

72 FLRA No. 128

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

0-AR-5642

DECISION

February 10, 2022

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

I. Statement of the Case

In this case, we remind arbitrators that they cannot assert jurisdiction over a grievance that is barred under § 7121(d) of the Federal Service Labor-Management Relations Statute (the Statute).¹

An employee (the grievant) filed an equal employment opportunity (EEO) complaint alleging that the Agency created a hostile work environment by issuing him a proposed removal letter. Later, the Union filed a grievance similarly contending that the Agency engaged in discriminatory bullying and harassment by proposing to remove the grievant. Arbitrator Steven E. Kane issued an award finding the grievance arbitrable, and concluding that the proposed removal violated the parties' collective-bargaining agreement.

In its exceptions to the award, the Agency argues that § 7121(d) of the Statute bars the grievance from arbitration. Because the Union's earlier-filed EEO complaint addresses the same matter as the grievance, we find the grievance barred by § 7121(d). Therefore, we set aside the award.

¹ 5 U.S.C. § 7121(d).

II. Background and Arbitrator's Award

The grievant filed a formal EEO complaint asserting that the Agency subjected him to a racially hostile work environment. In pertinent part, the EEO complaint stated that the Agency engaged in discrimination by, among other things, "issu[ing] a proposed removal which was rescinded."² Later that week, the Union filed a grievance on behalf of the grievant. As relevant here, the grievance alleged that the Agency engaged in "bullying and harassment" by issuing the grievant a proposed removal.³ The parties could not resolve the grievance and proceeded to arbitration.

At arbitration, the Agency argued that the grievance and earlier-filed EEO complaint concerned the same matter – the proposed removal that the Agency subsequently rescinded and mitigated to a five-day suspension.

The Arbitrator framed the issues as follows: "Did the Agency violate the [c]ollective-[b]argaining [a]greement and relevant public policy by bullying and harassing the [g]rievant? If so, what is the appropriate remedy?"⁴

In the award, the Arbitrator found the grievance arbitrable without addressing the earlier-filed EEO complaint.⁵ On the merits, the Arbitrator concluded that the proposed removal of the grievant violated the master agreement because the Agency was not permitted to "use notices of proposed terminations as weapons."⁶ The Arbitrator further found that the Agency displayed discriminatory intent and caused the grievant

² Agency's Exceptions, Ex. 10, EEO Complaint (EEO Complaint) at 1.

³ Award at 8; *see also* Agency's Exceptions, Ex. 2, Sept. 5, 2018 Grievance at 6 (asserting that the Agency violated the master agreement by issuing the grievant a "proposed removal [that] was rescinded").

⁴ Award at 2; *see also id.* at 11 (excluding from the scope of arbitration "events and incidents which occurred more than [thirty] days prior to the filing of the [g]rievance").

⁵ The Arbitrator instead focused on a different grievance challenging the five-day suspension and found it "separate and distinct" from the grievance challenging the proposed removal. *Id.* at 10. The suspension grievance proceeded before a different arbitrator. *U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 72 FLRA 656, 656 (2022) (VA) (Member Abbott concurring; Chairman DuBester dissenting in part). In an award resolving that grievance, the arbitrator reduced the suspension to a letter of reprimand. *Id.* at 657. The Agency filed exceptions to the award, and the Authority denied the Agency's exceptions, in part, and granted them, in part. *Id.* at 657-59.

⁶ Award at 14.

“emotional injury” by proposing a removal.⁷ As a result, the Arbitrator sustained the grievance, in part.⁸

The Agency filed exceptions to the award on June 12, 2020, and the Union filed exceptions to the award on June 17, 2020. The Union filed an opposition to the Agency’s exceptions.

III. Preliminary Issue: The Authority has jurisdiction over the exceptions.

On August 10, 2020, the Authority’s Office of Case Intake and Publication issued an order directing the Agency and the Union to show cause why the Authority should not dismiss their exceptions for lack of jurisdiction under §§ 7122(a) and 7121(f) of the Statute. The order stated, “[I]t appears that the bullying and harassment claims advanced in arbitration are inextricably intertwined with a proposed removal.”⁹ In their responses, the Union and Agency argued that the Authority has jurisdiction to review the exceptions.¹⁰

The preliminary question before us is whether our lack of jurisdiction over removals means that we lack jurisdiction over an award concerning a *proposed* removal.

