66 FLRA No. 174

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS CANTEEN SERVICE
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
AFL-CIO
(Charging Party/Union)

BN-CA-08-0183

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DECISION AND ORDER

August 31, 2012

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

I. Statement of the Case

This unfair labor practice (ULP) case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the Respondent and a cross-exception filed by the Charging Party. The General Counsel (GC) and the Charging Party filed oppositions to the Respondent's exceptions, and the Respondent filed an opposition to the Charging Party's cross-exception. The Charging Party also filed a motion concerning attorney fees, to which the Respondent filed an opposition.

The complaint alleges that the Respondent violated § 7116(a)(1) and (8)[1] of the Federal Service Labor-Management Relations Statute (the Statute) when it failed to comply with a final and binding arbitration award as required by § 7122(b) of the Statute. The Judge found that, because the Respondent failed to prove its affirmative defense that the grievance concerning the removal of a Veterans Canteen Service (VCS) employee was not arbitrable as a matter of law, the Respondent "failed to establish that it was not required to comply with the arbitrator's award." Judge's Decision at 15. As a result, the Judge determined that the Respondent committed a ULP by failing to comply with the award. *Id.* For the reasons set forth below, we grant the Respondent's exception regarding the arbitrability of the grievance and dismiss the complaint.

II. Background and Judge's Decision

A. Background

The Respondent removed the grievant, a bargaining unit employee who worked as a food service worker, from his position. *Id.* at 3. The Charging Party grieved his removal, and the Respondent denied the grievance. *See id.* The Charging Party invoked arbitration. *See id.* The parties participated in hearings before the arbitrator concerning the grievant's removal, and the arbitrator "issued her decision and award mitigating the [removal] to a [three]-day suspension and ordering the Respondent to reinstate [the grievant] to his former position and provide him with back[pay]." *Id.* The Respondent refused to comply with the award. *Id.*

As a result, the Charging Party filed a ULP charge against the Respondent. *Id.* at 1. The GC issued a complaint, alleging that "the Respondent failed to comply with an arbitration award . . . as required by [§] 7122(b) of the Statute and, thereby, violated [§] 7116(a)(1) and (8) of the Statute." *Id.* at 2. The Respondent filed an answer to the complaint, admitting the factual allegations, but denying that it had committed a ULP. *See id.*

B. Judge's Decision

Before the Judge, the Respondent contended that its refusal to implement the award did not violate the Statute. *Id.* at 4-5. According to the Respondent, because VCS employees who are appointed under 38 U.S.C. § 7802(e) have no right to pursue arbitration under the parties' negotiated grievance procedure, the arbitrator lacked jurisdiction over the grievance as a matter of law. *Id.* The Respondent further argued that, because the grievant was also a nonpreference eligible excepted service (NEES) employee, "the arbitrator did not have jurisdiction to hear the grievance regarding the removal and was precluded by law from reaching the merits of the removal." *Id.* at 5.

The Judge concluded that, although the Respondent did not file exceptions to the award and did not contest the arbitrator's jurisdiction at arbitration, she could consider the Respondent's affirmative defense that the arbitrator lacked jurisdiction over the grievance. *Id.* at 6-7. According to the Judge, claims challenging an arbitrator's statutory, as opposed to contractual, jurisdiction "may be entertained in a ULP proceeding for enforcement of the arbitrator's award," regardless of

[1] The text of the relevant statutory and regulatory provisions is set forth in the appendix to this decision.

whether such claims were presented to the arbitrator.[2] *Id.* at 7.

In considering the Respondent's affirmative defense, the Judge addressed the applicability of § 7121(e) of the Statute to NEES employees. *See id.* at 8-12. The Judge indicated that, for purposes of § 7121(e), "personnel systems fall into one of two general categories[:] . . . the general civil service personnel system [(civil service)] that is governed by Title [5] . . . or 'other personnel systems.'" *Id.* at 8. The Judge first analyzed the right of NEES employees within the civil service to grieve adverse actions. *Id.* at 8-11. The Judge noted that the civil service is comprised of competitive service employees and excepted service employees, such as VCS employees. *Id.* at 8 & n.4. The Judge also determined that the Civil Service Reform Act (CSRA) afforded procedural protections and appellate rights to a majority of employees in the competitive service who were subject to adverse actions as identified in 5 U.S.C. § 7512, but did not extend such rights to NEES employees. *Id.* at 9. The Judge indicated that, based on the decisions of several circuit courts and the Supreme Court's decision in *United States v. Fausto*, 484 U.S. 439 (1988) (*Fausto*), the Authority held that, because NEES employees in the civil service were unable to appeal adverse actions to the Merit Systems Protection Board (MSPB), they were precluded by law from grieving those same actions. *See* Judge's Decision at 9. In addition, the Judge found that, in 1990, Congress amended the CSRA (1990 Amendments) "to bring many, but not all, [NEES] employees within the definition of 'employee'" under 5 U.S.C. § 7511 "and[,] by doing so[,] afforded them procedural protections and appellate rights for matters covered under [§] 7512." *Id.*; *see also id.* at 10-11 (citing an Office of Personnel Management (OPM) regulation, 5 C.F.R. § 752.401(d)(12), which was enacted by OPM after the 1990 Amendments).

In addition, the Judge analyzed the right of NEES employees within "other personnel systems" to grieve adverse actions. *Id.* at 11-12. The Judge found that Congress's intention with respect to employees in the civil service differed from its intention with regard to employees in "other personnel systems." *Id.* at 11. According to the Judge, "[w]hile Congress sought through the CSRA to replace a patchwork system with an integrated scheme of administrative and judicial review and to promote uniformity and consistency in matters involving personnel actions" by giving primacy to the MSPB and the United States Court of Appeals for the Federal Circuit (Federal Circuit) to review "adverse personnel actions arising in the . . . civil service system, it did not apply the same method of promoting integration, uniformity and consistency to other personnel systems." *Id.* at 11-12. As a result, the Judge determined that the fact that NEES employees in "other personnel systems" could not appeal adverse actions did not preclude them from grieving those same actions. *Id.* at 12.

Also, in considering the Respondent's affirmative defense, the Judge found that, based on the MSPB's decision in *Chavez v. Department of Veterans Affairs*, 65 M.S.P.R. 590 (1994) (*Chavez*), VCS employees were unable to appeal their terminations to the MSPB. Judge's Decision at 12-13. According to the Judge, the MSPB in *Chavez* held that "it had no jurisdiction over the adverse action appeals of [VCS] employees appointed under 38 U.S.C. § 7802[(e)] because those employees [were] excluded from the appointing provisions of [T]itle 5 by separate statutory authority and no provision placed them within the coverage of [C]hapter 75" of Title 5. *Id.* at 13.

Applying the above analysis, the Judge set forth four scenarios to determine whether the grievance concerning the removal of a VCS employee was arbitrable. *Id.* at 14. The Judge determined that: (1) "[i]f [the grievant] was in an other personnel system, the matter would be arbitrable;" (2) "if [the grievant] was in the . . . civil service and was a preference eligible employee, the matter would be arbitrable;" (3) "if [the grievant] was in the . . . civil service . . . and covered by the . . . [1990] Amendments, the matter would be arbitrable[;]" and (4) "[i]f, however, [the grievant] was in the . . . civil service . . . and excluded from the . . . [1990] Amendments, his termination would not be arbitrable." *Id.*

The Judge found that the record did not permit her to determine which of the four scenarios applied in this case. *See id.* at 8 n.5, 13, 14. Therefore, the Judge concluded that the Respondent did not meet its burden of proof to establish its affirmative defense. *Id.* at 14-15. As a result, the Judge found that the Respondent failed to show it did not have to comply with the award and that the Respondent committed a ULP in violation of § 7106(a)(1) and (8) of the Statute. *Id.* at 15. As a remedy, the Judge recommended a notice posting "signed by the Secretary of the Department of Veterans Affairs [(VA)] . . . at VCS facilities where employees represented by the Union are located." *Id.* at 16 n.11. Finally, the Judge denied the Charging Party's request for attorney fees relating to the ULP proceedings because the Charging Party failed to address whether the requirements provided in 5 U.S.C. § 7701(g)(1) for an award of attorney fees were met. *Id.* at 15.

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[2] Because there are no exceptions to the Judge's finding that the Respondent was permitted to collaterally attack the arbitrator's statutory jurisdiction, we adopt that finding and any other unexcepted-to findings without precedential significance. *See, e.g.*, *U.S. Sec. & Exch. Comm'n*, 62 FLRA 432, 433 n.4 (2008).

