66 FLRA No. 177

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS CANTEEN SERVICE
DAYTON, OHIO
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2209
(Union)

0-AR-4808

_____

DECISION

September 10, 2012

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

I. Statement of the Case

The Agency filed an exception to an initial award and a supplemental award of Arbitrator Stephen L. Hayford under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exception. The Arbitrator found that the grievance concerning the removal of a Veterans Canteen Service (VCS) employee was arbitrable and that the grievant's removal was not for just cause. For the reasons set forth below, we grant the Agency's exception and set aside the awards.

II. Background and Arbitrator's Awards

A. Background

The grievant, "a non-preference eligible excepted service (NEES) employee," worked at the VCS. Initial Award at 2. The Agency removed her from her VCS position for misconduct. *Id.* The Union filed a grievance concerning the grievant's removal. *Id.* The matter was unresolved and was submitted to arbitration. *Id.* at 3. The parties stipulated to the following issues: (1) does the grievant, a VCS employee appointed under § 7802(e),[1] "have the right to challenge her removal under the negotiated grievance procedure of the [p]arties' . . . [a]greement" as a matter of law; (2) "[w]as the removal of [the grievant] for just cause? If not, what [was] the proper remedy?" *Id.*

B. Arbitrator's Initial Award

In his initial award, the Arbitrator found that the Agency had the burden of proving that, as a matter of law, he lacked jurisdiction over the grievance. *Id.* at 15-16. To decide whether the Agency had met its burden, the Arbitrator considered the effect of 5 U.S.C. § 7802, prior to 1990, "on the standing of VCS . . . employees to challenge removals through grievances filed under the negotiated grievance procedure." *Id.* at 16; *see also id.* at 17. The Arbitrator found that, although the Authority initially concluded that NEES employees were entitled to challenge their adverse actions[2] through negotiated grievance procedures, the Authority reversed its prior precedent and held that, because NEES employees were unable to appeal their adverse actions to the Merit Systems Protection Board (MSPB), they were precluded by law from grieving those actions. *Id.* at 17-18 (citing, among other precedent, *NLRB*, 35 FLRA 1116, 1125 (1990)).

The Arbitrator also addressed the effect of the Civil Service Due Process Amendments enacted by Congress in 1990 (1990 Amendments), Pub. L. No. 101-376, 104 Stat. 461 (1990), "on the pre-1990 jurisdictional rule established by 5 U.S.C. § 7802(e)." *Id.* at 16; *see also id.* at 18. The Arbitrator concluded that the Authority's decision in *United States Department of Veterans Affairs, VCS, Martinsburg, West Virginia*, 65 FLRA 224 (2010) (*VA Martinsburg*) was instructive in determining the effect of the 1990 Amendments on VCS employees. *See* Initial Award at 18-20. Specifically, the Arbitrator determined that the Authority, in *VA Martinsburg*, found that, as a result of the 1990 Amendments, NEES employees were permitted to grieve adverse actions. *Id.* at 19. Moreover, the Arbitrator noted that the Authority affirmed the administrative law judge's finding that, if the respondent was able to demonstrate that the grievant's removal was not arbitrable, "it [would] be based on her status as a § 7802 employee," and not on her status as an NEES

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

[2] For purposes of this decision, a "disciplinary action" is defined as a suspension of fourteen days or less, and an "adverse action" is defined as a removal, a suspension of more than fourteen days, a reduction in pay or grade, or a furlough of thirty calendar days or less. 5 U.S.C. §§ 7502, 7512.

employee. *Id.* (internal citation omitted) (internal quotation marks omitted).

