FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C.

U.S. DEPARTMENT OF VETERANS AFFAIRSVETERANS AFFAIRS MEDICAL CENTERHAMPTON, VIRGINIARespondent

andAMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2328, AFL-CIO Charging Party — Case No. WA-CA-01-0150

Ruth L. November, EsquireFor the Respondent

Thomas F. Bianco, Esquire For the General Counsel

Before: WILLIAM B. DEVANEY Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. [1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq.,concerns Respondent's refused to comply with a final arbitration award which held that the Union was entitled to have an observer at NPSB [Nurse Professional Standards Board] hearings (G.C. Exh. 4[2]).

This case was initiated by a charge filed on December 7, 2000 (G.C. Exh. 1) which alleged violation of §§16(a)(1), (5) and (8) of the Statute. The Complaint and Notice of Hearing issued September 24, 2001 (G.C. Exh. 2); alleged violation only of §§16(a)(1) and (8) of the Statute; and set the hearing for January 9, 2002. On December 14, 2001, General Counsel filed, by facsimile mail, a Motion to Postpone Hearing indefinitely, to which neither Respondent nor the Charging Party (Union) objected and by Order dated December 19, 2001, the Hearing was indefinitely postponed; the pre-hearing conference, set for January 2, 2002, was canceled in view of General Counsel's Motion for Summary Judgment and the high probability that this matter would be determined on motion for summary judgment.

General Counsel's Motion for Summary Judgment and Brief in Support, each was dated and mailed on December 12, 2001; however, the Motion and Brief were not received until January 2, 2002. The Order postponing hearing had specifically provided that, ". . . because of the delay of mail following September 11, 2001 . . . the time for response will be 5 days after receipt of General Counsel's Motion for Summary Judgment."

Respondent certified that it received General Counsel's Motion for Summary Judgment on December 26, 2001, and on December 28, 2001, Respondent filed a Motion to Dismiss and Cross Motion for Summary Judgment, which was received on December 31, 2001.

FINDINGS

1. The American Federation of Government Employees, National Veterans Affairs Council of Locals (Council) is the exclusive representative of a unit of employees appropriate for collective bargaining at the Department of Veterans Affairs (hereinafter, "VA") (G.C. Exh. 3). American Federation of Government Employees, Local 2328, AFL-CIO (hereinafter, "Union") is an agent of the Council for the purpose of representing employees in the bargaining unit at the Hampton, VA Medical Center.

2. The Council and VA are parties to a collective bargaining agreement covering employees in the bargaining unit. (G.C. Exhs. 2, 3).

3. On July 5, 2000, Arbitrator Andree McKissick issued a Decision and Award in FMCS Case No. 99-15304 (Award) holding that the Respondent violated that agreement. (G.C. Exhs. 2, 3 and 4). The Award requires that Respondent allow the Union to have an observer present at Nurse Professional Standards Board hearings. (G.C. Exh. 4, p. 12).

4. On August 14, 2000, Respondent filed Exceptions to the Award.[3] General Counsel (". . . The exceptions were denied on the ground that they were not timely filed." (General Counsel's Brief in Support of Motion for Summary Judgment p.3)(hereinafter, "G.C. Brief") and Respondent (". . . Respondent filed exceptions to the award that were found to be untimely." (Respondent's Motion to Dismiss and Cross Motion for Summary Judgment, p. 2. Par. 6) (hereinafter, "Res. Motion") each assert that the Authority denied Respondent's exceptions as untimely filed or that the Authority found the exceptions to be untimely. Neither assertion is correct.[4] For reasons set forth in n.3, it seems clear that the exceptions were not timely filed; nevertheless, the Authority did not deny the exceptions on the ground that

they were not timely filed, as General Counsel asserted, nor found that Respondent's exceptions were untimely, as Respondent asserted. Rather, the Order of the Authority in Case No. 0-AR-3348, dated September 15, 2000, stated as follows:

"The Agency has requested that its exceptions to the award of Arbitrator Andree Y. McKissick in the above-captioned case be withdrawn. The request to withdraw is granted. The Authority will not take further action on the exceptions.

. . . ." (Emphasis supplied).

5. The Complaint alleged that, ". . . Respondent

has failed to perform the acts ordered by Arbitrator McKissick. . ." (Complaint, Par. 15) and Respondent by its Answer admitted that it had not complied with the Arbitrator's award (Answer, Par. 15)[Because, it asserts, it has no legal obligation to comply with the Award]. Respondent in its Motion states, ". . . Respondent did not implement the award." (Res. Motion, p. 2, Par. 7).

6. General Counsel asserts that, "There is no genuine issue as to any material fact in this case." (G.C. Brief, p. 4) and in its Motion, Respondent states, ". . . The Respondent agrees there is no issue of material fact . . . ." (Res. Motion, p. 3, Par. 18).

