68 FLRA No. 147

UNITED STATES
DEPARTMENT OF LABOR
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 12
(Union)

0-AR-5083

_____

DECISION

September 15, 2015

_____

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the grievant's right to due process when her term appointment expired without notice and an opportunity for a hearing. Arbitrator Andrée Y. McKissick granted the grievance and reinstated the grievant to her position with the Agency, with backpay. We must decide whether the award is contrary to law because the Arbitrator wrongly determined that the grievant was entitled to adverse-action procedures under 5 U.S.C. §§ 4303 and 7513, as well as Article 49, Section 5 of the parties' agreement. Because the expiration of a term appointment is not an adverse action that is covered by §§ 4303 and 7513, or Article 49, Section 5 of the parties' agreement, we find that the award is contrary to law and set it aside.

II. Background and Arbitrator's Award

The grievant began her appointment with the Agency in August 2009 under a term appointment not to exceed thirteen months. In August 2010, the grievant was transferred to a different division under a separate term appointment not to exceed September 30, 2010. This term appointment was extended until it expired on August 30, 2013. On that day, the grievant's employment ended due to the expiration of her term appointment. The grievant does not allege that her employment with the Agency ended for any reason other than the expiration of her term appointment.

The Union filed a grievance, arguing that the grievant was entitled to advance notice of her termination, and an opportunity to respond to the Agency's action, as required by 5 U.S.C. §§ 4303 and 7513, as well as Article 49, Section 5 of the parties' agreement. The grievance was unresolved, and the parties proceeded to arbitration.

The Arbitrator found that, because the grievant had been employed continuously for more than two years in the same or similar positions with the Agency, she met the definition of "employee" under 5 U.S.C. § 7511.[1] Accordingly, the Arbitrator concluded that the grievant was entitled to the adverse-action procedures set forth in 5 U.S.C. §§ 4303 and 7513, as well as in Article 49, Section 5 of the parties' agreement, and that the Agency violated the law by failing to provide them. As a remedy, the Arbitrator reinstated the grievant to her position with the Agency and awarded her backpay.

The Agency filed exceptions to the award, and the Union filed an opposition.

III. Preliminary Matter: The Authority has jurisdiction to review the Agency's exceptions.

Section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) provides, in pertinent part: "Either party to arbitration under [the Statute] 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 [the Statute])."[2] The matters described in § 7121(f) are "those matters covered under 5 U.S.C. §§ 4303 and 7512 and similar matters that arise under other personnel systems."[3] As relevant here, the matters covered under 5 U.S.C. §§ 4303 and 7512 include removals.[4]

In its exceptions, the Agency asserted that the Authority has jurisdiction to review this case because "the grievant's claim does not concern a 'removal' appealable to the [Merit Systems Protection Board (MSPB)] under 5 U.S.C. § 7512."[5] Specifically, the Agency argued that the expiration of a term appointment is not an adverse action that is appealable to the MSPB, and whether the grievant is an "employee" within the meaning of 5 U.S.C. § 7511(a)(1) who has completed a

[1] Award at 9 (citing 5 U.S.C. 7511(a)(1)(C)(ii)).
[2] 5 U.S.C. § 7122(a).
[3] *U.S. EPA, Narragansett, R.I.*, 59 FLRA 591, 592 (2004).
[4] *See AFGE, Local 1013*, 60 FLRA 712, 713 (2005).
[5] Exceptions at 9.

probationary period is irrelevant to determining whether the expiration of a term appointment is appealable.[6] The Agency, however, cited no Authority precedent in its exceptions to support its claim that the Authority has jurisdiction over a removal based upon the expiration of a term appointment. As such, the Authority's Office of Case Intake and Publication (CIP) issued an order directing the Agency to show cause why the Authority should not dismiss its exceptions for lack of jurisdiction. The Agency filed a timely response to this order. The order also offered the Union an opportunity to respond to the Agency's response, but the Union did not file a response.

