69 FLRA No. 44

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL UNDERSEA
WARFARE CENTER DIVISION KEYPORT
KEYPORT, WASHINGTON
(Agency)

and

BREMERTON METAL TRADES COUNCIL
(Union)

0-AR-5155

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DECISION

April 13, 2016

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

I. Statement of the Case

In an interim award on a "threshold question,"[1] Arbitrator Philip Tamoush found a grievance concerning a letter of reprimand (the reprimand) arbitrable, even though the grievant previously challenged the reprimand in an equal-employment-opportunity complaint (the EEO complaint).

The main question before us is whether the interim award conflicts with § 7121(d) of the Federal Service Labor-Management Relations Statute (the Statute) by allowing the grievant to challenge the same personnel "matter" under both the "statutory [EEO] procedure" and the parties' "negotiated grievance procedure."[2] Because the grievance and the EEO complaint both concern the reprimand, and the grievant amended the EEO complaint to include the reprimand before filing the grievance, the answer is yes.

II. Background and Arbitrator's Award

On July 14, 2014, the grievant filed the EEO complaint, which alleged that the Agency unlawfully discriminated against him. On February 10, 2015, the Agency issued the reprimand to the grievant. And the next day, the grievant asked in writing to amend the EEO complaint to include an allegation that the reprimand was an act of unlawful reprisal. An Agency EEO official notified the grievant by letter on February 13 that she had amended his EEO complaint to include the reprimand.

On February 19, the Union filed a formal grievance on the grievant's behalf, and the grievance alleged that: (1) the Agency violated several provisions of the parties' collective-bargaining agreement; and (2) the reprimand did not "contain a violation of any law[,] rule[,] or regulation, indicating [that the] . . . charges were untrue, and the facts misrepresented."[3] As relief, the grievance asked the Agency to rescind the reprimand, and remove it from the grievant's record. Although the Agency declined the Union's requests to meet to discuss the grievance, the Agency responded to it. In particular, the Agency denied the grievance under § 7121(d) of the Statute because of the grievant's earlier challenge to the reprimand in his EEO complaint.

The grievance went to arbitration, where the Union proposed that the Arbitrator decide "[w]hether or not the [reprimand] . . . was for just cause."[4] But the Agency proposed a "threshold question" about the grievance's arbitrability.[5] In response, the Arbitrator issued an interim award to address only the "[a]rbitrability issue."[6] Although he mistakenly stated that the reprimand was evidence before the Merit Systems Protection Board – rather than the Equal Employment Opportunity Commission – the Arbitrator recognized that the reprimand was already offered as "evidence in support of the [grievant's statutory] discrimination complaint."[7] However, the Arbitrator found that the EEO complaint involved a "different matter" than the grievance because the grievance "alleged violation[s] of the" parties' agreement.[8] Thus, the Arbitrator found that the "[r]eprimand . . . [was] arbitrable," but he postponed addressing the grievance's merits so that the parties could discuss how to resolve the grievance.[9]

[1] Award at 1.
[2] 5 U.S.C. § 7121(d).
[3] Exceptions, Attach., Tab 1 (grievance form).
[4] Award at 1.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 2.
[8] *Id.*
[9] *Id.*

The Agency filed an exception to the interim award, and the Union filed an opposition to the Agency's exception.

III. Preliminary Matter: The exception is interlocutory, but the Agency alleges a plausible jurisdictional defect in the interim award.

Because the interim award did not appear to resolve the parties' dispute completely, the Authority's Office of Case Intake and Publication ordered the Agency to show cause why its exception should not be dismissed as interlocutory.[10] The Agency filed a response to the order (Agency's response),[11] which we discuss further below.

The Authority "ordinarily will not consider interlocutory appeals."[12] In other words, the Authority ordinarily will not resolve exceptions to an arbitration award unless the award completely resolves all of the issues submitted to arbitration.[13] Consequently, an arbitration award that postpones the determination of an issue submitted is not a final award subject to review.[14] In this regard, "an award is not final merely because the parties agree to resolve the issues presented in separate proceedings."[15] However, the Authority will review interlocutory exceptions that allege a "plausible jurisdictional defect" in an award[16] – meaning that the arbitrator did not have the power to issue the award "as a matter of law"[17] – *if* addressing that defect "will advance the ultimate disposition of the case."[18] In this context, "advanc[ing] the ultimate disposition" of a case means that granting interlocutory review "would end the litigation."[19]