7. On May 7, 2001, Respondent's Under Secretary for Health determined, pursuant to 38 U.S.C. §7422(d), that the presence of a Union observer at Nurse Professional Standards Board hearings is a matter that concerns or arises under peer review and, therefore, is exempt from collective bargaining pursuant to 38 U.S.C. §7422(b) (G.C. Exh. 5).

8. The Award of July 5, 2000, became final on September 15, 2000, upon Respondent's withdrawal of its exceptions.

CONCLUSIONS

§22(b) of the Statute expressly states,

"(b) If no exception to an arbitrator's award is filed . . . the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. . . ."

Inasmuch as Respondent asked to withdraw the exceptions it had filed and the Authority, on September 15, 2000, granted the request to withdraw the exceptions, in legal effect, no exceptions were filed and the award of July 5, 2000, became final and binding on September 15, 2000, when the Authority granted withdrawal of the exceptions. For reasons set forth in n. 3, above, it would appear that Respondent's exceptions were not timely filed and, had Respondent not requested leave to withdraw them, and the Authority had not granted their withdrawal, its exceptions might have been dismissed because of not being timely filed [i.e., ". . . during the 30-day period beginning on the date the award is served on the party . . . ." (id.)], but whether its exceptions were, or were not, timely--which is unnecessary to decide--, it was Respondent's withdrawal of its exceptions that rendered the Award final and binding.

The Authority has made clear that,

". . . The Authority and the Courts have held that, under section 7122(b) of the Statute, an agency must take the action required by an arbitrator's award when that award becomes 'final and binding.' U.S. Department of Health and Human Services, Health Care Financing Administration, 35 FLRA 491, 494-495 (1990); Department of Health and Human Services, Social Security Administration, 41 FLRA 755, 765-766 (1991); Veterans Administration Central Office, Washington, D.C. and Veterans Administration Medical and Regional Office Center, Fargo, North Dakota, 27 FLRA 835, 838 (1987)(hereinafter, "VA Central Office"), aff'd sub nom., AFGE v. FLRA, 850 F.2d 782 (D.C. Cir. 1988).

Nevertheless, the Authority in VA Central Office, supra, held that where an arbitrator's award under a negotiated grievance procedure involves alleged misconduct subject to the provisions of Title 38, ". . . the Arbitrator's award . . . cannot be enforced . . . For the Authority to find a violation and order the Agency to comply with the award . . . would be to apply the Statute so as to supersede or override the provisions of 38 U.S.C. §4110. Such a result is barred by 38 U.S.C. §4119. We conclude that there is no basis under the Statute for enforcing compliance with the award." (VA Central Office, 27 FLRA at 840).

VA Central Office, supra, involved a staff registered nurse. The Center Director (Fargo) on February 21, 1984, appointed a Board of Investigation to inquire into certain alleged misconduct of the nurse. On March 1, 1984, the Board recommended her removal and the Director, following the Board's recommendation, recommended her removal. The nurse was entitled to request a hearing before a Disciplinary Board, under 38 U.S.C. §4110, before any action by the Medical Director. The nurse, on July 23, 1984, requested a hearing, which was held on October 23-24, 1984, and the Union, in May, 1984, filed a grievance under the negotiated grievance procedure. On May 20, 1985, while the parties awaited the decision of the Disciplinary Board, the Arbitrator held a hearing at which the Agency asserted that the Arbitrator lacked jurisdiction. On, or about, June 14, 1985, the Disciplinary Board recommended discharge and the Chief Medical Director on June 14, 1985, issued a letter of discharge, effective June 30, 1985. On August 20, 1985, the Arbitrator issued his award ordering, inter alia, that the nurse be reinstated. The agency filed an exception to the Arbitrator's award with the Authority asserting that the Arbitrator lacked jurisdiction and on December 13, 1985, the Authority dismissed the exceptions because it, ". . . is without jurisdiction to review the exception." (Veterans Administration Medical Center, Fargo, North Dakota, 20 FLRA 854, 856 (1985)[because the award relates to a matter described in §21(f) of the Statute and, under §22(a), exception to such an award may not be filed with the Authority]. No timely request for judicial review of the Award was made and the Award became final. When the Agency refused to comply with the Award the General Counsel issued a complaint alleging that the Agency violated the Statute by its refusal to comply with the Arbitrator's award. The Union filed a petition for review, to the Authority's decision and the United States Court of Appeals for the District of Columbia Circuit, sub nom., American Federation of Government Employees, AFL-CIO v. FLRA, 850 F.2d 782 (D.C. Cir. 1988), denied the Union petition for review and, in part, stated as follows:

