**70 FLRA No. 167**

UNITED STATES
DEPARTMENT OF DEFENSE
EDUCATION ACTIVITY
(Agency)

and

FEDERAL EDUCATION ASSOCIATION
(Union)

0-AR-5312

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DECISION

September 25, 2018

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

## I. Statement of the Case

Arbitrator Joseph M. Sharnoff framed the issue before him as whether a Union-filed grievance was procedurally arbitrable. He did not limit himself to that issue; instead, he resolved an issue not submitted to arbitration and disregarded a specific limitation on his authority. We find that, by doing so, the Arbitrator exceeded his authority, and we set aside the award.

## II. Background and Arbitrator's Award

The Union filed a grievance challenging the Agency's pay practices, as related to numerous grievants. The Agency denied the grievance on the ground that it was not procedurally arbitrable and on the merits.

The parties then submitted the grievance to arbitration. The Arbitrator stated that: the parties were unable to agree on a stipulated issue, the Union "did not identify an issue," and the Agency's framing of the issue was "appropriate for resolution in this proceeding."[1] Accordingly, he found that the issue before him was "[w]hether . . . [the] [g]rievance . . . [was] procedurally . . . arbitrable."[2]

The Agency argued that the grievance was not procedurally arbitrable because: (1) it lacked specific details; (2) it was untimely; (3) the claims in the grievance lacked commonality; and (4) the Agency had previously addressed the grievants' same claims in its responses to individual grievances.

In contrast, the Union argued that the grievance was arbitrable because the parties had a past practice of grouping individual claims into institutional grievances. As part of the alleged past practice, the Union asserted that it could essentially refile already-rejected individual claims as part of an institutional grievance, and that the ordinary filing deadlines in the parties' agreement should not apply because the institutional grievance alleged a continuing violation. Further, the Union asserted that multiple arbitrators had found arbitrable – and sustained – grievances in which the Union had followed the alleged past practice.

The Arbitrator rejected the Union's argument that the parties had established a past practice of treating as arbitrable any individual pay-related claims that the Union combined into an institutional grievance.[3] Thus, he concluded that the Union had not shown that there was a past practice requiring him to find that the instant grievance was procedurally arbitrable.[4]

Additionally, the Arbitrator stated that "many of the Agency's positions regarding procedural arbitrability" were "correct" and could be grounds for dismissing the grievance.[5] Nevertheless, the Arbitrator considered: (1) prior arbitration awards between the parties involving the "same type" of alleged "improper pay practices";[6] and (2) the Union's proffer of evidence regarding the merits of the individual claims in this grievance. Based on those considerations, the Arbitrator concluded that the Agency had a "history of systemic[,] repeated[,] improper pay practices."[7] Further, he stated that "*but for* the . . . history of improper pay practices by the Agency," the grievance would be non-arbitrable.[8] Ultimately, the Arbitrator stated that the parties' history "conclusively

[1] Award at 10.
[2] *Id.*

[3] *Id.* at 44 ("[t]he Arbitrator does not agree with the [Union]'s position that the Agency has violated an established and controlling *past practice* regarding the propriety of the [Union] compiling several individual employee pay/debt collection grievances and presenting them collectively").
[4] *Id.* at 45 (because there had been "no consistent Agency response or 'past practice'" regarding pay-related claims, the Arbitrator "[could] not agree with the [Union] that it ha[d] established the basis for finding that [the arbitrability of the instant grievance was] controlled by an established 'past practice'").
[5] *Id.* at 42; *see id.* at 43-44.
[6] *Id.* at 47.
[7] *Id.* at 44.
[8] *Id.* at 43-44.

persuade[d]"[9] him that the grievance was procedurally arbitrable.[10]

Having found the grievance procedurally arbitrable, the Arbitrator remanded the grievance to the parties to resolve the merits of the individual claims. The Arbitrator retained jurisdiction in order to "resolve any issues raised by [the grievance] which the [p]arties are not able to resolve."[11]

On September 13, 2017, the Agency filed exceptions to the Arbitrator's award, and on October 3, 2017, the Union filed an opposition to the Agency's exceptions.

## III. Analysis and Conclusion: The Arbitrator exceeded his authority.

At the outset, the parties dispute whether the Agency's exceptions are interlocutory.[12] Ordinarily, the Authority will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all issues submitted to arbitration.[13] Here, the sole issue before the Arbitrator was whether the grievance was arbitrable.[14] The Arbitrator resolved that issue.[15] Therefore, the award constitutes a complete resolution of all issues at arbitration, and the exceptions are not interlocutory.[16] As such, we address the Agency's exceptions.

