72 FLRA No. 123

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
GUAYNABO, PUERTO RICO
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS #33
LOCAL 2585
(Union)

0-AR-5548

_____

DECISION

January 24, 2022

_____

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

I. Statement of the Case

In a 2016 award, now-deceased Arbitrator Wallace Rudolph found that the Agency violated the Fair Labor Standards Act (FLSA)[1] by failing to compensate employees for work performed during unpaid lunch breaks. Arbitrator Rudolph retained jurisdiction to address "any disputes that may arise[,] in addition to any future claims for [a]ttorneys' fees."[2]

After Arbitrator Rudolph's passing, the parties selected Arbitrator Kitty Grubb for the purpose of resolving any entitlement to attorney fees. Arbitrator Grubb, at the Union's request, also asserted jurisdiction over the Union's claim that the Agency had continued to violate the FLSA after issuance of the Rudolph award. And in 2019, Arbitrator Grubb issued an award finding that the Agency had continued to violate the FLSA, as alleged.

The Agency's exceptions primarily challenge Arbitrator Grubb's assertion of jurisdiction over the continuing FLSA violations. Because, as explained below, Arbitrator Grubb acted within the bounds of Arbitrator Rudolph's retention of jurisdiction, we deny those exceptions.

II. Background and Arbitrators' Awards

The Union filed a grievance alleging that the Agency violated the FLSA by not compensating certain bargaining-unit employees (the grievants) for work performed during unpaid lunch breaks. Before Arbitrator Rudolph, the Agency "refused to present . . . evidence" to rebut the Union's allegation.[3] Consequently, in a September 16, 2016 award, Arbitrator Rudolph concluded that the Agency violated the FLSA, as alleged. Arbitrator Rudolph directed the Agency to reimburse the grievants, and he retained jurisdiction for 120 days to "resolve any disputes that may arise[,] in addition to any future claims for [a]ttorneys' fees."[4]

Subsequently, the Agency filed exceptions to the Rudolph award, which the Authority considered and denied in *U.S. DOJ, Federal BOP, Metropolitan Detention Center, Guaynabo, Puerto Rico* (*Guaynabo*).[5] Around the time the Authority issued *Guaynabo*, Arbitrator Rudolph passed away. The parties then jointly selected Arbitrator Grubb to assist them in addressing whether the Union was entitled to attorney fees.

After Arbitrator Grubb's selection, the Union proposed additional issues, including whether the Arbitrator had jurisdiction to address continuing FLSA violations by the Agency. Responding, the Agency argued that the only issue within Arbitrator Grubb's purview was attorney fees. Relying on the "completion exception" to the doctrine of functus officio, Arbitrator Grubb concluded that she was empowered to address the continuing FLSA claims.[6] But, she refused to allow new grievants or legal theories, and considered only the "same employees . . . [at] the same location, [on] the same issue."[7]

As it did during the proceedings before Arbitrator Rudolph, the Agency offered no evidence or witnesses to dispute the FLSA allegations against it. Thus, based on evidence submitted by the Union, Arbitrator Grubb found that after the Authority's decision in *Guaynabo*, the Agency engaged in "continuous and ongoing willful" violations of the FLSA.[8]

[1] 29 U.S.C. §§ 201-209.
[2] Exceptions, Attach. B, Arbitrator Rudolph's Award (Rudolph Award) at 4.
[3] *Id.* at 3.
[4] *Id.* at 4.
[5] 70 FLRA 186 (2017).
[6] Award at 16.
[7] *Id.* at 20.
[8] *Id.* at 38.

As a remedy, Arbitrator Grubb directed the Agency to pay the grievants compensatory damages and an equal amount of liquidated damages for the period between the grievance filing date and the date that the arbitration record closed. She also awarded the Union "reasonable attorney fees" but asserted that the Union "must" submit a fee petition.[9] Otherwise, the Arbitrator relinquished jurisdiction, referring to the award as a "complete closure" of the substantive FLSA issues.[10]

On September 23, 2019, the Agency filed exceptions to the award, and, on October 25, 2019, the Union filed an opposition.

III. Analysis and Conclusions

A. Arbitrator Grubb was not functus officio.

The Agency does not challenge any of Arbitrator Grubb's substantive FLSA findings. Instead, it claims that Arbitrator Grubb exceeded her authority, and the award is contrary to law, because she was functus officio as to the continuing FLSA violations.[11]

Under the doctrine of functus officio, once an arbitrator resolves matters submitted to arbitration, the arbitrator is generally without further authority.[12] Consistent with this principle, the Authority has found that, unless arbitrators retain jurisdiction or receive permission from the parties, they exceed their authority by reopening and reconsidering an original award that has become final and binding.[13]