". . . Although normally the FLRA will not permit a party to challenge an arbitrator's award collaterally in an unfair labor practice proceeding . . . it concluded that where the challenge is to the arbitrator's very jurisdiction--as opposed to his interpretation of a collective bargaining agreement--its usual approach is inappropriate. Then the Authority--abandoning its earlier position that section 4110 was not the exclusive means for review of a grievance and acquiescing in two circuit court opinions[2]--concluded that 38 U.S.C. §4110 provides the exclusive remedy for Kain to challenge her discharge. It relied, *inter alia*, on section 4119, part of the 1980 amendment to title 38 (the Veterans Administrative statute) . . . ." id. at 785)

2. *VA Medical Center, Northport, N.Y. v FLRA*, 732 F.2d 1128, 1131 (2d Cir. 1984); *VA Medical Center, Minneapolis, Minn. v. FLRA*, 705 F.2d 953, 956 (8th Cir. 1983).

. . .

"Subsequently, Congress, in the Civil Service Reform Act of 1978, extensively modified the civil service laws and added the FSLRA to title 5, arguably generating some ambiguity as to the continuing exclusivity of section 4110. . . . In 1980, however, Congress passed section 4119 which states explicitly that where title 5 is 'inconsistent with' title 38, the latter governs.

. . .

". . . Granted, the FLRA initially thought section 4110 was not the exclusive means to redress a grievance for VA employees covered by that section, even after the 1980 passage of section 4119, see *AFGE v. VA Medical Center, Minneapolis, Minnesota*, 4 F.L.R.A. 391 (1980), but the Authority, as we indicated, has since adopted the view of the Second and Eight Circuits that in light of section 4119, title 38's section 41110 is the only method for redressing grievances. See *VA v. AFGE*, 15 F.L.R.A. 948 (1984). (id. at 786).

. . .

"We conclude that we should follow the view of the Second and Eight Circuits and the Authority, and therefore the petition for review is

Denied." (id. at 787-788).

VA Central Office had involved a disciplinary action arising out of professional conduct and/or peer review which are specifically excluded from collective bargaining and any grievance procedure provided under a collective bargaining agreement by 38 U.S.C. §7422(b). In National Association of Government Employees Local R1-109 and U.S. Department of Veterans Affairs, Medical Center, Newington, Connecticut, 44 FLRA 356 (1992), the Authority held negotiable union proposals concerning procedures to be followed by Professional Standards Boards in reviewing their peers for promotion, over VA's assertion that the proposals infringed on the exclusive authority of the Secretary to prescribe regulations for promotion and advancement of hybrid VHA employees. On petition for Review, the United States Court of Appeals for the District of Columbia Circuit reversed and remanded, U.S. Department of Veterans Affairs v. FLRA, 9 F.3d 123 (D.C. Cir. 1993). Authority's decision on remand, National Association of Government Employees Local R1-109 and U.S. Department of Veterans Affairs Medical Center, Newington, Connecticut, 49 FLRA 622 (1994). In, Wisconsin Federation of Nurses and Health Professionals, Veterans Administration Staff Nurses Council, Local 5032 and U.S. Department of Veterans Affairs, Clement J. Zablocki Medical Center, Milwaukee,

Wisconsin, 47 FLRA 910 (1993), the Authority held that it was without jurisdiction to address issues pertaining to the Secretary's determination under title 38.

In, Department of Veterans Affairs, Veterans Affairs Medical Center, Jackson, Mississippi, 48 FLRA 787 (1993), the Authority held that VA violated §§16(a)(1) and (8) of the Statute by refusing to allow a union representative to represent an employee at a NPSB review proceeding. The Authority stated, in part, as follows:

". . . the Respondent asserts that it has prescribed regulations governing probationary terminations and, in doing so, has determined that employees have no entitlement to union representation at professional standards board proceedings. To the extent that the Respondent is arguing that its Agency regulations take precedence over the representation rights accorded to Federal employees in section 7114(a)(2)(B), we disagree. An agency cannot, through internal regulation, unilaterally limit the rights granted to bargaining unit employees by the Statute. . . .

Moreover, the representation rights created by section 7114(a)(2)(B) do not interfere with the Respondent's ability, pursuant to 38 U.S.C. § 7403, to summarily terminate probationary employees through peer reviews. The Supreme Court in Weingarten recognized that union representation at investigatory interviews or examinations could contribute to preventing unjust discipline. . . ." (id. at 794).