III. Positions of the Parties

A. Respondent's Exceptions

The Respondent asserts that the Judge wrongfully concluded that, as a matter of law, the arbitrator had jurisdiction to decide the merits of the grievant's removal. Respondent's Exceptions at 2. In support of its assertion, the Respondent claims that "[t]he Authority should adopt the Federal Circuit's" rationale in *Bennett v. MSPB*, 635 F.3d 1215, 1219 (Fed. Cir. 2011) (*Bennett*) and find that VCS employees cannot grieve their removals. Respondent's Exceptions at 5-10. Specifically, the Respondent argues that, based on the language of § 7802, in conjunction with legislative history, VCS employees are prohibited from appealing their removals to the MSPB and thus similarly are prohibited from grieving their removals. *See id.* at 6-8. Also, the Respondent contends 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. Respondent's Exceptions at 8, 9. Moreover, the Respondent 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 10.

In addition, the Respondent claims that the Judge's determination that, based on the record, she was unable to determine whether the grievant was covered by the 1990 Amendments "or was a preference eligible excepted service employee [is] . . . misguided." *Id.* at 13. According to Respondent, the parties do not dispute that the grievant is an NEES employee, *id.*, and the Federal Circuit's decision in *Bennett* clearly establishes that VCS employees appointed pursuant to § 7802(e) are not covered by the 1990 Amendments, *id.* at 13, 17. Similarly, the Respondent asserts that the Judge improperly found that the record prevented her from determining whether VCS employees are part of an "other personnel system" because, as a legal matter, VCS employees, for purposes of § 7121(e), are not part of an "other personnel system," but, rather, are included in the civil service.[3] *Id.* at 12, 14. In this regard, the Respondent argues that it does not consider itself as part of an "other personnel system." *Id.* at 12. Moreover, the Respondent contends that the language of § 7802(e), which allows VCS employees to grieve minor disciplinary matters, 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 14 (quoting 38 U.S.C. § 7421).

Finally, the Respondent maintains that, even if the Authority does not find *Bennett* to be controlling, the Judge improperly directed the Secretary of the VA to sign the posting. *Id.* at 18. According to the Respondent, "[t]here is absolutely no reason why the Director of the VCS . . . should not be the signatory of" the posting. *Id.*

B. GC's Opposition

The GC argues that the Judge properly found that the Respondent failed to establish that the arbitrator lacked jurisdiction over the grievance as a matter of law. GC's Opp'n at 17. In this regard, the GC claims that the Judge was not required to dismiss the complaint based on the Federal Circuit's decision in *Bennett*. *Id.* at 8-11. The GC asserts that the Federal Circuit, in *Bennett*, did not decide whether VCS employees, like the grievant, may grieve their removals under a negotiated grievance procedure, but, rather, found that such employees could not appeal their removals to the MSPB. *Id.* at 9. Moreover, the GC maintains that the Federal Circuit's finding in *Bennett* that the 1990 Amendments did not create any new rights for these NEES employees is inconsistent with the Authority's holding in *United States Department of Veterans Affairs, VCS, Martinsburg, West Virginia*, 65 FLRA 224 (2010) (*VA Martinsburg*). GC's Opp'n at 10. According to the GC, the Authority, in *VA Martinsburg*, properly concluded that VCS employees appointed pursuant to 38 U.S.C. § 7802(e) were covered by the 1990 Amendments and thus could grieve their terminations. *Id.* at 10-11.

In addition, the GC contends that VCS employees are part of an "other personnel system" within the meaning of § 7121(e). *Id.* at 11-14. The GC maintains that, "[t]o meet the unique demands of staffing and operating a nationwide canteen service for the VA's medical facilities, the Secretary of the VA was given the authority to appoint, pay and remove VCS employees without regard to the Title 5 . . . civil service system rules." *Id.* at 13-14. The GC also claims that, although VCS employees are entitled to some of the same benefits that civil service employees receive, their entitlement to such benefits is based on their status as federal employees and not on their inclusion in the civil service or in an "other personnel system." *Id.* at 12. Additionally, the GC argues that the Authority has found that the personnel

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[3] In support of this argument, the Respondent "submits [an] attached affidavit of the Associate Director for Resources and Support of the VCS." Respondent's Exceptions at 12. 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. Respondent's Exceptions, Attach., Affidavit of Associate Director, at 2; *see also id.* at 3. For reasons discussed below, we conclude that the affidavit is properly before us.

system covering Title 38 healthcare professionals constitutes an "other personnel system" and that "[t]he personnel system covering . . . VCS employees is not materially different" because, under both systems, "the appointment, pay, tenure and discipline of . . . employees are . . . determined outside the Title 5 general civil service rules." *Id.* at 13.

Furthermore, the GC maintains that, although § 7802(e) gives the Secretary of the VA "the discretion to remove VCS employees without regard to" Title 5, the Secretary "can voluntarily agree to allow VCS employees the contractual right to grieve their" removals. *Id.* at 15. Finally, the GC argues that the Secretary is the appropriate official to sign the notice because he is the highest official at the VA, and his signature will signify that "the Respondent acknowledges its obligations under the Statute and will comply with those obligations." *Id.* at 16.

C. Charging Party's Opposition and Cross-Exception

In its opposition, the Charging Party maintains that the Judge properly found that the grievance concerning the removal of a VCS employee was arbitrable and that, as a result, the Respondent committed a ULP by failing to comply with the award. Charging Party's Opp'n at 3-4. Specifically, the Charging Party contends that, because the grievant is an NEES employee within the meaning of § 7511(a)(1)(C) and an "employee" within the meaning of § 7103 of the Statute, the grievant is covered by the parties' agreement. *Id.* at 4. The Charging Party also asserts that the Judge properly relied on the Authority's decision in *VA Martinsburg*, which supports the conclusion that VCS employees can grieve their removals. *Id.* at 6. Moreover, the Charging Party claims that *Bennett* was decided wrongly, *id.* at 5 n.7, but that, even if the Authority disagrees and finds that the grievant does not have appeal rights to the MSPB, VCS employees are in an "other personnel system" pursuant to § 7121(e), *e.g.*, *id.* at 11 n.12, and thus do not lack grievance rights, *see, e.g.*, *id.* at 8-9.

In addition, the Charging Party argues that the Judge properly determined that the Respondent's reliance on *Nutt* was misplaced because the Supreme Court did not find that, if the MSPB lacked jurisdiction over an adverse action, an arbitrator also lacked jurisdiction over that action. *E.g.*, *id.* at 7. Similarly, the Charging Party contends that the Respondent improperly relies on *Fausto* and its progeny because the holdings in those cases that the CSRA "purposely curtailed . . . MSPB appeal rights [and other judicial rights] of [NEES] employees like the grievant" were "undercut by Congress when, in direct response to the decision in *Fausto*, Congress amended" that statute to give NEES employees MSPB appeal rights pursuant to § 7511(a)(1)(C). *Id.* at 9-10; *see also, e.g.*, *id.* at 9 n.9. Furthermore, the Charging Party claims that OPM's regulation, 5 C.F.R. § 752.401(d)(12), is invalid and that the Authority owes it no deference. *Id.* at 11 n.13.

Finally, in its cross-exception, the Charging Party contends that, contrary to the conclusion of the Judge, the Authority should give it thirty days after the Authority's decision is final to file for attorney fees concerning the hours that it expended in litigating this ULP charge.[4] *Id.* at 12-14.

D. Respondent's Opposition to Charging Party's Cross-Exception

The Respondent opposes the Charging Party's request for attorney fees. Respondent's Opp'n to Charging Party's Cross-Exception at 1. According to the Respondent, under 5 C.F.R. § 2423.21, "a [c]harging [p]arty is not eligible for an award of attorney[] fees, even if it . . . prevails in the underlying [ULP] case."[5] *See id.* (emphasis omitted).

IV. Preliminary Matter: Section 2429.5 does not bar the Authority from considering the disputed affidavit.

The GC contends that, pursuant to § 2429.5 of the Authority's Regulations, the Authority should not consider the Respondent's affidavit because the Respondent did not present it to the Judge. GC's Opp'n at 11 n.2. The Authority has declined to apply § 2429.5 to arguments challenging an arbitrator's statutory jurisdiction, as well as to evidence relating to such arguments. *See AFGE, Local 648, Nat'l Council of Field Labor Locals*, 65 FLRA 704, 708 (2011) (refusing to apply § 2429.5 to bar the agency's contention that the arbitrator lacked statutory jurisdiction); *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

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[4] The Charging Party also filed a motion to permit it to file a request for attorney fees under the Equal Access to Justice Act (EAJA), 5 C.F.R. § 2423.21, at the end of this litigation. In response to the motion, the Authority ordered the Charging Party "to show cause why its motion should not be dismissed because [it] [was] ineligible for attorney fees under the EAJA." Order to Show Cause (Order) at 1. In its response to the order (response), the Charging Party indicated that it meant to request fees or, alternatively, the opportunity to request fees at the conclusion of this litigation pursuant to the Back Pay Act, as opposed to the EAJA. Response at 1.

