66 FLRA No. 75

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 103
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
LONG BEACH, CALIFORNIA
(Agency)

0-AR-4748

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DECISION

December 19, 2011

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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 Sara Adler filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

In an initial award, the Arbitrator found that a grievance challenging a probationary employee's termination was arbitrable. After a hearing on the merits, the Arbitrator reconsidered her earlier ruling and issued a revised award, finding that the grievance was not arbitrable. For the reasons discussed below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Agency hired the grievant through the Federal Career Intern Program (FCIP).[1] Initial Award at 2-3. The grievant was subject to a two-year probationary period. *See id.* at 2. After hiring the grievant, the Agency informed her that, as a result of a background investigation, it was proposing to find her unsuitable for service. *Id.* at 3. Subsequently, the Agency terminated the grievant's employment. *Id.* The Union "griev[ed the] removal" as being based on an "erroneous negative suitability determination." Exceptions, Attach., Tab 1 at 2 (Grievance). The grievance was unresolved and submitted to arbitration. *See* Initial Award at 3.

At arbitration, the parties disputed whether the grievant's status as a probationary employee rendered the grievance nonarbitrable, and asked the Arbitrator to resolve that issue before considering the grievance on the merits. *See id.* at 2-4. After considering the parties' arguments on arbitrability, the Arbitrator issued the initial award, finding that: (1) the grievant's termination was based on a suitability determination; (2) under 5 C.F.R. § 731.501,[2] the suitability determination was appealable to the Merit Systems Protection Board (MSPB); and (3) because the matter was appealable to the MSPB, the matter was also arbitrable. *See id.* at 4-5 & n.5.

Subsequently, a hearing was held, and the Agency again argued to the Arbitrator that the grievance was not arbitrable. *See* Revised Award at 1-2. The Arbitrator acknowledged that she had "initially ruled that [the grievance] was arbitrable," but stated that she would revisit her initial determination because "jurisdiction is always a prerequisite to a decision on the merits." *Id.* at 1. After reconsidering the record, the Arbitrator determined that the Agency had based the termination on 5 C.F.R. § 213.3202(o),[3] not on 5 C.F.R. § 731.501. *Id.* at 2. Finding that 5 C.F.R. § 213.3202(o) "does not permit an appeal," *id.*, the Arbitrator determined that the grievance was not arbitrable, *id.* at 3.

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the Arbitrator exceeded her authority because she violated the principle of functus officio. *See* Exceptions at 1, 10. Specifically, the Union argues that under the principle of functus officio, the Arbitrator lacked authority to reverse, in the revised

[1] The FCIP was created in 2000 and ended effective March 1, 2011. Exec. Order No. 13,162, 65 Fed. Reg. 43,211 (July 6, 2000); Exec. Order No. 13,562, 75 Fed. Reg. 82,585, 82,588 (Dec. 27, 2010).

[2] 5 C.F.R. § 731.501(a) states, in pertinent part, that when an "agency . . . takes a suitability action against a person, that person may appeal the action to the Merit Systems Protection Board."

[3] 5 C.F.R. § 213.3202(o) lists FCIP positions among those filled under Schedule B of the excepted service, and states, in pertinent part, that appointments under the program "may not exceed 2 years." 5 C.F.R. § 213.3202(o)(1). The regulation also states that "[c]ompetitive civil service status may be granted to career interns who successfully complete their internships and meet all qualification, suitability, and performance requirements." 5 C.F.R. § 213.3202(o)(6)(i). As indicated *supra* note 1, the program ended effective March 1, 2011.

award, her finding that the grievance was arbitrable. *See id.* at 10 (citing *AFGE, Local 2172*, 57 FLRA 625 (2001) (*Local 2172*); *U.S. Dep't of Veterans Affairs, E. Kan. Health Care Sys.*, 57 FLRA 440 (2001) (*Veterans*); and *U.S. Dep't of Def., Dependents Schs.*, 49 FLRA 120 (1994) (*DOD*)). The Union asserts that the Arbitrator became functus officio when she issued the initial award and the Agency declined to file interlocutory exceptions to it. *See id.* at 11-12 (citing *Local 2172*, 57 FLRA at 627)).

The Union also contends that the award is contrary to law. *Id.* at 1. Specifically, the Union argues that the grievant could not have been terminated under 5 C.F.R. § 213.3202, because that regulation does not "provide[] the authority for an agency to terminate an FCIP appointment for suitability reasons prior to the expiration of the appointment." *Id.* at 14. Instead, according to the Union, the record indicates that the grievant's termination was a "suitability action." *Id.* at 13. The Union claims that because a suitability action is appealable to the MSPB, its grievance challenging the "removal of [an] FCIP appointee[] for suitability reasons" is arbitrable. *Id.* at 14 (citing *Scull v. Dep't of Homeland Sec.*, 113 M.S.P.R. 287, 295 (2010) (*Scull*)).

B. Agency's Opposition

The Agency argues that the Arbitrator did not exceed her authority, and was not functus officio, because her initial award dealt with a "threshold issue" and the "grieved issue, the termination, was not resolved in the [initial] award." Opp'n at 5. Further, the Agency contends that the Arbitrator, at all times relevant here, had authority to consider whether she had jurisdiction to resolve the dispute. *See id.* at 6 (citing *Devine v. Levin*, 739 F.2d 1567, 1570 (Fed. Cir. 1984)).

