

71 FLRA No. 100

UNITED STATES
DEPARTMENT OF THE ARMY
NATIONAL TRAINING
CENTER AND FORT IRWIN, CALIFORNIA
(Agency)

and

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 2035
(Union)

0-AR-5375

DECISION

January 23, 2020

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

I. Statement of the Case

In this case, we clarify that a grievance seeking to change employees' exemption status under the Fair Labor Standards Act (FLSA) does not raise a classification issue barred from negotiated grievance procedures under § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute).¹

II. Background

The Union filed a grievance on behalf of "all bargaining[-]unit employees" at the Agency's Fort Irwin National Training Center in California. As relevant here, the grievance alleges that the Agency violated the FLSA and the parties' collective-bargaining agreement because the Agency "[f]ailed to properly designate employees as FLSA non[-]exempt" and "pay proper compensation for overtime."² Among other requirements, the FLSA obligates employers to compensate non-exempt employees for work in excess of forty hours per week at a rate of one and one-half times

the employees' regular wages.³ Under the FLSA, an "agency must review and make a determination on each employee's exemption status."⁴

The Agency dismissed the Union's grievance, and the Union invoked arbitration. Because the Agency argued that the Union's grievance was not arbitrable, the parties agreed to bifurcate the proceeding and submit the arbitrability issue to Arbitrator Jan Stiglitz before asking him to consider the merits. As relevant here, the Arbitrator framed the issues⁵ as: (1) "Is the [g]rievance [n]on-[a]rbitrable [b]ecause it is a [c]lassification [g]rievance?";⁶ (2) "Does the Union [h]ave [s]tanding to [b]ring an [a]ction for [d]amages?";⁷ and (3) "Is the [g]rievance [p]rocedurally [d]efective?"⁸

Addressing the first issue, the Arbitrator rejected the Agency's argument that resolution of the Union's FLSA claim would raise a classification issue barred under § 7121(c)(5) of the Statute.⁹ He concluded that "[t]he mere fact that one or more criteria for the FLSA determination might overlap with . . . [the] criteria for reclassification does not necessarily mean" that the Union was barred "from pursuing a legitimate claim regarding the FLSA status of bargaining[-]unit employees."¹⁰

Addressing the second issue, the Arbitrator rejected the Agency's claim that the Union lacked standing. Relying on the Authority's decision in *U.S. Department of the Army, White Sands Missile Range, White Sands Missile Range, New Mexico (White Sands)*¹¹ and § 7121(b)(1)(C)(i)¹² of the Statute, the Arbitrator found no merit to the Agency's claim that the Union's grievance was barred as a "class action."¹³

Next, the Arbitrator addressed the Agency's procedural arguments. For example, the Agency argued

³ See 29 U.S.C. § 207(a).

⁴ 5 C.F.R. § 551.201.

⁵ See Award at 4-5 (reciting each party's proposed issues and noting their similarities), 7 (explaining that he would resolve the dispute "on an issue by issue basis" and proceeding to frame each section of the analysis with an issue statement).

⁶ *Id.* at 8.

⁷ *Id.* at 14.

⁸ *Id.* at 17.

⁹ *Id.* at 12-14; *U.S. Small Bus. Admin.*, 70 FLRA 729, 729 (2018) (*SBA*) (Member DuBester dissenting).

¹⁰ Award at 14.

¹¹ 67 FLRA 619, 621 (2014) ("the grievance in this case is neither a class action nor a collective action because there is only one 'plaintiff': the [u]nion, which represents all bargaining-unit employees as a matter of law").

¹² 5 U.S.C. § 7121(b)(1)(C)(i) ("an exclusive representative [has] the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances").

¹³ Award at 17 (quoting *White Sands*, 67 FLRA at 621).

¹ 5 U.S.C. § 7121(c)(5) (negotiated grievance procedures "shall not apply with respect to any grievance concerning . . . the classification of any position which does not result in the reduction in grade or pay of an employee").