The Agency claims that the Arbitrator exceeded his authority.[17] An arbitrator exceeds his or her authority when, as relevant here, the arbitrator resolves an issue not submitted to arbitration or disregards specific limitations on his authority.[18] Where the parties fail to stipulate the issue, the arbitrator may formulate the issue on the basis of the subject matter before him or her, and this formulation is accorded substantial deference.[19] However, the Authority has consistently held that arbitrators must confine their decisions to those issues submitted for resolution and "must not dispense their own brand of industrial justice."[20]

The Arbitrator framed the issue as "[w]hether . . . [the] [g]rievance . . . [was] procedurally . . . arbitrable."[21] The Authority has held that procedural arbitrability involves questions of whether a grievance satisfies a collective-bargaining agreement's procedural conditions.[22] Because he framed the issue as one of procedural arbitrability, and he rejected the Union's argument that the parties were governed by a past practice,[23] the Arbitrator was limited to determining whether the grievance satisfied the procedural requirements in the parties' agreement. But the Arbitrator did not do so. Instead, the Arbitrator considered: (1) prior arbitration awards between the parties involving the "same type" of alleged "improper pay practices";[24] and (2) the Union's proffer of evidence regarding the merits of the individual claims in this grievance. And, as a result, the Arbitrator reached a conclusion that did not concern procedural arbitrability: that the Agency had a "history of systemic[,] repeated[,] improper pay practices."[25] By considering evidence concerning the parties' arbitral history and the merits of the instant grievance, and making findings regarding the propriety of the Agency's pay practices, the Arbitrator resolved an issue not submitted to arbitration.

More importantly, the Arbitrator stated that "*but for* the . . . history of improper pay practices by the Agency,"[26] he would have found the grievance non-arbitrable because of its procedural deficiencies. In other words, the Arbitrator found that the parties' history and the Agency's alleged systemic pay problems provided a *non-contractual* basis for finding the grievance arbitrable.[27] In doing so, the Arbitrator disregarded a specific limitation on his authority, which

[9] *Id.* at 43.
[10] *Id.* at 44.
[11] *Id.* at 49.
[12] Exceptions Br. at 5-7; Opp'n Br. at 4-5.
[13] 5 C.F.R. § 2429.11 ("[T]he Authority . . . ordinarily will not consider interlocutory appeals."); *Cong. Research Emp. Assoc., IFPTE, Local 75*, 64 FLRA 486, 489 (2010).
[14] Award at 10 (adopting solely the Agency's proposed issue of whether the grievance was arbitrable).
[15] *Id.* at 50 ("For the reasons discussed in the Opinion, [the grievance] is found to be arbitrable.").
[16] *U.S. Dep't of the Navy, Norfolk Naval Shipyard*, 63 FLRA 144, 144 n.* (2009) ("As it is undisputed that the sole issue submitted to the Arbitrator was the issue of arbitrability, and as the award constitutes a complete resolution of that issue, the Agency's exceptions are not interlocutory.").
[17] Exceptions Br. at 7-9.
[18] *AFGE, Council of Prison Locals #33, Local 0922*, 69 FLRA 351, 352 (2016) (citing *U.S. DOD, Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996)).
[19] *Id.* (citing *AFGE, Local 522*, 66 FLRA 560, 562 (2012)).
[20] *U.S. Dep't of the Navy, Naval Sea Logistics Ctr., Detachment Atl., Indian Head, Md.*, 57 FLRA 687, 688 (2002) (*Navy*) (quoting *VA*, 24 FLRA 447, 450 (1986)).
[21] Award at 10.
[22] *AFGE, Local 2041*, 67 FLRA 651, 652 (2014) (citing *AFGE, Local 3615*, 65 FLRA 647, 649 (2011)).
[23] Award at 44-45.
[24] *Id.* at 47.
[25] *Id.* at 44.
[26] *Id.* at 43-44; *see also id.* at 42 (stating that "many of the Agency's positions regarding procedural arbitrability" were "correct"); *id.* at 43 (stating that he was "conclusively persuade[d]" by the parties' "arbitral history" that the grievance was arbitrable).
[27] *See id.* at 42-44.

was to consider only whether the grievance satisfied the procedural conditions in the parties' agreement.[28]

Accordingly, we find that the Arbitrator exceeded his authority.[29]

## IV. Decision

We set aside the award.

