73 FLRA No. 81

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
BASTROP, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3828
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5785

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ORDER DISMISSING EXCEPTION

January 26, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

In this case, the Agency filed an interlocutory exception to Arbitrator Bruce Ponder's interim award. We dismiss the Agency's exception because it does not demonstrate extraordinary circumstances warranting interlocutory review.

II. Background and Arbitrator's Award

In 2011, the Union filed a grievance alleging that the Agency was not compensating bargaining-unit employees for work performed at the start and end of each shift. The grievance went to arbitration. An arbitrator issued an award finding that the Agency had violated the Fair Labor Standards Act (FLSA),[1] and, as a remedy, that arbitrator directed the Agency to compensate affected employees. The Agency filed an exception.

In *U.S. DOJ, Federal BOP, Federal Correctional Institution, Bastrop, Texas* (*Bastrop I*), the Authority noted that the U.S. Supreme Court had recently issued a decision altering the relevant standard for determining whether certain activity is compensable under the FLSA.[2] As a result, the Authority remanded the award for further findings consistent with the new standard.[3] On remand, the arbitrator failed to address the relevant FLSA standard, as directed by the Authority in *Bastrop I*. Thus, in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Bastrop, Texas* (*Bastrop II*), the Authority set aside the award as contrary to law.[4]

In 2015, before the Authority issued *Bastrop I*, the Union filed the grievance at issue in this case (the second grievance). The second grievance alleged the same violations over a different period of time. When the Agency denied the second grievance, the parties selected a different arbitrator – Arbitrator Ponder (the Arbitrator) – to resolve their dispute. Due to the similarity of the issues in the two grievances, the parties discussed whether to delay a hearing in the second grievance until the resolution of *Bastrop II*. In a 2016 email exchange between the parties, the Union asked whether such a delay was acceptable. The Agency did not respond.

Five years later, in April 2021, the Union contacted the Agency and the Arbitrator to schedule a hearing for the second grievance. The Agency moved for a pre-hearing determination on arbitrability, claiming that the doctrine of laches barred the second grievance. The Arbitrator noted that the equitable defense of laches applies when: (1) a claimant unreasonably delays filing a claim, and (2) that delay prejudices the other party's ability to mount a defense. Finding that the parties' agreement contained no deadline for scheduling a hearing, and the Agency had not proven that the delay was unreasonable, the Arbitrator concluded that the second grievance was arbitrable.[5] Because the Agency failed to establish a necessary element of laches, the Arbitrator did not address whether the Agency was prejudiced.

The Agency filed an exception on December 17, 2021, and the Union filed an opposition on January 14, 2022.

[1] 29 U.S.C. §§ 201-219.

[2] 69 FLRA 176, 179 (2016) (noting that the Court held that the relevant consideration for determining whether a preliminary or postliminary activity is compensable under the FLSA is whether it is "integral and indispensable" to the employer's principal activities (citing *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 33 (2014)).

[3] *Id.* at 180.

[4] 70 FLRA 592, 594 (2018) (Member DuBester dissenting).

[5] Award at 22 (noting that the parties' communications about a delay, and the Agency's extended silence in response to the Union's request to confirm the delay, "complicated" the question of whether the delay was reasonable).

III. Analysis and Conclusion: We dismiss the Agency's interlocutory exception, without prejudice, because it does not demonstrate extraordinary circumstances warranting review.

The Agency argues that the award is contrary to law because the Arbitrator erred in finding that the Union's delay in requesting a hearing was reasonable.[6] The Authority ordinarily will not consider an exception to an arbitration award unless the award completely resolves all the issues submitted to arbitration.[7] Although the Authority will grant interlocutory review under certain "extraordinary circumstances," the Authority has long held that it will *not* do so if it would not obviate the need for further arbitration.[8]

The Agency concedes that its exception is interlocutory.[9] But the Agency argues that the Authority granting its exception—and holding that the Arbitrator's laches determination was contrary to law—would result in the dismissal of the second grievance, thereby bringing an end to the entire dispute.[10]

