65 FLRA No. 210

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 12
(Union)

and

UNITED STATES
DEPARTMENT OF LABOR
(Agency)

0-AR-4541

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ORDER DISMISSING EXCEPTIONS

July 11, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Merry C. Hudson filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.[1]

The Arbitrator found that the Agency did not violate the parties' agreement or law when it removed the grievant from federal service. For the reasons that follow, we dismiss the Union's exceptions.

II. Background and Arbitrator's Award

The Agency gave the grievant a "minimally satisfactory" performance rating and placed him on a performance improvement plan (PIP). Award at 6. After the PIP period ended, the supervisor informed the grievant that his performance had not been successful, and that the grievant could request a downgrade as an alternative to removal. *See id.* at 7. After a Union representative informed the supervisor that the grievant would consider requesting a downgrade, the grievant e-mailed the supervisor a settlement proposal that provided for a downgrade if certain additional conditions were met. *See id.* at 7-8. The supervisor rejected the settlement proposal, and the grievant decided not to request a downgrade. *Id.* at 8. Subsequently, the Agency removed the grievant from federal service for failing to meet the requirements of his PIP. *Id.*

The Union filed a grievance challenging the grievant's removal, and when the grievance was unresolved, it was submitted to arbitration. *See id.* at 2, 10. At arbitration, the Union argued, as relevant here, that the "performance-based removal of the [g]rievant" violated the parties' agreement and 5 U.S.C. chapter 43. *Id.* at 4. The Union also argued that the Agency removed the grievant to retaliate against him for involving the Union in the dispute, and thereby committed an unfair labor practice (ULP). *See id.* at 4, 12-13.

The Arbitrator framed the issue before her as whether the Agency "removed [the] [g]rievant from his position . . . in violation of the [parties' agreement] or federal law and, if so, what shall be the remedy." *Id.* at 3. The Arbitrator found that the grievant's removal was justified, and determined that the Agency complied with the parties' agreement and 5 U.S.C. chapter 43. *See id.* at 10. In addition, the Arbitrator found that the Agency "considered both [the] [g]rievant's past performance[] and his performance during the PIP period." *Id.* at 17. With regard to the Union's ULP claim, the Arbitrator found that the Union "failed to show that the Agency's decision" to remove the grievant was "in any way influenced by [the] [g]rievant's exercise of his right to obtain union representation." *Id.* at 14. Based on the foregoing, the Arbitrator denied the grievance. *Id.* at 17.

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that the Arbitrator "erred in finding that [the] Agency had not engaged in" a ULP, Exceptions at 10, and maintains that the Arbitrator "erred in finding that [the] Agency had lawful reasons to explain its" decision to remove the grievant, *id.* at 11. Additionally, the Union argues

1. As discussed further below, the parties also filed supplemental submissions in response to an Authority Order to Show Cause, and we consider those submissions. Further, the Union and the Agency filed additional supplemental submissions. However, the parties did not request permission to file those submissions. Thus, consistent with the Authority's Regulations and precedent, we decline to consider those submissions. *See* 5 C.F.R. § 2429.26; *AFGE, Local 1061*, 63 FLRA 317, 317 n.1 (2009).

that the award is contrary to 5 C.F.R. § 432.105(a),[2] and that the Arbitrator "erroneously concluded that the Agency could remove employees based on pre-PIP performance." *Id.* at 17.

B. Agency's Opposition

The Agency contends that the Authority lacks jurisdiction to consider the Union's exceptions because the grievant's removal was a performance-based action arising under 5 U.S.C. § 4303 (§ 4303). *See* Opp'n at 2-3. The Agency also contends that the Arbitrator correctly rejected the Union's remaining arguments, including its ULP allegation. *See id.* at 11-15.

IV. Order to Show Cause and Parties' Responses

The Authority directed the Union to show cause why its exceptions should not be dismissed for lack of jurisdiction pursuant to § 7122(a) of the Statute because the award "concerns the Agency's removal of an employee[.]" Order to Show Cause at 1.

In its response to the show-cause order (Union's response), the Union asserts that it "appealed to the Authority" because the removal "flowed from the Agency's commission of" a ULP, and "only the [Authority] can determine whether the Union's charge is correct." Union's Response at 1.

In a reply to the Union's response (Agency's reply), the Agency contends that the Authority does not have jurisdiction because the award is "inextricably intertwined" with a matter covered by § 4303. Agency's Reply at 2; *accord id.* at 3 (citing, inter alia, *U.S. Dep't of Veterans Affairs, Carl T. Hayden Med. Ctr., Phoenix, Ariz.*, 59 FLRA 569, 570 (2004) (Chairman Cabaniss concurring) (*VA*)).

