65 FLRA No. 51

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

and

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R4-78
(Charging Party)

WA-CA-09-0247

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DECISION AND ORDER

October 29, 2010

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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 unfair labor practice (ULP) case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the Respondent. The General Counsel (GC) and the Charging Party filed oppositions to the Respondent's exceptions.

The amended complaint alleges that the Respondent violated § 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to participate in the arbitration of a grievance. The Judge determined that the Respondent violated § 7116(a)(1) and (8) of the Statute and recommended that the Authority issue a cease and desist order, require the Agency to proceed to arbitration concerning the grievance at issue, and require the Agency to post a notice of the ULP finding within sixty days.

Upon consideration of the decision and the entire record, we deny the Respondent's exceptions and adopt the Judge's findings, conclusions, and recommended order.

II. Background and Judge's Decision

A. Background

The grievant, a supply clerk, was removed by the Respondent from her position. The Charging Party grieved her removal, and the Respondent denied the grievance. *Id.* at 3. The Charging Party then invoked arbitration. After the parties had selected an arbitrator, the Respondent informed the arbitrator that it would not participate in the arbitration. *Id.* The Charging Party then filed a ULP charge against the Respondent. *Id.* at 1. The Regional Director of the Washington Regional Office of the Authority issued a Complaint and Notice of hearing, alleging that the Respondent had violated § 7116(a)(1), (5), and (8) of the Statute by refusing to arbitrate the grievance. *Id.* at 1-2. The Respondent filed its Answer to the Complaint, admitting the factual allegations, but denying that it had committed a ULP. *Id.* at 2.

B. Judge's Decision

Before the Judge, the Respondent contended that the grievant, as a Veterans Canteen Service (VCS) employee, had no right to pursue arbitration under the negotiated grievance procedure of the parties' collective bargaining agreement. *Id.* at 5. According to the Respondent, VCS employees are appointed under 38 U.S.C. § 7802, which provides that such employees may be "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."[1] *Id.*

1. 38 U.S.C. § 7802(e) provides:

> (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 Respondent asserted that, because, by its plain language, the statute provides that VCS employees may be removed "without regard to title 5," they do not have the right under 5 U.S.C. § 7512 to appeal their removals to the Merit Systems Protection Board (MSPB). *Id*. (citing *Chavez v. Dep't of Veterans Affairs*, 65 M.S.P.R. 590, 592-94 (1994) (*Chavez*)). The Respondent further contended that, because the grievant was also a nonpreference eligible excepted service (NEES) employee, she had no right to challenge adverse actions. *Id*. at 5-6.

The Respondent asked the Judge to resolve the question of arbitrability. *Id*. at 6. The Respondent acknowledged the general principle that parties must arbitrate all unresolved grievances, including questions of arbitrability, but contended that the Authority had carved out an exception from this general rule in *Director of Administration Headquarters, United States Air Force*, 17 FLRA 372 (1985) (*HQ, USAF*) for matters involving "clearly established" law. *Id*.

The Judge found that the language of 38 U.S.C. § 7802(e) was not as plain or as clear as the Respondent alleged and that an arbitrator would need to resolve significant issues of law and statutory construction in order to resolve the question of arbitrability. *Id.* In this regard, the Judge noted that, although the Respondent argued that the plain language of the statute provides that "VCS employees appointed under [§ 7802] may be removed . . . without regard to Title 5 provisions[,]" § 7802(e) actually provides that employees may be "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*." *Id.* (emphasis added). The Judge further noted that VCS employees are in the excepted service, not the competitive service, and under the plain language of the statute, would be excluded only from a narrow portion of title 5. *Id.* According to the Judge, the MSPB, in reaching a contrary conclusion in its *Chavez* decision, relied on legislative history from the 1982 amendments to 38 U.S.C. § 7802(e). The Judge stated that, even assuming the MSPB was correct, its interpretation of § 7802(e) was "far from obvious" and that its holding was not the "clearly established law" that the Authority had relied upon in *HQ, USAF*. *Id.*

Moreover, the Judge stated that, even if the MSPB's interpretation of § 7802(e) was correct with respect to the adverse action appeal rights of VCS employees under 5 U.S.C. § 7512, this "d[id] not automatically mean" that such employees "h[ad] no right to use the negotiated grievance procedure to challenge adverse actions." *Id.* The Judge noted that § 7121(e)(1) of the Statute requires employees whose cases are appealable under both 5 U.S.C. § 7512 and a negotiated grievance procedure to select one of these procedures. *Id.* at 9-10. The Judge characterized as "rather murky" the case law pertaining to the Respondent's contention that, if an employee is barred from a § 7512 appeal, she is also barred from using the negotiated grievance procedure. *Id*. at 10.

After outlining the case law "addressing the overlap between an employee's right to arbitration under a negotiated grievance procedure and her appeal rights under 5 U.S.C. § 7512 to the MSPB," the Judge concluded that a full hearing before an arbitrator was required. *Id*. at 10-11. He noted that, unlike the probationary employee's grievance in *HQ, USAF*, "it cannot be said that clearly established law bars [VCS] employees from grieving their removal." [2] *Id*. at 11 (citing *HQ, USAF*, 17 FLRA at 375).

The Judge then held that the Respondent committed a ULP in violation of § 7116(a)(1) and (8) of the Statute when it refused to proceed to an arbitration hearing regarding the grievance. *Id*. As a remedy, he recommended that the Authority issue a remedial order requiring that the Respondent:

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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.

2. In a footnote, the Judge also noted that the Respondent separately contended that, as an NEES employee, the grievant is precluded from grieving the merits of her removal under the Authority's decision in *National Labor Relations Board*, 35 FLRA 1116, 1117 (1990). According to the Judge, in that decision, the Authority held that NEES employees could not utilize the negotiated grievance procedure to appeal adverse actions because allowing such actions would subvert the integrated scheme Congress had created because it would provide adverse action appeal rights to some classes of employees, but not others. The Judge then noted that, after the Authority issued that decision, Congress granted MSPB appeal rights to most NEES employees. Accordingly, the Judge concluded that, if the Respondent were to prevail on its allegation of nonarbitrability of the grievant's removal, it would be based on her status as a § 7802 employee, not as an NEES employee. Judge's Decision at 10 n. 4.

