United States Department of Housing and Urban Development (Agency) and American Federation of Government Employees, National Council of HUD Locals 222 (Union)

70 FLRA No.
122

UNITED STATES

DEPARTMENT OF HOUSING AND

URBAN DEVELOPMENT

(Agency)

and

AMERICAN FEDERATION

OF GOVERNMENT EMPLOYEES

NATIONAL COUNCIL OF HUD LOCALS 222

(Union)

0-AR-4586

(65 FLRA 433 (2011))

(66 FLRA 867 (2012))

(68 FLRA 631 (2015))

(69 FLRA 60 (2015))

(69 FLRA 213 (2016))

(70 FLRA 38 (2016))

DECISION

May 24, 2018

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

(Member DuBester dissenting)

Decision by Member Abbott for the Authority

1. **Statement of the Case**

Today, we conclude that this grievance concerns classification and is therefore excluded from the grievance process by § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (Statute).[1] Specifically, this is the eighth time since 2004 that the Authority has been asked to weigh in on this lengthy and unique case. Accordingly, we vacate the Arbitrator's awards and written summaries and *U.S. Department of HUD* (*HUD I*)[2] through *U.S. Department of HUD* (*HUD VII*).[3]

II. **Background**

The Union filed a grievance in 2002 alleging that the Agency had improperly advertised and filled positions with a promotion potential to General Schedule (GS)-13 in a manner that deprived GS-12 bargaining-unit employees of the opportunity to be non-competitively promoted to the GS-13 level. As a remedy, the Union requested promotion potential to the GS-13 level "for all similarly situated employees" at the GS-12 level.[4]

The Agency argued that the grievance concerned classification and was therefore not arbitrable under § 7121(c)(5) and a provision in the parties' collective-bargaining agreement. The parties submitted one issue to the Arbitrator: whether the grievance was arbitrable.

The Arbitrator determined that the grievance did not concern classification but rather "the fairness of advertisements and vacancy announcements,"[5] even though the remedy requested by the Union was the "reassignment of employees to reclassified positions."[6]

The Agency filed exceptions.

HUD I

In its first decision on this matter in 2004, the Authority found that the Agency's exceptions were interlocutory[7] but considered them because they raised a plausible jurisdictional defect, i.e., classification under § 7121(c)(5).[8]

In its exceptions, the Agency argued that the grievance concerned classification because the Union sought the reclassification, and upgrade, of employees covered by the grievance (the grievants). Rather than making a final determination on that question, the Authority remanded the issue to have the Arbitrator clarify whether the grievance concerned classification or the reassignment of the grievants to existing, already-classified positions.

U.S. Department of HUD (*HUD II*)[9]

After considering the matter on remand, the Arbitrator again found that the grievance was arbitrable because it concerned the "right to be placed in previously-classified positions [with promotional

potential to GS-13],"[10] and was therefore arbitrable.

In her September 29, 2009, decision on the merits, the Arbitrator determined that the Agency made several missteps when it advertised new GS-13 positions and filled them in violation of the parties' agreement. As a remedy, the Arbitrator ordered "an organizational upgrade of [all] affected . . . to [the] GS-13 level retroactively."[11]

The Agency filed exceptions.

The Authority found that the remedy concerned classification because the Arbitrator's remedy required the Agency to "*re*classify the grievants' *existing positions* [to the GS-13] level."[12] The Authority once again remanded the matter to the Arbitrator—this time, to formulate an alternative remedy.[13]

U.S. Department of HUD (*HUD III*)[14]

On remand, the Union suggested several alternative remedies. The Agency did not suggest any remedies or respond to the Union's suggested remedies.

In a new award on January 10, 2012, the Arbitrator prioritized four alternative remedies just in case the Authority found any of them to be contrary to law. The first remedy again directed the Agency to "retroactively, permanently promote[] all affected bargaining-unit employees [to the] GS-13" level.[15] But the Arbitrator agreed to retain jurisdiction over the implementation of the award for however long implementation would take.[16]

The Agency again filed exceptions, but the Authority dismissed them because the Agency did not reargue the same arguments it had made in *HUD I* and *HUD II* and did not make any new arguments.[17]

U.S. Department of HUD (*HUD IV*)[18]

The parties held an implementation meeting with the Arbitrator to try to implement the award. Shortly thereafter, the Arbitrator issued a summary of the meeting. Two more implementation meetings took

place with written summaries issued on May 17, 2014 (the second summary) and August 2, 2014 (the third summary). Among other things, these written summaries included an expansion of the employees affected by the remedy.[19]

The Agency filed new exceptions to the third summary arguing that the Arbitrator had modified the original award with new remedies. The Authority dismissed the exceptions as untimely because if any "modification" to the award had occurred, the modification had occurred on May 17, 2014, with the second summary. Therefore, the Authority found, the exceptions to the third summary were not timely.

