70 FLRA No. 32

UNITED STATES
DEPARTMENT OF THE ARMY
XVIII AIRBORNE CORPS AND FORT BRAGG
FORT BRAGG, NORTH CAROLINA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1770
(Union)

0-AR-5201

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DECISION

February 7, 2017

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Before the Authority: Patrick Pizzella, Acting Chairman, and Ernest DuBester, Member

I. Statement of the Case

The Union filed a grievance on behalf of security guards employed by the Agency's Directorate of Emergency Services (DES). The grievance alleged that the Agency violated the parties' agreement when it unilaterally changed the DES security guards' work schedules.[1] Before addressing the merits of the grievance, Arbitrator James E. Rimmel determined that the grievance is arbitrable, finding that the DES security guards are in the bargaining unit. He therefore directed the parties to proceed with arbitration on the merits of the grievance.

The main question before us is whether the award is contrary to §§ 7105(a)(2)(A) and 7112(a) of the Federal Service Labor-Management Relations Statute (the Statute),[2] which give the Authority exclusive jurisdiction to make unit determinations. Because the Arbitrator's award resolves the contested bargaining-unit status of the DES security guards, the award is contrary to law. And, because the award is contrary to law, we find it unnecessary to address the Agency's nonfact exception.

[1] Award at 2; *see also* Exceptions, Ex. 1, Tr. at 5.
[2] 5 U.S.C. §§ 7105(a)(2)(A), 7112(a).

II. Background and Arbitrator's Award

The Union filed a grievance on behalf of DES security guards. The grievance alleged that the Agency unilaterally changed the work schedules of bargaining-unit employees – the DES security guards – in violation of the parties' agreement. The Agency asserted that the security guards were not in the bargaining unit. Before addressing the merits of the grievance, the parties asked the Arbitrator to determine whether the grievance was arbitrable.

The Arbitrator framed the issues as follows: "Is this grievance properly before me in arbitration for adjudication on the merits? If so, what shall be required of the parties?"[3]

The Agency argued that the grievance is not arbitrable because it involved a bargaining-unit determination over which the Authority has exclusive jurisdiction. Recognizing that the most recent unit-certification – issued in 2005 – includes "guards" in the bargaining unit,[4] the Agency nonetheless asserted that the certification does not control because the DES security-guard position was not created until 2010. The Agency also asserted that testimony on the actual duties at issue, as opposed to a position classification, determines an employee's bargaining-unit status. Therefore, the Agency argued, because the Authority had not determined whether these particular security guards are in the bargaining unit, the grievance is not arbitrable. And the Agency requested that the Arbitrator place the grievance in abeyance pending the result of a unit-clarification petition should the Union decide to file one.

The Union countered that the Authority "previously considered the bargaining[-]unit status of guards"[5] and found them included in the unit. Additionally, the Union asserted that the Agency's arguments were resolved "definitively" in a 2015 award issued by Arbitrator Dennis R. Nolan (Nolan Award), and that the Nolan Award binds the Agency under the parties' agreement.[6]

The Arbitrator concluded that the grievance is arbitrable. Relying on a "principle of arbitral [r]es [j]udicata," the Arbitrator determined that the Nolan Award is "binding on the parties."[7] He found that

[3] Award at 13.
[4] *Id.* at 6.
[5] *Id.* at 10; *see id.* at 2-6 (citing JX 5 (Authority's 2005 Decision and Order on Petition certifying the Union as the exclusive representative of all civilian Agency employees, including "guards")) .
[6] *Id.* at 9.
[7] *Id.* at 13-14.

the Agency failed to show that the prior award was erroneous and should not apply. He also found that the prior award binds the Agency because no exceptions were filed, and thus the award became final and binding under the parties' agreement. Therefore, the Arbitrator determined that the grievance is arbitrable, and he directed the parties to proceed with arbitration on the grievance's merits.[8]

The Agency filed exceptions to the award and the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matters

A. The Agency does not demonstrate that extraordinary circumstances exist for waiving the expired time limit for filing its response to the Authority's show cause order.

