66 FLRA No. 131

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

FEDERAL DEPOSIT
INSURANCE CORPORATION
(Agency)

0-AR-4286
(65 FLRA 302 (2010))

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ORDER DISMISSING EXCEPTIONS

June 7, 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

This matter is before the Authority on exceptions to an award of Arbitrator Jerome H. Ross 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[1] to the Agency's exceptions.[2]

In a prior decision, the Authority remanded to the parties part of a previous award of the Arbitrator (original award) for the Arbitrator to make further findings and to apply the proper statutory burdens for claims under Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act (ADEA). *NTEU*, 65 FLRA 302, 309 (2010). In an award on remand (remand award) – the award at issue here – the Arbitrator sustained the Title VII and ADEA claims, but he did not provide any remedies. For the reasons discussed below, we dismiss the Agency's exceptions, without prejudice, as interlocutory.

II. Background and Arbitrator's Awards

The Union filed a national grievance alleging, as relevant here, that the Agency's process for selecting recipients of certain monetary awards resulted in an unlawful disparate impact on some employee groups. *NTEU*, 65 FLRA at 302. The Union invoked arbitration, and, as relevant here, the Arbitrator framed the issues before him as follows: "Did the [Agency] violate Title VII . . . [or the ADEA] . . . in its implementation of the [awards] program . . .? The parties agreed that any question of an appropriate remedy be deferred until after a decision on the merits." Exceptions, Attach. 1 (Original Award) at 8.

The original award denied the Title VII and ADEA claims, and the Union filed exceptions with the Authority alleging that, as relevant here, the original award was contrary to law. *NTEU*, 65 FLRA at 303-05. The Authority found that the original award was contrary to law in part and remanded the Title VII and ADEA claims to the parties for resubmission to the Arbitrator, absent settlement, for resolution. *See id.* at 309. In the remand award, the Arbitrator sustained the Title VII and ADEA claims but did not provide any remedies because the "parties . . . previously agreed that issues related to any remedy . . . were to be held in abeyance until after a decision on the merits." Remand Award at 20.

III. Positions of the Parties

A. Agency's Exceptions

The Agency claims that the remand award is contrary to law in three respects. First, the Agency contends that the Authority and the Arbitrator lack jurisdiction over the ADEA claims because 29 U.S.C. § 633a, which prohibits age discrimination in federal-government employment, does not waive sovereign immunity for disparate-impact claims by federal-government employees (the sovereign-immunity

[1] The Union filed a request for an extension of time to file its opposition, but as the Union timely filed the opposition without need for an extension, we do not further address this request.

[2] As discussed in Part III.B. below, the Union also filed a "Motion to Dismiss Agency's Interlocutory Exceptions to Non-Final Arbitration Award" (motion). Thereafter, the Authority issued to the Agency an Order to Show Cause (Order), which directed the Agency to show why its exceptions should not be dismissed as interlocutory. Order at 1. The Agency filed a response to the Order, which is discussed in Part IV. below.

exception).[3] *See* Exceptions at 1 (citation omitted), 3. Second, the Agency argues that the Arbitrator's resolution of the merits of the Title VII and ADEA claims is contrary to Title VII and the ADEA. *See id.* at 3. Third, the Agency contends that the Arbitrator exceeded his authority under the remand instructions in *NTEU*. *See id.*

B. Union's Motion and Opposition

The Union asserts that the Agency's exceptions are interlocutory and should be dismissed because they do not present a plausible jurisdictional defect that would advance the ultimate disposition of the case. *See* Motion at 2-3 (citing 5 C.F.R. § 2429.11; *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Terminal Island, Cal.*, 66 FLRA 414 (2011) (*Terminal Island*); *U.S. Dep't of the Treasury, IRS, Nat'l Distrib. Ctr., Bloomington, Ill.*, 64 FLRA 586, 589 (2010) (*IRS, Bloomington*); *U.S. Dep't of Transp., FAA, Wash., D.C.*, 60 FLRA 333, 334 (2004) (*FAA*)); *see also* Opp'n at 5-13, 40 (reiterating arguments from the motion). In this regard, the Union contends that the remand award "is not final . . . because Arbitrator Ross has not resolved the remedial aspects" of the claims before him. Motion at 2; *see also id.* (quoting Remand Award at 20). The Union contends that "the Arbitrator did not decide the remedial aspects of the case [as part of the remand award] because he was precluded from doing so by the parties' agreement to bifurcate the proceedings." *Id.* at 3. In addition, the Union argues that there are no extraordinary circumstances warranting review of the interlocutory exceptions because, even if the Authority granted the sovereign-immunity exception related to the ADEA claims, the case will still proceed to a remedial hearing on the Title VII claims. *See id.* at 4-5. Finally, the Union argues that if the Authority reaches the merits of the exceptions, then they should be denied because the remand award is not contrary to law. *See* Opp'n at 1.

