

70 FLRA No. 177

UNITED STATES
DEPARTMENT OF LABOR
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 12
(Union)

0-AR-5314

DECISION

October 17, 2018

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

I. Statement of the Case

The issue in this case is whether a student intern (the grievant) serving under a term appointment may grieve the Agency's decision not to convert her to a permanent position at the end of her appointment. Although Arbitrator Salvatore J. Arrigo found that the Agency had violated the grievant's contractual and statutory due-process rights in processing her "termination,"¹ we find that the Arbitrator lacked jurisdiction to resolve the grievance in the first place. And we take this opportunity to clarify that, like probationary employees, term appointees and similar time-limited appointees may not file grievances challenging an agency's decision concerning extending, converting, or ending their employment.

II. Background and Arbitrator's Award

In June 2010, the Agency appointed the grievant to an excepted-service intern position under its Student Temporary Employment Program (STEP).² The parties entered into an agreement (the STEP agreement), which stated that the grievant's appointment was a temporary appointment, not to exceed one year, but that the Agency could extend her appointment in one-year increments through the completion of her academic program, if she

continued to fulfill certain academic criteria.³ As relevant here, the STEP agreement advised that the grievant must maintain a 2.0 grade-point average (GPA) in her academic courses,⁴ and that her "appointment will be terminated if [she did] not maintain eligibility as a student in good academic standing."⁵ Consistent with OPM regulations,⁶ the STEP agreement further stated that the grievant would "not acquire competitive status or eligibility for noncompetitive conversion to a term, career, or career-conditional appointment" upon completion of her internship.⁷

In September 2011, the grievant informed the Agency that her GPA had fallen below 2.0 during the spring 2011 semester. The Agency did not terminate the grievant. Thereafter, she maintained a GPA above 2.0.

In May 2012, OPM issued regulations implementing the Pathways program, which replaced STEP.⁸ The Agency converted the grievant from a STEP intern to a Pathways intern under an excepted-service appointment.⁹ As with STEP, the parties entered into an agreement (the Pathways agreement), which provided a not-to-exceed date for the grievant's appointment and stated that she "ha[d] no entitlement to conversion to a term or permanent position upon completion of [her] internship."¹⁰ Consistent with OPM regulations,¹¹ the Pathways agreement further stated that the duration of the grievant's appointment was for a "trial period,"¹² but that the Agency had the option

³ Exceptions, Union Ex. 1, Statement of Conditions for STEP (2010 STEP Agreement) at 1; Exceptions, Agency Ex. 3, Standard Form 50, effective date June 6, 2010 (2010 SF-50) at 1 ("Temporary employees serve under appointments limited to [one]-year or less and are subject to termination at any time without use of adverse action or reduction-in-force procedures.").

⁴ 2010 STEP Agreement at 1; *see also* Award at 2.

⁵ 2010 STEP Agreement at 3.

⁶ *See* 5 C.F.R. § 213.3202(a)(10)(iii) (2010).

⁷ 2010 STEP Agreement at 2; *see also* 2010 SF-50 ("A temporary appointment does not confer eligibility to be promoted or reassigned to other positions, or ability to be noncompetitively converted to [a] career-conditional appointment.").

⁸ *See* Excepted Service, Career and Career-Conditional Employment; and Pathways Programs, 77 Fed. Reg. 28194, 28215 (May 11, 2012) (creating new Schedule D Pathways Program in 5 C.F.R. § 362.101); Exceptions, Union Ex. 6 at 1-44.

⁹ Award at 3.

¹⁰ Exceptions, Agency Ex. 5, 2012, Pathways Intern Participant Agreement (2012 Pathways Agreement) at 3; *see* Award at 3.

¹¹ 5 C.F.R. § 362.107(f) (stating that "service in a Pathways Program confers no right to further employment in either the competitive or excepted service" upon completion of the program).

¹² 2012 Pathways Agreement at 2.

¹ Award at 9.