Regarding Arbitrator Rudolph's retention of jurisdiction, the Agency claims that it—and, thus, Arbitrator Grubb's exercise of jurisdiction—was limited to the issue of attorney fees.[14] However, Arbitrator Rudolph unambiguously retained jurisdiction for two purposes: (1) to resolve "any future claims for [a]ttorneys' fees," and (2) to address "any disputes that may arise."[15] Also, it is undisputed that Arbitrator Grubb assumed the full arbitral authority retained by Arbitrator Rudolph and did so within the 120-day time frame set forth in the Rudolph award.[16] Thus, in concluding that the Agency had continued to violate the FLSA, Arbitrator Grubb was merely exercising Arbitrator Rudolph's reserved authority to address such a dispute. This is further evidenced by Arbitrator Grubb's refusal to expand jurisdiction to cover new grievants, new locations, or new legal theories.[17]

The Agency also alleges that the Authority's consideration of exceptions to the Rudolph award in *Guaynabo* establishes that the only issue Arbitrator Grubb could have addressed, without disrupting the finality of the Rudolph award, was attorney fees.[18] We agree that the Rudolph award was final in that Arbitrator Rudolph addressed all of the issues before him that were, in 2016, capable of resolution. But Arbitrator Rudolph could not have presumed that the Agency would have continued to violate the FLSA, with respect to the same employees, after he issued his award. Accordingly, at the time the Union raised the issue of continuing violations to Arbitrator Grubb, that claim was unresolved. Arbitrator Grubb's resolution of that unresolved issue could not, and did not, have any effect on the Rudolph award. Moreover, Arbitrator Grubb did not reopen or reconsider any determination made by Arbitrator Rudolph.

By retaining jurisdiction, Arbitrator Rudolph established a proper basis for considering issues arising out of the grievance.[19] Arbitrator Grubb acted within the bounds of that retained authority when she asserted jurisdiction for the limited purpose of addressing continuing FLSA violations. Accordingly, we find that Arbitrator Grubb was not functus officio, and we deny the Agency's exceptions.[20]

---

[9] *Id.* at 45.
[10] *Id.* at 46.
[11] Exceptions Br. at 8.
[12] *U.S. DOD, Educ. Activity, U.S. DOD, Dependents Schs.*, 70 FLRA 84, 86 (2016) (Member Pizzella dissenting) (citing *SSA*, 63 FLRA 274, 278 (2009)).
[13] *Id.* (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 66 FLRA 300, 302 (2011)).
[14] Exceptions Br. at 10.
[15] Rudolph Award at 4 (retaining jurisdiction over "any disputes that may arise[,] *in addition to* any future claims for [a]ttorneys' fees" (emphasis added)).
[16] Exceptions Br. at 1 n.2 (stating that "Arbitrator Grubb was selected to replace Arbitrator Rudolph"); *id.* at 12 (asserting that the parties selected Arbitrator Grubb to "pick up the case where Arbitrator Rudolph left off").
[17] Award at 20.
[18] Exceptions Br. at 11.
[19] *See* Exceptions, Attach. E, Union's Grievance at 1 (alleging FLSA violations from "November 4, 2014 and *ongoing and until resolved by a third party*" (emphasis added)); *see also U.S. Dep't of Energy, Oak Ridge Off., Oak Ridge, Tenn.*, 64 FLRA 535, 539 (2010) (finding arbitrator did not exceed authority by retaining jurisdiction to consider "any renewed discrimination claims" because "the issue of whether the [a]gency discriminated against the grievant in the selection process was submitted to the [a]rbitrator and ha[d] the possibility of being a 'live' claim at a later time").
[20] Given that Arbitrator Grubb was not functus officio, it is unnecessary for us to consider the completion exception. *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Terminal Island, Cal.*, 68 FLRA 537, 543 (2015) (Member Pizzella dissenting) (noting that the completion exception allows an arbitrator, who is functus officio, to "resolve a submitted issue that the arbitrator's initial award failed to resolve").

B. The Agency fails to establish that the award is contrary to public policy.

The Agency argues that the award is contrary to the public policy favoring "the finality of arbitration awards and the arbitral process."[21] For an award to be found deficient on this basis, the asserted public policy must be "explicit," "well defined," and "dominant," and a violation of the policy "must be clearly shown."[22] In addition, the excepting party must identify the policy "by reference to the laws and legal precedents and not from general considerations of supposed public interests."[23]

In large part, the Agency's public-policy claim is premised on the same arguments underlying its contrary-to-law and exceeded-authority exceptions, denied above. Mainly, the Agency avers that Arbitrator Grubb's assertion of jurisdiction over the FLSA violations results in a "never-ending arbitration process."[24] However, as noted, Arbitrator Grubb refused to allow any new grievants and considered only whether the Union's original FLSA claims (related to unpaid lunch breaks) continued to have merit.[25] Notably, Arbitrator Grubb also overtly relinquished any further jurisdiction over FLSA matters.[26] Therefore, even if the Agency had demonstrated that the asserted public policy is sufficiently explicit, well defined, and dominant, the Agency has not "clearly shown" that Arbitrator Grubb's limited, and now expended, exercise of jurisdiction over FLSA issues violated the alleged policy.[27] Accordingly, we deny the Agency's public-policy exception.

