73 FLRA No. 23

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 572
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
COMMANDER, NAVY REGION SOUTHEAST
MILLINGTON, TENNESSEE
(Agency)

0-AR-5714

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ORDER DISMISSING EXCEPTION

June 28, 2022

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

I. Statement of the Case

The Union filed an exception to Arbitrator Paul F. Gerhart's award finding that the Union's grievance was not arbitrable under the parties' collective-bargaining agreement. Because the award concerns the removal of a non-appropriated fund (NAF) employee, we find that we do not have jurisdiction over the exception and we dismiss it.

II. Background and Arbitrator's Award

The grievant was an assistant within the child and youth program (CYP). After several incidents involving the grievant and a child, the Agency suspended the grievant. The Agency forwarded the grievant's discipline to the Navy's Family Advocacy Program, which is an authority outside of the Agency. The Family Advocacy Program's procedures include review by the Incident Determination Committee (IDC). The IDC reviewed the incidents and determined that the grievant's actions met the criteria for child abuse. Based on the IDC's finding, the Agency removed the grievant for failing to meet the requirements of the CYP position. The grievant appealed the "IDC incident determination" using the relevant administrative procedures.[1]

The Union filed a grievance challenging the grievant's removal. The parties advanced the grievance to arbitration, agreeing to bifurcate arbitrability and merits issues. As relevant here, the Agency proposed the issue before the Arbitrator as "whether the finding of child abuse by the [IDC] against [the grievant] is a matter excluded from the grievance process."[2] While acknowledging the Union's assertion that the Agency's "removal/termination of [the g]rievant was premature since . . . [the grievant's] appeal is still pending," the Arbitrator also noted that the Union did not "appear to argue" with the Agency's formulation of the issue.[3]

Addressing this issue, the Arbitrator noted that the parties' agreement excludes from the grievance procedure "[a] specific action required by any authority outside of [the Agency] or any matter subject to final administrative review outside [the Agency]" and "[a]ny matter that has its own review or appeal procedure stated as part of its regulatory provisions."[4] The Arbitrator found that it was undisputed that the IDC was "outside [of the Agency]" and has its own appeal procedure.[5] On this basis, the Arbitrator found that the IDC's procedures and determinations were not subject to the parties' negotiated grievance procedure, and that the grievance was not arbitrable.

On March 8, 2021, the Union filed an exception to the award. On May 13, 2021, the Agency filed an opposition to the Union's exception.[6]

III. Analysis and Conclusion: The Authority does not have jurisdiction over the exception.

The Union asserts that the award is contrary to public policy, specifically the grievant's right to due process.[7] On March 26, 2021, the Authority's Office of Case Intake and Publication issued an order directing the Union to show cause why the Authority should not dismiss its exception for lack of jurisdiction under §§ 7122(a) and 7121(f) of the Federal Service Labor-Management Relations Statute (the Statute) because "it appears that the

[1] Award at 19.
[2] *Id.*
[3] *Id.* The parties disputed whether the grievant had withdrawn her appeal before the IDC. *Id.* at 20.
[4] *Id.* at 20 (quoting Art. 14, § 9(C)(1)(i), (t)).
[5] *Id.*
[6] On April 15, 2021, the Agency filed a motion requesting an extension of time to file an opposition to the Union's exceptions. On April 29, 2021, the Authority's Office of Case Intake and Publication granted the Agency's motion. Accordingly, the Agency's opposition is timely.
[7] Exception Br. at 4-8.

claim advanced in arbitration is inextricably intertwined with a removal."[8]

In its response to the show-cause order, the Union argues that the Authority has jurisdiction to review the exception because the Union's claims relate to the due-process failures of the IDC and not to the grievant's removal.[9] In support of its argument, the Union asserts that "the bifurcation" of its due process claims and the Agency's arbitrability claims from the merits issues "served to separate the [g]rievant's removal claim."[10]

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]."[11] The matters described in § 7121(f) are those "covered under [5 U.S.C. §§] 4303 and 7512," and include removals.[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 § 4303 or § 7512 matter.[13]

The Authority has found that an arbitrator's determination of arbitrability issues under a collective-bargaining agreement is inextricably intertwined with the removal action.[14] Here, the exception concerns the Arbitrator's determination that the grievance is not arbitrable under the parties' negotiated grievance procedure. The Arbitrator's arbitrability determination is dispositive of the removal claim and is, therefore, inextricably intertwined with that claim.[15]

In support of its exception, the Union also argues that the Authority has jurisdiction because the grievant was a "[NAF] . . . employee with no [Merit System Protection Board (MSPB)] appealable rights."[16] However, the matters covered under § 7121(f) include "similar" matters that "arise under other personnel systems,"[17] which the Authority has held includes removals of NAF employees.[18]

Here, it is undisputed that the grievant is a NAF employee.[19] Further, the grievant's removal arises under an "other personnel system." On this point, we note that the Department of Defense (DOD) is permitted to establish morale, welfare, and recreation (MWR) programs as NAF instrumentalities and treat the employees as NAF employees.[20] Pursuant to this statutory scheme, these NAF employees are excluded by 5 U.S.C. § 2105(c) from the definition of "employee" in regard to the application of laws administered by the Office of Personnel Management (OPM), which includes 5 U.S.C. §§ 4303 and 7512.[21]

Moreover, the parties recognize that DOD NAF employees are subject to different rules than appropriated-fund employees.[22] Article 41 of the parties' agreement, which applies only to NAF employees, states

[8] Order to Show Cause at 2. The Agency filed a Motion for Leave to File a Reply to the Union's Response to Order to Show Cause. Because we dismiss the Union's exception, we find it unnecessary to address the Agency's motion.