The Arbitrator considered the Agency's argument that there was a required symmetry between the jurisdiction of the MSPB and arbitrators over adverse actions, but rejected that argument. *See id.* at 20-22. In this regard, the Arbitrator found that the Agency's reliance on *Cornelius v. Nutt*, 472 U.S. 648 (1985) (*Nutt*) and *Devine v. Levin*, 739 F.2d 1567 (Fed. Cir. 1984) (*Devine*) was misplaced. Initial Award at 21-22. According to the Arbitrator, the Supreme Court, in *Nutt*, did not find that arbitrators' jurisdiction over adverse actions through negotiated grievance procedures was dependent upon the MSPB's jurisdiction over such matters, but, rather, held that "arbitrators [were] bound by [the] same 'substantive standards that the [MSPB] would apply' if the [MSPB] had decided the matter." *Id.* at 22; *see also id.* at 21. Moreover, the Arbitrator determined that the court's decision in *Devine*, which concerned the arbitrability of a grievance concerning the removal of a non-unit employee, did not support the Agency's assertion that grievances concerning the removal of VCS employees were not arbitrable as a matter of law. *Id.* at 22.

In addition, the Arbitrator analyzed "[t]he [c]urrent [e]ffect of . . . § 7802(e) on [his] [j]urisdiction" to adjudicate the grievant's removal. *Id.* Specifically, the Arbitrator determined that the inclusion of NEES employees within the definition of "employee" in 5 U.S.C. § 7511(a)(1)(C), "in conjunction with the explicit exclusion of ten specific categories of federal employees from the coverage of . . . Chapter 75 of Title 5 [in] . . . § 7511(b)(1)-(10)," reflected Congress's intent that any employee, including a VCS employee who was not excluded from coverage of Chapter 75 in § 7511(b), had the right to challenge his or her removal either by appealing to the MSPB or by grieving to an arbitrator. *Id.* at 24; *see also id.* at 23. The Arbitrator also noted that, despite this clear statutory language, the United States Court of Appeals for the Federal Circuit (Federal Circuit) in *Bennett v. MSPB*, 635 F.3d 1215 (Fed. Cir. 2011) (*Bennett*) found that, based on § 7802(e), VCS employees could not appeal their removals to the MSPB. Initial Award at 24. However, the Arbitrator concluded that, even if the Federal Circuit's decision in *Bennett* concerning the question of law before it was correct, the court did not determine whether VCS employees could grieve their removals through a negotiated grievance procedure. *Id.* Moreover, the Arbitrator determined that Article 13 of the parties' agreement clearly states that Title 38 employees may not be subject to disciplinary action except for just cause and that it "defines the term . . . 'adverse action' as a suspension, transfer, reduction in grade, reduction in basic pay, or *discharge taken against an employee for misconduct*." *Id.* at 24-25 (emphasis in original).

Based on the foregoing analysis, the Arbitrator found that he had jurisdiction to decide the merits of the grievant's removal and retained jurisdiction to resolve the issue of whether the grievant was removed for just cause at a later date. *Id.* at 25-26.

C. Arbitrator's Supplemental Award

In a supplemental award, the Arbitrator reiterated the conclusions he made in his initial award concerning the jurisdictional issue. Supplemental Award at 15-25. Moreover, the Arbitrator found that the grievant's removal was not for just cause. *Id.* at 25. In this regard, the Arbitrator indicated that the Agency conceded that it was unable to "meet its burden of proof on the merits of [the grievant's] removal" and determined that, as a result, he was required to find that the grievant's removal was not for just cause. *Id.* Finally, the Arbitrator ordered the Agency to reinstate the grievant to her former position and to provide her with backpay. *See id.* at 26.

III. Positions of the Parties

A. Agency's Exception

The Agency maintains that the Arbitrator's conclusion that he had jurisdiction to decide the merits of the grievant's removal because VCS employees appointed pursuant to 38 U.S.C. § 7802 may grieve their removals is contrary to law. Exception at 7. In this regard, the Agency argues that, based on the language of § 7802, in conjunction with legislative history, and the language of 5 C.F.R. § 752.401(d)(12), an Office of Personnel Management (OPM) regulation, VCS employees are prohibited from appealing their removals to the MSPB and thus similarly are precluded from grieving their removals. *See, e.g., id.* at 12-15. Also, the Agency contends that, because the Supreme Court in *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. *Id.* at 15. Moreover, the Agency asserts that, because VCS employees are in the excepted service, the Arbitrator lacked jurisdiction to decide the merits of her removal. *Id.* at 16.

