70 FLRA No. 194

UNITED STATES
DEPARTMENT OF THE ARMY
WOMACK ARMY MEDICAL CENTER
FORT BRAGG, NORTH CAROLINA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1770
(Union)

0-AR-5295

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DECISION

December 11, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member Abbott concurring; Chairman Kiko dissenting)

I. Statement of the Case

The sole question before us is whether the Agency filed its exceptions timely. The grievant sought unpaid retention incentives that the Agency paid to other employees. In his first award, Arbitrator Samuel J. Nicholas, Jr. sustained the grievance and awarded backpay for the unpaid retention incentives for 2010 to 2014. In his second award, the Arbitrator extended the recovery period to include 2015, but did not otherwise revise his award.

Because the deficiencies alleged in the exceptions arose from the first award, and the Agency filed its exceptions more than thirty days after the Arbitrator served the first award, we dismiss the Agency's exceptions because they are untimely.

II. Background and Arbitrator's Award

In 2009, the Agency hired the grievant, a radiological technologist, to work in the Agency's radiology department. The Agency paid the grievant a retention incentive in 2009, but not in subsequent years. Sometime in 2015, the grievant discovered that the Agency had paid retention incentives to other radiological technologists in the radiology department every year. As a result, the Union filed a grievance alleging that the Agency had failed to properly compensate the grievant from 2010 to 2015. The grievance was unresolved, and the parties submitted the matter to arbitration.

As the parties were unable to agree on an issue, the Arbitrator framed the issues as: (1) Did the Agency "violate any rule of law or policy provision" by failing to award the grievant a yearly retention bonus, and (2) if the Agency "was in violation of established protocol or controlling policy," what is the appropriate remedy?[1]

In his first award, issued on May 24, 2017 (original award), the Arbitrator sustained the grievance and awarded the grievant backpay for the retention incentives she would have received from 2010 to 2014. After the Union asked for clarification, the Arbitrator issued a second award on June 5, 2017 (clarified award), that extended the recovery period to include 2015, but did not otherwise revise his original award.

On July 3, 2017, the Agency filed exceptions. The Union filed an opposition to the Agency's exceptions on July 28, 2017.

III. Analysis and Conclusion: The Agency's exceptions are untimely.

We find that the Agency failed to timely except to the original award, and that the clarified award does not extend the filing period for exceptions.

The time limit for filing exceptions to an arbitration award is thirty days "after the date of service of the award."[2] The Authority may not extend or waive this time limit.[3]

The Authority has repeatedly held that when a party asks an arbitrator to clarify his or her award, the arbitrator's response does not extend the time period for filing exceptions.[4] But the Authority has also held that "only when an arbitrator's response to a clarification request gives rise to the deficienc[ies] alleged in the exception[s] does the filing period for exceptions begin with the service of the arbitrator's response."[5]

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[1] Award at 3.
[2] 5 C.F.R. § 2425.2(b).
[3] *Id.* § 2429.23(d).
[4] *E.g.*, *AFGE, Local 3749*, 69 FLRA 519, 520-21 (2016) (Member Pizzella dissenting); *Nat'l Archives & Records Admin.*, 42 FLRA 664, 669 (1991) (*Archives*).
[5] *Archives*, 42 FLRA at 669.

The original award, which the Arbitrator served by email on May 24, 2017,[6] found that the grievant was entitled to retroactive retention incentives and directed the Agency to provide the grievant retention incentives for 2010 to 2014, but did not address 2015.[7] The Union then requested that the Arbitrator clarify whether he intended to include 2015 in the recovery period.[8] By email on June 5, 2017, the Arbitrator notified the parties that he had "erred in his mathematical calculation of the years" and attached the clarified award—solely correcting the recovery period to include 2015.[9]

The deficiencies alleged in the Agency's exceptions arose from the original award, not from the clarified award.[10] In the original award, the Arbitrator found that the grievant was entitled to retroactive retention incentives. In the clarified award, the Arbitrator merely reiterated the first ruling and corrected a typographical error by extending the end of the recovery period from 2014 to 2015. The exceptions do not challenge the only matter—the one-year recovery period extension—that arose from the clarified award, nor do they distinguish 2015 from the other years for which the Arbitrator ordered retroactive retention incentives.

Because the Agency's exceptions appeared to be untimely, the Authority's Office of Case Intake and Publication issued an order to show cause why the Agency's exceptions should not be dismissed as untimely.[11] In its response to the show-cause order, the Agency argues that excepting to the original award would have been "an impermissible interlocutory appeal" and that the clarified award "was the first final, appealable award."[12] The Agency argues that the original award was not final because it did not address the issue of retention incentives for 2015.[13]

Contrary to the Agency's interlocutory-appeal contention, the original award was a final award. At arbitration, the parties disputed whether the grievant was entitled to a remedy for the Agency's failure to provide her retention incentives. The original award completely resolved that issue, so timely exceptions to that award would not have been interlocutory.[14]

Accordingly, the Agency must have filed its exceptions no later than June 23, 2017—within thirty days after the Arbitrator served the original award—in order to be considered timely. But the Agency filed its exceptions on July 3, 2017. Therefore, we find the exceptions untimely, and dismiss them.

IV. Decision

We dismiss the Agency's exceptions.

