65 FLRA No. 140

UNITED STATES
DEPARTMENT OF LABOR
BUREAU OF LABOR STATISTICS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 12
(Union)

0-AR-4527

_____

DECISION

March 30, 2011

_____

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 David P. Clark 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 concluded, among other things, that: (1) the Agency violated Articles 18 and 38 of the parties' agreement (Agreement); and (2) a desk audit was necessary to determine whether the Agency violated Article 20 of the Agreement, a matter over which he retained jurisdiction. For the reasons set forth below, we dismiss the Agency's exceptions, without prejudice, as interlocutory.

II. Background and Arbitrator's Award

The grievant works as a General Schedule (GS)-7 Support Services Assistant at the Agency's Bureau of Labor Statistics (BLS). Award at 15. When the grievant was transferred to his current location, he was told that he would be helping a GS-12 Program Analyst (the Program Analyst) with his duties. *Id.* at 16. In this capacity, the grievant worked on an almost daily basis with the Program Analyst. *Id.* For about two months, the grievant performed about 55% of the Program Analyst's duties while the Program Analyst worked on a "flexiplace" work schedule. *Id.* According to the Union, the grievant was told that he would be given an opportunity to compete for a Program Analyst position if one became available. Opp'n at 14.

Several months after the grievant began working with the Program Analyst, the Agency decided to hire two entry level Program Analysts through the Federal Career Intern Program (FCIP). Award at 17. The BLS posted information about the FCIP on its website, but did not post a vacancy announcement specifically for the Program Analyst positions, nor did it specifically notify the Union of the vacant positions. *Id.*

The Union presented a grievance arguing that the Agency violated the Agreement by: (1) failing to notify the Union of the vacant position and (2) failing to pay the grievant equal pay for substantially equal work.[1] *Id.* at 1. The grievance requested that the grievant "be placed in a career ladder Program Analyst position" and also requested backpay. *Id.* at 3. The matter was not resolved and was submitted to arbitration. The Arbitrator framed the relevant issues as follows:

> 1) Whether the Agency's decision to appoint a GS-9 Program Analyst pursuant to the Agency's component of the [FCIP], without announcing to the Union the existence of a vacancy for that position title, violated Article 18 of the . . . Agreement.
>
> 2) Whether the Agency failed to pay the [g]rievant for performing work that was substantially equal to that of a higher-paid Program Analyst, in violation of Article 20 of the . . . Agreement.

Id. at 2.[2]

1. Additionally, the Union argued to the Arbitrator that the failure to appoint the grievant was motivated by racial animus, in violation of Article 25 of the Agreement. Award at 1. The Arbitrator rejected the Union's argument on this issue. *Id.* at 25. Because no exceptions were filed to the Arbitrator's resolution of this issue, it is not before us.

2. The relevant provisions of the Agreement are set forth in the attached appendix.

During the hearing, the Agency objected to the Union's introduction of Article 18, Section 2, arguing that, because the Union did not allege a violation of that section in its step 2 grievance, it could not be considered by the Arbitrator. *Id.* at 20 n.4. The Arbitrator overruled the objection, finding that the Union did not allege a violation of Article 18, Section 2, but, rather, used that section to inform the "purpose and scope of the substantive articles articulated in the grievance." *Id.*

The Arbitrator first determined that the Agency must follow competitive merit staffing procedures in hiring through the FCIP because it "falls under the scope of Article 18" of the Agreement, as defined by Article 18, Section 2, because it "entails training and also qualifies appointees for eventual promotion." *Id.* at 19-20. The Arbitrator found that Article 18, Sections 4 and 7 of the Agreement required the Agency to notify the Union of the vacant Program Analyst positions. *Id.* at 20.

The Arbitrator then concluded that the Agency violated Article 18 by "failing to provide written notice to the Union of its intent to appoint Program Analysts pursuant to the BLS [FCIP]." *Id.* at 21. While the Arbitrator did not find any specific notification process to be required, he found that the Agency could have notified the Union through its "Spotlight" publication, in accordance with Article 18, Section 7 of the Agreement, and found untenable the Agency's position that there was no time to notify the Union because the hires were unanticipated. *Id.* As a remedy for the Agency's violation of Article 18, the Arbitrator ordered the Agency "henceforth to provide notice to the Union of its intention to hire Program Analyst positions through its Career Intern Program." *Id.* at 26.