² *See* 5 C.F.R. § 213.3202(a) (2010).

to noncompetitively convert her to a permanent position upon her successful completion of the program.¹³

In May 2016, the grievant received her associate's degree, and her student status ended. On September 9, 2016, the Agency informed the grievant that it had decided not to convert her to a permanent position and that her Pathways appointment would expire two weeks later.¹⁴

The Union filed a grievance challenging the Agency's decision not to convert the grievant to a permanent position, and the grievance went to arbitration. At arbitration, the Union argued that the Agency *effectively* converted the grievant from a STEP intern to a "vested federal employee" by failing to terminate her once her GPA fell below 2.0, back in 2011.¹⁵ The Union further argued that the Agency's failure to *officially* convert the grievant to a permanent position once her student status ended constituted a "summary removal" that denied the grievant statutory and contractual due-process rights.¹⁶

In an award dated August 15, 2017, the Arbitrator found that the STEP and Pathways agreements state that interns are required to maintain at least a 2.0 GPA or their appointments "will be terminated."¹⁷ The Arbitrator found that, under those terms, the Agency was required to "terminate the grievant when her GPA fell below 2.0, and its failure to do so and, rather, retain the grievant, culminated in her becoming a regular employee."¹⁸ The Arbitrator also found that the Agency violated the grievant's contractual and statutory rights to due process when it terminated her. As remedies, the Arbitrator directed the Agency to reinstate the grievant and provide her backpay, interest, and lost benefits.¹⁹

On September 14, 2017, the Agency filed exceptions to the award and, on October 16, 2017, the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusion: This dispute is not grievable or arbitrable as a matter of law.

The Agency argues that the award is contrary to law but does not specifically challenge the arbitrability of the grievance.²⁰ However, the award "cannot stand if [the arbitrator] lacked jurisdiction to resolve the [grievance] in the first place."²¹ As the Authority may evaluate an arbitrator's substantive-arbitrability determination *sua sponte*,²² we first consider whether this dispute was grievable or arbitrable.²³

The Union grieved, as relevant here, whether the Agency improperly denied the grievant her statutory due-process rights when it chose not to convert her to a permanent position.²⁴ In enacting the Civil Service Reform Act (CSRA), Congress granted agencies the statutory right to terminate certain individuals without following the due-process procedures set forth in 5 U.S.C. §§ 4303 and 7512. For example, Congress granted agencies the statutory right to terminate probationary employees with minimal due process.²⁵ And, in *U.S. DOJ, INS v. FLRA (INS)*,²⁶ the U.S. Court of Appeals for the D.C. Circuit (the D.C. Circuit) concluded that allowing probationary employees to challenge adverse actions through arbitration would "undermine[] the scheme Congress envisioned when it excluded probationary employees from [5 U.S.C. §§] 4303 and 7513."²⁷ The court found that giving arbitrators the power to reinstate probationary employees through the grievance process would be "inconsistent with OPM's regulations" and would "usurp[] the authority Congress conferred on OPM" to issue rules to help implement the CSRA.²⁸ Since that decision, the Authority has repeatedly held that a grievance concerning the termination of a probationary

¹³ See *id.* at 3; Exceptions, Agency Ex. 4, Standard Form 50, effective date November 4, 2012 (2012 SF-50) at 1; see also 5 C.F.R. §§ 213.3402, 362.107(a).

¹⁴ Exceptions, Joint Ex. 2 at 1.

¹⁵ See Exceptions, Ex. 2, Union's Post-Hr'g Br. at 15.

¹⁶ *Id.*

¹⁷ Award at 7.

¹⁸ *Id.* at 9.

¹⁹ *Id.*

²⁰ Exceptions Br. at 10-16.

²¹ *U.S. DOL, Bureau of Labor Statistics*, 66 FLRA 282, 284 (2011) (*Labor*).

²² *E.g., U.S. Dep't of HUD*, 70 FLRA 605, 607 (2018) (considering *sua sponte* whether arbitrator had subject-matter jurisdiction over a grievance); see also *Labor*, 66 FLRA at 284 (considering whether arbitrator had subject-matter jurisdiction to resolve a grievance challenging the termination of a probationary employee).

²³ Where, as here, the issue concerns whether the arbitrator's substantive-arbitrability determination is contrary to law, the Authority reviews the arbitrator's determination *de novo*. See *Fraternal Order of Police, N.J. Lodge 173*, 58 FLRA 384, 385-86 (2003).

²⁴ Exceptions, Ex. 2, Union's Post-Hr'g Br. at 5-6.

²⁵ 5 U.S.C. §§ 4303(f), 7511(a)(1).

²⁶ 709 F.2d 724 (D.C. Cir. 1983).

²⁷ *Id.* at 728-29.