IV. Order to Show Cause and Agency's Response

As mentioned *supra* note 2, after the Union filed the motion, the Authority issued to the Agency an Order to Show Cause (Order), which directed the Agency to show why its exceptions should not be dismissed as interlocutory. *See* Order at 1. The Agency filed a response to the Order (response).

The Agency contends that the exceptions are not interlocutory because "the parties envisioned that the Arbitrator would first issue a final award on the merits and only submitted those issues to the Arbitrator." Response at 13; *see also id.* at 1, 12. According to the Agency, the issues before the Arbitrator "clearly did not include a determination of a remedy," *id.* at 2; *see also id.* at 12, and, consequently, the remand award resolved all of the issues submitted to the Arbitrator, *id.* at 1, 12. In support of those contentions, the Agency notes that the Authority's remand instructions in *NTEU* did not direct the Arbitrator to consider any remedial issues. *See id.* at 4, 12.

The Agency alternatively argues that, even if the exceptions are interlocutory, extraordinary circumstances warrant their review. *See id.* at 5, 10. According to the Agency, the sovereign-immunity exception identifies a plausible jurisdictional defect in the remand award. In addition, the Agency argues that granting interlocutory review of the sovereign-immunity exception would advance the ultimate disposition of the case by "saving the parties the time and expense of presenting evidence [relevant to] the ADEA [claims] at a damages hearing." *Id.* at 7; *see also id.* at 10-11. In that regard, the Agency argues that *Library of Congress*, 58 FLRA 486, 487 (2003) (then-Member Pope dissenting), supports reviewing interlocutory exceptions when doing so could prevent "additional, unnecessary expenditures." Response at 10 (quoting *Library of Congress*, 58 FLRA at 487). The Agency argues further that delaying resolution of the sovereign-immunity exception will cause the parties "unnecessary burden and expense" in contravention of § 7101(b) of the Statute, which provides that the Statute should be interpreted consistent with the requirement of an effective and efficient government.[4] *Id.*

[3] 29 U.S.C. § 633a provides, in pertinent part:

> **§ 633a. Nondiscrimination on account of age in Federal Government employment**
> **(a) Federal agencies affected**
> All personnel actions affecting employees . . . at least 40 years of age . . . in executive agencies . . . shall be made free from any discrimination based on age.
> . . . .
> **(e) Duty of Government agency or official**
> Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.
> **(f) Applicability of statutory provisions to personnel action of Federal departments, etc.**
> Any personnel action of any department [or] agency . . . referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of [the ADEA], other than . . . the provisions of this section.

29 U.S.C. § 633a.

[4] Section 7101(b) of the Statute provides, in pertinent part, that "[t]he provisions of [the Statute] should be interpreted in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. § 7101(b).

Moreover, the Agency asserts that the decisions cited in the Union's motion are inapposite because, unlike the circumstances here, those decisions did not involve awards resolving claims under two different statutes with distinct theories of liability. *See id.* at 7-8 (arguing that *Terminal Island* is distinguishable). Finally, the Agency contends that the Authority has found extraordinary circumstances warranting interlocutory review even when granting the interlocutory exceptions "did not fully end the litigation." *Id.* at 8 (citing *U.S. Dep't of the Treasury, IRS, L.A. Dist.*, 34 FLRA 1161 (1990) (*IRS, L.A.*)).

V. Analysis and Conclusions

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) (*HHS*); *U.S. Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project, Wapato, Wash.*, 55 FLRA 1230, 1231 (2000) (*BIA*). 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. 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) (*Local 12*). In particular, where parties agree to bifurcate the arbitration process into initial merits proceedings and subsequent proceedings on appropriate remedies, an arbitrator's award that sustains a grievance on its merits but postpones the issue of appropriate remedies is not a final award subject to review. *See FAA*, 60 FLRA at 333-34.