[5] The Respondent also filed an opposition to the Charging Party's motion and reiterated the arguments that it made in its opposition to the Charging Party's cross-exception. *See* Respondent's Opp'n to Charging Party's Motion at 1.

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* Respondent's Exceptions, Attach., Affidavit of Associate Director, at 2-3. Accordingly, we find that the affidavit is properly before us and that we may consider it.

V. Analysis and Conclusion: The Respondent did not commit a ULP by failing to comply with an arbitrator's award concerning the removal of a VCS employee.

The Respondent asserts that the Judge wrongfully concluded that, as a matter of law, the arbitrator had jurisdiction to decide the merits of the grievant's removal. Respondent's Exceptions at 2. Specifically, the Respondent claims that the Federal Circuit, in *Bennett*, properly found that VCS employees cannot appeal their removals to the MSPB and that, as a result, they cannot grieve their removals pursuant to a negotiated grievance procedure. *See id.* at 5-10. The Respondent also maintains that VCS employees appointed pursuant to § 7802(e) are not in an "other personnel system." *Id.* at 11-15. For the reasons stated below, we find that the Judge erred in concluding that the Respondent failed to establish that, as a matter of law, the arbitrator lacked jurisdiction over the grievance concerning the removal of a VCS employee.

A. VCS employees appointed pursuant to § 7802(e) cannot appeal their removals.

We find that VCS employees appointed pursuant to § 7802(e) are precluded from appealing their removals to the MSPB. When Congress initially "adopted the VCS Act in 1946, [§] 2(e), which would eventually be codified as [§] 7802(e), stated that '[p]ersonnel . . . shall be . . . removed by the Administrator without regard to civil-service laws.'" *Bennett*, 635 F.3d at 1219 (quoting Pub. L. No. 79-636, § 2(e), 60 Stat. 887, 888 (1946)). In the 1982 amendments to the VCS Act, Congress amended the language of § 4202(e), previously § 2(e), "to read as it does today" as § 7802(e). *Id.* The amendment "replac[ed] the language 'without regard to civil-service laws' with 'without regard to the provisions of [T]itle 5 governing appointments in the competitive service.'" *Id.* (quoting Pub. L. No. 97-295, § (4)88, 96 Stat. 1287, 1312 (1982)). Congress also included § 5(a), which states that the other portions of the amendments, including amended § 7802(e), "restate, without substantive change, laws enacted before December 2, 1981, that were replaced by those sections" and that "[t]hose sections may not be construed as making a substantive change in the laws replaced." Pub. L. No. 97-295, § 5(a), 96 Stat. 1287, 1313 (1982). Although § 5(a) is contained in the "Legislative Purpose and Construction" section of the amendments, that fact is immaterial. *Cf.* 2A Sutherland, Stat. Const., § 47.06, at 226 (Norman J. Singer ed., 6th ed. 2000) (indicating that, "[i]n construing provisions in the purview, or body, of an act, which consists of everything subsequent to the enacting clause, all matter contained therein must be interpreted together"); *Shawnee Tribe v. United States*, 423 F.3d 1204, 1215-16 (10th Cir. 2005) (noting that "the Legislative Purpose and Construction statement passed as part of the 2002 recodification of the Property Act" was a good indication of Congress's intent because it "was legislatively enacted as part of the public law"); *Union Elec. Co. v. United States*, 626 F.2d 1348, 1352 n.4 (8th Cir. 1980) (citing the "Legislative Purpose and Construction" section of a statute for the proposition that a "recodification [of that statute] did not make substantive changes"). Consequently, as the law itself clearly provides, the 1982 amendments did not make a change in the meaning of the language that they replaced. *See* Pub. L. No. 97-295, § 5(a), 96 Stat. 1287, 1313 (1982). Specifically, as discussed in *Bennett*, nothing in the 1982 amendments, including the amendment to § 7802(e), changed the Administrator's ability to remove individuals appointed under this section "regardless of the protections of [T]itle 5." *Bennett*, 635 F.3d at 1220; *see also id.* at 1219.

Further, the 1990 Amendments did nothing to change this situation. The 1990 Amendments expanded the definition of "employee" under 5 U.S.C. § 7511 and, as a result, afforded more individuals, including certain NEES employees, "procedural protections and appellate rights for matters covered under [§] 7512." Judge's Decision at 9. However, as noted above, VCS employees had been excluded from coverage under § 7512 by virtue of § 7802(e), not by virtue of the definition of "employee." For Congress to have repealed the pertinent part of § 7802(e) in the 1990 Amendments, it would had to have done so "clear[ly] and manifest[ly]" by explicitly providing them appeal rights in the Amendments. *Todd v. MSPB*, 55 F.3d 1574, 1577 (1995) (*Todd*) (internal citations and quotation marks omitted) (determining that "[r]epeal by implication is invoked only when an enactment is irreconcilable with an earlier statute, or the enactment so comprehensively covers the subject matter of the earlier statute that it must have been intended as a substitute"). Neither the text nor the legislative history of the 1990 Amendments indicate that Congress did so. Therefore, the 1990 Amendments did not provide VCS employees coverage under § 7512. *See Bennett*, 635 F.3d at 1220-21.

OPM's regulation implementing the 1990 Amendments, 5 C.F.R. § 752.401(d)(12), further supports the proposition that VCS employees continue to lack appeal rights. *See id.* at 1221. The regulation states that the requirements of Chapter 75 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." 5 C.F.R. 752.401(d)(12). In promulgating this regulation, OPM stated that it was "aware of the existence of other groups of [employees who were] also excluded from [the] appointing requirements of [T]itle 5" but who were not explicitly excluded in the 1990 Amendments. 58 Fed. Reg. 13, 191 (Mar. 10, 1993). OPM explained that, consistent with the plain language of the regulation, if employees were previously "excluded by an agency's statutory authorities from adverse action protections[,]" and no provision in the 1990 Amendments specifically gave those employees such protections, then they continued to be excluded regardless of whether or not they were "specifically listed as excluded in the" Amendments. *Id.*

Consequently, we interpret the 1982 amendments, and the 1990 Amendments in conjunction with § 752.401(d)(12), as demonstrating that VCS employees appointed under § 7802(e) are not afforded appeal rights under Chapter 75 of Title 5. They are therefore precluded, by law, from appealing the validity of their removals to the MSPB.

B. VCS employees appointed under § 7802(e) cannot grieve their removals.

We also find that, because VCS employees cannot appeal their removals to the MSPB, they cannot grieve their removals pursuant to a negotiated grievance procedure. Both the Authority and the courts consistently have held that, when an employee is precluded from appealing an adverse action under Chapter 75 of Title 5, that employee similarly is prohibited from grieving that same action. *See, e.g.*, *U.S. Dep't of the Air Force, Luke Air Force Base, Ariz.*, 65 FLRA 820, 821-22 (2011) (*Luke AFB*) (concluding that, when employees cannot appeal adverse actions to the MSPB, they cannot grieve those same actions pursuant to a negotiated grievance procedure); *NLRB*, 35 FLRA 1116, 1124-26 (1990) (same); *see also U.S. Dep't of Health & Human Servs. v. FLRA*, 858 F.2d 1278, 1283-85 (7th Cir. 1988) (same); *U.S. Dep't of Justice, Immigration & Naturalization Serv. v. FLRA*, 709 F.2d 724, 730 (D.C. Cir. 1983) (*DOJ*) (same). As held by the United States Court of Appeals for the District of Columbia Circuit, allowing employees who are precluded from appealing their removals to the MSPB, such as the employees at issue here, to grieve their removals would undermine Congress's intent to deny statutory appeal rights to these employees and to create uniformity between MSPB and arbitration decisions concerning adverse actions. *See, e.g., Dep't of the Treasury, Office of Chief Counsel v. FLRA*, 873 F.2d 1467, 1469-70 (D.C. Cir. 1989) (*Treasury*); *DOJ*, 709 F.2d at 729-30; *U.S. Dep't of the Air Force, Nellis Air Force Base, Las Vegas, Nev.*, 46 FLRA 1323, 1326-27 (1993). In addition, § 7121(e) does not, by itself, grant a right to grieve anything. Rather, § 7121(e), by its plain terms, requires that there be an election of remedies, *if* the grievance procedure otherwise is available. 5 U.S.C. § 7121(e). Accordingly, VCS employees appointed pursuant to § 7802(e) do not have the right to grieve their removals, and we reject the GC's and the Charging Party's contention to the contrary.

Further, the GC's and the Charging Party's reliance on *VA Martinsburg* as support for their contention concerning NEES employees' grievance rights is misplaced. In *VA Martinsburg*, the Authority did not decide whether a VCS employee's status as an NEES employee gave that employee the right to grieve because that issue was not before it. Moreover, to the extent the Authority addressed an employee's status as an NEES employee, it merely noted that, if the Respondent were able to demonstrate that the grievance concerning the removal of a VCS employee was not arbitrable, it would be based on the grievant's status as a § 7802(e) employee and not on his or her status as an NEES employee. *See VA Martinsburg*, 65 FLRA at 229.

