

65 FLRA No. 14

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL UNDERSEA WARFARE
CENTER DIVISION
NEWPORT, RHODE ISLAND
(Agency)

and

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R1-144
FEDERAL UNION
OF SCIENTISTS AND ENGINEERS
(Union)

0-AR-4289

ORDER DISMISSING EXCEPTIONS

August 31, 2010

Before the Authority: Carol Waller Pope, Chairman,
and Thomas M. Beck and Ernest DuBester, Members¹

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Marilyn H. Zuckerman 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.

The Arbitrator directed the Agency to reimburse the grievant for fifty-three travel vouchers that were submitted to the Agency more than six years from the dates on which the expenses were incurred. The Arbitrator did not resolve the grievant's claim for "travel compensation/overtime associated with such travel" (overtime claim).

For the reasons that follow, we dismiss the exceptions, without prejudice, as interlocutory.

1. Member Beck's dissenting opinion is set forth at the end of this decision.

II. Background and Arbitrator's Award

When the grievant submitted travel vouchers to the Agency, the Agency refused to process fifty-three of those vouchers because the travel occurred more than six years prior to the date on which the grievant submitted the vouchers for payment. Award at 2. The grievant filed a grievance, which was unresolved and submitted to arbitration. *Id.*

At arbitration, the parties stipulated to the following issue: "Must the Agency compensate [the grievant] for the fifty[-]three travel vouchers that were submitted to the Agency in excess of six years from the date entitlement arose, *as well as . . . overtime associated with such travel?*" *Id.* at 6 (emphasis added). The parties also stipulated as follows:

The [overtime claim] will be stayed pending resolution of the travel voucher claim. Should the Arbitrator find in favor of the Agency and deny the travel voucher grievance, the parties agree that the stayed issue will be considered resolved. However, if the Arbitrator rules in favor of the Union, the Arbitrator will retain jurisdiction over the [overtime claim] if the parties are unable to reach agreement.

Id.

In her award, the Arbitrator ruled in the Union's favor and found that the Agency must process the fifty-three vouchers and reimburse the grievant without interest, but did not rule on the overtime claim associated with such travel. *Id.* at 22. In this respect, the Arbitrator stated that, "[a]t the Union's request, [she] w[ould] retain jurisdiction over the [overtime claim] should the parties be unable to reach agreement on this issue." *Id.*

III. Positions of the Parties**A. Agency's Exceptions**

The Agency argues that the award is contrary to law and regulation, and that the Arbitrator failed to correctly apply the doctrine of laches. Exceptions at 9-21.

B. Union's Opposition

The Union argues that the award is consistent with law and regulation and that the Arbitrator

correctly held that the doctrine of laches does not apply. Opp'n at 2-6.

IV. Order to Show Cause and Agency's Response

The Authority issued an order, directing the Agency to show cause why its exceptions should not be dismissed as interlocutory.² See Order to Show Cause at 1-2. The Agency filed a response, in which it asserts that "the Arbitrator's act of ordering the Agency to compensate the grievant (without interest) for 53 travel vouchers is final as to that issue." Response at 1. The Agency argues that the Arbitrator's statement concerning her retention of jurisdiction for purposes of resolving the overtime claim is "in essence, . . . an offer to resolve possible problems related to the implementation of the [a]ward for travel voucher compensation." *Id.* at 2. According to the Agency, "[a]bsent the Arbitrator's award of compensation for travel vouchers, the parties would have had no authority to pursue or resolve the . . . overtime [claim] related to travel performed in conjunction with those vouchers." *Id.* Thus, the Agency asserts that the Arbitrator's award is final and the exceptions are not interlocutory. *Id.*

V. Analysis and Conclusions

Section 2429.11 of the Authority's Regulations pertinently 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) (*HHS*). Consequently, an arbitration award that postpones the determination of an issue submitted does not constitute a final award subject to review. See *Carswell*, 64 FLRA at 567; *Army*, 60 FLRA at 248; *HHS*, 57 FLRA at 926. 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 the Statute. See, e.g., *HHS*, 57 FLRA at 926. In this regard, "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). However, where an arbitrator has ordered a remedy, the mere fact that the arbitrator retains jurisdiction to assist parties with the details of the remedy's implementation does not render exceptions to that award interlocutory.³ See, e.g., *Office of Pers. Mgmt.*, 61 FLRA 358, 361 (2005) (then-Member Pope dissenting in part on unrelated grounds), *reconsideration denied*, 61 FLRA 657 (2006).