The Agency concedes that, because the Arbitrator postponed addressing the grievance's merits, his award is not final for purposes of review.[20] But the Agency contends that the Authority should nevertheless resolve the Agency's interlocutory exception because it concerns a jurisdictional defect in the interim award as a matter of law.[21]

The Authority has recognized that § 7121(d) limits the jurisdiction of an arbitrator to resolve a grievance.[22] And, for the reasons discussed in Section IV. below, we find that the Agency's argument that the interim award is contrary to § 7121(d) identifies a "plausible jurisdictional defect" in the award.[23] Further, because the Arbitrator did not identify any issues in dispute except the reprimand, interlocutory review will "advance the ultimate disposition" of this case.[24] We acknowledge, in this regard, that the Union vaguely asserts that the grievance and the EEO complaint "arise from *separate* events,"[25] but the Union does not identify any other events that the grievance concerns, besides the reprimand.

Because of a plausible jurisdictional defect, and considering the potential to "end the litigation" between the parties,[26] we grant interlocutory review of the Agency's exception.

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[10] Order to Show Cause (Dec. 8, 2015).
[11] Agency's Resp. to Order to Show Cause (Dec. 22, 2015).
[12] 5 C.F.R. § 2429.11.
[13] *See, e.g., 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) (*Army*); *U.S. Dep't of HHS, Ctrs. for Medicare & Medicaid Servs.*, 57 FLRA 924, 926 (2002) (*HHS*).
[14] *Carswell*, 64 FLRA at 567; *Army*, 60 FLRA at 248; *HHS*, 57 FLRA at 926.
[15] *AFGE, Local 12*, 61 FLRA 355, 357 (2005).
[16] *U.S. DOL*, 63 FLRA 216, 217 (2009) (citing *U.S. Dep't of Transp., FAA*, 61 FLRA 634, 635 (2006)).
[17] *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 851 (2012) (*Air Force*) (citing *U.S. DHS, U.S. Citizenship & Immigration Servs.*, 65 FLRA 723, 725 (2011) (*DHS*)).
[18] *Carswell*, 64 FLRA at 567 (citing *U.S. Dep't of the Treasury, Customs Serv., Tucson, Ariz.*, 58 FLRA 358, 359 n.* (2003)).
[19] *DHS*, 65 FLRA at 725 (first citing *U.S. Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project, Wapato, Wash.*, 55 FLRA 1230, 1232 (2000); then citing *U.S. Dep't of the Interior, Bureau of Reclamation*, 59 FLRA 686, 688 (2004); *U.S. Dep't of the Treasury, IRS, L.A. Dist.*, 34 FLRA 1161, 1163-64 (1990)).
[20] Agency's Resp. at 2 (admitting that "decision . . . is not final"); *see, e.g., Carswell*, 64 FLRA at 567.
[21] Agency's Resp. at 3-4.
[22] *E.g., U.S. Dep't of the Interior, Nat'l Park Serv., Golden Gate Nat'l Recreation Area, S.F., Cal.*, 55 FLRA 193, 195 (1999).
[23] *Air Force*, 66 FLRA at 851.
[24] *Carswell*, 64 FLRA at 567.
[25] Opp'n at 10 (emphasis added).
[26] *DHS*, 65 FLRA at 725.

IV. Analysis and Conclusion: Section 7121(d) of the Statute bars the grievance.

The Agency argues that the interim award is contrary to § 7121(d) of the Statute.[27] As relevant here, § 7121(d) provides that an employee may raise a personnel "matter under a statutory [EEO] procedure or the negotiated procedure, *but not both*."[28] Further, an employee makes a binding choice between those two options when the employee "timely initiates an action under the applicable statutory procedure or timely files a grievance in writing . . . *whichever event occurs first*."[29] For purposes of § 7121(d), the term "matter" refers "'not to the issue or claim of prohibited discrimination,' but, rather, to the personnel action involved."[30]

