

**73 FLRA No. 25**

NATIONAL FEDERATION  
OF FEDERAL EMPLOYEES  
LOCAL 1998  
(Union)

and

UNITED STATES  
DEPARTMENT OF STATE  
PASSPORT SERVICES  
(Agency)

0-AR-5766

ORDER DISMISSING EXCEPTIONS

July 1, 2022

Before the Authority: Ernest DuBester, Chairman, and  
Colleen Duffy Kiko and Susan Tsui Grundmann,  
Members

**I. Statement of the Case**

The Union filed exceptions to an award by Arbitrator Eric M. Fine which upheld the Agency's removal of the grievant from a passport specialist position for unacceptable performance in a critical work element. For the reasons below, we find that the Authority lacks jurisdiction under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute).<sup>1</sup> Accordingly, we dismiss the Union's exceptions.

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

At the conclusion of the 2017 rating period, the grievant received a "not successful" rating for below average application adjudications.<sup>2</sup> Consequently, the grievant was placed on a Performance Improvement Plan (PIP). Between October 22, 2018 and December 10, 2018, the Agency continued to counsel the grievant and provided opportunities for the grievant to improve performance and meet the performance objectives. However, the grievant

never achieved a level of acceptable performance. On September 16, 2019, the Agency proposed the removal of the grievant. On February 6, 2020, the Agency removed the grievant for unacceptable performance.

The Union filed a grievance alleging that the Agency violated the parties' agreement by placing the grievant on a PIP and subsequently removing the grievant for unacceptable performance.<sup>3</sup> The parties were unable to resolve the matter and the grievance was submitted to arbitration. Because the parties could not agree on the issues, each submitted separate issue statements. The Agency phrased the issue as whether it "properly adhere[d] to its legal and contractual requirements . . . when it removed the grievant for unacceptable performance . . ." <sup>4</sup> The Union phrased the issues as (1) whether "the Agency violate[d] the [parties' agreement], policy and/or procedures . . . when making changes to PIPs," (2) whether the Agency violated the parties' agreement, policy, or procedures by not affording the grievant assistance and an opportunity to improve prior to issuing an unsatisfactory rating, and (3) whether "the [A]gency's justification of the PIP . . . violate[d] the parties' master agreement, policy, and/or procedures."<sup>5</sup>

The Arbitrator did not explicitly frame the issues to be considered at arbitration, but summarized the case as "involv[ing] the . . . termination of [the grievant]."<sup>6</sup> The Arbitrator denied the grievance, finding that the Agency acted reasonably in removing the grievant, despite finding that the Agency violated the parties' agreement in the implementation and administration of the PIP.

The Union filed exceptions to the award on September 22, 2021. The Agency filed an opposition to the exceptions on November 18, 2021.<sup>7</sup>

**III. Analysis and Conclusion: The Authority lacks jurisdiction to review the Union's exceptions.**

Because the arbitration involved a removal, the Authority's Office of Case Intake and Publication issued an order, directing the Union to show cause why the

<sup>1</sup> 5 U.S.C. § 7122(a).

<sup>2</sup> Award at 5.

<sup>3</sup> Opp'n, Attach. 4 at 1 ("The Union alleges that the Agency violated [the parties' agreement] when [it] made the determination to remove [the grievant] . . . . [The grievant] was not granted sufficient System Downtime during the 2017 and 2018 years, which led to [the Agency] placing [the grievant] on a [PIP], which ultimately led to [the] dismissal.").

<sup>4</sup> Award at 1-2.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 1.

<sup>7</sup> The Agency requested an extension of time to file its opposition. The Authority's Office of Case Intake and Publication granted an extension of time until November 19, 2021 to file an opposition. Accordingly, the Agency's opposition is timely.

Authority should not dismiss the exceptions for lack of jurisdiction under § 7122(a) of the Statute.<sup>8</sup>

In response, the Union argues it “advanced a claim of a change in a condition of employment affecting working conditions – the change to the PIP process [and] procedures”<sup>9</sup> – at arbitration, and requested the Arbitrator find an unfair-labor-practice (ULP) with respect to these unilateral changes.<sup>10</sup> Accordingly, the Union argues the Authority has jurisdiction because it advanced claims the Agency violated the parties’ agreement and the Statute in administering the PIP.<sup>11</sup>

Under § 7122(a) of the Statute, the Authority lacks jurisdiction to review exceptions to an award “relating to” a matter described in § 7121(f) of the Statute.<sup>12</sup> Matters described in § 7121(f) include adverse actions, such as removals, that are covered under 5 U.S.C. §§ 4303 or 7512.<sup>13</sup> Such matters are appropriately reviewed by the Merit Systems Protection Board (MSPB) and ultimately the United States Court of Appeals for the Federal Circuit (Federal Circuit).<sup>14</sup>