In its response to CIP's order, the Agency cited *Veterans Administration*[7] to demonstrate that the Authority has jurisdiction to review the Agency's exceptions. In that case, the grievant was hired for a term appointment not to exceed a certain date.[8] After the grievant's employment ended on the expiration date of his term appointment, the union filed a grievance and the parties proceeded to arbitration.[9] When the agency filed exceptions to the arbitrator's award, the union argued that the Authority lacked jurisdiction under § 7122(a) of the Statute because the arbitrator's award related to a matter described in § 7121(f) of the Statute – specifically, a removal under 5 U.S.C. §§ 4303 or 7512.[10]

However, the Authority held that the expiration of the grievant's appointment did not constitute a removal under 5 U.S.C. §§ 4303 or 7512, and therefore did not dismiss the agency's exceptions for lack of jurisdiction.[11] In doing so, the Authority noted that "[r]egulations specifically exclude from the coverage of the actions set forth in [§§] 4303 and 7512 the termination of an appointment on an expiration date if the date was specified as a condition of employment at the time the appointment was made."[12]

Accordingly, as the Authority held in *Veterans Administration* that it has jurisdiction to review exceptions concerning the expiration of a term appointment, we find that the Agency has demonstrated that its exceptions are properly before us.

IV. Analysis and Conclusions: The Arbitrator's award is contrary to law.

The Agency argues that the Arbitrator's award is contrary to law because it found that the grievant was entitled to due process upon the termination of her employment.[13] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[14] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[15]

Here, the Arbitrator found that the grievant met the definition of "employee" under 5 U.S.C. § 7511 because she had completed more than two years of continuous service in the same or similar positions with the Agency.[16] The Arbitrator thus concluded that the grievant had a vested property right in continued employment, and was entitled to the due-process procedures set forth in 5 U.S.C. chapters 43 and 75, as well as in Article 49, Section 5 of the parties' agreement.[17]

However, § 4303 pertains only to "[a]ctions based on unacceptable performance,"[18] and § 7512 pertains only to adverse actions.[19] As the Authority explained in *Veterans Administration*, the termination of an employee due to the expiration of his or her term employment is not a removal under §§ 4303 or 7512.[20] Moreover, regulations expressly exclude from coverage under §§ 7512 and 4303, respectively, the "[t]ermination of [an] appointment on the expiration date specified as a basic condition of employment at the time the appointment was made,"[21] and "[a] termination in accordance with terms specified as conditions of employment at the time the appointment was made."[22]

Similarly, Article 49, Section 5 of the parties' agreement covers only "[a]dverse and [d]isciplinary [a]ctions."[23] There is nothing in the record to indicate

[6] *Id.* at 10.
[7] 24 FLRA 447 (1986).
[8] *Id.* at 448.
[9] *Id.*
[10] *Id.* at 447 n.1.
[11] *Id.*
[12] *Id.* (citing 5 C.F.R. §§ 432.201(c)(3)(xii) & 752.401(c)(6) (now codified as 5 C.F.R §§ 432.102(b)(14) & 752.401(b)(11) respectively).

[13] Member Pizzella notes that the Agency also argues that this matter is not arbitrable because Congress did not intend to allow employees to have access to arbitration to challenge a termination due to the expiration of a term appointment. Exceptions at 12-13.
[14] *AFGE, Local 3506*, 65 FLRA 121, 123 (2010) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).
[15] *Id.* (citing *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998)).
[16] 5 U.S.C. § 7511(a)(1)(C)(ii); Award at 7-8.
[17] Award at 8-9.
[18] 5 U.S.C. § 4303.
[19] *Id.* § 7512.
[20] *Veterans Admin.*, 24 FLRA at 447 n.1.
[21] 5 C.F.R. § 752.401(b)(11).
[22] *Id.* § 432.102(b)(14).
[23] Award at 3.

that the parties' agreement defines the expiration of a term appointment as a disciplinary action. Moreover, the Arbitrator did not find, and the Union does not argue, that the parties' agreement provides for greater due-process rights than what is already provided by statute.

Additionally, the MSPB has long held that, "when an expiration date of an appointment is specified as a basic condition of employment," an employee has no right to appeal the conclusion of her employment on that date.[24] That the grievant "met the definition of 'employee' at 5 U.S.C. § 7511(a)(1) and had completed [her] probationary period is irrelevant to that determination."[25]

Accordingly, because the Agency did not take any adverse action against the grievant, it was not required to provide the grievant with notice and an opportunity to be heard under 5 U.S.C. §§ 4303 and 7513, or Article 49, Section 5 of the parties' agreement. The Arbitrator therefore erred as a matter of law in finding that the grievant was entitled to the due-process protections set forth in 5 U.S.C. §§ 4303 and 7513, as well as in Article 49, Section 5 of the parties' agreement. As such, we grant the Agency's exception that the award is contrary to law.

V. Decision

We grant the Agency's exception that the award is contrary to law, and set the award aside.