²⁸ *Id.* at 728-30.

employee is not substantively grievable or arbitrable as a matter law.²⁹

With the foregoing principles in mind, we consider whether a dispute over an agency's decision not to convert an intern to a permanent position upon the expiration of her term appointment is substantively grievable or arbitrable.³⁰ The Authority has previously noted that OPM regulations "specifically exclude from the [definition of adverse] actions set forth in [5 U.S.C. §§] 4303 and 7512 the termination of an appointment on an expiration date if the date was specified as a condition of employment at the time the appointment was made."³¹ Consistent with those regulations, the U.S. Court of Appeals for the Federal Circuit and the Merit Systems Protection Board (MSPB) have held that an agency's decision not to convert an intern to a permanent position upon the expiration of the intern's term appointment was not an adverse action appealable to the MSPB.³²

Here, it is undisputed that the Agency appointed the grievant to an intern position under a term appointment not to exceed a certain date.³³ Therefore,

²⁹ *NTEU, Chapter 103*, 66 FLRA 416, 418 (2011) (citing *Labor*, 66 FLRA at 284); *GSA, Region 2, N.Y.C., N.Y.*, 58 FLRA 588, 589 (2003); *AFGE, Local 2006*, 58 FLRA 297, 298 (2003); *U.S. Dep't of the Air Force, Nellis Air Force Base, Las Vegas, Nev.*, 46 FLRA 1323, 1325-27 (1993); *U.S. DOL, Labor-Mgmt. Serv. Admin., Cleveland, Ohio*, 13 FLRA 677, 678 (1984).

³⁰ *U.S. DOL*, 68 FLRA 927, 927 (2015) (*DOL*) (Member Pizzella concurring).

³¹ *Id.* (quoting *Veterans Admin.*, 24 FLRA 447, 447 n.1 (1986)); see 5 C.F.R. §§ 432.102(b)(14), 752.401(b)(11).

³² See *Lee v. MSPB*, 857 F.3d 874, 875 (Fed. Cir. 2017) (finding that an intern serving under a series of term appointments could not appeal the agency's decision not to convert her to a permanent position upon the completion of her internship); *Rocha v. MSPB*, 688 F.3d 1307, 1311 (Fed. Cir. 2012) (finding that an intern serving under a term appointment "had no right to further federal employment when his [internship] appointment ended" and the agency's decision not to convert him to a permanent position was not an "adverse action" appealable to the MSPB); see also *Scull v. DHS*, 113 M.S.P.R. 287, 290 (2010) ("The termination of an appointment on the expiration date specified as a basic condition of employment at the time the appointment was made simply carries out the terms of the appointment; it does not constitute an adverse act appealable to the [MSPB] . . ."), *aff'd*, 515 F. App'x 885 (Fed. Cir. 2013); *Endermuhle v. Dep't of the Treasury*, 89 M.S.P.R. 495, 498 (2001) ("The Board has consistently held that when an expiration date of an appointment is specified as a basic condition of employment, the expiration of the appointment is not an adverse action appealable to the Board.").

³³ 2010 STEP Agreement at 1 ("This student temporary appointment is for a period of time not-to-exceed the date specified above. As long as you continue to meet the definition of a student . . . , your appointment may be extended in one[-]year increments."); 2012 Pathways Agreement at 1

the Agency's decision not to convert the grievant to a permanent position upon the expiration of her term appointment was not an adverse action appealable to MSPB.³⁴ In that way, the grievant here is analogous to the probationary employees considered by the D.C. Circuit in *INS*. In that decision, the D.C. Circuit examined probationary employees' ineligibility for most statutory due-process protections to determine those employees' rights to challenge their terminations under a negotiated grievance procedure. The D.C. Circuit found that such challenges were not grievable or arbitrable because "[a] grievance/arbitration procedure entails the same type of after-the-fact review and limitation on an agency's decision as do the statutory appeals procedures."³⁵

For the same reasons that disputes relating to the termination of probationary employees are not grievable or arbitrable, term appointees – and similar time-limited appointees – may not challenge, through a negotiated grievance procedure, an agency's determination not to convert them to a permanent position upon the expiration of their term appointment. To hold otherwise would give arbitrators the power to grant an entirely new class of rights to term appointees that neither OPM nor Congress intended them to have.³⁶ This would fundamentally change the nature of term appointments like those in the Pathways program.³⁷ Congress did not give arbitrators the power to grant permanent-employee status to term appointees like the grievant here. Therefore, we conclude that this dispute is not grievable or arbitrable as a matter of law, and we set aside the award.³⁸

IV. Decision

We set aside the award.

