66 FLRA No. 155

UNITED STATES
DEPARTMENT OF THE AIR FORCE
POPE AIR FORCE BASE, NORTH CAROLINA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1770
(Union)

0-AR-4830

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DECISION

July 27, 2012

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

I. Statement of the Case

The Agency filed exceptions to an award of Arbitrator Stanley H. Sergent under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions. The Arbitrator sustained the grievance because he found that the Agency was required to bargain with the Union before unilaterally implementing alternative work schedules (AWS). Award at 38. The Arbitrator ordered the parties to determine the appropriate remedy and retained jurisdiction only to resolve that issue if the parties were unable to reach an agreement. *Id.* at 38-39. For the reasons set forth below, we dismiss the exceptions, without prejudice, as interlocutory.

II. Background and Arbitrator's Award

As a result of a base realignment and closure (BRAC), "employees formerly represented by AFGE[,] Local 2364 . . . were absorbed into" AFGE, Local 1770's bargaining unit, and AFGE, Local 2364 was dissolved. *Id.* at 6. Despite this realignment, such employees continued to be governed by a memorandum of agreement between the Agency and AFGE, Local 2364. *Id.* The Union later submitted ground-rules proposals to the Agency to negotiate a new agreement covering all bargaining-unit employees who worked at the Agency. *Id.* Although "[a]n agreement over ground rules was reached and signed by the Union and [the] Agency locally," it was rejected on Agency head review. *Id.*

The Union presented a grievance claiming that the Agency violated the parties' agreement and various laws and regulations by: (1) unilaterally implementing AWS and compressed work schedules (CWS) and (2) scheduling bargaining-unit employees to work overtime without proper compensation. *Id.* at 3. The Union requested various remedies, such as backpay and a cease and desist order. *Id.* at 3-4. The matter was unresolved and was submitted to arbitration. *Id.* at 4.

The Arbitrator framed the following issues:

> 1. Procedural Issues
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> a. Is the grievance procedurally non-arbitrable on the grounds that the Union failed to comply with the requirements set out in Article 33, paragraph 9 of the [parties'] [a]greement for filing a group grievance?
>
> b. Does the Arbitrator have jurisdiction over that portion of the grievance concerning overtime pay for bargaining[-]unit employees who worked in excess of eight hours a day and/or forty hours in a work week?
>
> 2. Substantive Issue
>
> Did the Agency violate the [parties'] [a]greement or any applicable law or rule or regulations by failing to bargain with the Union with regard to implementing and maintaining [AWS] and [CWS]; and/or [sic]

Id. at 5.

With regard to the procedural issues, the Arbitrator found that the grievance was arbitrable. *See id.* at 22-27. The Arbitrator concluded that the Agency's contention "that the grievance should be dismissed on the ground that the Union failed to observe the requirement[s] for filing" a group grievance was without merit. *Id.* at 22. In this regard, the Arbitrator determined that the grievance was filed timely as a Union grievance. *Id.* at 22-25. Also, the Arbitrator rejected the Agency's contention that he lacked jurisdiction to decide whether bargaining-unit employees worked overtime without proper compensation because the Union already had presented another grievance concerning that issue to a different arbitrator. *Id.* at 25-26. Moreover, the Arbitrator noted that, "to the extent this matter potentially involve[d] an issue of damages, the parties . . . agreed to defer that issue until [he] rule[d] on the liability issue." *Id.* at 26.

With regard to the merits, the Arbitrator concluded that the Agency violated the parties' agreement and applicable law, rules, and regulations by unilaterally implementing AWS and CWS. *See id.* at 28. Specifically, the Arbitrator determined that the language of the parties' agreement, namely Article 19, did not confer authority expressly "on the Agency to implement and maintain AWS." *Id.*; *see also id.* at 31-32. Moreover, the Arbitrator found that the Agency failed to demonstrate "that a past practice regarding the use of AWS" existed, but that, even if the Agency had established a past practice, it was not incorporated explicitly into the parties' agreement. *Id.* at 34; *see also id.* at 33, 35-38.