Member Pizzella, concurring:

I agree with my colleagues' decision to set aside the Arbitrator's award. However, unlike the majority, I would not have reached the question of whether the award is contrary to 5 U.S.C. §§ 4303 and 7513, and to Article 49, Section 5 of the parties' agreement. Rather, I would have granted the Agency's exception that the grievance was not substantively arbitrable.

Although the majority only discusses the Agency's contrary-to-law exception, the Agency also argues that the Arbitrator erred in finding that the grievance was arbitrable.[1] Specifically, the Agency argues that grievances concerning the expiration of a term appointment are excluded, as a matter of law, from the scope of the negotiated grievance procedure.[2] As the Arbitrator's arbitrability determination was based on the subject matter of the grievance, and not a procedural provision of the parties' agreement, this is a substantive-arbitrability determination.[3] When an arbitrator's substantive-arbitrability determination is based on the parties' agreement, the Authority applies the deferential "essence" standard.[4] However, if an arbitrator's substantive-arbitrability determination is based on a statute, the Authority reviews that determination de novo.[5] Because the Agency is challenging the Arbitrator's substantive-arbitrability determination as contrary to law – namely, the Civil Service Reform Act (CSRA) and its implementing regulations – I would review this determination de novo.[6]

In enacting the CSRA, Congress granted agencies the statutory right to terminate *probationary* employees without following the due-process procedures contained in 5 U.S.C. §§ 4303 and 7513.[7] However, the Authority did not exclude such grievances as a matter of law from the negotiated grievance process until the U.S. Court of Appeals for the D.C. Circuit (the court) issued its decision in *U.S. DOJ, INS v. FLRA* (*INS*).[8]

In that case, the court concluded that allowing probationary employees to challenge adverse actions through arbitration would "undermine[] the scheme

[24] *Endermuhle v. Dep't of Treasury*, 89 M.S.P.R. 495, 498-99 (2001).
[25] *Scott v. Dep't of Air Force*, 113 M.S.P.R. 436, 438 (2010) (citations omitted).

[1] Exceptions at 12-13.
[2] *Id*.
[3] *See Fraternal Order of Police, N.J. Lodge 173*, 58 FLRA 384, 385-86 (2003) (*FOP Lodge 173*).
[4] *See* 5 U.S.C. § 7122(a)(2); *SPORT Air Traffic Controllers Org.*, 64 FLRA 606, 609 (2010).
[5] *FOP Lodge 173*, 58 FLRA at 386 (citing *Ass'n of Civilian Technicians, Show-Me Army Chapter*, 58 FLRA 154, 155 (2002)).
[6] Exceptions at 12.
[7] 5 U.S.C. §§ 4303(f), 7511(a)(1).
[8] *INS*, 709 F.2d 724 (D.C. Cir. 1983).

Congress envisioned when it excluded probationary employees from [5 U.S.C. §§] 4303 and 7513."[9] In that regard, the court found that giving arbitrators the power to reinstate probationary employees through the grievance process would be "inconsistent with [Office of Personnel Management (OPM)] regulations" and would "usurp[] the authority Congress conferred on OPM" to issue rules to help implement the CSRA.[10] Following this decision, the Authority has consistently held that all grievances concerning the termination of probationary employees, as a matter of law, are not substantively arbitrable.[11]

In this case, the Agency asks the Authority to expand the holding in *INS* to exclude grievances relating to the expiration of a term appointment.[12] It appears that the Authority has not yet considered the question of whether term appointees, as opposed to probationers, may challenge the expiration of term appointments through the negotiated grievance process. For the same reasons that grievances relating to the termination of probationary employees are not substantively arbitrable, I believe that grievances relating to the expiration of term appointments must also be excluded from arbitration.

As noted by the majority, the procedural protections set forth in 5 U.S.C. § 4303 are reserved solely for "[a]ctions based on unacceptable performance."[13] Similarly, the protections contained in 5 U.S.C. § 7513 apply only to adverse actions such as removals, suspensions, or reductions in grade or pay, and not to the expiration of a term appointment.[14] In issuing regulations concerning the implementation of the CSRA,[15] OPM expressly stated that the "termination" of a term appointee on the expiration date of his or her term appointment is excluded from coverage under both §§ 4303 and 7513.[16] Specifically, OPM excluded from coverage under § 4303 "[a] termination in accordance with terms specified as conditions of employment at the time the appointment was made,"[17] and excluded from coverage under § 7513 the "[t]ermination of [an] appointment on the expiration date specified as a basic condition of employment at the time the appointment was made."[18]

