

66 FLRA No. 20

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2789
NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-4679

ORDER DISMISSING EXCEPTIONS

September 8, 2011

Before the Authority: Carol Waller Pope, Chairman, and
Thomas M. Beck and Ernest DuBester, Members¹

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator James R. Cox filed by the Agency 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 exceptions.²

The Arbitrator considered two grievances filed by the Union. He denied the grievance concerning the grievant's removal from employment but sustained the grievance concerning the grievant's assignment to administrative desk duty.

For the reasons discussed below, we dismiss the Agency's exceptions.

II. Background and Arbitrator's Award

A. Background

After the police cited the grievant, a Border Patrol employee, with disorderly conduct, the Agency placed him on a desk assignment and removed his

¹ Member Beck's dissenting opinion is set forth at the end of this order.

² The Agency and the Union also filed supplemental submissions, which are discussed further below.

firearm. Award at 1-4. In response, the Union filed a grievance (desk assignment grievance).³ The Federal Mediation and Conciliation Service assigned the grievance a case number and submitted a panel of arbitrators to the parties, but the parties did not select an arbitrator. *Id.* at 15.

After the grievant was cited with disorderly conduct, the Agency commenced an investigation and discovered that the grievant had failed to pay rent to his landlord despite receiving rent vouchers from the Agency. *Id.* at 4, 7-8. The Agency ordered the grievant to pay the arrears, but he did not. *Id.* at 8-9. Based upon the grievant's disorderly conduct citation and his failure to pay rent, the Agency charged the grievant with discourteous conduct (discourteous conduct charge) and a failure to honor financial obligations (failure to pay rent charge).⁴ *Id.* at 3.

The grievant remained on desk assignment pending an investigation into the two charges. After the investigation, the Agency removed the grievant from employment, finding that both charges supported the removal. *Id.* at 5, 11-12. The Union then filed a second grievance concerning the grievant's removal (removal grievance) and asserted that the desk assignment grievance should be consolidated with it. *Id.* at 3, 15. The Agency objected to consolidation. *Id.* at 15; Exceptions at 4. The grievances were not resolved, and the parties proceeded to arbitration.

B. Arbitrator's Award

The claims advanced by the Union at arbitration concerned the desk assignment and removal grievances. The Arbitrator framed the issues, in pertinent part, as:

Whether the Agency had properly assigned [the grievant] . . . to Administrative Desk Duty and revoked his authority to carry a firearm after recalling him from a Temporary Duty Assignment[.] . . . Whether the removal of [the grievant] from employment had been for just and sufficient cause and for such reasons as would promote the efficiency of the

³ The Arbitrator, the Agency, and the Union refer to the desk assignment and the removal of the firearm as one event. *See* Award at 3-5, 15-16; Exceptions at 4, 5; Opp'n at 2-3. Accordingly, our reference to the desk assignment grievance encompasses the firearm removal and the desk assignment.

⁴ The Agency subsequently dropped a third charge, absence without leave. Award at 3. As that charge is not at issue here, we do not discuss it further.

service and, if not, what is the appropriate remedy?⁵

Award at 1.

As an initial matter, the Arbitrator determined that the grievances were properly before him. *Id.* at 2. In this connection, he found that the desk assignment grievance should be consolidated with the removal grievance because it was relevant to the removal grievance, and because resolving both in one proceeding would save the parties time and expense. *Id.* at 15-16.

The Arbitrator then addressed the grievant's removal and considered both charges upon which the removal was based. *Id.* at 3. Specifically, he found that the discourteous conduct charge did not support the removal, *id.* at 5, but that the failure to pay rent charge did, *id.* at 15. Accordingly, he found the removal appropriate and denied the removal grievance. With respect to the desk assignment, the Arbitrator found that it "was an integral part of the disciplinary process and was made pending investigation of the [c]harges" that ultimately resulted in the grievant's removal. *Id.* However, because the Arbitrator found that there was insufficient evidence to support the discourteous conduct charge, he concluded that the desk assignment "was a punitive assignment made for precautionary reasons without cause." *Id.* at 17. Therefore, the Arbitrator sustained the desk assignment grievance and directed a make-whole remedy for any lost overtime opportunities. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues, as an initial matter, that the Authority has jurisdiction to consider its exceptions. Exceptions at 6. Specifically, the Agency contends that the desk assignment and the loss of overtime opportunities are not adverse actions that are appealable to the Merit Systems Protection Board (MSPB). *Id.* at 6-7. In addition, the Agency argues that: (1) the desk assignment and the removal were "two separate grievances that moved along separate tracks" resulting in "two separate arbitrations," *id.* at 7; (2) the Agency never acquiesced in the Union's request to consolidate the two grievances, *id.*; and (3) the desk assignment is not "inextricably intertwined" with the grievant's removal because the safety concerns that resulted in the desk

assignment are unrelated to the removal, which was based on a failure to pay rent, *id.* at 8.

