69 FLRA No. 91

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1633
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
NATIONAL CEMETERY ADMINISTRATION
(Agency)

0-AR-5185

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ORDER DISMISSING EXCEPTIONS

September 28, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The Agency issued a decision to remove an employee (the grievant) from the federal service. In a later settlement agreement (the agreement), the Agency provided the grievant with a "[l]ast [c]hance" to remain an Agency employee by holding his removal in abeyance,[1] and, in return, the grievant agreed to a reduction in the grade level of his Wage Grade (WG) position. After the agreement expired, the grievant argued that the Agency was required to reinstate him to his previous grade level (grade reinstatement), but Arbitrator Diane Dunham Massey found that the agreement did not obligate the Agency to do that. The Union filed exceptions to the award.

The main question before us is whether, under §§ 7122(a) and 7121(f) of the Federal Service Labor-Management Relations Statute (the Statute),[2] the Authority has jurisdiction over the Union's exceptions. Because this dispute relates to a removal, the answer is no.

II. Background and Arbitrator's Award

The Agency issued a decision to remove the grievant for misconduct. Thereafter, the parties entered into the agreement. During the two years when the agreement was in effect, the Agency agreed to hold the grievant's removal in abeyance, as long as the grievant "maintain[ed] acceptable standards of conduct and performance."[3] Under the agreement, either misconduct or poor performance would lead to the grievant's immediate removal. Additionally, as part of the agreement, the grievant accepted a reduction in the grade level of his position – from WG-06 to WG-05.

At the end of the agreement's two-year term, the Agency informed the grievant that he had fulfilled the agreement's conditions. As a result, the Agency cancelled his removal. However, the grievant remained at the WG-05 level. The Union filed a grievance, claiming that the agreed-upon reduction in grade was a temporary provision of the agreement, and that the agreement's expiration entitled the grievant to grade reinstatement.

The stipulated issue before the Arbitrator was whether "the Agency violate[d] the [a]greement . . . by leaving the [g]rievant . . . [at] WG[-05] at the expiration of the . . . [a]greement."[4] In that regard, the Union argued that: (1) the grievant reasonably believed that he would be reinstated to the WG-06 grade after the agreement expired; and (2) if the agreement was ambiguous about grade reinstatement, then "the ambiguity must be construed against . . . the Agency."[5]

The Arbitrator found that: (1) the agreement had no "language that the [grade reduction] . . . was for a specified period of time"; (2) there "were no communications about the clarification of any of the conditions set forth in the [agreement]"; and (3) there was "no evidence of a past practice [that] the [p]arties could have relied upon regarding the language."[6] Therefore, the Arbitrator determined that the agreement was unambiguous and that its clear wording did not require the grievant's grade reinstatement.

The Union filed exceptions to the Arbitrator's award. The Agency did not file an opposition to the Union's exceptions.

[1] Award at 2.
[2] 5 U.S.C. §§ 7121(f), 7122(a).
[3] Award at 5.
[4] *Id.* at 2.
[5] *Id.* at 7.
[6] *Id.* at 11.

III. Analysis and Conclusion

In its exceptions, the Union claims that the award is contrary to "law, rule, or governing regulation"[7] because the award is inconsistent with laws and rules regarding proper contract construction.[8] The Authority's Office of Case Intake and Publication (CIP) issued an order directing the Union to show cause why its exceptions should not be dismissed.[9] In particular, CIP ordered the Union to explain why the award did not relate to a matter over which the Authority lacks jurisdiction under §§ 7122(a) and 7121(f) of the Statute.[10] Further, CIP explained that, under § 7122(a) of the Statute, the Authority lacks jurisdiction to review an arbitration award "relating to a matter described in § 7121(f)" of the Statute.[11] In that regard, the matters described in § 7121(f) include serious adverse actions, such as removals under 5 U.S.C. § 4303 or § 7512.[12]

In its response to the order, the Union asserts that the Authority has jurisdiction to review its exceptions because the Union's claim at arbitration did not challenge the original decision to remove the grievant, or his initial, voluntary reduction in grade.[13] Instead, the Union asserts that its exceptions challenge the Arbitrator's interpretation of the agreement.[14]

As relevant to the Union's exceptions, the Authority will determine that an award relates to a matter described in § 7121(f) when the award resolves, or is inextricably intertwined with, a § 4303 or § 7512 matter.[15] 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 Merit Systems Protection Board (MSPB) and, on appeal, by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit).[16] In that regard, the Authority has stated that "when an employee settles a dispute over [a] removal, and there is an alleged breach of that settlement, the award resolving the breach allegation is a substitute for [an] MSPB proceeding,"[17] over which only the Federal Circuit exercises review.[18] In other words, only the Federal Circuit may review an arbitrator's award concerning an alleged breach of an agreement that settled a removal action, under 5 U.S.C. § 4303 or § 7512.[19]

The Union contends that this case involves a question of contract interpretation – a matter that the Authority "routinely" reviews.[20] But, applying the precedent discussed above, the Authority has held that, "where the [question] is not separate and distinct from the original issue of the grievant's removal, the [a]rbitrator's award relates to a matter described in § 7121(f) of the Statute."[21] Here, because the agreement resolved the grievant's removal,[22] the question of the agreement's interpretation is not separate and distinct from the original removal decision itself.[23] For that reason, the Arbitrator's award interpreting the agreement was inextricably intertwined with the original removal action that gave rise to the agreement.[24] Consequently, we conclude that the claim that the Union advanced in arbitration related to the grievant's removal.[25] As a result, the Arbitrator's award served as a substitute for an MSPB decision[26] that was reviewable only by the Federal Circuit[27] – not the Authority.

Accordingly, consistent with the principles discussed above, we find that we lack jurisdiction over the Union's exceptions, and we dismiss them.

IV. Order

We dismiss the Union's exceptions.

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[7] Exceptions at 1.
[8] *See id.* at 6.
[9] Order to Show Cause (May 11, 2016) at 1.
[10] *Id.* at 1-2.
[11] *Id.* at 1 (quoting *U.S. EPA, Narragansett, R.I.*, 59 FLRA 591, 592 (2004) (*EPA*)).
[12] *See EPA*, 59 FLRA at 592.
[13] Union's Resp. at 2-3.
[14] *Id.*
[15] *See U.S. Dep't of Transp., FAA*, 57 FLRA 580, 581 (2001) (*FAA*).
[16] *See U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Miami, Fla.*, 57 FLRA 677, 678 (2002) (*DOJ*).
[17] *AFGE, Local 2094*, 51 FLRA 1612, 1616 (1996) (*Local 2094*).
[18] *See DOJ*, 57 FLRA at 678.
[19] *See, e.g., Girani v. FAA*, 924 F.2d 237, 239-40 (Fed. Cir. 1991) (reviewing arbitration award that upheld agency's removal of employee based on violation of last-chance agreement).
[20] Union's Resp. at 2-3.
[21] *U.S. Army Armament Research, Dev., & Eng'g Ctr. (ARDEC), Dover, N.J.*, 24 FLRA 837, 839 (1986) (*U.S. Army*) (citations omitted).
[22] *See* Award at 2 ("As a result of a Notice of Decision [to remove the grievant] dated January 8, 2013, the [g]rievant entered into . . . [the a]greement on January 10, 2013.").
[23] *See U.S. Army*, 24 FLRA at 839.
[24] *Id.*; *see also FAA*, 57 FLRA at 581.
[25] *See* Award at 2 (stipulated issue concerning whether the Agency violated last-chance agreement).
[26] *Local 2094*, 51 FLRA at 1616.
[27] *See DOJ*, 57 FLRA at 678.