72 FLRA No. 18

UNITED STATES
DEPARTMENT OF TRANSPORTATION
MARITIME ADMINISTRATION
U.S. MERCHANT MARINE ACADEMY
KINGS PORT, NEW YORK
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3732
(Union)

0-AR-5650

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DECISION

February 22, 2021

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

I. Statement of the Case

In this case, we affirm that the Authority lacks jurisdiction over a grievance concerning a reassignment that was inextricably intertwined with a subsequent removal. This claim relates to a matter that could be reviewed by the Merit Systems Protection Board (MSPB) and, on appeal, by the United States Court of Appeals for the Federal Circuit.

The Agency filed an exception to an award by Arbitrator Janet M. Spencer, who found that the Agency lacked sufficient cause when it decided not to return a head soccer coach (the grievant) to coaching duties pending the completion of an investigation into potential misconduct. Because the award relates to a matter described in § 7121(f) of the Federal Service Labor-Management Relations Statute (the Statute),[1] we find that the Authority lacks jurisdiction to review the award under § 7122(a) of the Statute.[2] Therefore, we dismiss the Agency's exception.

II. Background and Arbitrator's Award

The grievant was the head coach of the Agency's men's soccer team. While the grievant was travelling on a bus with the team, a member of the team was attacked and sexually abused in a hazing incident that was later reported to the Agency. Following two internal investigations of the incident, the Department of Transportation's Office of Inspector General (OIG) launched a criminal investigation of the men's soccer program. Based on preliminary findings from the OIG, the Agency suspended the men's soccer program. The grievant was assigned to non-coaching duties and verbally instructed to have no contact with the team or potential recruits. Two weeks later, he was given a written directive to abide by the no-contact order.

While the investigation was still ongoing, the Agency reinstated the men's soccer team with a new interim coaching staff. The Union filed a grievance challenging the Agency's decision not to return the grievant to coaching duties once the soccer program was reinstated (the reassignment grievance). Based on reports that the grievant was communicating with the interim coaching staff and recruits, the Agency issued a second written no-contact directive. One month later, the OIG completed its report, which contained allegations that the grievant was responsible for creating a permissive – or even encouraging – environment for hazing and harassment. It further suggested that the grievant had violated the no-contact order by talking to recruits and that he had misused government funds by overordering meals for the team. After two subsequent internal investigations into the new allegations, the Agency removed the grievant.

The Union filed a second grievance challenging the removal. The grievances proceeded to arbitration together. The parties stipulated the issues as: (1) "[w]as the termination of employment of [the grievant] for just cause," and (2) "[w]as the bar of [the grievant] from soccer[-]coaching duties prior to his termination for just cause?"[3] In her analysis, the Arbitrator found sufficient evidence to establish that the grievant improperly handled meal orders and that he flagrantly violated the no-contact order. The Arbitrator also found, however, that the Agency lacked credible evidence to sustain the more serious allegations related to the bus incident and the team's hazing culture.

Based solely on the two grounds that she sustained, she concluded that the Agency did not have just cause to remove the grievant or to bar him from returning to coaching duties, and she reduced his removal to a reprimand and a 30-day suspension.

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

The Agency filed an exception to the award on June 30, 2020, and on July 10, 2020, the Union filed an opposition to the Agency's exception. The Agency's exception challenges only the Arbitrator's resolution of the reassignment grievance.

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

Because the arbitration involved a removal, 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 exception for lack of jurisdiction under § 7122(a) of the Statute.[4]

In its response, the Agency argues that the Authority has jurisdiction over the exception because the two grievances resolved at arbitration are distinct.[5] According to the Agency, the issue underlying the reassignment grievance predated the removal by a significant period of time and the two personnel actions were based on different reasons.[6]

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 serious adverse actions, such as removals,[8] that are covered under 5 U.S.C. §§ 4303 or 7512.[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 § 4303 or § 7512.[10] In making that determination, the Authority looks not to the outcome of the award, but to whether the claim advanced in arbitration is one that would be reviewed by the MSPB and, on appeal, by the United States Court of Appeals for the Federal Circuit.[11]

