71 FLRA No. 34

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 97
(Union)

0-AR-5399

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DECISION

June 20, 2019

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

I. Statement of the Case

Without evaluating the merits of the underlying dispute in this case, we confirm that an ongoing disagreement about how to interpret and apply a contractual cost-shifting provision is a "grievance" within the meaning of § 7103(a)(9) of the Federal Service Labor-Management Statute (the Statute).[1]

The parties' collective-bargaining agreement specifies how they will divide third-party factfinding costs during negotiation impasses. Arbitrator Luella E. Nelson denied the Agency's motion to dismiss a grievance about how the parties would divide the factfinding costs for a particular impasse.

The Agency has filed an interlocutory exception arguing that the dispute in this case is not a "grievance" under § 7103(a)(9).[2] Consequently, the Agency contends that the Arbitrator's denial of its motion to dismiss is contrary to law. We grant interlocutory review because the Agency's exception, if meritorious, would obviate the need for further arbitral proceedings. However, we conclude that this case concerns "the effect or interpretation, or claim of breach, of a collective[-]bargaining agreement," and such disputes are within the Statute's definition of a "grievance."[3] Therefore, we deny the exception.

II. Background and Arbitrator's Award

A. Background

After the Agency renewed the lease on its existing office and offered to bargain with the Union over changes in the new lease agreement, the parties' negotiations reached an impasse over certain issues. The parties' national agreement contains an advisory factfinding procedure to help them resolve negotiation impasses (the procedure). The procedure says that, after the parties refer an impasse to a factfinder, the factfinder "will recommend a resolution to the dispute . . . [, and t]he recommended resolution will be in writing."[4] Accordingly, the parties referred their impasse to a factfinder.

The factfinder provided the parties a written recommendation that addressed several issues, and he sent invoices to the parties. The Agency responded that it would follow the recommendation on all issues except the factfinder's suggestion that the Agency continue providing free parking spaces to employees, as the Agency had done under the previous lease. The Agency asserted that this parking issue was nonnegotiable.

The procedure says that, if disputes remain after factfinding, then those disputes "will be resolved pursuant to . . . § 7119" of the Statute – concerning the Federal Service Impasses Panel (FSIP) – "or other appropriate provisions" of the Statute.[5] Further, the procedure says that, "[i]f a dispute moves to the statutory process, [then] the objecting party will pay the full costs of the [f]actfinder who produced" the recommendation (the cost-shifting provision).[6]

Here, when the Agency responded that it would not follow the factfinder's recommendation on the parking issue, the Union invoked the cost-shifting provision and asserted that the Agency should be responsible for all of the previously invoiced factfinding costs. The Agency disagreed.

The Union asked the factfinder to amend his invoices to charge all costs to the Agency. The Agency opposed the Union's request. The factfinder replied that he did "not want to become a casualty of the dispute [that] the parties have over the issues," and he "ask[ed]

[1] 5 U.S.C. § 7103(a)(9).
[2] *Id.*
[3] *Id.* § 7103(a)(9)(C)(i).
[4] Award at 2 (quoting Collective-Bargaining Agreement (CBA) Art. 15, § 3.A.3.).
[5] *Id.* (quoting CBA Art. 15, § 3.A.4.).
[6] *Id.* (quoting CBA Art. 15, § 3.A.6.).

that the initial invoices be honored and the parties split the costs evenly."[7] The Union then asked the factfinder to reconsider, but he responded that his factfinding was "complete."[8] He also stated that he "expect[ed] the parties to split the costs. Further action by the parties is within their purview."[9]

Thereafter, the Union filed a grievance alleging that, under the cost-shifting provision, the Agency was responsible for all of the factfinding costs. The Agency did not respond to the grievance, and the Union invoked arbitration. Separately, the Union requested FSIP's assistance with the outstanding parking dispute, but the Union later withdrew that assistance request. In addition, after filing the grievance and the FSIP-assistance request, the Union filed an unfair-labor-practice charge about alleged unilateral changes in employee parking.

B. Arbitrator's Award

The parties advanced the grievance over factfinding costs to the Arbitrator, and the Agency filed a motion to dismiss the grievance. As relevant here, the Agency argued that the grievance was not arbitrable because it: (1) "allege[d] wrongdoing by a third party" (specifically, the factfinder in not amending his invoices);[10] (2) did not meet the definition of a "grievance" under the Statute; and (3) collaterally attacked the factfinder's decision.

In a preliminary award on the Agency's motion to dismiss – which is the award at issue here – the Arbitrator began her analysis by noting that the "sole question" before her at that stage concerned "substantive arbitrability."[11] She then turned to the Agency's arguments. First, she found that the grievance was alleging that the Agency violated the cost-shifting provision, rather than alleging wrongdoing by a third party. Second, she found that the dispute was a "grievance" under the Statute because it concerned "the effect or interpretation, or claim of a breach, of a collective[-]bargaining agreement."[12] Third, she found that the grievance was not a collateral attack on a *decision* because the factfinder's recommendation was merely advisory.

Further, the Arbitrator noted that when the parties were before the factfinder, they could not yet have triggered the cost-shifting provision because neither party had moved the dispute to a "statutory process," which was a contractual prerequisite for cost-shifting.[13]

For the foregoing reasons, the Arbitrator denied the Agency's motion to dismiss.

The Agency filed an exception on August 7, 2018, and the Union filed an opposition on September 6, 2018.

III. Analysis and Conclusion: We grant interlocutory review, but we deny the exception because this dispute is a "grievance" under the Statute.

