73 FLRA No. 130

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
SOUTHERN NEVADA HEALTH CARE SYSTEM
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1224
(Union)

0-AR-5835

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ORDER DISMISSING EXCEPTIONS

September 22, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator Mark J. Keppler issued an award finding: (1) the grievant voluntarily accepted a reassignment to a lower-graded, but higher-paid, position, based on Agency misinformation; (2) the Agency later wrongfully reduced the grievant's pay; and (3) the pay reduction was an adverse action under 5 U.S.C. § 7512 because the grievant reasonably and detrimentally relied on the Agency misinformation when he accepted the reassignment to the lower-graded position.

The Agency filed exceptions to the award on contrary-to-law, exceeded-authority, fair-hearing, and essence grounds. Because the award relates to a reduction in grade under 5 U.S.C. § 7512, we lack jurisdiction to review the Agency's exceptions, so we dismiss them.

II. Background and Arbitrator's Award

In August 2018, the grievant applied for a reassignment from a dental-hygienist position in Reno, Nevada to the same position in Las Vegas, Nevada. The grievant's Reno position was classified at the general-schedule grade (GS) 10, step 3, with a salary of $59,435.[1] The Agency advertised the Las Vegas position as a GS-9, step 9 with a salary range of $55,553 to $68,711. The grievant submitted a "Request for Change to [a] Lower Grade," seeking approval for a grade reduction.[2] The Agency offered, and the grievant accepted, the Las Vegas position at a GS-9, step 9 with a salary of $67,249.

In August 2021, after the grievant contacted the Agency's human-resources office about a step increase, the Agency informed him that the initial offer for the Las Vegas position should have been set at GS-9, step 7 rather than the offered and accepted GS-9, step 9. The Agency then reset the grievant's step to GS-9, step 7, with a salary of $64,325.

The Union grieved the matter and it went to arbitration. The parties stipulated to the issue as whether the Agency's "resetting of the [g]rievant's pay grade to a GS[-]9, [s]tep 7 [is] commensurate with Agency regulations and the parties' collective[-]bargaining agreement?"[3]

At arbitration, the Agency argued that it was required to reset the grievant's step because an Agency handbook mandates application of the "maximum payable rate rule" (rule) found in 5 C.F.R. § 531.221.[4] The Arbitrator acknowledged that the Agency's handbook "states that when there is a change to a lower grade, the . . . rule will be applied."[5] However, the Arbitrator found § 531.221 is discretionary because it states an agency "may" apply the rule.[6] Thus, the Arbitrator rejected the Agency's argument that it was required to reset the grievant's step.

The Arbitrator then considered the Union's claim that the matter concerned an adverse action under 5 U.S.C. § 7512. The Arbitrator cited *Paszek v. DOD* (*Paszek*), in which the Merit Systems Protection Board (MSPB) found an appellant's acceptance of, and relocation for, a lower-graded position was an involuntary reduction in grade because the appellant reasonably relied, to his detriment, on misinformation from agency officials regarding the step and pay at the lower grade.[7] Examining the grievant's acceptance of a lower-graded position, the

[1] Award at 6. The award states the position was classified at the GS-10, step 2 level, but the parties' filings indicate it was GS-10, step 3. *See* Exceptions Br. at 2-3; Opp'n Br. at 4.
[2] Exceptions, Ex. C at 4.
[3] Award at 2.
[4] Section 531.221(a)(1) provides, in relevant part: "An agency may apply the maximum payable rate rule as described in this section to determine an employee's payable rate of basic pay under the GS pay system at a rate higher than the otherwise applicable rate upon . . . transfer [or] reassignment."
[5] Award at 7 & n.1 (quoting Agency Post-Hr'g Br. at 4; Joint Ex. 4 at 19) (internal quotation marks omitted).
[6] *Id.* at 11 (internal quotation marks omitted).
[7] 50 M.S.P.R. 534, 538-39 (1991).

Arbitrator found that the offer for the Las Vegas position was within the posted salary range, and therefore, the grievant had no reason to suspect that the step offered was improper. The Arbitrator further found the grievant's decision to relocate was "based on the GS[-]9, [s]tep 9" offer and that the grievant detrimentally relied on the Agency's misinformation in the initial offer.[8] Further, the Arbitrator found that it was unreasonable for the Agency to reset the grievant's pay after three years.[9] Thus, applying *Paszek*, the Arbitrator concluded that the Agency's action "amounted to an 'adverse action,'" and he therefore sustained the grievance and awarded backpay.[10]

The Agency filed exceptions on September 9, 2022, and the Union filed an opposition on October 7, 2022.