(1) cease and desist from refusing to arbitrate the grievance and from restraining or coercing its employees in the exercise of their rights under the Statute; (2) proceed to arbitration over the grievant's grievance; (3) post a notice as required by the order; and (4) within thirty days, provide written notice to the Regional Director of the Washington Regional Office of the steps that the Respondent has taken to comply with the order. *Id.* at 12-13.

III. Positions of the Parties

A. Respondent's Exceptions

Reiterating the arguments that it made before the Judge, the Respondent contends that the plain language of 38 U.S.C. § 7802 establishes that removed § 7802 employees do not have grievance rights; that the MSPB has concluded that such language is "plain and clear" and has held that employees who are removed under § 7802 do not have appeal rights to the MSPB; and that the Authority should follow the MSPB's interpretation and find that such employees have no right to pursue arbitration under a negotiated grievance procedure. Exceptions at 4-6. Moreover, the Respondent contends that the Judge erred by finding: (1) that the MSPB's interpretation of the law "is far from obvious from the plain language of § 7802(e)" and (2) that the MSPB's "holding is not the 'clearly established law' that the Authority relied on" in *HQ, USAF*. *Id.* at 6 (quoting Judge's Decision at 9).

The Respondent also asserts that, under 5 C.F.R. § 752.401(d)(12), MSPB appeal rights are not available to employees who are excluded from title 5.[3] *Id.* at 6-7. The Respondent contends that it "would be nonsensical to allow for grievance rights when MSPB appeal rights, which are articulated in the same regulation [(5 C.F.R. § 752.405(b))] as grievance rights, are not available."[4] *Id.* at 7. The Respondent argues that 5 C.F.R. § 752.405(b), therefore, must be read to exclude § 7802 employees from a negotiated grievance procedure. *Id.* The Respondent contends that the Judge erred by finding that "case law on this issue is rather murky." *Id.* at 7. According to the Respondent, an arbitrator is subject to the same jurisdictional limitations as the MSPB and "may not issue awards which conflict with the applicable 'external law.'" *Id.* (quoting *Devine v. Levin*, 739 F.2d 1567, 1570 (Fed. Cir. 1984)).

The Respondent also contends that the Judge erred by concluding that, "[i]f the Respondent is to prevail on the nonarbitrability [of the grievant's] removal, it will be based on her status as a [§] 7802 employee, not as a NEES employee." *Id.* at 8 (citing Judge's Decision at 10 n.4). The Respondent asserts that the Judge improperly relied on the fact that, in *National Labor Relations Board*, the Authority "left open" the question whether NEES employees could use the grievance procedure to challenge adverse actions based on "alleged interference with protected union activity" because that issue is irrelevant to this case. *Id.* at 8-9 (citing *NLRB*, 35 FLRA 1116, 1125-26 (1990) (*NLRB*)). The Respondent also asserts that the Authority's decision in *Panama Canal Commission, Balboa, Republic of Panama*, 45 FLRA 1075 (1992), is likewise irrelevant because that decision failed to discuss an exception to the rule "that removed NEES employees do not have grievance rights as a matter of law." *Id.* at 9.

Finally, the Respondent asserts that the Authority should rule that, as a matter of law, § 7802 employees cannot grieve their removals. *Id.* at 9-11.

B. GC's Opposition

The GC contends that the Respondent's claims are without merit because the Respondent has not shown that the Judge failed to follow Authority precedent in concluding that the Respondent

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3. 5 C.F.R. § 752.401(d)(12) provides, in pertinent part, that the following type of employee is excluded from coverage under this section:

> 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[.]

5 C.F.R. § 752.401(d)(12).

4. 5 C.F.R. § 752.405(b) provides:

> *Grievance rights.* As provided at 5 U.S.C. [§] 7121(e)(1), if a matter covered by this subpart falls within the coverage of an applicable negotiated grievance procedure, an[] employee may elect to file a grievance under that procedure or appeal to the [MSPB] under 5 U.S.C. [§] 7701, but not both. 5 U.S.C. [§] 7114(a)(5) and [§] 7121(b)(3), and the terms of an applicable collective bargaining agreement, govern representation for employees in an exclusive bargaining unit who grieve a matter under this subpart through the negotiated grievance procedure.

committed a ULP. GC's Opp'n at 2. The GC contends that it is well established that questions of arbitrability are solely for an arbitrator to decide and that an administrative law judge is precluded from making a determination of whether a grievance is arbitrable. *Id.* at 3. According to the GC, the Authority created a "one-time" exception to this rule in *HQ, USAF*, holding that "clearly established law" precluded a grievance regarding the termination of a probationary employee. *Id.* at 4 (citing *HQ, USAF*, 17 FLRA at 375). The GC argues that the Respondent's assertion that *HQ, USAF* provides a basis for the Authority to decide the arbitrability of the grievance at issue is incorrect. *Id.* at 4-5, 7. According to the GC, the authority cited by the Respondent in support of its position does not have the same "force and effect" as the precedent relied upon by the Authority in *HQ, USAF*. *Id.*

Further, the GC asserts that the Respondent's exception to "the Judge's characterization of the case law that addresses MSPB appeal rights in relation to grievance arbitrability as 'murky' misinterprets the Judge's point." *Id.* at 5. According to the GC, contrary to the Respondent's argument, the Judge did not state that an arbitrator is free to issue a decision that fails to comply with a governing statute. *Id.* Rather, the GC asserts, the Judge simply determined that the substantive arbitrability of a grievance concerning an NEES employee was not clear and, accordingly, determined that question should be resolved by an arbitrator. *Id.* at 5-6.

The GC contends that the Respondent's claim that arbitrators have no jurisdiction as a matter of law to determine the merits of a grievance filed by a NEES employee is incorrect and that its reliance on *NLRB* as support for this argument is misplaced. *Id.* at 6. According to the GC, due to the enactment of the Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (1990), a NEES employee is permitted to use the negotiated grievance procedure to challenge an adverse employment action as long as the employee has completed two continuous years of service. *Id.* at 6-7 (citing *NTEU*, 52 FLRA 1265, 1269-71 (1997); *NTEU*, 39 FLRA 346 (1991)). The GC argues that the grievant had more than two years of continuous service at the time of her removal and, thus, is eligible to challenge her termination using the negotiated grievance procedure. *Id.* at 7.

