74 FLRA No. 43

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

PROFESSIONAL AVIATION SAFETY SPECIALISTS
(Union)

0-AR-5912

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ORDER DISMISSING EXCEPTIONS

June 17, 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 David P. Clark issued an award finding that the Agency's reasons for denying three grievants' requests for full-time telework violated the parties' collective-bargaining agreement. As a remedy, the Arbitrator remanded the grievants' telework requests to the Agency for reconsideration in compliance with the agreement. The Arbitrator retained jurisdiction and stated that the Union could resubmit the grievances to him if the Agency denied the telework requests again for reasons that violated the agreement. The Arbitrator added that, if the Union resubmitted the grievances to him, then it would be "within [his] authority to order an equitable remedy."[1] The Agency filed exceptions to the award.

Applying *U.S. Department of the Army, Army Materiel Command, Army Security Assistance Command, Redstone Arsenal, Alabama* (*Redstone*),[2] we deny interlocutory review of the exceptions because the Agency fails to demonstrate that the Arbitrator lacks jurisdiction as a matter of law. Therefore, we dismiss the Agency's exceptions, without prejudice.

II. Background and Arbitrator's Award

Due to the COVID-19 pandemic, the Agency temporarily approved full-time-telework schedules (max telework) for the grievants. After COVID-19 cases declined, the Agency ordered the grievants to begin working at the Agency's offices one day per week. The grievants reported to their respective offices as ordered, but they requested that the Agency re-approve max telework for them. The Agency denied the requests on the grounds that requiring the grievants to work at the Agency's offices: (1) improved customer service; (2) increased coworker collaboration; and (3) prevented the Agency from incurring travel expenses that could arise if max telework required designating the grievants' homes as their new official duty stations. The Union grieved the denials, which advanced to arbitration.

The Arbitrator framed the issues as "[w]hether the Agency violated Article 37 of the [agreement] when it denied the [g]rievants' . . . requests" for max telework, and, if so, what would be an appropriate remedy.[3] The Arbitrator held that Article 37, Section 5 of the agreement[4] requires the Agency's written explanation for its treatment of telework requests to "have a basis that is objective and non[-]arbitrary."[5] Explaining further, the Arbitrator concluded that "management's determination in response to an employee's request for telework must be based on facts or conditions that actually exist ['objective'], *not* based on a manager's personal preference, but on the intrinsic nature of the employee's actual work ['non arbitrary']."[6] Based on his review of the Agency's reasons and the record evidence, the Arbitrator decided that the Agency's rationales for denying max telework to the grievants were "not grounded in facts or conditions that actually exist."[7] Thus, the Arbitrator determined the Agency's max-telework denials violated Article 37.

As a remedy, the Arbitrator remanded the grievants' telework requests to the Agency for reconsideration. The Arbitrator added that he was "not ordering the Agency to grant the [g]rievants' requests for [max] telework."[8] However, the Arbitrator retained jurisdiction "in the event [the matter] is not resolved on reconsideration."[9] He stated that the Union could resubmit the grievances to him if the Agency denied the telework

[1] Award at 18.
[2] 73 FLRA 356, 361-62 (2022) (then-Member Kiko dissenting).
[3] Award at 1.
[4] Section 5 states, in pertinent part, "The Agency agrees that all [telework] determinations will be made in a fair, objective, and equitable manner, and based on sound business practices, not arbitrary limitations." *Id.* at 3 (quoting Collective-Bargaining Agreement Art. 37, § 5).
[5] *Id.* at 15 (internal quotation marks omitted).
[6] *Id.* at 16 (brackets in original).
[7] *Id.* at 17.
[8] *Id.* at 18.
[9] *Id.* at 17.

requests again for reasons that violated the agreement. The Arbitrator added that, if the Union resubmitted the grievances to him, then it would be "within [his] authority to order an equitable remedy."[10]

The Agency filed exceptions to the award on August 15, 2023, and the Union filed an opposition on September 12, 2023.[11]

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

In its exceptions, the Agency argues the award (1) fails to draw its essence from the parties' agreement,[12] and (2) is contrary to law – specifically, management rights under § 7106 of the Federal Service Labor-Management Relations Statute.[13] The Authority ordered the Agency to show cause why its exceptions should not be dismissed, without prejudice, as interlocutory.[14] The Authority also directed the Agency to address whether this dispute is distinguishable from the one in *Department of the Air Force, Carswell Air Force Base, Texas* (*Air Force*).[15] In *Air Force*, the Authority dismissed exceptions as interlocutory because an arbitrator directed an agency to reconsider its actions and "expressly retained jurisdiction to afford the [u]nion another opportunity to challenge the [a]gency's action."[16]

