74 FLRA No. 42

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 149
(Union)

0-AR-5978

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ORDER DISMISSING EXCEPTIONS

May 27, 2025

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Before the Authority: Colleen Duffy Kiko, Chairman, and Susan Tsui Grundmann and Anne Wagner, Members
(Chairman Kiko dissenting)

I. Statement of the Case

Arbitrator Robert Costello issued an award finding the Agency violated the parties' collective-bargaining agreement in connection with how the Agency configured certain "work units."[1] The Arbitrator directed various remedies, but remanded the matter to the parties to negotiate the specifics of those remedies, and he retained jurisdiction to resolve any disputes as to the implementation of the award. The Agency filed exceptions to the award on essence, nonfact, and contrary-to-law grounds. For the following reasons, we dismiss the Agency's exceptions, without prejudice, as interlocutory.

II. Background and Arbitrator's Award

The Union filed a grievance alleging the Agency violated the parties' agreement in various respects when the Agency announced work units that employees could bid on for the 2023 fiscal year. The grievance went to arbitration, where the parties stipulated several issues regarding whether the Agency violated the parties' agreement and, "[i]f so, what is the remedy?"[2]

The Arbitrator found the Agency violated the agreement in some, but not all, of the ways the Union alleged. Therefore, he granted the grievance in part. With regard to remedies, the Arbitrator declined to "issu[e] any orders for the Agency to cease and desist from any particular practice or policy," and "instead[] order[ed] that the Agency promptly bring its work units into compliance with" the parties' agreement, "as discussed in" the award.[3] The Arbitrator stated that "[t]he specifics of what that requires should be worked out between the parties themselves," but said he would "remain available to resolve any disputes the parties have."[4] The Arbitrator also directed the Agency to make whole any employees who lost overtime opportunities as a result of the Agency's contractual violations. The Arbitrator "remand[ed] the matter to the parties to negotiate regarding the specifics of the Agency's compliance," and he retained jurisdiction for ninety days "to resolve any disputes as to the implementation of" the award.[5]

On July 29, 2024,[6] the Agency filed exceptions to the award. On August 27, the Authority issued an order directing the Agency to show cause why its exceptions should not be dismissed, without prejudice, as interlocutory. The show-cause order invited the Union to file a reply to any Agency response. On September 6, the Union filed an opposition to the Agency's exceptions;[7] on September 10, the Agency filed a timely response to the show-cause order (response); and on September 23, the Union filed a timely reply to the Agency's response.

III. Analysis and Conclusion: We dismiss the Agency's exceptions, without prejudice, as interlocutory.

Section 2429.11 of the Authority's Regulations pertinently provides that the Authority "ordinarily will not consider interlocutory appeals."[8] In the arbitration context, this means that the Authority ordinarily will not resolve exceptions to an arbitrator's award unless the award completely resolves all of the issues submitted to arbitration.[9] However, the Authority has held that it will grant interlocutory review under certain "extraordinary circumstances."[10] As the Authority

[1] Award at 2.
[2] *Id.* at 6-7.
[3] *Id.* at 24.
[4] *Id.*
[5] *Id.*
[6] All dates in this section are from 2024.
[7] On August 6, the Union requested an extension of time to file its opposition. On August 8, the Authority granted the Union an extension until September 6. Therefore, the Union's opposition is timely.
[8] 5 C.F.R. § 2429.11.
[9] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Bastrop, Tex.*, 73 FLRA 423, 424 (2023).
[10] *Id.*

explained in *U.S. Department of the Army, Army Materiel Command, Army Security Assistance Command, Redstone Arsenal, Alabama* (*Redstone*),[11] the Authority will find such extraordinary circumstances only when the excepting party demonstrates *both* that the arbitrator lacks jurisdiction as a matter of law *and* that resolving the exceptions would bring an end to the entire dispute that the parties submitted to arbitration.[12]

In its response, the Agency "does not dispute" that its exceptions are interlocutory.[13] However, the Agency argues that the matter of "how the Agency will effect the Arbitrator's substantive decision . . . portend[s] further arbitral proceedings and potentially lengthy negotiations between the [p]arties."[14] According to the Agency, "[t]hese arbitral proceedings will be obviated should the [e]xceptions be granted in the Agency's favor."[15]

The Agency does not allege, much less demonstrate, that the Arbitrator lacks jurisdiction as a matter of law. As such, the Agency has not demonstrated extraordinary circumstances warranting interlocutory review under the standard set forth in *Redstone*. Consequently, we dismiss the Agency's exceptions without prejudice to the Agency's ability to refile.

IV. Order

We dismiss the Agency's exceptions without prejudice.