We also reject the GC's contention that, even if VCS employees do not have a legal right to grieve their removals, the parties have agreed to provide these employees a "contractual right to grieve their [removals] under [the] negotiated grievance procedure." GC's Opp'n at 15; *see also id.* at 14. The Authority has held, in similar circumstances, that agreement provisions granting employees procedural protections that are not authorized by law are unenforceable. *See, e.g.*, *Luke AFB*, 65 FLRA at 822 (rejecting the arbitrator's determination that the grievants could be terminated only for just cause under their agreement because parties are barred from establishing additional procedural protections that are not provided to terminated, temporary employees by statute). Accordingly, because we have held that VCS employees are precluded from grieving their removals as a matter of law, any provision of the parties' agreement purporting to grant these employees the right to grieve their removals is unenforceable.

C. VCS employees are not part of an "other personnel system."

The GC and the Charging Party argue that the above analysis is inapplicable to VCS employees because they are part of an "other personnel system" within the meaning of § 7121(e). *See* GC's Opp'n at 11-14; Charging Party's Opp'n at 5 n.7, 8 n.8. We reject this contention and find that these employees are not part of an "other personnel system."

The Authority has concluded that the determinative factor in deciding whether a personnel system constitutes an "other personnel system" within the meaning of § 7121(e) or § 7121(f) is whether it is intended to operate separate and apart from the personnel system which is applicable to civil service employees and is governed by Title 5. *U.S. Dep't of Def., Dependents Sch., Ger. Region*, 38 FLRA 1432, 1436 (1991). Although Congress did not define the term "other personnel system," the legislative history of the Statute provides one specific example of an "other personnel system," namely the system established by 38 U.S.C. §§ 4104-4119 for Department of Medicine and Surgery (DM & S) professional employees of the Veterans Administration. *See, e.g.*, *U.S. Small Bus. Admin.*, 33 FLRA 28, 34-35 (1988) (*SBA*). In that statute, Congress gave the Veterans Administration the authority to establish regulations governing: (1) DM & S professionals' qualifications regardless of civil service requirements; (2) a different probationary period for them than civil service employees; (3) their hours, conditions of employment, and leaves of absence regardless of any law, executive order, or regulation; and (4) their pay according to special grades and scales. *Id.* at 34-35.

Using the above personnel system as a benchmark, the Authority found that the personnel system for teachers in overseas schools operated by the Department of Defense (DoD) constituted an "other personnel system." *Dep't of Def., Dependents Sch. (DoDDS), Pac. Region*, 22 FLRA 597, 599-601 (1986) (*DoDDS Pac. Region*). In reaching this conclusion, the Authority determined that Congress, in enacting the Defense Department Overseas Teachers Pay and Personnel Practices Act (the Act), codified at 20 U.S.C. §§ 901–907, clearly intended to allow the Secretary to issue regulations to provide for a system of personnel administration. *Id.* at 600. Moreover, the Authority found that, under § 902(a), Congress gave the DoD the authority to promulgate regulations governing: (1) the establishment of teaching positions; (2) the fixing, entitlement, and payment of teachers' compensation; (3) the appointment of teachers; (4) the conditions of employment of teachers; and (5) the leave system for teachers. *Id.*

Section 7802(e) stands in stark contrast to the personnel systems described above, which clearly are intended to operate apart from the personnel system which is applicable to civil service employees and which is governed by Title 5. In this regard, whereas employees in the above personnel systems are excluded from substantially all of Title 5, § 7802(e) allows the Secretary to exclude VCS employees from the provisions of Title 5 only with regard to appointment, compensation, and removal. 38 U.S.C. § 7802(e); *cf. U.S. Dep't of Transp., Fed. Aviation Admin.*, 54 FLRA 235, 238 (1998) (observing that the Federal Aviation Administration's personnel management system was exempted from substantially all of Title 5 in determining that it constituted an "other personnel system"). Moreover, whereas Congress clearly intended to allow the above agencies to establish other personnel systems for certain employees, there is no indication that Congress intended, through Title 38, for the VA to establish an "other personnel system" for VCS employees. *See* 38 U.S.C. § 7802(e); *cf. DoDDS Pac. Region*, 22 FLRA at 600 (finding that the personnel system covering teachers in overseas schools operated by the DoD constituted an "other personnel system" because the purpose of the Act clearly was to have the Secretary issue regulations to establish an alternative system of personnel administration). Consequently, VCS employees are not covered by an "other personnel system" within the meaning of § 7121(e), but, rather, are part of the personnel system applicable to civil service employees governed by Title 5. *See SBA*, 33 FLRA at 35-36 (concluding that temporary employees, although excluded from coverage regarding specified personnel matters governed by Title 5, were not in an "other personnel system" within the meaning of § 7121(e)); *see also Dep't of Health & Human Servs., Soc. Sec. Admin.*, 32 FLRA 79, 85 (1988).

In sum, because we find that, as a matter of law, the grievance was not arbitrable, we also find that the Respondent did not commit a ULP in violation of § 7116(a)(1) and (8) by failing to comply with the arbitrator's award.[6]

VI. Order

The complaint is dismissed.[7]

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[6] In view of this conclusion, it is unnecessary to address the Charging Party's request for attorney fees in its cross-exception and motion. It is also unnecessary to consider the Respondent's objections to that request in its oppositions to the Charging Party's cross-exception and motion. *See Fraternal Order of Police Lodge No. 158*, 66 FLRA 420, 423 (2011) (determining that it was unnecessary to address the union's request for backpay and attorney fees and the agency's objection to that request based on our resolution of the case).

[7] Because we dismiss the complaint, it is also unnecessary to address the Respondent's exception concerning the Judge's recommended notice posting. *See NTEU*, 66 FLRA 611, 615 n.4 (2012) (concluding that it was unnecessary to address the union's requested remedies after upholding the arbitrator's determination that the agency did not commit a ULP).

APPENDIX

Section 7116 of the Statute states, in pertinent part:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency –
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> . . . .
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

Section 7122(b) of the Statute states:

> If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30 day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

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. § 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[.]

Office of Administrative Law Judges

DEPARTMENT OF VETERANS AFFAIRS
VETERANS CANTEEN SERVICE
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
Charging Party

BN-CA-08-0183

Susanne S. Matlin, Esq.
For the General Counsel

Granville M. Keys, Esq.
For the Respondent

Martin R. Cohen, Esq.
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, *et. seq.* (the Statute), and the revised Rules and Regulations of the Federal Labor Relations Authority (the Authority/FLRA), 5 C.F.R. Part 2423.

On March 17, 2008, the American Federation of Government Employees, AFL-CIO (Charging Party/Union) filed an unfair labor practice charge against the Department of Veterans Affairs, Veterans Canteen Service (Respondent/Agency). The charge was transferred to the Chicago Regional Office of the Federal Labor Relations Authority on September 15, 2009. An amended charge was filed on November 23, 2010. On November 30, 2010, the Regional Director of the Chicago Region issued a Complaint and Notice of Hearing in which it alleged that the Respondent failed to comply with an arbitration award issued in FMCS Case No. 07-56733 as required by section 7122(b) of the Statute and, thereby, violated section 7116(a)(1) and (8) of the Statute.

On or about December 27, 2010, the Respondent filed its Answer to the complaint, in which it admitted certain allegations, but denied the substantive allegations of the complaint.

The hearing in this case was originally scheduled for January 20, 2011, but was indefinitely postponed in response to a joint motion for decision based upon stipulation of facts filed by the parties on January 4, 2011. The parties entered into a stipulation of facts dated January 4, 2011. In that stipulation, the parties agreed that the Charge, the Complaint and Notice of Hearing, Respondent's Answer, the Stipulation and its attached exhibits, constitute the entire record in the case and no oral testimony is necessary or desired by any party as no material issue of fact exists. Since the parties waived their right to a hearing before the Administrative Law Judge, no hearing has been held and this decision is based on the formal papers, the stipulation of facts and attached exhibits.

FINDINGS OF FACT

The parties agreed to the following stipulation of facts:

1. The American Federation of Government Employees, AFL-CIO (the Union) is a labor organization under section 7103(a)(4) of the Statute.

2. The Union is the exclusive representative of a nationwide consolidated unit of employees appropriate for collective bargaining at the Respondent.

3. U.S. Department of Veterans Affairs, Veterans Canteen Service (the Respondent or Agency) is an agency under section 7103(a)(3) of the Statute.

4. At all times material, the following individuals held the positions set opposite their names and have been supervisors or management officials within the meaning of section 7103(a)(10) and/or (11) of the Statute and agents of the Respondent acting upon its behalf:

   Eric K. Shinski
   Secretary

   Robert A. Petzel
   Under Secretary for Health

   Marilyn Iverson
   Director, Veterans Canteen Service

   J. Patrick Weise
   Regional Counsel

Granville M. Keys
Attorney

5. At all times material, the Union and Respondent were parties to a collective bargaining agreement (CBA) that includes a grievance-arbitration procedure. (Jt. Ex. 2).

