**65 FLRA No. 4**

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WAPATO IRRIGATION PROJECT
(Agency)

and

INDIAN EDUCATORS FEDERATION
LOCAL 4526
AMERICAN FEDERATION OF TEACHERS
(Union)

0-AR-4406

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DECISION

August 20, 2010

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

## I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Vern E. Hauck filed by the Agency under § 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.

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

## II. Background and Arbitrator's Award

### A. Background

The Union filed a grievance alleging that the Agency's removal of the grievant from his position as an Irrigation System Operator "was not for just cause." Opp'n at 2. The Union argued that an Agency policy that provided the basis for the grievant's removal violated the collective bargaining agreement (CBA) and Title VII of the Civil Rights Act. *Id.*

### B. Arbitrator's Award

The claim advanced before the Arbitrator presented the issue of the grievant's removal. As the Arbitrator framed the issue, it stated:

> Was the grievant's removal in accordance with law, rule, regulation and/or the parties' negotiated labor agreement? If not, what is the remedy?

Award at 3.

The Arbitrator ruled that the grievant was improperly removed. The Arbitrator found that the grievant was removed because he was unable to perform the duties of his position. *Id.* at 8. The grievant occupied a position that required him to operate a motor vehicle. The Arbitrator found that the grievant was unable to perform the duties of his position because of an Agency policy requiring the termination of driving privileges for motor vehicle operators who have been "[a]rrested for . . . Driving Under the Influence [(DUI)]." *Id.* at 7; Opp'n, Attach., Volume 1, Agency Hearing Ex. 3, Notice of Proposal to Remove at 9. After the Agency learned that the grievant had been arrested for DUI, it terminated the grievant's driving privileges, and then removed him because he could no longer perform his position's driving duties.

The Arbitrator ordered the Agency to reinstate the grievant and to cease implementation of the policy on which the grievant's removal was based. Award at 21. The Arbitrator concluded that the Agency's policy has a disparate impact on Native American Agency employees. *Id.* at 18, 20. Consequently, the Arbitrator determined that both the Agency's policy and the grievant's removal violated the CBA. *Id.* at 14-15, 20. The Arbitrator therefore sustained the grievance.

1. Member Beck's dissent is set forth at the end of this decision.

## III. Positions of the Parties[2]

A. Agency's Exceptions

The Agency seeks review of the Arbitrator's determination that the Agency's DUI policy violates the CBA and that, therefore, the Agency must cease implementing it. The Agency argues that the Authority has jurisdiction to review this portion of the award because it is not "inextricably intertwined" with the Arbitrator's decision to reverse the grievant's removal. Exceptions at 8. According to the Agency, "the second ruling" regarding the policy is separate from the ruling on the removal because the facts that formed the basis for the Arbitrator's decision to reinstate the grievant are unrelated to those that led to the decision concerning the DUI policy. *Id.* at 8-9.

In addition, the Agency claims that the Authority is the correct forum to review the portion of the award concerning the DUI policy because the Merit Systems Protection Board (MSPB) – which normally reviews appeals pertaining to removals – would not address the Arbitrator's ruling on the policy. *Id.* at 8.

B. Union's Opposition

The Union argues that the Authority does not have jurisdiction to review the award. In the Union's view, the Arbitrator did not make "two distinct rulings." Opp'n at 4 (quoting Exceptions at 1). To the contrary, the Union argues, the Arbitrator identified the DUI policy as playing a central role in the Agency's decision to remove the grievant. Opp'n at 4.

The Union also contends that the Agency erroneously claims that the MSPB would not review the Arbitrator's determination concerning the DUI policy. According to the Union, the MSPB has jurisdiction to resolve discrimination claims raised as affirmative defenses in cases involving removals. *Id.*

## IV. Analysis and Conclusions

For the reasons set forth below, we find that the Authority lacks jurisdiction to review the Agency's exceptions.

