64 FLRA No. 75

OVERSEAS PRIVATE
INVESTMENT CORPORATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1534
(Union)

0-AR-4303

ORDER DISMISSING EXCEPTIONS

January 29, 2010

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 Ira F. Jaffe 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 that the Agency erroneously failed to waive fully a debt owed by the grievant to the Agency and sustained the Union's grievance. The Arbitrator also made his award conditional upon a determination by the Authority as to whether the grievant is within the bargaining unit. For the reasons set forth below, we dismiss the Agency's exceptions as barred by § 2429.10 of the Authority's Regulations.

II. Background and Arbitrator's Award

The grievant held the position of Computer Specialist, GS-14. Several years after she began her employment, the Agency informed her that her compensation rate was inaccurate and that the Agency would reduce it to reflect the accurate rate. *See* Award at 9-10. The Agency also informed the grievant that it would collect from her the difference between the amount of money that she was paid and the amount of money that she should have been paid. *See id.* at 12. The Agency eventually agreed to waive a portion of this debt, but denied the grievant's request to waive the debt in full. *See id.* at 14-15.

The Union filed a grievance arguing that the Agency's decision to not waive fully the grievant's debt violated 5 U.S.C. § 5584 and the parties' agreement. [1] The matter was unresolved and submitted to arbitration. Prior to the hearing, the Agency asserted that the grievant could not utilize the parties' negotiated grievance procedure because she was not a member of the bargaining unit. *See id.* at 20. The Agency also requested a stay of the proceedings until this issue was resolved. *See id.* Despite this request, the parties subsequently agreed that the Arbitrator would decide the merits of the grievance and that any award in favor of the Union would be conditional upon a determination by the Authority of the grievant's bargaining unit status. *See id.* at 20-21. The Arbitrator framed the issues for resolution as whether: (1) the grievant owed a debt to the Agency; (2) the Arbitrator had jurisdiction to review the Agency's decision not to waive the grievant's debt in full; (3) the Agency's decision violated law and/or the parties' agreement; and (4) certain remedies were appropriate. *See id.* at 2.

The Arbitrator concluded that he could review the Agency's decision to not fully waive the grievant's debt and that this decision violated the parties' agreement and 5 U.S.C. § 5884. *See id.* at 55. However, the Arbitrator also stated that his award was "conditional upon an appropriate determination [by the Authority] that the [g]rievant is a member of the bargaining unit[.]" *Id.* at 54.

III. Order to Show Cause and the Agency's Response

The Agency filed exceptions challenging the merits of the Arbitrator's award, and the Union filed an opposition. Thereafter, the Authority issued an Order directing the Agency either to show cause why its exceptions should not be dismissed as interlocutory or demonstrate the existence of extraordinary circumstances that would permit the Authority to consider the exceptions. *See* Order at 2. The Order stated that, because the Arbitrator conditioned his award on a determination of the grievant's bargaining unit status and the record did not reveal whether the parties had resolved this issue, the award appeared interlocutory. *See id.*

1. 5 U.S.C. § 5584(a) states, in relevant part, that an agency may fully or partially waive a claim against an individual stemming from "an erroneous payment of pay[.]"

The Agency filed a response to the Order.[2] The Agency does not contest the fact that the award is conditional upon a determination of the grievant's bargaining unit status. The Agency argues that the Authority should resolve the Agency's exceptions at this time, however, because the Arbitrator decided the merits of the grievance despite this pending issue and his award is final with respect to the merits. *See* Agency's Response to Order to Show Cause (Response) at 2. The Agency suggests that the Arbitrator selected this approach because it represented "the best use of resources." *Id*.

IV. Discussion and Analysis

Section 2429.11 of the Authority's Regulations provides: "[t]he Authority . . . ordinarily will not consider interlocutory appeals." In arbitration cases, this means that ordinarily the Authority will not resolve exceptions filed to an arbitration award unless the award constitutes a complete resolution of all of the issues submitted to arbitration. *See, e.g., U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs.*, 57 FLRA 924, 926 (2002) (*DHHS*); *AFGE Nat'l Council of EEOC Locals No. 216*, 47 FLRA 525, 530 (1993). Consequently, an arbitration award that postpones the determination of an issue submitted does not constitute a final award subject to review. *See DHHS*, 57 FLRA at 926; *AFGE, Local 12*, 38 FLRA 1240, 1246 (1990). Exceptions are considered interlocutory when the arbitrator has declined to make a final disposition as to a remedy. *See DHHS*, 57 FLRA at 926.