6. On or about April 4, 2007, the Respondent removed bargaining unit employee Thomas Barnes from his position at Respondent's Castle Point, New York, facility. (Jt. Ex. 3). Barnes was employed continuously as a Food Service Worker under 38 U.S.C. 7802 since 1991 before his removal.

7. The Union grieved the termination of Barnes under the parties' CBA and the parties selected Arbitrator Randi Lowitt concerning the termination of Barnes (FMCS Case No. 07-56733).

8. On November 2, 2007, the Union and Respondent participated in an arbitration hearing before Arbitrator Lowitt concerning the termination of Barnes (FMCS Case No. 07-56733).

9. On January 28, 2010, Arbitrator Lowitt issued her decision and award mitigating the termination to a 3-day suspension and ordering the Respondent to reinstate Barnes to his former position and provide him with back pay.[1] (FMCS Case No. 07-56733). (Jt. Ex. 4).

10. The parties' CBA includes a term that reads: "Grievance/Arbitrability will be resolved as threshold issues of arbitration, but must have been raised no later than the time the Step 3 decision is given."

11. Prior to the issuance of Arbitrator Lowitt's award, the Respondent did not raise any issue regarding the grievability or arbitrability of the removal of Barnes.

12. Since on or about January 28, 2008, and continuing, the Respondent has failed and refused to reinstate Barnes to his former position and provide him with back pay. (FMCS Case No. 07-56733).

[1] The copy of the arbitrator's award that is included in the record is dated January 28, 2008. (Jt. Ex. 4). This date is consistent with the chronology of the case and corresponds with the date stated in the charge and complaint. I will assume January 28, 2010, the date specified in the stipulation, is inadvertent error.

POSITION OF THE PARTIES

A. General Counsel

The General Counsel (GC) alleges the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to comply with Arbitrator Lowitt's award. The GC avers that Veterans Canteen Service (VCS) employment involves an "other personnel system" within the meaning of section 7121(f) of the Statute. The GC asserts that although the arbitrator's award was not subject to the filing of exceptions to the Authority under section 7122(a) of the Statute because it related to a termination, the Respondent could have obtained review of the award by filing an appeal with the U.S. Court of Appeals for the Federal Circuit. As no appeal was filed and the time for doing so passed, the General Counsel maintains the award became final and binding and cannot be attacked collaterally through the unfair labor practice process.

The GC argues any claim by the Respondent that it was not obligated to comply with the Lowitt award because the grievance involved was not arbitrable as a matter of law should be rejected. In this regard, the GC asserts that the cases in which the Authority declined to enforce an arbitration award on such a ground are limited to very narrow exceptions that do not apply here. Further, the GC contends the status of VCS employees is materially different from that of VA medical professionals who are subject to 38 U.S.C. § 7422 and probationary employees--two groups who, "under clearly established law," have no right to challenge removals through a negotiated grievance procedure. (G.C.'s Brief at 10).

Citing *U.S. Dep't of Veterans Affairs, Veterans Canteen Serv., Martinsburg, WV*, 65 FLRA 224 (2010)(*VA, Martinsburg*), the General Counsel maintains the Authority recently considered and rejected Respondent's argument that VCS employees should be denied the right to challenge a removal under grievance and arbitration procedures because they do not have the right to appeal removals to the Merit Systems Protection Board (MSPB). The General Counsel characterizes *VA, Martinsburg*, as finding that the removal of a VCS employee may be grieved under the negotiated grievance procedure and urges the same finding should be applied in this case.

The General Counsel also asserts that even assuming the Respondent has the right to remove VCS employees without any administrative appeal rights, the

Respondent can and has entered into a collective bargaining agreement that extends the right to grieve removal actions to VCS employees.

As remedy, the General Counsel seeks an order requiring the Respondent to cease and desist, comply with the arbitration award, reinstate Barnes to his former position, provide him with back pay, and post a notice to employees.

B. Respondent

The Respondent asserts its actions in refusing to implement the award issued by Arbitrator Lowitt did not violate the Statute as alleged. The Respondent contends Barnes' removal was not substantively arbitrable because he was a VCS employee appointed to an excepted service position pursuant to 38 U.S.C. § 7802 and was not a preference eligible. In support of its position regarding arbitrability, the Respondent relies on MSPB case law finding that VCS employees appointed under 38 U.S.C. § 7802 do not fall within the coverage of chapter 75 of title 5 and have no appeal rights to MSPB. Specifically, Respondent cites *Thomas v. Dep't of Veterans Affairs*, 78 M.S.P.R. 304 (1998) and *Chavez v. Dep't of Veterans Affairs*, 65 M.S.P.R. 590 (1994)(*Chavez*). Respondent asserts it makes no sense to allow grievance rights to employees and actions for which MSPB appeal rights are not available.

Additionally, the Respondent maintains that in view of the employee's excepted service status, the arbitrator did not have jurisdiction to hear the grievance regarding the removal and was precluded by law from reaching the merits of the removal. With respect to this particular argument, the Respondent relies on, among others, the Authority's decision in *NLRB*, 35 FLRA 1116 (1990)(*NLRB*). The Respondent acknowledges that, although the CBA between the parties provides that questions of arbitrability will be resolved as threshold issues at arbitration and such questions must be raised before the decision at the third step of the grievance procedure is given, it did not challenge the arbitrability of the grievance over Barnes' removal during the processing of the grievance or before the arbitrator. The Respondent avers, however, the contractual requirements and parties' actions cannot confer jurisdiction on the arbitrator that is not afforded by law.

The Respondent contends the facts in this case are indistinguishable from those in *U.S. Dep't of Veterans Affairs, VAMC, Asheville, NC*, 57 FLRA 681 (2002)(*VA, Asheville*). Specifically, the Respondent maintains that both cases involve circumstances where no timely exceptions were filed to an arbitrator's award and the agency refused to comply with the award. The Respondent points out that in *VA, Asheville*, the Authority dismissed the ensuing unfair labor practice complaint finding it lacked jurisdiction and in doing so stated that parties may raise arguments regarding the Authority's jurisdiction at any stage of the Authority's proceedings. The Respondent argues the complaint in this case also should be dismissed.

C. Charging Party

The Charging Party asserts the Respondent violated the Statute by failing to comply with the arbitrator's award. Additionally, the Charging Party contends the Respondent failed to challenge the arbitrator's jurisdiction in a timely manner—specifically it failed to raise the question of arbitrability before the arbitrator or file exceptions to the arbitrator's award but, rather, only raised its claim about the arbitrator's lack of jurisdiction after the Charging Party instituted litigation to obtain enforcement of the award. The Charging Party argues that in view of Respondent's failure to timely challenge the arbitrator's jurisdiction and the financial consequences for the Charging Party that resulted, a violation should be found regardless of the ultimate determination on whether the arbitrator had jurisdiction over removals of VCS employees.

In addition to being ordered to comply with the arbitrator's award with respect to Barnes' termination as well as any related awards, the Charging Party requests that the Respondent be ordered to make the Charging Party whole and pay all costs and attorney fees incurred by it.[2]

Alternatively, the Charging Party cites *VA, Martinsburg*, and maintains questions of arbitrability should be decided in the first instance by an arbitrator and thus, in the event a violation is not found in this case and the Respondent is not ordered to comply with the arbitrator's award, the matter should be remanded to the arbitrator for decision. The Charging Party further urges that in such remand, the arbitrator should be directed to comply with the Authority's legal finding in *VA, Martinsburg*, which the Charging Party interprets as being that VCS employees are eligible to challenge a termination by using the negotiated grievance procedure. In conjunction with this alternative, the Charging Party requests the Respondent be ordered to comply with any future award issued by the arbitrator to include any awards relating to attorney fees.

[2] The Charging Party states that an attorney fee petition was filed "post decision by the union." (Charging Party Brief at 2).

DISCUSSION AND ANALYSIS

A. The Respondent Has Not Complied with the Arbitrator's Award

In this case, it is undisputed the Respondent has not complied with the award issued by Arbitrator Lowitt. It is also undisputed that the Respondent did not challenge the arbitrator's jurisdiction during the grievance or arbitration proceedings and did not attempt to file exceptions to or otherwise seek review of the award. Rather, the first point at which the Respondent asserted the arbitrator, as a matter of law, lacked jurisdiction over the matter of the termination of Barnes, a VCS employee, was as a defense to the unfair labor practice (ULP) proceedings initiated in this case in response to its non-compliance with the award.

