

**70 FLRA No. 196**

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

and

NATIONAL TREASURY  
EMPLOYEES UNION  
LOCAL 154  
(Union)

0-AR-5378

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ORDER DISMISSING EXCEPTIONS

December 17, 2018

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

**I. Statement of the Case**

In this case, we conclude that the Arbitrator's *in camera* review of manuals, which may or may not contain law-enforcement privileged information, does not demonstrate in and of itself sufficient extraordinary circumstances or irreparable harm to warrant interlocutory review. Accordingly, we dismiss the Agency's interlocutory exceptions to the Arbitrator's discovery award.

Arbitrator Jeanne M. Vonhof issued an award (discovery award) that ordered the Agency to submit information to her for an *in camera* review in order to determine whether the information is relevant and should be disclosed to the Union. The Agency filed exceptions to the discovery award.

**II. Background and Arbitrator's Award**

In December 2016, the Union filed a grievance alleging that the Agency violated the parties' agreement when it interviewed a Customs and Border Patrol Officer who was allegedly intoxicated while on duty without notifying the Union in advance. The grievance was unresolved, and the parties submitted it to arbitration.

In preparation for the arbitration hearing, the Union requested a copy of the Agency's Investigative

Operations Guidebook and its Internal Operating Procedure, a manual used by the Office of Professional Responsibility to conduct investigations (the manuals). The Agency claimed that the manuals could not be disclosed under the federal law-enforcement privilege.

On April 20, 2018, the Arbitrator issued a discovery award that ordered the Agency to provide the manuals to the Arbitrator *in camera* so that she could consider whether discrete sections of those documents should be introduced at arbitration. In the award, the Arbitrator noted that she would consider the relevance of the manuals as well as the Agency's arguments concerning the law enforcement privilege before determining whether the information should be disclosed to the Union.

On May 21, 2018, the Agency filed exceptions to the discovery award, and the Union filed an opposition on June 13, 2018.

**III. Analysis and Conclusion: The Agency has not demonstrated extraordinary circumstances warranting review.**

The Authority ordinarily will not resolve exceptions to an arbitration award unless the award is final and constitutes a complete resolution of all the issues submitted to arbitration.<sup>1</sup> Recently, however, the Authority held that it will consider interlocutory exceptions when their resolution will advance the ultimate disposition of the case.<sup>2</sup>

Here, because the discovery award did not resolve all of the issues,<sup>3</sup> the exceptions are interlocutory.<sup>4</sup>

The Agency acknowledges that the discovery award might be "less than final," but argues there are extraordinary circumstances to warrant our interlocutory review.<sup>5</sup> As relevant here, the Agency argues that the discovery award is contrary to law and the Arbitrator exceeded her authority when she ordered an *in camera*

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<sup>1</sup> 5 C.F.R. § 2429.11; *U.S. DHS, U.S. CBP*, 65 FLRA 603, 605 (2011).

<sup>2</sup> *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (*IRS*) (Member DuBester dissenting).

<sup>3</sup> On December 4, 2017, the Agency requested that the scheduled hearing on the merits of the grievance on December 12, 2017, be postponed. Exceptions, Attach. 10.

<sup>4</sup> *U.S. Small Bus. Admin.*, 70 FLRA 729, 729-30 (2018) (Member DuBester dissenting) (citing *U.S. Dep't of the Navy, Navy Undersea Warfare Ctr. Div. Keyport, Keyport, Wash.*, 69 FLRA 292, 293 (2016)) (exceptions to an arbitration award were interlocutory where the arbitrator had not yet resolved the grievance on the merits).

<sup>5</sup> Exceptions Br. at 3, 29.

review of the manuals.<sup>6</sup> Even if the Authority were to grant these exceptions concerning the discovery issue, the Arbitrator must still resolve the merits of the grievance.<sup>7</sup> As such, the resolution of these exceptions would *not* advance the ultimate disposition of this case.<sup>8</sup>

The Agency also argues that the Arbitrator's *in camera* review would cause irreparable harm.<sup>9</sup>

On this point, the Agency argues that the disclosure of the manuals to the Arbitrator would violate the federal law-enforcement privilege and their release would cause irreparable harm by disclosing law-enforcement techniques.<sup>10</sup>

Here, the Arbitrator's order is quite narrow and only requires disclosure so she can determine whether discrete sections of the manuals are relevant and material to the grievance.<sup>11</sup> The discovery award also provides that the Arbitrator will consider the Agency's arguments concerning the law-enforcement privilege to ensure that any disclosure will not cause irreparable harm.<sup>12</sup> These factors militate against any potential harm. Therefore, we do not agree that the Agency has made a sufficient showing that it will suffer irreparable harm by providing the manuals to the Arbitrator *in camera*.<sup>13</sup>

<sup>6</sup> Exceptions Br. at 11-14 (alleging that the Arbitrator exceeded her authority when she ordered the *in camera* review of the manuals).

