

71 FLRA No. 136

UNITED STATES  
DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 476  
(Union)

0-AR-5551

DECISION

April 23, 2020

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

Decision by Member Abbott for the Authority

**I. Statement of the Case**

In this case, we emphasize that, to determine whether the Authority lacks jurisdiction to review a party’s exceptions under § 7122(a) of the Federal Service Labor-Management Relations Statute (Statute), the Authority will look to the claim advanced at arbitration.<sup>1</sup>

The Agency filed exceptions to an award by Arbitrator Blanca E. Torres in which she found that the Agency did not have just cause to remove the grievant and that the grievant’s removal was based on retaliation for protected activity. For the reasons that follow, we find that the Authority lacks jurisdiction under § 7122(a) of the Statute. Accordingly, we dismiss the Agency’s exceptions.

**II. Background and Arbitrator’s Award**

In 2015, the grievant filed a complaint with the Equal Employment Opportunity (EEO) Commission alleging harassment by a supervisor. After filing her complaint, she was assigned to work for a different supervisor. Over the course of several months, the Agency progressively disciplined the grievant for a series

of instances of misconduct. The Agency eventually proposed removal and the deciding official sustained the charges of failure to follow instructions and insubordination and removed the grievant.

The Union grieved the removal and invoked arbitration. The Arbitrator framed the issues as:

Whether the grievant was discharged for just and sufficient cause. If not, what shall be the remedy?  
Whether the grievant’s discharge was based on retaliation for protected EEO activity under Title VII. If so, what shall be the remedy?<sup>2</sup>

The Arbitrator concluded that the record did not support any just or sufficient cause for the adverse action and that the grievant proved that her discharge was based on retaliation for filing an EEO complaint. The Arbitrator set aside the adverse action and ordered reinstatement and backpay.

The Agency filed exceptions to the award on October 10, 2019. The Union filed an opposition to the exceptions on November 27, 2019.<sup>3</sup>

**III. Order to Show Cause**

After receiving the Agency’s exceptions, the Authority’s Office of Case Intake and Publication issued an order directing the Agency to show cause why the Authority should not dismiss its exceptions for lack of jurisdiction.<sup>4</sup>

In response, the Agency argues that this case is properly before the Authority because “[a]lthough the arbitration hearing concerned the removal of the [g]rievant,” the Agency is not challenging the Arbitrator’s factual or legal determinations, but her jurisdiction to hear the grievance under Executive Order

<sup>1</sup> 5 U.S.C. § 7122(a).

<sup>2</sup> Award at 1.

<sup>3</sup> The Union filed a request for an extension of time to respond to the Agency’s exceptions on October 31, 2019. On November 1, 2019, the Authority’s Office of Case Intake and Publication granted an extension until November 29, 2019. Thus, the Union’s opposition is timely.

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

(EO) 13,839.<sup>5</sup> More specifically, the Agency contends that because its exceptions “are based only on whether the Arbitrator had jurisdiction to hear the grievance based on EO 13,839,”<sup>6</sup> and agencies have been directed to bring their claims regarding the Executive Orders to the Authority,<sup>7</sup> that neither the Merit Systems Protection Board (MSPB) nor the United States Court of Appeals for the Federal Circuit (Federal Circuit) can hear its claim regarding whether EO 13839 is applicable to this matter.<sup>8</sup> The Agency also states that it is challenging the Arbitrator’s remedies based on the doctrine of sovereign immunity, which it maintains “is a jurisdictional question.”<sup>9</sup>

#### **IV. Analysis and Conclusion: The Authority lacks jurisdiction to resolve the Agency’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.<sup>10</sup> Matters described in § 7121(f) include serious adverse actions, such as removals, that are covered under 5 U.S.C. § 7512.<sup>11</sup> Such matters are appropriately reviewed by the MSPB and ultimately the United States Court of Appeals for the Federal Circuit.<sup>12</sup>

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.<sup>13</sup> In making that determination, the Authority has long held that it 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 United States Court of Appeals for the Federal Circuit.<sup>14</sup>

Here, the Agency argues that the Authority has jurisdiction because the Agency’s exceptions concern EO 13839, and the Agency asserts that these arguments are not reviewable by the MSPB or the Federal Circuit. However, the Agency’s argument is entirely based on the claims it is now advancing to the Authority. As noted above, the relevant inquiry for purposes of determining jurisdiction is whether the claim advanced at arbitration is reviewable by the MSPB or Federal Circuit.<sup>15</sup> In this case, the issues before the Arbitrator were whether the grievant’s removal was for just and sufficient cause and whether her removal was based on retaliation for protected activity.<sup>16</sup>