In its response to the Authority's order, the Agency acknowledges the exceptions are interlocutory.[17]

The Authority will generally dismiss an interlocutory appeal without prejudice to the parties' abilities to later file timely exceptions to a final award.[18] However, the Authority will grant interlocutory review under certain "extraordinary circumstances."[19] In *Redstone*, the Authority held that it will not find such extraordinary circumstances exist unless 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.[20]

First, the Agency argues this dispute is distinguishable from *Air Force* because the Arbitrator sustained the grievances in this case, whereas – according to the Agency – the arbitrator in *Air Force* did not sustain the grievance before him.[21] Contrary to the Agency's argument, the fact that the Arbitrator sustained the grievances has little bearing on the determinative factor here – the potential introduction of some new measure of relief. Specifically, in the event that the Union resubmits the grievances to the Arbitrator after the Agency's reconsideration, the Arbitrator's retention of "authority to order an equitable remedy" contemplates the potential introduction of some new measure of relief.[22] Thus, the Agency has not shown that *Air Force* is materially distinguishable from this case.

Next, the Agency asserts that the "[A]rbitrator awarded himself indefinite jurisdiction in th[is] matter," and, as such, the Agency asserts the Authority should grant interlocutory review of its exceptions because of this

[10] *Id.* at 18.

[11] On September 27, 2023, the Authority issued an order giving the parties an opportunity to address the Authority's revised management-rights test set forth in *Consumer Financial Protection Bureau*, 73 FLRA 670 (2023). On October 26, 2023, the Union filed a response; the Agency did not file one.

[12] Exceptions Br. at 11-16.

[13] *Id.* at 5-11 (citing 5 U.S.C. § 7106).

[14] Order to Show Cause at 3.

[15] *Id.* (citing *Air Force*, 33 FLRA 757, 758 (1988)).

[16] *Air Force*, 33 FLRA at 758.

[17] Agency's Resp. to Order to Show Cause (Resp.) at 7 ("[T]he Agency respectfully requests the Authority to grant interlocutory review of the Agency's exceptions . . . ."); *see also Cong. Rsch. Emps. Ass'n, IFPTE, Loc. 75*, 64 FLRA 486, 489 (2010) ("[T]he Authority normally will not resolve exceptions . . . to an arbitration award unless the award constitutes a complete resolution of all issues submitted to arbitration."); *U.S. DOL, Bureau of Lab. Stat.*, 65 FLRA 651, 653-54 (2011) (explaining that an award that postpones the determination of a submitted issue is not a final award); *U.S. Dep't of the Treasury, BEP, W. Currency Facility, Ft. Wor., Tex.*, 58 FLRA 745, 746 (2003) ("Exceptions are considered interlocutory when the arbitrator has declined to make a final disposition as to a remedy.").

[18] *See, e.g.*, *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Carswell, Tex.*, 64 FLRA 566, 568 (2010).

[19] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Bastrop, Tex.*, 73 FLRA 423, 424 (2023) (*FCC Bastrop*).

[20] *Redstone*, 73 FLRA at 356; *cf. FCC Bastrop*, 73 FLRA at 424 ("Although the Authority will grant interlocutory review under certain 'extraordinary circumstances,' the Authority has long held that it will *not* do so if it will not obviate the need for further arbitration.").

[21] Resp. at 5.

[22] Award at 18 ("[I]t is within [the Arbitrator's] authority to order an equitable remedy [after resubmission]."); *see NTEU, Chapter 164*, 67 FLRA 336, 337 (2014) (holding that an "award is final for purposes of filing exceptions" if it "does not indicate that the arbitrator or the parties contemplate the introduction of some new measure of damages").

alleged jurisdictional defect.[23] The Agency's assertions do not demonstrate that "the arbitrator *lacks* jurisdiction as a matter of law," as *Redstone* requires.[24] Thus, the Agency has not satisfied the first part of the *Redstone* standard, and interlocutory review is not warranted.[25] Accordingly, we dismiss the exceptions without prejudice to the Agency's right to refile them to a final award.[26]

IV. Order

We dismiss the Agency's exceptions without prejudice.