Consistent with these standards, as relevant here, we must assess which personnel actions were at issue in the EEO complaint and the grievance, in order to resolve the Agency's exception. Initially, we note that the Union asked the Arbitrator to decide "[w]hether or not the [reprimand] . . . was for just cause."[31] Relatedly, the Arbitrator found that the EEO complaint and the grievance both concerned the reprimand.[32] Further, the grievant's email amending his EEO complaint,[33] and the grievance itself,[34] challenged the reprimand.[35] Moreover, the relief that the grievance requested was the rescission of the reprimand and its removal from the grievant's record.[36] We recognize that the grievance cited the parties' agreement, whereas the EEO complaint relied on nondiscrimination statutes and regulations, but that distinction did not change the *personnel action* in dispute.[37] For those reasons, we find that the reprimand was the personnel action – or "matter"[38] – at issue in both the EEO complaint and the grievance.[39]

In its opposition, the Union repeatedly asserts that the interim award is not deficient because the Agency allegedly denied the grievant "due process" by refusing to meet regarding the grievance.[40] However, the Agency denied the grievance on the basis that § 7121(d) barred it, and the Union does not identify any authority to show that the grievant had a due-process right to meetings regarding a grievance that the law barred. Therefore, the Union's due-process argument does not provide a basis to find the interim award consistent with § 7121(d).

On the grounds above, and because there is no dispute that the grievant amended his EEO complaint to include the reprimand before filing the grievance,[41] § 7121(d) barred the Arbitrator from resolving the grievance.

V. Decision

We grant interlocutory review and set aside the award as contrary to § 7121(d) of the Statute.

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[27] Exceptions at 5-9.
[28] 5 U.S.C. § 7121(d) (emphasis added).
[29] *Id.* (emphasis added).
[30] *U.S. Dep't of the Air Force Headquarters, Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 43 FLRA 290, 297 (1991) (*Tinker*) (quoting *U.S. DOJ, U.S. Marshals Serv.*, 23 FLRA 564, 567 (1986) (*Marshals Serv.*)).
[31] Award at 1.
[32] *Id.* at 2; *see, e.g.*, *Marshals Serv.*, 23 FLRA at 567 (assessing scope of EEO complaint based on arbitrator's "acknowledg[ment] that the EEO complaint expressly concerned the suspension"); *see also Tinker*, 43 FLRA at 298 (relying on arbitrator's finding about the "issue" in an EEO complaint).
[33] Exceptions, Attach., Tab 3 (emails between grievant and EEO official (Feb. 11, 2015)).
[34] Exceptions, Attach., Tab 1 (grievance form).
[35] *See, e.g., U.S. DOJ, INS, El Paso, Tex.*, 40 FLRA 43, 54 (1991) (reviewing plain wording of narrative description in EEO complaint to evaluate § 7121(d) exception).
[36] Exceptions, Attach., Tab 1 (grievance form); *see U.S. Dep't of HUD*, 42 FLRA 813, 817-18 (1991) (considering that grievance and EEO complaint requested "almost identical remedies," when resolving § 7121(d) exception).
[37] *See Tinker*, 43 FLRA at 298-99 (where grievance and EEO complaint both alleged an improper failure to promote, albeit based on different theories, § 7121(d) barred later-filed grievance because of earlier-filed EEO complaint).
[38] 5 U.S.C. § 7121(d).
[39] Member Pizzella agrees with the majority that the award is contrary to § 7121(d) of the Statute. He reiterates, however, the inconsistency, which he noted in *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y., N.Y.*, 67 FLRA 442, 452 (2014) (Dissenting Opinion of Member Pizzella), whereby the majority will bar an individual employee, as here, from filing a statutory-based EEO complaint and a grievance on the same matter because of § 7121(d) but will permit a union to file a statutory-unfair-labor-practice (ULP) charge and a contract-based grievance on the same matter. *Id.* According to Member Pizzella, permitting a union to file a statutory-ULP charge and a contract-based grievance on the same matter, based entirely on the unfounded distinction between "matter" in § 7121(d) and "issue" in § 7116(d), runs counter to Congress' clear intent to prevent "*duplicative proceedings* by requiring an aggrieved party to make *an election of remedies*." *Id.* (citation omitted).
[40] Opp'n at 5, 6, 7, 8, 9, 10.
[41] *Compare* Exceptions, Attach., Tab 3 (emails between grievant and EEO official (Feb. 11, 2015)), *with* Exceptions, Attach., Tab 1 (grievance form showing signature for Agency's receipt on Feb. 19, 2015), *and* Opp'n at 4 (stating that grievance filed Feb. 19, 2015, with Agency signing for receipt).