70 FLRA No. 160

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
DAYTON, OHIO
(Agency)

and

NATIONAL NURSES UNITED
(Union)

0-AR-5343

ORDER DISMISSING EXCEPTIONS

August 31, 2018

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

I. Statement of the Case

In this case, we find that we do not have jurisdiction over exceptions to an arbitration award concerning the termination of an employee appointed to the Agency under 38 U.S.C. § 7401(1), and we dismiss the exceptions.

II. Background and Arbitrator's Award

The grievant is a registered nurse. A patient's wife reported that the grievant verbally abused the patient (the allegation). An Agency Administrative Investigation Board (Investigation Board) investigated the allegation and recommended that the Agency terminate the grievant. The Agency did so. The Union filed a grievance alleging that the termination violated the parties' collective-bargaining agreement because the Agency lacked just cause.

On December 18, 2017, Arbitrator Howard Tolley issued an award finding that the Agency failed to show that it had just cause for terminating the grievant. As a remedy, the Arbitrator directed the Agency to reinstate the grievant, with backpay.

On January 16, 2018, the Agency filed exceptions to the award. On February 20, 2018, the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusion: The Authority does not have jurisdiction over the exceptions.

In its exceptions, the Agency argues that the award is based on nonfacts.[1] On January 26, 2018, 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 because the award concerns a termination.

In response to the order, the Agency argues that the Authority must assert jurisdiction because the grievant cannot appeal her termination to the Merit Systems Protection Board (MSPB).[2] However, for the reasons discussed below, the MSPB's lack of jurisdiction[3] does not mean that the Authority has jurisdiction.

As a registered nurse, the grievant was appointed under 38 U.S.C. § 7401(1).[4] Employees appointed under this provision (appointees) are treated differently than those appointed under other subsections of § 7401 and those appointed under title 5. Simply put, appointees do not have the same protections afforded to other federal employees because Congress established an exclusive disciplinary system for appointees in 38 U.S.C. §§ 7461-7463.[5] The grievant's termination is governed by 38 U.S.C. § 7463,[6] under which an appointee may challenge an adverse action using either (a) the Agency's

[1] Exceptions at 8-29.

[2] Agency Response to Show-Cause Order (Response) at 1-2 (citing *Powell v. Dep't of Army*, 4 M.S.P.R. 540, 541 (1981)).

[3] As a registered nurse, the grievant is not the type of employee who can appeal a termination to the MSPB. *See* 5 U.S.C. § 7511(b)(10) (excluding persons who hold "a position within the Veterans Health Administration which has been excluded from the competitive service by or under a provision of title 38, unless such employee was appointed to such position under" 38 U.S.C. § 7401(3)); *see also id.* § 7701(a) ("An employee, or applicant for employment, may submit an appeal to the [MSPB] from any action which is appealable to the [MSPB] under any law, rule, or regulation."); *Mfotchou v. Dep't of VA*, 113 M.S.P.R. 317, 319-21 (2010) (citations omitted); *Pichon v. Dep't of the VA*, 67 M.S.P.R. 325, 326-28 (1995) (citations omitted).

[4] *See* Award at 4; Exceptions, Attach. 1, Third-Step Grievance Decision at 1; Exceptions, Attach. 3, Discharge Decision at 2 (Discharge Decision); Exceptions, Attach. 5, Notice of Proposed Discharge at 1.

[5] *Pathak v. Dep't of VA*, 274 F.3d 28, 31-32 (1st Cir. 2001) (citations omitted).

[6] *See, e.g.*, *Fligiel v. Samson*, 440 F.3d 747, 750 (6th Cir. 2006) (*Fligiel*) (citing 38 U.S.C. § 7463(a)) (explaining that, under § 7463(a), employees have "no right of judicial review afforded by the statute, and review to [the Agency] Disciplinary Appeals Board… is specifically foreclosed").

internal grievance procedure,[7] or (b) the parties' *negotiated* grievance procedure.[8]