Here, the issue that the parties disputed at arbitration was whether the Agency had just cause for the two personnel actions taken against the grievant. And there is no dispute that one of those personnel actions was a removal. In its opposition, the Union argues that placing the grievant on non-coaching duty was a preliminary step in the disciplinary process that led to his subsequent removal, and that the resolution of the reassignment grievance was, therefore, inextricably intertwined with the resolution of the removal grievance.[12]

In support of this position, the Union cites two instances when the Authority has held that placing an employee on reduced duty pending an investigation was inextricably intertwined with the employee's subsequent removal.[13] In these decisions, the Authority held that a preliminary reassignment and a subsequent termination were inextricably intertwined when either (1) the two personnel actions were both the "consequence" of the same alleged misconduct,[14] or (2) when the reassignment was considered at arbitration as a factor in the removal issue.[15] Thus, even where the exception concerned a portion of the award that did not involve the removal itself, the interrelationship between the challenged agency actions necessitated a finding that the Authority lacked jurisdiction.[16]

The Agency disputes that the grievant's reassignment was a consequence of his alleged failure to

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[4] Order to Show Cause at 1-2.
[5] Resp. to Order (Resp.) at 2-4.
[6] *Id.* at 3-4.
[7] 5 U.S.C. § 7122(a).
[8] *Id.* § 7121(f).
[9] *Id.* §§ 4303, 7512.
[10] *U.S. Dep't of the Treasury, U.S. Customs Serv.*, 57 FLRA 805, 806 (2002) (*Customs Serv.*).
[11] *Id.*; *see also U.S. Dep't of the Interior, Bureau of Indian Affs.*, 65 FLRA 5, 7 (2010) (Member Beck dissenting) ("We recognize that our refusal to assert jurisdiction may leave the [a]gency without a forum to challenge the Arbitrator's award." (quoting *U.S. Dep't of VA, Med. Ctr., Newington, Conn.*, 53 FLRA 440, 443 (1997))); *U.S. Dep't of Com., Pat. & Trademark Off., Arlington, Va.*, 61 FLRA 476, 478 (2006) (noting that "[a]s a general matter, the Authority has previously recognized that, under the statutory scheme enacted by Congress, there may be some awards that are not reviewable at all").
[12] Opp'n at 6-7.
[13] *Id.* at 7.
[14] *U.S. DHS, U.S. CBP*, 66 FLRA 91, 93 (2011) (*Customs*) (Member Beck dissenting) (holding that grievance challenging assignment to desk duty pending an investigation was inextricably intertwined with grievance concerning removal because they were part of the same disciplinary process). The Agency attempts to distinguish *Customs* on the basis that "the Arbitrator recognized the Agency acted separately and for different reasons" when it reassigned the grievant as compared to when it removed the grievant. Resp. at 4. However, this characterization of the Arbitrator's findings is not supported by the award.
[15] *U.S. DOJ, Fed. BOP, Fed. Prison Camp Alderson, W. Va.*, 47 FLRA 572, 575 (1993) (holding that a reduced duty assignment was inextricably intertwined with a removal because the union challenged the reassignment as harmful error that constituted an "affirmative defense" on the removal issue). In this regard, we note that, here, the Arbitrator considered the grievant's lack of compliance with the conditions of the reassignment as one of the five specifications for his removal. Award at 7, 24.
[16] *Customs*, 66 FLRA at 93 ("We note [that] . . . to find otherwise would effectively allow the [excepting party] to litigate aspects of . . . the removal[] in multiple venues contrary to the policy objective of avoiding the multiplicity of litigation over one claim.").

supervise the team that contributed to his removal.[17] The Agency's argument—which frames the reassignment as an administrative, rather than disciplinary action[18]—is weakened by the Agency's failure to provide any rationale for removing a long-serving head coach with a successful record from coaching responsibilities or for prohibiting him from any contact with the team. Furthermore, the Agency's characterization of the action as unrelated to the investigation of the hazing incident is contradicted by its statements throughout the negotiated grievance process. For example, in the Agency's Step 1 grievance response, it stated, "the matter [of the soccer team] is under investigation by the [OIG], which has not yet issued its report. You have been assigned to other duties pending the completion of the investigation."[19] Moreover, in weighing whether the Agency had just cause for refusing to return the grievant to coaching duties once the soccer program was reinstated, the Arbitrator considered the same factual findings she used in evaluating the removal grievance.[20]

As the Agency, the Arbitrator, and the Union[21] treated the two personnel actions as related, we conclude that we lack jurisdiction, under § 7122(a), to review the Agency's exceptions.[22]

IV. Decision

We dismiss the Agency's exceptions.

