
[\[v51 p1549 \]](#)

51:1549(126)AR

The decision of the Authority follows:

51 FLRA No. 126

FEDERAL LABOR RELATIONS AUTHORITY

WASHINGTON, D.C.

—
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

LOCAL 2986

(Union)

and

U.S. DEPARTMENT OF DEFENSE

NATIONAL GUARD BUREAU

THE ADJUTANT GENERAL, STATE OF OREGON

(Agency)

0-AR-2550

—
DECISION

July 19, 1996

—
Before the Authority: Phyllis N. Segal, Chair; Tony Armendariz and Donald S. Wasserman, Members. [\(1\)](#)

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator George Lehleitner filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.⁽²⁾

The Agency removed the grievants from their positions as national guard civilian technicians for failure to maintain their military membership in the national guard and denied them severance pay. The Arbitrator found that the grievants were entitled to severance pay under 5 U.S.C. § 5595 (section 5595) and 5 C.F.R. part 550, subpart G (subpart G).

We conclude that we have jurisdiction to resolve the exceptions and that the award is contrary to section 5595, subpart G, and Technician Personnel Regulation (TPR) 990-2. Accordingly, we set aside the award.

II. Arbitrator's Award

The grievants were employed by the Agency as civilian technicians. Civilian technicians are required to maintain membership in the national guard as a condition of employment. The grievants were discharged from the national guard for failure to comply with military weight standards after the Agency determined that their failure to comply was not caused by a medical condition beyond their control. As a result, they were removed from their technician employment for failing to maintain their military status. In removing the grievants from their technician employment, the Agency denied the grievants severance pay on the basis of TPR 990-2, which bars severance pay to a technician removed as a result of a failure to comply with the military weight control program. The Union filed a grievance disputing the denial of severance pay.

The Arbitrator determined that the grievants were separated against their will and that the separations were not based on inefficiency. Accordingly, he ruled that the grievants were entitled to severance pay under section 5595 and subpart G.⁽³⁾ Although the Arbitrator acknowledged that the "National Guard Bureau is authorized to clarify through regulations whether a technician's separation from service is voluntary or involuntary[.]" he found that TPR 990-2 was not controlling because it conflicted with section 5595 and subpart G. Award at 20. The Arbitrator acknowledged the Authority's decision in U.S. Department of Defense, National Guard Bureau, Arkansas Army National Guard, North Little Rock, Arkansas and National Federation of Federal Employees, Local 1671, 48 FLRA 480 (1993) (Arkansas Army National Guard), in which the Authority found that TPR 990-2 controlled and set aside an award that ordered severance pay in a similar situation. However, he refused to follow that decision because it did not address the conflict between TPR 990-2 and applicable statutory and regulatory provisions. As his award, the Arbitrator ordered the Agency to pay the grievants severance pay.

III. OPM's Advisory Opinion

Because subpart G was promulgated by OPM to implement section 5595, the Authority requested an advisory opinion from OPM on the following question:

When a civilian technician is separated from technician employment as the result of having been discharged from the national guard for failing to comply with the military weight standards of the weight control program, is that separation for "inefficiency" within the meaning of 5 C.F.R. § 550.703?

OPM advised that "a civilian national guard technician who is separated from technician employment for failure to comply with military weight standards is not entitled to severance pay under 5 U.S.C. § 5595, unless this failure is attributable to a medical condition beyond the control of the technician." OPM Opinion at 1. OPM explained that a civilian technician who fails to comply with military weight standards would be engaging in "a course of conduct constituting voluntary and knowing non-compliance with the conditions for the technician's continued employment." *Id.* at 2. OPM further advised that even if the technician's conduct were construed to be involuntary, the separation would be for inefficiency within the meaning of 5 C.F.R. § 550.703.

IV. Exceptions

A. Agency's Contentions

The Agency contends that the award is deficient because it conflicts with TPR 990-2 and is based on a nonfact.