III. Analysis and Conclusion: The Authority does not have jurisdiction over the Agency's exceptions.

Under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute), the Authority lacks jurisdiction to resolve exceptions to awards "relating to" a matter described in § 7121(f) of the Statute.[11] Matters described in § 7121(f) include adverse actions, such as a reduction in pay or grade, that are covered under 5 U.S.C. § 7512.[12] 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.[13] 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.[14] Therefore, the Authority looks to MSPB precedent to assess whether a matter is covered under § 7512.[15]

On September 22, 2022, the Authority's Office of Case Intake and Publication issued an order directing the Agency to show cause why the Authority should not dismiss its exceptions for lack of jurisdiction under §§ 7122(a) and 7121(f) of the Statute, as the award appears to relate to a § 7512 matter – a reduction in pay or grade.[16] In its response, the Agency asserts that the issue at arbitration, and thus the award, concerns a pay-setting that is contrary to law and regulation.[17] As such, the Agency argues, the award does not relate to a § 7512 matter, because 5 C.F.R. § 752.401(b)(15) (§ 752.401(b)(15)) explicitly excludes from MSPB-appealable adverse actions a "[r]eduction of an employee's rate of basic pay from a rate that is contrary to law or regulation."[18] We reject the Agency's argument, and conclude the Authority lacks jurisdiction to review its exceptions, for the following reasons.

First, at arbitration, the Union advanced the claim that the Agency's action was an adverse action under § 7512, specifically a reduction in pay or grade.[19] The MSPB has explained that "a reduction in grade will be considered involuntary, and an appealable adverse action, if the employee reasonably and materially relied on agency-supplied misinformation to [the employee's] detriment, based on an objective evaluation of the surrounding circumstances."[20] To establish a reduction in grade was involuntary, an employee must demonstrate that: "(1) [t]he agency provided misinformation; (2) the [employee] materially relied on that misinformation; and (3) the [employee's] reliance was [detrimental]."[21] The MSPB has held that where an employee alleges facts sufficient to satisfy this standard, it has jurisdiction to resolve an appeal from a reduction in grade.[22]

There is no dispute that the Arbitrator addressed these matters as part of the Union's adverse-action claim.[23] The Arbitrator found the matter involved "a textbook case

[8] Award at 11.
[9] *Id.* (discussing MSPB precedent recognizing that agencies may correct pay-setting errors "within a reasonable period of time," but cautioning that a "reasonable" time period "should be measured in weeks and not years" (quoting *Hudlow v. Dep't of the Treasury*, 8 M.S.P.R. 467, 469 (1981)).
[10] *Id.* at 11-12.
[11] 5 U.S.C. § 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).").
[12] *Id.* § 7121(f); *see also AFGE, Loc. 1738*, 71 FLRA 812, 813 (2020) (*Local 1738*) (citing 5 U.S.C. § 7121(f)).
[13] *Local 1738*, 71 FLRA at 813 (quoting *AFGE, Loc. 2004*, 59 FLRA 572, 573 (2004)).
[14] *Id.*
[15] *Id.* (citing *U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 65 FLRA 969, 972 (2011)).
[16] Order to Show Cause (SCO) at 1-2.
[17] Response to SCO (Resp.) at 2-5.
[18] *Id.* at 2 (quoting § 752.401(b)(15)).
[19] *See* Exceptions, Ex. C at 1-2, 7-8 (grievances alleging generally that Agency improperly reduced the grievant's pay); Exceptions, Ex. L1, Union Closing Br. (Union Br.) at 3-5, 7 (arguing that the reduction in pay was an adverse action under § 7512).
[20] *Fouks v. Dep't of VA*, 122 M.S.P.R. 483, 487-88 (2015) (*Fouks*) (citing *Elmore v. Dep't of Transp.*, 421 F.3d 1339, 1344 (Fed. Cir. 2005); *Harris v. Dep't of VA*, 114 M.S.P.R. 239, 243-44 (2010); *Herrin v. Dep't of the Air Force*, 95 M.S.P.R. 536, 542 (2004) (*Herrin*)); *see also Goodwin v. Dep't of Transp.*, 106 M.S.P.R. 520, 528 (2007) (*Goodwin*) (citations omitted); *Wise v. Dep't of the Navy*, 73 M.S.P.R. 95, 98 (1997) (*Wise*); *Paszek*, 50 M.S.P.R. at 538-39.
[21] *Herrin*, 95 M.S.P.R. at 542 (citing *Wise*, 73 M.S.P.R. at 98).
[22] *Goodwin*, 106 M.S.P.R. at 528-29.
[23] Award at 10 (noting Union's argument that the grievant be reinstated to his prior pay grade and step "pursuant to the principles of detrimental reliance" (quoting Union Br. at 6)).

of 'detrimental reliance,'" because the grievant accepted the position "with the very clear expectation" of being paid at a GS-9, step 9 level, and "if the Agency had offered [the position at] a GS-9, [s]tep 7 [level] . . . [the grievant] would never have taken the position."[24]

The Agency argues that this issue was "never grieved,"[25] and that the Union did not raise an adverse-action claim "until the Union's closing brief."[26] However, it is "well established that the Authority looks at the claim advanced in arbitration, not the grievance, when determining its jurisdiction" with respect to matters described in § 7121(f) of the Statute.[27] Moreover, while the Agency asserts that the Arbitrator improperly considered the Union's adverse-action claim because the Union did not timely raise it,[28] the MSPB considers those types of procedural arguments when resolving adverse-action claims.[29] Accordingly, because the claim advanced at arbitration concerned an adverse action, we conclude that the exceptions relate to a matter described in § 7121(f) over which the Authority lacks jurisdiction.

