UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: February 26, 2010

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: DEPARTMENT OF VETERANS AFFAIRS
VETERANS CANTEEN SERVICE
MARTINSBURG, WEST VIRGINIA

Respondent

AND

Case No. WA-CA-09-0247

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R4-78

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the Joint Motion for Adjudication in Lieu of Hearing and the attachments thereto, motions and related pleadings, and any briefs filed by the parties.

Enclosures

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NATIONAL ASSOCIATION OF GOVERNMENT
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NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard by the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **MARCH 29, 2010,** and addressed to:

Office of Case Intake & Publication
Federal Labor Relations Authority
1400 K Street, NW., 2nd Floor
Washington, DC 20424-0001

RICHARD A. PEARSON

Administrative Law Judge

Dated: February 26, 2010
Washington, D.C.

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

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,

[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.

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, 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

[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.

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 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

[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).

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 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

[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.

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 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.

RICHARD 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.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. WA-CA-09-0247, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT	**CERTIFIED NOS:**
Neil P. Daly **Counsel for the General Counsel** **Federal Labor Relations Authority** **1400 K Street, NW., 2nd Flr** **Washington, DC 20424**	7004-1350-0003-5175-3512
Michael E. Anfang **Staff Attorney** **Office of Regional Counsel** **Department of Veterans Affairs** **1201 Walnut Street, Suite 800** **Kansas City, MO 64106**	**7004-1350-0003-5175-3529**
Sarah E. Suszczyk **Assistant Regional Counsel** **NAGE, SEIU 500** **601 N. Fairfax Street, Suite 125** **Alexandria, VA 22314**	**7004-1350-0003-5175-3536**

_____
Catherine Turner
Office of Administrative Law Judges
Federal Labor Relations Authority

Dated: February 26, 2010
Washington, DC