

73 FLRA No. 173

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2342
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
BLACK HILLS HEALTH CARE SYSTEMS
FORT MEADE, SOUTH DAKOTA
(Agency)

0-AR-5902

ORDER DISMISSING EXCEPTIONS

June 4, 2024

Before the Authority: Susan Tsui Grundmann, Chairman,
and Colleen Duffy Kiko, Member
(Chairman Grundmann concurring)

I. Statement of the Case

Arbitrator Howard S. Bellman issued an award finding the Union's grievance was not arbitrable under the parties' collective-bargaining agreement. The Union filed exceptions to the award on bias, fair-hearing, essence, and exceeded-authority grounds. Because the award relates to a reduction in grade, we lack jurisdiction to review the Union's exceptions, so we dismiss them.

II. Background and Arbitrator's Award

The Agency hired the grievant on October 25, 2020 as a chaplain through a temporary appointment at the General Schedule (GS)-12 level (GS-12 position). In November 2021, while serving in this temporary position, the grievant applied for a GS-13 supervisory chaplain position (GS-13 position). On December 13, 2021, the Agency rejected his application, informing the grievant he did not meet the minimum requirements for the GS-13 position because he should not have been hired at the GS-12 level. The Agency explained this "hiring error" occurred due to changes in the chaplain position requirements made after the grievant applied for, but

before he assumed, the GS-12 position.¹ The Agency further explained he needed one year of experience at the GS-12 level to qualify for the GS-13 position, and his error-based service in the GS-12 position could not be credited toward that requirement.

The Agency retroactively reduced the grievant's grade to GS-9, effective as of his hiring date. The Agency then retroactively changed his grade to GS-11, effective October 2021, which the Agency determined was when he obtained the certification required for that grade. On June 19, 2022, the Agency appointed the grievant to a permanent GS-11 position.

The Union filed a grievance challenging the grievant's non-selection for the GS-13 position, and his "constructive demotion" to the GS-9 and GS-11 levels.² To remedy the grievance, the Union requested, in relevant part, the Agency promote the grievant to the GS-13 position, and rescind the two personnel actions that effectuated his reductions in grade. The Agency denied the grievance, and the parties proceeded to arbitration.

The parties did not stipulate to an issue. The Arbitrator framed the issues as whether the grievance was arbitrable, whether it should be sustained on the merits, and if so, what was the appropriate remedy.

At arbitration, the Union alleged there was a continuing violation involving the grievant's non-selection to the GS-13 position and the "constructive demotions"³ because "the Agency constructively demoted [the grievant] to intentionally prevent him from obtaining the [GS-13] position."⁴ The Arbitrator determined the "occurrences of December 13, 2021, . . . were not of a 'continuing nature.'⁵ Instead, the Arbitrator found "they were analogous to a termination" which is "imposed on a particular date" and, therefore, "a singular violation."⁶ On this basis, the Arbitrator found the grievance untimely filed under the parties' agreement and, thus, not arbitrable.

On June 28, 2023, the Union filed exceptions to the award, and the Agency filed an opposition on July 28, 2023.

III. Analysis and Conclusion: The Authority does not have jurisdiction over the Union's exceptions.

Under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute), the Authority lacks jurisdiction to resolve exceptions to

¹ Award at 2.

² Exceptions, Ex. 3, Grievance (Grievance) at 2, 3.

³ Award at 5.

⁴ *Id.* at 6.

⁵ *Id.* at 7.

⁶ *Id.*

awards “relating to” a matter described in § 7121(f) of the Statute.⁷ Matters described in § 7121(f) include adverse actions, such as a reduction in pay or grade, that are covered under 5 U.S.C. § 7512.⁸ Such matters are appropriately reviewed by the Merit Systems Protection Board (MSPB) and ultimately the United States Court of Appeals for the Federal Circuit (Federal Circuit).⁹

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.¹⁰ 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 MSPB, and, on appeal, by the Federal Circuit.¹¹ Therefore, the Authority looks to MSPB precedent to assess whether a matter is covered under § 7512.¹²

On July 24, 2023, the Authority’s Office of Case Intake and Publication issued an order directing the Union to show cause why the Authority should not dismiss its exceptions for lack of jurisdiction under § 7121(f) of the Statute, as the award appears to relate to, or be inextricably intertwined with, a reduction in pay or grade.¹³

In response to the order, the Union asserts the issue at arbitration was the Agency’s “violation of merit[-]system principles by the failure to promote the [g]rievant to” the GS-13 position.¹⁴ As such, the Union argues, the grievance did not concern an adverse action, and the award does not relate to a § 7512 matter.¹⁵ The Union also asserts that, as the party filing the grievance, it cannot appeal the Agency’s actions to the MSPB because it is not an “employee” under 5 U.S.C. § 7511.¹⁶ For the following reasons, we reject the Union’s arguments and

conclude the Authority lacks jurisdiction to review its exceptions.