The Agency concedes that the Arbitrator has not resolved the overtime claim, but argues that the Arbitrator's retention of jurisdiction on this issue is to "resolve possible problems related to the implementation of the [a]ward for travel voucher compensation." Response at 2. However, in regard to the travel-voucher issue, the Arbitrator directed the Agency to "process the fifty[-]three claims and pay the [g]rievant what he is owed on them[.]" Award at 20, and the Agency does not explain how the Arbitrator's retention of jurisdiction over a claim for overtime "associated with" the grievant's travel would merely "implement[]" the Arbitrator's ruling on the vouchers. *Id.* at 6; Response at 2. In addition, it is undisputed that the parties stipulated that if the Arbitrator ruled in favor of the Union, then the Arbitrator would retain jurisdiction over the overtime claim "if the parties are unable to reach agreement." Award at 6. As the Arbitrator ruled in favor of the Union, and there is no assertion or record evidence that the parties have reached agreement regarding the overtime claim, that claim remains before the Arbitrator. Thus, although the Arbitrator's award may have resolved the Agency's liability as to the vouchers, it does not constitute a complete resolution of all the issues submitted to arbitration.⁴ See

3. The Authority has found interlocutory review to be appropriate where the exceptions present a plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of the case. *U.S. Dep't of the Treasury, Customs Serv., Tucson, Ariz.*, 58 FLRA 358, 359 n.* (2002). Here, there is no claim that the exceptions raise a plausible jurisdictional defect.

4. The dissent asserts that "[t]he parties understood that, if the Agency was found to be obligated to pay [the] grievant for the old travel vouchers, it would also be obligated to compensate the grievant for overtime associated with that travel." Dissent at 5. The record does not support this assertion, as the parties stipulated that the overtime claim would be "considered resolved[]" only if the Arbitrator ruled that the Agency was *not* liable for the voucher claim, which she did not do. Award at 6. With regard to the dissent's reliance on the fact that the grievant prevailed in a

2. The Authority also gave the Union an opportunity to respond to the order to show cause, but the Union did not file a response.

Carswell, 64 FLRA at 568; *AFGE, Local 12*, 61 FLRA at 356-57; *Army*, 60 FLRA at 248-49; *HHS*, 57 FLRA at 926.

For the foregoing reasons, we conclude that the Agency's exceptions are interlocutory. Accordingly, we dismiss the exceptions without prejudice. *See, e.g., AFGE, Local 12*, 61 FLRA at 357.

VI. Order

The exceptions are dismissed without prejudice.

Member Beck, Dissenting:

I do not agree with the Majority that the Agency's exceptions are interlocutory. That determination is not consistent with our recent decisions in *United States Department of Justice, Federal Bureau of Prisons, USP Admin. Maximum (ADX) Florence, Colorado*, 64 FLRA 1168 (2010), (*Bureau of Prisons*), *United States Department of Homeland Security, Customs and Border Protection*, 64 FLRA 989 (2010) (*DHS/CBP*) and *United States Department of the Treasury, Internal Revenue Service*, 63 FLRA 157 (2009) (*Treasury, IRS*).

Consistent with long-standing precedent, these cases conclude that the Authority will not resolve exceptions unless the arbitrator's award constitutes a complete resolution "of all the issues submitted to arbitration." *Bureau of Prisons*, 64 FLRA at 1169; *DHS/CBP*, 64 FLRA at 991; and *Treasury, IRS*, 63 FLRA at 158.

