64 FLRA No. 97

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL MEDICAL CENTER
CARSWELL, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1006
(Union)

0-AR-4510

ORDER DISMISSING EXCEPTIONS

March 8, 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 a merits award, supplemental award, and an attorney-fee award * of Arbitrator Samuel J. Nicholas, Jr. 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 addition, the Authority issued an order to show cause why the exceptions should not be dismissed, to which the Agency filed a response. The Union filed an opposition to the Agency's response.

For the reasons that follow, we dismiss the exceptions, without prejudice, as interlocutory.

II. Background and Arbitrator's Awards

The Union filed a grievance on behalf of all bargaining unit employees alleging that the Agency was violating the Fair Labor Standards Act (FLSA) by requiring non-exempt employees to perform certain duties without compensation. Merits Award at 1-2. The grievance was not resolved and was submitted to arbitration. In a pre-hearing order, the Arbitrator directed that, at the hearing, the Union would present evidence concerning only a subset of the positions at issue (hereinafter "the subset of positions"), and the Agency would present its defenses. Attachment to Opp'n (Pre-Hearing Order) at 1. The Arbitrator stated that, "[b]ased on the posts/positions covered during the hearing, and the post-hearing briefs submitted by the parties," he would "present an interim decision concerning any liability of the Agency with respect to the claims asserted in the Union's grievance." *Id.* at 1-2. The Arbitrator noted that if the parties were unable to resolve remaining issues within thirty days of the issuance of his interim decision, he would schedule dates for a second hearing. *Id.* at 2.

In the merits award, the Arbitrator found the disputed duties constituted compensable work. Merits Award at 13-14. The Arbitrator directed the parties to file "a stipulation on the number of hours to be compensated and the monetary rate for quantifying the Award relative to the total sum due." *Id.* at 14. In addition, the Arbitrator stated that, if the parties failed to do so, then he would "make the calculations upon receiving advice of the parties." *Id.*

When the parties were unable to reach an agreement on the number of hours subject to compensation, the Arbitrator issued a "Supplemental Opinion and Final Award." Supplemental Award at 1, 13. In this award, the Arbitrator noted that the evidence at the hearing concerned the disputed duties of the subset of positions within the unit. *Id.* at 12. The Arbitrator awarded employees working in the subset of positions liquidated damages, and stated that this amount was "exclusive of any attorneys' fees and costs to which the [U]nion may be entitled under the FLSA." *Id.* at 13.

When the Agency filed exceptions to the merits award and supplemental award, the Authority issued an order directing the Agency to show cause why its exceptions should not be dismissed as interlocutory. When the Agency failed to respond to the order, the Authority dismissed the exceptions without prejudice.

Subsequently, the Arbitrator issued an attorney-fee award entitled "Final Order and Award on Union's Petition for Attorneys' Fees." Attorney-Fee Award at 1. Pursuant to the FLSA, the Arbitrator awarded attorney fees and costs in the amount requested by the Union. *Id.* at 3-4. The Arbitrator stated that "[n]o determination is made as to whether any fees/expenses may be due on

*. As discussed below, the Agency previously filed exceptions to the merits award and supplemental award, which the Authority dismissed without prejudice. The Agency has now filed exceptions to the attorney-fee award. These exceptions incorporate by reference the previously-filed exceptions to the merits award and supplemental award. Exceptions at 2; Agency Response to Show Cause Order (Response) at 6 n.2.

the remaining unheard issues set for [the upcoming] hearing." *Id.* at 4.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the attorney-fee award is contrary to law and fails to draw its essence from the parties' agreement. Exceptions at 4-13. The Agency also incorporates by reference its previously-filed exceptions to the merits award and supplemental award. *Id.* at 2; Agency Response to Show Cause Order (Response) at 6 n.2.

B. Union's Opposition

The Union argues that the Agency's exceptions are interlocutory because all of the issues submitted by the parties to arbitration have not yet been resolved. Opp'n at 6-9. In this regard, the Union asserts the Arbitrator's decision regarding the subset of positions "covers only approximately 25% of the approximately 36 posts/departments" at issue, and that the interlocutory nature of the Agency's exceptions is "plainly evidenced" by the fact that a hearing was scheduled after the attorney fee award to "resolve remaining issues." *Id.* at 6, 8. Alternatively, the Union argues that the award of attorney fees and costs is not deficient. *Id.* at 9-23.