At arbitration, the Union challenged the Agency’s decision to reduce the grievant’s grade from GS-12 to GS-9 and GS-11 as a result of the Agency’s determination that the grievant had been erroneously appointed to the GS-12 position (grade-reduction claim).¹⁷ The MSPB has set forth the general rule that it has jurisdiction to hear appeals of reductions in employees’ grades.¹⁸ Further, the MSPB has held that “[t]here is no general statutory or regulatory exclusion from the chapter 75 process for reductions in grade intended to correct an ‘administrative error.’”¹⁹ The MSPB has found it has jurisdiction over similar claims challenging a reduction in grade, notwithstanding that the action was taken to correct an initial appointment error.²⁰ Applying this precedent, we conclude that the Arbitrator’s award relates to a matter described in § 7121(f) of the Statute, insofar as it resolved the grade-reduction claim.

We next determine whether the remaining issue raised by the Union – the Agency’s non-selection of the grievant for the GS-13 position (non-selection claim)²¹ – is inextricably intertwined with the grade-reduction claim. The Arbitrator found the grievant’s non-selection was based on the Agency’s determination that he lacked the requisite GS-12 experience, which, in turn, was based on the Agency’s determination that he was erroneously appointed at the GS-12 level.²² Therefore, to resolve the Union’s exceptions regarding the non-selection claim, we would need to determine whether the Agency erroneously reduced the grievant’s grade below the GS-12 level – that is, the grade-reduction claim over which the MSPB has jurisdiction.

Accordingly, any ruling by us regarding the non-selection claim – including addressing the Union’s

⁷ 5 U.S.C. § 7122(a) (“Either party to arbitration . . . 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).”).

⁸ *Id.* § 7121(f); *see also U.S. Dep’t of VA, S. Nev. Health Care Sys.*, 73 FLRA 666, 667 (2023) (VA) (citing 5 U.S.C. § 7121(f)).

⁹ *NFFE, Loc. 1998*, 73 FLRA 111, 112 (2022) (citing *U.S. Dep’t of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 88, 89 (2021) (Chairman DuBester concurring)).

¹⁰ VA, 73 FLRA at 667.

¹¹ *Id.*

¹² *Id.*

¹³ Order to Show Cause (SCO) at 1, 3.

¹⁴ Resp. to SCO (Resp.) at 2.

¹⁵ *Id.* at 2-4, 6.

¹⁶ *Id.* at 3-4, 6.

¹⁷ *See* Grievance at 3 (alleging Agency harmed grievant by engaging in “constructive demotion”); Exceptions, Ex. 9, Union’s Post-Hr’g Br. (Union’s Post-Hr’g Br.) at 149 (alleging

“Agency constructively demoted [the grievant] to intentionally prevent him from obtaining the [GS-13] position”).

¹⁸ *Fouks v. Dep’t of VA*, 122 M.S.P.R. 483, 485 (2015).

¹⁹ *Id.* at 486 (rejecting agency claim that 5 C.F.R. § 752.401(b)(15) excludes claims involving reduction in grade from MSPB’s jurisdiction where agency action was allegedly taken to correct administrative error).

²⁰ *Id.* at 486-87 (considering claimant’s challenge to alleged demotion based on agency’s decision to reduce his appointed grade due to alleged administrative error); *Walderman v. Dep’t of the Air Force*, 103 M.S.P.R. 456, 458-60 (2006) (addressing claimant’s “constructive demotion” appeal from agency’s reduction to the step-level under which it appointed him).

²¹ *See* Grievance at 3 (challenging Agency’s determination grievant lacked requisite experience at GS-12 grade to qualify for GS-13 position); Union’s Post-Hr’g Br. at 149 (challenging grievant’s non-selection to GS-13 position because grievant allegedly had requisite experience at GS-12 grade to qualify for GS-13 position).

