

72 FLRA No. 96

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VA MEDICAL CENTER
POPLAR BLUFF, MISSOURI
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2338
(Union)

0-AR-5644

ORDER DISMISSING EXCEPTIONS

October 7, 2021

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

I. Statement of the Case

The Agency filed an interlocutory exception to Arbitrator David M. Gaba's interim award. For the reasons discussed below, we dismiss the Agency's exception because it does not demonstrate extraordinary circumstances warranting interlocutory review.

II. Background and Order to Show Cause

The Union filed two grievances concerning the grievant's non-selection for a voluntary services specialist position. The first grievance was filed on November 26, 2018 (2018 grievance), and the second grievance was filed on July 10, 2019 (2019 grievance). The Union invoked arbitration on each. Although the parties agreed that the issue was the Agency's non-selection of the grievant for a voluntary services specialist position, they could not agree whether the 2018 or 2019 grievance was before the Arbitrator. Consequently, the parties requested that the Arbitrator resolve that dispute before a merits hearing.

In an interim award, the Arbitrator determined that the 2018 grievance was the grievance at arbitration and directed the parties to schedule a hearing on the merits. On June 15, 2020, the Agency filed an exception

to the Arbitrator's award, and the Union filed an opposition to the Agency's exception on July 15, 2020.

On August 10, 2020, the Authority's Office of Case Intake and Publication issued an Order to Show Cause (order) directing the Agency "to show cause why the Authority should not dismiss its exception[] . . . as interlocutory."¹ In its response, the Agency asserts that its exception is not interlocutory or, if interlocutory, it warrants review because there are "exceptional circumstances."²

III. Analysis and Conclusion: The Agency's exception is interlocutory, and it has not demonstrated extraordinary circumstances warranting review.

The Authority ordinarily will not resolve an exception to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration.³ However, the Authority has determined that an interlocutory exception presents "extraordinary circumstances" that warrant review when its resolution will advance the ultimate disposition of the case by obviating the need for further arbitration.⁴

The Agency argues that its exception is not interlocutory because the Arbitrator resolved the only issue submitted – whether the 2018 or 2019 grievance was properly at arbitration.⁵ We disagree. Quite clearly, the Arbitrator's determination that the 2018 grievance would proceed to arbitration did not resolve the issue of the grievant's non-selection for the voluntary services specialist position.⁶ Therefore, the Arbitrator directed the parties to schedule a hearing on the merits of that grievance.⁷ Because the Arbitrator did not resolve all of the issues submitted to arbitration, the exception is interlocutory.⁸

The Agency also argues that "exceptional circumstances" warrant review because a ruling on its exception could obviate the need for further

¹ Order to Show Cause at 1.

² Agency Resp. to Show-Cause Order (Resp.) at 2.

³ *U.S. DHS, U.S. CBP, L.A., Cal.*, 72 FLRA 411, 412 (2021) (*DHS*); *U.S. Dep't of Educ., Fed. Student Aid*, 72 FLRA 316, 316-17 (2021) (Chairman DuBester concurring); *U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Dist.*, 71 FLRA 713, 713-14 (2020) (*Army Corps*) (then-Member DuBester concurring).

⁴ *DHS*, 72 FLRA at 412; *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (then-Member DuBester dissenting).

⁵ Resp. at 1-2.

⁶ Award at 2.

⁷ *Id.* at 18.

⁸ See *Army Corps*, 71 FLRA at 714 (exceptions interlocutory where arbitrator resolved arbitrability as a threshold matter but had not yet resolved the merits).

arbitration proceedings.⁹ The Agency contends that if we were to grant its exception and find that the 2019 grievance is before the Arbitrator, it could then argue that the grievance is not procedurally arbitrable.¹⁰

But the Agency does not explain how granting its essence exception would obviate the need for further arbitration proceedings. Even if we were to find that the 2019 grievance is the one before the Arbitrator, the Agency would still need to present its procedural arguments to the Arbitrator in further proceedings.

Consequently, the Agency has failed to demonstrate extraordinary circumstances that warrant review,¹¹ and we dismiss the Agency's exception as interlocutory.

IV. Decision

We dismiss, without prejudice, the Agency's exception.

⁹ Resp. at 2.

¹⁰ Exceptions Br. at 9. We note that, in its exception, the Agency does not allege that the matter is non-arbitrable and the Arbitrator made no arbitrability findings.

¹¹ *U.S. DHS, CBP*, 70 FLRA 992, 993 (2018) (then-Member DuBester concurring) (where granting exceptions regarding discovery issue would not obviate the need for arbitration proceedings on the merits of the grievance, the excepting party failed to demonstrate extraordinary circumstances warranting interlocutory review).

Chairman DuBester, concurring:

I agree with the Decision to dismiss, without prejudice, the Agency's exceptions.