**67 FLRA No. 11**

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2455
NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-4828

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DECISION

November 21, 2012

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

## I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Kathryn Durham, 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.

The Arbitrator set aside the removal of the grievant, a preference-eligible veteran, during the grievant's "trial period" under a federal internship program. Merits Award at 3. For the reasons discussed below, the Authority lacks jurisdiction to review the Agency's exceptions pursuant to § 7122(a) of the Statute, and we dismiss the exceptions.

## II. Background and Arbitrator's Award

The Agency hired the grievant, a preference-eligible veteran, as a Border Patrol Agent intern under the Federal Career Intern Program (FCIP).[1] *Id.* at 7. Under the FCIP, the grievant was subject to a two-year "trial period." *Id.* at 3.

A little more than a year into his internship, the grievant was injured while on duty – during a foot pursuit in a field. *Id.* at 7. The Agency placed the grievant in "an injury, non-work status." *Id.* Subsequently, a few months before the end of the grievant's two-year trial period, the Agency terminated his employment. *Id.* at 8. The Agency stated that "due to the injury . . . [the grievant] would be unable to successfully complete the Agency's [required] . . . training during the remaining term of his trial period." *Id.* However, the Agency almost immediately rescinded the termination because it had failed to notify the grievant of his appeal rights as a "preference[-]eligible" veteran with over a year of "current, continuous service" under 5 U.S.C. § 7511(a)(1)(B).[2] *Id.* at 8-9.

The rescission of the grievant's termination was brief. Shortly after the Agency rescinded the termination, the Agency presented the grievant with a letter "remov[ing] [him] from [his] position" for "[f]ailure to [s]uccessfully [c]omplete [his] [t]rial [p]eriod." Exceptions, Attach., Joint Exs., Ex. J (Ex. J) at 1. The letter advised the grievant of his "remov[al]," as well as his right to appeal the action to the Merit Systems Protection Board (MSPB). *Id.* at 1-2.

The Union filed a grievance challenging the grievant's removal. When the parties could not resolve the grievance, they submitted it to arbitration.

As a threshold matter, the Agency contested the grievance's arbitrability, claiming that the grievant was not an "employee" under the parties' agreement. Merits Award at 11. In a bifurcated proceeding, the Arbitrator found the grievance arbitrable, concluding that the grievant was an "employee" under 5 U.S.C. § 7511(a)(1)(B), "with rights to appeal adverse actions to

[1] The FCIP began in 2000 and ended March 1, 2011. *See* Exec. Order No. 13,162, 65 Fed. Reg. 43,211 (July 6, 2000); Exec. Order No. 13,562, 75 Fed. Reg. 82,585, 82,588 (Dec. 27, 2010).

[2] In both the arbitrability and the merits awards, the Arbitrator refers to the applicable statute variously as 5 U.S.C. § 1711(a)(1)(B) and 5 U.S.C. § 7511(a)(1)(B). *See* Arbitrability Award at 2, 7, 9, 11; Merits Award at 11-12. Given the context in which the Arbitrator references § 1711(a)(1)(B), it appears that the references to that section are typographical errors. Further, the parties do not dispute that the Arbitrator intended to base her decision in both awards on § 7511(a)(1)(B). *See* Opp'n at 6 n.1. The text of 5 U.S.C. § 7511(a)(1)(B) is set forth below in note 5.

the MSPB" and to pursue arbitration under the parties' agreement. Exceptions, Ex. 5, Arbitrability Award at 11 (Arbitrability Award).

In the subsequent award on the merits, the Arbitrator found that the Agency failed to establish that it removed the grievant for just and sufficient cause and for reasons "as will promote the efficiency of the Service." Merits Award at 2, 20. As a remedy, the Arbitrator ordered the Agency to reinstate the grievant to a permanent appointment as a Border Patrol Agent, and to pay him backpay for lost compensation and benefits. *Id.* at 19-20.