Finally, the GC contends that, in the event that the Authority chooses to address arbitrability under § 7802(e), the language of that provision does not exclude arbitral review of termination actions. *Id.* at 7-9.

C. Charging Party's Opposition

The Charging Party asserts that the Judge did not err by finding that the Respondent committed a ULP when it refused to participate in the arbitration hearing regarding the grievant's removal. Charging Party's Opp'n at 3-4. The Charging Party alleges that it has negotiated and implemented a collective bargaining agreement with the Respondent that provides rights for employees of the VCS, including the grievant. *Id.* at 4. The Charging Party argues that Article 44 of the agreement establishes a clear negotiated grievance procedure, as well as a process for resolving questions of arbitrability, and that the Respondent has failed to show that the agreement does not govern the grievant's removal. *Id.*

Further, the Charging Party contends that the plain language of § 7802(e) does not establish that VCS employees who are removed do not have grievance rights and that the Authority should reject the Respondent's assertion that this issue has been clearly established. *Id.* at 5-6.

The Charging Party also contends that the Judge correctly determined that the grievant's status as a NEES employee would not affect the arbitrability of this matter. *Id.* at 8. The Charging Party contends that, in *Department of the Treasury, Office of Chief Counsel v. FLRA*, 873 F.2d 1467, 1472 (D.C. Cir. 1989), the D.C. Circuit recognized that, under § 7121(f) of the Statute, some employees in specialized personnel systems would negotiate for grievance procedures even though they have no statutory right of appeal. *Id.*

Finally, the Charging Party contends that the arbitrability issues raised by the Respondent are not properly resolved through this proceeding. *Id.* According to the Charging Party, the Authority has determined that negotiated grievance procedures may not confer jurisdiction regarding questions of arbitrability on the Authority and that, unless the parties agree otherwise, "negotiated grievance and arbitration procedures 'must be read as providing that all questions o[f] arbitrability not otherwise resolved shall be submitted to arbitration.'" *Id.* at 8-9 (quoting *DOL*, 10 FLRA 316 (1982)).

IV. Analysis and Conclusions

A. The Judge did not err by failing to find that the language of § 7802(e) was so clear that it was unnecessary for an arbitrator to interpret it.

Section 7121(a) of the Statute requires that collective bargaining agreements contain "procedures for the settlement of grievances, including questions of arbitrability." Additionally, § 7121(b)(1)(C)(iii) of the Statute requires that all such negotiated grievance procedures include procedures that "provide that any grievance not satisfactorily settled under the negotiated grievance procedure be subject to binding arbitration[.]" Such negotiated grievance and arbitration procedures "must be read as providing that all questions of arbitrability not otherwise resolved shall be submitted to arbitration." *DOL*, 10 FLRA at 318. The Authority has repeatedly held that a party refusing to arbitrate violates § 7116(a)(1) and (8) of the Statute. *See, e.g., Dep't of the Air Force, Langley AFB, Hampton, Va.*, 39 FLRA 966 (1991) (*Langley AFB*); *AFGE, Local 1457*, 39 FLRA 519 (1991).

Moreover, it is well established that questions of arbitrability are solely for an arbitrator to decide. *See* 5 U.S.C. § 7121(c); *Langley AFB*, 39 FLRA at 969. In *HQ, USAF*, the Authority created a limited exception to this rule, finding that "clearly established law" precluded a grievance regarding the termination of a probationary employee. *See HQ, USAF*, 17 FLRA at 374-75.

The Respondent does not dispute that, consistent with § 7122(a) of the Statute, the parties' agreement contains a negotiated grievance procedure, as well as a process for resolving questions of arbitrability. The Respondent also does not dispute that, consistent with § 7121(b)(1)(C)(iii) of the Statute, the parties' agreed-upon negotiated grievance procedure provides that any grievance not satisfactorily settled under the grievance procedure is subject to binding arbitration. Moreover, the Respondent does not dispute that the Authority has consistently held that questions of arbitrability are for an arbitrator to decide. Rather, the Respondent contends that the Judge erred in this case when he determined that the language of § 7802(e) and the MSPB's interpretation of that provision in *Chavez* are not the "clearly established law" that the Authority relied upon in *HQ, USAF*. Exceptions at 5-6.

We reject this contention. The "clearly established law" relied upon by the Authority in *HQ, USAF* involved an opinion of the United States Court of Appeals for the D.C. Circuit and several Authority decisions that directly interpreted an employee's rights under the Statute. Here, however, the Respondent relies upon an opinion of the MSPB that interprets an employee's right to appeal adverse actions to the MSPB.[5] Furthermore, in *HQ, USAF*, the Authority noted that "no threshold question or any other question of interpretation or statutory construction" was present that could "legitimately be resolved by an arbitrator." *HQ, USAF*, 17 FLRA at 375. In this case, however, several questions of interpretation and statutory construction must be answered in order to decide the arbitrability of the grievance that the Respondent refused to arbitrate. For instance, as an initial matter, the language of 38 U.S.C. § 7802(e) must be interpreted to determine what rights, if any, a VCS employee has under title 5. Moreover, as the Judge correctly explained, the answers to these questions are far from clear or straightforward. Judge's Decision at 9-11 (noting that the law "regarding the rights of [§] 7802 employees is far from clear" and that the case law regarding whether employees who do not have adverse action appeal rights also do not have grievance rights is "rather murky").

Accordingly, we find that the Judge did not err by finding that the language of § 7802(e) and the MSPB's interpretation of that provision is not the "clearly established law" that the Authority relied upon in *HQ, USAF* and denying this exception.

5. The Respondent also asserts, in this regard, that, because the MSPB has held that MSPB appeal rights are not available, it "would be nonsensical to allow for grievance rights" and contends that the Judge erred in concluding otherwise. Exceptions at 7. According to the Respondent, an arbitrator is subject to the same jurisdictional limitations as the MSPB and "may not issue awards which conflict with the applicable 'external law.'" *Id.* (quoting *Devine v. Levin*, 739 F.2d at 1570). To the extent that the Respondent is contending that the Judge found that an arbitrator is free to issue a decision that fails to comply with Federal laws, rules and regulations, we reject that contention. The Judge did not find that an arbitrator is free to issue a decision that fails to comply with applicable law. Rather, the Judge simply determined that the case law addressing the overlap between an employee's right to appeal adverse actions to the MSPB and his or her right to arbitration under a negotiated grievance procedure was not clear and, accordingly, determined that question should be resolved by an arbitrator.