The Authority will determine an award relates to a matter described in § 7121(f) when it resolves, or is inextricably intertwined with, a matter covered under § 7512.<sup>15</sup> In making that determination, the Authority looks not to the outcome of the award, but to whether the

claim advanced in arbitration is reviewable by the MSPB, and, on appeal, by the Federal Circuit.<sup>16</sup>

Here, the Union argues the Authority has jurisdiction over its claim that the Agency violated the parties’ agreement and the Statute in changing the PIP procedures as applied to the grievant.<sup>17</sup> However, the Arbitrator considered the Agency’s actions surrounding the implementation and administration of the PIP in determining whether the Agency acted reasonably in removing the grievant.<sup>18</sup> The Arbitrator also summarized the dispute as “involv[ing] the . . . termination of [the grievant].”<sup>19</sup> As such, the alleged contractual and statutory violations regarding the PIP procedures applied to the grievant are inextricably intertwined with the removal of the grievant.<sup>20</sup> Furthermore, the Authority has rejected assertions that it has jurisdiction over a matter inextricably intertwined with a removal merely because a party alleged

<sup>8</sup> Order to Show Cause at 1-2; *see also* 5 U.S.C. § 7122(a) (“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].”).

<sup>9</sup> Response at 13.

<sup>10</sup> *Id.* at 11, 13.

<sup>11</sup> *Id.* at 14-21.

<sup>12</sup> 5 U.S.C. § 7122(a) (“Either party to arbitration under this chapter 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.* § 7121(f) (“In matters covered under [§§] 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this 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].”).

<sup>13</sup> *U.S. Dep’t of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 88, 89 (2021) (Chairman DuBester concurring) (*Poplar Bluff*) (citing *AFGE, Loc. 933*, 71 FLRA 521, 521 (2020)).

<sup>14</sup> *Id.* (citing *U.S. Dep’t of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 533, 534 (2020) (*Pershing*)).

<sup>15</sup> *Pershing*, 71 FLRA at 534 (citing *AFGE, Loc. 1013*, 60 FLRA 712, 713 (2005) (finding Authority lacked jurisdiction to resolve exceptions to award where claim before arbitrator related to grievant’s removal)).

<sup>16</sup> *See Poplar Bluff*, 72 FLRA at 89; *Pershing*, 71 FLRA at 534 (citing *Schafer v. Dep’t of Interior*, 88 F.3d 981, 986 (Fed. Cir. 1996)).

<sup>17</sup> Response at 14-21. We note the Union asserts the Authority has jurisdiction in this case because the Authority had jurisdiction in *U.S. Department of VA, Veterans Benefits Administration*, 71 FLRA 1113, 1114-16 (2020) (*VA*) (Chairman Kiko dissenting in part). Response at 20-21. However, *VA* is distinguishable from the instant case. *VA* involved an institutional grievance concerning the agency’s unilateral implementation of procedures provided by the Veterans Affairs Accountability and Whistleblower Protection Act of 2017. *See* 71 FLRA at 1114-15. While the union in *VA* did introduce evidence of two employees being removed under the new procedures, the fundamental nature of the grievance did not change because the central issue was the agency’s implementation of new procedures. Here, the central issue is the placement of the grievant on a PIP, and the subsequent removal of the grievant.

<sup>18</sup> Award at 24 (finding the Agency “satisfied the notification requirements of the [parties’ agreement] regarding . . . notification of [the] PIP letter, and . . . notification of [the] proposed removal letter”); *id.* at 27 (finding the Agency violated the parties’ agreement “when it failed to provide [the grievant] with a PIP opportunity before providing [the grievant] with an unsuccessful appraisal rating in 2017”); *id.* at 31 (finding the Agency violated the parties’ agreement by limiting the PIP to forty-five days regardless of “performance issues involved and by failing to have the supervisor determine the length of the PIP as required by its own regulations”).

<sup>19</sup> *Id.* at 1.

<sup>20</sup> *AFGE, Loc. 12*, 65 FLRA 1009, 1010-11 (2011).

a ULP.<sup>21</sup> Accordingly, we lack jurisdiction to review the Union's exceptions.

#### **IV. Decision**

We dismiss the Union's exceptions.

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<sup>21</sup> *Id.* (finding the Authority lacked jurisdiction over an award involving a removal for unacceptable performance even though the union argued that the removal “flowed from the [a]gency’s commission of a ULP”). We note that despite the Union’s assertion that it requested that the Arbitrator find a ULP, the Arbitrator never mentions the Statute or a statutory violation in the award. *See generally* Award. Further, the Arbitrator explicitly stated that some of the Union’s requested remedies were “beyond the scope of this grievance . . . .” Award at 32.