**66 FLRA No. 47**

UNITED STATES
DEPARTMENT OF LABOR
BUREAU OF LABOR STATISTICS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 12
(Union)

0-AR-4743

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DECISION

October 12, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

## I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Jesse Etelson filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator found that a grievance concerning a probationary employee's termination was arbitrable. For the following reasons, we set aside the award as contrary to law.

## II. Background and Arbitrator's Award[1]

The Agency terminated the grievant during his probationary period. *See* Award at 1. The Union filed a grievance asserting that the Agency dismissed the grievant "on the basis of religious and national origin discrimination" and thereby violated the Equal Employment Opportunity (EEO) clause of the parties' agreement. *Id.* In response, the Agency asserted to the Union that the parties' agreement bars grievances filed on a probationary employee's behalf. *See id.* The Union replied to the Agency the grievance was arbitrable because it alleged discrimination. *See id.*

The grievance was unresolved and submitted to arbitration. *See id.* Before the arbitration hearing, the Agency informed the Union that it "intend[ed] to raise the threshold issue of whether the . . . grievance is excluded from" the negotiated grievance procedure and, thus, not arbitrable. *Id.* at 1-2.

The Arbitrator framed three issues: (1) whether the Union had a reasonable basis for believing that the Agency had waived its arbitrability argument; (2) whether the Agency could argue to the Arbitrator that the grievance was not arbitrable; and (3) whether the grievant was able to challenge his dismissal in other forums. *See id.* at 2.

With regard to the first issue, the Arbitrator found that the Union had a "reasonable basis to believe that the Agency had waived . . . its contention that the grievance was precluded." *Id.* at 3. In this regard, the Arbitrator found that there was "no evidence" that the Agency was not "willing[] to proceed" to arbitration and that the parties had selected an arbitrator, scheduled a hearing, and exchanged witness lists. *See id.* at 1-3. Nevertheless, with regard to the second issue, the Arbitrator found that the parties' agreement permitted the Agency to "raise an objection to arbitration at any time," and that the "Agency's participation in arranging for arbitration" did not "by itself" waive the Agency's right to contest the grievance's arbitrability. *Id.* at 4.

With regard to the third issue, the Arbitrator found that because the Agency had "appeared to abandon" its arbitrability argument, it was "reasonable" for the Union "to assume that . . . the Agency was prepared to follow the grievance procedure to its conclusion." *Id.* at 5. Therefore, the Arbitrator determined, the Union had "good reason to believe that it was unnecessary" for the grievant to make a timely appeal to the Merit Systems Protection Board (MSPB) or the Equal Employment Opportunity Commission. *Id.* In addition, the Arbitrator found that the Agency "abused its privilege of reserving" its right to challenge arbitrability by waiting "unnecessarily until a time when the grievant would be time barred from proceeding elsewhere." *Id.* at 6. Thus, the Arbitrator stated that the "Agency's actions make the basis of its objection to arbitrability unavailable to it at this stage." *Id.* In addition, the Arbitrator rejected the Agency's reliance on *United States Department of Justice, Immigration & Naturalization Service v. FLRA*, 709 F.2d 724 (D.C. Cir. 1983), stating that he did not interpret the holding in that decision to mean that an agency may "preserve its right to summarily discharge a probationary employee simply by saying that it is doing so because of unacceptable work performance." Award at 3.

[1] We note that after the Arbitrator issued his award, he modified the award in minor ways. *See* Agency's Supplemental Submission, "Amended Decision on Arbitrability." The Agency does not object to the minor changes, *see id.*, and they do not alter our analysis of the initial award.

Based on the foregoing, the Arbitrator concluded that the grievance was arbitrable under Article 25 of the parties' agreement.[2] *See id.* at 6.

## III. Positions of the Parties

### A. Agency's Exceptions

The Agency argues that an agency cannot waive the statutory prohibition against arbitration of the separation of a probationary employee. Exceptions at 10. The Agency also argues that the award is contrary to law. *See id.* at 8. In this regard, the Agency claims that the Statute bars grievances concerning the separation of a probationary employee "regardless of the issues involved," *id.* at 9 (citing *NTEU*, 25 FLRA 1067 (1987), *petition for review denied sub nom. NTEU v. FLRA*, 848 F.2d 1273 (D.C. Cir. 1988)). *Id.* at 10. The Agency also asserts that the award fails to draw its essence from Article 47, § 5, and Article 48, § 8, of the parties' agreement.[3] *Id.* at 12-13.