In addition, the Agency claims that, for purposes of § 7121(e), VCS employees are not part of an "other personnel system," but, rather, are included in the general civil service (civil service). *Id.* at 17-22. Specifically,

the Agency argues that it does not consider itself as part of an "other personnel system." *Id.* at 20. The Agency asserts 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 [T]itle 5[,] . . . except for appointment, compensation and removal" and are entitled to various benefits, such as disability compensation. *Id.* at 19 (emphasis omitted); *see also id.* at 21 (arguing also that § 7802 does not prevent VCS employees from grieving disciplinary actions or other conditions of employment). Moreover, the Agency contends that, while Congress allowed the Department of Veterans Affairs (VA) to create an "other personnel system" for Title 38 employees in the Veterans Health Administration (VHA), the exclusion in § 7802 is much narrower than "the laws applicable to many . . . Title 38 employees" in the VHA. *Id.* at 21. According to the Agency, unlike 38 U.S.C. § 7421, which grants the Secretary of the VA the right to prescribe by regulation the conditions of employment of many employees within the VHA, § 7802 contains no such language. *Id.* at 22.

B. Union's Opposition

The Union argues that the grievance concerns the removal of a VCS employee, which constitutes either a matter covered under 5 U.S.C. § 7512 or a similar matter which arises under an "other personnel system." Opp'n at 3. As a result, the Union claims that the Authority lacks jurisdiction under § 7121(f) of the Statute to consider the Agency's exception. *Id.* at 2, 3.

However, the Union maintains that, if the Authority finds that it has jurisdiction, then the award is not contrary to law. *See id.* at 3. Specifically, the Union 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.* The Union also asserts that the Arbitrator properly relied on the Authority's decision in *VA Martinsburg* and that it supports the conclusion that VCS employees can grieve their removals. *Id.* at 4-5. Moreover, the Union argues that *Bennett* was decided wrongly, *id.* at 8 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 10 n.8, 13 n.12, and thus do not lack grievance rights, *see, e.g.*, *id.* at 9-11.

In addition, the Union contends that the Arbitrator properly determined that the Agency's reliance on *Nutt* was misplaced because the Supreme Court did not find that, if the MSPB lacks jurisdiction over an adverse action, then an arbitrator also lacks jurisdiction over that action. *E.g.*, *id.* at 9. Similarly, the Union contends that the Agency improperly relies on the Supreme Court's decision in *United States v. Fausto*, 484 U.S. 439 (1988) (*Fausto*) and its progeny because the holdings in those cases were undercut by the 1990 Amendments, which provided NEES employees MSPB appeal rights pursuant to § 7511(a)(1)(C). Opp'n at 11-12; *see also id.* at 11 n.9. Furthermore, the Union asserts that OPM's regulation, 5 C.F.R. § 752.401(d)(12), is invalid and that the Authority owes it no deference.[3] *Id.* at 13 n.13.

IV. Preliminary Matters

A. The Authority has jurisdiction to consider the Agency's exception under § 7121(f) of the Statute.

The Authority issued an Order to Show Cause (Order), directing the Agency to demonstrate why it should not dismiss its exception for lack of jurisdiction under § 7121(f) of the Statute. Order at 1-2. The Agency filed a response, asserting that the Authority has jurisdiction to resolve its exception because, based on precedent, "the claim involved . . . is not reviewable by the MSPB or the Federal Circuit." Agency Response at 6; *see also id.* at 7. Conversely, as noted previously, the Union, in its opposition, claims that the Authority lacks jurisdiction over the Agency's exception because the grievance concerns the removal of a VCS employee, which either constitutes a matter covered under 5 U.S.C. § 7512 or a similar matter which arises under an "other personnel system." Opp'n at 3.

