that the award relates to a matter described in § 7121(f) of the Statute. The claim advanced before the Arbitrator relates to the grievant’s removal. Moreover, the Union itself asserts, in its response to the Order to Show Cause, that the attorney fee award is “inextricably intertwined with” the grievant’s removal. In these circumstances, therefore, we find that the award relates to the grievant’s removal. *See U.S. Dep’t of Transp., Fed. Aviation Admin., Fort Worth, Tex.*, 61 FLRA 834 (2006).

1. The Authority may raise such arguments concerning jurisdiction *sua sponte*.

2. Section 7122(a) provides, in pertinent part: “Either party to arbitration . . . 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 § 7121(f) of this title).” Section 7121(f) provides, in pertinent part: “In matters covered under §§ 4303 and 7512 of this title which have been raised under the negotiated grievance procedure . . . , § 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator”

3. Section 7512 covers removals, suspensions for more than fourteen days, reductions in grade or pay, and furloughs for thirty days or less.

Accordingly, we conclude that the Authority lacks jurisdiction to review the Union’s exception.⁴

VI. Decision

The Union’s exception is dismissed.

4. Contrary to the Union’s contention, *U.S. Gen. Serv. Admin.* does not apply. That case involved a fourteen day suspension; accordingly, it was not a matter covered by § 7512, which only applies to suspensions of more than fourteen days.