B. Union's Opposition and Response to OPM's Advisory Opinion

The Union contends that the Authority should dismiss the Agency's exceptions for lack of jurisdiction under section 7122(a) of the Statute because the award relates to the grievants' removal. Alternatively, if the Authority has jurisdiction, the Union contends that the Arbitrator properly found that the grievants were entitled to severance pay. The Union argues that the National Guard Bureau was not authorized to issue a severance pay regulation or, if it was, TPR 990-2 is unenforceable because it conflicts with section 5595 and subpart G.

The Union also contends that the Authority should disregard OPM's opinion because it addresses matters beyond the legitimate scope of an advisory opinion under section 7105(i) of the Statute. Additionally, the Union argues that OPM has no basis for concluding that a separation for failing to comply with the military weight control program is voluntary and that OPM was arbitrary in concluding that such a separation is for inefficiency. The Union further maintains that the legislative history of the National Guard Technicians Act, Pub. L. 90-486, 82 Stat. 755 (1968), expressly provides that technicians removed for failing to meet the military's physical standards "would be separated from service with civilian severance pay." Union's Response at 3 (quoting S. Rep. No. 1446, 90th Cong., 2d Sess. 13 (1968)).

V. Analysis and Conclusions

A. The Authority Has Jurisdiction

Section 7122(a) of the Statute provides, in pertinent part:

Either party to arbitration under this chapter 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).

As raised by the Union, this case presents the jurisdictional issue of whether the Arbitrator's award is "an award relating to a matter described in section 7121(f)[.]" The matters described in section 7121(f) are those matters covered under 5 U.S.C. §§ 4303 and 7512 and similar matters that arise under other personnel systems.⁽⁴⁾

In American Federation of Government Employees, Local 3529 and U.S. Department of Defense, Defense Contract Audit Agency, Central Region, 49 FLRA 1482 (1994) (DCAA), the arbitrator rejected a grievance over the agency's denial of severance pay to the grievant. The Authority determined that it lacked jurisdiction to resolve exceptions to the award under section 7122(a) of the Statute. The Authority held that in addition to lacking jurisdiction over awards resolving the section 4303 or 7512 action, it lacks jurisdiction over awards related to those actions. 49 FLRA at 1485. The Authority concluded that the award concerning severance pay related to the grievant's removal within the meaning of section 7122(a) of the Statute.

On reexamination, we conclude that the majority in DCAA interpreted the phrase "relating to" in section 7122(a) more broadly than is warranted by the Statute. For the reasons explained here, we conclude that the Authority has jurisdiction to review exceptions to an award resolving a grievance over severance pay.

The phrase "relating to" in section 7122(a) is not expressly defined in the Statute. Our task in applying the provision is complicated by the inherent ambiguity in this phrase: "relating to" may be read simply to refer to the matters described in section 7121(f), or to expand those matters to include others that are separate but connected in some manner. See Webster's Third New International Dictionary 1916 (1986) (defines "relate" as "to show or establish a logical connection between" and to "have reference"). As the phrase itself is ambiguous, we construe it by examining other relevant statutory provisions as well as Congressional intent.

Two other provisions of the Statute are relevant to this inquiry: section 7121(e) and section 7121(f). The former, section 7121(e), gives an option to certain employees who decide to challenge a matter covered under section 4303 or 7512 of title 5 or similar matters arising under other personnel systems. These employees can either:

- file a grievance over the matter under a negotiated grievance procedure (if the matter is included within the scope of the procedure); or

- appeal the matter to the Merit Systems Protection Board (if the employee is within the MSPB's jurisdiction) or raise the matter under whatever appellate procedures, if any, are applicable (if the employee is within another personnel system).