<sup>7</sup> *E.g.*, *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 384 (1987) (citing *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 221, 232 (1979) (Rehnquist, J., concurring)) (absent a showing of extraordinary circumstances, the granting or denial of discovery is not immediately reviewable).

<sup>8</sup> *IRS*, 70 FLRA at 808 (granting interlocutory review where the resolution of the exceptions could advance the ultimate disposition of the arbitration).

<sup>9</sup> Exceptions Br. at 27, 29.

<sup>10</sup> The Agency alleges that there is well-established public policy of shielding law enforcement techniques from disclosure if such disclosure could risk circumvention of law. Exceptions Br. at 24-27, 29.

<sup>11</sup> Discovery Award at 5.

<sup>12</sup> *Id.* at 7.

<sup>13</sup> Member Abbott notes that the issue of whether irreparable harm presents extraordinary circumstances to warrant interlocutory review has never been addressed by the Authority. However, in accordance with the rulings of the U.S. Supreme Court, he would find that extraordinary circumstances exist when a party demonstrates that it will suffer irreparable harm absent such review. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376 (1981) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 331, n.11 (1976) (“[T]he finality requirement should ‘be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered.’”); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (Under the collateral order doctrine, an “order must conclusively determine [a] disputed question, resolve an important issue completely separate from the merits of the

The Agency also argues that an *in camera* review itself would cause irreparable harm by “undermin[ing] the confidentiality” of the materials.<sup>14</sup> We note that the U.S. Supreme Court has held that an *in camera* review to determine the merits of a claimed privilege does not terminate the claimed privilege.<sup>15</sup> Thus, the Arbitrator's *in camera* review does not diminish the Agency's ability to later raise<sup>16</sup> its law-enforcement privilege.<sup>17</sup> Therefore, these arguments do not demonstrate that, absent interlocutory review, the *in camera* review will cause irreparable harm.<sup>18</sup>

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

#### IV. Decision

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

action, and be effectively unreviewable on appeal from a final judgment.”).

<sup>14</sup> Exceptions Br. at 26.

<sup>15</sup> *See United States v. Zolin*, 491 U.S. 554, 568 (1989) (The “disclosure of allegedly privileged materials to the district court for purposes of determining the merits of a claim of privilege does not have the legal effect of terminating the privilege.”); *see also Shapiro v. Sec’y of State*, 499 F.2d 527, 536 (D.C. Cir. 1974) (holding that it is within the trial judge's discretion to examine the alleged privilege information *in camera*).

<sup>16</sup> We also do not give credence to the Agency's allegation that, if it gave the allegedly privileged materials to the Arbitrator for an *in camera* review, the Arbitrator could be subpoenaed to disclose those materials or that the materials could then “potentially be accessed by any number of criminal actors.” Exceptions Br. at 26. Such claims are, at best, speculative and do not demonstrate irreparable harm. *See United States v. Approximately 81,454 Cans of Baby Formula*, 560 F.3d 638, 640-41 (7th Cir. 2009) (rejecting claim of irreparable harm); *Rodriguez v. Banco Cent.*, 790 F.2d 172, 180 (1st Cir. 1986) (rejecting claim of irreparable harm that is “purely speculative”).

<sup>17</sup> *E.g.*, *Fisher v. U.S.*, 425 U.S. 391, 398-99 (1976) (finding that a privilege should not be lost solely because the party disclosed documents to their lawyers in order to obtain legal advice).

<sup>18</sup> *See, e.g., U.S. DHS, U.S. CBP*, 63 FLRA 505, 510 (2009) (arguments that are purely speculative fail to demonstrate that the arbitrator erred as a matter of law); *Packard Elevator v. Interstate Commerce Comm’n*, 782 F.3d 112, 115 (8th Cir. 1986) (bare allegations are insufficient to establish irreparable harm).

**Member DuBester, concurring:**

I agree that the Agency's interlocutory exceptions should be dismissed, without prejudice.