70 FLRA No. 56

NATIONAL ARCHIVES
AND RECORDS ADMINISTRATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2578
(Union)

0-AR-5269

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ORDER DISMISSING EXCEPTION

June 28, 2017

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Before the Authority: Patrick Pizzella, Acting Chairman, and Ernest DuBester, Member

I. Statement of the Case

The Agency placed an employee (the grievant) on "forced leave" for more than four months on the basis that he was medically unable to perform the essential duties of his position.[1] But Arbitrator Blanca E. Torres sustained a grievance over this period of forced leave because she found that it was an "improperly implemented suspension" under the parties' collective-bargaining agreement.[2]

The question before us is whether, under §§ 7121(f) and 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute),[3] the Authority has jurisdiction over the Agency's exception to the Arbitrator's award. Because the award relates to a suspension of more than fourteen days, the answer is no.

II. Background and Arbitrator's Award

The grievant's duties include retrieving heavy boxes. After the grievant requested assistance with his duties "because he was still recovering from surgery,"[4] the Agency requested and received documentation from the grievant concerning his physical condition. After reviewing the documentation, the Agency told the grievant that his medical restrictions were "not compatible with [his] position," and, therefore, he would "be granted requested leave and/or [l]eave without [p]ay (LWOP) until [he could] return to work without restrictions."[5] Thereafter, from February through June 2016, the Agency designated the grievant's absence from work as LWOP. During roughly the same time period, the Agency also proposed, finalized, and then held in abeyance the grievant's removal from the federal service, but the Agency later cancelled that removal action.

The Union filed a grievance over the forced leave. The grievance went to arbitration, where the stipulated issues included "[w]hether the Agency violated . . . [the parties' a]greement when it placed [the grievant] on medical suspension,"[6] but did not include any dispute over the removal action. The Arbitrator determined that the Agency "imposed leave"[7] on the grievant from February through June 2016 without "follow[ing] the suspension provisions" in the parties' agreement.[8] Accordingly, the Arbitrator sustained the grievance and awarded the grievant backpay beginning on the date that the Agency had proposed his removal.

The Agency filed an exception to the Arbitrator's award, and the Union filed an opposition.

III. Analysis and Conclusion: We lack jurisdiction over the Agency's exception.

In its exception, the Agency claims that the Arbitrator exceeded her authority by considering the Agency's proposal for the grievant's removal.[9] The Authority's Office of Case Intake and Publication (CIP) issued an order directing the Agency to show cause why its exception should not be dismissed.[10] CIP explained that, 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],"[11] and that the matters described in § 7121(f) include serious adverse actions, such as "suspensions for more than fourteen days under 5 U.S.C. § 7512."[12]

In response to the order, the Agency asserts that the Authority has jurisdiction to review its exception because: (1) "the Agency did not take an adverse action under 5 U.S.C. § 7512";[13] and (2) the grievant's absence

[1] Award at 7, 9.
[2] *Id.* at 8.
[3] 5 U.S.C. §§ 7121(f), 7122(a).
[4] Award at 2-3.
[5] *Id.* at 4.
[6] *Id.* at 1.
[7] *Id.* at 7.
[8] *Id.* at 8.
[9] Second Exceptions Form at 5; *see also* First Exceptions Form at 10.
[10] Order to Show Cause (Mar. 27, 2017) at 1.
[11] *Id.* (alterations in original) (quoting 5 U.S.C. § 7122(a)).
[12] *Id.* (emphasis omitted) (citing *AFGE, Council 236*, 39 FLRA 896, 897-98 (1991)).
[13] Agency's Resp. (Apr. 10, 2017) at 1-2.

"was not . . . a suspension," inasmuch as he "was free to return to work . . . when he could support his ability to perform the essential functions of his position."[14]

As relevant to the Agency's exception, the Authority will determine that an arbitrator's award relates to a matter described in § 7121(f) when the award resolves a dispute over a personnel action set forth in 5 U.S.C. § 7512.[15] In making that determination, the Authority looks not to the outcome of the award, but to whether the claim advanced in arbitration is one reviewable by the Merit Systems Protection Board (MSPB) and, on appeal, by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit).[16] In that regard, under MSPB and Federal Circuit precedent, periods of agency-enforced leave that are based on an employee's medical condition are disciplinary adverse actions.[17] Further, when such periods of enforced leave are greater than fourteen days, they are suspensions under § 7512 and are reviewable by the MSPB and, on appeal, by the Federal Circuit.[18] Moreover, to determine whether an agency "enforced" leave – that is, placed an employee on leave "against [the employee's] will" – the MSPB has held that the employee's ability to perform essential duties "is *immaterial*. Rather, the only question is whether the employee's placement in a leave status was voluntary or involuntary."[19]

Here, because the claim advanced in arbitration concerned the grievant's "medical suspension,"[20] that personnel action – rather than subsequent personnel actions – guides our jurisdictional analysis. The Agency contends that it did not subject the grievant to an adverse action under § 7512.[21] However, consistent with both MSPB and Federal Circuit precedent, we reject that argument because the Agency forced the grievant to be absent from work due to his medical condition for more than fourteen days.[22] Regarding the Agency's claim that the grievant was "free to return to work" once he established his ability to perform his job duties,[23] the grievant's "placement in a leave status was . . . involuntary."[24] Consequently, his ability to perform his job duties is "immaterial" to determining whether the Agency suspended him under § 7512.[25]

For the foregoing reasons, we conclude that the claim that the Union advanced in arbitration related to a suspension of more than fourteen days under § 7512. As a result, the Arbitrator's award relates to a matter described in § 7121(f),[26] and we lack jurisdiction over the Agency's exception.

IV. Order

We dismiss the Agency's exception.

[14] *Id.* at 2.
[15] *See U.S. Dep't of Transp., FAA*, 57 FLRA 580, 581 (2001) (*FAA*) (citing *U.S. Dep't of VA, Med. Ctr., Newington, Conn.*, 53 FLRA 440, 441-42 (1997)).
[16] *See U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Miami, Fla.*, 57 FLRA 677, 678 (2002).
[17] *Pittman v. MSPB*, 832 F.2d 598, 599-600 (Fed. Cir. 1987); *Abbott v. U.S. Postal Serv.*, 121 M.S.P.R. 294, 298 n.* (2014).
[18] *Pittman*, 832 F.2d at 599-600; *Abbott*, 121 M.S.P.R. at 298-99 (citing *Pittman*, 832 F.2d at 599-600); *see also U.S. Dep't of the Air Force, Headquarters Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 40 FLRA 88, 92-93 (1991).
[19] *Abbott*, 121 M.S.P.R. at 297 (emphasis added).
[20] Award at 1 (stating stipulated issues).
[21] Agency's Resp. at 1-2.
[22] *See Pittman*, 832 F.2d at 599-600; *Abbott*, 121 M.S.P.R. at 298-99 (citing *Pittman*, 832 F.2d at 599-600).
[23] Agency's Resp. at 2.
[24] *Abbott*, 121 M.S.P.R. at 297; *see* Award at 7 (finding Agency "imposed leave" on the grievant).
[25] *Abbott*, 121 M.S.P.R. at 297.
[26] *See FAA*, 57 FLRA at 581.