Under § 7122(a) of the Statute, the Authority lacks jurisdiction to review an arbitration award "relating to a matter described in § 7121(f)" of the Statute. *U.S. Envtl. Prot. Agency, Narragansett, R.I.*, 59 FLRA 591, 592 (2004). The matters described in § 7121(f) "are those matters covered under 5 U.S.C. §§ 4303 and 7512 and similar matters that arise under other personnel systems." *Id.* Moreover, in determining whether it lacks jurisdiction, the Authority looks not to the outcome of the award, but to whether the claim advanced in arbitration is one reviewable by the MSPB and, on appeal, by the Federal Circuit. *See AFGE, Local 1013*, 60 FLRA 712, 713 (2005).

[3] As discussed and addressed below, the Union also claims that the Agency has attached various documents to its exception that were not included in the joint exhibits presented to the Arbitrator and that, as a result, the Agency improperly submitted many of these documents to the Authority. Opp'n at 4 n.1.

Here, consistent with the Authority's decision in *United States Department of Veterans Affairs, Veterans Canteen Service*, 66 FLRA 944 (2012) (*VA, VCS*), VCS employees appointed pursuant to § 7802(e) are excluded from the provisions of Chapter 75 of Title 5, including § 7512. *See* 5 C.F.R. § 752.401(d)(12) (stating that the requirements of Chapter 75 of Title 5 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"); *see also Bennett*, 635 F.3d at 1216, 1221 (concluding that VCS employees appointed under § 7802(e) are excluded from the provisions of Chapter 75 of Title 5 and thus are barred from appealing their removals to the MSPB). As a result, because the grievant is a VCS employee appointed under § 7802(e), her removal is not "covered under" § 7512. *Bonner v. Dep't of Veterans Affairs, Pittsburgh Healthcare Sys.*, 477 F.3d 1343, 1346 (Fed. Cir. 2007) (concluding that the grievant's removal was "not 'covered under' 5 U.S.C. § 7512 because . . . the provisions relating to adverse actions in [C]hapter 75 of [T]itle 5, including § 7512, d[id] not apply to him"); *see also U.S. Dep't of Def., Office of Dependents Sch.*, 45 FLRA 1411, 1414 (1992) (finding that, because the grievant was not an employee within the meaning of § 7511, her termination was not a matter covered under § 7512).

Moreover, as discussed further in *VA, VCS*, VCS employees appointed under § 7802(e) are not part of an "other personnel system," but, rather, are part of the personnel system which is applicable to civil service employees and is governed by Title 5. *VA, VCS*, 66 FLRA at 949-50. Thus, the grievant's removal is not a similar matter arising under an "other personnel system." *U.S. Small Bus. Admin.*, 33 FLRA 28, 36 (1998) (concluding that, because temporary employees are not part of an "other personnel system" within the meaning of § 7121(f), the grievant's termination was not a similar matter arising under an "other personnel system," and the Authority had jurisdiction to review the merits of the grievant's termination). Accordingly, we find that the award concerning the grievant's removal does not relate to a matter described in § 7121(f) and that the Authority has jurisdiction to resolve the Agency's exception to the award. *See NTEU, Chapter 193*, 65 FLRA 281, 283 (2010) (addressing the union's exceptions because the removal of a probationary employee did not relate to a matter described in § 7121(f) of the Statute).

B. Certain documents attached to the Agency's exception are not barred from consideration under §§ 2425.4(c) and 2429.5 of the Authority's Regulations.

The Union asserts that the Agency has attached various documents to its exception that were not included in the joint exhibits presented to the Arbitrator and that, as a result, the Agency improperly submitted many of these documents to the Authority. Opp'n at 4 n.1. Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider issues or evidence "that could have been, but were not, presented in the proceedings before the . . . arbitrator." 5 C.F.R. § 2429.5; *see also id.* at § 2425.4(c). However, the Authority has found that, where evidence arises from the issuance of the award and could not have been presented to the arbitrator, that evidence is not precluded from being considered by the Authority. *See, e.g., Soc. Sec. Admin.*, 63 FLRA 274, 276 (2009).