[17] Resp. at 3.
[18] The Arbitrator determined that—contrary to the Agency's characterization—the reassignment was an adverse action requiring just cause. Award at 31.
[19] Exceptions, Attach. E, Union Ex. 18 (Union Ex. 18) at 4; *see also id.* at 9 ("I concur with Ms. White's decision to assign you to other duties than coaching soccer at the Academy until the OIG Report is completed. You have been assigned to other duties pending the completion of the investigation.").
[20] Award at 31.
[21] Union Ex. 18 at 13 ("if the coaches are reinstated pending the outcome of the OIG inquiry, it could be a reinstatement with conditions, e.g., an agreement that the conditional reinstatement would not impair the [U.S. Merchant Marine Academy's] ability to take action later if justified").
[22] *See Customs Serv.*, 57 FLRA at 806 (notwithstanding the parties' election to arbitrate probationary period issue separately and as a preliminary matter, the issue was "inextricably intertwined" with the removal, so the Authority lacked jurisdiction). Member Kiko notes that she shares Member Abbott's serious concerns with the Arbitrator's disregard for federal policies in place to protect victims of harassment and discrimination. She emphasizes that the role entrusted to coaches—as teachers and leaders of student athletes—requires a greater awareness of the safety and wellbeing of their charges, and it carries with it an affirmative duty to enforce anti-harassment policies. Member Kiko notes that agencies should act when supervisors have serious doubts about the ability of an employee to maintain a safe work environment—particularly in response to such an appalling incident—and the Arbitrator's indifference to this duty is troubling.

Member Abbott, concurring:

I agree that the Authority does not have jurisdiction in this matter.[1] I write separately, however, because this award runs counter to several mandates that have established the federal government as a model employer.[2]

Judicial and administrative bodies have, rightly and for many years, required the federal government to create and maintain an environment that is free from any form of harassment. Agencies spent endless hours, and taxpayer dollars, on training and awareness regarding harassment, establishing policies that are designed to prevent harassment, and establishing strict disciplinary procedures for violating such policies and the various anti-harassment laws, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, etc.[3] Enforcing these policies, agencies, and specifically their managers, are expected to deal with allegations of misconduct promptly and effectively when violations are brought to their attention.

Despite these clear requirements, the Arbitrator effectively ignores the Agency's failure to immediately address and correct the alleged, ongoing pattern of harassment and hostile work environment undisputedly permitted, if not encouraged, by the soccer coach. As noted above, managers are trained and expected to take prompt, remedial action to investigate, and while investigating, to take reasonable interim actions to insulate purported victims from the harasser.

Here, it was alleged that the coach permitted an environment of harassment. There were questions about his efficacy as a leader – the person responsible for teaching and training the student-athletes – but also his responsibility for demonstrating and enforcing what is acceptable behavior on the team. The allegations were not minor nor isolated.[4] They were serious, ongoing, and investigated by various offices, including the Office of Inspector General.[5]

From my perspective, many aspects of the Arbitrator's decision are lacking. Most noteworthy, though, is the Arbitrator's disregard of the harassing environment created by the grievant. I am even more troubled by the Arbitrator's indifferent concern about the effects the purported harassment had, or could have had, on the alleged victims – the student athletes. Although the student athletes are not parties to the collective bargaining agreement, an arbitrator is not free to ignore longstanding government-wide policies and laws that have been implemented to protect victims of harassment or those who reasonably allege patterns or incidents of harassment.