U.S. Department of HUD (*HUD V*)[20]

The Agency filed a motion for reconsideration of the dismissal of its exceptions to the third summary in *HUD IV*.[21] On November 4, 2015, the Authority denied the motion because the Agency raised the same arguments it had made in *HUD IV*.[22]

U.S. Department of HUD (*HUD VI*)[23] and *HUD VII*

But even before the Authority could issue its decision in *HUD V*, the Arbitrator claimed she retained jurisdiction, and she held three more implementation meetings with corresponding fourth, fifth, and sixth written summaries immediately after each meeting. Among other things, these summaries ordered the Agency to send an email to all bargaining-unit employees[24] and directed the Agency's Deputy Secretary to contact the Office of Personnel Management (OPM).[25]

The Agency filed its next exceptions to the sixth implementation meeting. According to the Agency, the remedy at that time required an upgrade of 73% of all GS-12 positions in the Agency. Despite the Agency arguing that the ongoing remedies violated § 7121(c)(5) of the Statute[26] because they involved the classification of positions, the Authority denied or dismissed all of the Agency's arguments.[27] The Agency again filed a motion for reconsideration. The Authority denied this motion on November 3, 2016 in *HUD VII*. [28]

The Instant Case[29]

All the while, from June 2015 to June 2016, the Arbitrator still claimed to retain jurisdiction and held even more implementation meetings, issuing her seventh, eighth, ninth, and tenth summaries. On July 29, 2016, the Agency filed exceptions to the tenth written summary, including its ongoing assertion that the grievance concerns classification.[30] It is these exceptions that are before us today.[31] The Union filed an opposition.[32]

III. Analysis and Conclusion

Under the Statute, § 7121(c)(5) excludes from the scope of the negotiated grievance procedure any grievance concerning "the classification of any position which does not result in the reduction in grade or pay of an employee."[33] Therefore, the central question in this case always has been whether the underlying grievance concerns classification and is therefore not arbitrable under § 7121(c)(5).

This statutory exclusion "appl[ies] irrespective of whether a party makes such a claim before the Authority" because "[t]o hold otherwise would be inconsistent with clearly expressed congressional intent to bar grievances over such matters altogether."[34] Not only can the Authority consider classification matters *sua sponte*, but "the Authority is *required* to address that statutory issue, regardless of whether the issue was also presented to the arbitrator."[35] Consequently, we consider the issue of classification because it has been the central issue throughout this saga.

In *HUD I*, the Authority noted that a grievance concerns the classification of a position within the meaning of § 7121(c)(5) of the Statute where the substance of the grievance concerns the grade level to which the grievant could receive a noncompetitive career promotion.[36] On remand after *HUD I*, the Arbitrator held that the requested remedy asked for the "reassignment of employees to reclassified positions"[37] and "direct[ed] the Agency to *re*classify the grievants' *existing positions* by raising their journeyman level."[38] The Authority even held that remedy was contrary to law because "the Statute does not authorize the Arbitrator to change the 'promotion potential of employees' permanent positions."[39] But rather than vacating the entire award as contrary to law, the Authority circularly continued to remand this case to the Arbitrator to try to fashion yet another remedy.

At all times, however, the essential nature of this grievance—as demonstrated by the requested remedy—concerned classification.[40] Therefore, the Authority should have declared this grievance to be non-arbitrable from the outset.[41] And, because the Authority failed to do so, the Arbitrator granted herself continual and indefinite jurisdiction with which she slightly changed the award at every implementation meeting, leaving the Agency unable to ever fully comply.

Because this grievance always concerned classification, the Arbitrator has always lacked jurisdiction over the grievance, as a matter of law, under § 7121(c)(5). Accordingly, we vacate the Arbitrator's awards and written summaries in this case, and we vacate *HUD I* through *HUD VII.*

IV. Decision

We set aside the awards and written summaries, and we vacate *HUD I* through *HUD VII*.