The parties dispute whether the remand award is a final award subject to review. Specifically, they dispute whether remedial issues are before this Arbitrator. *See* Motion at 2; Response at 2. In the original award, the Arbitrator stated – in the "Issue" section – that the "parties agreed that any question of an appropriate remedy be deferred until after a decision on the merits." Original Award at 8. Then, in the remand award, the Arbitrator again stated that the "parties . . . previously agreed that issues related to any remedy . . . were to be held in abeyance until after a decision on the merits." Remand Award at 20. There is no indication, in either award, that the parties did not submit remedial issues to the Arbitrator. *Cf. U.S. Dep't of the Treasury, Customs Serv., Tucson, Ariz.*, 58 FLRA 358, 359 (2002) (in determining whether exceptions were interlocutory, Authority considered whether arbitrator framed issues in a manner that would "preclude" him from deciding what remedy was appropriate). In addition, in its motion, the Union expressly states that it was the parties' bifurcation agreement that "precluded" the Arbitrator from concurrently deciding the merits and the remedial aspects of the grievance, Motion at 3, and that "Arbitrator Ross" will be addressing appropriate remedies in subsequent proceedings, *id.* at 2. *See also id.* (quoting Remand Award at 20) ("issues related to any remedy . . . held in abeyance until after a decision on the merits" (internal quotation mark omitted)). In its response to the Order, the Agency does not cite any evidence to rebut the Union's statements or to support its own claim that remedial issues were not submitted to the Arbitrator. Accordingly, we find that the Agency has not demonstrated that remedial issues are not before the Arbitrator.

As previously mentioned, the parties' agreement to a bifurcated process could not convert the remand award, which expressly postpones a decision on appropriate remedies, *see* Remand Award at 20, into a final award subject to review. *See FAA*, 60 FLRA at 333-34. *Accord Carswell*, 64 FLRA at 567; *Local 12*, 61 FLRA at 357; *Army*, 60 FLRA at 248; *HHS*, 57 FLRA at 926. Further, although the Authority's remand instructions in *NTEU* did not direct the Arbitrator to consider any remedial issues, nothing in those instructions deprived the Arbitrator of his authority, pursuant to the parties' agreed-upon, bifurcated process, to address appropriate remedies in the event that he sustained the grievance on remand. For the foregoing reasons, we find that the Agency's exceptions are interlocutory.

The Authority will review interlocutory exceptions when they raise a plausible jurisdictional defect, the resolution of which would advance the ultimate disposition of the case. *E.g., BIA*, 55 FLRA at 1232. But the Authority reserves this review for "extraordinary situations." *Id.*; *see U.S. Dep't of Homeland Sec., U.S. Immigration & Customs Enforcement*, 60 FLRA 129, 130 (2004) (dismissing exception as interlocutory because excepting party failed to demonstrate that "extraordinary circumstances" existed warranting interlocutory review). To establish that interlocutory review would advance the ultimate disposition of the case, the excepting party must demonstrate that resolving the exceptions would end the litigation. *See Terminal Island*, 66 FLRA at 415 (citing *U.S. Dep't of the Interior, Bureau of Reclamation*, 59 FLRA 686, 688 (2004) (*Interior*); *IRS, L.A.*, 34 FLRA at 1163-64)).

Even assuming that the sovereign-immunity exception establishes a plausible jurisdictional defect, the Agency does not demonstrate that interlocutory resolution of that exception will advance the ultimate disposition of this case. In this regard, even if the Authority were to resolve the sovereign-immunity exception regarding the ADEA, the parties would still have to litigate the appropriate remedies for the Title VII claims. As such, interlocutory review would not end the proceedings in this case. *See Terminal Island*, 66 FLRA at 415 (denying interlocutory review of an exception, which, if meritorious, would eliminate an entire class of FLSA overtime claims, because review would not end the parties' litigation); *Interior*, 59 FLRA at 688 (same). Although the Agency attempts to distinguish Authority precedent on the ground that prior decisions did not involve a situation where, like here, two separate statutes are at issue, that is a distinction without a difference: Resolution of the Agency's interlocutory exceptions still would not end this litigation.

The remaining authorities cited by the Agency do not demonstrate that there are extraordinary circumstances warranting interlocutory review. In *Library of Congress*, if the interlocutory exception had been meritorious, then its resolution would have ended all further proceedings on the grievance; the decision did not state, as the Agency implies, that interlocutory review may be appropriate without regard to whether such review would advance the ultimate disposition of the case. *See* 58 FLRA at 487-88. In *IRS, L.A.*, the Authority granted interlocutory review and set aside an arbitrator's award that purported to determine an employee's bargaining-unit status – and, in doing so, advanced the ultimate disposition of the case by precluding further proceedings on the grievance's merits for so long as the grievant's unit status remained uncertain. *See* 34 FLRA at 1164-65. Finally, as for whether granting interlocutory review would promote an effective and efficient government within the meaning of § 7101(b) of the Statute, the Authority's bar on interlocutory appeals is itself a means of promoting government effectiveness and efficiency by "discouraging fragmentary appeals of the same case." *IRS, L.A.*, 34 FLRA at 1163.

For the foregoing reasons, we find that the Agency has not established extraordinary circumstances warranting interlocutory review. Accordingly, we dismiss the Agency's exceptions without prejudice.

VI. Order

The Agency's exceptions are dismissed, without prejudice, as interlocutory.