Under § 7122(a) of the Statute, the Authority lacks jurisdiction to resolve exceptions to awards "relating to" a matter described in § 7121(f) of the Statute.[3] Matters described in § 7121(f) include adverse actions, such as removals, that are covered under 5 U.S.C. § 7512.[4] Such matters are appealable to the MSPB and reviewable by the United States Court of Appeals for the Federal Circuit. *See, e.g., U.S. Dep't of Commerce, Patent & Trademark Office, Arlington, Va.*, 61 FLRA 476, 477 (2006) (*PTO*).

The Authority will determine that an award relates to a matter described in § 7121(f) when it resolves, or is inextricably intertwined with, a § 7512 matter. *See AFGE, Local 1013*, 60 FLRA 712, 713 (2005). In making that determination, the Authority looks not to the outcome of the award, but to whether the claim advanced in arbitration is one reviewable by the MSPB, and, on appeal, by the United States Court of Appeals for the Federal Circuit. *See id.; Panama Canal Comm'n*, 49 FLRA 1398, 1402 (1994).

Applying this precedent, we conclude that the award relates to a matter described in § 7121(f) of the Statute. The sole claim advanced in arbitration was that the grievant was improperly removed from his position as an Irrigation System Operator. *See* Award at 2-3 (framing the issue before the Arbitrator). The Arbitrator's determination that the grievant was improperly removed resolved that claim. In these circumstances, we find that the award relates to the grievant's removal for purposes of § 7121(f). *See U.S. EPA, Narragansett, R.I.*, 59 FLRA 591, 592 (2004). Accordingly, we conclude that the Authority lacks jurisdiction to review the Agency's exceptions.

The dissent's position that we should exercise jurisdiction in this case is inconsistent with the plain language of the Statute. Section 7122(a) of the Statute specifically provides that the Authority lacks jurisdiction over "an award relating to a matter described in section 7121(f)[.]" It is clear, and

2. As we dismiss the exceptions for lack of jurisdiction, we do not address the parties' arguments on the merits.

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

4. Section 7512 covers removals, suspensions for more than fourteen days, reductions in grade or pay, and furloughs for thirty days or less.

undisputed by the dissent, that the award in this case relates to the grievant's removal, a matter described in § 7121(f). Indeed, as the dissent acknowledges, "[t]he issue to be addressed, as expressly framed by the Arbitrator, relates only to the grievant's removal[.]" Dissent at 6 (citing Award at 3).

The dissent's concerns with the breadth of the Arbitrator's remedy and the absence of a forum in which the Agency can challenge the award do not provide a legal foundation for Authority jurisdiction. In the dissent's view, the Arbitrator's determinations went beyond what was necessary to resolve the propriety of the grievant's removal. In addition, the dissent is concerned that unless the Authority exercises jurisdiction, the Agency may not have a forum in which to challenge the award.

With regard to the breadth of the remedy, Authority precedent explicitly directs that "the existence of Authority jurisdiction to review an award does not properly rest on the outcome of an award but, rather, depends on whether the claim advanced in arbitration is one that would be reviewed by the MSPB and, on appeal, by the Federal Circuit." *Panama Canal Comm'n*, 49 FLRA at 1402; *see also PTO*, 61 FLRA at 478-79 (noting, among other things, the Statute's legislative history "confirm[ing] that the statutory scheme of which § 7122(a) is a part was specifically designed to promote consistency and uniformity of process and to discourage forum shopping."). As discussed above, the claim advanced in arbitration went to the propriety of the grievant's removal. We therefore reject the dissent's reliance on the award's outcome as a basis for asserting jurisdiction.