This is not a matter to be resolved by the Arbitrator's own sense of industrial justice.[6] The far more important issue includes the Agency's and Union's roles in the federal government's obligations to foster a harassment-free environment for all employees and persons who engage with federal agencies or employees.

[1] Similar to Chairman DuBester, I too initially struggled to find the matters inextricably intertwined. However, it is apparent to me that as matters progressed – the Agency imposed discipline, the Union filed a second grievance, and those grievances were consolidated – the matters became inextricably intertwined and could no longer be treated as distinct matters for purposes of determining whether § 7122(a) precludes our review of the matter.

[2] In the area of equal employment opportunity, the federal government strives to be a model employer. It is the stated policy of the federal government to provide equal employment opportunity to all persons and to prohibit discrimination in employment because of race, color, religion, sex, or national origin. 29 C.F.R. § 1614.101; *see also* Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301(b); Rehabilitation Act, 29 C.F.R. § 1614.203(b).

[3] The head of each agency is directed to exercise personal leadership in establishing, maintaining, and carrying out a continuing program designed to promote equal employment opportunity in every aspect of agency personnel policy and practice. 29 C.F.R. § 1614.102. Under the terms of this program, each agency, among other things, is to conduct a continuing campaign to eradicate every form of prejudice or discrimination based upon race, color, religion, sex, or national origin from the agency's personnel policies, practices, and working conditions, including action against employees who engage in discriminatory practices. In addition, each agency is to review, evaluate, and control managerial and supervisory performance in such manner as to ensure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity and to provide orientation, training, and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program. *Id.*

[4] In fact, the Arbitrator found two students to be credible when testifying regarding the September 2, 2016 incident. Award at 10.

[5] *Id.* at 4-5 & n.3.

[6] *U.S. DHS, U.S. CBP*, 71 FLRA 895, 896 (2020) (then-Member DuBester dissenting); *U.S. DHS, U.S. CBP*, 64 FLRA 916, 920 (2010); *U.S. Dep't of the Treasury, U.S. Mint, Denver, Colo.*, 60 FLRA 777, 779 (2005).

Chairman DuBester, dissenting:

I disagree that the Authority lacks jurisdiction to review the Arbitrator's decision regarding the Union's grievance challenging the Agency's failure to reinstate the grievant to his soccer coaching duties. In my view, the record does not compel dismissal of the Agency's exception to this ruling under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute).[1]

In reaching a contrary conclusion, the majority finds that the Authority is divested of its jurisdiction over this grievance because its resolution by the Arbitrator was "inextricably intertwined" with her resolution of the Union's grievance challenging the grievant's removal.[2] But this conclusion is not supported by either the record of this case or the Authority decisions upon which the majority relies.

In the wake of a significant hazing incident by senior soccer team members on the team bus, the Agency suspended the soccer program, and assigned the grievant to non-coaching duties, while it investigated the incident.[3] A year later, while the investigation was still pending, the Agency reinstated the soccer program but did not return the grievant to his coaching duties.[4] The Union filed a grievance alleging that the Agency's failure to reinstate the grievant to his coaching duties harmed the grievant's reputation and his ability to find work elsewhere.[5]

Upon completion of the investigation, the Agency removed the grievant from his employment based upon five specific charges. The Union separately grieved that action, and the parties consolidated the two grievances for a hearing before the Arbitrator.[6]

While I agree that the Agency's actions challenged in both grievances generally arose from the same incident, it does not necessarily follow that the Authority lacks jurisdiction to resolve the Union's first grievance. There is certainly no question that the Merit Systems Protection Board (MSPB) would lack jurisdiction to review the claim advanced in the Union's first grievance, which solely related to the Agency's failure to reinstate the grievant as a soccer coach.[7]

Moreover, I do not agree that the issues to be resolved in the Union's first grievance are "inexplicably intertwined" with the grievant's removal from employment. At the outset, it is clear that this case is distinguishable from our decision in *U.S. DOJ, Federal BOP, Federal Prison Camp, Alderson, West Virginia* (*FPC Alderson*),[8] a case upon which the majority relies. In *FPC Alderson*, we concluded that the issue of the grievant's home duty assignment was "clearly linked" to the issue of the grievant's removal because the Union claimed that the grievant's home duty assignment "constituted harmful error and a prohibited personnel practice which required 'reversal of the [a]gency's [removal] decision.'"[9]

Thus, while the Authority concluded that the Arbitrator's decision regarding the home duty assignment was "related" to the award regarding the grievant's removal for purposes of § 7122(a) of the Statute, it reached this conclusion only because the home duty assignment issue "was raised by the [u]nion as 'an affirmative defense' to the removal."[10] That is clearly not the case here.