IV. Order to Show Cause and Parties' Responses

The Authority issued an order directing the Agency to show cause why its exceptions should not be dismissed as interlocutory. *See* Order to Show Cause (Order) at 1.

In its response, the Agency asserts that, "[i]n the current case, the sole issue before the Arbitrator was the reasonableness of the Union's request for attorney fees under the [FLSA]." Response at 2. The Agency argues that, when considered along with the merits award and the supplemental award, the attorney-fee award disposed of the final remaining issue before the Arbitrator. *Id.* at 4-5. According to the Agency, the hearing scheduled by the parties to resolve the FLSA claims of unit employees other than the incumbents of the subset of positions already ruled upon "is essentially the start of a new case." *Id.* at 4. As that hearing concerns "whether or not an entirely different group of employees is entitled to overtime pay under the FLSA[,]" the Agency argues that "[n]othing that will be decided in any subsequent decisions will in [any way] have an effect" on the decisions already issued by the Arbitrator and excepted to by the Agency. *Id.*

In its opposition to the Agency's response, the Union reiterates its position that the Agency's exceptions are interlocutory. *See* Opp'n to Response at 2-6. The Union argues that the Arbitrator "split a complex, multi-issued grievance into separate issues and bifurcated their resolution," and that the attorney-fee award does not constitute a final disposition of all issues before the Arbitrator. *Id.* at 3-4. According to the Union, the grievance award will not be final until the Arbitrator has ruled on liability as to the remaining positions covered by the grievance, and on any liquidated damages, backpay, attorney fees, and costs to which the Union may be entitled. *Id.* at 4. In this connection, the Union asserts that the attorney-fee award addressed the Union's statutory entitlement to attorney fees and costs up to and including the date of the Union's fee petition, but that the Arbitrator may still find the Agency liable for the additional fees and costs that the Union has incurred since that date. *See id.* at 4-5.

V. Analysis and Conclusions

Section 2429.11 of the Authority's Regulations pertinently provides that "the Authority . . . ordinarily will not consider interlocutory appeals." 5 C.F.R. § 2429.11. Thus, the Authority ordinarily will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration. *See, e.g., 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 Health & Human Servs., Ctrs. for Medicare & Medicaid Servs.*, 57 FLRA 924, 926 (2002) (*HHS*). Consequently, an arbitration award that postpones the determination of an issue submitted does not constitute a final award subject to review. *See Army*, 60 FLRA at 248; *HHS*, 57 FLRA at 926. Similarly, the parties' agreement to conduct a separate hearing on a threshold issue does not operate to convert the arbitrator's threshold ruling into a final award subject to exceptions being filed under the Statute. *See, e.g., HHS*, 57 FLRA at 926 (arbitrator's resolution of a legal question did not make his interim award final and binding). In this regard, "an award is not final merely because the parties agree to resolve the issues presented in separate proceedings." *AFGE Local 12*, 61 FLRA 355, 357 (2005). However, the Authority has found interlocutory review to be appropriate where the exceptions present a plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of the case. *U.S. Dep't of the Treasury, Customs Serv., Tucson, Ariz.*, 58 FLRA 358, 359 n.* (2003) (*Treasury*).

The Agency does not dispute that the first hearing concerned only a subset of the positions covered by the grievance, or that, following the Arbitrator's issuance of the attorney-fee award, the parties participated in proceedings to address the Agency's liability as to unit employees in "the remaining posts/positions." Response at 6. Thus, although the Arbitrator's three awards may have resolved the Agency's liability as to employees in the subset of positions addressed at the parties' first hearing, they do not constitute a complete resolution of all the issues submitted to arbitration. In this regard, it is undisputed that the awards at issue here postpone the determination of the Agency's liability as to the employees in the remaining positions covered by the grievance. Therefore, these awards do not constitute a complete resolution of all issues submitted to arbitration. *See AFGE Local 12*, 61 FLRA at 356-57; *Army*, 60 FLRA at 248-49; *HHS*, 57 FLRA at 926.

For the foregoing reasons, we conclude that the Agency's exceptions are interlocutory. Further, the Agency does not claim that its exceptions raise a plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of this case. Accordingly, we dismiss the exceptions without prejudice. *See, e.g.*, *AFGE Local 12*, 61 FLRA at 357; *Treasury*, 58 FLRA at 359 & n.*.

VI. Order

The exceptions are dismissed without prejudice.