[9] Union's Response to Order to Show Cause at 3-4.

[10] *Id.* at 4.

[11] 5 U.S.C. § 7122(a).

[12] *Id.* § 7121(f); *see, e.g.*, *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 88, 89 (2021) (*Pershing VA*) (Chairman DuBester concurring) (citing *AFGE, Loc. 933*, 71 FLRA 521, 521 (2020); *AFGE, Loc. 491*, 63 FLRA 307, 308 (2009)).

[13] *Pershing VA*, 72 FLRA at 89 (citing *U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 533, 534 (2020)).

[14] *U.S. Dep't of the Interior, Bureau of Indian Affs., Sw. Region, Albuquerque, N.M.*, 63 FLRA 2, 3 (2008) (concluding that, "[a]s in the cases involving procedural arbitrability cited above, here, the [a]rbitrator's determination that the grievance was substantively arbitrable under the [parties' agreement] is inextricably intertwined with the grievance over the grievant's removal under 5 U.S.C. § 7512," because "the grievance concerns whether the grievant can grieve a removal action under the parties' agreement and, if so, whether the grievant's removal was for just cause" (citing *AFGE, Loc. 1770*, 62 FLRA 503, 504 (2008))).

[15] *Id.*

[16] Exception Br. 2-3.

[17] 5 U.S.C. § 7121(f).

[18] *AFGE, Loc. 429*, 59 FLRA 545, 546 (2003) (*Local 429*); *U.S. Dep't of the Navy, Navy Resale Activity, Guam*, 40 FLRA 515, 517 (1991) (*Guam*); *NAGE, Loc. R5-169*, 36 FLRA 348, 350-51 (1990) (*NAGE*); *AFGE, Loc. 1533, AFL-CIO*, 17 FLRA 1082, 1082-83 (1985) (*Local 1533*).

[19] Exceptions Br. at 3; *see also* Award at 2 (quoting grievance).

[20] *See generally* 10 U.S.C. § 2491; *see also id.* § 2491(c)(4) ("In this subsection, the term 'an employee of a nonappropriated fund instrumentality' means an employee described in section 2105(c) of title 5.").

[21] 5 U.S.C. § 2105(c)(1) ("[a]n employee paid from nonappropriated funds of . . . instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of . . . (1) laws administered by the Office of Personnel Management"); *see also McAuliffe v. Rice*, 966 F.2d 979, 980 (5th Cir. 1992) (stating that "it was never the intent of Congress that NAF[] employees be entitled to the same levels of employment protection as are other federal employees" and explaining that this was codified in 5 U.S.C. § 2105 and, consequently, the Civil Service Reform Act of 1978); *AFGE, Loc. 2921*, 47 FLRA 446, 451 (1993) ("Where Congress has made NAF[] employees subject to laws applicable to other Federal employees, it has done so 'by expressly including [NAF[] employees] within the coverage of specific laws.'" (quoting *Perez v. Army & Air Force Exch. Serv.*, 680 F.2d 779, 787 (D.C. Cir. 1982))).

[22] Exceptions, Attach. 3 (CBA) at 114 ("There are inherent differences in funding, programs and personnel policies, practices and procedures between appropriated fund (APF) employees and [NAF] employees.").

that "NAF employees are all governed by Department of Defense Instructions (DoDIs). They are also governed by CNIC Instruction 5300.2 (or any subsequent revision), Commander Navy Installations Command Non-appropriated Fund Personnel Manual" (the Instruction).[23] Section 106(a) of the Instruction states that, pursuant to 5 U.S.C. § 2105, "NAF employees are Federal employees within DOD, but are not subject to many of the [Human Resource] laws administered by OPM for [appropriated fund] employees" and notes that § 2105 "explains this status and identifies the OPM administered laws that cover NAF employees unless otherwise specifically stated."[24] As a CYP employee, the grievant was covered by the Instruction, and the provisions therein governing removals.[25] Therefore, consistent with Authority precedent, we conclude that the grievant was covered by "another personnel system."[26]