V. Analysis and Conclusions

Under § 7122(a) of the Statute, the Authority lacks jurisdiction to resolve exceptions to awards "relating to" matters described in § 7121(f) of the Statute.[3] *See, e.g., AFGE, Local 491*, 63 FLRA 307, 308 (2009) (*Local 491*). Matters described in § 7121(f) include adverse actions, such as removals for unacceptable performance, that are covered under 5 U.S.C. § 4303 and are appealable to the Merit Systems Protection Board (MSPB) and reviewable by the United States Court of Appeals for the Federal Circuit (Federal Circuit).[4] *See, e.g., U.S. Dep't of Commerce, Patent & Trademark Office, Arlington, Va.*, 61 FLRA 476, 477 (2006) (*PTO*).

The Authority will determine that an award relates to a matter described in § 7121(f) "when it resolves, or is inextricably intertwined with," a § 4303 matter. *See Local 491*, 63 FLRA at 308. In making that determination, 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. *Id.*

It is undisputed that the grievant was removed from employment for unacceptable performance, pursuant to 5 U.S.C. chapter 43, and that the claim advanced at arbitration challenged the Agency's decision to remove the grievant for his unacceptable performance. *See* Award at 1, 4-5, 8, 10; Union's Response at 1-3; Exceptions at 1, 3, 6; Agency's Reply at 1-2, 4; Opp'n at 4. As the award at issue relates to the grievant's removal for unacceptable performance under 5 U.S.C. chapter 43, the award relates to a matter described in § 7121(f). *See PTO*, 61 FLRA at 477-78 (grievant's removal for unacceptable performance "inextricably intertwined" with § 4303). Thus, the above-cited precedent supports a conclusion that the Authority lacks jurisdiction to consider the Union's exceptions to the award.

The Union asserts that the removal "flowed from the Agency's commission of" a ULP, and asserts that "only the [Authority] can determine whether" this assertion is correct. Union's Response at 1. However, the Authority previously has dismissed exceptions under § 7121(f) even where the conduct at issue in the arbitration proceeding was alleged to constitute a ULP. *See VA*, 59 FLRA at 570 (Authority lacked jurisdiction to consider exceptions

2. 5 C.F.R. § 432.105(a) states, in pertinent part, that "[o]nce an employee has been afforded a reasonable opportunity to demonstrate acceptable performance . . . an agency may propose a reduction-in-grade or removal action if the employee's performance . . . is unacceptable[.]"

3. Section 7122(a) provides, in pertinent part: "Either party to arbitration . . . may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title)." Section 7121(f) provides, in pertinent part: "In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure . . . section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator . . . ."

4. Section 4303, states, in pertinent part: "[A]n agency may reduce in grade or remove an employee for unacceptable performance."

to award that found, among other things, that agency committed a ULP when it suspended grievant for thirty days). In addition, although the MSPB may not adjudicate whether a ULP occurred, it "not only can but *must* address issues that could properly underlie [ULP] charges where such issues are raised as affirmative defenses alleging 'prohibited personnel practices.'" *Wildberger v. FLRA*, 132 F.3d 784, 791 (D.C. Cir. 1998) (citing 5 U.S.C. § 2302(b)(9); *Ireland v. Dep't of HHS, SSA*, 34 M.S.P.R. 614 (1987); *Bodinus v. Dep't of the Treasury*, 7 M.S.P.R. 536, 540-42 (1981)). *See also Dep't of Commerce, Bureau of the Census v. FLRA*, 976 F.2d 882, 890 (4th Cir. 1992). Accordingly, the MSPB addresses claims that employee removals violate 5 U.S.C. § 2302(b)(9) because they were taken in retaliation based on union activities. *See, e.g., Gustave-Schmidt v. DoL*, 87 M.S.P.R. 667, 675 (2001). For these reasons, the claim advanced at arbitration in this case is one that could have been reviewed by the MSPB, and, on appeal, by the Federal Circuit. Even if that were not the case, the possibility that there may be no forum in which a party may challenge an arbitration award does not provide a basis for finding that the Authority has jurisdiction. *E.g., PTO*, 61 FLRA at 478 (citing *U.S. Dep't of Veterans Affairs, Med. Ctr., Newington, Conn.*, 53 FLRA 440, 443 (1997)).

For the foregoing reasons, the Authority lacks jurisdiction to consider the Union's exceptions to the award. Accordingly, we dismiss the exceptions.

VI. Order

The Union's exceptions are dismissed.