B. Respondent's Affirmative Defense that the Arbitrator Lacked Jurisdiction as a Matter of Law May Be Considered in Resolving the Complaint in this Case

Although, as a rule, the legal analysis that applies to allegations of non-compliance with an arbitrator's award is clear cut, this case presents issues that introduce areas of law that are complex and in some regards, to borrow a term from *VA, Martinsburg*, "murky."

The Authority has long held that, generally, once an arbitration award becomes final and binding, it must be complied with and failure to do so constitutes a violation of the Statute. *See, e.g., U.S. Dep't of Transp., FAA, Northwest Mountain Region, Renton, Wash.*, 55 FLRA 293, 296-97 (1999)(*FAA NW Region*). An arbitration award becomes final and binding when no exceptions are filed or when timely filed exceptions are denied by the FLRA or other appropriate reviewing authority. *See, id.* at 296. In ULP proceedings for enforcement of a final and binding award, the award is not subject to collateral attack and the Authority does not review the merits of an arbitration award. *See, id*. Thus, generally speaking, the only issue for resolution in a ULP alleging failure to comply with a final and binding arbitration award is whether there was non-compliance. *See, e.g., DHHS, SSA*, 41 FLRA 755 (1991)(*SSA*), *aff'd,* 976 F.2d 1409 (D.C. Cir. 1992)(*SSA v. FLRA*).

With respect to challenges to the jurisdiction of the arbitrator, the Authority has made clear that such questions are to be presented to the arbitrator for resolution. *See, VA, Martinsburg*. Except in narrow circumstances, the Authority will not accept a claim that the matter was not arbitrable as a valid defense to failure to participate in an arbitration proceeding. *See, VA, Martinsburg*. Both the General Counsel and Charging Party rely heavily on *VA, Martinsburg*, to support their positions as to what should be the outcome in this case. It is important to note, however, that the circumstances considered in *VA, Martinsburg,* were limited to **a refusal by a party to proceed to arbitration** on a grievance based on a claim that the matter was not arbitrable. Thus, the decision in *VA, Martinsburg* was confined to the question presented by those circumstances and did not reach the question presented in this case--that is, whether a party can validly assert non-arbitrability, or an arbitrator's lack of jurisdiction, as a defense for **refusing to comply with an arbitrator's award** where the party failed to present that claim to the arbitrator. Thus, the question addressed and decided in *VA, Martinsburg*, although related to the question raised in this case, is different.

With respect to claims made in conjunction with a ULP proceeding seeking enforcement of an arbitration award that the award is not enforceable because the arbitrator lacked jurisdiction, a distinction has been recognized between claims that the arbitrator lacks jurisdiction as a matter of law and those that question the arbitrator's contractual jurisdiction. *See SSA* and *SSA v. FLRA*. What emerges from *SSA* is that claims made in a ULP complaint challenging an arbitrator's contractual jurisdiction will be barred and not provide a defense to an allegation of non-compliance with the award if they are not raised timely. That is, claims regarding contractual jurisdiction must be raised before the arbitrator and/or in exceptions filed to the arbitrations award and will not be entertained in ULP proceedings involving a claimed failure to comply with the award. Claims of a statutory impediment to the arbitrator's jurisdiction are another matter and may be entertained in a ULP proceeding for enforcement of the arbitrator's award. *Cf. U.S. Dep't of Agric., Food & Consumer Serv., Dallas, Tex.*, 60 FLRA 978, 981 (2005)(in reviewing exceptions to an arbitration award, the Authority found where the issue of the arbitrator's statutory jurisdiction is presented to the Authority, it is required to address the issue regardless of whether the issue was also presented to the arbitrator).

I find the Respondent's defense that Arbitrator Lowitt lacked jurisdiction over the issue of Barnes' termination must be considered in ruling on the complaint in this case.

C. Reviewability of Terminations of VCS Employees—the Relevant Legal Landscape

Overview of Relevant Portions of Section 7121(e) of the Statute

The matter before the arbitrator was a termination for cause and, thus, section 7121(e) of the

Statute is relevant.[3] As the termination of Barnes was for conduct, it was a matter that was either covered under 5 U.S.C. § 7512 or similar to such a matter. *See, U.S. DOD, AAFES, Dallas, Tex.*, 51 FLRA 1651 (1996)(section 7512 covers, among other things, removals; separation from employment is a matter similar to a section 7512 removal). Under section 7121(e) of the Statute, if an action taken is covered by § 7512 and also falls within the coverage of a negotiated grievance procedure, an aggrieved employee has the choice of raising the matter either under appellate procedures of 5 U.S.C. § 7701 or under the negotiated grievance procedure. If an action involving a similar matter is taken under an "other personnel system," the aggrieved employee has the choice of raising it under applicable appellate procedures, if any, or under the negotiated grievance procedure. Pursuant to the terms of 7121(e), while employees in an "other personnel system" have a choice between applicable appellate procedures and the negotiated grievance procedure for seeking redress for, among others, removals, they can, however, and as will be discussed further herein, raise the matter under the negotiated grievance procedure even if no applicable appellate procedure exists. *See, 24th Combat Support Group, Howard AFB, Republic of Pan.*, 55 FLRA 273, 282 (1999)(*Howard AFB*).

Applicability of Section 7121(e) to Excepted Service Employees[4]

It appears that for purposes of section 7121(e), personnel systems fall into one of two general categories—the general civil service personnel system that is governed by Title V of the U.S. Code or "other personnel systems." *See, e.g., U.S. DODDS, Germany Region*, 38 FLRA1432 (1991). Further, for purposes of section 7121(e), employees generally fall into two general groups—competitive service employees and excepted service employees.[5]

See 5 U.S.C. § 7511. From its inception, the CSRA afforded most employees in the competitive service who were subject to adverse personnel actions as identified in section 7512 with procedural protections and appellate rights. With respect to excepted service employees, however, the CSRA extended such protections and rights only to preference-eligible employees. *United States v. Fausto*, 484 U.S. 439, 443, 447 (1988)(*Fausto*). In 1990, however, the Civil Service Due Process Amendments, Pub. L. No. 101-376, amended section 7511 to bring many, but not all, excepted service employees within the definition of "employee" and by doing so afforded them procedural protections and appellate rights for matters covered under section 7512.[6]

When initially presented with the question, the Authority held that adverse personnel actions involving nonpreference eligible, excepted service employees could be within the scope of the negotiated grievance procedure. *NTEU*, 25 FLRA 1110 (1987), *rev'd,* 858 F.2d 1278 (7th Cir. 1988). Several of the Authority's decisions taking that approach were reversed by the courts of appeals in several circuits that relied on rationale contained in the Supreme Court's decision in *Fausto*.[7] As a consequence of those reversals, the

[3] Section 7121(e) of the Statute is not an affirmative grant of remedies specified elsewhere in the Civil Service Reform Act of 1978, Pub. L. No. 95-454 (CSRA), but, rather, only requires an election among various of the otherwise available remedies. It does, however, offer a useful framework for structuring a discussion of whether a particular category of employee may raise terminations under negotiated grievance and arbitration procedures established pursuant to section 7121 of the Statute.

[4] It is undisputed that Barnes, as a VCS employee, was excepted service. Although the parties do not stipulate such as a fact, in their briefs, they either assert Barnes is an excepted service employee or treat him as such. Also, that Barnes is an excepted service employee is consistent with 38 U.S.C. § 7802 as well as *VA, Martinsburg* and *Chavez.*

[5] A sub-category applied to both groups relates to whether an employee has veterans preference, i.e., based on their status in that regard they are labeled either preference eligible or nonpreference eligible. The parties do not stipulate whether Barnes was a preference eligible or nonpreference eligible. In its brief, the Respondent asserts Barnes was a nonpreference eligible. (Resp. Br. at second (unnumbered) page). The General Counsel and the Charging Party provide nothing that directly supports or refutes this assertion. The General Counsel and Charging Party do, however, both contend that *VA, Martinsburg*, a case that involved a nonpreference eligible employee is applicable, which suggests they agree with the Respondent's view of Barnes' status in that regard.

[6] The Civil Service Due Process Amendments specified a number of exclusions from the application of the provisions of title V that grant procedural protections and appellate rights to employees subject to adverse personnel actions. See section 7511(b).

