65 FLRA No. 151

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CITIZENSHIP AND IMMIGRATION
SERVICES
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3923
(Union)

0-AR-4727

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ORDER DISMISSING EXCEPTIONS

April 22, 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 e-mail of Arbitrator Thomas Angelo filed by Immigration and Customs Enforcement (ICE)[*] 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 ICE's exceptions.

In an initial award, the Arbitrator sustained the grievance and awarded the grievant priority consideration. In additional awards, the Arbitrator determined that the Agency had not complied with his awards and awarded remedial relief. Subsequently, in the e-mail to which ICE has filed exceptions, the Arbitrator denied ICE's motion to dismiss ICE from the arbitration proceedings.

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

[*] ICE states that ICE and U.S. Citizenship and Immigration Services (CIS) are separate components within the Department of Homeland Security (DHS). Exceptions, Attach. A at 2.

II. Background and Arbitrator's Awards

The grievant, an employee of CIS, filed a grievance when she was not selected for a position for which she had applied. The grievance was not resolved and was submitted to arbitration. In his initial award, the Arbitrator stated that the grievance arose out of a bargaining relationship between DHS, which he designated the "Agency[,]" and the Union. October 27, 2005 Award at 2. The Arbitrator sustained the grievance and awarded the grievant priority consideration for any published vacancy within the Agency's jurisdiction. *Id.* at 19.

In a subsequent award, the Arbitrator found that, in violation of the initial award, the Agency had failed to process the grievant's request for priority consideration and determined that the grievant was entitled to placement in the position of her choosing with backpay. January 30, 2007 Award at 29. The Agency filed exceptions to this award, but subsequently withdrew them. *See U.S. Dep't of Homeland Sec., U.S. Citizenship & Immigration Servs.*, 64 FLRA 335, 335-36 (2009).

In an additional award, the Arbitrator found that the Agency had failed to comply with the prior awards and directed it to comply. He awarded the grievant the next position, with backpay, within the Agency's facility at Glynco, Georgia, to which she applies and for which she is qualified. In addition, he directed the Secretary of DHS, or a responsible subordinate, to ensure that the Agency complies with the award. May 22, 2009 Award at 5.

In advance of a scheduled hearing on compliance with the awards, ICE submitted to the Arbitrator a motion to dismiss ICE from the arbitration on the basis that the Arbitrator lacked personal jurisdiction over ICE. ICE explained that the alleged lack of jurisdiction is based on the absence of any employee-employer relationship with the grievant in regard to the subject matter of the original grievance. ICE also contended that it had never been notified of the grievance, prior arbitration proceedings, or prior arbitration awards and that there was nothing substantive in any of the awards that concerns ICE. Exceptions, ICE's Motion to Dismiss for Lack of Jurisdiction, Attach. A at 1 n.2, 5.

The Arbitrator informed the ICE representative that the motion could be addressed at the outset of the compliance hearing scheduled for December 13, 2010. In conjunction with the hearing, the Union submitted a proposed order of "Final Compliance and

Clarification of Award" for the Arbitrator's approval and signature. In an e-mail, the Arbitrator denied ICE's motion to dismiss, stated that he was "adopting" the Union's proposed order, and cancelled the compliance hearing. December 3, 2010 e-mail.

III. Positions of the Parties

A. ICE's Exceptions

ICE maintains that the December 3, 2010 e-mail is an award and contends that it is contrary to law and that the Arbitrator was biased, exceeded his authority, and denied ICE a fair hearing. Exceptions at 3, 5, 7, 9. ICE also contends that the Arbitrator's exercise of jurisdiction over it is deficient. *Id.* at 11.

B. Union's Opposition

The Union contends that ICE's exceptions are interlocutory and should be dismissed. Opp'n at 1. The Union claims that the Arbitrator has not issued a final award. In this regard, the Union notes that the Arbitrator has yet to issue a final signed order. *Id.* at 3. In addition, the Union attaches an e-mail, dated January 3, 2011, from the Arbitrator to a representative of ICE in which the Arbitrator states: "As of this date I have not issued a final award." *Id.*, Union's Attach. A. Finally, the Union contends that there are no extraordinary circumstances warranting interlocutory review. *Id.* at 3.

IV. Order to Show Cause and Agency's Response

As it appeared that the December 3 e-mail did not constitute a complete determination of all issues submitted to arbitration, the Authority ordered ICE to show cause why its exceptions should not be dismissed as interlocutory. In its response to the show cause order, ICE makes two arguments.

First, ICE argues that the December 3 e-mail is not interlocutory as to ICE because the Arbitrator's denial of ICE's motion to dismiss is final as to the only issue involving ICE. Although ICE concedes that "it may be that the [A]rbitrator's award is in some manner less than final as between CIS and AFGE," ICE maintains that "[n]othing else that the [A]rbitrator may do in the future, short of reversing his decision and granting ICE's motion, will change his denial of ICE's motion." Response at 1, 3.