Our review of Authority precedent indicates that the issue of whether the Authority has jurisdiction over exceptions to an arbitration award concerning a proposed removal has not been consistently addressed. In *U.S. Patent and Trademark Office*, the Authority dismissed exceptions for lack of jurisdiction under §§ 7122(a) and 7121(f) because the award related to a proposed removal.¹¹ However, in *U.S. Department of Transportation, FAA*, the Authority held that it had jurisdiction to review the exceptions “because the grievant’s removal had only been proposed.”¹² We take this opportunity to clarify the Authority’s jurisdiction to

resolve exceptions to an award concerning a proposed removal.¹³

Under § 7122(a) of the Statute, the Authority lacks jurisdiction to resolve exceptions to an award “relating to” a matter described in § 7121(f) of the Statute.¹⁴ Matters described in § 7121(f) include serious adverse actions, such as removals, that are covered under 5 U.S.C. §§ 4303 or 7512.¹⁵

The Authority will determine that an award relates to a matter described in § 7121(f) “when it resolves, or is inextricably intertwined with,” a matter covered under § 4303 or § 7512.¹⁶ In making that determination, the Authority looks not to the outcome of the award but to whether the claim advanced in arbitration is one that would be reviewed by the Merit Systems Protection Board (MSPB) and, on appeal, by the United States Court of Appeals for the Federal Circuit.¹⁷

Previously, both the MSPB and Federal Circuit have held that the MSPB does not have jurisdiction over proposed removals.¹⁸ Therefore, consistent with the above standard, we find that the Authority has jurisdiction to resolve exceptions to an arbitration award where (1) the claim advanced in arbitration concerns a proposed removal,¹⁹ and (2) the award does not resolve, and is not inextricably intertwined with, any resulting

⁷ *Id.*

⁸ The Arbitrator fashioned his own backpay remedy after concluding that the master agreement did not support the Union’s requested remedy. *See id.* (finding that the contract did not “enable[] pecuniary damages” or provide for “tort-like remedies”); *see also id.* at 13 (noting that the grievance requested various forms of “pecuniary damages, non-pecuniary damages, . . . behavioral restraint[,] and restitution”).

⁹ Order to Show Cause (Order) at 2.

¹⁰ Agency’s Resp. to Order at 1 (arguing that the Authority has jurisdiction because the proposed removal was reduced to a five-day suspension “prior to the instant arbitration”); Union’s Resp. to Order at 1 (contending that the grievant’s proposed removal was one of many Agency actions evidencing bullying and harassment).

¹¹ 15 FLRA 243, 243-44 (1984) (*PTO*).

¹² 54 FLRA 480, 480 n.1 (1998) (*DOT*).

¹³ *See AFGE, Loc. 1454*, 63 FLRA 329, 329 n.1 (2009) (stating that the Authority would “await an appropriate case in which to resolve the apparent inconsistency between *DOT* and *PTO*”).

¹⁴ 5 U.S.C. § 7122(a).

¹⁵ *USDA, Agric. Mktg. Serv.*, 72 FLRA 156, 156 (2021) (Chairman DuBester concurring) (citing *AFGE, Loc. 491*, 63 FLRA 307, 308 (2009) (*Loc. 491*)).

¹⁶ *Loc. 491*, 63 FLRA at 308 (quoting *AFGE, Loc. 1013*, 60 FLRA 712, 713 (2009)).

¹⁷ *U.S. Dep’t of VA, Health Res. Ctr., Topeka, Kan.*, 71 FLRA 583, 584 (2020) (citing *U.S. Dep’t of the Treasury, U.S. Customs Serv.*, 57 FLRA 805, 806 (2002)).

¹⁸ *Cruz v. Dep’t of the Navy*, 934 F.2d 1240, 1243 (Fed. Cir. 1991) (“Because mere proposals to remove are not listed in [5 U.S.C.] § 7512, they are not appealable adverse actions in themselves and the [MSPB] has no jurisdiction over them.” (citing *Rose v. Dep’t of HHS*, 721 F.2d 355, 356 (Fed. Cir. 1983)); *LaMell v. Armed Forces Retirement Home*, 104 M.S.P.R. 413, 417 (2007) (“The [MSPB]’s jurisdiction does not extend to proposed removals.”); *Lethridge v. U.S. Postal Serv.*, 99 M.S.P.R. 675, 681 (2005) (“[T]he applicable statutes limit the [MSPB]’s jurisdiction to removals, not proposed removals.”).

¹⁹ *See U.S. DHS, U.S. CBP, JFK Airport, Queens, N.Y.*, 64 FLRA 841, 841-42 (2010) (reviewing exceptions to an award involving a proposed removal that was reduced to a suspension).

action covered under §§ 4303 or 7512.²⁰ But where a party files exceptions to an arbitration award that resolves or is inextricably intertwined with a removal, the Authority will continue to find that it lacks jurisdiction under § 7122(a) of the Statute.²¹

Applying that clarified standard here, we have jurisdiction to review the exceptions. The claim advanced in arbitration was whether the Agency engaged in bullying and harassment by issuing the grievant a proposed removal.²² Further, the resulting discipline was a suspension of less than fourteen days²³—a matter that is neither covered by §§ 4303 or 7512²⁴ nor at issue in this case.²⁵ Thus, we conclude that the Authority has jurisdiction to review the parties' exceptions to the award.²⁶

IV. Analysis and Conclusion: Section 7121(d) of the Statute bars the grievance.

The Agency argues that the award is contrary to § 7121(d) of the Statute.²⁷ Specifically, the Agency contends that the grievance is inarbitrable because the

²⁰ See *U.S. Dep't of VA, William Jennings Bryan Dom Veteran's Hosp.*, 34 FLRA 580, 583 (1990) (where agency reduced proposed removal to reduction in grade, the Authority found it was without jurisdiction because resulting reduction in grade was a matter covered under § 7512).