[6] Agency's Resp. to Order to Show Cause (Agency's Resp.), Ex. 2 at 1 (Arbitrator's May 24, 2017 email transmittal); Opp'n, Ex. 6 at 1 (same).
[7] Original Award at 10.
[8] Agency's Resp., Ex. 2 at 1 (email seeking clarification of original award); Opp'n, Ex. 2 at 1 (same).
[9] Opp'n, Ex. 3 at 1.
[10] *Compare Archives*, 42 FLRA at 669 (dismissing as untimely an exception challenging merits of underlying arbitration award directing grievant's retroactive promotion where party did not file exception until after arbitrator clarified backpay dates), *with U.S. Dep't of the Army, Corps of Eng'rs, Nw. Div. & Portland Dist.*, 60 FLRA 595, 596 (2005) (granting as timely an exception that challenges an arbitrator's finding that a position could not be contracted out, a finding that the Arbitrator first articulates in a clarified award, where an earlier arbitration award merely directed agency to fill disputed position).
[11] Order to Show Cause at 1-2.
[12] Agency's Resp. at 2.
[13] *Id.* at 3.
[14] *See U.S. Dep't of the Treasury, IRS, Nat'l Distrib.Ctr., Bloomington, Ill.*, 64 FLRA 586, 589 (2010) (an award is final, for purposes of filing exceptions, when it completely resolves all of the issues submitted to arbitration); *Cong. Research Emps. Ass'n, IFPTE, Local 75*, 64 FLRA 486, 489 (2010) (an award is final for purposes of filing exceptions if it does not indicate that the arbitrator or parties contemplate the introduction of some new measure of damages, even if it may leave room for further disputes about compliance; *OPM*, 61 FLRA 358, 361 (2005) (award is final when it awards fees or damages, but leaves the amount of those damages to be determined).

Member Abbott, concurring:

Consistent with my position in *U.S. DOD, Defense Contract Management Agency* (*DCMA*)[1] and later in *U.S. DOD Education Activity, U.S. DOD Dependents Schools*,[2] I agree that the Agency's exceptions in this case are untimely.

Statutory and regulatory deadlines must be enforced in order to facilitate the timely and amicable resolution of disputes in the federal workplace.[3] I noted in *DCMA* that missing a statutory deadline is quite different from making a technical error.[4] Therefore, we reaffirmed that exceptions "must be filed 'during the [thirty]-day period beginning on the date the award *is served* on the party.'"[5]

In this case, it was clear in the Arbitrator's May 24, 2017, award that he found a violation and awarded a remedy through 2014. That award was served on the Agency that same day. Therefore, the re-issuance of the award on June 5, 2018, with no changes or explanations other than the correction of 2014 to 2015, was nothing more than an editorial correction. It certainly did not constitute a new or modified award that could extend the Agency's deadline for filing exceptions.

To hold otherwise would establish a vague precedent that in effect would permit any party to self-extend the statutory thirty-day filing period for filing exceptions simply by asking an Arbitrator to clarify any point of her award no matter how minor or technical. Such an interpretation is not consistent with effective and efficient Government.[6]

[1] 70 FLRA 370 (2018).
[2] 70 FLRA 718 (2018) (Member DuBester dissenting).
[3] *See* 5 U.S.C. § 7101(a)(1)(B).
[4] *DCMA*, 70 FLRA at 371 n.22.
[5] *Id.* at 370.
[6] 5 U.S.C. § 7101(b).

Chairman Kiko, dissenting:

The parties to this case asked the Arbitrator to decide whether the Agency improperly failed to pay the grievant retention bonuses from 2010 through 2015.[1] On May 24, 2017, the Arbitrator served the first award.[2] In it, he found that the grievant was entitled to retention bonuses for the years 2010 *through 2014*. Thus, the first award left the question of whether the grievant should receive retention bonuses through 2015 partly unresolved.

The Union emailed the Arbitrator and asked that he address the issue of the grievant's 2015 retention bonus.[3] At that point, it was reasonable for the Agency to await a second award. On June 5, 2017, the Arbitrator served the second award.[4] The second award found the grievant entitled to retention bonuses from 2010 *through 2015*. Thus, the second award marked the *first time* that the Arbitrator completely resolved the question that the parties put before him.[5] Only then was the award final and subject to review.[6]

For these reasons, I would find that the second award supplanted the first award for purposes of the Agency's right to file exceptions.[7] Because there is no dispute that the exceptions are timely as measured from the issuance of the second award, I would consider the exceptions on the merits.

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[1] *See* Award (May 27, 2017) at 4 ("The Union has filed the . . . grievance on the basis . . . that [m]anagement . . . fail[ed] to award [the grievant] a retention bonus for the period from November 2010 to December 2015.").

[2] Agency's Resp. to Order to Show Cause, Ex. 2, Email from Arbitrator to Parties' Counsels (May 24, 2017, 3:03 PM).

[3] Agency's Resp. to Order to Show Cause, Ex. 2, Email from Union's Counsel to Arbitrator, with Carbon Copy to Agency's Counsel (June 2, 2017, 5:01 PM).

[4] Opp'n, Ex. 3, Email from Arbitrator to Parties' Counsels (June 5, 2017, 11:08 AM).

[5] *See generally NFFE, Local 11*, 53 FLRA 1747, 1749-50 (1998) (discussing when communications from arbitrators should be considered awards).

[6] *See U.S. Dep't of the Interior, Nat'l Park Serv.*, 67 FLRA 489, 490 (2014) (*Interior*) ("An arbitrator's award is final when all the issues submitted for arbitration are completely and unambiguously resolved."); *see also U.S. DHS., U.S. ICE*, 60 FLRA 129, 130 (2004) (finding exceptions interlocutory where the award did not completely resolve all of the issues submitted to arbitration).

[7] *See, e.g.*, *Interior*, 67 FLRA at 489-90 (where arbitrator did not completely resolve matters before him until he issued a second award, exceptions to both first and second award were timely as measured from service of second award).