In regard to the merits of the award, the Agency argues that: (1) the award is "contrary to law. . . because the Arbitrator exceeded his authority" when he resolved the desk assignment grievance that was not submitted to him, *id.* (emphasis omitted); (2) the award fails to draw its essence from the agreement because "only arbitrators selected in accordance with the [a]greement have authority to rule on a grievance submitted by the parties," *id.* at 10; and (3) the Arbitrator deprived the Agency of an opportunity to fully present evidence regarding the desk assignment grievance because it was not informed before the arbitration proceeding that this grievance would be considered, *id.* at 10-11.

B. Union's Opposition

The Union asserts that the Authority is without jurisdiction to consider the Agency's exceptions because they relate to the grievant's removal, an adverse action under 5 U.S.C. § 7512.⁶ Opp'n at 2-3. The Union contends that the Arbitrator correctly found that the desk assignment was an integral part of the disciplinary process, and that it argued before the Arbitrator that the grievant's loss of overtime opportunities, which resulted from the desk assignment, contributed to his failure to pay rent. *Id.* at 2. The Union also argues that the Agency's exceptions lack merit and that the Authority should not consider certain evidence submitted by the Agency because that evidence was not submitted to the Arbitrator. *Id.* at 5-6.

IV. Preliminary Issue: The Authority will not consider the parties' supplemental submissions.

Although the Authority's Regulations do not provide for the filing of supplemental submissions, § 2429.26 of the Authority's Regulations provides that the Authority may, in its discretion, grant leave to file "other documents" as deemed appropriate. *See, e.g., U.S. Dep't of the Treasury, IRS, Nat'l Distrib. Ctr., Bloomington, Ill.*, 64 FLRA 586, 589 (2010) (*IRS, Bloomington*); *Cong. Research Emps. Ass'n, IFPTE, Local 75*, 59 FLRA 994, 999 (2004)). However, the Authority generally will not consider such submissions if the filing party has not requested permission to do so. *See AFGE, Local 1815*, 65 FLRA 430, 431 (2011) (*AFGE, Local 1815*). Where a party has requested leave to file a supplemental submission, the Authority has granted such leave when, for example, the submission

⁵ The Arbitrator also framed an issue regarding whether the Agency violated the collective bargaining agreement by failing to provide notice of the proposed removal at the earliest possible date. The Arbitrator found no violation, and as there are no exceptions to that finding, we do not address it further. Award at 7.

⁶ 5 U.S.C. § 7512 covers removals, suspensions for more than fourteen days, reductions in grade or pay, and furloughs for thirty days or less.

responds to arguments raised for the first time in an opposing party's filing. *IRS, Bloomington*, 64 FLRA at 589. By contrast, the Authority has denied requests to consider a supplemental submission where the submission raises issues that the party could have raised in a previous submission. *Id.*

The Agency moved for leave to file a response to the Union's opposition. The Union filed an opposition to the Agency's motion. As the Union failed to request permission to file its supplemental submission, we do not consider it. *See AFGE, Local 1815*, 65 FLRA at 431.

In its supplemental submission, the Agency claims that the Union's opposition raises a new issue that is beyond the scope of the Agency's exceptions, specifically, whether the loss of overtime opportunities, as a result of the desk assignment, contributed to the grievant's failure to pay rent. Motion to File a Reply at 3. However, this issue was not raised for the first time in the Union's opposition. The Union argues, and the Agency acknowledges, that this issue was raised before the Arbitrator. *Id.* at 5; Opp'n at 2. Therefore, the Agency could have addressed this issue in its exceptions, and we deny the Agency's request for leave to file its response to the Union's opposition. *See IRS, Bloomington*, 64 FLRA at 589.

V. Analysis and Conclusion

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. Matters described in § 7121(f) include adverse actions, such as removals, that are covered under 5 U.S.C. § 7512. Arbitration awards resolving such matters are appealable to the MSPB and reviewable by the United States Court of Appeals for the Federal Circuit, rather than the Authority. *See, e.g., U.S. Dep't of Commerce, Patent & Trademark Office, Arlington, Va.*, 61 FLRA 476, 477 (2006). Consistent with the plain wording of the Statute, the Authority lacks jurisdiction not only over awards that resolve adverse actions, but those that resolve issues related to adverse actions. *See AFGE, Local 2004*, 59 FLRA 572, 573 (2004).

The Authority will determine that an award relates to a matter described in § 7121(f) when it resolves, or is inextricably intertwined with, a § 7512 matter. *See AFGE, Local 1013*, 60 FLRA 712, 713 (2005). In determining that an award relates to a § 7121(f) matter, the Authority looks not to the outcome of the award, but to whether the claim advanced in arbitration is reviewable by the MSPB and, on appeal, by the Federal Circuit. *See id.; Panama Canal Comm'n*, 49 FLRA 1398, 1401 (1994). In addition, the claims advanced in arbitration, and not the timing of the

grievances, determine whether the Authority has jurisdiction. *U.S. Dep't of the Air Force, Hill Air Force Base, Utah*, 58 FLRA 476, 477 (2003) (Chairman Cabaniss dissenting). The Authority has stated that § 7121(f) is based on, among other things, a policy objective of avoiding the multiplicity of litigation over one claim that might result if aspects of the same claim are reviewed in more than one forum. *AFGE, Local 2986*, 51 FLRA 1549, 1554 (1996) (Member Armendariz dissenting).