### B. Union's Opposition

As an initial matter, the Union asserts that, under §§ 7122(a) and 7121(f) of the Statute, the Authority lacks jurisdiction to consider the Agency's exceptions.[4] *See* Opp'n at 6. In this regard, the Union asserts that the Authority has "no jurisdiction to consider exceptions to awards involving major adverse or performance-based actions," particularly with regard to "allegations of discrimination brought under the parties' [agreement] as well as under 42 U.S.C. § 2000e." *Id.* at 7.

In addition, the Union maintains that the Arbitrator's determination that the Agency waived its arbitrability argument is consistent with Authority precedent. *See id.* at 11 (citing *U.S. Dep't of Transp., FAA, Airways Facility Serv., Nat'l Airway Sys. Eng'r Div., Okla. City, Okla.*, 60 FLRA 565 (2005) (*FAA*)). Further, the Union asserts that an employer "waives any objection to the arbitrator's jurisdiction by submitting an issue to arbitration." *Id.* at 10-11 (citing *Int'l Bhd. of Teamsters v. Wash. Emp'rs, Inc.*, 557 F.2d 1345, 1350 (9th Cir. 1977) (*Teamsters*)).

The Union also asserts that the award is not contrary to law. *See id.* at 8. In this connection, the Union states that it recognizes the "Authority's position" that "Congress did not intend . . . arbitration procedures to cover grievances concerning the termination of probationary employees," but that the Authority's "position . . . does not override the provisions of the [parties' agreement,]" which, according to the Union, permit the grievance to go to arbitration. *Id.* at 9.

Finally, the Union asserts that the award does not fail to draw its essence from the parties' agreement. *See id.* at 10.

## IV. Preliminary Matters

The Union asserts that the Authority lacks jurisdiction because the award pertains to an employee's termination. *See* Opp'n at 6-7. Under § 7122(a) of the Statute, the Authority lacks jurisdiction to review an arbitration award "relating to a matter described in § 7121(f)" of the Statute. The matters described in § 7121(f) include adverse actions, such as removals, which are covered under 5 U.S.C. § 4303 or § 7512 and are appealable to the MSPB. *See, e.g.*, *U.S. Dep't of the Army Headquarters, I Corps & Ft. Lewis, Ft. Lewis, Wash.*, 65 FLRA 699, 701 n.5 (2011). The Authority has held that awards pertaining to a *probationary employee's* termination do not relate to any of the matters described in § 7121(f). *See NTEU, Chapter 193*, 65 FLRA 281, 283 (2010); *Dep't of Def., Dependents Schs.*, 10 FLRA 312, 312 n.* (1982). The Union's assertion that the grievance involves discrimination does not provide a basis for reaching a different result here. Based on the foregoing, we conclude that we have jurisdiction to consider the Agency's exceptions.

The Union also asserts, and the Agency concedes, that the Agency's exceptions are interlocutory. *See* Opp'n at 7-8; Exceptions at 7. However, the Agency contends that the Authority may resolve the exceptions because they raise a plausible jurisdictional defect, the resolution of which would advance the ultimate disposition of the case. *See* Exceptions at 7. For the reasons set forth in the next section, we conclude that, although the exceptions are interlocutory, review is warranted.

## V. Analysis and Conclusions

The Authority "ordinarily will not consider interlocutory appeals." 5 C.F.R. § 2429.11. Thus, the Authority ordinarily will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration. *See, e.g., U.S. Dep't of the Air Force, Flight Test Ctr., Edwards Air Force Base, Cal.*, 65 FLRA 1013, 1014 (2011). However, the Authority will review

[2] The Arbitrator did not cite a specific provision of, or specific wording in, Article 25.

