

**70 FLRA No. 174**

UNITED STATES  
DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF PRISONS  
FEDERAL MEDICAL CENTER CARSWELL  
FORT WORTH, TEXAS  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 1006  
COUNCIL OF PRISON LOCALS #33  
(Union)

0-AR-5328

DECISION

September 28, 2018

Before the Authority: Colleen Duffy Kiko, Chairman,  
and Ernest DuBester and James T. Abbott, Members  
(Member DuBester dissenting)

**I. Statement of the Case**

In this case, we are once again called upon to examine the reach and outer limits of a negotiated grievance procedure.<sup>1</sup> Specifically, we must decide whether those procedures can reach into decisions concerning the medical competency of an intern training to become a clinical psychologist.

Arbitrator Stephen Fischer found that the Agency violated the parties' collective-bargaining agreement, American Psychology Association (APA) regulations, Association of Psychology Postdoctoral and Internship Center regulations, and Agency rules and program statements when it refused to issue the intern a certificate of completion at the end of a doctoral internship. As a remedy, the Arbitrator ordered the Agency to pay the intern \$1,288,500 in front pay—the twenty-five year difference in median wages between a psychologist and a mental health counselor.

The main question before us is whether the complaint<sup>2</sup> filed by the Union constitutes a “grievance” as that term is defined by the Federal Service Labor-Management Relations Statute (Statute).<sup>3</sup> Because the subject of the complaint—a review of determinations made by qualified medical personnel concerning the medical competency of an intern in a clinical, professional program—does not relate to the employment of an employee, the matter is not grievable and the answer to this question is no. Consequently, we vacate the award.

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

The grievant was an intern in the Agency’s doctoral psychology program, a one-year internship for graduate students in their last year of academic training to become clinical psychologists. An intern who successfully completes the doctoral program earns a certificate, which is required to complete a doctorate in clinical psychology.

At a certain point in his internship, the intern began to receive negative assessments concerning his administrative abilities, and supervisory clinical staff put him on multiple remediation plans. At the end of the intern’s one-year internship in August of 2016, the program’s chief psychologist refused to issue him a certificate of successful completion.

The Union filed a complaint contesting the chief psychologist’s refusal to issue the intern the certificate. The Agency denied the complaint, and the parties submitted the matter to arbitration.

At arbitration, the Union argued that the Agency began to treat the intern disparately after he raised concerns at a group meeting with the chief psychologist. The Agency argued that it evaluated the intern fairly, and that he had not achieved the minimum levels of achievement required by applicable APA accreditation standards and the clinical program. Accordingly, the intern was determined to have not successfully completed the clinical program and was not awarded a certificate of successful completion. The Agency also argued that the matter was not grievable because the intern, as a temporary employee,<sup>4</sup> could not file a grievance under the parties’ agreement.

<sup>2</sup> This decision uses the term “complaint” as used in 5 U.S.C. § 7103(a)(9). This should not be confused with the term “complaint” as used in the context of an unfair labor practice or related portions of the Statute. *See, e.g.*, 5 U.S.C. § 7104(f)(2)(B); *id.* § 7105(a)(2)(G); *id.* § 7118(a).

<sup>3</sup> 5 U.S.C. § 7103(a)(9).

<sup>4</sup> Throughout its exceptions, the Agency refers to the intern as a temporary employee and a probationary employee as well as a term-appointed employee. Because the status of the intern does

<sup>1</sup> *See AFGF, Local 1547*, 67 FLRA 523 (2014), *rev’d sub nom. U.S. Dep’t of the Air Force, Luke Air Force Base, Ariz. v. FLRA*, 844 F.3d 957 (D.C. Cir. 2016).

