

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: September 19, 2011

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEPARTMENT OF VETERANS AFFAIRS
VETERANS CANTEEN SERVICE

RESPONDENT

AND

Case No. BN-CA-08-0183

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
CHARGING PARTY

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the stipulation of facts, transcript, exhibits and any briefs filed by the parties.

Enclosures

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EMPLOYEES, AFL-CIO

CHARGING PARTY

Case No. BN-CA-08-0183

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been submitted to the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 19, 2011**, and addressed to:

Office of Case Intake & Publication
Federal Labor Relations Authority
1400 K Street, NW., 2nd Floor
Washington, DC 20424-0001

SUSAN E. JELEN
Administrative Law Judge

Dated: September 19, 2011
Washington, D.C.

FEDERAL LABOR RELATIONS AUTHORITY

WASHINGTON, D.C.

OALJ 11-13

Office of Administrative Law Judges

DEPARTMENT OF VETERANS AFFAIRS
VETERANS CANTEEN SERVICE

RESPONDENT

AND

Case No. BN-CA-08-0183

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

CHARGING PARTY

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).

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

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.

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.

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

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

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 Employees⁴

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

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.

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 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

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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).

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

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

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.

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.”

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

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

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 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'

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.

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.

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.

¹¹The 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 than what the General Counsel requested, I adopt the General Counsel's proposals regarding the signatory and location of the posting.

(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.

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.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. BN-CA-08-0183, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

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Catherine Turner
Office of Administrative Law Judges
Federal Labor Relations Authority

Dated: September 19, 2011
Washington, DC