B. The Judge did not err in finding that, "if the Respondent is to prevail on the nonarbitrability [of the grievant's] removal, it will be based on her status as a [§] 7802 employee, not as a [nonpreference-eligible excepted service employee]."

The Respondent also contends that the Judge erred in finding that, "[i]f the Respondent is to prevail on the nonarbitrability [of the grievant's] removal, it will be based on her status as a [§] 7802 employee, not as a [nonpreference-eligible excepted service employees]." Exceptions at 8 (citing Judge's Decision at 10 n.4). According to the Respondent, arbitrators have "no jurisdiction as a matter of law to determine the merits of [a] grievance" filed by a NEES employee. *Id.* at 8 (citation omitted).

We reject the Respondent's contention. Due to the enactment of the Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (1990), an NEES employee is permitted to use the negotiated grievance procedure to challenge an adverse employment action as long as the employee has completed two continuous years of service. *See NTEU*, 52 FLRA at 1269-71. It is undisputed that the grievant had more than two years of continuous service at the time of her removal. GC's Opp'n at 7; Exceptions at 1. Thus, the grievant, as an NEES employee, is eligible to challenge her termination using the negotiated grievance procedure.

Accordingly, we find that the Judge did not err in finding that, if the Respondent were to prevail on the nonarbitrability of the grievant's removal, it would be based on her status as a § 7802 employee, not as an NEES employee, and deny the Respondent's exception.

V. Order

Pursuant to § 2423.41(c) of the Authority's Regulations and § 7118 of the Statute, it is hereby ordered that the Respondent shall:

1. Cease and desist from:

(a) Failing or refusing to arbitrate the grievance over the grievant's removal, after receiving notice from the Union of its desire to proceed to arbitration.

(b) In any like or related manner, interfering with, restraining, or coercing its 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) Proceed to arbitration concerning the grievance over the grievant's removal after receiving notice from the Union of its desire to proceed to arbitration.

(b) Post at its facilities where employees of the Veterans Canteen Service represented by the Union are located, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Director of the Veterans Canteen Service 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.

(c) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director of the Washington Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States Department of Veterans Affairs, Veterans Canteen Service, Martinsburg, West Virginia, violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail or refuse to arbitrate the grievant's grievance after receiving notice from the National Association of Government Employees, Local R4-78 of its desire to proceed to arbitration.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured under the Statute.

WE WILL arbitrate the grievant's grievance.

_____
(Respondent/Agency)

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 its provisions, they may communicate directly with the Regional Director, Washington Regional Office, whose address is: 1400 K Street, NW, 2nd Floor, Washington, DC 20424-0001, and whose telephone number is: (202) 357-6029.

Office of Administrative Law Judges

DEPARTMENT OF VETERANS AFFAIRS
VETERANS CANTEEN SERVICE
MARTINSBURG, WEST VIRGINIA
Respondent

AND

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R4-78
Charging Party

Case No. WA-CA-09-0247

Neil P. Daly
For the General Counsel

Michael E. Anfang
For the Respondent

Sarah E. Suszczyk
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423. The case was submitted to me in accordance with section 2423.26(a) of the Authority's Rules and Regulations, based on a waiver of a hearing and a stipulation of facts by the parties.

On March 12, 2009, National Association of Government Employees, Local R4-78 (the Union or Charging Party), filed an unfair labor practice charge against the Department of Veterans Affairs, Veterans Canteen Service (VCS), Martinsburg, West Virginia (the Agency or Respondent). After investigating the charge, the Regional Director of the Washington Region of the Authority issued a Complaint and Notice of Hearing on September 11, 2009, alleging that the Agency had violated section 7116(a)(1), (5) and (8) of the Statute by refusing to participate in the arbitration of a grievance. The Respondent filed its Answer to the Complaint on October 1, 2009, admitting the factual allegations of the Complaint but

denying that it had a duty to arbitrate or that it committed an unfair labor practice.

A hearing was scheduled in the matter, but prior to the hearing the parties entered into a stipulation of facts and agreed that a hearing was not necessary. The parties filed a Joint Motion for Adjudication in Lieu of Hearing, which included a statement of facts not in dispute and documentary attachments. The hearing was therefore canceled. The General Counsel, the Respondent and the Charging Party have filed briefs, which I have fully considered.

Based on this record, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

Paragraphs 1 through 15 of the Joint Motion for Adjudication in Lieu of Hearing are hereby set forth verbatim, along with the references therein to Attachments 1 through 7, which I admit and will hereafter refer to as Joint Exhibits 1 through 7:

1. The charge in Case Number WA-CA-09-0247 was filed by the Charging Party with the Authority's Washington Regional Director on March 12, 2009. See Joint Exhibit 1 (Formal Papers for WA-CA-09-0247 including Charge, Complaint, and Answer to Complaint), paragraph 5 of Complaint and Answer.

2. The Respondent is an agency under 5 U.S.C. § 7103(a)(3). See Joint Exhibit 1, paragraph 2 of Complaint and Answer.

3. Ms. Angel Cottrell was employed as a Supply Clerk for the Respondent. See Joint Exhibit 2 (June 7, 2008, Standard Form 50 issued by Respondent removing Angel Cottrell from her position).

4. Ms. Cottrell was employed in her position under the authority of 38 U.S.C. § 7802. See Joint Exhibit 2.

5. Effective June 7, 2008, the Respondent removed Ms. Cottrell. See Joint Exhibit 2.

6. The National Association of Government Employees (NAGE) is the exclusive representative of a consolidated unit of employees appropriate for collective bargaining at the Department of Veterans Affairs.

7. The Charging Party is a labor organization under 5 U.S.C. § 7103(a)(4), and is NAGE's agent for employees in the bargaining unit at the Respondent, including Ms. Cottrell. See Joint Exhibit 1, paragraph 4 of Complaint and Answer.

8. During the time period covered by the Complaint, the Respondent and Charging Party were subject to a term collective bargaining agreement (CBA). See Joint Exhibit 3 (Department of Veterans Affairs – National Association of Government Employees Master Agreement effective November 28, 2003).

