

71 FLRA No. 103

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

0-AR-5484

DECISION

January 29, 2020

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

I. Statement of the Case

The Agency filed exceptions to an award by Arbitrator Earlene R. Baggett-Hayes in which she found that the grievant had been coerced to retire and ordered his reinstatement. For the reasons that follow, we find that the Authority lacks jurisdiction under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute). Accordingly, we dismiss the Agency’s exceptions.

II. Background and Arbitrator’s Award

The Agency proposed the removal of the grievant following an altercation in which he made remarks that were interpreted as threatening. The grievant reported to the human resources department and initiated his retirement the same day he was served with the removal letter.

The Union grieved the retirement, arguing that the grievant was effectively removed after a campaign of mistreatment against him. The parties were unable to resolve the grievance and submitted the matter to the Arbitrator. The Arbitrator found that circumstances surrounding the grievant’s purportedly voluntary retirement – such as the time pressure he felt to act in order to protect his benefits, the Agency’s failure to advise the grievant of any language or opportunity regarding any type of involuntary retirement, and the

grievant’s comment when he initiated his retirement with the human resources specialist – was evidence that he initiated his retirement under the duress of being removed. Therefore, she found that the grievant’s retirement was involuntary.

The Arbitrator found that the Agency did not present any evidence to establish that the decision to remove the grievant was justified because it relied solely on its contention that the grievant voluntarily retired. Specifically, she rejected the Agency’s argument that the grievance was barred by an earlier-filed equal employment opportunity (EEO) complaint. As a remedy, the Arbitrator ordered the Agency to reinstate the grievant with backpay.

The Agency filed exceptions to the Arbitrator’s award on March 20, 2019. The Union filed an opposition on April 22, 2019.

III. Order to Show Cause

The Authority’s Office of Case Intake and Publication issued a show-cause order (SCO) directing the Agency to show cause why its exceptions should not be dismissed for lack of jurisdiction.¹ In response, the Agency argues that grievance was not substantively arbitrable. It argues that the Arbitrator lacked jurisdiction to hear the grievance under § 7121(d) of the Statute² because the grievant elected to pursue the matter through EEO procedures. As a result, the Agency argues that the matter is properly before the Authority.

IV. Analysis and Conclusion: The Authority lacks jurisdiction over 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

¹ Order to Show Cause at 2 (“Because it appears that the claim advanced in arbitration is inextricably intertwined with a removal that is reviewable by the [Merit Systems Protection Board ([MSPB])], the Agency must show cause why the Authority should not dismiss its exceptions for lack of jurisdiction.”).

² 5 U.S.C. § 7121(d).

³ *Id.* at § 7122(a) (“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)”); *id.* at § 7121(f) (“In matters covered under section[] . . . 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the [MSPB].”).

actions, such as removals, that are covered under 5 U.S.C. § 7512. Such matters are appropriately reviewed by the Merit Systems Protection Board (MSPB) and ultimately the United States Court of Appeals for the Federal Circuit.⁴

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.⁵ 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.⁶

Applying this precedent, we conclude that the award relates to a matter described in § 7121(f) of the Statute⁷ because the claim advanced before the Arbitrator relates to the grievant's removal.⁸ Accordingly, we conclude that the Authority lacks jurisdiction to review the Agency's exceptions.⁹

V. Decision

We dismiss the Agency's exceptions.

⁴ *AFGE, Local 491*, 63 FLRA 307, 308 (2009) (dismissing exceptions where award addressed issues relating to grievant's removal).

⁵ *AFGE, Local 1013*, 60 FLRA 712, 713 (2005) (finding Authority lacked jurisdiction to resolve exceptions to award where claim before arbitrator related to grievant's removal).

⁶ *Id.*; *Schafer v. Dep't of Interior*, 88 F.3d 981, 986 (Fed. Cir. 1996) (Federal Circuit can review arbitrator awards relating to removal and other adverse actions).

⁷ 5 U.S.C. § 7121(f).

⁸ *Moore v. U.S. Postal Serv.*, 70 M.S.P.R. 357, 359-60 (1996) (citing *Mays v. Dep't of Transp.*, 27 F.3d 1577, 1580-81 (Fed. Cir. 1994)) (noting that MSPB has jurisdiction "to hear the appeal of an employee who retires because his employing agency has issued a decision to remove him, without regard to whether the date of the retirement falls on or before the effective date of the removal").

⁹ Because we find the Authority lacks jurisdiction, we do not reach the Agency's argument that § 7121(d) of the Statute barred the grievance.