

66 FLRA No. 186

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS CANTEEN SERVICE
MARTINSBURG, WEST VIRGINIA
(Agency)

and
NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R4-78
(Union)

0-AR-4856

DECISION

September 25, 2012

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

The Agency filed an exception to an award of Arbitrator Richard W. Dissen under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exception. The Arbitrator found that the grievance concerning the removal of a Veterans Canteen Service (VCS) employee was arbitrable and that the grievant's removal was not for just cause. For the reasons set forth below, we grant the Agency's exception and set aside the award.

II. Background and Arbitrator's Award

The grievant, "a non-preference eligible[] excepted service [(NEES)] employee," worked at the VCS. Award at 1. The Agency removed her from her VCS position for misconduct. *See id.* at 1, 10. The Union filed a grievance concerning the grievant's removal. *Id.* at 1. The matter was unresolved and was submitted to arbitration. *Id.* at 2. The Arbitrator stated that the issues were: (1) "does the [g]rievant, a[n] [NEES VCS] employee[] appointed under 38 U.S.C. § 7802, have the right to challenge her removal [under] a negotiated grievance procedure" as a matter of law; and (2) "[a]re the charges contained in the Agency's Notice of Proposed Removal[] . . . supported by a preponderance of the evidence? If not[,], what shall the remedy be?" *Id.* at 6.

The Arbitrator found that the Agency had the burden of proving that, as a matter of law, he lacked jurisdiction over the grievance. *Id.* at 8. The Arbitrator determined that the issue of whether or not VCS employees appointed pursuant to § 7802(e) may grieve their removals under a negotiated grievance procedure was "not a settled question of law." *Id.* at 9. The Arbitrator also noted that the Agency identified no statute that made an arbitrator's jurisdiction dependent upon the jurisdiction of the Merit Systems Protection Board (MSPB). *Id.* According to the Arbitrator, while the statutory scheme requires an election between the grievance procedure and appellate review by the MSPB "and directs a reviewing arbitrator to apply decisional standards consistent with those applied by the MSPB" to avoid forum shopping, "[a] risk of forum shopping is not present where only one tribunal is available to review an adverse action."¹ *Id.* The Arbitrator further found that failing to allow VCS employees appointed under § 7802(e) to appeal their removals would only encourage excessive discipline of such employees. *Id.* at 9-10. Based on the foregoing analysis, the Arbitrator concluded that the grievant was not precluded from grieving the merits of her removal under the parties' negotiated grievance procedure and that as a result he had jurisdiction to decide the merits of her removal. *Id.* at 10.

In addition, the Arbitrator determined that the grievant was not removed for just cause. *Id.* at 10-12. Specifically, the Arbitrator found that the Agency failed to present evidence that the grievant engaged in the misconduct for which she was charged and that the Agency prejudiced the grievant by improperly denying her "the limited representation to which she was entitled" during an investigatory interview. *Id.* at 12; *see also id.* at 10-11. As a result, the Arbitrator set aside the grievant's removal and ordered the Agency, among other things, to compensate the grievant for any lost wages and benefits "which she would have received but for her improper discharge." *Id.* at 12.

III. Positions of the Parties**A. Agency's Exception**

As a preliminary matter, the Agency asserts that the Authority has jurisdiction to resolve its exception. Exception at 3-4. The Agency contends that, based on precedent, "the claim involved . . . is not reviewable by the MSPB or the Federal Circuit." *Id.* at 3.

¹ For purposes of this decision, a "disciplinary action" is defined as a suspension of fourteen days or less, and an "adverse action" is defined as a removal, a suspension of more than fourteen days, a reduction in pay or grade, or a furlough of thirty calendar days or less. 5 U.S.C. §§ 7502, 7512.

