68 FLRA No. 101

UNITED STATES
DEPARTMENT OF THE ARMY
LETTERKENNY ARMY DEPOT
CHAMBERSBURG, PENNSYLVANIA
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1442
(Union)

0-AR-5091

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DECISION

May 22, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Ira F. Jaffe issued an award finding that the Agency violated the parties' collective-bargaining agreement by not processing a grievance (the FLSA grievance) alleging violations of the Fair Labor Standards Act (FLSA)[1] and the Federal Employees Pay Act.[2] The Agency challenges the award on contrary-to-public-policy, essence, and exceeds-authority grounds. Because the award does not completely resolve all of the issues submitted to arbitration, we dismiss the Agency's exceptions, without prejudice, as interlocutory.

II. Background and Arbitrator's Award

The Union filed the FLSA grievance on behalf of all employees in the bargaining unit. The Agency did not respond to the grievance despite several inquiries from the Union, and the Union invoked arbitration over the grievance.

The Union filed a second grievance (the default grievance), alleging that the Agency violated Article 42 of the parties' agreement by not processing the FLSA grievance. Article 42, Section 7.a. provides, "[a] Union grievance (defined as nonpersonal, nonindividual, concerning an issue [that] has wide impact over the interpretation and/or application of this agreement) will be submitted by the Union directly at step [three]."[3] Article 42, Section 5 of the parties' agreement gives the Agency twenty days to respond to a third-step grievance. Finally, Article 42, Section 14 provides, in relevant part, "[f]ailure of the [e]mployer to observe the time limits at step [three] of the grievance procedure will entitle the employee(s) to the remedy sought, provided the remedy is not contrary to any law, rule, or regulation."[4] As a remedy for the alleged violation of Article 42, the Union requested that the Agency grant the remedy requested in the FLSA grievance. The Agency denied the default grievance, and the parties submitted it to arbitration.

Before the Arbitrator, the Agency argued, as relevant here, that it did not violate the parties' agreement by not processing the FLSA grievance because the grievance was not arbitrable. The Agency also argued that if the Arbitrator sustained the default grievance, then the only remedy that he could order would be for the parties to process the FLSA grievance because the default language in Article 42, Section 14 applied to individual and group grievances, rather than Union grievances. Conversely, the Union argued that the grievance was arbitrable and that if the Arbitrator sustained the default grievance, then the proper remedy was to grant the remedy requested by the FLSA grievance.

The Arbitrator found that the FLSA grievance was arbitrable, and therefore sustained the default grievance. The Arbitrator also found that he had the authority to hear the merits of the FLSA grievance. Specifically, he found that the remedy for the default grievance was to grant the remedy requested by the FLSA grievance, "provided [that] the remedy is not contrary to any law, rule, or regulation."[5] Thus, the Arbitrator held that "the finding of default provides a basis for permitting the Union to, in essence, present the merits of the original [FLSA] grievance in th[e] arbitration [of the default grievance]."[6] The Arbitrator stated that he had no objection "if the [p]arties jointly elect to now pursue the [FLSA] grievance by selection of an arbitrator for that matter instead of addressing the Union's claims of violation[s] of the FLSA for bargaining[-]unit employees in the context of this arbitration," but that "[a]bsent such joint election . . . the [Agency] cannot . . . complain that such a procedural avenue is required."[7] Thus, the Arbitrator ordered that, absent joint agreement, "the Union's claims of violation[s] of the FLSA for bargaining[-]unit employees

[1] 29 U.S.C. §§ 201-219.
[2] 5 U.S.C. §§ 5541-5550b.
[3] Award at 6.
[4] *Id.* at 7.
[5] *Id.* at 48 (internal quotation marks omitted).
[6] *Id.* at 49.
[7] *Id.* at 50.

will proceed in this arbitration as a question of the appropriate remedy for the [default] grievance."[8]

The Agency filed these exceptions, and the Union filed an opposition.

III. Analysis and Conclusions: The Agency's exceptions are interlocutory.

The Authority's Regulations provide that "the Authority . . . ordinarily will not consider interlocutory appeals."[9] Thus, the Authority will not resolve exceptions to an arbitration award "unless the award constitutes a complete resolution of all the issues submitted to arbitration"[10] or a party demonstrates extraordinary circumstances warranting review.[11] The Authority has found extraordinary circumstances "only in situations in which a party raised a plausible jurisdictional defect, the resolution of which would advance the ultimate disposition of the case."[12] When the only issue submitted to an arbitrator concerns a grievance's arbitrability, exceptions to the award are not interlocutory even if the parties contemplate further proceedings on the merits of the grievance.[13] But an award that postpones the determination of a submitted issue or retains jurisdiction over at least one issue does not constitute a final award.[14]

The Agency first argues that the award is final because "the matters submitted for arbitration have been decided by the Arbitrator, th[ose] of procedure and arbitrability."[15] However, the Arbitrator determined that the question of the appropriate remedy for the default grievance is still before him.[16] Moreover, the Agency does not allege that the Arbitrator exceeded his authority by addressing an issue not submitted to arbitration. Thus, it does not argue that the "unresolved issues" still pending before the Arbitrator were never submitted to arbitration in the first place.[17] Indeed, one of the Agency's proposed issues was "[w]hether there should be one arbitration proceeding or two where there are both procedural/questions of arbitrability and substantive issues."[18] Accordingly, because the issue of the appropriate remedy for the default grievance is an unresolved issue that remains pending before the Arbitrator, the award is not final, and the Agency's exceptions are interlocutory.

The Agency also argues that there are extraordinary circumstances warranting interlocutory review.[19] Specifically, the Agency argues that the Authority should "determin[e] if perceptions of [an arbitrator's] impartiality come into play when an arbitrator rules on arbitrability issues" while retaining jurisdiction over the merits of the dispute.[20] On this point, the Agency notes that an arbitrator has a financial interest in presiding over a prolonged merits hearing.[21] 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.[22] Thus, the Agency has not established extraordinary circumstances warranting interlocutory review.

Accordingly, we dismiss the Agency's exceptions without prejudice.

IV. Order

We dismiss the Agency's exceptions, without prejudice, as interlocutory.

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[8] *Id.* at 51.
[9] 5 C.F.R. § 2429.11.
[10] *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 1, 2 (2012) (*White Sands*) (citing *U.S. DOJ, Fed. BOP, 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) (*Norfolk*); *U.S. Dep't of HHS, Ctrs. for Medicare & Medicaid Servs.*, 57 FLRA 924, 926 (2002)).
[11] *Id.* (citing *U.S. DOL, Bureau of Labor Statistics*, 65 FLRA 651, 654 (2011) (*BLS*)).
[12] *Id.* (citing *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 851 (2012) (*Pope*)).
[13] *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 620 (2014) (citing *U.S. EPA, Region 2*, 59 FLRA 520, 524 (2003)).
[14] *White Sands*, 67 FLRA at 2 (citing *BLS*, 65 FLRA at 653-54; *Carswell*, 64 FLRA at 567; *Norfolk*, 60 FLRA at 248).
[15] Exceptions at 17.
[16] Award at 49-50.
[17] *Cf. White Sands*, 67 FLRA at 3 (record did not support argument that arbitrator's retained jurisdiction was in excess of her authority).
[18] Exceptions, Attach., Agency's Opening Br. on Procedural Arbitrability at 8.
[19] Exceptions at 17.
[20] *Id.*
[21] *Id.*
[22] *White Sands*, 67 FLRA at 3 (citing *Pope*, 66 FLRA at 851).