[7] In reversing the Authority, the courts of appeals found that allowing nonpreference eligible, excepted service employees to challenge adverse personnel actions through the negotiated grievance and arbitration procedures was contrary to the remedial scheme constructed by Congress in the CSRA. *See, Dep't of the Treasury, Office of Chief Counsel v. FLRA,* 873 F.2d 1467 (D.C. Cir. 1989) (*Treasury)*. For example, following a rationale set forth in *Fausto*, one court reasoned that the remedial scheme was designed to (1) promote uniformity and consistency in resolving disputes over adverse actions and (2) grant competitive service and preference eligible employees a preferred status relative to nonpreference eligible, excepted service employees insofar as the ability to appeal adverse personnel actions. *Id.* at 1469. In the court's view, allowing arbitral review of adverse actions taken against nonpreference eligible, excepted service employees would undermine the goal

Authority announced a change in course in *NLRB*, 35 FLRA at 1116. In *NLRB*, the Authority, following the reversing courts' rationale and conclusions, held that nonpreference eligible, excepted service employees were precluded by law from challenging "major adverse actions" through the negotiated grievance procedure. *Id.* at 1125. Thus, arbitrators had no jurisdiction as a matter of law to determine the merits of a nonpreference eligible, excepted service employee's removal. *Id.* at 1126. With the passage of the Civil Service Due Process Amendments, *Fausto*, the circuit court decisions that followed it, and *NLRB* have been overtaken by events, and most nonpreference eligible, excepted service employees who are subject to adverse personnel actions were afforded appellate rights comparable to those previously granted competitive service employees and preference eligible employees. With respect to those excepted service employees who were specifically excluded from coverage under the Civil Service Due Process Amendments, however, the limitations on appeal rights that flowed from *Fausto* continued to exist and those employees continued to "have no right of access to the negotiated grievance procedure and arbitral review regarding adverse actions." *Panama Canal Commission, Balboa, Republic of Pan.*, 43 FLRA 1483, 1503 (1992)(*Panama Canal*), *reconsideration denied*, 45 FLRA 1075 (1992).

Subsequent to the enactment of the Civil Service Due Process Amendments, the Office of Personnel Management (OPM) issued regulations to implement that law.[8] *See* 58 Fed. Reg. 131901 (March 10, 1993). Among other things, OPM's regulations provide that requirements of Chapter 75 that pertain to removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less do not apply to

> [a]n 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[.]

5 C.F.R. § 752.401(d)(12).

In explaining the meaning of this regulatory provision, OPM advised that in addition to the agencies specifically listed by the Civil Service Due Process Amendments as being excluded from its coverage and that had previously been excluded from "the appointing requirements of title 5" "by their own separate statutory authority," OPM was aware of other agencies and positions that had similarly been excluded from those appointing requirements but were not specifically included in the Due Process Amendment exclusions. 58 Fed. Reg. at 13191. OPM stated that if positions were previously excluded "by an agency's statutory authorities from the adverse action protections[,]" they continued to be excluded whether or not they were specifically listed in the Civil Service Due Process Amendments as excluded. *Id.* OPM emphasized that all that is required for a statutory exclusion from chapter 75 is a legislative exclusion from the appointing requirements of title 5, unless a provision existed to place the employee within the coverage of chapter 75. *Id.* at 13192.

In the application of OPM's regulatory provision, it appears that both MSPB and the Court of Appeals for the Federal Circuit take a narrower view than OPM may of the extent to which exclusions from the appointing authorities of title 5 established in separate statutory authorities may trump the broad definition of "employee" in section 7511(a)(1)(C) that resulted from the Civil Service Due Process Amendments and expanded the ability of excepted service employees to appeal adverse actions to MSPB. *See King v. Briggs*, 83 F.3d 1384 (Fed. Cir. 1996). Nevertheless, the concept adopted by OPM in its implementing regulations that a separate statutory exclusion from the protections afforded by Chapter 75 can trump the broadened definition of "employee" in section 7511 that resulted from the Civil Service Due Process Amendments and operate to continue to exclude those subject to the separate statutory exclusion from the right to appeal adverse actions to MSPB has been applied by MSPB and upheld by the Federal Circuit. *See Todd v. MSPB*, 55 F.3d 1574 (Fed. Cir. 1995).

In summary, preference eligible, excepted service employees and most nonpreference eligible, excepted service employees have the option of appealing adverse personnel actions to MSPB or raising the matter under negotiated grievance and arbitration procedures. Those nonpreference eligible, excepted service employees who, subsequent to the Civil Service Due Process Amendments, remain excluded from coverage under subchapter II of chapter 75 and who are in positions within the general civil service personnel system, have no right of appeal to MSPB or access to the negotiated grievance procedure and arbitral review for purposes of challenging an adverse action. *See Panama Canal*. A different scenario applies, however, to employees who are in positions within "other personnel systems."

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of uniformity and consistency and invert the preferences intended by Congress. *Id.* at 1470.

[8] Pursuant to 5 U.S.C. § 7514, OPM is authorized to prescribe regulations to carry out the purpose of subchapter II of Chapter 75 of title 5. Subchapter II includes sections 7511 through 7514 of title 5.

Other Personnel Systems

As noted above, the second sentence of section 7121(e), addresses the election of remedies that may occur with respect to matters similar to those covered under section 7512 that arise in "other personnel systems." The Authority has identified the determinative factor for differentiating "other personnel systems" from the "general civil service" as being whether the system is intended to operate separate and apart from the personnel system that is applicable to general civil service employees. *E.g., U.S. Dep't of Transp., FAA*, 54 FLRA 235 (1998).

With respect to avenues for challenging adverse personnel actions available to nonpreference eligible, excepted service employees employed in other personnel systems, the Authority has determined that such employees may raise matters relating to those actions through a negotiated grievance procedure regardless of whether an appeal procedure that applies to the matter exists. *See Howard AFB*, 55 FLRA at 282. In support of this determination, the Authority cited *Treasury*, in which the court stated that the inclusion of the words "if any" in the second sentence of section 7121(e) showed Congress "'contemplated that some . . . employees, who fall under specialized personnel systems apart from the main civil service system,'" could negotiate to raise adverse actions under negotiated grievance procedures even though they have no statutory appeal rights. 55 FLRA at 282 *quoting Treasury*, 873 F.2d at 1472.

As recognized in *Howard AFB* and *Treasury,* the intentions of Congress are different with respect to employees in the "main" or "general" civil service system and those in other personnel systems. While Congress sought through the CSRA to replace a patchwork system with an integrated scheme of administrative and judicial review and to promote uniformity and consistency in matters involving personnel actions by establishing the MSPB and giving primacy to MSPB and Court of Appeals for the Federal Circuit insofar as review of adverse personnel actions arising in the "main" or "general" civil service system, it did not apply the same method of promoting integration, uniformity and consistency to other personnel systems. As manifested in section 7121(e) and (f), rather than including employees in other personnel systems under the unitary system dominated by the MSPB and Federal Circuit, Congress allowed for the existence of variations that reflect the appellate situations that exist in the individual systems. Given the different treatment of employees in other personnel systems in the CSRA,[9] the considerations regarding the structural elements of the CSRA discussed in *Fausto* and *Treasury* and pertaining to the unitary system do not have the same applicability to nonpreference eligible, excepted service employees in other personnel systems.

In sum, the fact that statutory appeal rights may not be available to nonpreference eligible, excepted service employees in other personnel systems doesn't preclude them from raising adverse personnel actions through negotiated grievance and arbitration procedures. Thus, employees in other personnel systems may choose to raise an adverse personnel action under either a negotiated grievance and arbitration procedure or an applicable appellate procedure, if one exists.

MSPB's Decision in *Chavez*

In *Chavez*, the MSPB applied 5 C.F.R. § 752.401(d)(12) and dismissed an appeal of a termination by a VCS employee finding it lacked jurisdiction. 65 MSPR 590. The MSPB characterized section 752.401(d) (12) as barring those positions that have been excluded from the appointing provisions of title 5 by separate statutory authority from coverage under the Civil Service Due Process Amendments in the absence of any provision placing them within the coverage of chapter 75, title 5. In its decision, the MSPB reiterated its view that section 752.401(d)(12) applies, by its terms, to positions that have been excluded generally from the appointing provisions of title 5. *Id.* at 592-93. In this regard, the MSPB distinguished between positions that are excluded generally from the appointing provisions of title 5 and those that have been excluded from the provisions of title 5 governing appointment to the competitive service, finding that the latter type of exclusion means only that the positions are in the excepted service. 65 MSPR at 593.