Section 7121(f) addresses the review of arbitration awards resolving the grievances encompassed by section 7121(e). For employees in the general civil service, section 7121(f) provides that if an employee has chosen the grievance option, then a resulting award has the same review as if the matter had been appealed to the MSPB. Specifically, the award is appealable to the U.S. Court of Appeals for the Federal Circuit. For employees in other personnel systems, section 7121(f) provides that if an employee has filed a grievance over a matter similar to one covered under section 4303 or 7512, then a resulting award has the same review as if the administrative appeal option, if one exists, was chosen. Under section 7122(a), the Authority is without jurisdiction to review any of these awards.

Pursuant to this statutory scheme, the appellate forum is the same regardless of which route an employee has chosen under section 7121(e) to assert his or her claim. By ensuring that for these claims, arbitration awards and other administrative decisions are reviewed in the same appellate forum, the Statute operates to assure consistency and uniformity of process between (1) arbitration; and (2) whatever administrative appeal option is available to the affected employees. Legislative history confirms that such consistency and uniformity was what Congress intended. H. Rep. No. 95-1717, 95th Cong., 2d Sess. 157 (1978) reprinted in 1978 U.S.C.C.A.N. (92 Stat.) 2891. In addition, this statutory scheme serves, again as Congress intended, to discourage forum shopping. Id. The delineation between arbitration awards that are reviewable by the Authority, and those that are not, also advances the desirable policy objective of avoiding the multiplicity of litigation over one claim that might result if different fora review aspects of the same claim.

In the case now before us, there is no question that disputes over severance pay are not covered under section 4303 or 7512. E.g., Ward v. U.S. Consumer Product Safety Commission, 8 MSPR 603, 604 (1981). Not surprisingly, there is no contention that the grievant had, or could have been provided, any choice other than the negotiated grievance procedure to contest the denial of his severance pay. Accordingly, it is clear that if the "relating to" requirement in section 7122(a) merely serves to refer readers to section 7121(f), it would not deprive the Authority of jurisdiction over the Agency's exceptions. In addition, none of the policies identified above would be advanced by construing "relating to" broadly enough to encompass severance pay disputes. As no other forum has jurisdiction over the severance pay dispute, the Authority's assertion of jurisdiction will not encourage forum shopping or multiple litigation or otherwise create the possibility of inconsistent procedures or results.

We agree with our dissenting colleague that the phrase "relating to" permits the Authority to decline jurisdiction over more awards than those that resolve the "pure" section 4303 or 7512 matter. For example, the Authority may decline jurisdiction because an award is

inextricably intertwined with a section 4303 or 7512 matter.⁽⁵⁾ See Veterans Administration Medical Center, Hines, Illinois and Illinois Nurses Association, Hines Local Unit, 20 FLRA 510, 511 (1985) (Authority declined jurisdiction over an attorney fee award because the award was a supplement to the arbitrator's award on the matter described in section 7121(f)); cf. FLRA v. Department of Commerce, Bureau of the Census, 976 F.2d 882, 890 (4th Cir. 1992) (under section 7116(d) of the Statute, jurisdiction over minor disciplinary actions lies with the MSPB when the action ripens into a section 4303 or 7512 action). However, we find no basis--statutory or policy--to decline jurisdiction in cases such as this. To do so would deprive parties of review of awards, a result neither required by the Statute nor needed to further any discernible public policy. Accordingly, we overrule DCAA and will resolve the Agency's exceptions.

B. The Award Is Deficient

In Arkansas Army National Guard, the Authority held that TPR 990-2 is a governing regulation that defines a failure to meet military weight standards as a voluntary separation for which severance pay is not warranted. 48 FLRA at 487. The Authority further found that nothing in section 5595 or its implementing regulations established that the National Guard Bureau lacked the authority to promulgate a regulation, such as TPR 990-2, with respect to entitlement to severance pay. *Id.* The Authority did not discuss the requirements of severance pay set out in section 5595 and its implementing regulations contained in subpart G. We now have OPM's interpretation of those regulations.