The Authority's Office of Case Intake and Publication (CIP) issued an order to show cause (first order) why the Authority should not dismiss the Agency's exceptions, without prejudice, as interlocutory.[9] The Agency filed an untimely response, and CIP issued a second order to show cause (second order) directing the Agency to show cause why the Authority should not dismiss its exceptions for failure to timely respond to CIP's first order.[10]

The Agency responded, conceding that its response to the first order was untimely, and requesting a waiver of the expired time limit due to extraordinary circumstances.[11] Section 2429.23(b) of the Authority's Regulations permits the Authority to waive an expired time limit in "extraordinary circumstances."[12]

The Agency's request does not meet the requirements for a waiver. None of the Agency's reasons demonstrate the extraordinary circumstances required for waiving the expired deadline for filing the Agency's response to the first order.[13] Therefore, we find that extraordinary circumstances do not exist for a waiver of the expired time limit under §2429.23(b).

However, as discussed more fully below, extraordinary circumstances do exist that warrant review of the Agency's exceptions. Specifically, the exceptions raise a plausible jurisdictional defect – that, as a matter of law, the Arbitrator lacked jurisdiction to consider the grievance – and resolution of the Agency's exceptions will advance the ultimate disposition of this case.[14] Therefore, we consider the Agency's exceptions.

B. The exceptions are interlocutory, but the Agency alleges a plausible jurisdictional defect that warrants review.

The Authority "ordinarily will not consider interlocutory appeals."[15] In arbitration cases, this means that the Authority ordinarily will not resolve exceptions to an arbitration award unless the award completely resolves all of the issues submitted to arbitration.[16] And an award is not final merely because, as in this case, the parties' agreement requires them to conduct a separate hearing on the arbitrability of a grievance before proceeding to a hearing on the merits.[17] But the Authority will review interlocutory exceptions that allege a plausible jurisdictional defect – that the arbitrator did not have the power to issue the award as a matter of law – if addressing that defect will advance the ultimate disposition of the case by ending the litigation.[18]

[8] *Id.* at 14.
[9] First Order at 1-2.
[10] Second Order at 1-2.
[11] Agency Response to Second Order at 1.
[12] 5 C.F.R. § 2429.23(b).

[13] *See, e.g., U.S., DHS, ICE*, 66 FLRA 880, 883 (2012) (finding that reason for untimely filing – away from the office due to work and illness – did not demonstrate extraordinary circumstances for waiving expired time limit); *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 444 (2014) (finding no extraordinary circumstance for waiving expired time limit where union failed to explain why union representative could not have requested another person to monitor mail while he was out of the office).
[14] *See Library of Cong.*, 58 FLRA 486, 487 (2003) (finding that where exceptions raise a plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of the case, extraordinary circumstance may exist warranting review of interlocutory exceptions).
[15] 5 C.F.R. § 2429.11
[16] *U.S. Dep't of the Navy, Naval Undersea, Warfare Ctr. Div. Keyport, Keyport, Wash.*, 69 FLRA 292, 293 (2016) (*Navy*) (citations omitted); *U.S. DOJ, Exec. Office for Immigration Review*, 67 FLRA 131, 131 (2013) (citations omitted).
[17] *U.S. Dep't of the Treasury, IRS, L.A. Dist.*, 34 FLRA 1161, 1163 (1990) (*IRS*); *see also Navy*, 69 FLRA at 293.
[18] *Navy*, 69 FLRA at 293; *IRS*, 34 FLRA at 1163-64.

Here, the Agency alleges a plausible jurisdictional defect – that the Arbitrator made a bargaining-unit determination.[19] The Authority has long held that, under §§ 7105(a)(2)(A)[20] and 7112(a)[21] of the Statute, it has exclusive jurisdiction to resolve questions concerning the bargaining-unit status of employees, and that arbitrators are not empowered to do so.[22]

Accordingly, we grant interlocutory review of the Agency's exceptions.[23]

IV. Analysis and Conclusion: The award is contrary to §§ 7105(a)(2)(A) and 7112(a) of the Statute.

The Agency argues that the award is contrary to law, specifically, § 7105(a)(2)(A) of the Statute.[24] As discussed above, §§ 7105(a)(2)(A) and 7112(a) of the Statute provide the Authority with exclusive jurisdiction to determine the bargaining-unit status of employees.[25] This exclusive jurisdiction includes the power to resolve disputes between the parties over whether certain positions are in a certified bargaining unit – as in this case.[26] And, arbitration cannot be used as a substitute.[27]