The above precedent establishes that the Agency's exceptions are not interlocutory. Although the Arbitrator stated that his award was "conditional upon an appropriate finding that the [g]rievant was a member of the bargaining unit[,]" the Arbitrator clearly stated that this issue was not before him for resolution. Award at 56; *see also id.* at 36, 54. Indeed, the Arbitrator could not even consider the issue. *See U.S. Dep't of Veterans Affairs, Allen Park Veterans Admin. Med. Ctr., Allen Park, Mich.*, 40 FLRA 160, 172 (1991) (stating that arbitrators may not resolve bargaining unit status issues). The only issues the Arbitrator considered were those related to the Union's grievance, which he resolved. *See* Award at 2, 55. The Arbitrator, therefore, fully resolved all of the issues that were properly before him. Consequently, we find that the award is not interlocutory. *See, e.g., U.S. Dep't of the Navy, Norfolk Naval Shipyard*, 63 FLRA 144, 144 n.* (2009) (award that fully resolved all submitted issues was not interlocutory); *AFGE, Local 1242, Council of Prison Locals 33*, 62 FLRA 477, 479 (2008) (same).

Although the award is not interlocutory, we find that the Agency's exceptions must be dismissed because a decision on them would constitute an impermissible advisory opinion. The Agency contends that, because the Arbitrator resolved the grievance despite the pending representation issue, the Authority should likewise decide the Agency's exceptions despite this outstanding issue. However, the Agency continues to assert that the grievant is not within the bargaining unit. *See* Response at 2. If the Authority subsequently determines that the grievant is not a member of the bargaining unit, then she does not — and did not — have access to the grievance procedure. *See, e.g., Headquarters, XVIII, Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 34 FLRA 21, 25 (1989) (stating that grievance would not be arbitrable if grievant was found not to be within bargaining unit). The Agency's exceptions, accordingly, would become moot. A decision on the exceptions at this time, thus, would constitute an impermissible advisory opinion. *See U.S. DOJ, Fed. Bureau of Prisons, U.S. Penitentiary, Terre Haute, Ind.*, 58 FLRA 327, 330 (2003) (*DOJ*) (Authority refrained from deciding exceptions that had potential to become moot following further proceedings because such a decision would constitute an impermissible advisory opinion). Accordingly, we find that we are unable to resolve the Agency's exceptions. 5 C.F.R. § 2429.10[3]; *DOJ*, 58 FLRA at 330.

Based on the foregoing, we find that the exceptions are not interlocutory, but that a decision on them would constitute an impermissible advisory opinion. We, accordingly, dismiss the exceptions without prejudice and remand the award to the parties with instructions to place the grievance in abeyance until the issue of the grievant's bargaining unit

2. The Union filed a supplemental submission in response to the Agency's Response to the Order. The Union, however, did not request permission to file its submission under § 2429.26 of the Authority's Regulations. Accordingly, we will not consider the submission. *See, e.g., NAIL, Local 6*, 63 FLRA 232, 232 n.1 (2009).

3. Section 2429.10 of the Authority's Regulations states that "[t]he Authority . . . will not issue advisory opinions."

status has been resolved.[4] *See U.S. Dep't of Veterans Affairs*, 55 FLRA 781, 784 n.4 (1999) (listing decisions where the Authority has remanded awards to parties with instructions to place grievance in abeyance pending further representation proceedings) (citations omitted).

V. Decision

We dismiss the exceptions as barred by § 2429.10 of the Authority's Regulations and remand the award to the parties with instructions, absent settlement, to place the grievance in abeyance pending resolution of the grievant's bargaining unit status.

4. The Authority has decided exceptions to awards where parties have resolved bargaining unit status issues through a stipulation. *See, e.g., U.S. Dep't of Labor, Mine Safety & Health Admin., Se. Dist.*, 40 FLRA 937, 942 (1991) (Authority found that arbitrator could consider grievance because parties stipulated that grievant was within bargaining unit). The parties have not stipulated to the bargaining unit status of the grievant here, however. Moreover, clarification of unit petitions may be filed at any time; accordingly, either party may now seek clarification of the grievant's unit status. See 5 C.F.R. § 2422.1. Neither party appears to have taken steps to do so.