(noting not-to-exceed date); Exceptions, Ag. Ex. 6, 2015 Pathways Intern Participant Agreement at 1 (noting program end date); see also 2010 SF-50 at 1 ("Temporary employees serve under appointments limited to [one]-year or less and are subject to termination at any time without use of adverse action or reduction-in-force procedures."); 2012 SF-50 at 1 ("The duration of a Pathways appointment . . . is a trial period.").

³³ *INS*, 709 F.2d at 729-30.

³⁴ See *DOL*, 68 FLRA at 929 (Member Pizzella concurring).

³⁵ *INS*, 709 F.2d at 729-30.

³⁶ See *id.*

³⁷ 5 C.F.R. § 362.107(f) ("Though Pathways Participants are eligible for noncompetitive conversion to the competitive service upon successful completion of their [p]rogram and any other applicable conversion requirements, service in a Pathways Program confers no right to further employment in either the competitive or excepted service. An agency wishing to convert a Pathways [p]articipant must therefore execute the required actions to do so." (emphasis added)).

³⁸ Because we set aside the award on this basis, we find it unnecessary to resolve the parties' remaining arguments.

Member DuBester, dissenting:

Like the majority, I would set aside the award. However, I would do so for different reasons. In my view, the Arbitrator's award is contrary to law because it is inconsistent with OPM regulations.

The Arbitrator effectively held that, when the Agency failed to discharge the grievant after her GPA did not meet STEP's requirements, she automatically became a "regular employee."¹ But the Arbitrator ignores OPM's regulations governing STEP. At the time of her purported conversion in the spring of 2011, those regulations explicitly stated that "[s]tudents are not eligible for non-competitive conversion to . . . career, or career-conditional appointments."² Indeed, the grievant acknowledged this prohibition when she entered STEP in 2010.³ Moreover, the Arbitrator cites no legal authority for the proposition that the Agency's act of omission could convert the grievant to a career appointment, notwithstanding OPM regulations to the contrary.⁴ On this record, I would find the award contrary to law.

However, I strongly disagree with the majority's decision that the Arbitrator does not have jurisdiction. The grievance in this case indisputably satisfies the definition of "grievance" in § 7103(a)(9)(A) of the Statute.⁵ Under that section, a "grievance" is "any complaint by any employee concerning any matter relating to the employment of the employee."⁶

Further, the majority's claim that interns are analogous to probationary employees, and should have their grievance rights similarly restricted, is flatly inconsistent with the judicial precedent upon which the majority relies.⁷ If that precedent, the *DOJ* case, makes any one thing clear, it is that Congress placed probationary employees in a special category "[T]he whole point of *DOJ* . . . [is] that Congress in the CSRA . . . affirmatively preserved agencies' right to fire probationary employees with minimal procedural obstacles."⁸ To rule otherwise "would eviscerate Congress's intention that collective bargaining not

supplement probationers' existing procedural protections."⁹

Interns, like other term-limited employees, are completely different. There is no comparable legislative history focusing on these employees. In addition, these employees have appointments that expire on a date specified as a condition of their employment at the time their appointments are made. The majority's conclusion, based on a faulty analogy, is therefore baseless.

For these reasons, I dissent from the majority's disposition of the Union's exceptions.

¹ Award at 8.

² 5 C.F.R. § 213.3202(a)(10)(iii).

³ Exceptions, Union Ex. 1, 2010 STEP Agreement at 2.

⁴ Award at 8-9.

⁵ 5 U.S.C. § 7103(a)(9)(A).

⁶ *Id.*

⁷ Majority at 4 (citing and discussing *U.S. DOJ, INS v. FLRA*, 709 F.2d 724 (D.C. Cir. 1983) (*DOJ*)).

⁸ *NTEU v. FLRA*, 848 F.2d 1273, 1276 (D.C. Cir. 1988) (discussing *DOJ*, 709 F.2d at 729); *see also id.* at 1275 ("Congress affirmatively intended agencies to retain the power to summarily terminate probationary employees . . . with only written notice and a brief statement of reasons.").

⁹ *Id.* at 1276.