[3] Article 47 ("Grievance Procedure"), § 5 provides, in pertinent part, that the "Article does not apply to . . . separation of an employee during the probationary period." Exceptions, Attach., Tab C at 2-3. Article 48 ("Panel of Arbitrators"), § 8 states, in pertinent part, that "the arbitrator will have no authority to address any matters excluded from the grievance procedure regardless of the specific allegation(s) or issue(s) raised." *Id.* at 8.

[4] The pertinent portions of §§ 7122(a) and 7121(f) are set forth below.

interlocutory exceptions when the exceptions raise a plausible jurisdictional defect, the resolution of which would advance the ultimate disposition of the case. *See, e.g.*, *U.S. Dep't of Homeland Sec., U.S. Citizenship & Immigration Servs.*, 65 FLRA 723, 724 (2011) (*DHS*). Exceptions raise a plausible jurisdictional defect when they present a credible claim that the arbitrator lacked jurisdiction. *See, e.g.*, *U.S. Dep't of Labor*, 63 FLRA 216, 217 (2009) (*DOL*). In addition, the Authority has found that resolving such exceptions would advance the ultimate disposition of the case when doing so would "end the litigation." *DHS*, 65 FLRA at 725.

Although there is no dispute that the Agency's exceptions are interlocutory, we find, for the reasons stated below, that the Agency has presented a plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of the case. *See Gen. Servs. Admin., Ne. & Caribbean Region, N.Y.C., N.Y.*, 60 FLRA 452, 453 (2004) (Chairman Cabaniss writing separately).

As an initial matter, the Arbitrator found that the Agency's conduct precluded it from raising a challenge to arbitrability. *See* Award at 6. However, the Arbitrator's determination cannot stand if he lacked jurisdiction to resolve the matter in the first place. *Cf. U.S. Dep't of Agric., Food & Consumer Serv., Dall., Tex.*, 60 FLRA 978, 981 (2005) (then-Member Pope dissenting as to other matters) (*USDA*) ("[A] party's failure to present an issue to an arbitrator cannot have the effect of creating jurisdiction in an arbitrator over a matter that Congress . . . excluded."). Thus, we consider whether the Arbitrator had jurisdiction to resolve the grievance.

The Authority has held that a grievance concerning the termination of a probationary employee is excluded from the scope of negotiated grievance procedures as a matter of law. *See GSA* 58 FLRA at 589 (citing *AFGE, Local 2006*, 58 FLRA 297, 298 (2003) (*AFGE*); *Dep't of Health & Human Servs., SSA*, 14 FLRA 164, 164-65 (1984)). Accordingly, the merits of a probationary employee's termination are not subject to review in arbitration. *See AFGE*, 58 FLRA at 298. Additionally, the Authority has held that a proposal that entitled a probationary employee to file a grievance challenging his or her termination on the basis of discrimination was nonnegotiable. *See NTEU*, 25 FLRA 1067, 1078 (1987). In upholding the Authority's decision in *NTEU*, the United States Court of Appeals for the District of Columbia Circuit stated that "to allow the mere allegation of discrimination to give a discharged probationary employee access to the grievance procedure, with concomitant power of the arbitrator to order reinstatement, would substantially thwart Congress's intention to allow summary termination of probationary employees." *NTEU v. FLRA*, 848 F.2d at 1275.

The foregoing supports a conclusion that the Union may not grieve the Agency's decision to terminate the grievant, *see GSA*, 58 FLRA at 589, even by alleging that the Agency based its decision on discrimination, *see NTEU v. FLRA*, 848 F.2d at 1277. Further, the decisions cited by the Union are inapposite, as neither decision involved a grievance challenging a probationary employee's termination. *See Teamsters*, 557 F.2d at 1349-51; *FAA*, 60 FLRA at 568-69. Accordingly, the Arbitrator's determination that the grievance is arbitrable is contrary to law, and we set aside the award.[5]

## VI. Decision

The award is set aside.

[5] In these circumstances, it is unnecessary to resolve the Agency's essence claim. *See, e.g.*, *U.S. Dep't of Transp., FAA, Nashua, N.H.*, 65 FLRA 447, 450 n.3 (2011) (finding that it was unnecessary to address the agency's remaining exceptions after setting aside the award as contrary to law).