69 FLRA No. 81

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
RICHMOND, VIRGINIA
(Agency)

0-AR-5153

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DECISION

September 14, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

The Union filed a grievance alleging that the Agency underpaid bargaining-unit employees, including registered nurses (RNs) and licensed practical nurses (LPNs), by paying them the wrong locality-pay adjustment. Arbitrator Ira Cure determined that the grievance was not arbitrable as to RNs, but that it was arbitrable as to LPNs and other employees. On the merits, the Arbitrator found that, because the Agency refused to cooperate with the Union to determine the extent of the underpayments, it was impossible to award damages. Therefore, he granted the grievance, in part. As a partial remedy, he directed the Agency to conduct an audit that the Union had requested, and provide the Union with information related to the alleged underpayments. He also retained jurisdiction to fashion a "possible" backpay remedy.[1] The Union then filed exceptions to the Arbitrator's determination that the grievance was not arbitrable as to RNs.

The question before us is whether the Union's exceptions are interlocutory. Because the Arbitrator did not fully resolve the remedy issue, the answer is yes.

[1] Award at 18.

II. Background and Arbitrator's Award

The Union represents a bargaining unit comprising RNs, LPNs, and other employees. The bargaining-unit employees work at the Agency's medical center in Richmond, Virginia, and an outpatient clinic in Fredericksburg, Virginia. The employees' work locations affect their salaries: employees at the clinic receive higher salaries than employees who hold similar positions at the medical center because the clinic employees work in the Washington, D.C., metropolitan area for locality-pay purposes.[2]

The medical center's director announced that RNs assigned to the clinic would be paid at the Washington locality pay rate, effective July 14, 2013. After this announcement, other clinic employees, including the LPNs, realized they should have been, but were not, receiving Washington locality pay. Although the Agency adjusted the locality-pay rates for the miscoded employees, the parties disagreed over whether employees were entitled to backpay, retroactive to their dates of employment. The Union filed a grievance, which the parties were unable to resolve, and the matter went to arbitration.

The issue submitted to the Arbitrator was whether "the Agency properly compensate[d] employees who were miscoded under the Richmond [l]ocality [p]ay instead of the Washington, D.C. [l]ocality [p]ay?"[3] The Arbitrator first addressed whether the Union's grievance was arbitrable. He determined that the grievance was substantively arbitrable as it related to the LPNs and the other employees, but not as it related to the RNs. Specifically, the Arbitrator concluded that "the Union ha[d] conceded" that the grievance concerned RNs' "compensation,"[4] and 38 U.S.C. § 7422 and the parties' agreement exclude grievances over "the establishment, determination, or adjustment of employee compensation" for certain medical professionals, including RNs.[5]

On the merits of the grievance as it pertained to the LPNs and other clinic employees, the Arbitrator found that the Agency refused to cooperate with the Union in examining the locality-pay issue. On the compensation issue, the Arbitrator recognized that "the Union is primarily seeking compensation for members of the bargaining unit."[6] But he concluded that it was "impossible to [a]ward any compensation" because, based on the record before him, it was "not possible to

[2] *See, e.g.*, 5 U.S.C. §§ 5301-5307 (providing for locality pay).
[3] Award at 2.
[4] *Id.* at 12.
[5] 38 U.S.C. § 7422(b); *see also id.* § 7421(b)(5).
[6] Award at 16.

determine which [employees] were not paid appropriately or if some [employees] still are not being paid appropriately."[7] He also determined that under the circumstances, "it is difficult to pinpoint a precise period of time for which a remedy will be granted."[8] Therefore, the Arbitrator sustained the grievance in part, and directed the Agency to conduct an audit and provide the Union with certain information related to the alleged underpayments. He retained jurisdiction "for the purpose of fashioning a [backpay] remedy"[9] and "for the purpose of resolving any disputes concerning a possible [backpay] remedy."[10]

The Union filed exceptions to the Arbitrator's finding that the grievance was not arbitrable as it related to RNs, and the Agency filed an opposition to the Union's exceptions.

The Authority ordered the Union to show cause why its exceptions should not be dismissed, without prejudice, as interlocutory. In response, the Union argues that the Arbitrator fully resolved all of the issues submitted to arbitration and that the parties need only calculate backpay to implement the award.[11]

III. Analysis and Conclusion: The Union's exceptions are interlocutory.

Section 2429.11 of the Authority's Regulations provides that "the Authority . . . ordinarily will not consider interlocutory appeals."[12] 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"[13] or a party demonstrates "extraordinary circumstances" warranting review.[14] 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."[15]

An arbitration award that postpones the determination of an issue submitted to arbitration is not a final award subject to review.[16] An award is not final, and exceptions are considered interlocutory, when the arbitrator has declined to make a final disposition as to a remedy.[17] Consistent with this principle, the Authority has repeatedly held that where an arbitrator declines to issue a remedy, directing instead that the parties attempt to develop an appropriate remedy on their own, the award does not constitute a final decision to which exceptions can be filed.[18] However, an award is considered final, and exceptions to the award are not interlocutory, where an arbitrator has retained jurisdiction solely to assist the parties in the implementation of awarded remedies, including the specific amount of monetary relief awarded.[19]

Here, the Union does not allege that extraordinary circumstances exist. Rather, the Union contends that the award is final and the exceptions are not interlocutory because the Arbitrator resolved all of the submitted issues and all that remains are backpay calculations.[20]

