

**73 FLRA No. 4**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 2338  
(Union)

and

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

0-AR-5769

DECISION

May 26, 2022

Before the Authority: Ernest DuBester, Chairman, and  
Colleen Duffy Kiko and Susan Tsui Grundmann,  
Members

**I. Statement of the Case**

The Union filed exceptions to an award by Arbitrator Joseph V. Simeri finding that a grievance contesting the alleged involuntary resignation of the grievant from federal employment was not arbitrable. 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).<sup>1</sup> Accordingly, we dismiss the Union's exceptions.

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

On March 18, 2021,<sup>2</sup> the grievant submitted a "termination letter" to the Agency stating that

"[m]y last day of employment will be 26 March."<sup>3</sup> On May 20, the Union filed a grievance titled "[c]onstructive [r]esignation of [the grievant]."<sup>4</sup> According to the Union, the Agency violated the parties' agreement by "forcing [the grievant's] removal," and the Union asked the Agency to rescind the grievant's resignation.<sup>5</sup> The grievance was unresolved and submitted to arbitration.

The Agency submitted a motion to dismiss the grievance as untimely filed. The Arbitrator framed the issue as whether the Union timely filed the grievance.

Article 43, Section 7 of the parties' agreement states that "an employee and/or the Union shall present the grievance . . . within [thirty] calendar days of the date that the employee or Union became aware, or should have become aware, of the act or occurrence."<sup>6</sup> The Arbitrator determined that the grievance was untimely filed under this provision because the Union filed it more than thirty days after March 26—when the grievant's resignation took effect. On this basis, the Arbitrator dismissed the grievance.

The Union filed exceptions to the award on October 31.<sup>7</sup> The Agency filed an opposition to the exceptions on November 8.<sup>8</sup>

**III. Analysis and Conclusion: The Authority lacks jurisdiction to resolve the Union's exceptions.**

On March 10, 2022, the Authority's Office of Case Intake and Publication issued an order directing the Union to show cause why the Authority should not dismiss the exceptions for lack of jurisdiction because the award relates to a removal.<sup>9</sup> In a timely response to the order, the Union argues that the Authority has jurisdiction to review its exceptions because the grievance alleges an unfair labor practice (ULP). Specifically, the Union argues that the Authority should remand the award for a hearing on the merits of its claims that the Agency committed a ULP because, "[p]rior to any alleged resignation," the

<sup>1</sup> 5 U.S.C. § 7122(a).

<sup>2</sup> Unless otherwise noted, all dates hereafter occurred in 2021.

<sup>3</sup> Award at 3.

<sup>4</sup> Opp'n, Attach. 1, Agency's Motion to Dismiss at 23 (Grievance).

<sup>5</sup> *Id.*

<sup>6</sup> Award at 2; *see id.* at 4.

<sup>7</sup> The Union requested an expedited, abbreviated decision, and the Agency does not oppose this request. *See* Exceptions Br. at 27. We have determined that an expedited, abbreviated decision is not appropriate in this case and deny the Union's request. *See AFGE, Loc. 1148*, 70 FLRA 712, 713 n.8, 550 (2018) (then-Member DuBester concurring) (citing *AFGE, Nat'l INS Council*, 69 FLRA 549, 550 (2016)) (denying request for expedited, abbreviated decision).

<sup>8</sup> On November 4, the Union filed a "Motion for Leave" along with attachments seeking to clarify its service of the exceptions' attachments on the Agency. Because we find that the Authority lacks jurisdiction to review the Union's exceptions, we need not determine whether the Union properly served the attachments on the Agency. *See AFGE, Loc. 2004*, 59 FLRA 572, 573 n.2 (2004) (finding it unnecessary to address exceptions' timeliness where dismissing for lack of jurisdiction); *see also AFGE, Nat'l Joint Council of Food Inspection Locs.*, 64 FLRA 1116, 1118 n.2 (2010) (finding it unnecessary to address whether exception fulfilled regulatory requirements where Authority dismissed exception on other grounds).

<sup>9</sup> Order to Show Cause (Order) at 2.

“[A]gency interfered with the employee’s right to seek representation.”<sup>10</sup>

Under § 7122(a) of the Statute, the Authority lacks jurisdiction to review an arbitration award “relating to a matter described in [§] 7121(f) of [the Statute].”<sup>11</sup> The matters described in § 7121(f) are those “covered under [5 U.S.C. §§] 4303 and 7512,” and include removals.<sup>12</sup> The Authority has found that constructive removals are within the scope of §§ 4303 and 7512.<sup>13</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 § 4303 or § 7512 matter.<sup>14</sup> Further, the Authority has found that an arbitrator’s determination of arbitrability issues under a collective-bargaining agreement is inextricably intertwined with the removal action.<sup>15</sup>

Here, the claims advanced at arbitration, including the Union’s alleged ULP claims,<sup>16</sup> are inextricably intertwined with a constructive removal – a matter covered under § 4303 or § 7512 – that is reviewable by the U.S. Merit Systems Protection Board, and on appeal to the Federal Circuit rather than the Authority.<sup>17</sup> And the exceptions concern the Arbitrator’s determination that the grievance is not arbitrable under the parties’ negotiated grievance procedure. The Arbitrator’s arbitrability determination is dispositive of the removal claim and is, therefore, inextricably intertwined with that claim.<sup>18</sup> Accordingly, we conclude that the Authority lacks jurisdiction to review the Union’s exceptions.

#### IV. Decision

We dismiss the Union’s exceptions.

<sup>10</sup> Resp. to Order at 4 (internal quotations omitted).

<sup>11</sup> 5 U.S.C. § 7122(a).

<sup>12</sup> *Id.* at § 7121(f); *see, e.g., U.S. Dep’t of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 88, 89 (2021) (*VA Poplar Bluff*) (Chairman DuBester concurring) (citing *AFGE, Loc. 933*, 71 FLRA 521, 521 (2020); *AFGE, Loc. 491*, 63 FLRA 307, 308 (2009)).

<sup>13</sup> *AFGE, Loc. 2338*, 71 FLRA 1185, 1186 (2020) (*Local 2338*) (Member Abbott concurring) (finding that constructive removals are a type of adverse action covered under 5 U.S.C. §§ 4303 or 7512 (citing *U.S. Dep’t of Transp., FAA, Miami, Fla.*, 66 FLRA 876, 878 (2012) (recognizing that the U.S. Merit Systems Protection Board has jurisdiction over constructive removals))).

<sup>14</sup> *VA Poplar Bluff*, 72 FLRA at 89 (citing *U.S. Dep’t of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 533, 534 (2020)).

<sup>15</sup> *Id.* (citing *U.S. Dep’t of the Interior, Bureau of Indian Affs., Sw. Region, Albuquerque, N.M.*, 63 FLRA 2, 3 (2008)).

<sup>16</sup> We note that, contrary to the Union’s assertions, the claim advanced at arbitration does not appear to raise a ULP. The grievance makes general allegations and cites to various contractual provisions that the Agency allegedly violated, but does not reference the Statute or allege that the Agency violated any particular provision of the Statute. *See* Grievance at 1.

<sup>17</sup> *E.g., VA Poplar Bluff*, 72 FLRA at 89 (dismissing exceptions because the procedural-arbitrability matter was inextricably intertwined with a removal); *Local 2338*, 71 FLRA at 1186 (dismissing exceptions concerning involuntary removals).

<sup>18</sup> *VA Poplar Bluff*, 72 FLRA at 89; *Local 2338*, 71 FLRA at 1186.