The Arbitrator did not determine whether the Agency violated Article 20 of the Agreement; rather, he found a desk audit was necessary to decide whether the grievant was performing higher-graded duties. *Id.* at 23. While the Arbitrator recognized that he had no authority to determine the classification of the grievant pursuant to 5 U.S.C. § 7121(c)(5), he ordered the desk audit "so that the classification of the [g]rievant's work [could] be addressed" by the Agency. *Id.* The Arbitrator found that the desk audit would "not only affect the issue of back pay, but [could] also affect the issue of the appropriate remedy for the Agency's violation of Article 18" of the Agreement. *Id.* The Arbitrator retained jurisdiction over the desk audit matter, "in order to address, if necessary, the Union's requested remedy." *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the Arbitrator exceeded his authority by deciding whether Article 18, Section 2 of the Agreement applied because the Union did not raise that provision in its grievance. Exceptions at 6-7. According to the Agency, issues not raised in the Union's step 2 grievance are not arbitrable under Article 47, Section 7 of the Agreement. *Id.* The Agency asserts that the Arbitrator was incorrect that Article 18, Section 2 was simply background and, therefore, "relevant" to whether the Agency violated Article 18, Sections 1, 4, or 7 of the Agreement. *Id.* at 7-8.

The Agency also argues that the Arbitrator's remedy requiring the Agency to provide the Union with notice of open FCIP positions is contrary to law. *Id.* at 10. According to the Agency, the FCIP is in the excepted service and, thus, exempt from regular competitive service staffing requirements. *Id.* (citing Executive Order (E.O.) 13,162; 5 C.F.R. § 302). The Agency contends that, because there is no public notice requirement for positions in the excepted service, the Arbitrator's remedy that the Agency must notify the Union of positions in the FCIP is contrary to law. *Id.* at 10-11.

Finally, the Agency argues that the Arbitrator improperly engaged in classification when he ordered a desk audit. *Id.* at 12. According to the Agency, because the title of Article 20 is "Position Classification," the grievance challenges the grade level of the grievant's duties and whether he performed higher-graded work. *Id.* The Agency contends that the Arbitrator was making, analyzing, and identifying the grievant's position responsibilities. *Id.* at 14. Additionally, the Agency asserts that the Arbitrator's order that it conduct a desk audit is an attempt to force the Agency to do what the Arbitrator could not, i.e., make a classification determination. Therefore, the Agency claims that the Arbitrator's award of a desk audit is contrary to § 7121(c)(5) of the Statute. *Id.* at 15-16.

B. Union's Opposition

The Union responds that the Agency has not shown by a preponderance of the evidence that the

Arbitrator exceeded his authority by deciding an issue that was not before him. Opp'n at 8. The Union asserts that the Arbitrator properly interpreted Article 18 of the Agreement as requiring that the Union be given notice of advancement opportunities for unit employees. *Id.* at 9-10. The Union argues that, although it did not specifically mention Article 18, Section 2 in its grievance, the grievance indirectly raised that section. *Id.* at 11. Therefore, the Union argues, the Arbitrator did not exceed his authority in considering Article 18, Section 2 as relevant background.

The Union also argues that the Arbitrator's remedy that the Union must be provided notice of open Program Analyst positions is not contrary to law. *Id.* at 13-14. The Union contends that positions in the excepted service such as the FCIP are not exempt from all merit staffing requirements. *Id.* The Union asserts that various regulations and statutes and E.O. 13,162 require notice and that merit-based procedures be used for the recruitment and selection of candidates for the FCIP. *Id.* at 13-14 (citing E.O. 13,162; 5 C.F.R. § 213.3202(o); Department Personnel Regulation 213(2)(b)(1-2)).

Finally, the Union argues that the Arbitrator did not engage in classification in violation of § 7121(c)(5). *Id.* at 16. The Union claims that the Arbitrator should have awarded the grievant a temporary promotion because, for approximately one year, the grievant performed the same work as the Program Analyst. *Id.* The Union contends that the Arbitrator was measuring the accuracy of the grievant's position description. *Id.* at 16-17. Additionally, the Union argues that the act of ordering a desk audit does not, by itself, violate § 7121(c)(5) of the Statute. *Id.* at 17.

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 stated that, because the Arbitrator retained jurisdiction over the matter of the desk audit, his award did not "appear to constitute a final decision subject to review." *Id.* at 2-3.

In response, the Agency concedes that its exceptions are interlocutory because the Arbitrator "resolved one issue and retained jurisdiction of another issue." Response at 2. However, the Agency contends that it has presented a plausible jurisdictional defect, such that there are extraordinary circumstances warranting review. *Id.* The Agency claims that the Arbitrator lacked jurisdiction because "issues not identified by the Union in the grievance 'may not subsequently be considered by an arbitrator, should the grievance be invoked to arbitration'" pursuant to Article 47, Section 7 of the Agreement. *Id.* at 4. Therefore, the Agency argues that, because the Union did not allege a violation of Article 18, Section 2 in its grievance, the Arbitrator lacked jurisdiction to consider that section, and the entire award must be set aside. *Id.* at 3.