In reaching this conclusion, we find that the cases the Agency cites to support its contrary argument – *NLRB* (*NLRB*),[30] *AFGE, Local 1738* (*Local 1738*),[31] and *U.S. Department of the Treasury, IRS, Small Business/Self Employed Operating Division* (*IRS*)[32] – are distinguishable.[33] In *NLRB*, the Authority determined that the claim at arbitration was limited to whether the agency improperly denied a debt-waiver request,[34] and – unlike the case before us today – the dispute before the Authority did not involve a claim that the agency's reduction of the grievant's pay constituted an adverse action. In *Local 1738*, the issue at arbitration was whether the agency violated the parties' agreement and 5 C.F.R. § 531.221-.223 when it initially set the grievant's pay in a new position at less than she was promised.[35] In *IRS*, the claim at arbitration was whether the agency complied with 5 U.S.C. § 5334(b) and agency regulations by using the rate of pay in the grievant's permanent position, rather than the rate during a temporary promotion, when it set the grievant's initial rate of pay upon permanently promoting her.[36] None of these decisions addressed a claim that the agency's action constituted an adverse action under 5 U.S.C. § 7512.

The Agency also argues that, notwithstanding the Union's adverse-action claim, the Authority has jurisdiction to resolve the exceptions because the claim at arbitration involved whether the Agency reduced the grievant's pay to conform to 5 C.F.R. § 531.221. It is true the MSPB has determined that where an agency reduces an employee's pay "from a rate that is contrary to law or regulation[,]" the action is not an appealable adverse action under § 752.401(b)(15).[37] However, in addressing appeals contesting an agency's reliance on this provision, the MSPB has declined jurisdiction only if the agency meets its "burden of showing that it set the appellant's pay at a rate contrary to law or regulation."[38] As noted, in the award, the Arbitrator addressed this question by rejecting the Agency's assertion that it was required to reset the grievant's pay pursuant to 5 C.F.R. § 531.221. The Agency asks us to reverse this determination in resolving its exceptions, but the Authority previously has declined jurisdiction over exceptions to awards where – as here – resolving the exception would determine whether the

[24] *Id.* at 10-11 (quoting Union Br. at 6-7) (internal quotation marks omitted).
[25] Resp. at 4.
[26] *Id.* at 3.
[27] *U.S. Dep't of the Air Force, Hill Air Force Base, Utah*, 58 FLRA 476, 477 (2003); *see also EPA, Narragansett, R.I.*, 59 FLRA 591, 592 (2004) (concluding Authority lacked jurisdiction over removal claim where the union "specifically asserted to the [a]rbitrator that it was disputing the [a]gency's decision to remove the grievant," and where the arbitrator, "[i]n agreement with the [u]nion . . . ruled that the case involve[d] the [a]gency's removal of the grievant").
[28] Resp. at 4 (citing Exceptions Br. at 12-13).
[29] *See, e.g.*, *Fanelli v. Dep't of Agric.*, 109 M.S.P.R. 115, 120-23 (2008) (reviewing whether arbitrator's procedural-arbitrability determination was inconsistent with law or failed to draw its essence from the parties' collective-bargaining agreement); *Taylor v. Dep't of HHS*, 32 M.S.P.R. 342, 344 (1987) (reviewing claim that administrative law judge's acceptance of late submissions in action challenging a removal was procedural error); *see also Weng v. DOL*, 2014 WL 5304953, at *2-3 (M.S.P.B. Apr. 17, 2014) (reviewing claim that arbitrator improperly limited evidence in action alleging an involuntary resignation).
[30] 72 FLRA 133 (2021) (Chairman DuBester dissenting on other grounds).
[31] 71 FLRA 812.
[32] 65 FLRA 23 (2010).
[33] Resp. at 2-3.
[34] 72 FLRA at 134-35 & n.10.
[35] 71 FLRA at 812-13; *see also id.* at 813-14 (concluding the Authority had jurisdiction over the union's exceptions because "[t]he award does not concern any [a]gency action that reduced the grievant's grade or pay in the [new] position").
[36] 65 FLRA at 23.
[37] *Dekmar v. Dep't of Army*, 103 M.S.P.R. 512, 514 (2006) (*Dekmar*) (quoting § 752.401(b)(15)); *see also Paszek*, 50 M.S.P.R. at 538 (concluding that an "agency's correction of an administrative error in setting a pay-step level does not, in itself, constitute an action over which the [MSPB] has jurisdiction").
[38] *Dekmar*, 103 M.S.P.R. at 515; *see also Goodwin*, 106 M.S.P.R at 528 (where parties disputed whether appellant's voluntary acceptance of reduction in pay deprived MSPB of jurisdiction, MSPB remanded for further jurisdictional findings after concluding appellant alleged non-frivolous facts concerning reliance on agency misinformation "which, if proven, could establish [MSPB] jurisdiction over her appeal").