We disagree. The Arbitrator sustained the grievance and found that the LPNs and other clinic employees were not paid the proper locality pay.[21] And he awarded one of the remedies the Union requested – an audit to determine the extent of the underpayments to those employees. But, pending the audit's results, the Arbitrator declined to rule on the "primar[y]" remedy the Union sought – "compensation for members of the bargaining unit."[22] The Arbitrator declined to rule on the

[7] *Id.*
[8] *Id.* at 17.
[9] *Id.*
[10] *Id.* at 18.
[11] Response to Order to Show Cause at 1-2.
[12] 5 C.F.R. § 2429.11.
[13] *U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 68 FLRA 640, 641 (2015) (quoting *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 1, 2 (2012) (*White Sands*)).
[14] *Id.* (citing *White Sands*, 67 FLRA at 2).
[15] *Id.* (quoting *White Sands*, 67 FLRA at 2).
[16] *U.S. Dep't of VA, W. N.Y. Healthcare Sys., Buffalo, N.Y.*, 61 FLRA 173, 174 (2005) (*VA*) (2005); *U.S. Gov. Printing Office, Wash., D.C.*, 53 FLRA 17, 18 (1997) (*Printing Office*) (finding exceptions interlocutory where arbitrator retained jurisdiction to fashion specific remedy).
[17] *VA*, 61 FLRA at 174; *U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Dist.*, 60 FLRA 247, 248-49 (2004) (*Army Corps*) (finding exceptions interlocutory where grievance was sustained but arbitrator unable to determine from the record whether grievant was entitled to backpay).
[18] *VA*, 61 FLRA at 174-75 (finding exceptions interlocutory where arbitrator declined to issue remedy, retained jurisdiction, and ordered agency to determine appropriate remedy); *see also e.g.*, *Printing Office*, 53 FLRA at 18 (finding exceptions interlocutory where arbitrator ordered parties to develop remedy and retained jurisdiction to fashion one if parties could not); *Navy Public Works Ctr.*, *San Diego, Cal.*, 27 FLRA 407, 407-08 (1987) (finding exceptions interlocutory where arbitrator declined to make final disposition as to remedy because record was incomplete and directed parties to meet to settle dispute).
[19] *E.g.*, *U.S. Dep't of the Treasury, IRS*, 63 FLRA 157, 158-59 (2009).
[20] Response to Order to Show Cause at 1-2.
[21] Award at 16-17.
[22] *Id.* at 16.

appropriateness of a compensation remedy because, "without [the audit results], it is impossible to [a]ward any compensation."[23] Accordingly, the Arbitrator expressly declined, as part of the award, to order a backpay remedy. Rather, he retained jurisdiction so that, based on the audit's results, he could "fashion[] a [backpay] remedy"[24] and "for the purpose of resolving disputes concerning a *possible* [backpay] remedy."[25] Consistent with Authority precedent, we find that the award – which does not fully resolve the remedy issue – is not a final decision, and thus, the Union's exceptions are interlocutory.[26]

IV. Decision

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

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[23] *Id.*
[24] *Id.* at 17.
[25] *Id.* at 18 (emphasis added).
[26] *VA*, 61 FLRA at 174-75; *Army Corps*, 60 FLRA at 248-49; *Printing Office*, 53 FLRA at 18.

Member Pizzella, dissenting:

The majority makes this case far more difficult than it ought to be. I do not agree that the Union's exceptions are interlocutory.

There is nothing more for the Arbitrator to do here. He fully answered the single question that the parties asked him to resolve − whether the Agency "properly compensate[d] employees" for locality pay.[1]

As to the RNs, he found that the matter was not arbitrable.[2] That resolved that issue.

As to the LPNs, he found that they should have been paid under the locality pay which applies to employees working in the Washington, D.C. area. He simply "retained jurisdiction" *if* the parties ran into "any disputes concerning a possible remedy."[3] That resolved that issue.

The Authority has long held that "the fact that an award does not identify which employees were affected by an agency's actions does not, by itself, render exceptions to the award interlocutory."[4] Just as the arbitrator in *United States DOJ, United States Marshals Service*, the Arbitrator here left "the parties to resolve only the determinations of the affected persons' identities and the amounts of backpay."[5]

There is also no reason that we should not address, and resolve, the Union's exception concerning the non-arbitrability of the RNs' grievance. Without any doubt, the Union's grievance, insofar as it concerns the RNs, is barred by 38 U.S.C. § 7422. Therefore, withholding our ruling on this issue does nothing to advance this case to final resolution. My colleagues' reticence to make a final determination requires both parties on remand (which I would conclude is unnecessary) to *readdress* the same issue and then to *refile* exceptions on the same matter should this case come back before us.

As I have noted before, the role of the collective-bargaining process is to promote "the effective conduct of government [business]" by "bring[ing] [a] sense of finality [and] predictability" into the relationship between federal unions, employees, and agencies,[6] not to generate more controversy, more litigation, and more uncertainty. The decision of the majority has the opposite effect.

Thank you.

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[1] Award at 2.
[2] *Id.* at 17.
[3] *Id.* at 18.
[4] *U.S. DOJ, U.S. Marshals Serv*., 66 FLRA 531, 534 (2012) (*quoting AFGE, Nat'l Council of EEOC Locals No. 216*, 65 FLRA 252, 253-54 (2010)).
[5] 66 FLRA at 534; *see also U.S. Dep't of the Treasury, IRS*, 63 FLRA 157, 158 (2009) ("Exceptions to an award are not interlocutory where an arbitrator has retained jurisdiction solely to assist the parties in the implementation of awarded remedies, including the specific amount of monetary relief awarded.").
[6] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Williamsburg, Salters, S.C.*, 68 FLRA 580, 585 (2015) (Dissenting Opinion of Member Pizzella).