Following the decision of the United States Court of Appeals in U.S. Department of Veterans Affairs v. FLRA, supra, [9 F.3d 123 (D.C. Cir. 1993)], the Authority granted VA's Motion for reconsideration, reversed its prior decision and dismissed the complaint. The Authority stated, in part, as follows:

"We have decided to adhere to and will henceforth follow the court's decision in Veterans Affairs v. FLRA. Consistent with that decision, the Respondent is authorized to prescribe regulations governing, among other things, probationary peer review proceedings for nonhybrid employees without regard to the bargaining and representational rights and obligations set forth in the Statute. Also consistent with the court's decision, such regulations may override statutory rights other than those specifically referencing title 38 employees. Nothing in section 7114(a)(2)(B) of the Statute specifically references title 38 employees. Therefore, we reverse our finding in 48 FLRA 787 that the Respondent could not, by regulation, limit or override those rights by regulation.

"As noted previously, the Respondent has promulgated a regulation, VA Manual MP-5, Part II, Chapter 4.06(4), which precludes Union representation in probationary peer review hearings. The Respondent acted consistent with that regulation in refusing to permit Union representatives to participate in the disputed peer reviews. Accordingly, those actions do not constitute a violation of the Statute.

. . . . "(49 FLRA at 175).

Most recently, the Authority, in United States Department of Veterans Affairs, Veterans Affairs Medical Center, Asheville, North Carolina, 57 FLRA No. 137 (January 31, 2002) (hereinafter, "VA Asheville"), a case legally indistinguishable from the present case, where the agency's exceptions to an arbitration award were dismissed by the Authority as untimely, and the agency refused to comply with the arbitrator's award, the Authority dismissed the complaint for lack of jurisdiction stating, in part, as follows:

"Parties may raise arguments regarding the Authority's jurisdiction at any stage of the Authority's proceedings. *See United States Dep't of the Interior, Nat'l Park Serv., Golden Gate Nat'l Recreation Area, San Francisco, Cal.*, 55 FLRA 193, 195 (1999). As the Respondent's argument challenges the Authority's jurisdiction, it is properly raised here.

"Once the Secretary or designee has made a § 7422(d) determination concerning a matter, the Authority is deprived of jurisdiction over that matter. *See, e.g., Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Wash., D.C., 53 FLRA 822 (1997) (ULP case); Wis. Fed'n of Nurses & Health Prof'ls, Veterans Admin. Staff Nurses Council, Local 5032*, 47 FLRA 910, 913-14 (1993) (*Wis. Fed'n of Nurses*) (negotiability case). As the Under Secretary -- the Secretary's designee -- has made a § 7422(d) determination, the Authority lacks jurisdiction over this matter." (Slip Opinion at p. 8).

The Authority in n.6 also stated, in part, that,

". . . the plain language of § 7422(d) makes it clear that the Secretary decides issues of whether a matter or question concerns or arises out of the three identified subject matters, and the Secretary's decision as to such issues, whether or not made in the context of a regulation, is not itself subject to collective bargaining and may not be reviewed by any other agency, including the Authority." (id. at 9).

Here, the Under Secretary, on May 7, 2001 (G.C. Exh. 5) made a determination that presence of the Union observer at NPSB meetings concerned or arises out of peer review, pursuant to 38 U.S.C. §7422(b) and, pursuant to 38 U.S.C. §7422(d), the Secretary's determination of whether a matter arises under peer review is not subject to review by any other agency, i.e., as the Authority held, "Once the Secretary or designee has made a § 7422(d) determination concerning a matter, the Authority is deprived of jurisdiction over that matter . . . ." (V.A. Asheville, supra).

Respondent has properly challenged the Authority's jurisdiction and, for the reasons set forth above, the Authority is without jurisdiction. Accordingly, General Counsel's Motion for Summary Judgment is denied; Respondent's Cross Motion for Summary Judgment is granted; and the Complaint in Case No. WA-CA-01-0150 is hereby dismissed.

WILLIAM B. DEVANEY Administrative Law Judge

Dated: February 21, 2002

Washington, DC

1. For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71" of the statutory reference, i.e., Section 7122 will be referred to, simply, as, "§ 22".

2. Exhibits are attached to General Counsel's Motion for Summary Judgment.

3. Pursuant to § 2425.1 of the Authority's Rules and Regulations, 5. C.F.R. §2425.1, exceptions must be filed ". . . thirty (30) days beginning on the date the award is served on the filing party." (id., (b)).

If the Award had been served on Respondent (filing party) on July 5, 2000, and the record is silent as to the date of service, then exceptions were due August 4. If the Award were served by mail and five are added, pursuant to §2429.22, then exceptions were due August 9. In either case, as they were not filed with the Authority until August 14, 2000, it appears that they were not timely filed.

4. The Complaint also alleged that, "Respondent filed exceptions with the Authority which were denied as untimely." (Complaint, Par. 13) and Respondent by its Answer stated, ". . . The Authority denied said Exceptions and Motion [to Dismiss] upon determining that the document was filed one day late. . . ." (Answer, Par. 13). As noted, neither allegation is correct.