Here, the original grievance raised two related issues: (1) whether the Agency is required to compensate the grievant for the fifty-three travel vouchers that were submitted six years after entitlement "as well as" (2) whether the grievant is entitled to overtime compensation "associated with [that] travel." Award at 6. At arbitration, the parties jointly withdrew the second issue from the Arbitrator's jurisdiction, unless "the parties are unable to reach agreement." *Id.* The parties understood that, if the Agency was found to be obligated to pay grievant for the old travel vouchers, it would also be obligated to compensate the grievant for overtime associated with that travel.¹ Following the Arbitrator's determination regarding the vouchers, the only question left open was *how much* overtime compensation was owed to the grievant, not *whether* overtime compensation was owed.² As a result of the parties' stipulation, the Arbitrator had no jurisdiction to address the overtime issue. Award at 6. Consequently, the Arbitrator addressed (and resolved) all of the issues that were properly before him.

prior grievance concerning overtime, that fact is immaterial because it involved "travel overtime in 1995[.]" while the grievance at issue in this case concerns travel occurring during 1997 through 2000. *Id.* at 2. Further, the fact that the Arbitrator retained jurisdiction "should the parties be unable to reach agreement" on the overtime claim, Award at 22, does not render the award final. *See, e.g., U.S. Dep't of HHS, Navajo Area Indian Health Serv.*, 58 FLRA 356, 357 (2003) (award was not final where arbitrator retained jurisdiction in the event the parties were unable to agree on a remedy); *U.S. Gov't Printing Office, Wash., D.C.*, 53 FLRA 17, 18 (1997) (same). Because the issue of the Agency's liability for the overtime claim remains before the Arbitrator, this case is distinguishable from the decisions cited by the dissent, in which only the determination of the specific amounts of monetary remedies, and/or the particular individuals entitled to those remedies, remained before the arbitrators. *See U.S. DOJ, Fed. Bureau of Prisons, USP Admin. Maximum (ADX), Florence, Colo.*, 64 FLRA 1168, 1170 (2010); *U.S. Dep't of Homeland Sec., Customs & Border Prot.*, 64 FLRA 989, 991 (2010); *U.S. Dep't of the Treasury, IRS*, 63 FLRA 157, 159 (2009).

1. It is undisputed that the grievant prevailed in a prior grievance that established his entitlement to overtime while in a travel status. Award at 2.

2. The Union does not claim that the award is not final or that the exceptions are interlocutory. *See U.S. Dep't of Homeland Sec., Immigration & Customs Enforcement*, 64 FLRA 1003, 1006 (2010).

There is no substantive distinction between this case and those cited above that warrants a different outcome. In *Bureau of Prisons*, we found the arbitrator's award to be "final" even though the arbitrator retained jurisdiction "to assist the parties in the implementation of awarded remedies." 64 FLRA at 1170. We concluded that the arbitrator's retention of authority did not render the exceptions interlocutory. Two weeks earlier, we found another arbitrator's instructions (that directed the parties to "share information and determine individual employees' entitlement to backpay") and retention of jurisdiction did not render the agency's exceptions interlocutory. *DHS/CBP*, 64 FLRA at 991. Similarly, in *Treasury, IRS* we found exceptions were not interlocutory when "the only matter" over which the arbitrator retained jurisdiction "was the amount of back pay and expenses, if any" to be paid by the Agency. 63 FLRA at 159.

What the Majority has failed to explain is this: If the Agency is precluded from presenting its exceptions to the Authority now, at what point will the Agency be permitted to present its exceptions? The Arbitrator will weigh in on this matter again only "if the parties are unable to reach agreement" on the amount of overtime compensation owed. Award at 6. If (as seems likely) the parties reach agreement on the overtime question, there will be no further awards, remedies or rulings of any kind from the Arbitrator. In those circumstances, what triggering event will cue the Agency -- and the Authority -- that the Agency's exceptions are no longer interlocutory? What will have changed in terms of assessing whether the Arbitrator resolved all issues that were submitted to him? The answer to this question -- "nothing" -- demonstrates that the extant Award resolved all issues that were actually placed before the Arbitrator for his resolution.

Accordingly, I would find that the Arbitrator's award is final and that the Agency's exceptions are not interlocutory.