Applying these principles, the Authority has declined to assert jurisdiction over additional issues resolved in arbitration where those issues were inextricably intertwined with underlying adverse actions within the meaning of § 7512. For example, the grievance in *United States Department of Justice, Federal Bureau of Prisons, Federal Prison Camp, Alderson, W. Va.*, 47 FLRA 572 (1993) (*Fed. Bureau of Prisons*) disputed a removal action and the agency's placement of an employee on home duty status pending an investigation of disciplinary charges. The agency in that case filed exceptions to the portion of the award concerning home duty status, and the Authority found that it lacked jurisdiction to review that portion of the award because it was inextricably intertwined with the issue of the grievant's removal. *Id.* at 574-75.

Here, there is no dispute that one of the claims advanced in arbitration concerned the grievant's removal, which constitutes an adverse action within the meaning of § 7512. In addition, as relevant here, the grievant's removal was based on two charges: the discourteous conduct and failure to pay rent charges. Further, the Arbitrator found that the desk assignment "was a consequence of the [discourteous conduct charge]," and therefore significantly "relevant" to the grievant's removal. Award at 15. Moreover, this case is similar to *Fed. Bureau of Prisons*, where the Authority found that it lacked jurisdiction over the portion of the award concerning a non-adverse personnel action even though the exception did not involve the removal itself. For these reasons, we conclude that the portion of the award concerning the desk assignment relates to a matter described in § 7121(f) of the Statute because it is inextricably intertwined with the issue of the grievant's removal. We note, in this regard, to find otherwise would effectively allow the Agency 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. *AFGE, Local 2986*, 51 FLRA at 1554.

For the foregoing reasons, we conclude that we lack jurisdiction to review the Agency's exceptions, and we dismiss them.⁷

VI. Order

The Agency's exceptions are dismissed.

Member Beck, Dissenting:

I disagree with the Majority's conclusion that we lack jurisdiction to resolve the Agency's exceptions.

The Arbitrator's determination that the Agency's assignment of the grievant to administrative desk duties was unwarranted is not a matter that is reviewable by the Merit Systems Protection Board (MSPB). *U.S. Dep't of Veterans Affairs Med. Ctr., Richmond, Va.*, 65 FLRA 615, 617 (2011) (Authority looks to whether the claim advanced in arbitration is one that is reviewable by the MSPB); *see also U.S. Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project*, 65 FLRA 5, 8 (2010) (Dissenting Opinion of Member Beck) (*BIA Wapato*).^{*}

Nor is the Arbitrator's determination about desk duties inextricably intertwined with the Agency's decision to terminate the grievant's employment. Obviously, the grievant could have been placed on desk duty without later being terminated, and could have been terminated without first being placed on desk duty. The Union presented a grievance and invoked arbitration about the assignment to desk duty in March 2008. The alleged injury that the Union sought to address was the grievant's inability to earn overtime while on desk duty. *See Exceptions, Ex. 3*. The Agency's determination to terminate the grievant came much later, in August 2009, carried entirely different consequences for the grievant, and became the subject of a second, separate grievance. *See Exceptions, Exs. 4, 6*.

Simply put, the grievance about desk duty is easily distinguished from the grievant's eventual termination. Therefore, we are not precluded by § 7121(f) from reviewing the Agency's exceptions that challenge the Arbitrator's determination on that matter and his award of lost overtime.

I would consider the merits of the Agency's argument that the Arbitrator exceeded his authority and would conclude that the Arbitrator did exceed his authority by considering a matter that was not properly before him.

As I note above, the Union filed an initial grievance after the Agency placed the grievant on administrative desk duties, which precluded him from earning overtime. *See Exceptions, Ex. 3*. When the Agency terminated the grievant, the Union filed a second

⁷ In light of this determination, we do not address the parties' arguments regarding the merits of the award.

^{*} As I noted in my dissent in *BIA Wapato*, jurisdiction of the Board is limited to specific matters such as adverse actions, performance-based actions, and certain actions involving discrimination. 65 FLRA at 8 (Dissenting Opinion of Member Beck) (citing *Maddox v. MSPB*, 759 F.2d 9, 10 (Fed. Cir. 1985)).

grievance (Exceptions, Ex. 4) and separately invoked arbitration on that specific issue. *See* Exceptions, Ex. 6. This Arbitrator was selected to adjudicate the second grievance, not the first.

Accordingly, the matter concerning the grievant's administrative desk duties and the resulting loss of overtime that was raised in the first grievance was not within this Arbitrator's authority. The portion of his award relating to the desk duty grievance should be vacated.

Addressing the Agency's exceptions as I have suggested would not, as my colleagues in the Majority fear, "effectively allow the Agency to litigate aspects of one claim, the removal, in multiple venues." Majority at 6. I acknowledge that we lack jurisdiction to review the award insofar as it relates to the grievant's removal. Because the desk duties grievance and the removal grievance are so readily distinguished, we could deal with the exceptions relating to the desk duties grievance while leaving undisturbed the award as it relates to the removal grievance.