9. Articles 44 and 45 of the Agreement include 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." See Joint Exhibit 3, Articles 44 and 45.

10. In a memorandum dated June 13, 2008, and received June 19, 2008, the Charging Party, through its representative Ms. Dale Mills, grieved, at the third step, the Respondent's decision to remove Ms. Cottrell. See Joint Exhibit 4 (June 13, 2008, Step 3 Grievance filed by Dale Mills regarding Angel Cottrell's removal).

11. In a memorandum dated June 26, 2008, and received July 10, 2008, the Respondent, through its Associate Director of Field Operations Mr. Michael Wallace, denied the third-step grievance. See Joint Exhibit 5 (June 26, 2008, Step 3 Grievance Response signed by Michael Wallace).

12. On or about July 28, 2008, the Charging Party invoked arbitration of the third-step grievance. See Joint Exhibit 6 (July 28, 2008, electronic mail from Mills to Ray Tober invoking arbitration for the removal of Cottrell).

13. The Charging Party and Respondent agreed on or about December 18, 2008, that Arbitrator Richard Dissen would resolve the grievance described in paragraph 10.

14. On or about February 13, 2009, the Respondent, through its attorney, informed Arbitrator Dissen that the Respondent would not participate in arbitration of the grievance. See Joint Exhibit 7 (February 13, 2009, letter from Michael Anfang to Dissen informing Dissen that the Respondent would not participate in the arbitration of grievance regarding Cottrell's removal).

15. The Respondent has not participated in arbitration of the grievance described in paragraph 10.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

General Counsel

The General Counsel argues that the Respondent violated section 7116(a)(1) and (8) of the Statute by refusing to proceed with an arbitration hearing to resolve Ms. Cottrell's grievance.[1] The GC insists that if the Agency believed the grievance was not arbitrable, based on Cottrell's status as an employee appointed pursuant to 38 U.S.C. § 7802 (a Section 7802 employee), the proper way of pursuing its position was to raise the arbitrability issue before the arbitrator. By refusing to conduct the hearing altogether, the GC says the Agency violated section 7121 of the Statute.

The General Counsel first quotes the language of section 7121(a), that "any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability." Section 7121(b)(1)(C)(iii) further requires CBAs to "provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration . . ." These are the statutory linchpins on which the Authority has repeatedly held that the refusal to participate in an arbitration is an unfair labor practice. *Dep't of the Air Force, Langley Air Force Base, Hampton, Va.*, 39 FLRA 966 (1991)(*Langley AFB*); *Dep't of Labor, Employment Standards Admin./Wage and Hour Division, Wash., D.C.*, 10 FLRA 316 (1982)(*DOL*). According to the GC, a party is not permitted to make its own unilateral determination of the nonarbitrability of a dispute, even when it appears clear on its face that a grievance is not arbitrable. *DOL*, 10 FLRA at 321-22. Similarly, the GC says that it is improper for an Administrative Law Judge to address or resolve arbitrability issues in such cases, citing *Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 11 FLRA 456, 457 (1983)(*Portsmouth*). It notes that arbitrators routinely deal with arbitrability questions and refuse to address the merits of the grievance if it is not arbitrable. *See, e.g., Bremerton Metal Trades Council*, 64 FLRA 103 (2009).

According to the GC, the only exception to the rule requiring arbitration involves adverse actions against professional employees appointed under title 38 of the U.S. Code. *See Veterans Admin. Central Office, Wash., D.C.*, 27 FLRA 835 (1987)(*VA Central Office*). There, an arbitrator conducted a hearing and ruled on the merits in favor of the employee, but the Authority upheld the agency's refusal to comply with the award, because the disciplinary procedures established by Congress for such cases under 38 U.S.C. §§ 4110-4119 were meant to be exclusive. *Id.* at 839-40. The GC argues that the instant case is completely different from *VA Central Office*: VCS employees are appointed under an entirely different chapter of title 38 than the professional employees involved in *VA Central Office*; the statutory provision relating to VCS employees contains none of the detailed procedures for disciplinary actions covering professional employees; and unlike section 4119 of title 38, section 7802 does not expressly reference the Statute or chapter 71 of title 5 in its exclusionary language.

Since the instant case does not fit within the one recognized exception to the general rule, the General Counsel submits that the Respondent was required to participate in the arbitration hearing scheduled in this case. By refusing to do so, the Respondent obstructed the procedure mandated by the Statute for resolving grievances and violated section 7116(a)(1) and (8).

Respondent

The Respondent begins its case by citing the statute that created the Veterans Canteen Service and authorizes the Secretary of the Department of Veterans Affairs to operate canteens, 38 U.S.C. § 7802. The law provides:

> (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,

[1] The General Counsel has withdrawn, as cumulative, the allegation that the Respondent's actions violated section 7116(a)(5), and I will not consider that allegation further. G.C. Brief at 9 n.4.

> 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.*

38 U.S.C. § 7802(e)(emphasis added). The Respondent argues that since, by its "plain language," the statute provides that VCS employees may be removed without regard to title 5, they do not have the right under 5 U.S.C. § 7512 to appeal their removals to the Merit Systems Protection Board (MSPB). Resp. Brief at 5. The MSPB itself has held that it has no jurisdiction to hear adverse action appeals of VCS employees, citing 38 U.S.C. § 7802(e). *Chavez v. DVA*, 65 MSPR 590 (1994)(*Chavez)*.

The Respondent then relies on section 7121(e)(1) of the Statute and 5 C.F.R. § 752.405(b) of the MSPB implementing regulations to argue that an employee who has no MSPB appeal rights also has no right to pursue arbitration under a CBA's negotiated grievance procedures (NGP). According to the Respondent, "[i]t would be nonsensical to allow for grievance rights when MSPB appeal rights, which are articulated in the same regulation as grievance rights, are not available." Resp. Brief at 6.

The Agency further notes that VCS employees are in the Federal excepted service, and that since Ms. Cottrell was a nonpreference eligible employee (NEES)(referring to the veteran's preference), such employees have no right to challenge adverse actions. Respondent cites several court opinions reversing the Authority's former rule that NEES employees could appeal their adverse actions through the NGP, and the Authority's ultimate reversal of that rule. *See, e.g., Dep't of the Treasury, Office of Chief Counsel v. FLRA*,873 F.2d 1467 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990)(*Treasury v. FLRA*); *National Labor Relations Board*, 35 FLRA 1116 (1990)(*NLRB*) .