## III. Positions of the Parties

### A. Agency's Exceptions

Addressing a threshold matter, the Agency claims that the Authority has jurisdiction under § 7122(a) of the Statute to review its exceptions because the award pertains to the termination of a probationary employee, a matter that does "not relate to any of the matters described in § 7121(f)."[3] Exceptions at 7-8 (citing *NTEU, Chapter 103*, 66 FLRA 416, 417 (2011) (*NTEU, Chapter 103*); *U.S. DOL, Bureau of Labor Statistics*, 66 FLRA 282, 283 (2011) (*BLS*)). The Agency also notes its position "[t]hroughout this proceeding . . . [that] this action was not a removal." *Id.* at 13 n.3. On the merits, the Agency asserts that the award is contrary to law because "Authority precedent [clearly establishes] that the termination of employees during a probationary period is excluded from grievance procedures and is not arbitrable as a matter of law." *Id.* at 22.

### B. Union's Opposition

The Union argues that, under §§ 7122(a) and 7121(f) of the Statute, the Authority lacks jurisdiction to consider the Agency's exceptions because the grievant is a preference eligible, excepted-service employee under 5 U.S.C. § 7511(a)(1)(B) with appeal rights to the MSPB. Opp'n at 2-3. On the merits, the Union asserts that the award is not contrary to law. *Id.* at 7.

## IV. Analysis and Conclusions: The Authority lacks jurisdiction to resolve the Agency's exceptions.

Under § 7122 of the Statute, the Authority lacks jurisdiction to review exceptions to an arbitration award "relating to a matter described in [§] 7121(f)" of the Statute. 5 U.S.C. § 7122(a). The matters described in § 7121(f) include adverse actions, such as removals, which are covered under 5 U.S.C. §§ 4303 or 7512 and are appealable to the MSPB and reviewable by the United States Court of Appeals for the Federal Circuit (Federal Circuit), rather than the Authority.[4] *U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Miami, Fla.*, 57 FLRA 677, 678 (2001).

The Authority will determine that an award relates to a matter described in § 7121(f) when the award resolves, or is "inextricably intertwined" with, a § 4303 or § 7512 matter. *AFGE, Local 1013*, 60 FLRA 712, 713 (2005). In making that determination, the Authority looks not to the outcome of the award, but to whether the claim involved in arbitration is one that would be reviewed by the MSPB and, on appeal, by the Federal Circuit. *Id.*; *U.S. Dep't of the Treasury, U.S. Customs Serv.*, 57 FLRA 805, 806 (2002).

The award here relates to a matter described in § 7121(f) because it resolves a § 7512 matter. To relate to a § 7512 matter, the individual involved must be an "employee" as defined in § 7511.[5] *See U.S. Dep't of Def., Army & Air Force Exch. Serv., Dall., Tex.*,

[3] Section 7122(a) provides, in pertinent part, that "[e]ither party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in § 7121(f) of this title)." 5 U.S.C. § 7122(a). Section 7121(f) provides, in pertinent part, that:

> [i]n matters covered under §§ 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this 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.

5 U.S.C. § 7121(f).

[4] Section 4303 covers removals and reductions-in-grade for unacceptable performance. 5 U.S.C. § 4303(f). Section 7512 covers removals, suspensions for more than 14 days, reductions in either grade or pay, and furloughs for 30 days or less. 5 U.S.C. § 7512.

[5] Section 7511 provides, in pertinent part:

> (a) For the purpose of this subchapter--
>
> (1) "employee" means--
>
> . . . .
>
> (B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions--
>
> (i) in an Executive agency; or
>
> (ii) in the United States Postal Service or Postal Regulatory Commission.

5 U.S.C. § 7511(a)(1)(B).

51 FLRA 1651, 1653-54 (1996). As pertinent here, an "employee" includes "a preference eligible in the excepted service who has completed 1 year of current continuous service." 5 U.S.C. § 7511(a)(1)(B). It is undisputed that the grievant in this case, a preference-eligible veteran, satisfies these requirements. In fact, the Agency recognized as much in its removal letter when it advised the grievant of his right to appeal the removal action to the MSPB. Merits Award at 8-9; Ex. J at 2. *Accord Scull v. DHS*, 113 M.S.P.R. 287, 292 (2010) (*Scull*) (finding that if an FCIP intern, who was a preference-eligible with one year of current, continuous service, could establish that he was subject to an adverse action, he had standing to appeal the action to the MSPB). Accordingly, we find that the grievant is an "employee" for purposes of 5 U.S.C. § 7511(a)(1)(B).

