66 FLRA No. 128

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 4052
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
METROPOLITAN DETENTION CENTER
GUAYNABO, PUERTO RICO
(Agency)

0-AR-4650
(65 FLRA 734 (2011))

_____

ORDER DISMISSING EXCEPTIONS

May 30, 2012

_____

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 on remand (remand award) of Arbitrator Mark I. Lurie 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 *AFGE, Council of Prison Locals, Local 4052*, 65 FLRA 734 (2011) (*Local 4052*), the Authority remanded a previous award by the Arbitrator (original award) to the parties, for resubmission to the Arbitrator, "to determine an appropriate remedy." *Id.* at 737. On remand, the Arbitrator concluded that a further hearing was necessary to determine whether, given the Agency's current staffing levels, enforcement of the parties' agreement settling a prior grievance (settlement agreement) would abrogate management's rights. For the reasons set forth below, we dismiss the exceptions, without prejudice, as interlocutory.

II. Background and Arbitrator's Awards

A. Original Award

The Union presented a grievance alleging that the Agency unilaterally repudiated a settlement agreement between the parties concerning staffing at the Agency's metropolitan detention center (the Center). *Id.* at 734. The settlement agreement required the Agency to staff an additional officer to any overcrowded housing unit at the Center. *Id.*

In his original award, the Arbitrator found that the Agency violated the settlement agreement by unilaterally repudiating it. *Id.* at 734 n.2. The Arbitrator, however, found that enforcing the settlement agreement would "excessively interfere" with management's rights. Accordingly, he determined that "no remedy can be or is awarded." *Id.* at 735.

B. Authority's Decision in *Local 4052*

In exceptions to the original award, the Union argued that the award was contrary to § 7106 of the Statute because the Arbitrator misapplied the Authority's test concerning management's rights. *Id.* at 734-35. The Union also contended that the Authority should use an abrogation standard rather than an excessive interference standard to review the award and that enforcement of the settlement agreement would not abrogate management's rights. *Id.* at 735.

In its decision, the Authority noted that it had recently adopted an abrogation standard for assessing whether an arbitrator's interpretation of a provision of an agreement violated management's rights under § 7106. *Id.* at 736. The Authority then concluded that the original award did not abrogate management's rights to determine internal security or assign work because "the [s]ettlement [a]greement does not require the Agency to assign [an additional] officer in all cases." *Id.* Therefore, because the Authority found that the Arbitrator erred in finding that he could not provide a remedy, the Authority remanded the original award to the parties, for resubmission to the Arbitrator, "to determine an appropriate remedy." *Id.* at 737.

C. Arbitrator's Award on Remand

The parties were unable to settle their dispute and resubmitted the issue of an appropriate remedy to the Arbitrator. Remand Award at 3. The Union requested a financial, "make-whole" remedy for affected bargaining unit employees, as well as "any other relief deemed appropriate by the Arbitrator." *Id.* The Agency urged the Arbitrator "to not apply the [Authority's] abrogation standard," but also argued that enforcement of the

settlement agreement would "constitute abrogation of . . . management['s] rights" given the Agency's current staffing levels. *Id.*

In his remand award, the Arbitrator found that, because the Agency agreed to the settlement agreement, the Agency "was bound by its terms." *Id.* at 4. However, because the settlement agreement concerned personnel safety, not overtime, the Arbitrator concluded that "[n]o financial award is made." *Id.*

The Arbitrator also found that he was required to determine whether enforcement of the settlement agreement, given the Agency's current staffing levels, would abrogate any management right. *Id.* He concluded that the evidence presented "supported an arguable claim that it would" abrogate management's rights, but that the evidentiary record concerning the current staffing levels at the Agency "is lacking." *Id.* Therefore, the Arbitrator determined that "the next step will be a further hearing on the question, now raised by the [Authority], of whether current staffing is such that" an order enforcing the settlement agreement would "abrogate management's § 7106(a) rights." *Id.*

III. Positions of the Parties

A. Union's Exceptions

As an initial matter, the Union argues that the exceptions are not interlocutory. Exceptions at 5. According to the Union, "the Arbitrator seeks to hold an arbitration hearing over a matter which has already been decided by the Authority." *Id.* The Union contends that, because the Authority determined that the settlement agreement did not abrogate management's rights, that issue "is no longer in front of the [A]rbitrator." *Id.* The Union avers that the Arbitrator decided all of the issues before him by refusing to award backpay and to follow the Authority's determination that the settlement agreement was enforceable. *Id.* at 6. Alternatively, the Union argues that, if the exceptions are interlocutory, they raise a plausible jurisdictional defect. *Id.*

B. Agency's Opposition

As an initial matter, the Agency argues that the exceptions are interlocutory. Opp'n at 7. The Agency contends that "[i]t is clear that the Arbitrator has not yet rendered a final award on this dispute" and that the Union has not shown any extraordinary circumstances to justify interlocutory review.[1] *Id.*