In addition, the Agency maintains that the Arbitrator's conclusion that he had jurisdiction to decide the merits of the grievant's removal because VCS employees appointed pursuant to 38 U.S.C. § 7802 may grieve their removals is contrary to law. *Id.* at 6. In this regard, the Agency argues that, based on the language of § 7802, in conjunction with legislative history, and the language of 5 C.F.R. § 752.401(d)(12), an Office of Personnel Management (OPM) regulation, VCS employees are prohibited from appealing their removals to the MSPB and thus similarly are precluded from grieving their removals. *See id.* at 7-10, 12-15 (citing, among other cases, *Bennett v. MSPB*, 635 F.3d 1215 (Fed. Cir. 2011) (*Bennett*) and citing 5 C.F.R. § 752.405). The Agency specifically claims that, because the Supreme Court in *Cornelius v. Nutt*, 472 U.S. 648 (1985) (*Nutt*) held that arbitrators should apply the same substantive standards as the MSPB when adjudicating the merits of adverse actions, an arbitrator's jurisdiction over such matters is dependent upon the MSPB's jurisdiction. Exception at 7-8. Also, the Agency asserts that, because VCS employees are in the excepted service, the Arbitrator lacked jurisdiction to decide the merits of the grievant's removal. *Id.* at 15-16. Moreover, the Agency contends that, because VCS employees appointed pursuant to § 7802(e) are precluded from grieving their removals as a matter of law, the parties' agreement cannot grant grievance rights to such employees. *Id.* at 10.

Further, the Agency claims that, for purposes of § 7121(e), VCS employees are not part of an "other personnel system," but, rather, are included in the general civil service (civil service).² *Id.* at 16-19. The Agency argues that it does not consider itself as part of an "other personnel system." *Id.* at 18. Additionally, the Agency asserts that the language of § 7802(e), which allows VCS employees to grieve disciplinary actions, stands in contrast to the language in 38 U.S.C. § 7421, "which grants the Secretary the sole authority to determine the . . . conditions of employment, '[n]otwithstanding any law,'" of Title 38 employees of the VA "who are in the health[care] field." *Id.* at 19 (quoting 38 U.S.C. § 7421).

² In support of this argument, the Respondent submits an affidavit of "the VCS Associate Director for Resources and Support." Exception at 17. In the affidavit, the Associate Director states that "VCS field employees necessary for the transaction of the business at the canteens," such as the grievant, "are subject to all personnel provisions of Title 5[,] . . . except for appointment, compensation and removal" and are entitled to various benefits, such as disability compensation. Exceptions, Attach. 8, Affidavit of Associate Director at 2; *see also id.* at 3. For reasons discussed below, we conclude that the affidavit is properly before us.

B. Union's Opposition

The Union argues that the Authority lacks jurisdiction under § 7121(f) of the Statute to consider the Agency's exception. Opp'n at 6-7. The Union asserts that the grievance concerns the removal of a VCS employee, which is a similar matter to those covered under 5 U.S.C. § 7512 arising under an "other personnel system." *Id.* at 7. (citing *U.S. Dep't of Transp., Fed. Aviation Admin.*, 54 FLRA 235, 238-39 (1998)).

However, the Union maintains that, if the Authority finds that it has jurisdiction, then the award is not contrary to law. *Id.* Specifically, the Union contends that § 7121(e)(1) of the Statute gives employees the ability to "invok[e] the negotiated grievance procedure for matters falling under § 7512." *Id.* The Union asserts that, although the Agency relies on *Bennett* and *Nutt*, the Agency has failed to demonstrate that employees' ability to grieve adverse actions is tied to their ability to appeal such actions to the MSPB. *Id.* at 8-9. According to the Union, the Agency's reliance on 5 C.F.R. § 752.401 is misplaced because § 7802(e) excludes VCS "employees from the appointment provisions of Title 5." *Id.* at 11. The Union also argues that the grievant's status as an NEES employee does not preclude her from grieving her removal under the parties' negotiated grievance procedure. *Id.* at 12. Further, the Union claims that VCS employees are in an "other personnel system" pursuant to § 7121(e) and as a result they are not precluded from grieving their removals even if they cannot appeal their removals to the MSPB. *Id.* at 9-11.

IV. Preliminary Matters

A. The Authority has jurisdiction to consider the Agency's exception under § 7121(f) of the Statute.

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. *U.S. Envtl. Prot. Agency, Narragansett, R.I.*, 59 FLRA 591, 592 (2004). The matters described in § 7121(f) "are those matters covered under 5 U.S.C. §§ 4303 and 7512 and similar matters that arise under other personnel systems." *Id.* Moreover, in determining whether it lacks jurisdiction, the Authority looks not to the outcome of the award, but to whether the claim advanced in arbitration is one reviewable by the MSPB and, on appeal, by the Federal Circuit. *See AFGF, Local 1013*, 60 FLRA 712, 713 (2005).