The Arbitrator found that the complaint was arbitrable, concluding that the definition of “employee” in 5 U.S.C. § 7511 and the parties’ agreement did not preclude the intern from filing a grievance.<sup>5</sup> Addressing the complaint’s merits, the Arbitrator concluded that the Agency disparately treated the intern in violation of the parties’ agreement, laws, and regulations.<sup>6</sup> The Arbitrator found that, prior to the intern’s comments at the group meeting, the intern’s supervisors consistently rated the intern “satisfactory.”<sup>7</sup> The Arbitrator also found that after the intern raised concerns with the chief psychologist at the group meeting, the intern’s supervisors began to rate the intern’s work as “unacceptable.”<sup>8</sup>

The Arbitrator attributed the decline in the intern’s ratings to the chief psychologist’s actions. The Arbitrator also found that all of the remediation plans on which the Agency had put the intern concerned the completion of documentation and time-management skills. Based on this, the Arbitrator determined that even if these concerns were valid, “they were not deficiencies that provided justification to withhold a certificate [the intern] needed to advance to the next step of becoming a [clinical psychologist].”<sup>9</sup>

The Arbitrator concluded that the Agency’s actions had “serious ramifications for [the intern’s] ability to complete his doctorate, his ability to subsequently earn a living[,] and his ability to pay back student loans.”<sup>10</sup> As a remedy, the Arbitrator ordered the Agency to pay the intern \$1,288,500 in front pay.

On November 21, 2017, the Agency filed exceptions to the award, and on December 14, 2017, the Union filed an opposition to those exceptions.

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not affect the outcome of the decision, we will not address this confusion on the part of the Agency any further.

<sup>5</sup> Award at 14-16.

<sup>6</sup> Although the Arbitrator states that the Agency violated “other applicable laws, federal government regulations, [APA] regulations, Association of Psychology Postdoctoral and Internship Center regulations, Agency rules and [Agency] program statements,” the Arbitrator only specifically identifies language of the parties’ agreement and does not cite any other language as having been violated. Award at 32-33.

<sup>7</sup> Award at 18-19.

<sup>8</sup> *Id.* at 26.

<sup>9</sup> *Id.* at 30.

<sup>10</sup> *Id.* at 33.

### III. Analysis and Conclusion: The complaint was not a grievance under the Statute.

This case presents a jurisdictional question under the Statute that we consider *sua sponte*.<sup>11</sup> We must determine whether the complaint constitutes a “grievance” under § 7103(a)(9). We conclude that it does not for the reasons explained below.

The Union seeks to overturn determinations concerning the intern’s medical competency as assessed by licensed medical personnel.<sup>12</sup> The APA certified the Agency to make those determinations. In short, the medical personnel (licensed, certified clinical psychologists) who oversee the Agency’s doctoral program determined that the intern did not demonstrate an adequate level of skill to advance to the next step of his training.<sup>13</sup> Thus, he was not awarded a certificate.

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<sup>11</sup> *U.S. Dep’t of HUD*, 70 FLRA 605, 607 (2018) (Member DuBester dissenting) (raising, *sua sponte*, whether arbitrator lacked jurisdiction as a matter of law); *U.S. Small Bus. Admin., Wash., D.C.*, 51 FLRA 413, 432 n.9 (1995) (“[T]he Authority may question, *sua sponte*, whether it has subject matter jurisdiction to consider the merits of a dispute.”). *Cf. U.S. Dep’t of VA, VA Med. Ctr., Asheville, N.C.*, 57 FLRA 681, 683 (2002) (“Parties may raise arguments regarding the Authority’s jurisdiction at any stage of the Authority’s proceedings.”). We note that our dissenting colleague, until today, has recognized that the Authority may address, *sua sponte*, questions concerning statutory substantive arbitrability or the Authority’s jurisdiction. *See, e.g., U.S. Dep’t of VA, Cent. Tex. Veterans Health Care Sys., Temple, Tex.*, 67 FLRA 269, 270 (2014) (“Arguments concerning the Authority’s jurisdiction may be raised by a party at any stage of the Authority’s proceedings, and may even be raised by the Authority *sua sponte*.”) It is well-settled law that questions concerning “subject-matter jurisdiction can never be waived or forfeited” and if not raised by the parties themselves it is the “obligation” of the court or adjudicating body to raise and address the matter *sua sponte*. *Gonzales v. Thaler*, 565 U.S. 134, 141 (2012) (“When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented. Subject-matter jurisdiction can never be waived or forfeited.”). It is unclear to us what circumstances in this case lead our colleague to a conclusion contrary to prior precedent.

<sup>12</sup> We note that medical professionals employed by the U.S. Department of Veterans Affairs may not grieve issues of clinical competence through the negotiated grievance procedure. *See* 38 U.S.C. § 7422(b)-(d).