<sup>5</sup> Resp. to Order at 4; *see also* Exec. Order No. 13,839, 83 Fed. Reg. 25,343, 25,344 (May 25, 2018) (stating that “[w]henver reasonable in view of the particular circumstances, agency heads shall endeavor to exclude from the application of any grievance procedures negotiated under section 7121 of title 5, United States Code, any dispute concerning decisions to remove any employee from Federal service for misconduct or unacceptable performance”). The Agency contends that because the parties’ collective-bargaining agreement expired subsequent to EO 13,839, EO 13,839 controls the dispute here and “stripped” the Arbitrator of “jurisdiction to hear the employee’s grievance.” Resp. to Order at 2.

<sup>6</sup> Resp. to Order at 2.

<sup>7</sup> *Id.* at 5 (citing *AFGE, AFL-CIO v. Trump*, 929 F.3d 748 (D.C. Cir. 2019)).

<sup>8</sup> *Id.* at 6-7.

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *U.S. Dep’t of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 533, 533 (2020) (VA); *see also* 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 section[ ] . . . 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 [MSPB].”).

<sup>11</sup> VA, 71 FLRA at 533-534.

<sup>12</sup> *Id.* at 534 (citing *AFGE, Local 491*, 63 FLRA 307, 308 (2009)); *see also Dwyer v. Dep’t of VA*, 107 M.S.P.R. 632, 634 (2008) (*Dwyer*) (stating that the MSPB has jurisdiction over removals and that the MSPB has repeatedly held that it has

jurisdiction in arbitration cases that include an allegation of reprisal for filing an EEO complaint).

<sup>13</sup> VA, 71 FLRA at 534 (citing *AFGE, Local 1013*, 60 FLRA 712, 713 (2005)).

<sup>14</sup> *Id.*; *see also U.S. Dep’t of the Interior, Bureau of Indian Affairs, Sw. Region, Albuquerque, N.M.*, 63 FLRA 2, 2-3 (2008) (dismissing the agency’s exceptions for lack of jurisdiction and rejecting its arguments that the arbitrator lacked jurisdiction to adjudicate the grievance and that the matter was not one the MSPB would consider reviewable); *Office & Prof’l Emps. Int’l Union, Local 268*, 55 FLRA 775, 776-77 (1999) (dismissing the union’s exceptions for lack of jurisdiction because the claim advanced at arbitration was one that would be reviewed by the MSPB).

<sup>15</sup> VA, 71 FLRA at 534; *see also U.S. Dep’t of Transp., FAA, Miami, Fla.*, 66 FLRA 876, 878 (2012) (“what matters for the purposes of the Authority’s jurisdiction is the nature of the claim advanced at arbitration”).

<sup>16</sup> Award at 1; *see also Dwyer*, 107 M.S.P.R. at 634 (stating that removals fall within the scope of the MSPB’s jurisdiction and that the “Board has repeatedly held in the context of arbitration cases that an allegation of reprisal for filing an EEO complaint is also recognized” as within its jurisdiction).

Therefore, the award relates to a matter described in § 7121(f) of the Statute.<sup>17</sup> Accordingly, we conclude that the Authority lacks jurisdiction to review the Agency's exceptions.<sup>18</sup>

**V. Decision**

We dismiss the Agency's exceptions.

**Member DuBester, concurring:**

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

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<sup>17</sup> *AFGE, Local 2145*, 62 FLRA 505, 507 (2008) (dismissing the union's exceptions for lack of jurisdiction because the issues before the arbitrator related to the grievant's removal).

<sup>18</sup> *U.S. Dep't of VA, Health Res. Ctr., Topeka, Kan.*, 71 FLRA 583, 584-85 (2020) (dismissing the agency's exceptions for lack of jurisdiction because the claims advanced at arbitration were inextricably intertwined with a removal that could have been reviewed by the MSPB and, on appeal, by the Federal Circuit); *Nat'l Archives & Records Admin.*, 70 FLRA 277, 278 (2017) (finding that the Authority lacked jurisdiction over the agency's exception because the claim the union advanced in arbitration related to a matter covered under § 7512).