In addition, the dissent's reluctance to risk leaving the Agency without a forum to challenge the award's outcome does not provide a foundation for overcoming the jurisdictional restrictions of § 7122(a). As the Authority has stated: "We recognize that our refusal to assert jurisdiction may leave the Agency without a forum to challenge the Arbitrator's award. . . . Nevertheless, we conclude that the advancement of the Congressional policies of uniformity, discouragement of forum shopping, and avoidance of multiple litigation, as well as the need for clarity and predictability on questions concerning jurisdiction, clearly override any potential for unreviewable awards." *U.S. Dep't of Veterans Affairs Med. Ctr., Newington, Conn.*, 53 FLRA 440, 443 (1997); *see also PTO*, 61 FLRA at 478 (noting that "[a]s a general matter, . . . under the statutory scheme enacted by Congress, there may be some awards that are not reviewable at all." (citation omitted)).

For these reasons, we reject the position taken by the dissent and conclude that we lack jurisdiction over the Agency's exceptions.

## V. Decision

The Agency's exceptions are dismissed.

Member Beck, Dissenting:

I agree with the Majority that the Arbitrator enjoyed latitude to consider certain aspects of the Agency's Motor Vehicle Operation Policy (Part III.B.6.) (the Policy) on the way to resolving the specific issue that was before him: "was the grievant's removal in accordance with law, rule, regulation and/or the parties' [CBA]?" Award at 3.

I do not agree with my colleagues, however, that the Arbitrator's prospective invalidation of the Policy in its entirety "relates to" the grievant's removal such that we lack jurisdiction to consider the Agency's exceeds authority and contrary to law exceptions.

To the extent the Award purports to invalidate the Agency's policy, it neither "resolves" nor is "inextricably intertwined" with the grievant's removal. The issue to be addressed, as expressly framed by the Arbitrator, relates only to the grievant's removal. *Id.* at 3. Further, the Union requested relief only for the grievant – a clean record, reinstatement, and make-whole relief. *Id.* Consequently, the Arbitrator was not asked to, did not need to, and was not authorized to award a remedy directed at the Policy in general.

The validity of the policy is a question separate and distinct from the propriety of the grievant's removal and is a matter over which the Authority – and not the MSPB – has jurisdiction. Jurisdiction of the Board is limited strictly to those matters over which it has been given jurisdiction by law, rule, or regulation – i.e. 5 U.S.C. §§ 7701 (adverse actions), 7702 (certain actions involving discrimination). *Maddox v. MSPB*, 759 F.2d 9, 10 (Fed. Cir. 1985). The Board's jurisdiction does not extend, in general, to matters that involve an agency's policies[*] and conditions of employment. *NTEU v. OPM*, 110 M.S.P.R. 237, 239 (2008) (personal appearance standards); *Gore v. Dep't of Labor*, 101 M.S.P.R. 320, 322 (2006) (flexiplace); *Campbell v. Dep't of Veterans Affairs*, 93 M.S.P.R. 70, 72 (2002) (loss of locality pay).

The Arbitrator exceeded his authority when he went beyond the scope of the framed issue (and the relief requested by the Union) to invalidate the Policy itself and to direct the Agency to implement and negotiate an entirely new policy.

Stating my view of this case somewhat differently, one of these propositions must be true:

1. The Arbitrator's decision to direct a remedy at the Policy in general was inappropriate, in which case we have jurisdiction to consider the Agency's exception that the Arbitrator exceeded his authority; or
2. The Arbitrator's decision to direct a remedy at the Policy in general was appropriate, in which case we have jurisdiction to consider the Agency's exception that this portion of the Arbitrator's award is contrary to law.

In either event, we have jurisdiction to consider the Agency's exceptions. To conclude otherwise is to leave the Agency with no forum before which it can challenge the Arbitrator's invalidation of the Policy.

[*] The Board has original jurisdiction, nevertheless, to grant a petition to review a rule or regulation issued by the Office of Personnel Management (OPM) (see *Blanton v. OPM*, 105 M.S.P.R. 496, 498 (2007); 5 U.S.C. § 1204) to determine whether the regulation requires the agency to commit a prohibited personnel practice. *Prewitt v. MSPB*, 133 F.3d 885, 887 (Fed.Cir. 1998). Under these limited circumstances, the Board may declare such a regulation to be invalid. *Id.*