

**66 FLRA No. 181**

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
VETERANS CANTEEN SERVICE  
LEAVENWORTH, KANSAS  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 85  
(Union)

0-AR-4821

DECISION

September 20, 2012

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

**I. Statement of the Case**

This matter is before the Authority on an exception to an award of Arbitrator Amedeo Greco filed by the Agency 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. In addition, the Authority issued an Order to the Agency to show cause why its exception should not be dismissed, and the Agency filed a response to the Order.

The Arbitrator concluded that the grievance relating to the removal of a Veterans Canteen Service (VCS) employee appointed under 38 U.S.C. § 7802(e)\* was arbitrable and that the Agency did not have just cause under the parties' collective-bargaining agreement to remove the grievant.

For the reasons that follow, we set aside the award as contrary to law.

**II. Background and Arbitrator's Award**

The grievant, a non-preference eligible, excepted-service (NEES) employee, was appointed to the

Agency's canteen service under § 7802(e). Award at 2; Exception, Ex. 4. The Agency removed her for inappropriate behavior, and the Union filed a grievance on her behalf. The Union submitted the grievance to arbitration. The Arbitrator framed a preliminary issue of whether the grievance is arbitrable. In addition, he framed the merits issues as whether the Agency had just cause to remove the grievant, and, if not, then what is the appropriate remedy. Award at 2.

On the issue of arbitrability, the Arbitrator found the grievance arbitrable. *Id.* at 13. On the issue of just cause, the Arbitrator concluded that the Agency did not have just cause to remove the grievant. *Id.* at 16-17. On the issue of remedy, he mitigated the removal to a written reprimand and directed the Agency to reinstate the grievant and make her whole. *Id.* at 17.

**III. Positions of the Parties****A. Agency's Exception**

The Agency contends that the award is contrary to law. Exception at 4. Specifically, the Agency claims that NEES employees appointed under § 7802(e) cannot use the negotiated grievance procedure to contest their removals. *Id.* at 6.

**B. Union's Opposition**

The Union contends that the Authority should dismiss the Agency's exception for lack of jurisdiction because the award relates to a removal that arose in an "other personnel system" within the meaning of § 7121(e) of the Statute. Opp'n at 3, 6. Alternatively, the Union contends that the award is not deficient because the Arbitrator correctly concluded that the grievance was arbitrable. *Id.* at 2-3.

**IV. Preliminary Matter: The Authority has jurisdiction to resolve the Agency's exception.**

As noted previously, the Authority ordered the Agency to show cause why its exception should not be dismissed for lack of jurisdiction under § 7122(a) of the Statute. Show-Cause Order at 1-2. In response, the Agency argues that the Authority has jurisdiction because NEES employees appointed under § 7802(e) are not entitled to appeal their removals to the Merit Systems Protection Board (MSPB). Response to Show-Cause Order at 2-3.

Under § 7122(a) of the Statute, the Authority lacks jurisdiction to resolve exceptions to arbitration awards "relating to a matter described in § 7121(f)" of the Statute. *E.g., U.S. Envtl. Prot. Agency, Narragansett, R.I.*, 59 FLRA 591, 592 (2004). The matters described in

\* The text of the relevant statutory and regulatory provisions is set forth in the appendix to this decision.

§ 7121(f) are those matters covered under 5 U.S.C. §§ 4303 and 7512 and similar matters that arise under other personnel systems. 5 U.S.C. § 7121(f). 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. *E.g.*, *AFGE, Local 1013*, 60 FLRA 712, 713 (2005).

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 under § 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 v. MSPB*, 635 F.3d 1215, 1216, 1221 (Fed. Cir. 2011) (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. *See 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 that is applicable to civil service employees and is governed by Title 5. *See VA, VCS*, 66 FLRA at 949-50. Thus, the grievant's removal is not a similar matter arising under an "other personnel system." *See U.S. Small Bus. Admin.*, 33 FLRA 28, 36 (1988) (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).

## V. Analysis and Conclusions

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. *E.g.*, *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995). 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. In making that assessment, the Authority defers to the Arbitrator's underlying factual findings. *E.g.*, *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).

The Agency contends that the award is contrary to law because VCS, NEES employees appointed under § 7802(e) may not use the negotiated grievance procedures of the Statute to contest their removals. Exception at 6. The Union contends that VCS, NEES employees may grieve and arbitrate their removals. Opp'n at 2-3.

These issues and arguments are identical to those raised in VA, VCS, 66 FLRA at 948-49. As discussed in Section IV., *supra*, and consistent with the Authority's decision in VA, VCS, the 1982 amendments to the VCS Act and the Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (1990), 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. *See id.* at 948. 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, NEES 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, NEES employee appointed under § 7802(e).

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

**VI. Decision****APPENDIX**

The award is set aside.

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 atemporary 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[.]

....