In addition, to relate to a § 7512 matter, an award must resolve a dispute over an action listed in that section, including a "removal." 5 U.S.C. § 7512(1). There is no basis argued that the Authority should not apply the term "removal" in § 7512(1) according to its plain meaning, as did the Arbitrator, *e.g.*, Merits Award at 20, and treat the Agency's termination of the grievant as a removal. The Agency's removal letter, notifying the grievant of his MSPB appeal rights, reflects the same interpretation. Ex. J at 2. Further, although the Agency notes its position "[t]hroughout this proceeding . . . [that] this action was not a removal," Exceptions at 13 n.3, the Agency does not explain or provide authority for its position. Accordingly, we find that the grievant's termination was a "removal" under § 7512(1). *Compare McCrary v. Dep't of the Army*, 103 M.S.P.R. 266, 272 (2006) (finding that FCIP intern was subjected to an appealable adverse action where the agency terminated her prior to the expiration of her internship), *with Scull*, 113 M.S.P.R. at 292 (finding that FCIP intern's termination upon expiration of appointment is generally not an adverse action because it merely carries out the terms of the appointment).

The Agency's argument that the Authority has jurisdiction because the grievant is a probationary employee lacks merit. Citing Authority precedent, the Agency argues that awards pertaining to a probationary employee's termination do not relate to any of the matters described in § 7121(f). Exceptions at 7-8 (citing *NTEU, Chapter 103*, 66 FLRA at 417; *BLS*, 66 FLRA at 283).

The Agency's contentions would deprive the grievant of explicit statutory entitlements. Matters described in § 7121(f) include actions "covered under" § 7512. 5 U.S.C. § 7121(f). As discussed above, those actions include the grievant's removal. Under 5 U.S.C. § 7513(b) and (d), an "employee" as defined in § 7511, against whom an action listed in § 7512 is proposed or taken, is entitled to various procedural protections and appeal rights.[6] The grievant, a preference-eligible veteran with the requisite service to qualify as an "employee," possesses those entitlements as a statutory right with respect to his removal. And unlike § 7511(a)(1)(A)(i) and (a)(1)(C)(i), § 7511(a)(1)(B) does not include an exception for probationary employees.[7] This supports a finding that, even if the grievant is a "probationary" employee as the Agency claims, he is nevertheless an "employee" within the meaning of § 7511(a)(1)(B). To hold, as the Agency contends, that the grievant should be denied an "employee's" statutory entitlements because he is arguably a probationary employee grafts onto the provisions of §§ 7511 and 7513 an exception that Congress did not enact.

Moreover, the Agency's reliance on Authority precedent is misplaced. Neither case cited by the Agency involved a preference-eligible individual with the requisite service who qualified as an "employee" under 5 U.S.C. § 7511(a)(1)(B). *See NTEU, Chapter 103*, 66 FLRA at 416; *BLS*, 66 FLRA at 282. For all these reasons, we reject the Agency's claim that the award,

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[6] Section 7513(b) and (d) provides, in pertinent part:

> (b) An employee against whom an action is proposed is entitled to --
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> > (1) at least 30 days' advance written notice . . . stating the specific reasons for the proposed action;
> >
> > (2) a reasonable time . . . to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
> >
> > (3) be represented by an attorney or other representative; and
> >
> > (4) a written decision and the specific reasons therefor at the earliest practicable date.
>
> . . . .
>
> (d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

5 U.S.C. § 7513(b) & (d).

[7] Section 7511(a)(1)(A)(i) and (a)(1)(C)(i) provides, in pertinent part:

> (a) For the purpose of this subchapter--
>
> > (1) "employee" means--
> >
> > (A) an individual in the competitive service—
> >
> > > (i) who is not serving a probationary or trial period under an initial appointment;
> >
> > . . . .
> >
> > (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.

5 U.S.C. § 7511(a)(1)(A)(i) & (C)(i).

setting aside the grievant's removal, does not relate to any of the matters described in § 7121(f), and dismiss the Agency's exceptions for lack of jurisdiction under § 7122(a) of the Statute.

## V. Decision

We dismiss the Agency's exceptions.