66 FLRA No. 179

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS CANTEEN SERVICE
MARTINSBURG, WEST VIRGINIA
(Agency)

and

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R4-78
(Union)

0-AR-4819

_____

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 award of Arbitrator Norman R. Harlan 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. For the reasons set forth below, we grant the Agency's exception and set aside the award.

II. Background and Arbitrator's Award

The grievant, a non-preference eligible excepted service (NEES) employee, worked at the VCS. Award at 2. The Agency removed him from his position for failing "to adhere to [VCS] security procedures" and for being "[a]bsent without official leave." *Id.* The Union filed a grievance concerning the grievant's removal. *Id.* at 3. The matter was unresolved and was submitted to arbitration on the following issue: "Is the [g]rievance . . . arbitrable under the terms and conditions of the [p]arties' . . . [a]greement." *Id.* at 1; *see also id.* at 4. The Agency "chose not to appear" at the hearing, but submitted a brief addressing the matter. *Id.* at 1; *see also id.* at 5. The Agency argued that the grievance was not arbitrable because the grievant, a VCS employee appointed under 38 U.S.C. § 7802, had no right to challenge his removal under the negotiated grievance procedure of the parties' agreement.[1] *Id.* at 11-13, 17. The Union argued that VCS employees are appointed under 38 U.S.C. § 7802(e) and are not excluded from the parties' negotiated grievance procedure. *Id.* at 15, 16.

The Arbitrator concluded that the grievance was arbitrable. *Id.* at 25. In making this determination, the Arbitrator considered: (1) the Agency's argument that the grievant was appointed under the authority of 38 U.S.C. § 7802 and that, under this appointment, employees do not have appeal rights to the Merit Systems Protection Board (MSPB), *see id.* at 17; (2) the written opinion of the Agency's General Counsel that employees appointed under § 7802(e) cannot arbitrate their removals through the grievance process, *see id.* at 18-19; and (3) the sworn declaration of an Agency official who declared that "non-preference eligible VCS [f]ield employees . . . at the canteens are subject to all personnel provisions of Title 5 . . . except for appointment, compensation, and removal," *id.* at 18. The Arbitrator found that this evidence, however, "fell far short" of what was required under the preponderance standard. *Id.* at 24. The Arbitrator also rejected the Agency's "attempt to link" the grievant's right to file a grievance under the parties' agreement to an individual's lack of standing to appeal a removal to arbitration. *Id.* The Arbitrator found that the parties' agreement did not "prohibit[] a [r]emoval from being grieved and/or arbitrated." *Id.* at 20; *see also id.* at 24. Specifically, the Arbitrator found that a removal "is clearly an adverse action[2] under" Article 41, Section 2 and Article 44, Section 2.A of the parties' agreement. *Id.* at 21.

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 under the parties' agreement is contrary to law. Exception at 6, 7. In this regard, the Agency 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 precluded from grieving their removals. *See id.* at 7-9 (citing *Bennett v. MSPB*, 635 F.3d 1215 (Fed. Cir. 2011) (*Bennett*)). Also, the Agency contends that, because the

[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. *See* 5 U.S.C. §§ 7502, 7512.

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. Exception at 7. Moreover, the Agency 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 10-16 (citing 5 C.F.R. §§ 752.401(d) and 752.405).

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 16-19. Specifically, the Agency argues that it does not consider itself as part of an "other personnel system." *Id.* at 17; *see also* Exception, Attach., Respondent Ex. 3, Declaration of VCS Associate Director for Resources and Support. The Agency asserts that, "[w]ith the narrow exception of procedures for appointment, removal, and determining rates of pay, the VCS is part of the same 'personnel system' that applies to the vast majority of federal employees." *Id.* at 17. The Agency also asserts that § 7802 does not prevent VCS employees from grieving disciplinary actions or other conditions of employment. *Id.* at 18. 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. *Id.* at 18-19. 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 18.

B. Union's Opposition

The Union argues that the grievance concerns the termination of a VCS employee, which constitutes a matter covered "under 5 U.S.C. § 7512." Opp'n at 7. 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 6-7.

