

67 FLRA No. 1

UNITED STATES
DEPARTMENT OF THE ARMY
WHITE SANDS MISSILE RANGE
WHITE SANDS MISSILE RANGE, NEW MEXICO
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 2049
(Union)

0-AR-4826

ORDER DISMISSING EXCEPTIONS

October 1, 2012

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Diane Dunham Massey filed by the Agency 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 notified the parties that she intended to resolve all pre-hearing issues and that another arbitrator would hear and resolve the merits. After issuing several supplemental awards regarding pre-hearing matters, the Arbitrator recused herself from the case. The Arbitrator subsequently notified the parties that she was withdrawing her recusal. The Agency contends that the Arbitrator exceeded her authority in withdrawing her recusal. For the reasons set forth below, we dismiss the Agency's exceptions, without prejudice, as interlocutory.

II. Background and Arbitrator's Award

The Union filed a grievance regarding overtime, which was unresolved and submitted to arbitration. *See* Opp'n at 4; *see also* Exceptions, Ex. 2 at 8, 12, 15 n.13. The Agency contended that the grievance was not arbitrable. *Id.* at 1, 12. The Arbitrator issued an award

finding that the grievance was arbitrable. *Id.* at 1-2, 13, 16. Before proceeding to arbitration on the merits, the parties attempted to resolve the grievance through mediation but were unsuccessful.

In March 2011, the Arbitrator informed the parties that it was her "intention to resolve all pre-hearing matters[]" and "to remain the Arbitrator of record until the case got to the merits." Opp'n, Ex. 1 at 19. In June 2011, the Arbitrator, in a supplemental award (June 2011 award), stated that she continued to "retain[] jurisdiction . . . to resolve certain pre-[h]earing evidentiary/formal discussion issues on which the [p]arties have not been able to agree," but that "she would recuse herself from hearing the merits of th[e] [g]rievance, when and if they are reached." Exceptions, Ex. 2 at 15 n.14; *see also* Opp'n, Ex. 1 at 32 (August 2011 email from Arbitrator noting that, "[i]f the [p]arties wish[ed] for [the Arbitrator] to retain jurisdiction for the formal discussion[] issue, should it come up, that [was] fine with [her,]" but that it was also "acceptable . . . for the [p]arties to secure another [a]rbitrator for the remainder of [the] proceeding[s]"); *id.* at 35 (December 2011 email from Arbitrator concerning her recusal). On February 7, 2012, the Arbitrator issued another supplemental award (February 2012 award). Exceptions, Ex. 3a. In that award, the Arbitrator stated that, "[i]f the Agency follows this [r]uling, it should be the last necessary activity with this Arbitrator as this is the final pre-hearing matter brought before this Arbitrator." *Id.* at 3.

On February 13, 2012, the Agency notified the Arbitrator that it had complied with the award. *See* Exceptions, Ex. 3b. On February 15, 2012, the Arbitrator informed the Federal Mediation and Conciliation Service (FMCS) and the parties that she had resolved all pre-hearing matters and that she "did not wish to serve as [a]rbitrator on the merits." Exceptions, Ex. 1b at 14; *see also* Opp'n, Ex. 1 at 39.

On February 28, 2012, however, after the Agency raised an additional issue regarding arbitrability, the Union contacted the Arbitrator and requested her assistance. Exceptions, Ex. 1b at 6; Opp'n, Ex. 1 at 79; *see also* Exceptions, Ex. 1b at 8; Opp'n, Ex. 1 at 66. The Agency responded, asserting that the February 2012 award was the Arbitrator's final decision and that it did not request, and did not agree to, any further action by the Arbitrator on the matter. *See* Exceptions, Exs. 1f, 1h, 1i.