Finally, the Arbitrator requested that the parties resolve the issue concerning the appropriate remedy. *Id.* at 38. According to the Arbitrator, "the parties . . . agreed to defer the damages issue pending the outcome of [his] determination as to the liability issues." *Id.* Additionally, the Arbitrator retained jurisdiction "for the limited purpose of resolving any issues of damages upon which the parties [were] unable to reach an agreement." *Id.* at 39; *see also id.* at 38.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the award is contrary to law, rule, or regulation. Exceptions at 5-13. Among other things, the Agency maintains that the Arbitrator erred by ignoring the statutory definition of "collective bargaining agreement" contained in 5 U.S.C. § 6130(a) and by misapplying and relying heavily on the term "expressly" contained in that statute. *See, e.g.*, *id.* at 5-6. Moreover, the Agency argues that the Arbitrator's determination that the Agency failed to establish that a past practice regarding AWS existed is contrary to precedent. *See id.* at 7-10.

The Agency also claims that the award is based on nonfacts. *Id.* at 13-16. Among other things, the Agency contends that the Arbitrator improperly found that the Union immediately objected to the Agency's method of approving AWS requests and requested to bargain with the Agency. *Id.* at 14. In addition, the Agency asserts that the Arbitrator improperly found that the Union presented its grievance as a Union, as opposed to a group, grievance and that bargaining-unit employees of AFGE, Local 2364 were "absorbed [into] AFGE[,] Local 1770 as a result of the Congressional BRAC mandate." *Id.* at 16.

Furthermore, the Agency maintains that the Arbitrator exceeded his authority. *Id.* at 17-18. According to the Agency, the Arbitrator failed to resolve a submitted issue, namely "whether the remedy . . . should be [i]nstitutional in nature." *Id.* at 17. Moreover, the Agency argues that the Arbitrator awarded relief to non-grievants. *Id.* at 18.

B. Union's Opposition

As a preliminary matter, the Union contends that the Agency's exceptions are interlocutory. Opp'n at 13-14. According to the Union, "[t]he award does not constitute a complete determination of all issues submitted to arbitration" because the Arbitrator did not resolve the issue concerning the appropriate remedy. *Id.* at 14; *see also id.* at 13.

Also, the Union maintains that the award is not contrary to law, rule, or regulation. *Id.* at 14-27. The Union asserts, among other things, that the Agency merely disagrees with the factual findings and legal conclusions made by the Arbitrator. *Id.* at 14-16. According to the Union, the Arbitrator properly interpreted the term "expressly" contained in 5 U.S.C. § 6130(a). *Id.* at 18-19. Moreover, the Union claims that the Arbitrator's factual findings, which are entitled to deference, support his legal conclusion that the Agency failed to establish the existence of a past practice. *Id.* at 20-23.

The Union argues that the award is not based on nonfacts. *Id.* at 27-36. Among other things, the Union asserts that the alleged nonfacts were disputed at arbitration. *Id.* at 27-28. Additionally, the Union maintains that the Arbitrator's findings concerning whether it filed a Union, as opposed to a group, grievance and whether bargaining-unit employees were "absorbed into" AFGE, Local 1770 as a result of a BRAC are not central facts underlying the award. *See id.* at 35-36.

Finally, the Union claims that the Arbitrator did not exceed his authority. *Id.* at 36-40. The Union argues that the Arbitrator did not fail to resolve a submitted issue because the parties agreed to bifurcate the proceedings and to decide the issue of damages at a later date. *Id.* at 37-38, 39-40. Moreover, the Union asserts that the Arbitrator did not award relief to non-grievants because the Arbitrator has not yet awarded a remedy. *See id.* at 40.

IV. Order to Show Cause

In an Order to Show Cause (Order), the Authority directed the Agency "to show cause why its exceptions should not be dismissed as interlocutory." Order at 1. The Authority indicated that, because "the Arbitrator's statement of the substantive issue [was] incomplete," it was unclear whether the issue regarding the appropriate remedy was before the Arbitrator for resolution. *Id.* at 3. However, the Authority also stated that, because "the Arbitrator directed the parties to attempt to resolve the damages issue and retained jurisdiction to resolve any disputes over damages, it appear[ed] that the parties submitted the remedy issue to arbitration" and that the award did not constitute a complete determination of all submitted issues. *Id.*