² Award at 2.

that the Union failed to properly follow the procedures under Article 31 of the parties' agreement for challenging a position description or classification.¹⁴ Based on his conclusion that the grievance did not concern employees' classification, the Arbitrator found that the Union properly filed the grievance under Article 52 of the parties' agreement.

Regarding the Agency's challenge to the timeliness of the grievance – which was based on the grievance's lack of detail regarding when the alleged violations occurred – the Arbitrator found that “the breadth of the allegations in the grievance” compelled him to conclude that the grievance was timely because of the ongoing nature of the alleged misclassifications.¹⁵ However, he rejected the Union's claim that even employees who were no longer in the bargaining unit more than thirty days prior to the filing of the grievance were entitled to recover.

Finally, the Arbitrator acknowledged the Agency's argument that the grievance lacked the specificity required by the parties' negotiated grievance procedure, such as “the names of affected employees, the dates of the wrongs, and the demand for corrective action.”¹⁶ However, he concluded that those were issues for the merits phase of arbitration.¹⁷

The Arbitrator concluded that the grievance was arbitrable.

On May 4, 2018, the Agency filed exceptions to the award. On June 18, 2018, the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matter: The Agency's exceptions are interlocutory, but extraordinary circumstances warrant considering the exceptions.

Because the Arbitrator has not yet ruled on the grievance's merits, the Agency acknowledges that its exceptions are interlocutory.¹⁸ Ordinarily, under § 2429.11 of the Authority's Regulations, the Authority

does not consider interlocutory appeals.¹⁹ However, the Authority has determined that “any exception which advances the ultimate disposition of a case – by obviating the need for further arbitral proceedings – presents an extraordinary circumstance which warrants . . . review.”²⁰

The Agency asserts, in its exceptions, that the Arbitrator's determination that the grievance is arbitrable is contrary to law and fails to draw its essence from the parties' agreement, and that the Arbitrator exceeded his authority when he ruled the grievance arbitrable.²¹ The Agency argues that the Authority should resolve its exceptions and conclude that the grievance is not arbitrable, thereby avoiding the need for further arbitration.²² Because resolution of the Agency's exceptions could conclusively determine whether any further arbitral proceedings are required, we grant interlocutory review.²³

IV. Analysis and Conclusions

- A. The grievance does not involve a classification matter under § 7121(c)(5) of the Statute.

The Agency argues that the Union's grievance is barred as a matter of law,²⁴ and by the parties' agreement,²⁵ because it involves classification under § 7121(c)(5) of the Statute. The Agency argues that the Union's grievance concerns classification because it seeks the “redesignation of all exempt employees as non-exempt” under the FLSA and redesignation “involves an analysis and inquiry concerning the appropriate grade level of all of the positions held by the” grievants.²⁶

Under § 7121(c)(5), arbitrators lack jurisdiction to determine “the classification of any position [that] does not result in the reduction in grade or pay of an employee.”²⁷ The Authority has interpreted

¹⁴ See *id.* at 5 (quoting Article 31's provision that sets procedures for “[a]n employee dissatisfied with the classification of his/her position”).

¹⁵ *Id.* at 23.

¹⁶ *Id.* at 26.

¹⁷ *Id.* at 27 (“What remains to be determined is not the question of whether the grievance can go forward as presently articulated. Rather, the parties, with or without my assistance[,] will need to determine the fairest and most efficient way to have the merits of the case presented.” (citing *White Sands*, 67 FLRA 619)).

¹⁸ Exceptions Br. at 4-5.

¹⁹ 5 C.F.R. § 2429.11; *U.S. DHS, U.S. CBP*, 65 FLRA 603, 605 (2011).

²⁰ E.g., *U.S. Small Bus. Admin.*, 70 FLRA 885, 886 (2018) (*SBA II*) (Member DuBester dissenting); *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (*IRS*) (Member DuBester dissenting).

²¹ Exceptions Br. at 1.

²² *Id.* at 21.

²³ *SBA II*, 70 FLRA at 886; *IRS*, 70 FLRA at 808.

²⁴ Exceptions Br. at 3, 12.

