

63 FLRA No. 101

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 491
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
BATH, NEW YORK
(Agency)

0-AR-4375

DECISION

May 13, 2009

Before the Authority: Carol Waller Pope, Chairman
and Thomas M. Beck, Member

Decision by Chairman Carol Waller Pope for the
Authority

I. Statement of the Case

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

For the reasons set forth below, we conclude that the Authority lacks jurisdiction over this matter and dismiss the Union's exceptions.

II. Background and Arbitrator's Award

Prior to the grievance in this case, the grievant filed an earlier grievance that challenged her termination from employment, and the grievance was referred to arbitration. The hearing in that arbitration proceeding was conducted by a different arbitrator from the one in this case. The arbitrator in that proceeding withdrew from the proceedings after he discovered that the Union was not a party to the proceeding and after the grievant failed to pay her

share of the arbitrator's fees. Award at 3-4. Thereafter, by letter, the Agency notified the Union that because the Union and grievant had taken no further action since the withdrawal of the arbitrator, the Agency considered the grievance to be "abandoned." *Id.* at 5.

Subsequently, the Union filed the grievance in this case, which was unresolved and proceeded to arbitration. The Union alleged that the Agency violated the parties' collective bargaining agreement by "abandon[ing]" the earlier arbitration proceeding. *Id.* at 21, 22. The Union also alleged the Agency's "abandon[ment]" of the earlier arbitration proceeding constituted a reprisal against the grievant for her engagement in prior equal employment opportunity activities. *Id.*

The Arbitrator denied the grievance. According to the Arbitrator, it was the Union's responsibility to "take some action" if, following the earlier arbitrator's withdrawal from the proceeding, it wished to pursue the matter further. *Id.* at 26. As the Union took no such action, the Arbitrator concluded that the Agency properly treated the grievance as abandoned. *Id.* at 27-28. Accordingly, he denied the grievance.

III. Union's Exceptions and Agency's Opposition

The Union claims the award is deficient because it fails to draw its essence from the parties' collective bargaining agreement, the Arbitrator exceeded his authority, and the award is contrary to law. Exceptions at 18-25, 26. The Agency responds that the award is not deficient. The Agency argues, among other things, that the Authority lacks jurisdiction because the award relates to a removal action. Opposition at 3.

IV. Order to Show Cause

The Authority directed the Union to show cause why its exceptions should not be dismissed because the award relates to a matter over which the Authority lacks jurisdiction under § 7122(a) and § 7121(f) of the Statute.* In its response, the Union

* 5 U.S.C. § 7122(a) states, in relevant part, that a party 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)." 5 U.S.C. § 7121(f) provides, in pertinent part:

In matters covered under sections 4303 and 7512 of this title which have been raised under the

contends that it is only contesting the Agency's "refusal . . . to proceed with the procedural processing of a grievance[.]" Response at 2.

V. The Authority lacks jurisdiction to resolve the Union's exceptions.

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. 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." *United States Env'l Prot. Agency, Narragansett, R.I.*, 59 FLRA 591, 592 (2004). The matters covered under 5 U.S.C. §§ 4303 and 7512 include removals, *see AFGE, Local 1013*, 60 FLRA 712, 713 (2005) (*AFGE, Local 1013*). Arbitration awards resolving these matters are reviewable by the United States Court of Appeals for the Federal Circuit, rather than the Authority. *See* 5 U.S.C. §§ 7121(f) and 7703.

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, § 7512, or similar matter. *AFGE, Local 1013*, 60 FLRA at 713. 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 Merit Systems Protection Board, and, on appeal, by the United States Court of Appeals for the Federal Circuit. *See id.* Applying this precedent, we conclude that the grievance relates to the grievant's removal.

It is undisputed that the grievant was terminated from employment. It also is undisputed that the claim advanced in arbitration challenged the Agency's decision to cease participation in an earlier arbitration proceeding regarding the termination. As the Union's exceptions pertain to issues relating to the grievant's removal, the award relates to a matter described in § 7121(f). Accordingly, exceptions to the award may not be filed with the Authority under § 7122(a) of the Statute. Therefore, the Authority is without jurisdiction to review the Union's exceptions.

VI. Decision

The Union's exceptions are dismissed.

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.