Member DuBester, dissenting:

The impulsive decision the majority makes today in this case is, to put it colloquially, a really bad idea. Once again losing sight of the distinction between adjudicating and legislating,[1] the majority, sua sponte, reaches back well over a decade to eliminate a series of Authority decisions, and arbitration awards, they do not like. Because the majority's decision has neither a legal foundation nor a legal justification, and leaves chaos rather than greater certainty and stability in its wake, I dissent.

There are good reasons why courts and other adjudicative tribunals "vacate" final decisions only in extremely limited circumstances. These circumstances generally include a timely motion by a party, before too many actions in reliance on the decision have been taken, and reasons extrinsic to the proceeding itself, such as fraud or newly-discovered evidence.[2] But none of those circumstances are present here. Unbidden by the Agency that brought the current dispute before us, and which does not request this result, and wasting time on neither words nor reasoning, the majority in a few short paragraphs "vacates" seven decisions made by a variety of panels of Authority members reaching back well over a decade. And the majority does this despite the inconvenient legal reality that these decisions have long since become final decisions of the Authority, and the underlying arbitration awards have become "final and binding"[5] "for all purposes."[3] Also, the parties, fulfilling their legal obligations,[4] have for years been relying on these final and binding decisions and awards in deciding how to comply and what actions to take.

Undeterred by the lack of legal authorization for its actions, and heedless of the consequences, the majority impulsively, extralegally, seeks to travel back in time to undo what the majority would not have done if it, rather than those previous Members, had been in office. This is not what adjudicative tribunals, operating within the law, and respecting the finality and repose underlying the doctrine of res judicata, are authorized to do.[6]

Indeed, the majority goes even further, apparently claiming the authority to set aside awards to which no exceptions were ever filed.[7] These ultra vires actions are directly contrary to the Statute's injunction that "[i]f no exception to an arbitrator's award is filed . . . , the award shall be final and binding."[8]

And what of the majority's decision's retroactive consequences, a separate legal issue?[9] The majority avoids this uncomfortable subject. Under the Statute, the Arbitrator's first nine awards, including both those to which exceptions were denied, and those to which no exceptions were ever filed, are "final and binding" "for all purposes." But if those awards, "final and binding" "for all purposes," have somehow ceased to be so, as the majority claims, what is the status of any actions taken, or actions specifically not taken, by the Agency, the Union, and the thousands of potentially affected employees who may have made decisions and taken actions relying on those awards? The majority, in its haste to act, does not pause a moment to consider, and apparently does not care about, the chaos that its impulsive decision will cause. For example, what about the status of personnel actions taken, or postponed, years ago or recently, to comply with the "final and binding" awards? Or payments made to employees pursuant to the "final and binding" awards?[10]

To be clear, I understand, and accept, that Authority Members may differ, sometimes sharply, on how cases that parties bring to the Authority should be resolved. But it is also my expectation, which I believe is reasonable, that the Authority's Members will be unified in their allegiance to the rule of law, a pillar of our democratic society, to fundamental adjudicatory principles applied by courts and administrative agencies, and to interpreting and applying the Statute "in a manner consistent with the requirement of an effective and efficient government."[11] Because the majority's decision in this case is faithful to none of these precepts, I respectfully dissent.

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[1] 5 U.S.C. § 7121(c)(5).

[2] 59 FLRA 630 (2004).

[3] 70 FLRA 38 (2016) (Member Pizzella dissenting).

[4] *HUD I*, 59 FLRA at 630 (quoting the 2003 Award).

[5] *Id.*

[6] *Id.* at 632 (quoting the 2003 Award).

[7] *Id.* at 631 (noting that "[t]he parties' agreement to conduct a separate hearing on a threshold issue does not convert the threshold ruling into a final award").

[8] *Id.* (citing *U.S. DOD, Nat'l Imagery & Mapping Agency, St. Louis, Mo.*, 57 FLRA 837, 837 n.2 (2002)).

[9] 65 FLRA 433 (2011).

[10] *Id.* at 433 (quoting the 2009 Arbitrability Award).

[11] *Id.* at 434 (quoting the 2009 Merits Award).

[12] *Id.* at 436.

[13] *Id.*

[14] 66 FLRA 867 (2012).

[15] *Id.* at 868.

[16] Exceptions, Attach. 12, 2012 Award at 1.