²¹ *E.g., AFGE, Loc. 1633*, 69 FLRA 637, 638 (2016) (dismissing exceptions for lack of jurisdiction under § 7122(a) of the Statute where award concerned a settlement agreement that held the grievant's removal in abeyance); *AFGE, Loc. 1770*, 62 FLRA 503, 504 (2008) (finding that a grievance concerning the grievant's ability to challenge a removal under the parties' agreement was inextricably intertwined with the grievant's removal).

²² See Award at 8 (“It is the Union’s position that presenting the [grievant with a] proposed termination letter was an act of ‘bullying and harassment[,]’ and that is the issue in this arbitration hearing.”), 10 (“[T]he Agency asserted that the proposed removal presented to [the grievant] was not grievable or arbitrable . . .”).

²³ *Id.* at 13 (finding that the “anticipated termination of [the grievant] was reduced to a five-day suspension”).

²⁴ 5 U.S.C. § 7512 (“This subchapter applies to . . . a suspension for more than [fourteen] days.”); *U.S. DOJ, INS, Jacksonville, Fla.*, 36 FLRA 928, 932 (1990) (“Suspensions of [fourteen] days or less are not covered under 5 U.S.C. §§ 4303 or 7512.”).

²⁵ See *VA*, 72 FLRA at 658 (resolving exceptions to an award involving these same parties regarding “whether the Agency had just cause to suspend the grievant for five days”).

²⁶ See *U.S. Dep't of the Interior, Nat'l Park Serv., Gettysburg Nat'l Mil. Park*, 61 FLRA 849, 852 (2006) (holding that a grievance concerning a revoked law-enforcement commission was not inextricably intertwined with a removal where “the award would not resolve an adverse action” because “the employee’s termination had previously been resolved in a separate proceeding”).

²⁷ Agency’s Exceptions Br. at 5-7.

grievant “elected EEO as a remedy . . . when he received [the] proposed removal.”²⁸ The Authority reviews questions of law de novo.²⁹ In conducting a de novo review, the Authority determines whether the arbitrator’s legal conclusions are consistent with the applicable standard of law.³⁰

Under § 7121(d), an employee may raise a “matter under a statutory [EEO] procedure or the negotiated procedure, but not both.”³¹ For purposes of § 7121(d), the term “matter” refers “‘not to the issue or claim of prohibited discrimination,’ but rather, to the personnel action involved.”³² Thus, § 7121(d) bars a grievance concerning a personnel action if that matter was “central” to an earlier-filed EEO complaint.³³ As relevant here, a proposed personnel action—such as the grievant’s proposed removal—constitutes a personnel action for purposes of § 7121(d).³⁴

Here, the grievant’s formal EEO complaint alleged that the Agency created a hostile work environment by “issu[ing] a proposed removal which was rescinded.”³⁵ Similarly, the Union’s later-filed grievance alleged that the Agency’s *issuance of a “proposed termination”* constituted discriminatory bullying and harassment.³⁶ And the Arbitrator concluded, in the resulting award, that the Agency violated the master agreement when it *issued the grievant a proposed-removal letter*.³⁷ Consequently, the Agency’s proposed removal of the grievant was the personnel action – or matter – at issue in both the EEO complaint and the grievance.³⁸ By filing a formal EEO complaint over the proposed removal, the grievant elected that procedure and could not subsequently raise that same matter using the parties’ negotiated grievance procedure.

²⁸ *Id.* at 6.

²⁹ *U.S. Dep't of the Air Force, Edwards Air Force Base, Cal.*, 72 FLRA 168, 170 n.16 (2021) (Chairman DuBester concurring) (citing *Bremerton Metal Trades Council, Int'l Brotherhood of Boilermakers, Loc. 290*, 71 FLRA 1033, 1034-35 (2020) (*Loc. 290*)).

³⁰ *Id.* (citing *Loc. 290*, 71 FLRA at 1035).

³¹ 5 U.S.C. § 7121(d).

³² *U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr.*, 71 FLRA 758, 759 (2020) (*Warner Robins*) (then-Member DuBester dissenting) (quoting SSA, *Off. of Hearings Operations*, 71 FLRA 123, 124 (2019) (then-Member DuBester dissenting)).