Here, consistent with the Authority's decision in *United States Department of Veterans Affairs, Veterans Canteen Service*, 66 FLRA 944 (2012) (VA, VCS), VCS employees appointed pursuant to § 7802(e) are

excluded from the provisions of Chapter 75 of Title 5, including § 7512. *See* 5 C.F.R. § 752.401(d)(12) (stating that the requirements of Chapter 75 of Title 5 pertaining to adverse actions do not apply to “[a]n employee whose agency or position has been excluded from the appointing provisions of [T]itle 5 . . . by separate statutory authority in the absence of any provision to place the employee within the coverage of [C]hapter 75 of [T]itle 5”); *see also Bennett*, 635 F.3d at 1216, 1221 (concluding that VCS employees appointed under § 7802(e) are excluded from the provisions of Chapter 75 of Title 5 and thus are barred from appealing their removals to the MSPB). As a result, because the grievant is a VCS employee appointed under § 7802(e), her removal is not “covered under” § 7512. *See Bonner v. Dep’t of Veterans Affairs, Pittsburgh Healthcare Sys.*, 477 F.3d 1343, 1346 (Fed. Cir. 2007) (determining that the grievant’s removal was “not ‘covered under’ 5 U.S.C. § 7512 because . . . the provisions relating to adverse actions in [C]hapter 75 of [T]itle 5, including § 7512, d[id] not apply to him”); *see also U.S. Dep’t of Def., Office of Dependents Sch.*, 45 FLRA 1411, 1414 (1992) (finding that, because the grievant was not an employee within the meaning of § 7511, her termination was not a matter covered under § 7512).

Moreover, as discussed further in *VA, VCS*, VCS employees appointed under § 7802(e) are not part of an “other personnel system,” but, rather, are part of the personnel system which is applicable to civil service employees and is governed by Title 5. *See VA, VCS*, 66 FLRA at 949-50. Thus, the grievant’s removal is not a similar matter arising under an “other personnel system.” *See U.S. Small Bus. Admin.*, 33 FLRA 28, 36 (1988) (concluding that, because temporary employees are not part of an “other personnel system” within the meaning of § 7121(f), the grievant’s termination was not a similar matter arising under an “other personnel system,” and the Authority had jurisdiction to review the merits of the grievant’s termination). Accordingly, we find that the award concerning the grievant’s removal does not relate to a matter described in § 7121(f) and that the Authority has jurisdiction to resolve the Agency’s exception to the award. *See NTEU, Chapter 193*, 65 FLRA 281, 283 (2010) (addressing the union’s exceptions because the removal of a probationary employee did not relate to a matter described in § 7121(f) of the Statute).

- B. Section 2425.4(c) does not bar the Authority from considering the disputed affidavit.

The Union contends that the Authority should not consider the Agency’s affidavit because the Agency did not present it to the Arbitrator. Opp’n at 12-13. The Authority has declined to bar arguments challenging an arbitrator’s statutory jurisdiction, as well as evidence

relating to such arguments. *See VA, VCS*, 66 FLRA at 947-48 (refusing to bar an affidavit, which the agency relied on as evidence to support its claim that the arbitrator lacked statutory jurisdiction over the grievance concerning the removal of a VCS employee); *U.S. Dep’t of Justice, Immigration & Naturalization Serv., El Paso, Tex.*, 40 FLRA 43, 51-52 (1991) (declining to grant the union’s motion to strike certain documents because the documents attached to the agency’s exceptions related to the agency’s claim that the arbitrator was without jurisdiction under § 7121(d) of the Statute). Here, the Agency relies on the affidavit as evidence to support its claim that the Arbitrator lacked statutory jurisdiction over the grievance concerning the removal of a VCS employee. *See Exceptions, Attach. 8, Affidavit of Associate Director*, at 2-3. Accordingly, we find that the affidavit is properly before us and that we may consider it.³

V. Analysis and Conclusion: The grievance concerning the removal of a VCS employee is not arbitrable as a matter of law.

When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of *de novo* review, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the applicable standard of law. *See U.S. Dep’t of Def., Dep’ts of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator’s underlying factual findings. *See id.*

The Agency asserts that the Arbitrator’s determination that he had jurisdiction over a grievance concerning the removal of a VCS employee is contrary to law. Exception at 6. In this regard, the Agency claims that, because VCS employees cannot appeal their removals to the MSPB, they cannot grieve their removals pursuant to a negotiated grievance procedure. *See id.* at 7-10, 12-15. The Agency also maintains that VCS employees appointed pursuant to § 7802(e) are not in an “other personnel system.” *Id.* at 16-19. The Union disagrees, but contends that, even if the grievant does not have appeal rights to the MSPB, the grievant is in an “other personnel system” and thus does not lack grievance rights. *See Opp’n* at 9-11.