In the Order, the Union was granted leave to respond to the Agency's response. Order at 3. Instead, the Union filed a Motion to Correct and Amend Record before the Agency's response was filed. The Authority's Regulations do not provide for the filing of a supplemental submission. Therefore, it is incumbent upon the moving party to demonstrate a reason why the Authority should consider such supplemental submission. *See, e.g., U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 52 FLRA 622, 625 (1996) (citing *Nat'l Union of Labor Investigators*, 46 FLRA 1311, 1311 n.1 (1993)). Section 2429.26 of the Authority's Regulations provides that the Authority may, in its discretion, grant leave to file "other documents" as deemed appropriate. Because the Union's Motion was not a response to the Agency's Response, and because the Union did not seek permission from the Authority to file supplemental briefing, nor demonstrate a reason why the Authority should consider such supplemental submission, we will not consider the Union's supplemental response.

V. Analysis and Conclusions

A. The exceptions are interlocutory.

The Authority will not generally grant interlocutory review of arbitration awards. 5 C.F.R. § 2924.11; *U.S. Dep't of Veterans Affairs, W. N.Y. Healthcare Sys., Buffalo, N.Y.*, 61 FLRA 173, 175 (2005) (*Veterans Affairs*). Therefore, the Authority will not consider exceptions to an arbitrator's award until the arbitrator has issued a final decision with respect to all issues submitted to arbitration. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Med. Ctr., Carswell, Tex.*, 64 FLRA 566, 567 (2010); *U.S. Dep't of Health & Human Servs., Navajo Area Indian Health Serv.*, 58 FLRA 356, 357 (2003) (*DHHS*). If an arbitrator's award postpones the determination of a submitted issue or retains jurisdiction over at least one issue, then the decision

does not constitute a final award. *AFGE, Local 12*, 38 FLRA 1240, 1246 (1990); *DHHS*, 58 FLRA at 357. In this case, the Agency conceded that its exceptions are interlocutory. Response at 2.

B. There is no plausible jurisdictional defect warranting interlocutory review.

Because the Agency's exceptions are interlocutory, the Authority will consider them only if there are extraordinary circumstances warranting review. *U.S. Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project, Wapato, Wash.*, 55 FLRA 1230, 1232 (2000) (*BIA*). "[I]nterlocutory review should be reserved for those extraordinary situations where it is necessary," such as in the case of a plausible jurisdictional defect. *Id.* "[A] plausible jurisdictional defect is one that, on its face, is a credible claim, the resolution of which will advance the ultimate disposition of the case." *Library of Cong.*, 58 FLRA 486, 487 (2003) (then-Member Pope dissenting as to application).

1. Classification

The Agency argues that the Arbitrator's award is contrary to § 7121(c)(5) because the grievance concerned the classification of the grievant's position. Exceptions at 12-15. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army and the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

An arbitrator does not have jurisdiction to determine "the classification of any position which does not result in the reduction in grade or pay of an employee." 5 U.S.C. § 7121(c)(5). The Authority has repeatedly held that where the essential nature of a grievance concerns the grade level of the duties assigned to and performed by the grievant in his or her permanent position, the grievance concerns the classification of a position within the meaning of § 7121(c)(5) of the Statute. *See U.S. Dep't of Hous. & Urban Dev.*, 65 FLRA 433, 435 (2011) (*HUD*). However, where the substance of a grievance concerns whether the grievant is entitled to a temporary promotion on the basis of having performed the established duties of a higher-graded position other than the grievant's own, the grievance would not be barred by § 7121(c)(5). *See U.S. Dep't of Labor, Wash., D.C.*, 64 FLRA 829, 830 (2010); *BIA*, 55 FLRA at 1232.

We find that the Agency has not established that the grievance concerns classification rather than a temporary promotion. *See U.S. Dep't of the Treasury, Internal Revenue Service, Agency-Wide Shared Servs., Florence, Ky.*, 63 FLRA 574, 578 (2009) (finding a grievance not to be barred by § 7121(c)(5) where the grievance concerned whether the grievant performed duties of a higher-graded position). The Arbitrator characterized the Union's argument at arbitration as "that the [g]rievant should be compensated for approximately a year of performing higher-graded work." Award at 14. Moreover, in its opposition, the Union contends that the Arbitrator should have awarded the grievant a temporary promotion. Opp'n at 16. Finally, it is undisputed that the duties allegedly performed by the grievant are of a position other than his own. *See U.S. Dep't of the Air Force, 81st Training Wing, Kesler Air Force Base, Miss.*, 60 FLRA 425, 428 (2004) (finding a grievance does not concern classification where the arbitrator compared the grievant's duties to another position).[3]

As a result, we find that there is no plausible jurisdictional defect warranting interlocutory review. *See U.S. Dep't of Transp., Fed. Aviation Admin.*, 62 FLRA 344, 347 (2008) (dismissing exceptions as interlocutory where the agency could not show that the arbitrator lacked jurisdiction); *BIA*, 55 FLRA at 1232 (finding no plausible jurisdictional defect where the union's classification claim was not sufficiently supported). Accordingly, we dismiss this exception, without prejudice, as interlocutory.[4]

3. We note that, although the Arbitrator at one point discussed the significance of the desk audit for the Agency's classification process, Award at 23, we interpret the Arbitrator to be using the desk audit to determine whether the grievant was entitled to backpay for the performance of higher-graded duties.