In response, the Agency asserts that interlocutory review is warranted because of the existence "of a plausible jurisdictional defect, the resolution of which would advance [the] ultimate disposition of the case." Response at 3. According to the Agency, the Arbitrator lacked jurisdiction based on Article 33 of the parties' agreement because the Union failed to follow the required steps for filing a group grievance. *Id.* In addition, the Agency argues that extraordinary circumstances warrant interlocutory review. *Id.* at 4-6. Specifically, the Agency maintains that a subsequent hearing on damages would be costly and would "not promote an efficient government [because] the appropriate remedy in this case, based on the nature of the grievance being filed as a Union grievance, is an institutional remedy." *Id.* at 4. The Agency claims that, because Congress reduced the Agency's budget, and the President instituted a two-year pay freeze for all federal civilian employees, the Authority should address this interlocutory appeal so that the Agency is not required to expend "more money on an additional arbitration hearing that may not be required." *Id.* at 5. Moreover, the Agency contends that the Authority's discussion regarding extraordinary circumstances in *United States Department of the Air Force, 375th Combat Support Group, Scott Air Force Base, Illinois*, 50 FLRA 84 (1995) (*Scott AFB*) applies to this case. Response at 6.

In reply, the Union argues that the exceptions are interlocutory because the Arbitrator did not resolve all of the submitted issues. Reply at 3-4. According to the Union, the issue concerning the appropriate remedy clearly was before the Arbitrator, and the Arbitrator did not resolve that issue. *Id.* at 4 (maintaining that, because "the Arbitrator directed the parties to attempt to resolve the damages issue and retained jurisdiction to resolve any disputes over damages," it was clear that "the parties submitted the remedy issue to arbitration").

Also, the Union contends that the Agency has not shown the existence of a jurisdictional defect because the Agency does not allege that the Arbitrator lacked jurisdiction over the grievance as a matter of law, but, rather, asserts that the Arbitrator lacked jurisdiction under the parties' agreement. *Id.* at 4-6. The Union claims that the Agency has failed to establish "that interlocutory review will advance the ultimate disposition of the case" because, "even if the Arbitrator did not have jurisdiction over some or even all bargaining[-]unit employees, he would have jurisdiction to fashion an institutional remedy and/or other remedy for those bargaining[-]unit employees deemed covered." *Id.* at 6-7. Further, the Union maintains that the Agency has not demonstrated that extraordinary circumstances warrant consideration of this interlocutory appeal because, among other things, the Agency's assertions merely address "the ordinary and usual considerations of all litigation," and "the costs expected in any future hearings on damages" would be miniscule when compared with the Agency's budget. *Id.* at 7-8.

V. Analysis and Conclusion: The Agency's exceptions are interlocutory.

Section 2429.11 of the Authority's Regulations provides: "the Authority . . . ordinarily will not consider interlocutory appeals." 5 C.F.R. § 2429.11. In arbitration cases, this means that ordinarily the Authority will not resolve exceptions filed to an arbitration award unless the award constitutes a complete resolution of all of the issues submitted to arbitration. *E.g., U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs.*, 57 FLRA 924, 926 (2002). In other words, the Authority ordinarily will not resolve exceptions to an arbitration award until the arbitrator has issued a final decision on the entire proceeding. *E.g., id.*

An arbitration award that postpones the determination of an issue submitted does not constitute a final award subject to review. *E.g., id.* Exceptions are considered interlocutory when the arbitrator has declined to make a final disposition as to a remedy. *E.g., id.* Similarly, the parties' agreement to conduct a separate hearing on a threshold issue does not operate to convert the arbitrator's threshold ruling into a final award subject