³ For purposes of this decision, we note that the Union only claims that § 2425.4(c) of the Authority’s Regulations bars our consideration of the affidavit. However, we also find that, under § 2429.5 of the Authority’s Regulations, we are not precluded from considering the affidavit.

These issues and arguments are identical to those raised in *VA, VCS*, 66 FLRA at 948-49. As discussed in Section IV., *supra*, consistent with the Authority's decision in *VA, VCS*, the 1982 amendments to the VCS Act, and the 1990 Amendments in conjunction with 5 C.F.R. § 752.401(d)(12), demonstrate that NEES employees appointed under § 7802(e) are not afforded appeal rights under Chapter 75 of Title 5. They are therefore precluded, by law, from appealing their removals to the MSPB. *Id.* at 949. Also, as the Authority determined, employees who are precluded from appealing adverse actions to the MSPB, such as VCS employees, are prohibited from grieving such actions under a negotiated grievance procedure. *Id.* Moreover, as the Authority held, VCS employees are not part of an "other personnel system" and § 7121(e) of the Statute does not, by itself, grant parties the right to grieve. *Id.* As a result, the Arbitrator, as a matter of law, lacked jurisdiction over the grievance concerning the removal of a VCS employee appointed under § 7802(e).

Therefore, consistent with our decision in *VA, VCS*, we conclude that the Arbitrator's determination that he had jurisdiction, as a matter of law, over the grievance is contrary to law. *See id.*

VI. Decision

The Agency's exception is granted, and the award is set aside.

APPENDIX

Section 7121(e) of the Statute states:

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

5 U.S.C. § 7121(f) states:

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel

systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

5 U.S.C. § 7511 states, in pertinent part:

(a) For the purpose of this subchapter—

(1) “employee” means—

....

(C) an individual in the excepted service (other than a preference eligible)—

(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or

(ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less[.]

....

5 U.S.C. § 7512 states:

This subchapter applies to –

- (1) a removal;
- (2) a suspension for more than 14 days;
- (3) a reduction in grade;
- (4) a reduction in pay; and
- (5) a furlough of 30 days or less;

but does not apply to--

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1215 or 7521 of this title.

38 U.S.C. § 7802(e) states:

(e) Personnel. – The Secretary shall employ such persons as are necessary for the establishment, maintenance, and operation of the Service, and pay the salaries, wages, and expenses of all such employees from the funds of the Service. Personnel necessary for the transaction of the business of the Service at canteens, warehouses, and storage depots shall be appointed, compensated from funds of the Service, and removed by the Secretary without regard to the provisions of title 5 governing appointments in the competitive service and chapter 51 and subchapter III of chapter 53 of title 5. Those employees are subject to the provisions of title 5 relating to a preference eligible described in section 2108(3) of title 5, subchapter I of chapter 81 of title 5, and subchapter III of chapter 83 of title 5. An employee appointed under this section may be considered for appointment to a Department position in the competitive service in the same manner that a Department employee in the competitive service is considered for transfer to such position. An employee of the Service who is appointed to a Department position in the competitive service under the authority of the preceding sentence may count toward the time-in-service requirement for a career appointment in such position any previous period of employment in the Service.

5 C.F.R. § 752.401 states, in pertinent part:

(a) Adverse actions covered. This subpart applies to the following actions:

- (1) Removals;
- (2) Suspensions for more than 14 days, including indefinite suspensions;
- (3) Reductions in grade;
- (4) Reductions in pay; and
- (5) Furloughs of 30 days or less.

....

(d) Employees excluded. This subpart does not apply to:

....

(12) An employee whose agency or position has been excluded from the appointing provisions of title 5, United States Code, by separate statutory authority in the absence of any provision to place the employee within the coverage of chapter 75 of title 5, United States Code[.]

....