4. Member Beck notes that, should the Arbitrator make a classification determination following the results of the desk audit, such determination would violate § 7121(c)(5) of the Statute. *See HUD*, 65 FLRA at 436.

2. Exceeds Authority

The Agency also argues that the exceptions present a plausible jurisdictional defect because the Arbitrator decided an issue that was not before him and, thus, lacked jurisdiction to decide the entire award.[5] Response at 3-4.

The Agency argues that, pursuant to Article 47, Section 7 of the Agreement, issues not identified by the Union in the grievance may not later be considered by the Arbitrator. Exceptions at 6-7. The types of cases in which the Authority has reviewed interlocutory exceptions "have involved jurisdictional issues that arise pursuant to a statute." *Veterans Affairs*, 61 FLRA at 175. The Authority has consistently found that exceptions arising from the parties' agreement do not constitute extraordinary circumstances warranting review. *See U.S. Dep't of Homeland Sec., U.S. Immigration & Customs Enforcement*, 60 FLRA 129, 130 (2004) (concluding that the agency's exception claiming that the award failed to draw its essence from the agreement did not present a plausible jurisdictional defect); *AFGE, Local 446*, 59 FLRA 451, 454 (2003) (finding that an argument that the arbitrator exceeded his authority did not present a plausible jurisdictional defect).

Based on the foregoing, the Agency's argument that the grievance was not arbitrable under Article 47, Section 7 of the Agreement does not constitute a plausible jurisdictional defect warranting interlocutory review. *See U.S. Dep't of the Treasury, Bureau of Engraving & Printing, W. Currency Facility, Fort Worth, Tex.*, 58 FLRA 745, 746 (2003) (denying interlocutory review of the agency's exception where the agency argued that the matter was not grievable under the parties' agreement). Therefore, we dismiss these exceptions as interlocutory.

VI. Decision

The Agency's exceptions are dismissed, without prejudice, as interlocutory.[6]

5. The Agency's argument encompasses both the Agency's exceeds authority exception and its contrary to law exception.

6. Because we dismiss the exceptions as interlocutory, we make no determination on the merits of the Agency's claims.

APPENDIX

Article 18, Section 1 provides:

> The Department will adhere to all applicable Government-wide rules and regulations and the provisions in this Article in the administration of Merit Staffing. Moreover, the Department shall administer this Article in accordance with DPR 335, dated April 28, 2004, as specified or except as provided herein. Any future changes to this regulation will be handled in accordance with Article 38. The purpose and intent of this Article are to ensure that employees are given full and fair consideration and to ensure selection from among the best-qualified candidates. The Department and Local 12 also agree to fill positions in the bargaining unit on the basis of merit in accordance with systematic and equitable procedures adopted for this purpose.

Exceptions, Attach. 1, Agreement at 55.

Article 18, Section 2 provides, in relevant part:

> The following personnel actions are covered under competitive merit staffing procedures:
>
> . . . .
>
> d. Selection for training which is part of an authorized training agreement, part of a promotion program, or required by a formal training program before an employee may be considered for promotion;

Id.

Article 18, Section 4 provides:

> Vacancy announcements will be publicized in such a way as to ensure fair and open competition in accordance with Merit Systems Principles, 5 U.S.C. § 2301.

Id. at 57.

Article 18, Section 7 provides:

> The Department's Director of Human Resources will inform employees in the unit at least twice a year through a Spotlight or other issuance of the jobs, including qualification requirements that are likely to be filled at the entrance levels of career ladders during the year.

Id. at 58.

Article 20, Section 5 provides:

> The parties agree to the principle of equal pay for substantially equal work.

Id. at 60.

Article 38, Section 1 provides:

> In the administration of all matters covered by this Agreement and any supplements thereto, the parties are governed by existing or future laws and regulations of appropriate authorities; by published Department policies and regulations in existence at the time this Agreement became effective; and by subsequently published Department policies and regulations required by law or by the regulations of appropriate higher outside authorities.

Id. at 96.

Article 47, Section 7(a) provides, in relevant part:

> Issues and allegations that are not raised by the Union in the Step 2 process may not subsequently be considered by an arbitrator, should the grievance be invoked to arbitration.

Id. at 116.