Second, and alternatively, ICE argues that interlocutory review is warranted because of a plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of the case. In this connection, ICE claims that the Arbitrator lacks personal jurisdiction over ICE. *Id.* at 4. ICE acknowledges that the alleged lack of personal jurisdiction is not based on any statute and that, were interlocutory review to be granted, it would be the first time that the Authority did so when there is no statutory basis for a jurisdictional defect. *Id.* Nevertheless, ICE maintains that "[i]t is hard to imagine a stronger defect than the fact that an entity was not a party to the dispute which is before the [A]rbitrator." *Id.* Finally, ICE argues that interlocutory review would advance the ultimate disposition of the case because otherwise ICE must join CIS in expending funds on future proceedings. *Id.* at 4-5.

V. Analysis and Conclusions

The Authority's Regulations provide that the Authority "ordinarily will not consider interlocutory appeals." 5 C.F.R. § 2429.11 (§ 2429.11). An interlocutory appeal concerns a ruling that is preliminary to final disposition of a matter. In arbitration cases, this means that the Authority ordinarily will not resolve exceptions filed to an arbitration award unless the award constitutes a complete resolution of all issues submitted to arbitration. *See, e.g., U.S. Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project, Wapato, Wash.*, 55 FLRA 1230, 1231 (2000) (*BIA*).

ICE contends that the December 3 e-mail is not interlocutory as to ICE because the Arbitrator's denial of ICE's motion to dismiss is final as to the only issue involving ICE. However, ICE does not argue that the e-mail constitutes a complete resolution of whether there has been compliance with the Arbitrator's prior awards, and, if not, what remedies are appropriate. To the contrary, ICE concedes that there may not be a complete resolution of these matters as to CIS. Consequently, ICE's exceptions are precisely the type of appeal that § 2429.11 is meant to preclude. *See U.S. Dep't of the Treasury, IRS, L.A. District*, 34 FLRA 1161, 1163 (1990) (*IRS*) (§ 2429.11 reflects the judicial policy of discouraging fragmentary appeals of the same case). Accordingly, we conclude that ICE's exceptions are interlocutory.

The Authority will review interlocutory exceptions when the exceptions raise a plausible jurisdictional defect, the resolution of which would advance the ultimate disposition of the case. *E.g., BIA*, 55 FLRA at 1232. However, the Authority reserves this review for "extraordinary situations[.]" *Id.*; *see U.S. Dep't of Homeland Sec.,*

U.S. Immigration & Customs Enforcement, 60 FLRA 129, 130 (2004) (exception dismissed as interlocutory because excepting party failed to demonstrate that "extraordinary circumstances" existed warranting interlocutory review). As ICE recognizes, these extraordinary situations have been found by the Authority only in situations in which it was alleged that the arbitrator lacked jurisdiction, as a matter of law, over subject matter of the grievance. *See, e.g.*, *U.S. Dep't of Def., Nat'l Imagery & Mapping Agency, St. Louis, Mo.*, 57 FLRA 837, 837 n.2 (2002) (then-Member Pope dissenting as to other matters). Consequently, the Authority has repeatedly declined to extend interlocutory review to alleged jurisdictional defects that do not preclude arbitration of the grievance as a matter of law. *E.g.*, *U.S. Dep't of Labor, Bureau of Labor Statistics*, 65 FLRA 651, 655 (2011) (alleged contractual exclusions from negotiated grievance procedure); *U.S. Dep't of Housing & Urban Dev.*, 62 FLRA 52, 53 (2007) (alleged exclusion based on § 7106 of the Statute); *U.S. Dep't of the Treasury, Bureau of Engraving & Printing, W. Currency Facility, Fort Worth, Tex.*, 58 FLRA 745, 746 (2003) (alleged contractual exclusions from negotiated grievance procedure).

In addition to establishing a plausible jurisdictional defect, the excepting party must also establish that interlocutory review will advance the ultimate disposition of the case. *BIA*, 55 FLRA at 1232. The Authority has described this situation as one in which resolving the exceptions would end the litigation. *See U.S. Dep't of the Interior, Bureau of Reclamation*, 59 FLRA 686, 688 (2004) (*Bureau of Reclamation*); *IRS*, 34 FLRA at 1163-64. For example, in *Bureau of Reclamation*, the Authority found that, to the extent the appealing party was contesting the arbitrator's jurisdiction over grievants who had failed to opt in to the grievance, it was uncontested that the arbitrator had jurisdiction over other grievants who had opted in. Consequently, the Authority determined that immediate resolution of the jurisdictional defect would not advance the ultimate disposition of the case because the case would still proceed to arbitration on the merits of the grievance as it pertained to the grievants who had opted in. *Bureau of Reclamation*, 59 FLRA at 687-88.

Here, ICE does not dispute that further arbitration proceedings may be necessary. Thus, even if we were to agree with ICE that it should be dismissed from further proceedings, ICE does not establish that interlocutory review of its exceptions will advance the ultimate disposition of this case. Moreover, no basis has been established to extend interlocutory review to alleged jurisdictional defects that do not preclude arbitration of the grievance as a matter of law. In this regard, the Authority has emphasized that the exceptional interlocutory review allowed by 28 U.S.C. § 1292 for federal courts of appeal specifically requires that the case must involve a controlling question of law. *IRS*, 34 FLRA at 1163-64.

Based on the foregoing, we conclude that interlocutory review is not warranted. Accordingly, we dismiss ICE's exceptions, without prejudice.

VI. Order

ICE's exceptions are dismissed, without prejudice, as interlocutory.