IV. Analysis and Conclusion: The Union's exceptions are interlocutory.

The Union asserts that the exceptions are not interlocutory. Exceptions at 5. The Authority's Regulations provide that the Authority "ordinarily will not consider interlocutory appeals." 5 C.F.R. § 2429.11. An interlocutory appeal concerns a ruling that is preliminary to the 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 U.S. Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project, Wapato, Wash.*, 55 FLRA 1230, 1231 (2000) (*BIA*); *U.S. Dep't of the Treasury, IRS, L.A. Dist.*, 34 FLRA 1161, 1163 (1990) (*IRS*) (§ 2429.11 reflects the judicial policy of discouraging fragmentary appeals of the same case).

In *Local 4052*, the Authority remanded the case to the parties, for resubmission to the Arbitrator, "to determine an appropriate remedy." 65 FLRA at 737. The Arbitrator found that the issue on remand was whether an order "compelling the Agency to . . . comply with the [settlement agreement]," given the Agency's current staffing levels, would effectively abrogate the Agency's management rights. Remand Award at 4. In answering that question, he concluded that "the evidentiary record . . . is lacking" and that the Union must request "a further hearing on the question." *Id.* Therefore, the Arbitrator did not render a final award on this dispute. *See U.S. Dep't of Def. Army & Air Force Exch. Serv.*, 38 FLRA 587, 587-88 (1990) (finding exceptions to be interlocutory where the arbitrator found the record to be inadequate to effect an appropriate remedy). Even if, as the Union contends, the Arbitrator seeks to hold a "hearing over a matter which has already been decided by the Authority," Exceptions at 5, the Arbitrator did not determine an appropriate remedy for the Agency's violation of the settlement agreement, as instructed by the Authority. *See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 65 FLRA 603, 605-06 (2011) (finding the exceptions to be interlocutory because the arbitrator did not resolve all issues necessary to make a determination on attorney fees). Therefore, we find that the exceptions are interlocutory. *See U.S. Dep't of Veterans Affairs, W. N.Y. Healthcare Sys., Buffalo, N.Y.*, 61 FLRA 173, 175 (2005) (finding exceptions to be interlocutory because the arbitrator's

[1] The Agency also argues that the Authority should stay the proceedings pending resolution of the cases challenging the abrogation standard in the United States Court of Appeals for the D.C. Circuit. Opp'n at 5. However, those cases have been decided by the D.C. Circuit and, therefore, the Agency's argument is moot. *See U.S. Dep't of Commerce, Patent & Trademark Office v. FLRA*, 672 F.3d 1095 (D.C. Cir. 2012); *U.S. Dep't of the Treasury, Bureau of the Public Debt, Wash., D.C. v. FLRA*, 670 F.3d 1315 (D.C. Cir. 2012).

award did not resolve the issue of an appropriate remedy).

The Authority will review interlocutory exceptions when the exceptions raise a plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of the case. *BIA*, 55 FLRA at 1232. In this regard, we note that the few cases in which the Authority has granted interlocutory review have involved jurisdictional issues that arise pursuant to a statute. *Id.* In addition to establishing a plausible jurisdictional defect, the excepting party also must establish that interlocutory review will advance the ultimate disposition of the case. *Id.* 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); *IRS*, 34 FLRA at 1163-64.

The Union argues that, if the exceptions are interlocutory, they "raise a plausible jurisdictional defect." Exceptions at 6. The Union does not argue that the Arbitrator lacks jurisdiction, but, rather, argues that the Arbitrator purports to have authority to resolve an issue that has been conclusively decided by the Authority. *Id.* The Union's assertion does not present a jurisdictional issue arising pursuant to a statute. *See AFGE, Local 446*, 59 FLRA 451, 454 (2003) (*Local 446*) (finding that an argument that an arbitrator exceeded her authority does not present a plausible jurisdictional defect). Moreover, resolution of the interlocutory issue would not end the litigation and advance the ultimate disposition of the case because the Arbitrator still must determine an appropriate remedy. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Terminal Island, Cal.*, 66 FLRA 414, 415 (2011) (finding no plausible jurisdictional defect because the arbitrator still needed to resolve issues raised by the Authority); *Local 446*, 59 FLRA at 454 n.5 (dismissing exceptions as interlocutory because further action by the arbitrator was necessary). Therefore, the exceptions do not raise a plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of this case. Accordingly, we dismiss the exceptions without prejudice.

V. Order

The exceptions are dismissed, without prejudice, as interlocutory.[2]

[2] Because we find that the exceptions are interlocutory and fail to present a plausible jurisdictional defect, we do not address the Union's arguments on the merits that the remand award is contrary to law and based on nonfacts. *See U.S. Dep't of Health & Human Servs., Navajo Area Indian Health Serv.*, 58 FLRA 356, 356 n.1 (2003).