²² Award at 2.

challenges to the Arbitrator's arbitrability determination – would intrude upon the MSPB's jurisdiction for resolving the grade-reduction claim.²³ As such – and in order to “avoid[] the multiplicity of litigation over one claim that might result if aspects of the same claim are reviewed in more than one forum” – we conclude that resolution of the non-selection claim is inextricably intertwined with the grade-reduction claim.²⁴

Moreover, the Union's argument that neither the MSPB nor the Federal Circuit would have jurisdiction to review the exceptions because the Union is not an “employee” under 5 U.S.C. § 7511 is unavailing.²⁵ The Union cites no authority to support its assertion that, as the grievant's representative, it could not appeal a claim on his behalf, nor is the Union's position consistent with MSPB precedent.²⁶ Further, the Authority has found that a lack of appeal rights to the MSPB does not confer jurisdiction on the Authority.²⁷

Noting that matters excluded from the Authority's jurisdiction under § 7121(f) include reductions in grade covered under 5 U.S.C. § 4303, the Union also argues § 4303's jurisdictional bar is inapplicable.²⁸ We find it unnecessary to resolve the Union's argument because, even assuming it is correct, we lack jurisdiction for the reasons stated above.

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

IV. Order

We dismiss the Union's exceptions.

²³ VA, 73 FLRA at 668-69 (declining to assert jurisdiction over additional issues resolved in arbitration where those issues were inextricably intertwined with underlying adverse actions within meaning of § 7512 and noting the MSPB considers procedural arguments when resolving adverse-action claims); *U.S. DHS, U.S. CBP*, 66 FLRA 91, 93 (2011) (*DHS*) (Member Beck dissenting) (declining to assert jurisdiction over issues inextricably intertwined with underlying § 7512 matters).

²⁴ *DHS*, 66 FLRA at 93.

²⁵ Resp. at 3-6.

²⁶ See *Jennings v. Dep't of Navy*, 45 M.S.P.R. 615, 616 n.1 (1990) (concluding that union is viewed as “party standing in

appellant's shoes” for attorney fees when union retained private attorney on appellant's behalf).

²⁷ *AFGE, Loc. 572*, 73 FLRA 98, 100 (2022) (finding grievant's potential lack of MSPB appeal rights did not confer jurisdiction on the Authority).

²⁸ Resp. at 2-5, 6 (asserting reduction in grade based on unacceptable performance is appealable to MSPB under 5 U.S.C. § 4303, but that grievance did not concern such matter because Agency did not base grievant's grade reduction on unacceptable performance).

Chairman Grundmann, concurring:

When an arbitrator issues an award resolving a matter under 5 U.S.C. § 7512, the award is a substitute for a decision of the Merit Systems Protection Board (MSPB).¹ Under § 7121(f) of the Federal Service Labor-Management Relations Statute,² such awards must be appealed to the U.S. Court of Appeals for the Federal Circuit (the Federal Circuit) – not the Authority.³ Unfortunately, at this point in time, it is unclear whether such an appeal is an option. In this regard, 5 U.S.C. § 7703(b)(1) imposes a sixty-day deadline for filing appeals with the Federal Circuit in this type of case.⁴ At the same time, the U.S. Supreme Court recently held § 7703(b)(1)'s sixty-day limit is not jurisdictional, but is presumptively subject to equitable tolling.⁵

Regardless of whether an appeal may be filed with the Federal Circuit in this case, I agree – for the reasons stated in the decision – that the *Authority* lacks jurisdiction. Therefore, I concur.

¹ *AFGE, Loc. 2094*, 51 FLRA 1612, 1616 (1996).

² 5 U.S.C. § 7121(f).

³ *AFGE, Loc. 2338*, 71 FLRA 1185, 1186 (2020) (Member Abbott concurring), *mot. for recons. dismissed*, 72 FLRA 176 (2021) (Member Abbott dissenting); *NASA, Lewis Rsch. Ctr., Cleveland, Ohio*, 54 FLRA 620, 625 (1998).

⁴ *See* 5 U.S.C. § 7703(b)(1) (requiring any petition for review of final MSPB decision or order be filed with the Federal Circuit within sixty days after the MSPB issues notice of its final order or decision).

⁵ *Harrow v. DOD*, 144 S.Ct. 1178, 1186 (2024).