<sup>13</sup> Award at 8.

To be a “grievance” under § 7103(a)(9)(A) or (B) of the Statute, a complaint must “relat[e] to the employment of any employee.”<sup>14</sup> Applying § 7103(a)(9)(A) and (B) to these facts, it is clear that the complaint did not concern the intern’s employment with the Agency, but rather his competence as a medical professional, and so, whether he should advance to the next step that would occur *after* the internship concluded. As such, the complaint did not concern employment with the Agency—it concerned whether he had satisfactorily met the requirements of the internship, a determination that could only be made by licensed, certified medical personnel. Consequently, the complaint is not a “grievance” under § 7103(a)(9)(A) or (B).

Furthermore, denying the intern a certification is not a “violation . . . of any law, rule, or regulation affecting conditions of employment” within the meaning of § 7103(a)(9)(c)(ii) of the Statute.<sup>15</sup> The determinations made by the certifying medical personnel were made under standards and requirements set forth in the APA, which define the requirements for the successful completion of a clinical program. The APA standards do not concern “personnel policies, practices, [or] matters” and the determinations made under those standards may not be grieved under a negotiated grievance procedure.<sup>16</sup>

Accordingly, because the Union’s complaint is not a grievance, it cannot be grieved under a negotiated grievance procedure and the competency determinations as made by the certifying medical personnel cannot violate the parties’ agreement.<sup>17</sup> As such, the complaint cannot be a grievance under § 7103(a)(9)(C)(i).<sup>18</sup> In short, the parties’ agreement cannot transmute a complaint that is not a grievance under § 7103(a)(9) of the Statute into a grievance.<sup>19</sup>

As noted above, this case is about the limits of the negotiated grievance procedure under the Statute. Surely, Congress did not intend to give arbitrators the ability to second-guess the medical competency decisions

made by licensed, certified medical directors as part of a doctoral program.<sup>20,21</sup>

Because the complaint is not a grievance under the Statute, it cannot be the subject of a grievance or subsequent arbitral award. We therefore vacate the award.<sup>22</sup>

#### IV. Decision

We vacate the award.

<sup>14</sup> 5 U.S.C. § 7103(a)(9)(A) (defining a grievance as any complaint “by any employee concerning any matter relating to the employment of the employee”); *id.* § 7103(a)(9)(B) (defining a grievance as any complaint “by any labor organization concerning any matter relating to the employment of any employee”).

<sup>15</sup> 5 U.S.C. § 7103(a)(9)(C)(ii).

<sup>16</sup> *Id.* § 7103(a)(14).

<sup>17</sup> *Id.* § 7121(a)(1) (“[A]ny collective-bargaining agreement shall provide procedures for the settlement of grievances.”).

<sup>18</sup> *Id.* § 7103(a)(9)(C)(i) (defining a grievance as a complaint concerning “the effect or interpretation, or a claim of breach, of a collective[-]bargaining agreement”).

<sup>19</sup> See *Dep’t of the Treasury, IRS v. FLRA*, 494 U.S. 922, 929 (1990) (ruling that grievance procedures created under § 7121 of the Statute cannot supersede other sections of the Statute).

<sup>20</sup> We continue to note that our dissenting colleague seemingly raises arbitral awards to an entirely unprecedented decisional pedestal that effectively has no limits and makes Authority review inconsequential. Even decisions of the United States Court of Appeals for the District of Columbia Circuit and decisions of any state’s supreme court are subject to judicial review. See *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence Colo.*, 70 FLRA 748, 749 n.15 (2018) (Member DuBester dissenting).

<sup>21</sup> Member Abbott notes that permitting questions concerning medical certification and competency to be made by arbitrators creates a new class of *arbitrator-certified* medical professionals. And though his dissenting colleague is willing to subject incarcerated female prisoners to medical professionals deemed competent by an arbitrator, Member Abbott believes, however, that individuals who happen to be incarcerated in federal prison facilities deserve to be treated by medical professionals who have been deemed competent by those in the best position to certify medical competency – the American Medical Association, the American Dental Association, and the American Psychological Association.