However, the Union maintains that, if the Authority finds that it has jurisdiction, then the award is not contrary to law. *See id.* at 7. Specifically, the Union contends that § 7121(e) of the Statute "specifically allows employees the option of invoking the negotiated grievance procedure for matters falling under § 7512." *Id.* at 7; *see also id.* at 2. The Union asserts that the grievant "exercised his discretion to challenge his removal through the grievance . . . procedure[]." *Id.* at 7. The Union asserts that the Federal Circuit's decision in *Bennett* "is not applicable" because that case concerned only MSPB jurisdiction. *Id.* at 8. In addition, the Union contends that the Agency's reliance on *Nutt* is misplaced because the Supreme Court did not find that, if the MSPB lacks jurisdiction over a major adverse action, then an arbitrator also lacks jurisdiction over that action. *Id.* at 8-9.

The Union also asserts that the VCS employees, like the employees in *United States Department of Transportation, FAA*, 54 FLRA 235 (1998) (*FAA*), are in an "other personnel system" and thus should be allowed to grieve their removals. *Id.* at 9. Furthermore, the Union asserts that an Office of Personnel Management regulation, 5 C.F.R. § 752.405, does not apply to the grievant and that, as a result, any Agency argument "utilizing" this regulation "must fail." *Id.* at 10.

The Union further asserts that the grievant's "[e]xcepted [s]ervice [s]tatus [a]llows [h]im [t]o [g]rieve" his removal. *Id.* According to the Union, Congress amended the Civil Service Reform Act to give NEES employees who have "completed two years of service" the right to "grieve their removals." *Id.* at 11 (citing *NTEU*, 52 FLRA 1265, 1269-71 (1997)).

IV. Preliminary Matters

A. The Authority has jurisdiction to consider the Agency's exception.

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 2, 3. Conversely, as noted previously, the Union, in its opposition, claims that the Authority lacks jurisdiction over the Agency's exception because the grievance pertains to a § 7121(f) matter. Opp'n at 6-7.

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).

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 major 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), his 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. The Agency's exception is not interlocutory.

The Authority "ordinarily will not consider interlocutory appeals." 5 C.F.R. § 2429.11 (§ 2429.11). An interlocutory appeal concerns a ruling that is preliminary to the final disposition of a matter. In arbitration cases, this means that the Authority ordinarily will not resolve exceptions filed to an arbitration award unless the award constitutes a complete resolution of all issues submitted to arbitration. *See, e.g., U.S. Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project, Wapato, Wash.*, 55 FLRA 1230, 1231 (2000) (*BIA*); *U.S. Dep't of the Treasury, IRS, L.A. Dist.*, 34 FLRA 1161, 1163 (1990) (*IRS*). However, the Authority will review interlocutory exceptions when the exceptions raise a plausible jurisdictional defect, the resolution of which would advance the ultimate disposition of the case. *E.g.*, *BIA*, 55 FLRA at 1232. The Authority has found that resolving such exceptions would advance the ultimate disposition of the case when doing so would end the litigation. *IRS*, 34 FLRA at 1163-64; *see also U.S. Dep't of Homeland Sec., U.S. Citizenship & Immigration Servs.*, 65 FLRA 723, 725 (2011).

The parties in this case asked the Arbitrator to resolve whether the grievance was arbitrable. *See* Award at 1, 4. It is unclear, however, whether the parties also submitted a merits issue to the Arbitrator. As a result, we are unable to determine whether the award is preliminary to the final disposition of the case or instead constitutes a complete resolution of all issues submitted to arbitration. Accordingly, we are unable to determine whether the exception is interlocutory.

However, even assuming that the exception is interlocutory, we find that the exception raises a plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of the case. Such resolution would end the litigation. Exceptions raise a plausible jurisdictional defect when they present a credible claim that the arbitrator lacked jurisdiction as a matter of law. *See, e.g.*, *U.S. Dep't of Labor*, 63 FLRA 216, 217 (2009). For the reasons discussed below, we find that the Arbitrator lacked jurisdiction over the grievance as a matter of law. Accordingly, we will address the 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. *See* Exception at 6, 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 6-10. The Agency also maintains that VCS employees appointed pursuant to § 7802(e) are not in an "other personnel system," but, rather, are part of the civil service. *Id.* at 16-19. In contrast, the Union contends that the grievant is in an "other personnel system" and thus does not lack grievance rights. *See, e.g.*, Opp'n at 8, 9.

These issues and arguments are identical to those raised in *VA, VCS*, 66 FLRA at 948-49. As discussed in Section IV. A., *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 award is 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 arbitrator's 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--
> (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:
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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[.]
>
> . . . .