Relying on the principle that an arbitrator is subject to the same jurisdictional limitations as the MSPB, the Respondent therefore submits that it has no obligation to participate in the NGP for the removal of VCS employees. It concedes that the Authority has never addressed this precise question, but it urges me and the Authority to do so, in order to enable the Respondent and the Union to resolve an issue that otherwise may continue to be the subject of continued litigation. It cites the Authority's decision in *Director of Administration, Headquarters, U.S. Air Force*, 17 FLRA 372 (1985)(*HQ, USAF*), as an appropriate analogy. There, the Authority upheld an agency's refusal to participate in the grievance and arbitration procedure regarding the removal of a probationary employee. While it noted and reaffirmed its basic principle, articulated in *DOL*, 10 FLRA at 320-21, that parties must arbitrate all unresolved grievances, including questions of arbitrability, the Authority carved out an exception for probationary employees. It reasoned that because probationary employees have been held, as a "matter of clearly established law", to have no right to appeal their removal, there is "no threshold question or any other question of interpretation or statutory construction which can legitimately be resolved by an arbitrator." *HQ, USAF*, 17 FLRA at 375.

Finally, the Agency cites an earlier arbitration case in which it successfully asserted the nonarbitrability of a removed VCS employee's grievance. *Veterans Canteen Service, Hot Springs, S.D. and AFGE Local 1539,* March 19, 2007, attached to Respondent's Brief. In that case, the arbitrator cited the MSPB decision in *Chavez, supra*, and ruled that he could not arbitrate the merits of a case in which the MSPB had no jurisdiction. Award at 3-4. While conceding that the arbitrator's ruling is not binding on me or the Authority, the Respondent asserts that the rationale of that case is persuasive, and urges the Authority to take a similar position, to prevent the Respondent from being forced to repeatedly litigate arbitrations around the country, when such hearings are a "pointless and hollow exercise". 17 FLRA at 375. It requests, therefore, that the complaint be dismissed.

Charging Party

The Union generally reiterates the arguments raised by the General Counsel, particularly the basic principle that the negotiated grievance procedure is the proper forum for raising all disputes among the parties to an CBA, even disputes as to arbitrability. Unlike the situation involving probationary employees in *HQ, USAF*, the rights of Section 7802 employees under the NGP is not a "matter of clearly established law" (17 FLRA at 375), as the Respondent itself concedes. Even within the Department of Veterans Affairs, arbitration decisions have produced conflicting results on the arbitrability of removal cases involving Section 7802 employees. Thus, in contrast to the arbitration award cited by the

Respondent, the Union cites and attaches three arbitrators' decisions involving the removal of VCS employees. In two of these, the arbitrators ruled on the merits of the grievances, while in the third the arbitrator ruled it was not arbitrable, but on different grounds than that asserted in the instant case. While none of these arbitrators addressed the issue of a Section 7802 employee's rights, the Union says that the Agency could have raised the issue but failed to do so.

The Union also relies on the language of the CBA (Joint Exhibit 3), particularly Article 44, Section 3, which lists a number of exclusions from the parties' grievance and arbitration procedure. Among those issues which are excluded are "[m]atters appealable to the Merit System [sic] Protection Board" and certain types of grievances relating to employees appointed under 38 U.S.C. §§ 7401, 7405 and 7422. Joint Exhibit 3 at 126-27. Grievances relating to Section 7802 employees are not excluded there or at any other place in the CBA, and this conveys, in the Union's view, the parties' intention to cover Section 7802 employees under the NGP.

Finally, the Union cites various classes of employees, working under "other personnel systems" as defined by the Authority under section 7121(e)(1), who have been found to have the right to use the NGP to appeal adverse actions over which the MSPB has no jurisdiction. *See U.S. Dep't of Transportation, Federal Aviation Administration*, 54 FRA 235 (1998)(employees in FAA personnel system); *U.S. Dep't of Defense, Army & Air Force Exchange Service, Dallas, Tex.*, 51 FLRA 1651, 1653 (1996)(employees of nonappropriated funds); *U.S. Dep't of Defense Dependent Schools, Germany Region*, 38 FLRA 1432, 1436 (1991)(DOD school system employees). These cases demonstrate, according to the Union, that employees are not necessarily prevented legally from utilizing the NGP simply because they are precluded from appealing adverse actions to the MSPB.

Analysis

On its most direct and straightforward level, this case is quite simple, and the case law is not really in dispute. Section 7121(a) of the Statute requires that collective bargaining agreements contain "procedures for the settlement of grievances, *including questions of arbitrability*."[2] (Emphasis added). Section 7121(b)(1)(C)(iii) requires all negotiated grievance procedures to include procedures that "provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency." The General Counsel, the Respondent and the Union further agree that the Authority has almost uniformly held, since its *DOL* decision in 1982, that a party refusing to arbitrate violates section 7116(a)(1) and (8). This is equally true for recalcitrant unions as it is for agencies. *See AFGE, Local 1457*, 39 FLRA 519 (1991); *Langley AFB*, 39 FLRA at 966.

For nearly as long as the Authority has been emphasizing the necessity of challenging arbitrability before the arbitrator, however, parties have been trying to carve out exceptions to this rule, usually by arguing that in their particular cases the nonarbitrability of the grievance is "clear" or the law is "settled." Thus in *Portsmouth*, the agency convinced the Judge that the CBA contained "clear and unmistakable" language excluding EEO disputes from the grievance procedure, and the ALJ ruled that the agency's refusal to arbitrate was justifiable. The Authority reversed, reiterating that "all questions of arbitrability" must be presented to arbitration, and that "the Judge erred by attempting to resolve the question of arbitrability himself." 11 FLRA at 457. In *Langley AFB*, the seemingly "clear" exclusion from the NGP involved separation actions, and the agency again argued that it would be a waste of everyone's time and money to arbitrate the grievance. Using language almost identical to that of Respondent's counsel in this case, the Air Force asserted, "there is no 'question' of arbitrability and therefore, no requirement (or purpose) for going to arbitration." 39 FLRA at 967; *see also* Resp. Brief at 9. The Authority rejected the argument again, stating: "Such a refusal may not be justified by a party's contention, however arguable or reasonable, that the parties intended the subject matter of the grievance to be excluded from the coverage of the