Here, the grievant chose to challenge her termination using the parties' negotiated grievance procedure, and her grievance went to arbitration. Generally, a party may file exceptions to an arbitration award with the Authority. However, the Authority lacks jurisdiction to review an arbitration award "relating to a matter described in § 7121(f)" of the Federal Service Labor-Management Relations Statute (the Statute).[9] As relevant here, the matters described in § 7121(f) include adverse actions that: (1) arise under "other personnel systems" outside title 5;[10] and (2) are "similar to" serious adverse actions,[11] such as removals, covered by 5 U.S.C. § 7512 (Chapter 75).[12] The legislative history of the Statute states that appointees like the grievant belong to an "other personnel system."[13] The MSPB and federal courts also recognize that appointees are part of an "other personnel system."[14] Further, the grievant's termination is "similar to" a removal covered by Chapter 75.[15] Thus, because the grievant's termination arises under an "other personnel system[]" and is "similar to" a Chapter 75 adverse action,[16] the only potential review would be "judicial review of [the Arbitrator's] award . . . in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures."[17]

Nevertheless, the Agency argues that § 7121(f) grants the Authority jurisdiction over individuals who are not covered by Chapter 75, such as appointees.[18] For support, the Agency cites precedent stating that the Authority's jurisdictional analysis under § 7121(f) "looks . . . to whether the claim involved in arbitration is one reviewable by the [MSPB], and on appeal, by the . . . Federal Circuit."[19] However, the Agency misunderstands the Authority's jurisdictional analysis. The Authority has not held that, if the MSPB lacks jurisdiction over a claim, then the Authority *must* have jurisdiction over that claim.[20]

Because neither the Statute nor title 38 provides for further review by the Authority of arbitration awards involving an appointee's termination, we lack jurisdiction over the Agency's exceptions.[21]

IV. Order

We dismiss the Agency's exceptions.

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[7] *See* 38 U.S.C. § 7463(a) (The Agency head "shall prescribe by regulation procedures for the consideration of grievances of [appointees] arising from adverse personnel actions" that are either "not a major adverse action; or . . . do[] not arise out of a question of professional conduct or competence."). Here, the Agency determined that the grievant's termination did not involve professional conduct or competence, Discharge Decision at 1, and that determination is unreviewable, 38 U.S.C. § 7461(d).

[8] 38 U.S.C. § 7463(b) (bargaining-unit employees may seek review of an adverse action using the parties' negotiated grievance procedure).

[9] 5 U.S.C. § 7122(a).

[10] *Id.* § 7121(f).

[11] *Id.*

[12] *Pan. Canal Comm'n*, 49 FLRA 1398, 1401 (1994) (citing *U.S. DOD, Army & Air Force Exch. Serv., Dan Daniels Distribution Ctr., Newport News, Va.*, 42 FLRA 175, 175 (1991)); *see also U.S. Dep't of Transp., FAA*, 57 FLRA 580, 581 (2001).

[13] S. Rep. No. 95-969, at 110 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2723, 2832 (discussing "matters similar to those listed above which may arise under other personnel systems applicable to employees covered by this subchapter, such as those provided in [t]itle 38").

[14] *See, e.g.*, *Veterans Admin. Med. Ctr., Minneapolis, Minn. v. FLRA*, 705 F.2d 953, 957-58 (8th Cir. 1983) (citations omitted) (explaining that title 38 is an example of an "other personnel system"); *Weber v. Dep't of VA*, 521 F.3d 1061, 1067 (9th Cir. 2008) (citing *Fligiel*, 440 F.3d at 752) (title 38 provides a comprehensive regulatory scheme for VA employees).

[15] *See Fligiel*, 440 F.3d at 750 (title 38 provides a procedure for addressing major adverse actions and § 7461(c)(2)(B) includes "discharge" as such an action).

[16] 5 U.S.C. § 7121(f).

[17] *Id.*

[18] Response at 1-2.

[19] Show-Cause Order at 1-2 (citing *AFGE, Local 1633*, 69 FLRA 637, 638 (2016); *U.S. Dep't of the Interior, Bureau of Indian Affairs, Sw. Region, Albuquerque, N.M.*, 63 FLRA 2, 3-4 (2008); *AFGE, Local 1013*, 60 FLRA 712, 713 (2005)).

[20] *See U.S. Dep't of VA, Med. Ctr., Newington, Conn.*, 53 FLRA 440, 443 (1997) ("We recognize that our refusal to assert jurisdiction may leave the Agency without a forum to challenge the Arbitrator's award."); *AFGE, Local 2437*, 61 FLRA 560, 561-62 (no jurisdiction over exceptions to award concerning termination of two nurses); *Veterans Admin. Med. Ctr., Lebanon, Pa.*, 16 FLRA 813, 813-15 (finding no jurisdiction over termination of physician, who would be an appointee following 1991 amendments to title 38); *see also Veterans Admin. Med. Ctr., Hines, Ill.*, 16 FLRA 303, 304 (1984) (no jurisdiction over award mitigating removal; Authority notes that matter arises "under another personnel system").