<sup>22</sup> Although we do not reach the merits of the Arbitrator’s decision, we are still concerned about the Arbitrator’s actions in this matter. In upholding the complaint, the Arbitrator did so without regard to the credentialing standards of the program. The Agency, through its medical professionals and not the Arbitrator, has the authority under the APA- accredited program to determine the fitness of clinical interns. Cf. *U.S. Dep’t of VA, St. Petersburg Reg. Benefit Office*, 70 FLRA 586, 588-89 (2018) (Member DuBester dissenting) (finding an award contrary to law where an arbitrator granted a remedy without regard to credentialing standards left to the discretion of the agency). Although the Arbitrator dismissed the competency concerns of the Agency as “not deficiencies that provided justification to withhold a certificate,” it is the Agency, through its medical professionals and not the Arbitrator, who must make this decision. Award at 30.

**Member DuBester, dissenting:**

The majority would have us believe that this case is all about medical competence. But as the Arbitrator found, the heart of this case is about the Agency's disparate treatment of the grievant.

It is undisputed that the grievant, an Agency employee serving a doctoral internship, performed his medical duties successfully until his dispute with the Agency's Chief Psychologist. Only after this event did the supervising psychologists lower the grievant's evaluations, cut his deadlines for treating patients in half, and require him to complete "remediation plans,"<sup>1</sup> all because of the Agency's "discrimination, harassment, and reprisals."<sup>2</sup> The Arbitrator found that the Agency disparately treated the grievant by wrongly denying him a "certificate of completion,"<sup>3</sup> in violation of the parties' agreement, laws, and regulations.<sup>4</sup> This placed his future career as a clinical psychologist in jeopardy.

The majority overturns the Arbitrator. Ignoring the Authority's regulations, the majority raises a non-jurisdictional arbitrability issue not raised before the Arbitrator. And imposing an unjustifiably narrow interpretation on the Statute's broad definition of "grievance," the majority concludes that the grievant's disparate-treatment claim is not a "grievance" subject to the grievance procedures in the parties' agreement.<sup>5</sup> Because the majority's analysis is deeply flawed, and because the majority is barred by our regulations from even reaching this issue, I dissent.

The Statute's definition of grievance is extremely broad.<sup>6</sup> As relevant here, the Statute defines "grievance" as "*any* complaint . . . by *any* employee concerning *any* matter relating to the employment of *any* employee."<sup>7</sup> Disparate treatment complaints like the grievant's are common fare for arbitrators, and fit easily within the Statute's expansive definition.

Concerning the definition's requirements, the majority does not dispute that the grievant is an Agency "employee."<sup>8</sup> As the Arbitrator found, quoting the Agency's Psychology Internship Handbook, "once formally hired, interns are full-fledged employees," even though they are "also trainees who require supervision

and support consistent with their status as students."<sup>9</sup> As confirmed by the head of the Agency institution at which the grievant worked, in testimony the Arbitrator quoted, the grievant "was a bargaining-unit employee" at all times pertinent to this case.<sup>10</sup>

The grievant's complaint also clearly concerns a matter "relating to the employment of [an] employee."<sup>11</sup> Indeed, obtaining a certificate of completion was the specific purpose of the grievant's employment as an intern. Obtaining that certificate was a mandatory step for the grievant to complete his doctorate in clinical psychology. And the Agency's disparate treatment of the grievant, while he pursued that objective, prevented the grievant from obtaining that certificate.

The majority's flawed conclusion that the grievant's complaint is not a "grievance" ignores the Statute's language, legislative history, and purpose. Regarding the Statute's language, the majority ignores the definition's broad statement that a "grievance" is "any complaint" that "relates to" an employee's employment.<sup>12</sup> Instead, the majority rewrites the definition to apply a constricted interpretation of § 7103(a)(9)(A). The majority analyzes whether the grievance "concerns"<sup>13</sup> the grievant's employment, and concludes that the grievant's disparate-treatment complaint is not a "grievance" because it only "concerns" the grievant's completion of his doctorate, and becoming a clinical psychologist, "after the internship concluded."<sup>14</sup>

I disagree. The majority's constricted interpretation of § 7103(a)(9)(A), based on an edited version of the provision, is inconsistent with the Statute's plain language. Moreover, the majority's constricted interpretation of "grievance" ignores the special importance Congress attributed to the Statute's broadly inclusive grievance and arbitration procedures, when Congress enacted the Statute.<sup>15</sup> Congress' broad definition of a grievance is purposeful, and is one of the unique attributes of federal-sector labor law. Moreover, the grievance "relates to" more than just the grievant's

<sup>1</sup> *E.g.*, Award at 30.