The equitable defense of laches bars an action when unreasonable delay in bringing the action has prejudiced the party against whom the action is taken.[11] As the Agency acknowledges,[12] the party asserting laches must prove both unreasonable delay *and* prejudice.[13] These two elements of laches are questions of fact.[14]

Here, the Arbitrator found that the Agency failed to prove that the Union's delay in scheduling a hearing was unreasonable.[15] Based on the Agency's failure to establish unreasonable delay, the Arbitrator did not make any findings concerning whether the Agency was prejudiced. Because granting the Agency's exception would require the Authority to remand the case to the Arbitrator for a factual finding on the issue of prejudice,[16] the Agency has not shown that interlocutory review will obviate the need for further litigation.[17] Thus, we find that interlocutory review is not warranted, and we dismiss the Agency's exception without prejudice.

IV. Decision

We dismiss the Agency's exception without prejudice.

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[6] Exception Br. at 17-18.

[7] 5 C.F.R. § 2429.11; *U.S. DHS, U.S. CBP, L.A., Cal.*, 72 FLRA 411, 412 (2021).

[8] *See, e.g.*, *AFGE, Loc. 2814*, 72 FLRA 777, 778 (2022) (*Loc. 2814*) (Chairman DuBester concurring; Member Abbott concurring); *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 494, 494 (2021) (Chairman DuBester concurring); *see also, e.g.*, *NTEU*, 66 FLRA 696, 699 (2012) (denying interlocutory review where, as relevant here, doing so "still would not end this litigation"); *U.S. Dep't of the Interior, Bureau of Reclamation*, 59 FLRA 686, 687 (2004) (denying interlocutory review because, even if the Authority granted the exceptions, "the grievance would proceed to arbitration on the merits of" certain other claims).

[9] Exception Br. at 8.

[10] *Id.* at 9.

[11] *Broad. Bd. of Governors*, 66 FLRA 380, 384 n.16 (2011) (*Governors*) (Member Beck dissenting on other grounds).

[12] Exception Br. at 11 (noting the two requirements for laches).

[13] *Governors*, 66 FLRA at 384 n.16 (citation omitted).

[14] *Lismont v. Alexander Binzel Corp.*, 813 F.3d 998, 1002 (Fed. Cir. 2016) ("[T]he factors underlying a laches determination—unreasonable delay and prejudice—are factual in nature."); *Hall v. Aqua Queen Mfg., Inc.*, 93 F.3d 1548, 1552 (Fed. Cir. 1996) (noting that unreasonable delay and prejudice are "the two critical factual predicates for the application of the equitable bar of laches"); *Hemstreet v. Comput. Entry Sys. Corp.*, 972 F.2d 1290, 1292 (Fed. Cir. 1992) (noting that laches "ultimately turn[s] on underlying factual determinations"); *see also Major v. Plumbers Loc. Union No. 5 of the United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. of the U.S. & Can., AFL-CIO*, 370 F. Supp. 2d 118, 128 (D.D.C. 2005) ("[T]he circumstances of any delay or the prejudice suffered by the defendant is fundamentally a factual inquiry" (citing *EEOC v. Great Atl. & Pac. Tea Co.*, 735 F.2d 69, 80-81 (3d Cir. 1984)).

[15] Award at 22-24.

[16] *See AFGE, Loc. 3506*, 64 FLRA 583, 584-85 (2010) (remanding where arbitrator's failure to make certain factual findings prevented Authority from assessing whether the award was consistent with law); *see also U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div., Newport, R.I.*, 66 FLRA 656, 657 (2012) ("[T]he Authority defers to an arbitrator's factual findings because the parties bargained for the facts to be found by an arbitrator chosen by them." (citing *U.S. DOL*, 62 FLRA 153, 156 (2007) (Chairman Cabaniss concurring); *NATCA*, 60 FLRA 398, 400 (2004); *AFGE, Loc. 2612*, 55 FLRA 483, 486 (1999))); *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Carswell, Tex.*, 65 FLRA 960, 967 (2011) (remanding attorney-fee award because "the arbitrator, as the fact-finder, [was] in the best position to make" certain factual determinations).

[17] *See, e.g., Loc. 2814*, 72 FLRA at 778.