

**68 FLRA No. 67**

UNITED STATES  
DEPARTMENT OF THE AIR FORCE  
37th MISSION SUPPORT GROUP  
37th SERVICES DIVISION  
LACKLAND AIR FORCE BASE  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 1367  
(Union)  
  
0-AR-5069

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**ORDER DISMISSING EXCEPTIONS**

March 26, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

**I. Statement of the Case**

The Agency asks the Authority to set aside an award of Arbitrator Charles R. Greer under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute). The Union did not file an opposition to the Agency's exceptions. The Authority issued an order directing the Agency to show cause why we should not dismiss for lack of jurisdiction, and the Agency filed a response.

For the reasons set forth below, we conclude that the Authority lacks jurisdiction over the Agency's exceptions.

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

The grievant was employed as a housekeeper at the Agency for five years. The grievant requested annual leave from December 21 to December 31, 2013. The grievant's acting supervisor denied the requested leave. The grievant, then, at different times, asked for sick leave for surgery on her back and emergency leave to be with her father during his surgery in Mexico – both for the same time periods originally requested in her annual leave request (December 21 to December 31, 2013). The grievant did not supplement those leave

requests with the required documentation, and the Agency did not approve the requests.

The grievant did not report for work on December 21, 2013, and did not return until January 7, 2014. The grievant's acting supervisor and the Agency's lodging manager made several attempts to contact the grievant but were unsuccessful.

When the grievant returned to work on January 7, 2014, the Agency's designated appointing official from the human resources office informed her that she was no longer employed by the Agency. The Agency considered the grievant's failure to show up for work to be a resignation, pursuant to Article 14 of the parties' agreement. The Union considered the Agency's action a termination.

The Union filed a grievance protesting the grievant's termination. The grievance was unresolved and the parties submitted the matter to arbitration. The issue before the Arbitrator was "whether the termination of [the grievant's] employment by the Agency was warranted. That decision hinges on whether one accepts the Agency's premise that [the grievant] abandoned her position."<sup>1</sup>

The Arbitrator found that because "[t]he Agency's leave request procedure provides no consistent method of ensuring that employees are provided documentary proof that their leave has been approved[,] . . . the employee has no safeguard that his or her supervisor has approved annual leave before he or she goes on leave."<sup>2</sup> Notwithstanding this finding, the Arbitrator found no evidence to demonstrate that the Agency had approved the grievant's requests for leave.

The Arbitrator concluded that the grievant was "terminated," and that the termination was "too severe" of a penalty because the Agency failed to apply progressive discipline.<sup>3</sup> The Arbitrator sustained the grievance and directed the Agency to reinstate the grievant to her previous position; change her termination to a sixty-day suspension without pay; and make the grievant whole with backpay, benefits, and seniority, less the sixty-day suspension.

The Agency filed exceptions to the award. The Union did not file an opposition.

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<sup>1</sup> Award at 5.

<sup>2</sup> *Id.* at 9.

<sup>3</sup> *Id.* at 13.

### III. Analysis and Conclusions

The Agency claims that the Arbitrator exceeded his authority because the award does not draw its essence from the parties' agreement.<sup>4</sup> According to the Agency, Article 14-1 of the parties' agreement incorporates Air Force Manual (AFMAN) 34-310, which provides that "[a]n employee who fails to report for work or notify management for three consecutive workdays without a reasonable explanation is considered to have resigned."<sup>5</sup> Specifically, the Agency argues that when the grievant did not show up for work for more than three consecutive days, she had effectively resigned her position.<sup>6</sup>

The Authority's Office of Case Intake and Publication directed the Agency to show cause why its exceptions should not be dismissed because the award relates to the grievant's removal, a matter over which the Authority lacks jurisdiction under § 7122(a) and § 7121(f) of the Statute.

In its response, the Agency claims that the Authority has jurisdiction to review its exceptions because the grievant was not removed, but had resigned, under the terms of the parties' agreement.<sup>7</sup>

Under § 7122 of the Statute, the Authority lacks jurisdiction to review an arbitration award "relating to a matter described in [§] 7121(f)."<sup>8</sup> The matters described in § 7121(f) include serious adverse actions, such as removals, which are covered under 5 U.S.C. §§ 4303 or 7512.<sup>9</sup> Arbitration awards resolving these matters are reviewable by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit); they are not reviewable by the Authority.<sup>10</sup>

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 or § 7512 matter.<sup>11</sup> 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 Federal Circuit.<sup>12</sup>

Applying this precedent, we conclude that the claim advanced before the Arbitrator relates to the grievant's removal. The issue before the Arbitrator was "whether the termination of [the grievant's] employment by the Agency was warranted."<sup>13</sup> According to the Arbitrator, "[t]hat decision hinges on whether one accepts the Agency's premise that [the grievant] abandoned her position."<sup>14</sup> On this point, the Arbitrator found that the grievant was "terminat[ed]" and "directed [the Agency] to reinstate the [g]rievant to her previous position, to change her termination to a suspension without pay for [sixty] days, and to make the grievant whole."<sup>15</sup> Although the Arbitrator acknowledged the Agency's argument that the grievant had resigned, the Arbitrator concluded that "the Agency terminated the [g]rievant without sufficient or just cause of termination."<sup>16</sup>

In these circumstances, we dismiss the Agency's exceptions for lack of jurisdiction.

### IV. Order

We dismiss the Agency's exceptions.

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<sup>4</sup> Exceptions at 6.

<sup>5</sup> *Id.* at 5 (citing AFMAN 34-310, ¶ 5.6.6).

<sup>6</sup> *Id.* at 8.

<sup>7</sup> Agency's Response at 2-3.

<sup>8</sup> 5 U.S.C. § 7122; *see also U.S. Dep't of Transp., FAA, 54 FLRA 235, 235 (1998).*

<sup>9</sup> *See AFGE, Local 1013, 60 FLRA 712, 713 (2005).*

<sup>10</sup> *Id.*

<sup>11</sup> *See U.S. Dep't of Transp., FAA, 57 FLRA 580, 581 (2001).*

<sup>12</sup> *See U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Miami, Fla., 57 FLRA 677, 678 (2002).*

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<sup>13</sup> Award at 5.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 14.

<sup>16</sup> *Id.* at 13 (emphasis added).