[17] 5 C.F.R. § 2425.4(c) (Exceptions may not rely on any "evidence [or] arguments . . . that could have been, but were not, presented to the arbitrator."); *id.* § 2429.5 (The "Authority will not consider any evidence [or] . . . arguments . . . that could have been, but were not, presented in the proceedings before the . . . arbitrator.").

[18] 68 FLRA 631 (2015) (Member Pizzella dissenting).

[19] Exceptions, Ex. 1, Tab 3 at 4 ("These Orders are hereby extended to . . . additional . . . eleven employees.").

[20] 69 FLRA 60 (2015) (Member Pizzella dissenting).

[21] *Id.* at 60 (The Agency requested reconsideration under 5 C.F.R. § 2429.17.).

[22] *HUD V*, 69 FLRA at 60.

[23] 69 FLRA 213 (2016) (Member Pizzella dissenting).

[24] Exceptions, Attach. 4 at 1 ("This Arbitrator informed the Agency that it was to notify all [b]argaining[-u]nit [e]mployees that they do not need to contact management prior to discussing the Fair and Equitable case with the Union's counsel.").

[25] Exceptions, Attach. 6 at 2 ("The Agency is further ordered to have the Deputy Secretary . . . contact OPM directly.").

[26] 5 U.S.C. § 7121(c)(5).

[27] *HUD VI*, 69 FLRA at 223.

[28] 70 FLRA at 40.

[29] Member Abbott welcomes this new-found appreciation by his dissenting colleague of the impact on the parties that an award, in particular an erroneous award, can have. He also directs his colleague's attention to the Agency's Supplement to its exceptions, referenced in the footnote below. Any reasonable doubt about the substantial, often chaotic impact and cost to agencies, unions, individual grievants, and other agency employees that erroneous awards can have (and here, to the tune of an order to retroactively promote and pay ***backpay to 3,777 employees*** regardless of merit or available positions) is well-answered in that supplemental pleading. This decision by the Authority, to vacate its own earlier decisions in this seemingly never-ending saga, informs and assures the federal labor-relations community that this Authority will recognize when we get a decision wrong—***and that we will take whatever steps are necessary to correct the earlier, erroneous decision.*** Member Abbott observes that his dissenting colleague has himself been a member of other panels who did just that. *See AFGE, Local 1547*, 67 FLRA 523, 526 (2014) (Member Pizzella dissenting) ("To the extent that Authority decisions hold or imply to the contrary, we will no longer follow them"), *pet. for review granted, decision vacated, Dep't of the Air Force v. FLRA*, 884 F.3d 957 (D.C. Cir. 2016); *AFGE, Local 3294*, 66 FLRA 430, 432 (2012) (Member Beck dissenting) ("However, as our approach in *Davis-Monthan* and this case is consistent with MSPB precedent, we will no longer follow any inconsistent Authority decisions."); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106 (2010) (Chairman Pope concurring) ("Upon reexamination of the 'reconstruction' standard reflected in *BEP*'s second prong . . . we determine that such a standard is not required by the Statute and, indeed, unduly limits the appropriate remedial authority of arbitrators"). My dissenting colleague ignores the fact that the progression of decisions—propagated by past majorities of the Authority (of which he was a common denominator) and which we must vacate—are all part of the *same case, same matter, and same parties*. The "decisions" which we vacate may not in any reasonable context be considered "final and binding." It is quite obvious that if *HUD I* had resolved the case, there would have been no need for *HUD II*; if *HUD II* had resolved the case, there would have been no need for *HUD III*; etc. Any possible confusion or inefficiency that could occur from today's decision will not arise because of our action in vacating the awards, but would occur by leaving unresolved the question of whether or not the Agency is required to comply with an "award," "amended award," and "written summaries." Taking the latter course brings clarity and resolves all open questions for the parties. In other words, because "the Arbitrator has always lacked jurisdiction over the grievance," Majority at 6, we have been left with no choice but to vacate the earlier, progressive, and "assume[d] without deciding" determinations, *see HUD IV*, 68 FLRA at 631, which perpetuated a never-ending stream of *ultra vires*-esque arbitral edicts.

[30] The Agency also makes arguments concerning the Arbitrator's assertion of continuing jurisdiction, sovereign immunity, and bias of the Arbitrator. Each of these arguments is compelling in its own right, but we need not address these because of our ruling today.

[31] The Agency requested leave to file, and did file, supplemental submissions under 5 C.F.R. § 2429.6. However, because of the disposition of this case, it is not necessary to address these requests.

