

72 FLRA No. 120

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3369
(Union)

and

SOCIAL SECURITY ADMINISTRATION
(Agency)

0-AR-5710

DECISION

January 14, 2022

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

Decision by Member Abbott for the Authority¹

I. Statement of the Case

In this case, we remind the federal labor relations community that, under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute),² the Authority lacks jurisdiction to review a supplemental award when it resolves a removal claim.

Arbitrator Brenda P. Strashun found that the grievant violated Agency policy and “deserved serious discipline” for those violations, but that the Agency did not have just cause for removing the grievant.³ Therefore, the Arbitrator directed the Agency to reinstate the grievant. Thereafter, the award was returned to the Arbitrator for clarification regarding whether the grievant would be eligible for the within-grade pay increases (WIGIs) that would have accrued between the date of termination and the date of reinstatement (the removal period). The Arbitrator subsequently found that the

¹ As expressed in *U.S. Marine Corps, Marine Corps Air Ground Combat Center, Twentynine Palms, California*, Member Abbott believes the Authority should issue all of its decisions in a gender-inclusive manner and establish policies that require parties to incorporate gender-neutral language in filings submitted to the Authority. As such, this decision is drafted in a gender-neutral fashion. 72 FLRA 473, 473 n.1 (2021) (Chairman DuBester dissenting on other grounds).

² 5 U.S.C. § 7122(a).

³ Merits Award at 25.

grievant did not meet the statutory prerequisites to be eligible for WIGIs covering the removal period.

The main question before us is whether the clarification award is inextricably intertwined with a removal even though the clarification award concerns the grievant’s entitlement to WIGIs. Because the clarification award resolves the underlying removal action, we find that the Authority lacks jurisdiction to review the award under § 7122(a) of the Statute.

II. Background and Arbitrator’s Award

As relevant here, the grievant was removed from employment for alleged violations of the Agency’s systems access policy (the policy). Thereafter, the Union filed a grievance asserting that the grievant was removed by the Agency without just cause. The parties were unable to resolve the grievance and the dispute proceeded to arbitration.

In the first decision, the Arbitrator found that the Agency did not have just cause for the grievant’s removal but the grievant deserved discipline for violating the policy. Consequently, the Arbitrator ordered that the Agency reinstate the grievant, but that the grievant forfeit all back pay and all benefits from the removal period.

The Agency reinstated the grievant at the same pay grade and step that the grievant had earned when terminated. The Agency rejected the Union’s argument that the grievant was entitled to the WIGIs the grievant could have earned if the grievant had worked during the removal period. The Union then invoked Article 25, Section 5.H of the parties’ agreement—which states that “[i]f the arbitration award is unclear to either party, the award shall be returned to the arbitrator for clarification”⁴—so that the Arbitrator could issue a clarification as to whether the award entitled the grievant to the WIGIs for the removal period. Following a hearing and submissions from both parties, the Arbitrator subsequently issued a clarification award, finding that the grievant did not meet the statutory prerequisites to be eligible for WIGIs covering the removal period.

The Union filed exceptions to this award on January 18, 2021 and on February, 22, 2021, the Agency filed an opposition to the exceptions.

III. Analysis and Conclusions: The Authority lacks jurisdiction to resolve the Union’s exceptions.

On March 30, 2021, the Authority issued an order directing the Union to show cause why its

⁴ Exceptions Br. at 3.

exceptions should not be dismissed for lack of jurisdiction under § 7122(a) of the Statute.⁵ In its response, the Union argues that the Authority has jurisdiction to resolve the exceptions because the clarification award solely concerns the grievant's entitlement to WIGIs.⁶ Therefore, because the clarification award does not concern a removal, the Union further argues that the Authority must exercise jurisdiction because the clarification award is contrary to law and the parties' agreement.⁷

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.⁸ Matters described in § 7121(f) include adverse actions, such as removals,⁹ that are covered under 5 U.S.C. §§ 4303 or 7512.¹⁰ 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 § 7512.¹¹ 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 Merit Systems Protection Board and, on appeal, by the U.S. Court of Appeals for the Federal Circuit.¹² Additionally, the Authority has previously held that it lacks jurisdiction under § 7122(a) of the Statute to review a supplemental award that resolves a removal claim by specifically providing remedies for an unlawful removal.¹³

Here, it is undisputed that the grievance concerns a removal¹⁴ and the Arbitrator found in the award that there was not just cause for removing the grievant.¹⁵ Thereafter, the Union sought a clarification from the Arbitrator to consider an outstanding issue—the grievant's entitlement to WIGIs—and resolve the Union's grievance.¹⁶ Accordingly, because the clarification award resolved the removal claim by finding that the grievant was not entitled to any WIGIs that would have accrued from the date of termination to the

date of reinstatement, the clarification award is related to a removal within the meaning of § 7122(a) of the Statute.¹⁷ Therefore, we conclude that the Authority lacks jurisdiction to review the Union's exceptions.

IV. Decision

We dismiss the Union's exceptions.

⁵ Order to Show Cause at 2.

⁶ Resp. to Order at 3-4.

⁷ *Id.* at 4-5.

⁸ 5 U.S.C. § 7122(a).

⁹ *Id.* § 7121(f).

¹⁰ *Id.* §§ 4303, 7512.

¹¹ *U.S. Dep't of Transp., Maritime Admin., U.S. Merch. Marine Acad., Kings Port, N.Y.*, 72 FLRA 97, 98 (2021).

¹² *Id.*

¹³ *U.S. Dep't of Transp., FAA*, 57 FLRA 580, 581 (2001) (*FAA*) (holding that the Authority lacks jurisdiction under § 7122(a) of the Statute to review a supplemental award when it resolves a removal claim by specifically providing remedies for an unlawful removal).

¹⁴ Clarification Award at 2.

¹⁵ *Id.*

¹⁶ *Id.* at 2-3.

¹⁷ See *AFGE, Loc. 1633*, 69 FLRA 637, 638 (2016) (finding that an arbitrator's interpretation of a settlement agreement related to a removal was inextricably intertwined with the original removal action because the settlement agreement resolved the removal); *AFGE, Loc. 2004*, 59 FLRA 572, 573 (2004) (finding that remedial relief in connection with § 7121(f) matters is inextricably intertwined with those matters); *FAA*, 57 FLRA at 581 (Authority lacked jurisdiction over exceptions to a "supplemental award [that] resolve[d] only the issue of remedies for the removal").

Chairman DuBester, concurring:

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