[2] It also allows parties to exclude any matter from the application of the grievance procedure, but nobody argues in this case that the Agreement contains such an exclusion for Section 7802 employees. On the contrary, while the Article 44 grievance procedure does contain an explicit exclusion of certain types of grievances involving employees appointed under chapter 74 of title 38, it contains no such reference to VCS employees, who are appointed under chapter 78 of title 38. Furthermore, Article 44, Section 6, Note 3 of the Agreement (Attachment 3 at 128) eliminates Step 2 of the grievance procedure at some VCS facilities and elevates those grievances directly to Step 3. It is thus indisputable that VCS employees have the right to present at least some grievances under the negotiated procedure.

negotiated grievance and arbitration procedures." 39 FLRA at 969. More recently, this point was articulated in a dissenting opinion: "Clearly, parties can dispute whether an issue is properly before an arbitrator and not commit an unfair labor practice, but that ability to dispute the arbitrability of an issue does not extend to asserting that the arbitrator has no authority to resolve the matter." *United States Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Phoenix, Ariz.*, 60 FLRA 405, 408 (2004)(Cabaniss, dissent).

The General Counsel and the Respondent each cite one exception to the above rule, but interestingly they each cite different cases: the General Counsel cites *VA Central Office*, while the Respondent cites *HQ, USAF*. The Air Force case is more directly applicable, as it involved an agency that refused to participate in a probationary employee's removal grievance, and it is the only Authority decision I have found since 1982 in which an agency's refusal to arbitrate was **not** held to be an unfair labor practice. The Authority reiterated its general rule from *DOL* that parties must arbitrate all unresolved grievances, but it created an exception for probationary employees, as the case law had "clearly established" that probationaries had no right to challenge their removal in any forum, including arbitration. 17 FLRA at 375.[3] While the *VA Central Office* decision did not involve an agency refusing to arbitrate, but rather one that refused to comply with an award, it is a useful reference nonetheless. Because the Authority and the courts had previously held that the VA's internal peer review process was intended to be the exclusive procedure for resolving professional competency actions against employees appointed under 38 U.S.C. § 4110, the arbitrator had no jurisdiction over the merits of the grievance, and thus the Authority would not enforce the award. I think it is safe to say that both of these cases represent exceptions to the Authority's general rule requiring arbitrability issues to be resolved by the arbitrator. The question then is whether Section 7802 employee removal actions warrant an additional exception.

The major problems with the Respondent's argument in favor of such an exception are that the "plain language" of 38 U.S.C. § 7802(e) is not so plain or clear, and while an arbitrator in this case may not have to make any factual determinations, he will need to resolve significant issues of law and statutory construction. The Respondent argues that "the plain language" of the law provides that "VCS employees appointed under 38 U.S.C. § 7802 may be removed from employment without regard to Title 5 provisions." Resp. Brief at 5. But section 7802(e) actually says that such employees may be "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." As the Respondent notes elsewhere in its brief, VCS employees are in the excepted service, not the competitive service; thus the statutory language should "plainly" be interpreted to exclude VCS employees from only a narrow portion of title 5. The MSPB, in its *Chavez* decision holding that section 7802(e) should be read more broadly, so as to exempt VCS employees from all of title 5, including the right to appeal adverse actions to the Board, based its holding on the legislative history of the 1982 amendments to the 1946 VA statute. It noted that the original statutory language stated "without regard to civil-service laws" and that the 1982 amendments were labeled "technical amendments" that may not be construed as making a substantive change in the laws replaced. *Chavez*, 65 MSPR at 592-94. Assuming that the MSPB's reasoning is correct, its interpretation of the law is far from obvious from the plain language of section 7802(e), and its holding is not the "clearly established law" that the Authority relied on in *HQ, USAF*.

Further, while the MSPB may be correct in its interpretation of 38 U.S.C. § 7802(e) with respect to the adverse action appeal rights of VCS employees under 5 U.S.C. § 7512, that does not automatically mean that those employees have no right to use the negotiated grievance procedure to challenge adverse actions. Section 7121(e)(1) of the Statute requires employees whose cases are appealable under both 5 U.S.C. § 7512 and under the NGP to choose one of these procedures. The Respondent argues that if an employee is statutorily barred from a section 7512 appeal, she is also barred from using the NGP, but the case law on this issue is rather murky.

Initially, the Authority held in several decisions that NEES employees, who were barred by the Civil Service Reform Act (prior to 1990) from pursuing adverse action appeals under 5 U.S.C. § 7512, were nevertheless entitled to pursue such actions under their NGP. *See, e.g., National Treasury Employees Union*, 31 FLRA 993 (1988). Ultimately, however, the Authority overruled those decisions and adopted

[3] In fact, the Authority came to its decision in *HQ, USAF* only after the D.C. Circuit had reversed the Authority in another case involving the arbitration of a probationary's grievance. *Immigration and Naturalization Service v. FLRA*, 709 F.2d 724 (D.C. Cir. 1983).

the holdings of several courts that NEES employees could not utilize the NGP to appeal adverse actions. *NLRB*, 35 FLRA at 1117. The courts found that the CSRA established "an *integrated* scheme of administrative and judicial review" that granted adverse action appeal rights to some classes of employees and not to others, and it would therefore subvert that scheme to allow adverse action rights to unionized NEES employees that other NEES employees were denied. *Treasury v. FLRA*, 873 F.2d at 1469, quoting from *United States v. Fausto*, 484 U.S. 439, 445 (1988)(emphasis in original). However, based on the language of section 7121(e)(1) of the Statute, the D.C. Circuit also recognized that "Congress contemplated that some of these employees, who fall under specialized personnel systems apart from the main civil service system, would negotiate for grievance procedures although they have no statutory right of appeal." 873 F.2d at 1472. Moreover, when the Authority in *NLRB* acceded to the courts' position that NEES employees could not pursue adverse action appeals under their grievance procedure, it left open the question of whether NEES employees could use the grievance procedure to challenge adverse actions based on alleged interference with protected union activity. 35 FLRA at 1126.[4]