[32] The Union requested an extension for filing its opposition. The Authority found that the Union had shown sufficient cause for an extension and granted the Union's request.

[33] 5 U.S.C. § 7121(c)(5).

[34] *Office & Prof'l Emps. Int'l Union, Local 2001*, 62 FLRA 67, 69 (2007) (quoting *U.S. Dep't of the Army, Fort Polk, La.*, 61 FLRA 8, 12 (2005) (Member Pope dissenting)); *see also USDA, Food & Consumer Serv., Dall., Tex.*, 60 FLRA 978, 981 (2005) (*USDA I*); *U.S. EEOC, Memphis Dist. Office, Memphis, Tenn.*, 18 FLRA 88, 89 n.2 (1985).

[35] *USDA I*, 60 FLRA at 981 (emphasis added).

[36] *HUD I*, 59 FLRA at 631 (citing *USDA, Agric. Research Serv. E. Reg'l Research Ctr.*, 20 FLRA 508, 509 (1985) (*USDA II*)).

[37] *Id.* at 632.

[38] *HUD II*, 65 FLRA at 436.

[39] *Id.* (quoting *HUD I*, 59 FLRA at 632).

[40] *See id.* at 435; *VA*, 47 FLRA at 1117; *USDA II*, 20 FLRA at 509.

[41] 5 U.S.C. § 7121(c)(5).

[1] *Cf. U.S. DOL*, 70 FLRA 452, 458 n.8 (Dissenting Opinion of Member DuBester) (discussing the majority's "backdoor rulemaking" masquerading as adjudication).

[2] *See, e.g.*, Fed. R. Civ. P. 60 (identifying, among the grounds for vacating a judgment, "fraud" or "newly discovered evidence").

[3] *E.g.*, *AFGE, Local 2054*, 58 FLRA 163, 164 (2002) ("An arbitral awards becomes final and binding . . . when timely-filed exceptions are denied by the Authority."); *U.S. Dep't of HHS, SSA*, 41 FLRA 755, 765 (1991) (same) (citing *Wyo. Air Nat'l Guard, Cheyenne, Wyo.*, 27 FLRA 759 (1987); *Dep't of the Treasury, U.S. Customs Serv., N.Y. Region, N.Y.C., N.Y.*, 21 FLRA 999 (1986); *U.S. DOJ & DOJ BOP (Wash., D.C.)*, 20 FLRA 39 (1985), *enforced sub nom. U.S. DOJ v. FLRA*, 792 F.2d 25, 28 (2d Cir. 1986) ("We conclude that the denial of the exceptions . . . made the award final and binding."); *U.S. Marshals Serv.*, 13 FLRA 351 (1983), *aff'd sub nom. U.S. Marshals Serv. v. FLRA*, 778 F.2d 1432 (9th Cir. 1985)).

[4] *Dep't of the Air Force v. FLRA*, 775 F.2d 727, 735 (6th Cir. 1985) (noting the once an award becomes "final," "a party can no longer challenge the award by any means. It has become final for all purposes.").

[5] *See, e.g.*, 5 U.S.C. § 7122(b) ("An agency shall take the actions required by an arbitrator's final award.").

[6] *See Clifton v. Attorney Gen. of the State of Cal.*, 997 F.2d 660, 663 (9th Cir. 1993) ("If the ideals of finality and repose underlying the doctrine of res judicata are to have any meaning, that right must have fully accrued when the judgment became final.").

[7] *See, e.g.*, *HUD IV*, 68 FLRA at 632-35 (noting the Agency's acknowledgement that one of the Arbitrator's

awards had become "final and binding," and that the Agency failed to challenge certain of the Arbitrator's other awards).

[8] 5 U.S.C. § 7122(b).

[9] The majority appears confused on this point. *See* Majority at 5 n.24 (one of the majority's Members justifying the *retroactive* effect of the majority's decision based on Authority precedent in which the Authority determines, *prospectively*, to "no longer follow" certain Authority precedent).

[10 *See, e.g.*, Exceptions at 3 n.2 (noting promotions and backpay payments the Agency made to comply with one of the Arbitrator's awards).

[11 5 U.S.C. § 7101(b); *see HUD IV*, 68 FLRA at 636 ("[I]t is not clear how . . . reaching back to challenge the prior, final awards to which no party now objects . . . would promote 'efficient [g]overnment' or 'the prompt 'settlement[]' of disputes.'").

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