On April 8, 2012, in an email to the parties, the Arbitrator withdrew her recusal, stating that the "condition precedent" for her recusal was no longer met and that she was reasserting her jurisdiction to address any "allegation[] that the instant dispute [was] not arbitrable." Exceptions, Ex. 1b at 1; *see also* Opp'n,

Ex. 1 at 90. According to the Arbitrator, “[t]here was a condition precedent for [her] recusal becoming final,” namely, that she “would recuse [her]self when all pre-hearing matters were resolved and . . . the matter was ripe to proceed to the merits with a different arbitrator.” Exceptions, Ex. 1b at 1. The Arbitrator stated that “there was no recusal as the condition precedent had not occurred.” *Id.* As a result, the Arbitrator stated, “[t]he recusal was not legitimately effectuated” and she “continue[d] to have jurisdiction.” *Id.*; see also Exceptions, Ex. 1a. On April 16, 2012, the Arbitrator sent the parties a letter incorporating her April 8 email. Exceptions, Ex. 1a.

III. Positions of the Parties

A. Agency’s Exceptions

The Agency contends that its exceptions are not interlocutory because the Arbitrator “completely resolved all of the issues submitted to her for arbitration prior to her recusal.” Exceptions at 7. The Agency asserts that, in her February 2012 award, the Arbitrator stated that “the issue regarding conduct of formal discussions was ‘the final pre-hearing matter brought before this Arbitrator.’” *Id.* (quoting February 2012 award at 3). Alternatively, the Agency requests the Authority to find that its exceptions present a plausible jurisdictional defect because, “[w]ithout specific retention of jurisdiction, . . . any further action by the [A]rbitrator may only be taken at the joint request of the parties.” *Id.* at 8 (citations and internal quotation marks omitted).

The Agency also argues that the April 2012 letter and email exceed the Arbitrator’s authority. *Id.* at 4-5, 7. According to the Agency, the Arbitrator expressly limited her jurisdiction in the June 2011 award, which was final and binding, and the Agency neither requested, nor agreed to, any additional action by the Arbitrator. *Id.* at 7 (citing Exceptions, Exs. 1f, 1h, 1i). The Agency also contends that the April 2012 letter and email are contrary to public policy, which favors the finality of awards. *Id.* at 4 (citing *U.S. Gov’t Printing Office, Wash., D.C.*, 59 FLRA 273, 275 (2003)).

The Agency further contends that the April 2012 letter and email are based on a nonfact, specifically, that a condition precedent existed with respect to the Arbitrator’s recusal. *Id.* at 5. The Agency asserts that the “existence of a condition precedent was not a factual matter disputed at arbitration.” *Id.*

B. Union’s Opposition

The Union claims that the Arbitrator did not exceed her authority. Opp’n at 12. The Union contends that the parties agreed that the Arbitrator “would continue

presiding over the case until all threshold and arbitrability issues were resolved and all that would be left were hearings on the merits.” *Id.*; see also *id.* at 9, 11. According to the Union, after the Arbitrator had recused herself and “it appeared there may have been some other pre-hearing . . . issue(s),” the Union informed the Arbitrator that it “would be premature to strike from an FMCS panel until the Agency confirm[ed] that there [were] no pre-hearing issues preventing [the parties] from moving to the merits with a new arbitrator.” *Id.* at 12 (citing Exceptions, Ex. 1b at 3, 4).

The Union also asserts that the award is not contrary to public policy because the Arbitrator clearly retained jurisdiction to hear and resolve all pre-hearing matters and that her recusal was conditioned on all such issues having been resolved. *Id.* at 8-10. Finally, the Union contends that the Agency has not established that the award is based on a nonfact because the Arbitrator “made clear the conditions of her recusal.” *Id.* at 10; see also *id.* at 11.

IV. Analysis and Conclusion: The Agency’s exceptions are interlocutory.

Section 2429.11 of the Authority’s Regulations provides that “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 Justice, Fed. Bureau of Prisons, Fed. Med. Ctr., Carswell, Tex.*, 64 FLRA 566, 567-68 (2010) (*Carswell*); *U.S. Dep’t of the Army, Army Corps of Eng’rs, Norfolk Dist.*, 60 FLRA 247, 248 (2004) (*Army*); *U.S. Dep’t of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs.*, 57 FLRA 924, 926 (2002). Consequently, an arbitration award that postpones the determination of an issue submitted or retains jurisdiction over at least one issue does not constitute a final award subject to review. See *U.S. Dep’t of Labor, Bureau of Labor Statistics*, 65 FLRA 651, 653-54 (2011) (*Labor*); *Carswell*, 64 FLRA at 567; *Army*, 60 FLRA at 248. In addition, “an award is not final merely because the parties agree to resolve the issues presented in separate proceedings.” *AFGE, Local 12*, 61 FLRA 355, 357 (2005) (*Local 12*).