In *Panama Canal Commission, Balboa, Republic of Panama*, 45 FLRA 1075, 1083-85 (1992), the Authority compared the availability of adverse action appeal rights under negotiated grievance procedures for employees in several different personnel systems, all of whom were precluded from pursuing appeals to the MSPB. The Authority noted that when Congress amended the CSRA to give most NEES employees appeal rights to the MSPB, it expressly excluded NEES employees of the Panama Canal Commission; accordingly, the underlying premise of the Authority's *NLRB* holding continued to bar them from using the negotiated grievance procedures for adverse actions. 45 FLRA at 1083. By contrast, employees of the Department of Defense Dependent Schools are in a personnel system created by provisions in title 20 of the U.S. Code. *Id.* While the Authority did not directly address the question of whether title 20 employees are entitled to arbitration of adverse actions, it stated that such a right would not be inconsistent with the differing treatment of Panama Canal employees, "because, unlike the employees in the [*Panama Canal*] case, NEES employees in the title 20 system are not specifically excluded from the coverage of the Amendments [i.e., the 1990 amendments to the Civil Service Reform Act]." *Id.* Finally, the Authority looked at the grievance rights of nonappropriated fund (NAF) instrumentality employees, who (pursuant to 5 U.S.C. § 2105(c)) are not covered by most civil service laws but are covered by the Statute. Summarizing its previous decision in *NAGE, Local R5-82*, 43 FLRA 25 (1991), the Authority in *Panama Canal* stated: "Because of the unique nature of NAF employment, the fact that NAF employees are not covered by the Amendments does not mean that Congress specifically intended to deny those employees access to the negotiated grievance procedure." 45 FLRA at 1084.

In reviewing all of these decisions addressing the overlap between an employee's right to arbitration under a negotiated grievance procedure and her appeal rights under 5 U.S.C. § 7512 to the MSPB, I do not seek to answer the question of whether employees appointed under 38 U.S.C. § 7802 are barred from arbitrating their removals, although that is what the Respondent dearly wants me to do. Instead, the conclusion I reach from examining those decisions is that the interpretation of section 7802, and the balancing of section 7802 with the grievance rights of VCS employees under the Statute and the CBA, require a full hearing before an arbitrator. Unlike the probationary employee's grievance in *HQ, USAF*, it cannot be said that "clearly established law" bars Section 7802 employees from grieving their removal. 17 FLRA at 375. On the contrary, the law regarding the rights of Section 7802 employees under the Statute is far from clear. While the Respondent would have an arbitrator resolve only factual issues, the Authority noted in *HQ, USAF* that it is perfectly legitimate for arbitrators to resolve "question[s] of interpretation or statutory construction." *Id.* The Respondent has agreed in the CBA to resolve unsettled grievances by binding arbitration, and the Authority has repeatedly held that this includes "all" questions of arbitrability. *Langley AFB*, 39 FLRA at 969. It is far simpler for me to interpret the word "all" literally than it is to carve out a new exception to a thirty-year-old rule, and it would be far simpler

[4] In its brief (at 6-7), the Respondent separately argues that Ms. Cottrell, as an NEES employee, is precluded under the *NLRB* decision from grieving the merits of her removal. This was also a basis for the arbitrator's ruling in the *Hot Springs VA* case that the grievance was not arbitrable. *See* Attachment to Resp. Brief at 4. However, the CSRA was amended in 1990 to extend MSPB appeal rights to most NEES employees. *See* 5 U.S.C. §§ 4303, 7511, 7701 (Supp. II 1990); *see also Panama Canal Commission, Balboa, Republic of Panama*, 43 FLRA 1483, 1499 n.2, 1503 (1992). If the Respondent is to prevail on the nonarbitrability of Cottrell's removal, it will be based on her status as a Section 7802 employee, not as an NEES employee.

for the parties to a collective bargaining agreement to present their arbitrability disputes to the arbitrator than to undergo a lengthy unfair labor practice proceeding. While the Respondent might prefer that I resolve the question of arbitrability, the Authority has warned against just such a usurpation of the arbitrator's decision. *Portsmouth*, 11 FLRA at 457. Instead, I leave the parties to the bargain that they made: to air all aspects of their dispute before the arbitrator.

For all of the reasons stated above, I conclude that the Respondent committed an unfair labor practice, in violation of section 7116(a)(1) and (8) of the Statute, when it refused to proceed to an arbitration hearing in the Cottrell grievance.

Remedy

In order to remedy the unfair labor practice, a cease and desist order and the posting of a notice to employees are appropriate. The cease and desist order should require the Respondent to proceed to arbitrate the Cottrell grievance. While the grievance in question involved only the Respondent's Martinsburg, West Virginia, facility, the facts of the case make it clear that the Veterans Canteen Service's Central Office in St. Louis, Missouri, was involved in the refusal to arbitrate (Joint Exhibit 5); that the Respondent acted on a legal opinion given to it by the General Counsel of the Department of Veterans Affairs (Attachment to Joint Exhibit 7); and that the legal opinion applies throughout the Veterans Canteen Service. It is appropriate, therefore, that the notice be posted at all facilities where VCS employees represented by NAGE are located, and that it be signed by the Director of the Veterans Canteen Service. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 394-95 (1999).

Accordingly, I recommend that the Authority issue the following remedial Order:

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, Martinsburg, West Virginia, shall:

1. Cease and desist from:

(a) Failing or refusing to arbitrate the grievance over Angel Cottrell's removal, after receiving notice from the National Association of Government Employees, Local R4-78 (the Union) of its desire to proceed to arbitration.

(b) In any like or related manner interfering with, restraining, or coercing its 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) Proceed to arbitration concerning the grievance over Angel Cottrell's removal after receiving notice from the Union of its desire to proceed to arbitration.

(b) Post at all of its facilities where employees of the Veterans Canteen Service 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 Director of the Veterans Canteen Service 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.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director of the Washington 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 herewith.

Issued, Washington, D.C., February 26, 2010.

_____

RICAHARD A. PEARSON
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, Martinsburg, West Virginia, 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 arbitrate the Angel Cottrell grievance after receiving notice from the National Association of Government Employees, Local R4-78 of its desire to proceed to arbitration.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL arbitrate the Angel Cottrell grievance.

_____
(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, Washington Region, Federal Labor Relations Authority, and whose address is: 1400 K Street, NW, 2nd Floor, Washington, DC 20424-0001 and whose telephone number is: (202) 357-6029.