²⁵ *Id.* at 19.

²⁶ *Id.* at 3. The Agency concedes that a grievance seeking to change an individual employee's FLSA exemption status could be grievable. *Id.* at 16-17 (“The Agency is not suggesting that all grievances that seek as their remedy a change to an employee's FLSA exemption status are precluded from the [negotiated grievance procedure].”).

²⁷ 5 U.S.C. § 7121(c)(5); *SBA*, 70 FLRA at 730-31.

“classification” as “the analysis and identification of a position and placing it in a class under the position-classification plan established by [the Office of Personnel Management (OPM)] under chapter 51 of title 5, United States Code.”²⁸

The Agency does not demonstrate that the Union’s grievance, requesting that employees be redesignated as “non-exempt” under the FLSA, involves “the analysis and identification of a position and placing it in a class under the position-classification plan established by” OPM.²⁹ An agency’s FLSA “determination on each employee’s exemption status”³⁰ for purposes of overtime compensation is separate from an agency’s classification of a position.³¹ Moreover, as the Agency itself acknowledges, federal courts have long held that FLSA overtime claims of unionized employees are within the scope of grievable matters under the Statute.³²

Consequently, we reject the Agency’s claim that the grievance involves a classification matter under § 7121(c)(5).

B. The Agency’s additional arbitrability arguments lack merit.

The Agency raises several additional challenges to the Arbitrator’s arbitrability determination. First, the Agency argues that the Union lacks standing to file a grievance on behalf of its bargaining-unit members because every individual grievant is not named in the grievance as required for “associational standing.”³³ Even with a generous reading of the U. S. Supreme Court decisions that the Agency cites for the general proposition that the participation of individual members of an organization is a prerequisite to “associational standing,”³⁴ this concept is of no consequence here because—as the arbitrator found³⁵—

this case concerns a federal labor arbitration under the Statute.³⁶ Accordingly, the “associational standing” requirement does not apply.

Further, unlike the “associational standing” decisions the Agency cites,³⁷ the Authority has long held that the Statute provides “an exclusive representative the right, in its own behalf or *on behalf of any employee in the unit represented by the exclusive representative* to present and process grievances.”³⁸ As the Authority held in *White Sands*, it is well settled that in these circumstances “there is only one ‘plaintiff’: the Union which represents all bargaining-unit employees as a matter of law.”³⁹

Relatedly, the Agency makes generalized contrary-to-law and exceeded-authority arguments about the broadness of the grievance and claims that the grievance constitutes “misuse” of the negotiated grievance procedure.⁴⁰ But the Agency fails to cite any law with which the Arbitrator’s arbitrability determination conflicts.⁴¹ In this regard, the Agency cites OPM regulations that specify the requirements for filing an FLSA claim *with OPM* while conceding that these regulations “are not directly applicable to” the parties’ negotiated grievance procedure.⁴²

Similarly, the Agency does not support its exceeded-authority exception. Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.⁴³

²⁸ *SBA*, 70 FLRA at 729-30.

²⁹ *Id.*

³⁰ 5 C.F.R. § 551.201.

³¹ Consistent with this distinction, the Authority has routinely resolved the merits of exceptions to arbitration awards in which the underlying grievance alleged that the agency improperly exempted employees from overtime pay under the FLSA. *See, e.g., AFGE, Local 2145*, 70 FLRA 873 (2018); *U.S. Dep’t of the Navy, Naval Explosive Ordinance Disposal Tech. Div., Indian Head, Md.*, 56 FLRA 280 (2000); *U.S. Dep’t of HHS, SSA, Balt. Md.*, 44 FLRA 773 (1992).

³² Exceptions Br. at 20; *see also id.* at 16, 18.

³³ Exceptions Br. at 6-7 (*citing United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553 (1996) (*United Food*); *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977); *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

³⁴ Exceptions Br. at 6-7.

³⁵ Award at 17.

³⁶ *Cf. United Food*, 517 U.S. at 544 (The WARN Act grants unions standing to sue for damages on behalf of its employee members.).