[11] 73 FLRA 356 (2022) (then-Member Kiko dissenting).
[12] *Id.* at 362.
[13] Response at 2.
[14] *Id.*
[15] *Id.*

Chairman Kiko, dissenting:

As I stated in my dissent in *U.S. Department of the Army, Army Materiel Command, Army Security Assistance Command, Redstone Arsenal, Alabama* (*Redstone*),[1] it is a mistake to substantially restrict interlocutory review to only a few narrow circumstances.[2] Under the previous standard established in *U.S. Department of the Treasury, IRS* (*IRS*), the Authority granted interlocutory review of any exception that, "if decided, could obviate the need for further arbitration."[3] The value of this standard was considerable; parties avoided costly litigation by challenging the types of errors that pointlessly prolong arbitration *when they occurred*, rather than waiting until the errors had been compounded by further proceedings on the taxpayers' dime.

The *Redstone* standard achieves the opposite result. Under this highly restrictive interlocutory-review standard, the Authority will only address interlocutory exceptions in a single, exceedingly narrow set of circumstances: "when the excepting party demonstrates *both* that the arbitrator lacks jurisdiction as a matter of law *and* that resolving the exceptions would bring an end to the entire dispute that the parties submitted to arbitration."[4] But as this case demonstrates, requiring the exception to establish a statutory jurisdictional defect prohibits review of myriad exceptions whose consideration would promote government efficiency by ending disputes before the parties engage in superfluous arbitration or remedial actions.[5]

In his merits award, the Arbitrator found the Agency violated Article 13 of the parties' collective-bargaining agreement by improperly changing work units, and he directed the Agency "to promptly bring its work units into compliance with Article 13."[6] Having concluded the merits phase of the arbitration, the Arbitrator "remand[ed] the matter to the parties to negotiate regarding the specifics of the Agency's compliance."[7] But these negotiations over the Agency's compliance with Article 13 are necessarily contingent on the Arbitrator's finding that the Agency *violated* the parties' agreement, which the Agency *entirely* challenges in its exceptions.[8] Consequently, if we granted any one of these exceptions and vacated the merits award, we would obviate the need for further proceedings over the Agency's compliance with Article 13.

Applying *IRS*, the Authority would have granted interlocutory review of the Agency's exceptions because they could render further proceedings unnecessary.[9] As I noted in my *Redstone* dissent, the *IRS* "standard provided an opportunity for parties to raise crucial questions at the most practical point in the proceedings."[10] The most practical point at which to resolve the Agency's exceptions – arguing that the Arbitrator erred in finding contractual violations[11] – is *before* the parties begin the work of negotiating how the Agency will reorganize its work units to rectify those contractual violations. The *Redstone* standard delays the answer to this crucial question until after the parties have negotiated over, and perhaps further litigated, the issue of these potentially unwarranted changes to the Agency's work units.

Because I believe the *IRS* approach best effectuates the Federal Service Labor-Management Relations Statute's purpose of promoting "an effective and efficient [g]overnment,"[12] I dissent to the majority's continued use of the *Redstone* standard and its application to this case.

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[1] 73 FLRA 356 (2022) (then-Member Kiko dissenting).

[2] *Id.* at 363 (Dissenting Opinion of then-Member Kiko).

[3] 70 FLRA 806, 808 (2018) (Member DuBester dissenting).

[4] *Redstone*, 73 FLRA at 362.

[5] *See id.* at 363 (Dissenting Opinion of then-Member Kiko) ("With this decision, even where a meritorious exception could obviate the need for further proceedings, the majority obligates parties to engage in unnecessary arbitration in all but a few limited circumstances.").

[6] Award at 25.

[7] *Id.*

[8] Exceptions Br. at 12-22 (arguing the Arbitrator's finding that the Agency violated Article 13 fails to draw its essence from that provision); *id.* at 22-25 (arguing that the award is based on a nonfact); *id.* at 25-29 (arguing that the award excessively interferes with management's rights to assign work, assign and direct employees, and determine its administrative and functional structure).

[9] *See, e.g.*, *U.S. Dep't of the Treasury, IRS*, 72 FLRA 728, 729-30 (2022) (Chairman DuBester concurring in part and dissenting in part) (granting interlocutory review of essence exceptions that "would obviate the need for further arbitral proceedings" but denying review of exception where "further arbitral proceedings would [still] be required" if granted); *U.S. Dep't of the Army*, 72 FLRA 363, 365-66 (2021) (Member Abbott concurring; Chairman DuBester dissenting) (granting interlocutory review of essence, contrary-to-law, and public-policies exceptions that would obviate the need for further arbitration, and dismissing exceptions that would not end further proceedings); *U.S. Dep't of the Treasury, IRS*, 71 FLRA 192, 193 (2019) (Member DuBester dissenting) (granting interlocutory review of exception challenging interim award as contrary to law because, if the Authority granted the exception, "then the parties would not need further arbitration in th[e] case").

[10] *Redstone*, 73 FLRA at 365 (Dissenting Opinion of then-Member Kiko).

[11] Exceptions Br. at 12, 22, 25.

[12] 5 U.S.C. § 7101(b).