According to the Arbitrator, the Nolan Award – which found that a security guard was in the bargaining unit – controlled his decision here, and the grievance was therefore arbitrable.[28]

But the Agency now argues that the security guards at issue are outside the scope of the bargaining unit. Specifically, the Agency argues that the security guards are not in the bargaining unit because: (1) the DES security-guard position did not exist until five years after the unit certification; and (2) the DES security guards do not perform the same duties as the guards identified in the unit certification.[29] The Agency asserts that the Authority has not been asked to determine the bargaining-unit status of these security guards and the grievance, therefore, is not arbitrable.[30]

We agree. The Arbitrator erred when he found that the security guards are part of the certified unit.[31] While the Authority previously decided that guards are included in the bargaining unit,[32] the Authority has never been asked to determine the bargaining-unit status of these security guards.[33] Thus, the Nolan Award is not controlling precedent because any determination concerning the bargaining-unit status of these guards would fall under the Authority's exclusive jurisdiction.[34]

Accordingly, the grievance is not arbitrable and the award is contrary to law. We therefore set it aside.[35]

And, as requested by the Agency,[36] we order the parties to place the grievance in abeyance pending the result of a unit-clarification petition should the Union decide to file such a petition.[37]

Because we find the award contrary to law and set it aside, it is not necessary to address the Agency's nonfact exception.[38]

V. Decision

The award is contrary to law and we set it aside. We order the parties to place the grievance in abeyance pending the result of a unit-clarification petition should the Union decide to file such a petition.

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[19] Exceptions Br. at 3.
[20] 5 U.S.C. § 7105(a)(2)(A).
[21] *Id.* § 7112(a).
[22] *AFGE, Local 1617*, 55 FLRA 345, 348 (1999) (*Local 1617*) (an arbitrator "is not empowered to make an initial determination as to [a] grievant's bargaining-unit status"); *U.S. Dep't of VA, Allen Park Veterans Admin. Med. Ctr., Allen Park, Mich.*, 40 FLRA 160, 172 (1991) ("arbitrators have no authority to resolve questions concerning the unit status of employees"); *U.S. Small Bus. Admin.*, 32 FLRA 847, 852-54 (1988) (*SBA*) (finding arbitrator prohibited from deciding questions concerning employee's bargaining-unit status).
[23] *IRS*, 34 FLRA at 1164.
[24] Exceptions Br. at 3.
[25] *See* Section III.B.
[26] *SBA*, 32 FLRA at 853; *Office of Hearings & Appeals, SSA, Dep't of HHS*, 20 FLRA 797, 798 (1985).
[27] *See SBA*, 32 FLRA at 854.
[28] Award at 13-14.
[29] Exceptions Br. at 2, 4; *see also* Award at 7.
[30] Exceptions Form at 4.
[31] *See Local 1617*, 55 FLRA at 347-48 (arbitrator may apply previously made unit-status determination to decide arbitrability of grievance but not empowered to make initial determination as to grievants' bargaining-unit status); *cf. Dep't of the Army Headquarters, Fort Dix, Fort Dix, N.J.*, 53 FLRA 287, 294 (1997) (Authority's Regional Director may decide if grievants are automatically included under express terms of bargaining-unit certification).
[32] Award at 2-6 (citing JX 5).
[33] *See U.S. Army Transp. Ctr., Fort Eustis, Va.*, 34 FLRA 860, 864 (1990) (where nothing in record showed Authority resolved grievants' unit status, arbitrator precluded from addressing merits of grievance when decision depended on resolution of that issue).
[34] *See SSA, Office of Disability Adjudication & Review, Balt., Md.*, 64 FLRA 896, 904 (2010) (Regional Director not required to defer to arbitration award where question of bargaining-unit status reserved exclusively for Authority).
[35] *See IRS*, 34 FLRA at 1164-65.
[36] Award at 9.
[37] *See IRS*, 34 FLRA at 1165; *see also SBA*, 32 FLRA at 854.
[38] *See, e.g., U.S. Dep't of the Air Force, Luke Air Force Base, Ariz.*, 65 FLRA 820, 822 n.3 (2011).