The Agency also argues that the award is not contrary to law because the Arbitrator correctly found that the grievant's termination was not based on a suitability determination, but instead was based on her "fail[ure] to meet a condition of her employment under the FCIP." *Id.* at 7. The Agency maintains that the Arbitrator correctly determined that 5 C.F.R. § 213.3202(o) was the authority under which the Agency terminated the grievant. *See id.* at 8-9.

IV. Analysis and Conclusions

A. The Arbitrator did not exceed her authority by violating the principle of functus officio.

Under the principle of functus officio, once an arbitrator resolves the matter submitted to arbitration, the arbitrator is generally without further authority. *U.S. Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash.*, 64 FLRA 823, 825 (2010). The principle of functus officio prevents arbitrators from reconsidering a final award. *See Local 2172*, 57 FLRA at 627 (citing *Devine v. White*, 697 F.2d 421, 433 (D.C. Cir. 1983)). Consistent with this principle, the Authority has found that, unless an arbitrator has retained jurisdiction or received permission from the parties, the arbitrator exceeds his or her authority when reopening and reconsidering an original award that has become final and binding. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla.*, 66 FLRA 300, 302 (2011) (citing *Overseas Fed'n of Teachers AFT, AFL-CIO*, 32 FLRA 410, 415 (1988) (*OFT*)). The Authority also has found that an arbitrator's determination that a grievance is arbitrable is "'merely a threshold ruling and is not a final award.'" *Local 2172*, 57 FLRA at 628 (quoting *Dep't of the Army, Oakland Army Base*, 16 FLRA 829, 830 (1984) (*Army*)).

Here, in the initial award, the Arbitrator found only that the grievance was arbitrable; she did not sustain, deny, or otherwise resolve the grievance. *See* Initial Award at 5. Thus, the initial award was "'merely a threshold ruling and . . . not a final award.'" *Local 2172*, 57 FLRA at 628 (quoting *Army*, 16 FLRA at 830). As such, the decisions cited by the Union, which pertain to arbitrators' *final* awards, are inapposite. *See Veterans*, 57 FLRA at 442 (after sustaining a grievance, arbitrator lacked authority to issue a supplemental award on issue that had not been submitted); *DOD*, 49 FLRA at 122-23 (after resolving award on the merits, arbitrator's authority limited by scope of his retained jurisdiction); *OFT*, 32 FLRA at 414-15 (after arbitrator denied grievance, arbitrator lacked authority to reopen and reverse the award). With respect to the Union's claim that the initial award became final when the Agency declined to file interlocutory exceptions to it, to the extent that the Union is claiming that the Agency was *required* to file interlocutory exceptions to the initial award, no Authority precedent, including the decision cited by the Union, *Local 2172*, 57 FLRA at 627, supports that claim. In this regard, although the Authority has held that a party *may* file interlocutory exceptions that raise a plausible jurisdictional defect, *see, e.g.*, *U.S. Dep't of Labor, Bureau of Labor Statistics*, 66 FLRA 282, 283-84 (2011) (*BLS*), the Authority has not stated that a party *must* file such exceptions.

Based on the foregoing, we find that the Union has not demonstrated that the Arbitrator exceeded her authority by violating the principle of functus officio.

B. The award is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.

See NTEU, Chapter 24, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Authority has held that grievances concerning the termination of a probationary employee are excluded from the scope of the negotiated grievance procedure as a matter of law. *E.g.*, *BLS*, 66 FLRA at 284. This is based on "Congress's intention to allow summary termination of probationary employees." *NTEU v. FLRA*, 848 F.2d 1273, 1275 (D.C. Cir. 1988) (*NTEU*). Further, that certain matters involving a probationary employee's termination may be appealed through an administrative procedure does not mean that those matters may be resolved through the negotiated grievance procedure. *See id.* at 1276-77. Such a finding would be contrary to "Congress's intention that collective bargaining *not* supplement probationers' existing procedural protections." *Id.* at 1276 (emphasis added).

Here, the Arbitrator found, and the parties do not dispute, that the grievant was a probationary employee at the time of her termination. *See* Initial Award at 2; Revised Award at 2. *See also, e.g.*, *Scull*, 113 M.S.P.R. at 292 (FCIP appointments "serve functionally as competitive service probationary periods"). Because grievances concerning the termination of a probationary employee are excluded from the negotiated grievance procedure as a matter of law, the above-stated principles support the Arbitrator's finding that the grievance, which "griev[ed the] removal" of the grievant, Grievance at 2, was not arbitrable. *See, e.g.*, *BLS*, 66 FLRA at 284. Further, the Union's argument that it could have appealed the suitability action to the MSPB, *see* Exceptions at 14, does not establish that the grievance was arbitrable, *see NTEU*, 848 F.2d at 1276-77. Accordingly, we find that the Arbitrator's determination that the grievance was not arbitrable is not contrary to law.

V. Decision

The Union's exceptions are denied.