The Agency argues that the award is contrary to law because this dispute is not a "grievance" under the Statute.[14] Thus, the Agency contends that the Arbitrator should have granted its motion to dismiss.[15] Further, although the Arbitrator has not yet addressed the grievance's merits, the Agency asserts that the Authority should decide this matter now because doing so will end the litigation between the parties.[16]

The Authority has held that an exception presents "extraordinary circumstances" that warrant interlocutory review when resolving the exception could advance the ultimate disposition of the case by obviating the need for further arbitral proceedings.[17] If we were to grant the Agency's exception, then the parties would not need further arbitration in this case. On that basis, we grant interlocutory review, and we turn to the substance of the Agency's exception.

First, the Agency contends that this dispute does not satisfy the Statute's definition of a "grievance."[18] But we find that this case concerns a "complaint . . . by . . . a labor organization . . . concerning . . . the effect or interpretation, or claim of breach, of a collective[-]bargaining agreement,"[19] which means that this dispute satisfies the definition of a "grievance" in § 7103(a)(9) of the Statute.[20] In particular, this case concerns the effect or interpretation, or claim of breach, of the cost-shifting provision. Thus, we reject the Agency's argument to the contrary.

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[7] *Id.* at 8.
[8] *Id.*
[9] *Id.*
[10] *Id.* at 11.
[11] *Id.* at 18.
[12] *Id.* at 19 (quoting 5 U.S.C. § 7103(a)(9)(C)(i)).
[13] *Id.* at 20 (quoting CBA Art. 15, § 3.A.6).
[14] Exception at 8-10.
[15] *Id.* at 8.
[16] *Id.* at 7.
[17] *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (Member DuBester dissenting) (clarifying Authority precedent and holding that establishing a "plausible jurisdictional defect" is one way, but not the only way, to demonstrate "extraordinary circumstances" warranting interlocutory review).
[18] Exception at 8-9.
[19] 5 U.S.C. § 7103(a)(9)(C)(i).
[20] *Id.* § 7103(a)(9).

Second, the Agency argues that the Statute does not permit "grievances" over allegations that a "third party," such as the factfinder, "misinterpreted the parties' collective-bargaining agreement."[21] But as the Arbitrator explained, the grievance does not concern the factfinder's actions; it concerns the Agency's actions.[22] Therefore, we reject this argument.

Third, the Agency argues that this dispute is not a grievance because it is a "collateral attack on [the factfinder's] decision."[23] As an initial matter, it is not clear that a "collateral attack" would fall outside the definition of a "grievance" under the Statute.[24] In any event, relevant Authority precedent prohibiting collateral attacks is specific to *final-and-binding* arbitration awards.[25] The Authority has held that a party may not "collateral[ly] attack" a final-and-binding arbitration award in a subsequent proceeding because allowing such "indirect review" of an award would be contrary to the Statute's arbitration-appeal provisions.[26] However, that precedent does not apply here because this dispute involves an *advisory* factfinding recommendation, rather than a final-and-binding decision.[27]

In conclusion, having rejected the Agency's arguments, we deny its exception accordingly.

IV. Decision

We grant interlocutory review, but we deny the Agency's exception.

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[21] Exception at 9.
[22] Award at 9 (quoting Grievance) (asserting that "*the Agency* must pay the [f]actfinder's full costs under" the cost-shifting provision).
[23] Exception at 11.
[24] *Cf. U.S. DOD, Educ. Activity, Pensacola, Fla.*, 55 FLRA 1141, 1142-44 (1999) (rejecting an argument that a dispute over the interpretation of contract wording that was imposed during interest arbitration was not a "grievance," despite agency's contention that it was a "collateral attack" on interest arbitration).
[25] *E.g.*, *U.S. Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash.*, 55 FLRA 293, 296-97 (1999) (Chair Segal concurring).
[26] *Id.*; *see* 5 U.S.C. § 7122 (specifying how a party may seek Authority review of an arbitration award).
[27] Award at 2 (under the procedure, the "*recommended* resolution will be in writing," but disputes may remain after factfinding ends (emphasis added) (quoting CBA Art. 15, § 3.A.3. to 3.A.4.)); *cf. AFGE, Nat'l Council of EEOC Locals, Local 216*, 36 FLRA 9, 10-11, 17-18 (1990) (dismissing exceptions to an "umpire's" decision under a negotiated, "advisory final[-]offer[-]selection procedure" because the decision was not one to which the Statute's arbitration-appeal procedures applied).

Member DuBester, dissenting:

For reasons expressed at length in my dissents in *U.S. Small Business Administration*[1] and *U.S. Department of the Treasury, IRS*,[2] it remains my opinion that the majority mistakenly weakens the standard for interlocutory review, and thereby erroneously expands the grounds for granting interlocutory review of an arbitrator's determination. Consistent with long-established Authority precedent, the only basis for granting interlocutory review should be "extraordinary circumstances" that raise a plausible jurisdictional defect, the resolution of which would advance the resolution of the case.[3] And "[e]xceptions raise a plausible jurisdictional defect when they present a credible claim that the arbitrator lacked jurisdiction over the subject matter as a matter of law."[4]

Applying the restrictions that were properly placed on interlocutory review by prior Authority precedent,[5] I would dismiss, without prejudice, the Agency's interlocutory exception because it does not demonstrate extraordinary circumstances.

Accordingly, I dissent from the majority's decision to grant interlocutory review.

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[1] 70 FLRA 885, 888-89 (2018) (Dissenting Opinion of Member DuBester).
[2] 70 FLRA 806, 810-11 (2018) (*IRS*) (Dissenting Opinion of Member DuBester).
[3] *E.g.*, *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 851 (2012).
[4] *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 1, 3 (2012) (citations omitted); *see also U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 68 FLRA 640, 641 (2015) ("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").
[5] *See IRS*, 70 FLRA at 810-11 (Dissenting Opinion of Member DuBester).