We reject the Union's contention that we should disregard OPM's advisory opinion. OPM's opinion is responsive to our request for guidance and does not address matters beyond the legitimate scope of an advisory opinion under section 7105(i) of the Statute. The Union has failed to establish that OPM's interpretation is plainly erroneous or inconsistent with the language of the regulations or that its interpretation of section 5595 is an impermissible construction of the statute. Therefore, we find that OPM's interpretation of subpart G, which implements section 5595, is controlling. See National Association of Agriculture Employees and U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine, 51 FLRA 843, 849 (1996).

Under section 5595 and 5 C.F.R. § 550.704, entitlement to severance pay requires that the employee's separation must have been involuntary. While stating that "the determination of whether a separation is voluntary depends upon the facts in a particular case[.]" OPM advises that a civilian technician who fails to meet military weight standards is engaging in a voluntary action, except to the extent that the failure to comply is attributable to a medical condition beyond the employee's control. OPM Opinion at 4. In his award, the Arbitrator specifically found that the grievants were discharged from the national guard after the Agency determined from medical evaluations that their inability to comply with the weight standard was not caused by medical conditions beyond their control.

Consistent with OPM's advisory opinion, we find that the grievants' separations were voluntary and that they were not entitled to severance pay. Consequently, the award is contrary to section 5595 and subpart G.⁽⁶⁾ Insofar as the award orders payment of severance pay, it is also contrary to TPR 990-2. Arkansas Army National Guard, 48 FLRA at 487. Accordingly, we set the award aside.⁽⁷⁾

VI. Decision

The award is set aside.

Dissenting Opinion of Member Armendariz

I respectfully dissent. In my view, the Authority lacks jurisdiction to resolve the Agency's exceptions. Consequently, I would dismiss the exceptions without addressing their merits.

Section 7122(a) of the Statute provides, in relevant part, that "[e]ither party to arbitration under this chapter 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)." The matters described in section 7121(f) include serious adverse actions covered under 5 U.S.C. § 7512, such as removals, and similar actions that arise under other personnel systems. E.g., Panama Canal Commission and Maritime Metal Trades Council, 49 FLRA 1398, 1401 (1994). For the reasons stated below, I would find that the Authority does not have jurisdiction under section 7122(a) because the award in this case relates to a matter similar to a matter covered under 5 U.S.C. § 7512, which arose in an "other personnel system[]" within the meaning of section 7121(f).

In American Federation of Government Employees, Local 3529 and U.S. Department of Defense, Defense Contract Audit Agency, Central Region, 49 FLRA 1482 (1994) (DCAA), the Authority held that an award concerning a grievant's entitlement to severance pay related to the grievant's removal within the meaning of section 7122(a) of the Statute. The Authority found that by its very nature, severance pay is inseparable from, and inherently related to, the removal that provides the basis for that pay. Id. at 1487. Similarly, in this case, the award concerns the grievants' entitlement to severance pay following their separation from employment. For the reasons stated in DCAA, 49 FLRA at 1485-87, I would find the award in this case relates to the separation of the grievants from their employment within the meaning of the Statute.

In addition, I would find that the grievants' separations under 32 U.S.C. § 709(e) constitute a matter similar to removals covered under section 7512 which arose under another personnel system within the meaning of section 7121(f) of the Statute. The determinative factor in deciding whether a personnel system constitutes another

personnel system within the meaning of section 7121(f) is whether the system is intended to operate separate and apart from the personnel system that is applicable to general Federal civil service employees and is governed by title 5 of the United States Code. U.S. Department of Defense Dependents Schools, Germany Region and Overseas Education Association, 38 FLRA 1432, 1436 (1991). Applying that factor in this case, I would find that the National Guard Technicians Act, Pub. L. No. 90-486, 82 Stat. 755 (1968) (codified as amended at 32 U.S.C. §§ 709, 715) (Technicians Act), established a separate personnel system for civilian technician employees of the National Guard.