[21] The dissent provides no support for its contention that statutory wording about when *judicial review* "*may* be obtained" vests *the Authority* with jurisdiction to review the award. Dissent at 5 (emphasis added) (quoting 5 U.S.C. § 7121(f)). And the dissent does not contest that this matter "arise[s] under [an]other personnel system[]" and is "similar to those" covered by Chapter 75 of the U.S. Code. 5 U.S.C. § 7121(f). Consequently, under the plain wording of the Statute, the Authority lacks jurisdiction. *Id.* §§ 7121(f), 7122(a).

Member Abbott, dissenting:

I cannot join my colleagues in their conclusion that the Authority does not have jurisdiction to resolve the exceptions before us.

Without a doubt, Congress intended for Title 38 (professional medical) employees to be treated differently when it comes to appealing disciplinary actions concerning medical competency, negligence, etc. However, I do not agree with my colleagues' interpretation of § 7121(f) of the Federal Service Labor-Management Relations Statute.[1]

Sentence 2 of § 7121(f) provides that "matters similar to those covered under sections 4303 [performance-based actions] and 7512 [discipline as here] . . . which arise under other personnel systems [e.g. Title 38] and which an aggrieved employee has raised under the negotiated grievance procedure [as here], judicial review of an arbitrator's award ***may be*** obtained in the same manner and on the same basis as could be obtained . . . under applicable appellate procedures." The language in Sentence 2, which makes judicial review optional—"judicial review . . . ***may be*** obtained"—in disciplinary matters arising in "other personnel systems," stands in stark contrast with the language in Sentence 1, which makes judicial review mandatory—"judicial review ***shall*** apply"—in disciplinary matters challenged under a negotiated grievance procedure. This distinction has to mean something.[2] A plain reading indicates that in matters arising out of "other personnel systems," judicial review is an option, not a requirement, as is the case of matters arising out of Sentence 1.

Thus, if judicial review is not a requirement then there is no other basis upon which to conclude that the Authority does ***not*** have jurisdiction to review an arbitrator's award arising out of an "other personnel system" (other than the Authority's own preference to not assume jurisdiction). Therefore, while it may be true that "[t]he Authority has not held that, if the MSPB lacks jurisdiction over a claim, then the Authority *must* have jurisdiction,"[3] that is not the proper question. The ultimate question is whether the Authority ***does*** or ***does not*** have jurisdiction.

As explained above, there is no preemption of Authority jurisdiction to be found in Sentence 2 of § 7121(f). Here, we have but one more example where the Authority has made an incorrect (and long-standing) statutory interpretation, which is "support[ed] [by nothing more] than the Authority's own repetition of it."[4]

The majority's choice to not recognize our jurisdiction, under these circumstances, leaves the Agency with no avenue to challenge the Arbitrator's purportedly erroneous determination that there was no "just cause" to discipline the grievant. This is no small matter. In past decisions, cited by my colleagues, the Authority has admitted to this unreasonable result.[5] I do not believe that Congress intended to give arbitrators final, unreviewable say as to what discipline is and is not "just," especially when that discipline arises out of Title 38 discipline concerning medical competency, negligence, etc.

I would conclude that there is no statutory exclusion and that the Authority has jurisdiction.

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[1] 5 U.S.C. § 7121(f).

[2] *See Bonner v. U.S. Dep't of VA*, 477 F.3d 1343, 1346-48 (Fed. Cir. 2007) (discussing "clear" distinctions between Sentences 1 and 2 of 7121(f) and distinguishing the circumstances in which Title 38 employees are, and the circumstances in which they are not, treated differently from Title 5 employees).

[3] Majority at 4.

[4] *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 501, 503 (2018) (Member DuBester dissenting) (citing *GSA, E. Distrib. Ctr., Burlington, N.J.*, 68 FLRA 70, 80 (2014) (Dissenting Opinion of Member Pizzella)) (rejecting the notion that there is no distinction between the terms "conditions of employment" and "working conditions" in 5 U.S.C. § 7103(a)(14)).

[5] Majority at 4 (citing *U.S. Dep't of VA, Med. Ctr., Newington, Conn.*, 53 FLRA 440, 443 (1997)).