The MSPB acknowledged that, on its face, 38 U.S.C. § 7802(5), the separate statutory authority that governs the employment of VCS employees, did not appear to exclude VCS employees from the appointing requirements of title 5 in general. *Id.* at 593. Based on its analysis of that statutory provision and its history, the MSPB concluded, however, that VCS employees appointed under section 7802(5) are excluded from the appointing provisions of title V. In reaching this conclusion, the MSPB noted that when now-section 7802(5) originated in 1946 as section 4202(5) of title 38, it provided that VCS personnel "shall be appointed, compensated . . . and removed . . . without regard to civil-service laws." In 1982, the Technical Amendments to 10, 14, 37 and 38 U.S.C.A., Pub. L. No. 97-295 (Technical Amendments), substituted "without regard to the provisions of title 5 governing appointments in the competitive service" for what the MSPB characterized as the "broader language 'without regard to civil-service

[9] Section 7121 of the Statute was included in section 701 of the CSRA.

laws.' " *Id.* at 594. The MSPB found based (1) on the fact Congress "expressly declared" that the Technical Amendments "restate[s], without substantive change" 38 U.S.C. § 4202(5) as it existed prior to December 2, 1981 and could not be "construed as making a substantive change," and (2) the legislative history of the Technical Amendments, it could not construe the altered language that resulted from the Technical Amendments as making a substantive change in the earlier language. *Id.* Hence, the MSPB found the broader exclusion of VCS employees from civil-service laws remained in effect. The MSPB concluded it had no jurisdiction over the adverse action appeals of employees appointed under 38 U.S.C. § 7802(5) because those employees had been excluded from the appointing provisions of title 5 by separate statutory authority and no provision placed them within the coverage of chapter 75, title 5, U.S. Code. *Id.*

D. The Respondent Has Failed to Meet Its Burden of Proof in Establishing An Affirmative Defense

It is undisputed that the Respondent failed to comply with the arbitration award, did not raise the question of arbitrability before the arbitrator, and did not file any sort of appeal of the award. Thus, absent a valid affirmative defense, a violation occurred. See, *FAA NW Region.*

The affirmative defense the Respondent proffers is that the issue of the termination of Barnes was not arbitrable and that as a matter of law the arbitrator did not have jurisdiction over the grievance. As discussed above, I find the Respondent's claim regarding the arbitrator's jurisdiction can be entertained in this proceeding as a defense to the unfair labor practice alleged. Key to resolving the dispute regarding the arbitrator's jurisdiction and one of the things that is not clear from the information available in the record is the status of VCS employees relative to the available remedies referenced in section 7121(e)--more particularly, whether their status is such that the matter of Barnes' termination could be raised under a negotiated grievance procedure. The General Counsel asserts VCS employees are in an other personnel system without providing any support for this position other than pointing to the fact that their employment is pursuant to 38 U.S.C. § 7802. Neither the Respondent nor the Charging Party address whether VCS employees come under an "other personnel system" or the general civil service. Nothing in the stipulation itself addresses this question. There is no evidence in the record that provides an understanding of the particulars of the personnel system that has applied to VCS employees and would allow a determination of whether it operates separate and apart from the personnel system applicable to general civil service employees or whether they have simply been swept into the personnel system applicable to the general civil service employees.

As noted above, it is undisputed that the VCS employees are excepted service. However, that doesn't answer the questions of whether Barnes is in the general civil service personnel system and, if so, whether he is covered by or excluded from the Civil Service Due Process Amendments, or alternatively, whether he is in an other personnel system. With respect to the possible outcomes on the question of whether the matter of Barnes' termination was arbitrable, it appears to me that if Barnes was in an other personnel system, the matter would be arbitrable; if Barnes was in the general civil service and was a preference eligible employee, the matter would be arbitrable; and if Barnes was in the general civil service personnel system and covered by the Civil Service Due Process Amendments, the matter would be arbitrable. If, however, Barnes was in the general civil service personnel system and excluded from the Civil Service Due Process Amendments, his termination would not be arbitrable.

Although the MSPB's decision in *Chavez* has some relevance to the question of whether VCS employees may challenge a termination through the negotiated grievance and arbitration procedures, it is important to note that MSPB was not ruling on that particular question. Rather, *Chavez* was limited only to the question of whether a VCS employee who had been terminated could pursue an appeal to MSPB. One of the things that emerges from *Chavez* is that section 7802(5) is subject to differing interpretations with respect to the extent to which VCS employees are excluded from civil service laws. In *Chavez*, the MSPB effectively found that although section 7802(5) currently says one thing, it really means something different. The MSPB's finding was based on an analysis limited to the terms of the statutory provision and the effect of the Technical Amendments on the meaning of those terms. The MSPB does not appear to have had any information regarding the extent to which the personnel system that applies to VCS employees may operate separate and apart from the personnel system that is applicable to general civil service employees. Additionally, it is not clear whether the legislative activity during the years spanning 1946, when the law establishing the Veterans Canteen Service was passed, and 1981, when the Technical Amendments law was passed, that affected the civil service may have produced an evolution in the personnel system applying to VCS employees that effectively converted it from being something that could fairly be characterized as an other personnel system to being one that was drawn into

the general civil service personnel system.[10] This might explain the apparently contradictory provisions in the Technical Amendments that were discussed by the MSPB in *Chavez*.

The record in this case does not permit a determination on whether Barnes' grievance over his termination was, as argued by the Respondent, not arbitrable. As the claim that Barnes' grievance was not arbitrable, as a matter of law, is the crux of Respondent's affirmative defense, Respondent bears the burden of proving that the grievance was not arbitrable. See 5 C.F.R. § 2423.32. The Respondent has failed to bear this burden. Thus, the Respondent has failed to establish that it was not required to comply with the arbitrator's award because the arbitrator, as a matter of law, lacked jurisdiction over the matter of Barnes' termination.

I find that the Respondent violated section 7106 (a)(1) and (8) of the Statute when it failed to comply with the arbitration award issued by Arbitrator Randi Lowitt on or about January 28, 2008.

E. Remedy

Among other things and in addition to the remedies sought by the General Counsel, the Charging Party requests that Respondent be ordered to pay costs and attorney fees incurred by the union. It is not entirely clear whether the Charging Party intends the request to be limited to those attorney fees that related to the arbitration proceedings or extend to those related to the unfair labor practice proceedings in this case as well. Whatever the scope of the Charging Party's request, the matter is governed by the Back Pay Act, 5 U.S.C. § 5596. The regulations that implement the Back Pay Act require that a request for attorney fees "may be presented only to the appropriate authority that corrected or directed the correction of the unjustified or unwarranted personnel action." 5 C.F.R. § 550.807(a). As the arbitrator effectively found that the termination of Barnes was unwarranted or unjustified and directed his reinstatement with back pay, the request for attorney fees and expenses relating to the arbitration proceeding must be presented to the arbitrator rather than to the Authority. *See, e.g., Dep't of the Air Force Headquarters, 832D Combat Support Group DPCE, Luke AFB, Ariz.*, 32 FLRA 1084, 1093 (1988)(*Luke AFB*).

To the extent that the Charging Party is seeking attorney fees and expenses relating to this unfair labor practice proceedings, it has provided nothing to support its request by way of the information required to establish that an award of attorney fees is warranted under the Back Pay Act. Under that Act, in order for attorney fee payments to be ordered, the requirements set forth in 5 U.S.C. § 7701(g)(1) must be met. *Luke AFB*, 32 FLRA at 1095. Those requirements are that: (1) attorney fees have been incurred; (2) the employee is the prevailing party in the action, (3) an award of attorney fees is warranted in the interest of justice; and (4) the fees are reasonable. *Id.* In requesting that the remedy in this case include an award of attorney fees, the Charging Party has addressed none of these requirements.

Based on the foregoing, I reject the Charging Party's request that attorney fees and costs be ordered as a remedial action in this case. I recommend that the Authority adopt the following remedial order.[11]

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the Department of Veterans Affairs, Veterans Canteen Service, shall:

1. Cease and desist from:

(a) Failing or refusing to comply with the arbitration award issued by Arbitrator Randi Lowitt on or about January 28, 2008, in the matter of the termination of Thomas Barnes.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute.

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[10] For example, I note that Public L. No. 92-392, which was passed in 1972 and amended title 5 to provide a system for fixing and adjusting the wage rates of prevailing rate employees, included VCS employees within that system. See 5 U.S.C. § 5342(a)(2)(C). To the extent that there may have been other legislation that effectively brought VCS employees under the title 5 general civil service personnel system is something the parties, who should be familiar with the particulars and the history of the personnel system that is applied to VCS employees, are better situated than I to know.

[11] The GC requests that the Notice to Employees be signed by the Secretary of the Department of Veterans Affairs and that it be posted at VCS facilities where employees represented by the Union are located. In the absence of any persuasive reason offered by the Respondent as to why the notice should be signed by someone other than the Secretary and the locations of the posting of the notice should be more limited that what the General Counsel requested, I adopt the General Counsel's proposals regarding the signatory and location of the posting.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Comply with the arbitration award issued by Arbitrator Randi Lowitt on or about January 28, 2008, in the matter of the termination of Thomas Barnes.

(b) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Secretary of the Department of Veterans Affairs, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Chicago Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., September 19, 2011.

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SUSAN E. JELEN
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Veterans Affairs, Veterans Canteen Service, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to comply with the arbitration award issued by Arbitrator Randi Lowitt on or about January 28, 2008, in the matter of the termination of Thomas Barnes.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute.

WE WILL, comply with the award issued by Arbitrator Randi Lowitt on or about January 28, 2008, in the matter of the termination of Thomas Barnes.

____
(Agency/Activity)

Dated: ______ By:______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Chicago Region, Federal Labor Relations Authority, and whose address is: 55 W. Monroe Street, Suite 1150, Chicago, IL 60603, and whose telephone number is: (312) 886-3465.