C. The Agency's exception concerning attorney fees is premature.

The Agency contends that the Authority should set aside any award of attorney fees "for the hours [the Union] spent preparing for and litigating" the continuing FLSA allegations.[28] However, the Arbitrator has not yet addressed the merits of an attorney-fee petition related to that work.[29] Consequently, the Agency's exception is premature and we dismiss it, without prejudice, as such.[30]

IV. Decision

We deny, in part, and dismiss, in part, the Agency's exceptions.

[21] Exceptions Br. at 27.
[22] *NTEU, Chapter 299*, 68 FLRA 835, 840 (2015) (*NTEU*).
[23] *Id.*
[24] Exceptions Br. at 29.
[25] Award at 20.
[26] *Id.* at 46 (directing the parties "to proceed to immediate[ly] wrap-up of all outstanding related [a]rbitration activity, and for this matter to conclude with sure and unmistakable finality, being [a] complete closure").
[27] *See NTEU*, 68 FLRA at 840.
[28] Exceptions Br. at 27.
[29] Award at 45 (directing the Union to file a fee petition that reflects business judgement and professional discretion); *see also* Opp'n Br. at 9-10 (Union conceding that its original fee petition "only covered . . . the hearing and briefing submitted in front of Arbitrator Rudol[ph] and the . . . work on the subsequent exceptions," but no fee petition has been submitted on work performed related to the "additional [FLSA] damages").
[30] *See U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 244 (2011) (because union had not submitted, and arbitrator had not considered, attorney-fee petition, Authority dismissed exception challenging award of attorney fees, without prejudice). *Cf. AFGE, Loc. 2663*, 70 FLRA 147, 148 (2016) (Member Pizzella concurring) ("Because the [u]nion never made a fee request to the [a]rbitrator, and the [a]gency did not have an opportunity to respond to any fee request, we find that the [a]rbitrator's denial of attorney fees was premature.").

Member Abbott, dissenting:

There is one proposition that determines this case – when an arbitrator replaces another, for whatever reason, they assume the same jurisdiction, no more and no less, as the arbitrator they replaced.

In this case, Arbitrator Rudolph addressed the Union's claim and found that the Agency had violated the Fair Labor Standards Act (FLSA) for work performed by certain employees during unpaid lunch breaks. After the award, Arbitrator Rudolph retained limited jurisdiction – "to resolve any disputes that may arise in addition to any future claims for [a]ttorneys' fees"[1] – if the parties were unable to resolve those issues. Although the Agency filed exceptions to the award, the Authority denied them in 2017. It was around that time that the parties learned of the Arbitrator's death.

At that point, the parties had but two choices to resolve the outstanding remedies and attorney fees issues over which Arbitrator Rudolph had retained jurisdiction – address and resolve the issues themselves or select another arbitrator to assume the jurisdiction that Arbitrator Rudolph had reserved. The record is not clear if this unfortunate circumstance spurred the parties to attempt resolution on their own, or how long it took the parties to decide to select Arbitrator Grubb. What is clear, however, is that when Arbitrator Grubb stepped into the shoes of Arbitrator Rudolph, the only jurisdiction or scope of authority that could be assumed was the scope that had been retained by Arbitrator Rudolph.[2] As noted above, that jurisdiction was limited to matters concerning remedies and attorney fees.

The majority concludes that Arbitrator Grubb's authority was not exceeded even though the Grubb award addressed new claims and new grievants that were not part of the original grievance. According to my colleagues, the claims of the new grievants concerned "continuing violations" rather than new claims by "new grievants, new locations, or new legal theories."[3] But that is indeed a blurry and confusing distinction. By their very nature, FLSA claims are continuing violations. No matter how the claims asserted by the Union, after Arbitrator Rudolph's merit decision and death, are characterized, they involve new grievants and claims.

Because context and perspective bring clarity, it is worth noting several facts that may not be immediately apparent. Arbitrator Rudolph's award was issued in 2016. The Agency's exceptions were denied by the Authority in March 2017[4] around the time the parties learned of Arbitrator Rudolph's passing. Arbitrator Grubb's award was not issued until the summer of 2019 and the exceptions filed thereafter have languished before us since October 2019.[5] Whatever the causes of these gaps and delays, the Union took full advantage of them and seized the opportunity to file the new claims.

Consequently, I would conclude that Arbitrator Grubb exceeded their authority, and I would grant the Agency's exception.

[1] Exceptions, Attach. B, Arbitrator Rudolph's Award at 4.

[2] *U.S. Agency for Glob. Media*, 70 FLRA 946, 947 (2018) (then-Member DuBester dissenting) (finding that the arbitrator violated the doctrine of functus officio by assuming jurisdiction over claims that arose after the initial awards became final).

[3] Majority at 4.

[4] *Id.* at 2.

[5] *Id.* at 3.