to exceptions being filed under § 7122 of the Statute. *E.g.*, *id.*

We find that the Agency's exceptions are interlocutory. Here, the Union argues that the issue concerning the appropriate remedy was submitted to arbitration. *See* Reply at 4. The Union also maintains that the Arbitrator did not order a remedy, but, rather, required the parties to determine the appropriate remedy and retained jurisdiction to resolve any disputes concerning the remedy if the parties were unable to reach an agreement. *See id.* The Agency does not contest the Union's contentions. Moreover, it is clear from the record that the parties submitted the issue concerning the appropriate remedy to arbitration because the Arbitrator indicated that the parties agreed to bifurcate the proceedings by deferring that issue until the Arbitrator ruled on the issue regarding the Agency's liability. *See* Award at 26, 38; *see also NTEU*, 66 FLRA 696, 698 (2012) (finding that the issue concerning the appropriate remedy clearly was submitted to arbitration when the arbitrator indicated that the parties agreed to defer that issue until he decided the issue regarding the merits of the grievance); *cf. U.S. Dep't of the Treasury, Customs Serv., Tucson, Ariz.*, 58 FLRA 358, 359 (2002) (*Customs Serv.*) (taking into account that the arbitrator did not frame the issues to preclude consideration of a monetary remedy in determining that the issue concerning the appropriate remedy was submitted to arbitration). Thus, the Arbitrator did not resolve all of the submitted issues. *See U.S. Dep't of the Air Force, Air Force Flight Test Ctr., Edwards Air Force Base, Cal.*, 65 FLRA 1013, 1014 (2011) (concluding that the arbitrator did not resolve the remedy issue, which was submitted to arbitration, when he directed the parties to fashion the appropriate remedy and retained jurisdiction in the event the parties were unable to resolve the remedy issue); *Customs Serv.*, 58 FLRA at 359 (same).

In addition, that the Arbitrator declined to resolve the remedial aspects of the award, pursuant to the parties' agreement to bifurcate the proceedings, does not convert the initial part of the award into a final award. *See* Award at 26, 38-39; *see also U.S. Dep't of Transp., Fed. Aviation Admin., Wash., D.C.*, 60 FLRA 333, 334 (2004). Consequently, the Agency's exceptions are interlocutory. *See U.S. Dep't of the Treasury, Bureau of Engraving & Printing, W. Currency Facility, Fort Worth, Tex.*, 58 FLRA 745, 746 (2003) (*Treasury*).

The Authority will review interlocutory exceptions only if there are extraordinary circumstances warranting review. *See U.S. Dep't of Labor, Bureau of Labor Statistics*, 65 FLRA 651, 654 (2011) (*Labor*). Extraordinary circumstances have been found by the Authority only in situations in which a party raised a plausible jurisdictional defect, the resolution of which would advance the ultimate disposition of the case. *See U.S. Dep't of Homeland Sec., U.S. Citizenship & Immigration Servs.*, 65 FLRA 723, 725 (2011) (determining that the Authority has found extraordinary circumstances only in situations in which it was alleged that the arbitrator lacked jurisdiction, as a matter of law, over the subject matter of the grievance). However, the Authority repeatedly has declined to extend interlocutory review to alleged jurisdictional defects that do not preclude arbitration of the grievance as a matter of law. *See id*. We conclude that the Agency has failed to demonstrate extraordinary circumstances warranting review of its interlocutory exceptions.

In this regard, the Agency has failed to raise a plausible jurisdictional defect. While the Agency asserts that the Arbitrator lacked jurisdiction over the grievance based on Article 33 of the parties' agreement, the Agency's assertion does not present a jurisdictional issue arising pursuant to a statute. As discussed previously, the types of cases in which the Authority has reviewed interlocutory exceptions "have involved jurisdictional issues that arise pursuant to a statute." *See Labor*, 65 FLRA at 655 (finding that the agency's contention that the grievance was not arbitrable under the parties' agreement did not constitute a plausible jurisdictional defect warranting interlocutory review); *Treasury*, 58 FLRA at 746 (concluding that the Authority would not consider a purely contractual limit upon the substantive arbitrability of a particular matter as a plausible jurisdictional defect for which it would provide interlocutory review). Thus, the Agency has not raised a plausible jurisdictional defect.

In addition, the Agency has alleged no other extraordinary circumstances warranting review of its interlocutory exceptions. Furthermore, while the Agency relies on *Scott AFB* in arguing that extraordinary circumstances warrant review of its exceptions, that case is inapposite because it does not concern a request for interlocutory review, but, rather, a request for reconsideration. *See* Reply at 8; *Scott AFB*, 50 FLRA at 86-87.

Accordingly, we dismiss the exceptions without prejudice.[*]

VI. Decision

The exceptions are dismissed, without prejudice, as interlocutory.

[*] Based on the foregoing, we will not address the Agency's exceptions, which challenge the merits of the award. *See AFGE, Council of Prison Locals, Local 4052*, 66 FLRA 688, 690 n.2 (2012).