Moreover, as noted by the Arbitrator, the grievant's removal was based upon five specific charges, while the Agency provided no explanation for its failure to reinstate him to his position as a soccer coach. While I see no grounds for disputing the Arbitrator's finding that the Agency did so "because it did not want him to perform the coaching duties,"[11] this critically distinguishes this case from *U.S. DHS, U.S. CBP* (*Customs*),[12] the other decision upon which the majority primarily relies.

In *Customs*, the Authority found that the agency's decision to place the employee on desk duty status was based upon the same "discourteous conduct" charge that formed the basis of the grievant's removal.[13] And solely on that basis, the Authority concluded that the two actions were "inextricably intertwined" because "to find otherwise would effectively allow the [a]gency to litigate aspects of one claim, the removal, in multiple venues contrary to the policy objective of avoiding the multiplicity of litigation over one claim."[14]

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[1] 5 U.S.C. § 7122(a).
[2] Majority at 3 (quoting *U.S. Dep't of the Treasury, U.S. Customs Serv.*, 57 FLRA 805, 806 (2002)).
[3] Award at 6.
[4] *Id.*
[5] Exceptions, Attach. E at 1.
[6] Award at 7-8.
[7] *See, e.g.*, *Dep't of VA, Med. Ctr., Richmond, Va.*, 65 FLRA 615, 617 (2011) (in determining whether an award relates to a matter described in § 7121(f) of the Statute, the Authority looks to "whether the claim advanced in arbitration is one reviewable by the MSPB, and, on appeal, by the Federal Circuit").
[8] 47 FLRA 572 (1993).
[9] *Id.* at 574-75.
[10] *Id.* at 575.
[11] Award at 31.
[12] 66 FLRA 91 (2011) (Member Beck dissenting).
[13] *Id.* at 93.
[14] *Id.* (citing *AFGE, Local 2986*, 51 FLRA 1549, 1554 (1996) (Member Armendariz dissenting)).

The instant case does not present the same circumstances. Here, the Arbitrator could have found that the Agency lacked sufficient cause to reinstate the grievant to his coaching duties at the time it made that decision, but that it had sufficient cause to ultimately remove him from employment upon its completion of the investigation. This is particularly true in light of the "limited evidence and argument presented" by the Agency regarding its failure to reinstate the grievant.[15] And unlike in *Customs*, where both challenged actions depended upon the validity of an identical charge, our consideration of the Agency's decision regarding the grievant's coaching duties would not give rise to a "multiplicity of litigation" over this claim.[16] It also would not create the "possibility of inconsistent . . . results" with respect to the Union's grievance challenging the grievant's termination.[17]

In sum, I reject the majority's assertion that we must cede jurisdiction over the Union's grievance concerning his reinstatement to coaching duties simply because the parties, and the Arbitrator, treated this action as "related" to the grievant's termination.[18] Instead, applying the narrow standard that governs this jurisdictional question to the particular circumstances of this case, I would find that these two matters were not "inextricably intertwined" so as to preclude the Authority from addressing the merits of this grievance. Accordingly, I would not dismiss the Agency's exception challenging the Arbitrator's decision on this grievance.

Accordingly, I dissent.

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[15] Award at 31. Indeed, as the majority notes, the Agency "fail[ed] to provide any rationale" for removing the grievant from his coaching duties. Majority at 4.
[16] *Customs*, 66 FLRA at 93.
[17] *U.S. Dep't of VA, Med. Ctr., Newington, Conn.*, 53 FLRA 440, 443 (1997).
[18] Majority at 5.