

66 FLRA No. 74

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
TERMINAL ISLAND, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1680
(Union)

0-AR-4179
(63 FLRA 620 (2009))

ORDER DISMISSING EXCEPTIONS

December 19, 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 Kenneth A. Perea 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.

In a prior proceeding, the Authority remanded the Arbitrator's award (initial award) to clarify the remedy. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Terminal Island, Cal.* 63 FLRA 620, 625 (2009) (*Terminal Island*). Before resolving the issues on remand, the Arbitrator issued an interim award finding that he had jurisdiction to consider violations of overtime-compensation laws that allegedly occurred subsequent to the initial award.

For the reasons discussed below, we dismiss the Agency's exceptions, without prejudice, as interlocutory.

II. Background and Arbitrator's Awards**A. Background and Initial Award**

The Union filed a grievance on behalf of correctional officers alleging that the Agency violated the overtime-compensation provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 and the Federal Employees Pay Act, 5 U.S.C. § 5542. *Terminal Island*, 63 FLRA at 620; Interim Award at 1. The Arbitrator found that the Agency failed to compensate the correctional officers for overtime for certain pre-shift and post-shift activities, and he awarded them "30 minutes overtime compensation for each full shift completed beginning three years retroactive from the date of the filing of the subject grievance on May 31, 2005 until the date of th[e] Award" *Id.* at 2.

The Agency filed exceptions. The Authority found that the initial award failed to distinguish between correctional officers who performed compensable activity and those who did not, and that it did not account for the varying amount of time that different officers spent performing compensable activities. *Terminal Island*, 63 FLRA at 625. As a result, the Authority could not determine whether the award required the Agency to compensate correctional officers for activities that were either not performed, or not compensable. *Id.* Therefore, the Authority remanded the initial award to the parties for clarification as to these matters. *Id.*

B. Interim Award

Pursuant to the *Terminal Island* decision, the Arbitrator reconvened the proceedings. Interim Award at 3. The Union asserted that the Arbitrator had jurisdiction to consider allegations of FLSA overtime-compensation violations that occurred subsequent to the initial award. *Id.* The Agency disagreed and argued that the doctrine of *functus officio* precluded the Arbitrator from considering any additional claims. *Id.* at 3-4.

The Arbitrator determined that he had jurisdiction to consider the Union's allegations of FLSA overtime-compensation violations that occurred subsequent to the initial award. *Id.* at 5. In doing so, the Arbitrator found that his jurisdiction fell within "the judicially-created exception to the *functus officio* rule which permits an arbitrator to decide an issue which has been submitted for resolution but which remains open for adjudication." *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency acknowledges that the exceptions are interlocutory. However, the Agency asserts that the Authority's review is warranted because its exceptions raise a plausible jurisdictional defect. Exceptions at 4. In this connection, the Agency argues, the Arbitrator has no jurisdiction over allegations of overtime-compensation violations that occurred subsequent to the initial award, and by exercising jurisdiction over them, he "has exceeded his authority and issued an award that is contrary to law." *Id.* at 5. As to the Agency's exceeds-authority exception, the Agency claims that allegations of FLSA overtime-compensation violations that occurred subsequent to the initial award were not before the Arbitrator when he resolved the grievance in the initial award nor were they considered by the Authority in *Terminal Island*. *Id.* at 6-8. Therefore, the Agency argues, the Authority should review its interlocutory exceptions because a plausible jurisdictional defect exists and the Authority's resolution of this jurisdictional defect "would not only advance the ultimate disposition of this case, it would fully resolve this case." *Id.* at 8.

As to the Agency's contrary-to-law exception, the Agency argues that the Arbitrator's jurisdictional determination in the interim award violates the doctrine of *functus officio*. *Id.* at 8-9.

B. Union's Opposition

The Union asserts that a resolution of the Agency's interlocutory exceptions will not advance the ultimate disposition of the case because the parties must still address the initial award's deficiencies as identified by the Authority in *Terminal Island*. Opp'n at 4-5. The Union also claims that the initial award is not contrary to law and that the Arbitrator did not exceed his authority by retaining jurisdiction over FLSA overtime-compensation violations that occurred after the initial award. *Id.* at 6. According to the Union, the initial award is not final because the Arbitrator retained jurisdiction to resolve any disputes concerning the remedy, and it is therefore within his authority to modify the initial award so that the remedy reflects the FLSA overtime-compensation violations that occurred after the initial award. *Id.* at 7, 11.

IV. Analysis and Conclusions

The Authority's Regulations provide that the Authority "ordinarily will not consider interlocutory appeals." 5 C.F.R. § 2429.11 (§ 2429.11). An interlocutory appeal concerns a ruling that is preliminary to the final disposition of a matter. In arbitration cases,

this means that the Authority ordinarily will not resolve exceptions filed to an arbitration award unless the award constitutes a complete resolution of all issues submitted to arbitration. See, e.g., *U.S. Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project, Wapato, Wash.*, 55 FLRA 1230, 1231 (2000) (*BIA*); *U.S. Dep't of the Treasury, IRS, L.A. Dist.*, 34 FLRA 1161, 1163 (1990) (*IRS*) (section 2429.11 reflects the judicial policy of discouraging fragmentary appeals of the same case).

The Authority will review interlocutory exceptions when the exceptions raise a plausible jurisdictional defect, the resolution of which would advance the ultimate disposition of the case. E.g., *BIA*, 55 FLRA at 1232. But the Authority reserves this review for "extraordinary situations." *Id.*; see *U.S. Dep't of Homeland Sec., U.S. Immigration & Customs Enforcement*, 60 FLRA 129, 130 (2004) (dismissing exception as interlocutory because excepting party failed to demonstrate that "extraordinary circumstances" existed warranting interlocutory review).

In addition to establishing a plausible jurisdictional defect, the excepting party must also establish that interlocutory review will advance the ultimate disposition of the case. *BIA*, 55 FLRA at 1232. The Authority has described this situation as one in which resolving the exceptions would end the litigation. See *U.S. Dep't of the Interior, Bureau of Reclamation*, 59 FLRA 686, 688 (2004); *IRS*, 34 FLRA at 1163-64.

Here, there is no dispute that the parties must still resolve the issues raised by the Authority in *Terminal Island*. Those issues included determining which correctional officers actually performed compensable activities, and the amount of time they spent performing those activities. Interim Award at 3, 5; Exceptions at 4; Opp'n at 5. Thus, even assuming that a plausible jurisdictional defect exists, the Agency has not shown that interlocutory review will end the litigation, advancing the ultimate disposition of the case. Therefore, we find that interlocutory review is not warranted, and dismiss the Agency's exceptions, without prejudice.

V. Order

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