

72 FLRA No. 15

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
POPLAR BLUFF, MISSOURI
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

0-AR-5647

DECISION

February 12, 2021

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

Decision by Member Abbott for the Authority

I. Statement of the Case

The Agency filed exceptions to Arbitrator Cary Morgen's procedural-arbitrability determination of a grievance contesting the removal of the grievant from federal employment. For the reasons that follow, we find that the Authority lacks jurisdiction under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute).¹ Accordingly, we dismiss the Agency's exception.

II. Background and Arbitrator's Award

The Agency removed the grievant from federal employment. The Union filed a grievance (the initial grievance) contesting the removal and invoked arbitration. However, no arbitrator was selected due to a dispute between the Agency and the Union regarding the arbitral selection procedures set forth in the parties' agreement. Thereafter, the Union filed two grievances concerning disputes over the selection of arbitrators in various cases, including the initial grievance.

Subsequently, the Union filed another grievance (the removal grievance) contesting the removal of the grievant from federal employment. Prior to hearing, the Arbitrator held a conference call with the parties where the Agency asserted threshold issues regarding arbitrability of the removal grievance, because it claimed the arbitral-selection grievance should be resolved first as it related to the removal grievance. The Union argued that the Arbitrator should only rule on the removal grievance and it was not for the Arbitrator to determine the relevancy of other arbitrations related to this proceeding. The Arbitrator requested briefs from the parties "on the narrow question of whether [she] should defer holding a [h]earing on the [removal] [g]rievance until after an [a]ward [was] issued in the [arbitral selection] matter."²

The Arbitrator determined that the removal grievance should not be deferred until a final award was issued in the arbitral-selection grievance, finding that no language in the parties' agreement, or "case law, statute, or arbitral precedent," precluded the Union from submitting the removal grievance which also concerned the removal action.³ The Arbitrator also rejected the Agency's assertion that the removal grievance was not "ripe" until the arbitral-selection grievance was adjudicated.⁴

The Agency filed an exception to the award on June 24, 2020. The Union filed an opposition to the exception on July 23, 2020.

III. Order to Show Cause

After receiving the Agency's exception, the Authority's Office of Case Intake and Publication issued a show-cause order, directing the Agency to demonstrate why the Authority should not dismiss its exception relating to an award pertaining to the removal of the grievant from the Agency for lack of jurisdiction under § 7122(a) of the Statute.⁵

In response, the Agency argues that this case is properly before the Authority because it claims that threshold arbitrability issues are "not sufficiently 'related to'" matters described in § 7121(f) of the Statute and, as such, jurisdiction is not precluded.⁶

² Award at 4.

³ *Id.* at 7.

⁴ *Id.*

⁵ Order to Show Cause at 1-2.

⁶ Response to Order at 1-2.

¹ 5 U.S.C. § 7122(a).

IV. Analysis and Conclusion: The Authority lacks jurisdiction to resolve the Agency's exception.

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.⁷ Matters described in § 7121(f) include adverse actions, such as removals, which are covered under 5 U.S.C. §§ 4303 or 7512.⁸ Such matters are appropriately reviewed by the Merit Systems Protections Board (MSPB) and ultimately the United States Court of Appeals for the Federal Circuit (Federal Circuit).⁹

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 § 7512.¹⁰ 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 Federal Circuit.¹¹

The Authority has found that arbitration awards resolving procedural issues regarding removal grievances are inextricably intertwined with removal matters.¹² Here, the Agency's procedural claims are inextricably intertwined with a removal and are, therefore, reviewable by the Federal Circuit rather than the Authority.¹³

Therefore, the award relates to a matter described in § 7121(f) of the Statute.¹⁴ Accordingly, we conclude that the Authority lacks jurisdiction to review the Agency's exception.¹⁵

V. Decision

We dismiss the Agency's exception.

⁷ 5 U.S.C. § 7122(a).

⁸ *AFGE, Local 933*, 71 FLRA 521, 521 (2020) (*Local 933*); *AFGE, Local 491*, 63 FLRA 307, 308 (2009) (*Local 491*).

⁹ *U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 533, 534 (2020) (citing *Local 491*, 63 FLRA at 308).

¹⁰ *Id.* (citing *AFGE, Local 1013*, 60 FLRA 712, 713 (2005)).

¹¹ *Id.*; *Local 933*, 71 FLRA at 521 (citing *Local 491*, 63 FLRA at 308); see also *Appleberry v. DHS*, 793 F.3d 1291, 1294-95 (Fed. Cir. 2015) (noting that the Federal Circuit had jurisdiction to review an arbitral determination of procedural arbitrability in a removal claim).

¹² *U.S. Dep't of the Interior, Bureau of Indian Affs., Sw. Region, Albuquerque, N.M.*, 63 FLRA 2, 3-4 (2008) (citing *AFGE, Local 1770*, 62 FLRA 503 (2008) (*Local 1770*) (grievance concerning whether grievant could bring removal action under parties' negotiated grievance procedure was inextricably intertwined with grievant's removal)); see also *Local 933*, 71 FLRA at 521 ("Here, because the exceptions concern a procedural arbitrability issue[,] . . . the Arbitrator's determination of the procedural issue is dispositive of the removal claim and is, therefore, inextricably intertwined with that claim."); *U.S. Dep't of the Army, Mil. Dist. of Wash.*, 35 FLRA 1272, 1275 (1990) (holding that a grievance which was denied for being untimely filed was "directly connected to and an integral part of the grievance over the removal of the grievant").

¹³ See, e.g., *U.S. Dep't of VA, VA Caribbean Healthcare Sys.*, 71 FLRA 887, 887 (2020) (citing *Local 933*, 71 FLRA at 521; *Local 491*, 63 FLRA at 308); *U.S. DOL*, 71 FLRA 682, 683 (2020); *Local 1770*, 62 FLRA at 504.

¹⁴ *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).

¹⁵ *U.S. Dep't of VA, Health Res. Ctr., Topeka, Kan.*, 71 FLRA 583, 584-85 (2020) (then-Member DuBester concurring) (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).

Chairman DuBester, concurring:

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