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

<sup>3</sup> *Id.* at 33.

<sup>4</sup> *E.g.*, *id.* at 32 (the grievant's experience is a "blatant example" of disparate treatment).

<sup>5</sup> Majority at 4.

<sup>6</sup> *E.g.*, VA *Richmond*, 68 FLRA 822, 884 (2015) (citation omitted).

<sup>7</sup> 5 U.S.C. § 7103(a)(9)(A) (emphases added).

<sup>8</sup> Majority at 4.

<sup>9</sup> Award at 14 (quoting from Joint Ex. 5, the Federal Medical Center Carswell's Psychology Internship Handbook at 5).

<sup>10</sup> *Id.* at 16.

<sup>11</sup> 5 U.S.C. § 7103(a)(9)(A).

<sup>12</sup> *Id.*

<sup>13</sup> Majority at 4.

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

<sup>15</sup> See generally Arthur A. Howitzer & James F. Blandford, *Labor-Management Relations in the Public Sector* 447-48 (John L. Bonner, ed., 1999) (Contrasting with the private sector, "all collective-bargaining agreements in the federal sector *must* contain procedures – culminating in binding arbitration – for the settlement of grievances, including questions of arbitrability. These grievance procedures then extend automatically to all matters . . . covered by the broad definition of grievance in the [S]tatute.").

career after completing his internship. It also “relates,” most specifically, to the treatment he received during the time he was attempting to earn his completion certificate, the purpose of his internship.

The majority’s determination to raise sua sponte the arbitrability issue discussed above also violates the Authority’s regulations. In the arbitration context, §§ 2425.4(c) and 2429.5 of the Authority’s Regulations bar the Authority from considering any arguments that could have been, but were not presented to the Arbitrator.<sup>16</sup> The sole exception is jurisdictional issues.

Jurisdictional issues the Authority has raised sua sponte include the specific matters that Congress has explicitly identified in the Statute, such as adverse actions under 5 U.S.C. § 7512,<sup>17</sup> and classification, mentioned in § 7121(c) of the Statute. Although the majority characterizes the substantive-arbitrability issue in this case as “jurisdictional,” this issue does not fall into any of these categories. Accordingly, because the majority’s decision violates the Authority’s regulations, it is arbitrary and capricious.<sup>18</sup>

For these various reasons, I would not set the award aside. Instead, I would deny most of the Agency’s exceptions, except the Agency’s challenge to the award’s front-pay remedy. The BPA does not authorize front pay, and no other authority for awarding front pay is apparent.<sup>19</sup> Accordingly, I would remand the “remedy” portion of the award to the parties for resubmission to the Arbitrator, absent settlement, to determine an alternative remedy.

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<sup>16</sup> 5 C.F.R. §§ 2425.4(c), 2429.5; e.g., *AFGE, Local 3627*, 70 FLRA 627, 627 (2018).

<sup>17</sup> 5 U.S.C. § 7122(a) (excluding from the Authority’s jurisdiction “matter[s] described in § 7121(f)” of the Statute, which in turn refers to “matters covered under [§§] 4303 and 7512” of Title 5, U.S.C.).

<sup>18</sup> See *U.S. DOD, Def. Info. Sys. Agency*, 70 FLRA 482, 488 (2018) (Dissenting Opinion of Member DuBester); *U.S. Dep’t of VA, Kansas City, Kan.*, 70 FLRA 465, 471 (2018) (Dissenting Opinion of Member DuBester); *U.S. DOL*, 70 FLRA 452, 459 (2018) (Dissenting Opinion of Member DuBester).

<sup>19</sup> See *U.S. Dep’t of HHS, Gallup Indian Med. Servs. Ctr., Navajo Area Indian Health Service*, 60 FLRA 202, 212 (2004); see also *SSA Branch Office East Liverpool, Ohio*, 54 FLRA 142, 149 (1998).