

65 FLRA No. 212

UNITED STATES
DEPARTMENT OF THE AIR FORCE
AIR FORCE FLIGHT TEST CENTER
EDWARDS AIR FORCE BASE, CALIFORNIA
(Agency)

and

SPORT AIR TRAFFIC CONTROLLERS
ORGANIZATION
(Union)

0-AR-4620

ORDER DISMISSING EXCEPTIONS

July 11, 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 Edna E.J. Francis 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 found that the Agency violated the parties' agreement and the Statute by failing to fulfill its bargaining obligations before changing a past practice. The Arbitrator directed the Agency to return to the status quo until it satisfied its bargaining obligations, and directed the parties to agree on a remedy for affected employees. For the reasons that follow, we dismiss the exceptions, without prejudice, as interlocutory.

II. Background and Arbitrator's Award

The Union filed a grievance alleging, in pertinent part, that the Agency violated the parties' agreement and the Statute when it refused to follow the past practice of granting administrative leave in the amount necessary for employees to receive a minimum of twelve hours of rest after working an overtime shift (rest policy). Award at 2. The grievance was unresolved and submitted to arbitration.

Before the Arbitrator, the Agency conceded that it ceased following the rest policy, but argued that it had fulfilled its bargaining obligation by offering the Union the opportunity to submit impact and implementation proposals concerning its new policy under which the Agency would ensure an eight-hour minimum interval between shifts. *Id.* at 10-11.

The Arbitrator found that the Agency's notice to the Union was insufficient, *id.* at 22-23, and that the Agency violated the parties' agreement and the Statute by changing the rest policy past practice before fulfilling its statutory bargaining obligations, *id.* at 24. As one element of the remedy, the Arbitrator directed the Agency to "return to the status quo ante" and "cease and desist from enforcing the change in past practice until it has satisfied its statutory bargaining obligations." *Id.*

In addition, the Arbitrator found that the Agency's failure to continue following the rest policy affected employees. *See id.* at 18. In this regard, the Arbitrator found that there was "no dispute" that, on several occasions, employees were "offered irregular and unscheduled overtime on their regular day off . . . and were not granted administrative leave" consistent with the rest policy. *Id.* The Arbitrator also found that, on a particular date, the Union president "was forced to work overtime and was not granted administrative leave in the amount necessary" under the rest policy. *Id.* Because the Arbitrator found that the Agency changed the rest policy past practice before it had satisfied its bargaining obligations, the Arbitrator stated:

[T]he Agency and the Union shall attempt to fashion a remedy regarding the case of any bargaining unit employee who, [during the relevant time period], declined overtime as a result of the change in past practice or worked overtime or an irregular shift but was . . . denied administrative leave [consistent with the rest policy].

Id. at 24. The Arbitrator retained jurisdiction "in the event the parties are unable to resolve issues regarding implementation of the remedy[.]" but noted that her jurisdiction would expire if extension of her jurisdiction was not requested by a specified date. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award is contrary to law because the Arbitrator imposed additional

requirements not required by law when evaluating the adequacy of the Agency's notice and invitation to bargain. Exceptions at 1-2.

B. Union's Opposition

The Union argues that the award is not contrary to law. Opp'n at 1-5.

IV. Order to Show Cause

In an Order to Show Cause (Order), the Authority directed the Agency to show cause why its exceptions should not be dismissed as interlocutory. Order at 1. The Authority stated that, because the Arbitrator directed the parties "to attempt to fashion a remedy" for any employee who declined overtime as a result of the change in past practice, or worked overtime or an irregular shift but was denied administrative leave consistent with the rest policy, *id.* at 2 (quoting Award at 24), "it is unclear whether the award 'completely and unambiguously' resolves the remedy," *id.* (quoting *AFGE, Local 1923*, 48 FLRA 1117, 1121 (1993)).

In response, the Agency argues that the award is final because the Authority has previously upheld the finality of awards in which arbitrators directed the parties to reach agreement regarding remedies. Response at 1 (citing *U.S. Dep't of Justice, Fed. Bureau of Prisons*, 63 FLRA 132 (2009) (*Prisons*); *SSA, Balt., Md.*, 60 FLRA 32 (2004) (Chairman Cabaniss concurring) (*SSA*)). In addition, the Agency asserts that it is "not aware of any . . . employees entitled to a remedy under the award[.]" and that the Union has not provided the Agency with a list of employees allegedly entitled to a remedy.* *Id.* at 2.

In reply, the Union argues that: (1) the Agency's exceptions are interlocutory, Reply at 1; (2) the Arbitrator has extended her jurisdiction until after the Authority issues a decision, *id.* at 2; and (3) "[i]t is undisputed that the parties have not yet fashioned a remedy as required by the [a]ward[.]" *id.* at 3. Further, the Union disputes the Agency's claim that it is

* In addition, although the Agency originally argued that the Arbitrator's jurisdiction had expired because the Union failed to request an extension of her jurisdiction, Response at 1, the Agency filed a supplemental submission (Addendum) clarifying that, at the request of the Union, the Arbitrator extended the period during which the parties may request that she reassert jurisdiction until sixty days after the Authority issues a decision on the Agency's exceptions. Addendum at 1. *See also* Reply at 2.

unaware of any employees entitled to a remedy. *Id.* at 2.

V. Analysis and Conclusions

Under § 2429.11 of the Authority's Regulations, 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 Homeland Sec., U.S. Customs & Border Prot.*, 65 FLRA 603, 605 (2011). Consistent with this principle, the Authority has 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. *See U.S. Dep't of Health & Human Servs., Navajo Area Indian Health Serv.*, 58 FLRA 356, 357 (2003) (*Navajo*); *U.S. Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project, Wapato, Wash.*, 55 FLRA 1230, 1231-32 (2000) (*Interior*).

In this case, the Arbitrator found that it was undisputed that employees were adversely affected by the Agency's failure to follow the rest policy, Award at 18, directed the parties to "attempt to fashion a remedy" for affected employees, and retained jurisdiction in the event the parties were unable to resolve the remedy issue, *id.* at 24. Consequently, consistent with the decisions cited above, the award is not a final decision. *See Navajo*, 58 FLRA at 357; *Interior*, 55 FLRA at 1231-32.

The decisions cited by the Agency are inapposite. In *SSA* and *Prisons*, the arbitrators specified the nature of the awarded remedies, but directed the parties to confer concerning the details of those remedies, such as the exact amount of costs to be recovered, *SSA*, 60 FLRA at 32, and the number of backpay claims of affected employees, *Prisons*, 63 FLRA at 133. Here, by contrast, the Arbitrator did not specify the type of remedy to which the affected employees were entitled and merely direct the parties to agree on the details of the awarded remedy; rather, the Arbitrator left the entire nature of the remedy up to the parties to decide. Accordingly, the Arbitrator's award is not a final decision and, thus, the Agency's exceptions are interlocutory.

VI. Order

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