Here, the documents in dispute include: the Agency's brief to the Arbitrator regarding jurisdiction with attached exhibits, the Agency's supplemental statement to the Arbitrator with an attachment, and a copy of the envelope containing the postmark date of the award. Because the Agency's brief with attached exhibits and the Agency's supplemental statement with an attachment were submitted to the Arbitrator, there is no basis for declining to consider those documents. *See U.S. Dep't of Def., Am. Forces Radio & Television Broad. Ctr., Riverside, Cal.*, 59 FLRA 759, 760 (2004) (Chairman Cabaniss concurring) (concluding that, because the union did not contest that the disputed document was submitted to the arbitrator as part of the agency's post-hearing brief, there was no basis for declining to consider it). Moreover, because the envelope contained the award, this document could not have been presented to the Arbitrator. *See U.S. Dep't of Veterans Affairs, Alaska VA Healthcare Sys., Anchorage, Alaska*, 60 FLRA 968, 969 (2005) (Authority considered an affidavit that arose from the issuance of the award and thus could not have been presented to the arbitrator). Accordingly, we will consider the documents attached to the Agency's exception.

V. Analysis and Conclusion: The grievance concerning the removal of a VCS employee is not arbitrable as a matter of law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo

review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id*.

The Agency asserts that the Arbitrator's determination that he had jurisdiction over a grievance concerning the removal of a VCS employee is contrary to law. Exception at 7. In this regard, the Agency claims that, because VCS employees cannot appeal their removals to the MSPB, they cannot grieve their removals pursuant to a negotiated grievance procedure. *See id.* at 7-17. The Agency also maintains that VCS employees appointed pursuant to § 7802(e) are not in an "other personnel system." *Id.* at 17-22. The Union disagrees, but contends that, even if the grievant does not have appeal rights to the MSPB, then the grievant is in an "other personnel system" and thus does not lack grievance rights. *See, e.g.*, Opp'n at 8 n.7.

These issues and arguments are identical to those raised in *VA, VCS*, 66 FLRA at 948-49. As discussed in Section IV., *supra*, consistent with the Authority's decision in *VA, VCS*, the 1982 amendments to the VCS Act, and the 1990 Amendments in conjunction with 5 C.F.R. § 752.401(d)(12), demonstrate that NEES employees appointed under § 7802(e) are not afforded appeal rights under Chapter 75 of Title 5. They are therefore precluded, by law, from appealing their removals to the MSPB. *Id.* at 949. Also, as the Authority determined, employees who are precluded from appealing adverse actions to the MSPB, such as VCS employees, are prohibited from grieving such actions under a negotiated grievance procedure. *Id.* Moreover, as the Authority held, VCS employees are not part of an "other personnel system" and § 7121(e) of the Statute does not, by itself, grant parties the right to grieve. *Id.* As a result, the Arbitrator, as a matter of law, lacked jurisdiction over the grievance concerning the removal of a VCS employee appointed under § 7802(e).

Therefore, consistent with our decision in *VA, VCS*, we conclude that the Arbitrator's determination that he had jurisdiction, as a matter of law, over the grievance is contrary to law. *See id.*

VI. Decision

The Agency's exception is granted, and the awards are set aside.

APPENDIX

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. § 7121(f) states:

> (f) 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, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512

> of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrators, award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

5 U.S.C. § 7511 states, in pertinent part:

> (a) For the purpose of this subchapter--
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> (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 –
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> (1) a removal;
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> (2) a suspension for more than 14 days;
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> (3) a reduction in grade;
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> (4) a reduction in pay; and
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> (5) a furlough of 30 days or less;
>
> but does not apply to--
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> (A) a suspension or removal under section 7532 of this title,
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> (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,
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> (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:
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> (1) Removals;
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> (2) Suspensions for more than 14 days, including in definite suspensions;
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> (3) Reductions in grade;
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> (4) Reductions in pay; and
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> (5) Furloughs of 30 days or less.
>
> . . . .
>
> (d) Employees excluded. This subpart does not apply to:
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> . . . .
>
> (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[.]
>
> . . . .