The Authority will review interlocutory exceptions only if there are extraordinary circumstances warranting review. See *Labor*, 65 FLRA at 654. 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 the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 851 (2012) (*Pope Air Force Base*).

Exceptions raise a plausible jurisdictional defect when they present a credible claim that the arbitrator lacked jurisdiction over the subject matter as a matter of law. *See, id.* at 851 (citing *U.S. Dep't of Homeland Sec., U.S. Citizenship & Immigration Servs.*, 65 FLRA 723, 725 (2011); *U.S. Dep't of Labor*, 63 FLRA 216, 217 (2009)). However, the Authority has repeatedly declined to extend interlocutory review to alleged jurisdictional defects that do not preclude arbitration of the grievance as a matter of law. *See Pope Air Force Base*, 66 FLRA at 851.

Applying the above precedent to this case, we find the exceptions are interlocutory. Here, the Agency argues that its exceptions are not interlocutory because the Arbitrator “completely resolved all of the issues submitted to her for arbitration prior to her recusal.” Exceptions at 7. The record does not support the Agency’s contention. In March 2011, the Arbitrator informed the parties that she intended “to resolve all pre-hearing matters[]” and would “remain the Arbitrator of record until the case got to the merits.” Opp’n, Ex. 1 at 19. Later, in a supplemental award, the Arbitrator noted that she “retained jurisdiction . . . to resolve certain pre-[h]earing evidentiary/formal discussion issues on which the [p]arties have not been able to agree” and that “she would recuse herself from hearing the merits of the [g]rievance, when and if they are reached.” Exceptions, Ex. 2 at 15 n.14. More specifically, the Arbitrator explained, her recusal was conditioned on “all pre-hearing matters [being] resolved” and on the “matter [being] ripe to proceed to the merits with a different arbitrator.” Exceptions, Ex. 1a at 1; Exceptions, Ex., 1b; *see also* Opp’n, Ex. 1 at 90. Thus, the Arbitrator’s recusal applied only to issues involving the merits of the grievance; she explicitly retained jurisdiction over all pre-hearing matters, including those related to arbitrability. The Agency raised a *new* issue that concerned the arbitrability rather than the merits of the grievance. *See* Exceptions, Ex. 1b at 6, 8, 10; Opp’n, Ex. 1 at 79, 80, 81. Because an arbitrability issue still must be addressed, the Arbitrator’s award is not final and complete. As such, the Agency has not demonstrated that the Arbitrator’s February 2012 Award constitutes a complete resolution of all the issues submitted to arbitration. *See, e.g. Labor*, 65 FLRA at 653-54. Accordingly, we find that the Agency’s exceptions are interlocutory.

The Agency also has failed to establish a plausible jurisdictional defect, the resolution of which would advance the ultimate disposition of the case. The Agency asserts that its exceptions present a plausible jurisdictional defect because, “[w]ithout specific retention of jurisdiction . . . any further action by the [A]rbitrator may only be taken at the joint request of the parties.” Exceptions at 8 (citations and internal quotation marks omitted). However, as discussed above, the Arbitrator

retained jurisdiction to resolve pre-hearing arbitrability matters. In such circumstances, the Authority has repeatedly declined to extend interlocutory review to alleged jurisdictional defects that do not preclude arbitration of the grievance as a matter of law. *See Pope Air Force Base*, 66 FLRA at 851. Thus, the Agency has not raised a plausible jurisdictional defect.

Accordingly, we dismiss the exceptions without prejudice.

V. Order

The exceptions are dismissed, without prejudice, as interlocutory.