Additionally, Article 41 lists which provisions of the parties' agreement are applicable to NAF employees, and which are not.[27] Among the provisions that are not applicable are disciplinary/adverse actions and the grievance procedures.[28] Instead, the disciplinary and adverse action policy for NAF employees is set forth in Sections 504-511 of the Instruction.[29] Section 505 permits NAF employees to grieve non-severe disciplinary actions (up to suspensions of less than thirty days).[30] However, severe disciplinary actions, including removal for performance or conduct reasons, are processed differently, pursuant to Section 507.[31] This consists of a two-step process culminating in a final decision by the Commander, Navy Installations Command and no further appeal rights.[32]

We recognize, as the Union argues, that the grievant may lack MSPB rights.[33] However, the Authority has found that this lack of appeal right to the MSPB does not confer jurisdiction on the Authority.[34] The grievant's removal is a "matter" similar to one covered by § 7121(f), and because it arises in a personnel system not governed by Title 5, we find that the Authority lacks jurisdiction over the Union's exception.[35] Therefore, we dismiss it.

IV. Decision

We dismiss the Union's exception.

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[23] *Id.*; *see also* Instruction, *available at* https://www.google.com/search?client=firefox-b-1-d&q=CNIC+Instruction+5300.2 (last visited June 24, 2022). Pursuant to 5 C.F.R. § 2429.5, the Authority may take official notice of the Instruction.

[24] Instruction at 1-5; *see also* 5 U.S.C. § 2105.

[25] *See* Instruction at 1-1 ("The policies and procedures prescribed in this manual apply to NAF employees of CNIC including military and civilian Morale Welfare and Recreation (MWR) activities.").

[26] *Army & Air Force Exchange Service*, 33 FLRA 815, 817 (1988) (*Army*) ("NAF employees are under another personnel system pursuant to 5 U.S.C. § 2105(c)."); *see also NAGE, Loc. R5-82*, 43 FLRA 25, 44-45 (1991) ("NAF employees are not covered by laws which apply to employees within the general Federal Service, including laws dealing with removals and other adverse actions in 5 U.S.C. §§ 7501–7513. Rather, procedural protections for removals or other adverse actions affecting NAF employees are established by regulation of the agency employing them." (citing *Army*, 33 FLRA at 817-18)).

[27] CBA at 114-16.

[28] *Id.* at 116.

[29] Instruction at 5-6 to 5-23; *see also* CBA at 126 (stating that "[a]ny matter that has its own review or appeal procedure stated as part of its regulatory provisions" is excluded from the negotiated grievance procedure).

[30] Instruction at 5-12.

[31] *Id.* at 5-16 to 5-17; *see also id.* at 5-13 (listing removal as a severe disciplinary action).

[32] *Id.* at 5-16 to 5-17.

[33] *Id.* at 1-5 to 1-6 (stating that the MSPB has found that "NAF employees have no statutory or regulatory right of appeal to the MSPB because NAF employees . . . are not covered by the definition of employee set forth in 5 U.S.C. [§] 7511" and are also not covered by "5 U.S.C. [§] 7121(d) and (e)"); *see also Mills v. MSPB*, 51 F. App'x 14, 16 (Fed. Cir. 2002) (finding MSPB had no jurisdiction over NAF employee's termination).

[34] *See, e.g.*, *U.S. Dep't of VA, Med. Ctr., Dayton, Ohio*, 70 FLRA 803, 804 (2018) (Member Abbott dissenting) (citations omitted) ("The Authority has not held that, if the MSPB lacks jurisdiction over a claim, then the Authority *must* have jurisdiction over that claim."); *AFGE, Loc. 12*, 65 FLRA 1009, 1011 (2011) (noting that "the possibility that there may be no forum in which a party may challenge an arbitration award does not provide a basis for finding that the Authority has jurisdiction" (citing *U.S. Dep't of Com., Pat. & Trademark Off., Arlington, Va.*, 61 FLRA 476, 478 (2006) ("As a general matter, the Authority has previously recognized that, under the statutory scheme enacted by Congress, there may be some awards that are not reviewable at all."))); *U.S. Dep't of VA, Med. Ctr., Newington, Conn.*, 53 FLRA 440, 443 (1997) ("We recognize that our refusal to assert jurisdiction may leave the [a]gency without a forum to challenge the [a]rbitrator's award.").

[35] 5 U.S.C. § 7122(a); *Local 429*, 59 FLRA at 546 (finding no jurisdiction because removal of a NAF employee was "an action similar to a removal under 5 U.S.C. § 7512"); *Guam*, 40 FLRA at 517-18 (same and noting that a NAF employee's removal arises "under another personnel system"); *NAGE*, 36 FLRA at 351 (same); *Local 1533*, 17 FLRA at 1083 (same); *see also Pan. Canal Comm'n*, 49 FLRA 1398, 1401-02 (1994) (finding no jurisdiction where employee was in an "other personnel system," not covered by 5 U.S.C. § 7512 and noting that because the grievance "concerns a matter that, if a covered employee were involved, could have been referred to the MSPB and, on appeal, to the United Stated Court of Appeals for the Federal Circuit, the grievance concerns a matter which is similar to a matter covered by 5 U.S.C. § 7512").