MSPB has jurisdiction over the claim advanced at arbitration.[39]

Moreover, even if we were to find the Authority had jurisdiction to consider whether the Agency was required to reset the grievant's pay to conform to 5 C.F.R. § 531.221, this question is inextricably intertwined with the Union's detrimental reliance adverse-action claim.[40] We base this conclusion on MSPB precedent, which holds that an agency is not absolved of liability for an employee's *involuntary* reduction in grade simply by showing that the agency reset the employee's pay to conform to a law or regulation.[41] Accordingly, even if the Authority were to conclude the Agency reduced the grievant's pay to conform to 5 C.F.R. § 531.221, that would not resolve the grievant's pending detrimental reliance adverse-action claim. Under these circumstances, we find that the question of whether 5 C.F.R. § 531.221 required the Agency to reset the grievant's pay is inextricably intertwined with the Union's adverse-action claim.[42]

For the foregoing reasons, consistent with MSPB precedent, we find the Arbitrator resolved matters concerning an involuntary reduction in grade, which is a § 7512 matter. Therefore, under § 7122(a) of the Statute, we do not have jurisdiction to review the Agency's exceptions.[43]

IV. Order

We dismiss the Agency's exceptions.

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[39] *Off. & Pro. Emps. Int'l Union, Loc. 268*, 55 FLRA 775, 777 (1999) (declining jurisdiction over exceptions to award in which arbitrator concluded agency had valid reason for denying grievant's request to withdraw buyout application because *whether* agency had valid reason is relevant to MSPB's determination of whether grievant's resignation was "tantamount to a removal within its jurisdiction"); *see also Dep't of Treasury, U.S. Customs Serv.*, 57 FLRA 805, 807 (2002) (declining jurisdiction over exceptions to award concluding grievant was non-probationary employee because "*if* the grievant was a non-probationary employee, then he would be subject to 5 U.S.C. § 7512, and the Union's claim could properly be asserted as the basis for an appeal to the MSPB" (emphasis added)); *id*. at 806 (noting that question of employee's probationary status was "an essential element" of union's claim, and MSPB "routinely resolves" the issue in addressing challenges to removal actions).

[40] *See U.S. DHS, U.S. CBP*, 66 FLRA 91, 93 (2011) (Member Beck dissenting) (*DHS*) (the Authority lacks jurisdiction "not only over awards that resolve adverse actions, but those that resolve issues *related* to adverse actions").

[41] *See, e.g.*, *Fouks*, 122 M.S.P.R. at 485-86 (concluding that agency's assertion that it demoted appellant to correct appellant's rate of basic pay within the meaning of § 752.401(b)(15) is not excluded from MSPB's jurisdiction where the agency's action "was more than just a correction to the appellant's rate of basic pay" and involved an allegation the appellant was subject to an involuntary reduction in grade); *Paszek*, 50 M.S.P.R. at 538-39 (finding that agency committed an adverse action by reducing employee's *grade* based on a material misrepresentation even where the administrative judge properly dismissed employee's reduction in *pay* claim based on § 752.401(b)(15)).

[42] *DHS*, 66 FLRA at 93 (explaining the Authority's application of § 7122(a) is based on the "policy objective of avoiding the multiplicity of litigation over one claim that might result if aspects of the same claim are reviewed in more than one forum").

[43] 5 U.S.C. § 7122(a); *see, e.g.*, *U.S. Dep't of Transp., FAA*, 43 FLRA 1271, 1274 (1992) (citing *U.S. Dep't of VA, William Jennings Bryan Dorn Veterans Hosp.*, 34 FLRA 580, 583 (1990)) (dismissing exceptions for lack of jurisdiction where matter concerned involuntary reduction in grade); *U.S. Dep't of Com., Bureau of Census, Data Preparation Div.*, 19 FLRA 740, 742 (1985) (citing *AFGE, Loc. 3369, AFL-CIO*, 16 FLRA 866, 867-88 (1984)) (dismissing exceptions for lack of jurisdiction because matter concerned alleged reduction in grade or pay).