³⁷ Exceptions Br. at 6-7.

³⁸ *White Sands*, 67 FLRA at 621 (citing 5 U.S.C. § 7121(b)(1)(C)(i)).

³⁹ *Id.* We decline the Agency’s invitation to revisit *White Sands*. Exceptions Br. at 8-9. Contrary to the Agency’s assertion that *White Sands* disregards Supreme Court precedent, in that case, as here, the Authority found the cases cited inapposite. 67 FLRA at 621.

⁴⁰ Exceptions Br. at 10.

⁴¹ *See NFFE, Local 479*, 67 FLRA 284, 285 (2014) (“[A]n arbitrator’s determination regarding a party’s authority to file a grievance on another’s behalf is a procedural-arbitrability determination.”); *see also Fraternal Order of Police, Lodge No. 168*, 70 FLRA 788, 790 (2018) (“[I]n order for a procedural-arbitrability ruling to be found deficient as contrary to law, the appealing party must establish that the ruling conflicts with statutory procedural requirements that apply to the parties’ negotiated grievance procedure.”).

⁴² Exceptions Br. at 10 (citing 5 C.F.R. § 551.705(c)).

⁴³ *U.S. DHS, U.S. CBP, Seattle, Wash.*, 70 FLRA 180, 183 (2017) (citing *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996)).

However, the Agency does not explain how the challenged arbitrability determination is deficient under this standard.

Finally, as discussed above, the Agency argues that the Arbitrator's arbitrability determination fails to draw its essence from the parties' agreement,⁴⁴ but this argument fatally rests upon the proposition rejected above – that the number of employees implicated by the breadth of the FLSA grievance means that the grievance concerns classification.⁴⁵ Specifically, the Agency argues that Article 52, Section 3(e) of the parties' agreement expressly excludes from the negotiated grievance procedure the “[c]lassification of any position which does not result in the reduction of the pay or grade of employee[.]”⁴⁶ The Agency does not argue that the award is inconsistent with any other provision in the parties' bargaining agreement. For the same reasons we reject the Agency's claim that the grievance involves a classification matter under § 7121(c)(5), we are compelled to deny the Agency's essence exception.

V. Decision

We deny the exceptions.

⁴⁴ Exceptions Br. at 1, 19. An arbitration fails to draw its essence from a collective-bargaining agreement when the excepting party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *U.S. Dep't of State, Passport Servs.*, 71 FLRA 12, 13 n.18 (2019).

⁴⁵ See Exceptions Br. at 19-20.

⁴⁶ *Id.* at 19. Article 52, Section 3(e) states: “This grievance procedure does not cover the following: Classification of any position which does not result in the reduction in grade or pay of an employee.” Exceptions, Ex. 1, Collective-Bargaining Agreement at 62.

Member DuBester, dissenting:

In my view, the Agency's exceptions should be dismissed as interlocutory. As I have expressed previously,¹ the only basis for granting interlocutory review should be "extraordinary circumstances" that raise a plausible jurisdictional defect, the resolution of which would advance the resolution of the case.² And "[e]xceptions raise a plausible jurisdictional defect when they present a credible claim that the arbitrator lacked jurisdiction over the subject matter as a matter of law."³ Applying this standard, I would dismiss, without prejudice, the Agency's interlocutory exceptions.

Accordingly, I dissent from the majority's decision to grant interlocutory review.⁴

¹ *U.S. Dep't of the Treasury, IRS*, 71 FLRA 192, 195 (2019) (*IRS*) (Dissenting Opinion of Member DuBester); *U.S. Small Bus. Admin.*, 70 FLRA 885, 888-89 (2018) (Dissenting Opinion of Member DuBester).

² *IRS*, 71 FLRA at 195 (citing *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 851 (2012)).

³ *Id.* (citing *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 1, 3 (2012); *U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 68 FLRA 640, 641 (2015)).

⁴ Had I agreed with the majority to grant interlocutory review of the Agency's exceptions, I would have also found that the exceptions are without merit.