Allowing term appointees to file grievances relating to the expiration of their appointments – which would grant arbitrators the power to reinstate them and compel agencies to afford them the procedural protections set forth in §§ 4303 and 7513 – would be incompatible with these OPM regulations. This would give rise to the same problem the court sought to avoid in *INS*: "usurp[ing] the authority Congress conferred on OPM."[19]

Accordingly, I would find that grievances concerning the expiration of a term appointment on the date specified at the outset of the appointment are not substantively arbitrable as a matter of law. Permitting such grievances would give arbitrators the power to grant an entirely new class of rights to term appointees that neither Congress nor OPM intended them to have. This would fundamentally change the nature of the term appointment and, consequently, force federal agencies to reconsider their hiring practices in light of the heightened liability associated with new term appointees.

In this case, if the Arbitrator's award was permitted to stand, it would have granted full civil service rights to the grievant, a term appointee. Arbitrators do not have the authority to grant civil service status to anyone.

But, I am concerned, nonetheless, because the majority's decision could have the unintended effect of discouraging agencies from offering term appointments, knowing that the door has been opened for temporary appointees to grieve when their pre-established conclusion dates come near.

The award is thus contrary to law and I would set it aside.

The grievant does not dispute that the only reason for the conclusion of her appointment was that her term appointment ended on its previously-specified expiration date.[20] Accordingly, I see no reasonable outcome other than to conclude that the Arbitrator's determination that this grievance was substantively arbitrable is contrary to law. I would therefore set the award aside on those grounds.

---

[9] *Id*. at 728-29.
[10] *Id*. at 728, 730 (citing 5 U.S.C. §§ 1711(a)(1) (Supp. V. 1981)).
[11] *See NTEU, Chapter 103*, 66 FLRA 416, 418 (2011) (citing *U.S. DOL, Bureau of Labor Statistics*, 66 FLRA 282, 284 (2011)); *AFGE, Local 2006*, 58 FLRA 297, 298 (2003); *U.S. Dep't of the Air Force, Nellis Air Force Base, Las Vegas, Nev.*, 46 FLRA 1323, 1325-27 (1993); *U.S. DOL, Labor-Management Serv. Admin., Cleveland, Ohio*, 13 FLRA 677, 678 (1984).
[12] Exceptions at 12-13.
[13] 5 U.S.C. § 4303(b)(1).
[14] *Id*. § 7512(1)-(4).
[15] *See id*. §§ 1301-1302.
[16] 5 C.F.R. §§ 432.102(b)(14), 752.401(b)(11).
[17] *Id*. § 432.102(b)(14).
[18] *Id*. § 752.401(b)(11).
[19] *INS*, 709 F.2d at 730.
[20] Award at 2.

By electing to sidestep the question of substantive arbitrability, the majority avoids an excellent opportunity to provide clarity on this issue of first impression. In doing so, it leaves the door open for future grievances over the expiration of term appointments. This creates the possibility of repeating the illogical outcome Arbitrator McKissick ordered in this case, in which a term appointee is awarded rights to which she was never entitled under law or regulation. The consequences of this result are yet to be seen, but they could be significant.

First, it could discourage agencies from offering term appointments, knowing that the door has been left open for temporary appointees to grieve the pre-established conclusion date of their appointment. Additionally, compelling agencies to convert a term appointee into a bona fide member of the federal civil service could have widespread ramifications, budgetary and otherwise: it would force agencies to accommodate a new, permanent, position created solely by an unruly arbitrator who somehow failed to see that OPM regulations[21] exclude term appointees from coverage under 5 U.S.C. §§ 4303 and 7512.

Whatever the consequences, it is apparent to me that the majority should have resolved this question before any more of these frivolous grievances are allowed to fly out of Pandora's box. As long as this issue remains open, arbitrators maintain the power to "usurp[] the authority Congress conferred on OPM" when it enacted the CSRA.[22] I have no doubt that the Authority will someday be faced with unique legal issues arising out of cases similar to this one. This could have been avoided today if the majority had ruled that grievances over the expiration of a term appointment are, as a matter of law, substantively not arbitrable. And while I am pleased that this shockingly incorrect award is being set aside, it is unfortunate that my colleagues followed a different path in doing so.

Thank you.

[21] 5 C.F.R. §§ 432.102(b)(14), 752.401(b)(11).
[22] *INS*, 709 F.2d at 730.