³³ *U.S. Dep't of HUD*, 42 FLRA 813, 817 (1991) (*HUD*).

³⁴ *U.S. DOJ, U.S. Marshals Serv.*, 23 FLRA 564, 567 (1986).

³⁵ EEO Complaint at 1 (emphasis added).

³⁶ Award at 8 (emphasis added).

³⁷ *Id.* at 14.

³⁸ See *Warner Robins*, 71 FLRA at 760 (holding that § 7121(d) barred the grievance because the factfinder would have to “address the same underlying personnel action” in both the grievance and EEO complaint).

In its opposition, the Union contends that “[t]he thrust of th[e] EEO complaint is [a] racial slur and the hostile working environment it created, not a proposed removal.”³⁹ However, this alleged distinction is inconsistent with the EEO complaint itself, which plainly states that the Agency discriminated against the grievant by “issu[ing] a proposed removal.”⁴⁰ Moreover, even if the EEO complaint alleged that other Agency conduct contributed to the hostile-work-environment claim, the proposed removal need only be “central” to both the complaint and grievance for the complaint to bar the grievance.⁴¹ Accordingly, the Union’s contention does not establish that the EEO complaint and grievance concerned different matters for purposes of § 7121(d).⁴²

Based on the above, we find that § 7121(d) of the Statute bars the grievance. Thus, we grant the Agency’s contrary-to-law exception and set aside the award.⁴³

V. Order

We set aside the award as contrary to § 7121(d) of the Statute.

Chairman DuBester, concurring:

I agree that we have jurisdiction to resolve the parties’ exceptions to the Arbitrator’s award. I also agree that it is appropriate to set aside the Arbitrator’s award as contrary to § 7121(d) of the Federal Service Labor-Management Relations Statute (the Statute).¹ I write separately to explain how I reach that conclusion.

The Union filed the grievance, which was signed by two individuals – a husband and wife.² The grievance concerns several matters that are covered by the husband’s previously filed Equal Employment Opportunity (EEO) complaint.³ However, the grievance also concerns several *other* matters, including alleged violations pertaining to the wife, who was not an EEO complainant.⁴ As the grievance includes matters and an individual that were not involved in the EEO complaint, I would not find that the EEO complaint bars the grievance in its *entirety*.

Nevertheless, the Arbitrator limited the scope of his review to the Agency’s issuance of a proposed removal to the husband.⁵ That matter was clearly covered by the husband’s prior EEO complaint.⁶ Thus, § 7121(d) of the Statute barred the Arbitrator from addressing that matter, and the award is deficient for that reason.

Accordingly, I concur.

³⁹ Union’s Opp’n at 8.

⁴⁰ EEO Complaint at 1.

⁴¹ *HUD*, 42 FLRA at 817.

⁴² See *U.S. Dep’t of the Navy, Naval Undersea Warfare Ctr. Div. Keyport, Keyport, Wash.*, 69 FLRA 292, 294 (2016) (finding a grievance barred by § 7121(d) where the earlier-filed EEO complaint concerned the same matter as the grievance but also raised additional allegations of unlawful discrimination).

⁴³ Because we set aside the award under § 7121(d), we need not consider the Agency’s remaining exceptions or the Union’s exception to the Arbitrator’s remedy. Agency’s Exceptions Br. at 3-5 (arguing that the award is contrary to a Federal Service Impasses Panel decision and order), 7-9 (arguing that the award violates public policy), 9-11 (arguing that the award is deficient because the Arbitrator did not find that the Agency violated the master agreement), 11-12 (arguing that the awarded remedy interferes with a separate arbitral proceeding); Union’s Exceptions at 4-5 (asserting that the Arbitrator failed to correctly apply Title VII of the Civil Rights Act of 1964 in fashioning a remedy for the Agency’s violation of the master agreement); see *U.S. Dep’t of the Army, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 70 FLRA 172, 173 (2017) (finding it unnecessary to address the remaining exceptions after setting aside the award as contrary to law).

¹ 5 U.S.C. § 7121(d).

² See Agency’s Exceptions, Ex. 2, Sept. 5, 2018 Grievance (Grievance) at 7.

³ Compare *id.* at 1-7 with Agency’s Exceptions, Ex. 10, EEO Complaint (EEO Complaint) at 1.

⁴ See Grievance at 1-7 (alleging Agency misconduct directed towards, and requesting remedies for, both the husband and wife).

⁵ See Award at 14 (“[T]he Agency must not use notices of proposed terminations as weapons. Whether intentional or mistaken, such conduct violates the rights of employees afforded by the contract.”).

⁶ See EEO Complaint at 1 (“[O]n September 5, 2018, the complainant was issued a proposed removal which was rescinded.”).