The status of civilian technicians "is unusual and somewhat complex." Illinois National Guard v. FLRA, 854 F.2d 1396, 1398 (D.C. Cir. 1988). While many of their duties are similar to employees in the general Federal civil service, technicians must be members of the National Guard and must perform their civilian duties "in a distinctly military context, implicating significant military concerns." Id. (quoting New Jersey Air National Guard v. FLRA, 677 F.2d 276, 279 (3d Cir.), cert. denied, 459 U.S. 988 (1982)). Technicians were not Federal employees until 1968 when Congress passed the Technicians Act, which granted technicians Federal employee status "for the limited purpose of making fringe and retirement benefits of federal employees and coverage under the Federal Tort Claims Act . . . available to National Guard technician employees of the various states." Id. (quoting American Federation of Government Employees, Local 2953 v. FLRA, 730 F.2d 1534, 1537 (D.C. Cir. 1984)). The Technicians Act vests the adjutants general of the various states with final discretion over most matters relating to technician employment and termination and specifically exempts civilian technicians from certain provisions of title 5 of the U.S. Code that apply to the vast majority of Federal employees. Id. (citations omitted).

For these reasons, I conclude that the personnel system for civilian technicians is intended to operate separate and apart from the personnel system that is applicable to the general Federal civil service and is governed by title 5 of the United States Code. Accordingly, it constitutes another personnel system within the meaning of section 7121(f) of the Statute.

Consistent with these conclusions, I would find that the Authority lacks jurisdiction to resolve the exceptions in this case, and would dismiss them. [\(*\)](#)

FOOTNOTES:

(If blank, the decision does not have footnotes.)

Authority's Footnotes Follow:

1. Member Armendariz' dissenting opinion is set forth at the end of this decision.
2. The Authority requested and received an advisory opinion from the Office of Personnel Management (OPM) pursuant to section 7105(i) of the Statute. We granted the parties an opportunity to respond to OPM's advisory opinion, and the Union filed a response.
3. To be entitled to severance pay under 5 U.S.C. § 5595 the employee must have been "involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency[.]" To be entitled to severance pay under 5 C.F.R. § 550.704, an employee must be "removed from Federal service by involuntary separation." "Involuntary separation" is defined as a "separation initiated by an agency against the employee's will and without his or her consent for reasons other than inefficiency" and "[i]nefficiency" is defined as "unacceptable performance or conduct that leads to a separation under part 432 or 752 of this chapter or an equivalent procedure." 5 C.F.R. § 550.703.
4. 5 U.S.C. § 4303 covers removals and reductions-in-grade for unacceptable performance. 5 U.S.C. § 7512 covers removals, suspensions for more than 14 days, reductions either in grade or pay, and furloughs of 30 days or less.
5. In this regard, we do not view severance pay as inseparable from the removal that provides the basis for that pay. Although removal from service is a necessary condition for severance pay, eligibility for severance pay depends on additional factors, such as the type of appointment under which the employee was serving and the length of the employee's service, which have no connection to the removal itself. 5 C.F.R. § 550.704(a)(1), (2).
6. We disagree with the Union that the legislative history to the Technicians Act supports a finding that the grievants were entitled to severance pay. The portion of the legislative history cited by the Union addresses involuntary failures of civilian technicians to meet military physical standards. OPM has determined that, in circumstances such as those in this case, civilian technicians who fail to comply with military weight standards are engaging in voluntary conduct.
7. In view of this decision, we do not address the other contentions of the Agency.

Member Armendariz Dissenting Opinion Footnote Follows:

*/ In U.S. Department of Defense, National Guard Bureau, Arkansas Army National Guard, North Little Rock, Arkansas and National Federation of Government Employees, Local 1617, 48 FLRA 480 (1993) (Arkansas Army National Guard), the Authority

resolved exceptions to an award ordering the agency to pay severance pay to a civilian technician. Unlike this case, neither party in Arkansas Army National Guard contended that the award related to a matter over which the Authority did not have jurisdiction. In my view, DCAA sub silentio overruled Arkansas Army National Guard insofar as it held that the Authority had jurisdiction in that case to resolve the exceptions.