[23] Resp. at 6.

[24] *See Redstone*, 73 FLRA at 361 (emphasis added); *see also id.* at 362 (exception based on parties' agreement failed to demonstrate arbitrator lacked jurisdiction as a matter of law).

[25] *Id.* To the extent the Agency requests that we modify *Redstone*'s standard in order to permit interlocutory review in this case, *see* Resp. at 6-7, we deny that request because *Redstone* provided a detailed justification for the contours of its standard.

[26] *See Redstone*, 73 FLRA at 362 (where party did not satisfy interlocutory-review standard, Authority dismissed exceptions without prejudice to right to refile).

Chairman Kiko, dissenting:

I continue to disagree with the standard set forth in *U.S. Department of the Army, Army Materiel Command, Army Security Assistance Command, Redstone Arsenal, Alabama* (*Redstone*),[1] for determining when the Authority will grant interlocutory review. Consistent with my dissenting opinion in *Redstone*,[2] I reiterate that the standard established in *U.S. Department of the Treasury, IRS* (*IRS*) – to grant interlocutory review of any exception that, "if decided, could obviate the need for further arbitration,"[3] – better supports the Federal Service Labor-Management Relations Statute's (the Statute's) purpose of promoting "an effective and efficient [g]overnment."[4] As such, I would apply *IRS* here, rather than *Redstone*.[5] And I dissent from the majority's contrary approach.

Separately, I appreciate that the Agency finds itself in a conundrum here. In particular, the Agency has already evaluated the grievants' telework requests and denied them. Although the Arbitrator found that the Agency's denials violated the parties' agreement, he did not grant any meaningful, substantive remedies for those violations. Further, the Arbitrator did not find that the record required additional development by the parties.[6] Instead, he simply directed the Agency to consider the requests anew, even though the Agency likely views those requests as no more appropriate than it did before. For example, the Agency likely still wishes to deny the grievants max telework because granting such a schedule will require changing their official duty stations, which will affect the Agency's liability for travel costs when the grievants must report to an Agency office.[7]

Despite there being no indication that the Agency's views have changed on the merits of the grievants' telework requests, the Arbitrator cautioned that if the Agency denies the requests a second time, then the Union may return to him. This deny-appeal-deny-appeal rigmarole appears pointless – *except* that it allowed the Arbitrator to assert that he was "not ordering the Agency to grant the [g]rievants' requests for [max] telework,"[8] and it has insulated his award from review (for now). If this dispute makes its way back to the Arbitrator, then for the sake of the parties, I hope that he does not compel them to play this unamusing game a third time.[9]

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[1] 73 FLRA 356, 361-62 (2022) (then-Member Kiko dissenting).

[2] *Id.* at 363-67 (Dissenting Opinion of then-Member Kiko).

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

[4] 5 U.S.C. § 7101(b); *see U.S. DHS, CBP*, 74 FLRA 245, 247 (2025) (Dissenting Opinion of Chairman Kiko) ("[R]equiring 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." (citing *Redstone*, 73 FLRA at 363)).

[5] The Agency argues in its contrary-to-law exception that the Arbitrator's interpretation of Article 37 – including his finding that the Agency did not comply with Article 37 – violates management's rights under § 7106 of the Statute. *See* Exceptions Br. at 5-11. If meritorious, this argument would prompt the Authority to grant the Agency's exception and set aside the award, thereby obviating the need for further arbitration. *See IRS*, 70 FLRA at 808 (finding interlocutory review appropriate when deciding an exception could advance the ultimate disposition of the case).

[6] *Cf. Navy Pub. Works Ctr., S.D., Cal.*, 27 FLRA 407, 407 (1987) ("[T]he [a]rbitrator expressly declined to make a complete and definitive award as to the appropriate remedy because the record was apparently incomplete.").

[7] *See* Award at 7 (noting the grievants' requests were all denied, in part, because of the effect of max telework on the grievants' official duty stations).

[8] *Id.* at 18.

[9] *Cf.* 5 U.S.C. § 7101(b) (setting forth one of the Statute's purposes as "establish[ing] procedures which are designed to meet the special requirements and needs of the [g]overnment," and emphasizing the Statute "should be interpreted in a manner consistent with the requirement of an effective and efficient [g]overnment").