[28] *Cf. U.S. Dep't of the Treasury, IRS, Ogden Serv. Ctr., Ogden, Utah*, 63 FLRA 195, 197 (2009) (once arbitrator found that agency violated neither law nor the parties' agreement, he had no authority to nevertheless award a remedy); *U.S. EPA, Chi., Ill.*, 58 FLRA 495, 495-96 (Member Pope dissenting) (where stipulated issue was whether agency gave preferential treatment to the selectee, and the arbitrator found there was no preferential treatment, arbitrator had no authority to resolve whether selection process violated agency policy); *Navy*, 57 FLRA at 688-89 (where arbitrator framed issue as whether failure to promote violated parties' agreement, and arbitrator concluded that agency did *not* violate agreement, arbitrator exceeded his authority by nevertheless awarding a remedy).

[29] Because we set aside the award on the basis that the Arbitrator exceeded his authority, we need not resolve the Agency's fair-hearing and contrary-to-law exceptions. Exceptions Br. at 10-14; *e.g.*, *AFGE, Local 2145*, 69 FLRA 7, 9 (2015).

**Member DuBester, dissenting:**

As the Arbitrator made clear, the issue before him "relate[s] solely to the Agency's procedural claim that [the grievance] is not arbitrable."[1] That should be the end of the story. But if more were needed, this clear, simple conclusion is reinforced by the Authority's longstanding deference to arbitrators' procedural-arbitrability determinations.[2]

However, "[c]ontinuing its non-deferential treatment of arbitrators and their awards,"[3] the majority erroneously sets aside the award in this case. Focusing on the Arbitrator's reasoning rather than his conclusion that the grievance is arbitrable, the majority finds that the Arbitrator exceeded his authority by considering "prior arbitration awards between the parties involving the 'same type' of alleged 'pay practices'," "the Union's proffer of evidence regarding the merits of the individual claims in this grievance," and the Agency's "history of systemic[,] repeated[,] improper pay practices."[4]

I disagree. The Arbitrator did not exceed his authority. Most collective-bargaining relationships have a history, a character, and a dynamic that provide a context for the disputes that arise between the parties. And in order to do their jobs most effectively, arbitrators need to be aware of the nature of those relationships. Contrary to the majority's suggestion, this Arbitrator, by discussing those contextual matters, is not "dispens[ing his] own brand of industrial justice."[5] The Arbitrator is simply doing his job and expressing his awareness of the parties' ongoing relationship, which the Arbitrator properly considers for the limited purpose of resolving the sole issue before him, the grievance's arbitrability.[6]

Accordingly, I would deny the Agency's exceeds-authority exceptions, and reach the Agency's remaining exceptions.

[1] Award at 43; *see also id.* at 10 (the only issue is "[w]hether [the grievance] procedurally is arbitrable").

[2] *See, e.g.*, *U.S. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (Member DuBester concurring, in part, and dissenting, in part) (Parties' challenges to arbitrators' procedural-arbitrability determinations "are subject to the *deferential* essence standard." (emphasis added)).

[3] *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 810 (2018) (Dissenting Opinion of Member DuBester); *see U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence, Colo.*, 70 FLRA 748, 750 (2018) (Dissenting Opinion of Member DuBester); *see also U.S. Dep't of Transp., FAA*, 70 FLRA 687, 688-89 (2018) (Member DuBester dissenting); *U.S. Dep't of the Treasury, IRS, Austin, Tex.*, 70 FLRA 680, 683-84 (2018) (Member DuBester dissenting); *U.S. Dep't of VA, Med. Ctr., Asheville, N.C.*, 70 FLRA 547, 548 (2018) (Member DuBester dissenting).

[4] Majority at 4.

[5] *Id.* at 3.

[6] It is true that the nature of the parties' relationship does not reflect favorably on the Agency. It includes a long history of "stonewalling" grievants' individual claims. Opp'n at 2, 6; *see U.S. DOD, Def. Educ. Activity, U.S. DOD Dependent Sch.*, 70 FLRA 718, 720 (2018) (Member DuBester dissenting) (consolidating eight cases concerning "pay problems" between the parties). It also includes Agency actions "intentionally avoid[ing] fixing its broken compensation system by using [the Union's] attorneys," rather than the Agency's own, "to identify and remedy [the Agency's] pay problems," not through efficient administrative action, but instead though the often costly process of litigation. Opp'n, Attach. 1, Sands Award at 2. But the Arbitrator's recognition of this factual context for the dispute does not improperly expand the extent of his award, which is limited to the issue of the grievance's arbitrability.